

## DISCOVERING CHILD PORNOGRAPHY: THE DEATH OF THE PRESUMPTION OF INNOCENCE

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### INTRODUCTION

Child pornography cases, by their very nature, create a tension between protecting the child-victim's natural innocence and preserving the defendant's presumption of innocence. It is not surprising, then, that two opposing lines of cases have emerged in a debate concerning whether those accused of possessing or distributing child pornography should be allowed a copy of the sexually explicit materials to be used against them at trial. This Note contends that federal statutory and constitutional laws require such discovery, but not without ensuring adequate safeguards to prevent further harm to the child.

From the murder of an over-sexualized child beauty queen<sup>1</sup> to priest-child sex scandals<sup>2</sup> and international child pornography rings,<sup>3</sup> the news media bombards us almost daily with stories that portray the child as a sexual creature.<sup>4</sup> The media and the public are ready to

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1. Alex Tresniowski et al., *Trial by Suspicion*, PEOPLE, Nov. 1, 1999, at 68, 71.

2. See, e.g., Angela Bonavoglia, *The Church's Tug of War*, NATION, Aug. 19, 2002, at 11, 11.

3. See, e.g., Bill Hewitt et al., *Web of Horror: A Timely Tip and Some Clever Internet Sleuthing Help Break an Appalling International Child Pornography Ring*, PEOPLE, Aug. 26, 2002, at 67, 67.

4. See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 215 (2001). For example, a significant controversy arose in the media over the film *Hounddog*, in which 12-year-old Dakota Fanning portrayed a rape victim. Catholic League for Religious and Civil Rights, *Child Rape Film Is Sickening; Federal Probe Requested*, CATALYST, Mar. 2007, available at <http://www.catholicleague.org/catalyst.php?year=2007&month=March&read=2200>. Some argued that this is a clear violation of child pornography laws; others claimed the scene was artistically done and caused no harm to the young actress. E.g., David M. Halbfinger, *Furor Over 12-Year-Old Actress's Rape Scene*, N.Y. TIMES, Jan. 20, 2007, at B7.

condemn those accused of child sex crimes well before they have had their chance to present a defense, often before the prosecution even has enough evidence for a formal charge. This trial by media suspicion was at its height in the JonBenet Ramsey murder case, where the media condemned her parents for the murder, but neither were ever indicted in a court of law.<sup>5</sup> In an interview on *Larry King Live*, a former detective publicly stripped the Ramsey parents of their presumption of innocence.<sup>6</sup> John Ramsey responded with a question of his own: "Why do we have to *prove our innocence*? . . . That is fundamentally contrary to the Constitution."<sup>7</sup>

Unfortunately, there is little that can be done to change this media presumption of guilt. Our legal system, on the other hand, operates from a different philosophy than that of public opinion: a criminal defendant is innocent until proven guilty.<sup>8</sup> Although not explicitly stated in the Constitution, this presumption of innocence is inferred from the Fifth,<sup>9</sup> Sixth,<sup>10</sup> and Fourteenth Amendments<sup>11</sup> and was affirmed by the U.S. Supreme Court as early as 1895.<sup>12</sup> These amendments have led to the creation of expansive discovery laws in criminal cases, implying broadly that counsel for criminal defendants must provide an adequate defense for the accused.<sup>13</sup> Courts must not be swept away by the tendency of the public to condemn one accused of a horrendous crime, such as those involving the sexual exploitation of children, prior to an actual conviction at trial, but should instead keep

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5. Tresniowski et al., *supra* note 1, at 69–71, 73.

6. *Larry King Live: Who Killed JonBenet Ramsey?* (CNN television broadcast May 31, 2000) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0005/31/lkl.00.html>) ("Well, [the Ramseys] cast the cloud and the initial doubt that hindered their presumption of innocence.").

7. *Id.* (emphasis added).

8. DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 6–7 (1992) ("In criminal matters, the defendant enters the trial with a presumption of innocence that the prosecution must overcome. But this presumption is often an abstraction that may not correspond to community sentiment . . .").

9. U.S. CONST. amend. V (requiring due process of law).

10. U.S. CONST. amend. VI (preserving the right to confront witnesses, including any physical evidence presented, and the right to assistance of counsel).

11. U.S. CONST. amend. XIV (extending due process protection to state action).

12. *Coffin v. United States*, 156 U.S. 432, 453–54 (1895).

13. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel." (internal quotation marks omitted) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970))).

these principles in mind and afford them the same discovery rights as every other defendant.

Nevertheless, several courts recently appear to have abandoned these discovery doctrines for certain criminal defendants. In a line of child pornography cases beginning with *United States v. Kimbrough*, some courts have refused to allow the accused and his counsel discovery of the child pornographic materials held by the prosecution, the very evidence that is then presented against the accused.<sup>14</sup> In a legitimate effort to preserve what is left of the innocence of the child-victim, the innocence presumption for the accused is lost. Other cases, such as *Westerfield v. Superior Court*, have recognized this breakdown of constitutional protections and have refused to follow *Kimbrough's* lead.<sup>15</sup>

Child pornography is defined as any “material that visually depicts sexual conduct by children.”<sup>16</sup> Furthermore, “[i]t is unprotected by the First Amendment even when it is not legally obscene,” meaning that the depictions “may be banned on the basis of their content” alone.<sup>17</sup> Child pornography causes grave harm to the child-victims—more so than other forms of child abuse because the depictions create a permanent record and can cause continuous psychological damage to a child.<sup>18</sup> Recognizing the government’s legitimate interest in protecting children from such atrocious abuse, both federal and state legislatures have passed statutes forbidding not only the production and distribution, but also the mere possession of

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14. *E.g.*, *United States v. Kimbrough*, 69 F.3d 723, 730–31 (5th Cir. 1995).

15. *See, e.g.*, *Westerfield v. Super. Ct.*, 121 Cal. Rptr. 2d 402, 404–05 (Cal. Ct. App. 2002).

16. HENRY COHEN, CRS, CRS REPORT FOR CONGRESS, CHILD PORNOGRAPHY: CONSTITUTIONAL PRINCIPLES AND FEDERAL STATUTES 2 (2003) (emphasis omitted) (internal quotation marks omitted) (quoting *New York v. Ferber*, 458 U.S. 747, 764 (1982)).

17. *Id.* at 1–2. Sexual conduct of children is broadly defined, and includes “intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd [or lascivious] exhibition of the genitals.” Adler, *supra* note 4, at 238 (quoting *Ferber*, 458 U.S. at 751). This latter category has generated much controversy, specifically contributing to a rising number of “innocuous” family photos being prosecuted as child pornography. *Id.* at 239–40 (“If we pushed the definition in the evolving case law to the extreme, it seems to threaten all pictures of unclothed children, whether lewd or not, and even pictures of clothed children, if they meet the hazy definition of ‘lascivious’ or ‘lewd.’”).

18. Adler, *supra* note 4, at 215–16 (“[T]he [Supreme] Court . . . categorized child pornography as ‘an even greater threat to the child victim than . . . [routine] sexual abuse.’” (quoting *Ferber*, 458 U.S. at 759 n.10 (1982))); WILLIAM A. STANMEYER, THE SEDUCTION OF SOCIETY: PORNOGRAPHY AND ITS IMPACT ON AMERICAN LIFE 88 (1984) (“Child pornography is the worst form of child abuse.”).

such materials.<sup>19</sup> It is within the protection of this interest that the government seeks to deprive the defendant of his or her right to discovery.

This Note explores these two lines of cases and their constitutional implications. Restricting discovery of such material evidence undermines specific protections under the Constitution and federal discovery statutes, along with the fundamental presumption of innocence. The state does, however, have a compelling interest in protecting the child-victim. The government must produce copies of all material evidence to the defendant, but courts should also implement protective orders that shield the child from further harm.

Part I lays out the essential framework of the cases of *Kimbrough*, *Westerfield*, and their progeny. Part II discusses the historical context of child pornography, including First Amendment implications, inasmuch as it provides an insight into the perception of those accused of violating child pornography laws, as well as a specific need for allowing the defendant a copy of these materials before trial.<sup>20</sup> Part III considers the rights of the defendant under the Constitution and federal statutes, finding that the refusal of discovery in child pornography cases is a clear invasion of the defendant's rights. Part III also explores why this infringement weakens the presumption of innocence to the detriment of the accused. Part IV then explores the countervailing and legitimate interest in the protection of the child, concluding that, while this interest is quite compelling, it is not furthered by refusing the discovery rights of the accused. Part V applies these principles to the cases at issue, and illustrates a proper constitutional balance that serves to both protect the innocence of children and to preserve the presumption of innocence for the accused.

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19. Adler, *supra* note 4, at 236 n.154, 243.

20. By this I merely mean that I am going to examine the current status of child pornography under the First Amendment. This Note will not be arguing for or against such censorship as allowed under these statutes, but instead will argue for certain inferences that can be drawn from the decisions in this area. For an argument concerning the effect of such censorship on the right to free speech, see Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001).

## I. BACKGROUND

## A. Kimbrough and Its Progeny

In 1995, the U.S. Court of Appeals for the Fifth Circuit faced what appeared to be a novel issue.<sup>21</sup> In *Kimbrough*, federal agents began investigating a computer bulletin board system that enabled users to download pornography files, including child pornography.<sup>22</sup> Federal agents, having reason to suspect the accused, obtained a search warrant and seized several depictions of what appeared to be child pornography from the accused's computer.<sup>23</sup> The accused was convicted under the Child Pornography Prevention Act<sup>24</sup> for receiving as well as possessing child pornography.<sup>25</sup> The accused claimed reversible error because, during the discovery period, the government refused to allow him a copy of the child pornographic materials used as evidence in his indictment.<sup>26</sup> This refusal, he claimed, violated his constitutional rights to due process and effective assistance of counsel.<sup>27</sup>

The district court had granted the accused's discovery motion, allowing him a copy of the materials "to the extent that it requested information discoverable pursuant to Federal Rule of Criminal Procedure 16 and the lines of cases stemming from *Brady v. Maryland*."<sup>28</sup> Rule 16, the federal discovery rule, provides in pertinent part:

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21. See *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995). Although the court did not explicitly state that this was an issue of first impression, there does not appear to be a case dealing with the issue prior to this date and the court did not cite to any for that point in its decision.

22. *Id.* at 726.

23. *Id.*

24. 18 U.S.C. § 2252A(a) (2006). Unless otherwise noted, all references in this Note to the federal child pornography law refer to the 2006 statute, which criminalizes "[a]ny person who: (1) knowingly mails, or transports or ships . . . any child pornography; (2) knowingly receives or distributes . . . any child pornography . . . ; (3) knowingly . . . reproduces any child pornography for distribution . . . ; (4) . . . knowingly sells or possesses with the intent to sell any child pornography . . . ; (5) . . . knowingly possesses . . . an image of child pornography . . . ." *Id.*

25. *Kimbrough*, 69 F.3d at 726.

26. *Id.* at 730–31.

27. *Id.* at 730.

28. *Id.* (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). *Brady* broadly held that the accused has a right to all physical evidence held by the prosecution that is or could be favorable to the defense. *Brady*, 373 U.S. at 87. This case cemented constitutional discovery rights for a defendant and will be discussed in greater depth later. See *infra* Part III.

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.<sup>29</sup>

In response, the government offered to take the materials to a defense expert witness and to allow the accused to examine the materials at various locations.<sup>30</sup> But the government refused to allow the accused a copy of the materials.<sup>31</sup>

The Fifth Circuit denied that the government violated Rule 16 when it refused the accused's request for a copy of the materials, reasoning that Rule 16 does not compel the copying for defense of anything considered to be illegal contraband.<sup>32</sup> Because child pornography qualifies as contraband, the government's offer to allow inspection but not copying of the materials was reasonable without a demonstration of actual prejudice to the accused.<sup>33</sup> The accused's assertion that there was inadequate time to review the materials and

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29. FED. R. CRIM. P. 16(a)(1)(E) (emphasis added).

30. *Kimbrough*, 69 F.3d at 731.

31. *Id.*

32. *Id.* That child pornography is illegal contraband is universally settled law and this Note shall proceed on this assumption. *Id.*; see *New York v. Ferber*, 458 U.S. 747, 749–50, 756–57, 761 (1982). Rule 16, however, does not contain an exemption from discovery for illegal contraband as implied by the *Kimbrough* court. See FED. R. CRIM. P. 16. On the contrary, the district court is merely given discretion where there is a showing of “good cause” to “deny, restrict, or defer” discovery. FED. R. CRIM. P. 16(d)(1). No such showing was made in *Kimbrough*, and the district court did not invoke this discretionary power. Compare *Kimbrough*, 69 F.3d at 730–31, with *United States v. Horn*, 187 F.3d 781, 792 (8th Cir. 1999) (merely upholding the trial court's use of this discretionary power to restrict the motion for discovery of child pornographic videos to inspection only because such inspection would still allow expert witnesses to evaluate them). *Horn* noted, however, that had the appellant made an argument at trial that he needed the tapes to determine from their producers the relevant age of the performers, “such a rationale might well have required the trial court to grant [the appellant's] discovery motion.” *Horn*, 187 F.3d at 792–93.

33. *Kimbrough*, 69 F.3d at 731.

obtain an expert for trial without a copy was deemed insufficient to show actual prejudice and to rise to a constitutional violation.<sup>34</sup>

Several state courts and district courts have followed the lead of *Kimbrough*, restricting the accused's access to the child pornographic materials to mere inspection.<sup>35</sup> Although the cases were procedurally different, each was presented with essentially the identical issue of whether to compel discovery for the defense, which included copying child pornographic materials.<sup>36</sup> These cases insist that "the government [is] under no obligation to turn over the contraband child pornography."<sup>37</sup> More importantly, these cases further affirm that this exclusion of the distribution of contraband can be overcome by a sufficient showing of need by the accused's counsel to provide an adequate defense.<sup>38</sup> This standard, however, is not easily satisfied. Notably, privacy for defense work-product and ability to have the evidence examined by expert witnesses were not found to sufficiently demonstrate a lack of effective assistance of counsel.<sup>39</sup>

## B. *Westerfield and Its Progeny*

A countervailing line of cases developed concerning this issue, beginning in 2002 with *Westerfield v. Superior Court*.<sup>40</sup> With no

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34. *Id.*

35. For examples of federal district court cases that have followed *Kimbrough*, see *United States v. Husband*, 246 F. Supp. 2d 467 (E.D. Va. 2003), *United States v. Cox*, 190 F. Supp. 2d 330 (N.D.N.Y. 2002), and *United States v. Flora*, No. 1:06CR-8-M, 2006 U.S. Dist. LEXIS 12284, at \*5 (W.D. Ky. Mar. 22, 2006). For examples of state cases, see *State v. Ross*, 792 So. 2d 699 (Fla. Dist. Ct. App. 2001) and *State v. White*, No. 0102019515, 2001 Del. Super. LEXIS 513, at \*3 (Del. Super. Ct. Dec. 28, 2001). Although this Note limits discussion and analysis to the relevant federal provisions, the state child pornography and discovery provisions are essentially analogous and so the state cases here are relevant to this discussion. The same analysis employed here can and should be extended to future state discussions as well as federal discussions. The state courts themselves analogize the federal statutes to their own state statutes by relying on the federal precedent. See, e.g., *Ross*, 792 So. 2d at 701–02.

36. See sources cited *supra* note 35.

37. *Ross*, 792 So. 2d at 702; see also *Husband*, 246 F. Supp. 2d at 469 ("[T]he tape in question, which is alleged to contain child pornography . . . is contraband. This court will not order that contraband be distributed to defendant or his counsel.").

38. See *Ross*, 792 So. 2d at 702 (allowing the restriction because the accused "failed to demonstrate any prejudice or harm which would be caused by the procedures proposed . . . for review of these materials"); *Flora*, 2006 U.S. Dist. LEXIS 12284, at \*8 (allowing the restriction, but leaving open the possibility of reconsideration if the accused "can proffer a reason as to why the Government's proposal is unduly restrictive").

39. E.g., *United States v. Horn*, 187 F.3d 781, 792 (1999); *Ross*, 792 So. 2d at 702.

40. 121 Cal. Rptr. 2d 402 (Cal. Ct. App. 2002).

mention of forbidding the copying of the child pornography as contraband, this case introduces and dispels a new argument.<sup>41</sup> In *Westerfield*, the police seized “thousands of computer-stored and video images” of alleged child pornography from the accused’s house.<sup>42</sup> The trial court then refused the accused’s discovery motion to compel the state to provide a copy of the images to the accused.<sup>43</sup> The trial court had reasoned that “it did not have jurisdiction to order the prosecutor to duplicate and/or turn over the images to the defense” because “copying and dissemination would violate [the state child pornography statute]” itself.<sup>44</sup>

Using a traditional statutory analysis of “effectuat[ing] the purpose of the law,” the court of appeals refused to accept this conclusion.<sup>45</sup> The court reasoned that the “obvious intent [of the child pornography act] was to criminalize the publication and/or distribution” of child pornographic material.<sup>46</sup> If it were to criminalize the process of distribution during criminal trials, there would be “no conceivable way” for the accused to defend themselves against the charges.<sup>47</sup> Further, it would become impossible for the state to even try the case, as the act of distributing the evidence to the court would then be considered a violation of the statute.<sup>48</sup>

Significantly, and running directly counter to *Kimbrough* and its progeny, the *Westerfield* court concluded that the accused’s right to effective assistance of counsel *is* detrimentally impacted by limiting discovery to inspection of the materials.<sup>49</sup> Furthermore, the court did

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41. *See id.*

42. *Id.* at 403.

43. *Id.*

44. *Id.* As stated earlier, although this case deals exclusively in state law, the law is analogous to the federal law previously presented. Compare CAL. PENAL CODE § 311.1(a) (2006) (criminalizing anyone who “sends . . . brings or causes to be brought, into this state for sale or distribution, or . . . possesses, prepares, publishes, produces, develops, duplicates, or prints” child pornography), with 18 U.S.C. § 2252A(a) (2006) (criminalizing the transporting, shipping, receiving, distributing, selling, possessing with intent to sell, or possessing of child pornography).

45. *Westerfield*, 121 Cal. Rptr. 2d at 404.

46. *Id.*

47. *Id.*

48. *Id.* (explaining that the interpretation that discovery would violate the child pornography statute itself “not only defeats the purpose of the law and exalts absurdity over common sense, but it is also logically flawed”).

49. *Id.* at 405 (“[R]equiring the defense to view—and apparently commit to memory—the ‘thousands’ of images at the computer crimes office obviously impacts [the accused’s] right to effective assistance of counsel . . .”).

not require in its decision a showing of specific need based on the factual circumstances of the case.<sup>50</sup> Thus, the court implied that, in order to meet due process requirements, the government is required to give the defendant a copy of the evidence, especially these child pornographic depictions, as long as such demand meets the requirements under the relevant discovery laws.<sup>51</sup>

Numerous state cases thereafter simply followed *Westerfield* to conclude that their own child pornography statutes would not be violated by requiring the government to distribute a copy of the materials to the accused, adding little to the analysis at hand.<sup>52</sup> Despite this trend, some cases, like *Cervantes*, have actually gone on to consider the reasoning of previous courts that had dealt with the issue. Although dodging the constitutional question concerning due process of the law, the *Cervantes* court did directly address the contraband argument presented in *Kimbrough* and its progeny.<sup>53</sup> Looking at the language of the discovery rules,<sup>54</sup> the court concluded that reproduction is mandatory unless the government meets the burden of proving good cause.<sup>55</sup> According to the court, to require the defendant to show sufficient need for the materials' reproduction "improperly place[s] the burden of proof" on the accused.<sup>56</sup> Further, the court explicitly rejected *Kimbrough* and its progeny as "misstat[ing] the rule as to contraband" insofar as they "hold, *without*

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50. *See id.* at 404–05.

51. *See id.*

52. *E.g.*, *Cervantes v. Cates*, 76 P.3d 449, 456 (Ariz. Ct. App. 2003) ("Arizona's child pornography laws were not aimed at prohibiting defense counsel from preparing for trial, but to prohibit the spread of child pornography. . . . Such a reading [as proposed by the government] would frustrate the legislative purposes. . . ."); *State v. Second Jud. Dist. Ct.*, 89 P.3d 663, 668 (Nev. 2004) ("[N]othing in [state child pornography statutes] precludes child pornography from being copied for the purpose of defending criminal charges. . . ."); *State v. Butler*, No. E2004-00359-CCA-R9-CD, 2005 Tenn. Crim. App. LEXIS 302, at \*33 (Tenn. Crim. App. Mar. 30, 2005) ("[P]ossession, copying, or distribution of child pornographic materials does not constitute a violation of Tennessee's sexual exploitation of a minor statutes so long as it occurs in the context of the prosecution or defense of a case under the statute."); *see also State v. Kandel*, No. A04-266, 2004 Minn. App. LEXIS 933, at \*10 (Minn. Ct. App. Aug. 10, 2004) ("[T]he law prohibiting the possession of pornographic work involving minors 'does not apply to the performance of official duties by . . . attorneys.'" (quoting Minn. Stat. § 617.247, subdiv. 5 (2002))).

53. *Cervantes*, 76 P.3d at 455–56.

54. The discovery rules at issue were, of course, state law; however, as made explicitly clear within the case, the state laws are closely analogous to federal provisions. *Id.* at 454 ("[The state discovery rule] is modeled in part after Federal Rule of Criminal Procedure . . . 16.").

55. *Id.*

56. *Id.*

*citing any authority*, that the rules do not apply to contraband as a matter of law or that copying was not required without the government showing any harm or risk of misuse.<sup>57</sup> The relevant discovery rules do not include an exemption for copying contraband, and federal law uniformly gives the accused the right to samples and photographs of other tangible evidence such as narcotics and murder weapons, “without regard to whether it is contraband.”<sup>58</sup>

Several federal district courts recently added to this argument against refusing the discovery of child pornography as contraband.<sup>59</sup> While agreeing with *Cervantes* that “adopt[ing] the government’s position that the ‘defendant has made no showing of need,’ and thus is not entitled to copy the files, turns the mandatory discovery obligation of Rule 16(a)(1)(E) on its head,”<sup>60</sup> these courts promulgated additional reasons why the accused needed a copy of the materials at issue.<sup>61</sup> These reasons include: a need for a defense expert to “use his own tools in his own lab,”<sup>62</sup> a need for repeated access due to time necessary to complete examination,<sup>63</sup> and that travel would be unreasonably burdensome for out-of-state experts.<sup>64</sup>

Furthermore, these cases dispelled the proposition brought forth by the government that allowing discovery of child pornographic materials would cause further harm to the child-victims.<sup>65</sup> While acknowledging that “continued circulation of these images would certainly and greatly harm the children who appear in the images,” the court did not find a “greater risk in granting defense counsel a copy of the files for the preparation of its defense under a suitable protective order than exists in the government’s maintenance and use

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57. *Id.* at 455–56 (emphasis added).

58. *Id.* at 455.

59. *See, e.g.*, *United States v. Cadet*, 423 F. Supp. 2d 1, 2–3 (E.D.N.Y. 2006); *United States v. Frabizio*, 341 F. Supp. 2d 47, 51 (D. Mass. 2004); *United States v. Hill*, 322 F. Supp. 2d 1081, 1091 (C.D. Cal. 2004).

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

61. *See, e.g., id.* at 4; *Frabizio*, 341 F. Supp. 2d at 51; *Hill*, 322 F. Supp. 2d at 1091–92.

62. *Hill*, 322 F. Supp. 2d at 1092.

63. *Cadet*, 423 F. Supp. 2d at 1, 4 (finding restrictions “overly burdensome” for experts to evaluate, without duplication, just eleven images); *Frabizio*, 341 F. Supp. 2d at 51 (allowing the defendant’s expert to copy images for analysis where only thirty-three were at issue); *Hill*, 322 F. Supp. 2d at 1091–92 (concluding that the examination of “thousands” of images is not a “straightforward, one-time event”).

64. *Hill*, 322 F. Supp. 2d at 1092.

65. *Cadet*, 423 F. Supp. 2d at 3–4.

of the files in preparation of its own case."<sup>66</sup> Thus, each case set forth a set of suitable safeguards, restricting further dissemination, how and by whom the materials may be viewed, and proper disposal of the images post-trial.<sup>67</sup>

Many jurisdictions, both state and federal, have yet to be faced with this important discovery issue. The in-depth treatment of these cases above has revealed relevant themes which consistently arise, from which two related yet distinct questions emerge:<sup>68</sup>

1. Do either relevant discovery laws or provisions of the Constitution *require* the government to allow the defense a copy of the child pornographic material that has been seized from the accused's possession and will be relied upon for conviction?
2. To what extent, if any, must the accused show sufficient need in order to receive these copies and with what extra protective rules should the defense be required to comply?

Answering these questions will become the focus of future cases on this issue, and thus serve as the focus for the remainder of this Note.

## II. FIRST AMENDMENT IMPLICATIONS OF CHILD PORNOGRAPHY

The First Amendment of the U.S. Constitution guarantees that speech will be free from congressional regulation.<sup>69</sup> The Supreme Court has found that this assurance is upheld in nearly all

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66. *Id.* at 3; *see also Frabizio*, 341 F. Supp. 2d at 51 (“[T]here is no reason to think that defense counsel or her expert cannot be trusted” and “the government’s concern about re-victimization will be implicated regardless of where defense counsel and her expert view the images.”).

67. *See, e.g., Cadet*, 423 F. Supp. 2d at 4; *Frabizio*, 341 F. Supp. 2d at 49; *Hill*, 322 F. Supp. 2d at 1092.

68. There is actually a third question that is raised and dismissed by the *Westerfield* line of cases: whether such discovery should be construed as a violation of the child pornography statute itself. No court has yet to conclude that it does violate the statute, so it seems the argument is at best premature, if not inherently unreasonable. This Note will not address further that line of reasoning as it seems unlikely that a court will ever come to the absurd conclusion that these statutes were intended to impede the judicial system by labeling the discovery process as dissemination of pornography.

69. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

circumstances, with exceptions only for “certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”<sup>70</sup> Within the latter category of “real children” lies a vast area of potential litigation.

Unlike adult pornography, legal consideration of the specific area of child pornography is a fairly recent phenomenon. It was not until the late 1970s that nationwide awareness and concern ensued over the corresponding problems of child sexual abuse and child pornography,<sup>71</sup> marked by a great influx in related press coverage.<sup>72</sup> Shortly after the news media “discovered the crisis of child pornography,”<sup>73</sup> the federal government passed a statute that prohibited the production, distribution, and possession of sexually explicit materials involving children.<sup>74</sup> Many states followed suit shortly thereafter, and now all fifty states have passed some version of a child pornography ban.<sup>75</sup>

The landmark Supreme Court case *New York v. Ferber*<sup>76</sup> first examined these new child pornography statutes.<sup>77</sup> There, the Court considered whether a state statute, which banned production and distribution of child sexually explicit materials, in fact “suppress[ed] protected expression” under the First Amendment’s freedom of speech clause.<sup>78</sup> Previously, the Court had protected sexually explicit materials under the First Amendment, unless they rose to the level of “obscenity” under strict guidelines, which afforded protection to works of significant literary or artistic value.<sup>79</sup> For policy-based reasons that linked child pornography to child abuse, the unanimous Court refused to apply the obscenity standard, and instead created a

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70. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002).

71. ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY, FINAL REPORT 66–67 (1986); *see also* S. REP. NO. 95-438, *reprinted in* 1978 U.S.C.C.A.N. 40, 42 (“[C]hild pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale.”).

72. Adler, *supra* note 4, at 230.

73. Adler, *supra* note 4, at 236.

74. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-438, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251–2257 (2000)). As originally passed, the statute only banned distribution and production. The Act was later amended to also include possession. *See id.*

75. *See* Adler, *supra* note 4, at 236 n.154.

76. 458 U.S. 747 (1982).

77. *Id.* at 753.

78. *Id.* at 756.

79. *See* *Miller v. California*, 413 U.S. 15, 23–26 (1973).

new category of unprotected speech for non-obscene sexual depictions of children, irrespective of whether the work contains literary, artistic, or other value.<sup>80</sup> The First Amendment can thus no longer protect child pornography from regulation, provided certain Court-made limits are met: the offense must visually depict sexual conduct of children under a proscribed age, the prohibited sexual conduct must be adequately defined, and there must be at least some element of scienter, or knowledge.<sup>81</sup>

In explaining the first limitation, the Court specifically noted that “the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.”<sup>82</sup> This concept was later expounded upon in *Ashcroft v. Free Speech Coalition*.<sup>83</sup> Congress had just passed the Child Pornography Prevention Act of 1996 (“CPPA”), which expanded the definition of child pornography in federal law.<sup>84</sup> The new definition was intended to prohibit more than

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80. *Ferber*, 458 U.S. at 760–61 (“It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.” (alterations in original) (internal quotation marks omitted)); see also *United States v. Peterson*, 294 F. Supp. 2d 797, 801 (D.S.C. 2003) (“[C]hild pornography does not enjoy the same degree of First Amendment protection as obscene material.”). The Court later expanded this to include possession of child pornographic material as well. *Osborne v. Ohio*, 495 U.S. 103, 110–11 (1990) (recognizing the state’s legitimate interest in protecting the “victims of child pornography”).

81. *Ferber*, 458 U.S. at 764–65; see also Benjamin J. Vernia, Annotation, *Validity, Construction, and Application of State Statutes or Ordinances Regulating Sexual Performance by Child*, 42 A.L.R.5TH 291, 331–32 (1996) (describing the relationship between the First Amendment and child pornography).

82. *Ferber*, 458 U.S. at 764–65.

83. 535 U.S. 234 (2002).

84. Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 to -31 (codified at 18 U.S.C. § 2256). This Act read in significant part:

(8) “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

just depictions of actual children, instead including anything appearing to be a child such as images of adults who merely looked underage as well as “virtual child pornography.”<sup>85</sup> The Court found that these computer-generated and adult images were not within the unprotected category created by *Ferber* because the production of such images did not involve any *actual* children and was therefore not “intrinsically related” to child sexual abuse.<sup>86</sup> Because the statute neither met the requirements for obscenity under *Miller* nor the underlying abuse in *Ferber*, the Court struck down the CPPA provisions as an unconstitutional violation of the First Amendment.<sup>87</sup>

After *Free Speech Coalition*, the issue of whether an actual child is depicted in the images has formed the basis of much litigation since otherwise the pornography will be subjected to general obscenity law.<sup>88</sup> Although some images clearly portray actual minors, in most

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(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct . . . .

18 U.S.C. § 2256(8) (emphasis added).

85. *Free Speech Coalition*, 535 U.S. at 241. “[V]irtual child pornography’ . . . include[s] computer-generated images, as well as images produced by more traditional means.” *Id.*; see also MONIQUE MATTEI FERRARO & EOGHAN CASEY, INVESTIGATING CHILD EXPLOITATION AND PORNOGRAPHY: THE INTERNET, THE LAW AND FORENSIC SCIENCE 236 (2005) (“‘Virtual’ child pornography refers to visual images that are completely computer rendered. No actual child is used to create it. Images that depict actors who ‘appear to be’ minors means that the images were produced without using real children, such as through the use of youthful-looking adults.”). Thus, the focus is on whether real children were used to create the images. There is also a distinction between virtual child pornography as just described and morphed images which are also computer generated, but still contain parts of an actual child’s body. *Free Speech Coalition*, 535 U.S. at 242. While the Supreme Court has yet to face the issue of morphed images, these computer-generated depictions still involve the victimization of a child and so it is likely that they would fall under the unprotected category of child pornography. See FERRARO & CASEY, *supra*, at 237; see also *United States v. Bach*, 400 F.3d 622, 625, 632 (8th Cir. 2005). When discussing virtual or computer-generated images, this Note refers only to the first category and not to morphing.

86. *Free Speech Coalition*, 535 U.S. at 250.

87. *Id.* at 246, 249, 256.

88. See FERRARO & CASEY, *supra* note 85, at 282 (“[S]ince the *Ashcroft v. Free Speech Coalition* decision . . . [m]any defendants claim that the images in question are either of older people posing as minors or are computer rendered, or ‘virtual.’”); Deborah F. Buckman, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 2252A(a), Proscribing Certain Activities Relating to Material Constituting or Containing Child Pornography*, 2 A.L.R. FED. 2D 533, 547 (2005) (“One of the most basic prerequisites for application of the [child pornography] statute is that the images in question be of minors rather than adults. . . . After the Supreme Court’s *Ashcroft* decision, as mentioned, the reality of the children depicted, rather than being virtual images, is fundamental . . . .”).

cases expert testimony may be admitted to either establish or challenge whether the individual depicted in the sexually explicit material is both a real person and a minor.<sup>89</sup> The Supreme Court has also held that even when expert testimony is not required for prosecution, defendants still maintain a right to introduce it if they so choose.<sup>90</sup> Refusing to allow defendants, and therefore the defendants' experts, a copy of the materials could significantly impair their ability to call into question this hotly contested area.

### III. THE DISCOVERY RIGHTS OF THE DEFENDANT

A criminal defendant must generally be able to point to a statute, rule of criminal procedure, or constitutional provision that gives entitlement to obtain discovery from the government.<sup>91</sup> While it is true that the U.S. Constitution itself does not explicitly guarantee discovery for an accused,<sup>92</sup> the trend is toward liberalizing the federal discovery rules.<sup>93</sup> This trend began in 1935 with the Supreme Court

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89. *E.g.*, *United States v. Rearden*, 349 F.3d 608, 613–14 (9th Cir. 2003) (holding that the government's expert was properly admitted because he was helpful in determining that the images portrayed actual, as opposed to virtual, children); *United States v. Cadet*, 423 F. Supp. 2d 1, 4 (E.D.N.Y. 2006) (“[M]any defendants charged with child pornography crimes will seek expert analysis of the images that form the basis of the charges against them in order to determine whether the images constitute actual child pornography or whether they are constitutionally protected virtual images.” (internal quotation marks omitted)). It is a matter of contention whether *Free Speech Coalition* imposes a greater burden of proof on the government to prove that the children depicted were actual children, although most circuits have held that it does not. *See, e.g.*, *United States v. Farrelly*, 389 F.3d 649, 654 (6th Cir. 2004) (“*Free Speech Coalition* did not impose a special or heightened evidentiary burden on the Government to prove that images are of real children. . . . Other circuits have rejected the argument [as well.]”); *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006) (stating that images alone, without expert testimony, constitute legally significant evidence as to whether an actual child was used in production of the child pornography). *But see, e.g.*, *United States v. Morgan*, No. 01-CR-45-B-S, 2002 WL 975154, at \*2 (D. Me. May 10, 2002) (asserting that the government now bore an added burden of showing that the images portrayed actual minors).

90. *Kaplan v. California*, 413 U.S. 115, 121 (1973).

91. *United States v. Johnson*, 228 F.3d 920, 924 (8th Cir. 2000).

92. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987). In fact, allowing full discovery in criminal cases was thought to “subvert the whole system of criminal law.” *See The King v. Holland*, (1792) 100 Eng. Rep. 1248, 1249 (K.B.).

93. *See* FED. R. CRIM. P. 16 advisory committee's notes (“[B]road discovery contributes to the fair and efficient administration of criminal justice . . . .”); *see also Wardius v. Oregon*, 412 U.S. 470, 473–74 (1973) (“[T]he ends of justice will best be served by a system of liberal discovery . . . . The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system.”).

decision *Brady v. Maryland*, which gave the defendant a constitutional right to favorable evidence held by the government.<sup>94</sup> With the creation of discovery rules in the Federal Rules of Criminal Procedure, a defendant now has broad ability to procure disclosure of tangible evidence from the prosecution.<sup>95</sup> Either the federal discovery rules or the constitutional requirements would be sufficient to allow the accused in a child pornography case to receive a copy of the sexually explicit evidence.

#### A. *Discovery Required by Federal Statute*

In 1946, Congress promulgated Federal Rule of Criminal Procedure 16 in an attempt to codify the single common law exception to the general non-discovery norm for criminal defendants: defendants should have access to any materials belonging to them, even if seized by the prosecution.<sup>96</sup> Since that time, substantial revisions to the rule have significantly broadened the scope of allowable discovery for the accused.<sup>97</sup> The federal discovery rule now includes the ability to demand disclosure for both inspection and copying of all tangible items, including photographs, if the defendant can show that the item, first, is in the government's possession<sup>98</sup> and, second, fits into one of the three notably broad categories: material to

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94. *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963).

95. See FED. R. CRIM. P. 16. This will be discussed further in the next subsection. See *infra* Part III.A.

96. FED. R. CRIM. P. 16 advisory committee's notes; Timothy M. Hall, Annotation, *Books, Papers, and Documents Subject to Discovery by Defendant Under Rule 16 of Federal Rules of Criminal Procedure*, 108 A.L.R. FED. 380, 391 (1992).

97. FED. R. CRIM. P. 16 advisory committee's notes; Hall, *supra* note 96, at 391.

98. This Note deals with this element as a given. Broadly speaking, this is probably an accurate assumption to make, as either the police or the prosecution must have a copy of the materials in question to indict on a charge of possession, production, or distribution. Although "government" in Rule 16 does not mean every agency of the federal government, it also does not mean the prosecution alone, but rather refers to the accessibility of prosecution to the documents in question. *United States v. Robertson*, 634 F. Supp. 1020, 1025 (E.D. Cal. 1986), *aff'd without op.*, 815 F.2d 714 (9th Cir. 1987). Even if the materials were in the technical possession of the police, they would still be in control of a government entity that is working with the prosecution, thus making them accessible to the prosecution for discovery purposes. See, e.g., *People v. Santorelli*, 741 N.E.2d 493, 497–98 (N.Y. 2000).

the defense, used as evidence in government's case-in-chief at trial, or obtained from the accused.<sup>99</sup>

It seems elementary that the child pornographic materials would satisfy at least one of these three categories in a child pornography case. Most simply, in the majority of cases these items were seized from the accused's house or computer, which not only clearly falls into the third category, but also into the common law exception for which the discovery rules were designed to protect.<sup>100</sup> Because the materials were seized from the defendant, physical possession is usually not contested even though knowledge of, or an ownership interest in, the pornographic materials is an essential element that the government must prove.<sup>101</sup> Nevertheless, there may be cases where the accused denies actual possession, especially with the onset of the digital age.<sup>102</sup> This trial strategy would run counter to an attempt to demand disclosure under the premise that government obtained the materials from the defendant. In these cases, the defendant could still obtain discovery of the materials through one of the other two listed means.

"Materiality" requires more than merely a logical relation to the case at issue; it can include any evidence that the disclosure of which would significantly aid in the defense.<sup>103</sup> This potential "aid" can include evidence that alters proof in the accused's favor, leads to other admissible evidence, or aids in witness preparation or impeachment, as well as aiding in the preparation of a strategy against damaging evidence, such as conducting an investigation to discredit it.<sup>104</sup> This definition demands production of evidence that is

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99. FED. R. CRIM. P. 16(a)(1)(E) (emphasis added). Many state discovery rules contain language similar to, and often based upon, this federal rule. *See, e.g., supra* note 54 and accompanying text.

100. *See, e.g.,* United States v. Kimbrough, 69 F.3d 723, 726 (5th Cir. 1995).

101. *Id.*

102. *See, e.g.,* Beryl A. Howell, *Real World Problems of Virtual Crime*, 7 YALE J.L. & TECH. 103, 114–17 (2004–2005) (discussing technological issues with possession relating to use of computer programs that store even pop-up advertisements in temporary internet files). The law is still emerging regarding these, as well as many other, digital problems. COMPUTER CRIME & INTELLECTUAL PROP. SECTION, CRIMINAL DIV., U.S. DEP'T OF JUSTICE, SEARCH AND SEIZURE MANUAL: SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS, at x (2002) ("Computer crime investigations raise many novel issues . . .").

103. United States v. Marshall, 132 F.3d 63, 67 (D.C. Cir. 1998).

104. *Id.* at 68.

broader than that allowed by the *Brady* rule, including inculpatory evidence as well as exculpatory.<sup>105</sup>

In child pornography cases, the items which form the basis of the charge are generally material to the preparation of a defense. In order to succeed in its case, the government must prove *knowing* possession (or production or distribution) of a visual depiction of an *actual* child engaging in sexually explicit conduct.<sup>106</sup> Refuting the crime by challenging proof of one or more of its necessary elements is essential to the defense.<sup>107</sup> As already explored, the status of the person depicted as real (as opposed to virtually created) and a minor is oftentimes in contest, and expert testimony of the pornographic materials is relied upon to make these determinations.<sup>108</sup> Also, the use of computers has brought up new issues regarding *knowing* possession.<sup>109</sup> In those cases where actual possession is disputed, there may be a special need for a copy of the computer data in order to obtain a favorable expert to testify to how the images came to be saved onto the computer hard drive. An unaltered copy of the hard drive is necessary for this analysis.<sup>110</sup>

Similarly, in all but the rarest instances, the sexually explicit items will also necessarily be included as evidence in the government's

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105. *Id.* at 67 ("Inculpatory evidence, after all, is just as likely to assist in 'the preparation of the defendant's defense' as exculpatory evidence. In other words, it is just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths." (footnote omitted)); see also *United States v. Baker*, 453 F.3d 419, 424 (7th Cir. 2006); *United States v. Conder*, 423 F.2d 904, 911 (6th Cir. 1970); 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 254, at 108–09 (3d ed. 2000). The evidence must, however, relate to a reasonable preparation of a defense. *Marshall*, 132 F.3d at 69 n.2 ("[T]he evidence's materiality must, of course, be evident to a reasonable prosecutor. . . . [It is not to be] assume[d] that the defense will make false assertions about the facts, hence making relevant contrary evidence that would not have been relevant had the defense adhered to the truth.").

106. In *New York v. Ferber*, 458 U.S. 747, 765 (1982), the Supreme Court required that a child pornography statute must include at least some element of scienter, thus imposing a knowledge requirement on the defendant. Likewise, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 256 (2002), the Supreme Court required that production of such child pornography must have involved an actual minor. For a more detailed discussion of these requirements, see *supra* Part II.

107. See *United States v. Armstrong*, 517 U.S. 456, 462 (1996) ("[W]e conclude that in the context of Rule 16 'the defendant's defense' means the defendant's response to the Government's case in chief.").

108. See *supra* notes 88–89 and accompanying text.

109. See FERRARO & CASEY, *supra* note 85, at 280–81 (discussing new defenses for knowing possession such as computer viruses and "mousetrapping," which occurs when the computer is involuntarily taken to websites or subjected to pop-up advertisements).

110. See *supra* note 102 and accompanying text.

case-in-chief and are thus discoverable. It is important to understand that “documents are considered part of the evidence in chief if they are marked and offered into evidence by the government or relied on or referred to in any way by the government’s witness.”<sup>111</sup> In order to prove a contested violation of the child pornography law, it is generally necessary to introduce the sexually explicit materials themselves into evidence, or at least to describe them through the testimony of eyewitnesses, or to use expert witnesses who relied upon the depictions. Even in using these later two options, the documents will be relied on or referred to by the witnesses and, therefore, the documents are considered, for this purpose, as much the government’s evidence as if they had actually been introduced. Accordingly, these items will almost always be part of the government’s case-in-chief.

The defense is thus entitled to a copy of these child pornographic materials unless limited by the rules themselves. Rule 16 specifically includes an exemption for production of certain items.<sup>112</sup> Notably absent is an exemption for items that constitute contraband.<sup>113</sup> There is no support for an argument that child pornography should be excluded from discovery based solely on its status as contraband.<sup>114</sup> In fact, other types of contraband, such as drug samples used in the alleged offense, are routinely turned over during discovery for analysis by defense experts.<sup>115</sup>

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111. *United States v. Jordan*, 316 F.3d 1215, 1250 n.75 (11th Cir. 2003).

112. Federal Rule of Criminal Procedure 16(a) states:

(2) *Information Not Subject to Disclosure.* Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided [by statute].

(3) *Grand Jury Transcripts.* This rule does not apply to the discovery or inspection of a grand jury’s recorded proceedings, except as provided [in the Rules].

FED. R. CRIM. P. 16(a). Neither of these exceptions is applicable in the case at hand.

113. *See id.*

114. In fact, the child pornography cases that rely on this contraband argument to refuse the defendant’s request for a copy of the evidence are unable to cite to any authority for this point. *See, e.g., United States v. Kimbrough*, 69 F.3d 723, 731 (5th Cir. 1995); *United States v. Husband*, 246 F. Supp. 2d 467, 468–69 (E.D. Va. 2003); *Cervantes v. Cates*, 76 P.3d 449, 455–56 (Ariz. Ct. App. 2003); *State v. Ross*, 792 So. 2d 699, 701–02 (Fla. Dist. Ct. App. 2001).

115. *See William G. Phelps, Illegal Drugs or Narcotics Involved in Alleged Offense as Subject to Discovery by Defendant Under Rule 16 of Federal Rules of Criminal Procedure*, 109

A possible limitation to the discovery of the materials in question then comes from the regulatory power given to judges to create protective or modifying orders.<sup>116</sup> The trial judge has the discretion to refuse or restrict discovery for good cause.<sup>117</sup> The government, however, has an obligation to use “a less restrictive alternative” that “would [still] serve the [g]overnment’s purpose.”<sup>118</sup> Because there are less invasive means that still satisfy the government’s legitimate interest to protect the child-victims, courts should not broadly deny the defendant the ability to secure a copy of the evidence.<sup>119</sup>

B. *Discovery Required by the Constitution and the Presumption of Innocence*

The Federal Constitution protects the right to fundamental fairness in criminal trials, although it does not grant an affirmative right to discovery as such.<sup>120</sup> The Supreme Court held in *Brady*, however, that the Constitution requires some form of prosecutorial disclosure of evidence to the accused.<sup>121</sup> The government has a positive duty to turn over all exculpatory evidence within its possession “where the evidence is material either to guilt or to punishment.”<sup>122</sup> Materiality in this context involves showing that

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A.L.R. FED. 363, 369–70 (1992) (providing examples of cases that allowed the defense to have independent access to drugs for analysis).

116. Federal Rule of Criminal Procedure 16(d)(1) states: “At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte.” FED. R. CRIM. P. 16(d)(1).

117. *Id.* The prosecution, however, lacks such discretionary ability and must either comply with the discovery demand or request a protective order from the court.

118. *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000); *accord* *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (“[A] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”).

119. For a discussion of the rights of the child-victims and the less restrictive means available to protect these interests, see *infra* Part IV.

120. See *Patterson v. New York*, 432 U.S. 197, 201–02 (1977); *supra* note 92 and accompanying text.

121. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). While *Brady* involved an appeal from a state action and therefore specifically only referred to the Fourteenth Amendment’s Due Process Clause, the holding has been applied to the Fifth Amendment Due Process Clause as well. See, e.g., *United States v. Mitchell*, 365 F.3d 215, 254 (3d Cir. 2004).

122. *Brady*, 373 U.S. at 87. While the *Brady* Court indicated that the duty only arose after a demand, the Supreme Court later decided that an accused person’s failure to request the favorable evidence did not relieve the government of its duty. *United States v. Agurs*, 427 U.S.

“there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>123</sup> The *Brady* rule does not involve testing the sufficiency of the remaining inculpatory evidence to determine if there is still adequate evidence to support the conviction.<sup>124</sup> Reasonable probability of a different result is shown when the suppression of the evidence “undermines confidence in the outcome of the trial,” not proof that the final outcome would necessarily have been overturned.<sup>125</sup>

It is reasonable to believe that the sexually explicit depictions are often material in a child pornography case under the *Brady* definition. Certainly, these depictions would be material to the defense if the items in question allegedly did not involve either real people or actual minors, or if the defendant purportedly did not knowingly possess such items.<sup>126</sup> Both of these defenses, if successful, would relieve the accused of guilt. Although it is generally uncertain at the time of the discovery request whether the defense will succeed, a guarantee of success is unnecessary. Assuming a non-frivolous defense, suppressing the defendant’s access to a copy of evidence for analysis undercuts his or her ability to obtain a favorable expert witness. Because the jury decides which expert testimony is more credible, denying the defendant an opportunity to present a counter-expert calls the verdict into question. Accordingly, these child abuse discovery cases often involve violations of the accused’s constitutional due process rights.

The presumption of innocence presents a conclusion of law in favor of the accused; that is, a person’s guilt must be proven by the prosecution beyond a reasonable doubt or else he must be acquitted.<sup>127</sup> This presumption forms the fundamental basis of the

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97, 107 (1976). This distinction, however, is largely unimportant for this discussion, as the controversy at hand has only arisen after a discovery demand has been refused.

123. *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

124. *Id.* at 435 n.8.

125. *Id.* at 434 (quoting *Bagley*, 473 U.S. at 678).

126. See *supra* text accompanying notes 107–10.

127. The term “*presumption* of innocence” is actually a misnomer inasmuch as a presumption normally receives independent evidentiary weight. The Supreme Court initially ruled that it, in itself, was such actual evidence. See *United States v. Coffin*, 156 U.S. 432, 453–54 (1895). Today, it would be more accurate to call it an *assumption* of innocence. For an excellent discussion of this issue, see JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT

criminal justice system and is essential to a fair trial.<sup>128</sup> As such, it is implicitly included within the spirit of the Constitution's guarantee of a fair trial.<sup>129</sup> Allowing the government to suppress reproduction of evidence without showing good cause as required in the discovery statute "improperly place[s] the burden of proof" on the accused.<sup>130</sup> This inappropriate burden-shift transforms the presumption from one of innocence unless and until proven guilty to quite the opposite.

Moreover, according to the Supreme Court, "[t]o implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process."<sup>131</sup> Nothing threatens the fairness of fact-finding more than an unconstitutional restriction on the defendant's ability to adequately present a defense. When the government violates its constitutional or statutory duty by refusing to allow the defense a copy of the material evidence in question, it "shape[s] a trial that bears heavily on the defendant[,] . . . cast[ing] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."<sup>132</sup> With the loss of justice caused by unlawful acts of the government comes the loss of the core presumption of innocence for the accused. For, as the maxim goes, "it is better that ten guilty persons escape, than that one innocent suffer."<sup>133</sup>

The defendant has an unambiguous constitutional and statutory right to requested discovery, which only a more compelling interest

COMMON LAW 551-76 (1898). Bradley's treatise was instrumental in reversing the Supreme Court's ruling in *Coffin*. See Taylor v. Kentucky, 436 U.S. 478, 483-84 n.12 (1978).

128. *Coffin*, 156 U.S. at 453 ("[The] presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

129. *Id.*

130. *Cervantes v. Cates*, 76 P.3d 449, 454 (Ariz. Ct. App. 2003).

131. *Estelle v. Williams*, 425 U.S. 501, 503 (1976); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

132. *Brady*, 373 U.S. at 88.

133. WILLIAM BLACKSTONE, 4 COMMENTARIES \*352. The formula has seen varied forms by different proponents throughout its history: one guilty person (Emperor Trajan), five guilty persons (Sir Matthew Hale), twenty guilty men (Fortescue), ninety-nine guilty men (various Irish cases), one thousand guilty men (a victim of Titus Otis's perjury). James Bradley Thayer, Lecture, *The Presumption of Innocence in Criminal Cases*, 6 YALE L.J. 185, 186-87 (1897). As Thayer explained: "[o]bviously these phrases are not to be taken literally. They all mean the same thing . . . that it is better to run risks in the way of letting the guilty go, than of convicting the innocent." *Id.* at 187. For a discussion on the meaning of various numbers given throughout history, see Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997).

can serve to overcome. As discussed in the following section, the government's interest in protection of children, while legitimate, is not furthered by restricting evidence duplication.

#### IV. PROTECTING THE CHILD-VICTIM

There is no question that the government's interest in protecting children is compelling.<sup>134</sup> The government, as *parens patriae*, "provides protection to those who cannot care for themselves and who stand thus in need of protection."<sup>135</sup> Those in most obvious need of protection are children, specifically requiring protection when others charged with caring for them have proven incapable of properly discharging their duties, such as is the case in abuse and neglect.<sup>136</sup> The government must then step in to protect the children from the harms caused by these adult caregivers.<sup>137</sup>

It is this interest that forms the basis of child pornography law.<sup>138</sup> Child pornography is a form of child sexual abuse that is particularly exacerbated because the pornography itself constitutes a permanent record of the abuse and, in doing so, causes ongoing harm to the child-victim.<sup>139</sup> The laws proscribing mere possession, along with production and distribution, of these materials are intended to "dry up" the child pornography market at all levels, stopping the demand for, and thus production of, such abuse.<sup>140</sup>

While the state is given broad leeway to protect children through appropriate legislation, such as child pornography laws, this interest is not absolute. When interference with a defendant's right is at stake, courts have required that the limiting statute be narrowly tailored

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134. See 1 GRACE ABBOTT, *THE CHILD AND THE STATE*, at vii (1938) ("The progress of a state may be measured by the extent to which it safeguards the rights of its children.").

135. DAVID WILLIAM ARCHARD, *CHILDREN, FAMILY AND THE STATE* 119–20 (2003) ("[P]arens patriae—literally, the 'parent of his or her country.'").

136. See *id.* at 120.

137. *Id.* at 142.

138. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' . . . The legislative judgment . . . is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." (quoting *New York v. Ferber*, 458 U.S. 747, 756–58 (1982))).

139. *Ferber*, 458 U.S. at 759 n.10.

140. *Osborne*, 495 U.S. at 109–10 ("It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.").

using the “least restrictive means” of effectuating the government’s legitimate interest in protecting minors.<sup>141</sup> The alternative does not have to perfectly protect the government’s interest, but rather one that protects at least as well as would the challenged government interference.<sup>142</sup>

Allowing the defense counsel a reproduction of the child pornographic materials does add to those already available; on some level, every additional copy potentially increases the exploitation. The child pornography laws are primarily intended to stop the production of the abusive materials.<sup>143</sup> Limiting the dissemination of such evidence for trial purposes will not work to “dry up” the market. In fact, not allowing copies to be made for use within the judicial system could actually work against the purpose of the law, because without the physical evidence it would become impossible to convict the guilty.

To illustrate, consider another important aspect of the trial: introducing evidence to the record so it can be considered by the jury.<sup>144</sup> It would seem circular and ridiculous to argue that giving the jury a copy of the evidence creates a demand for production of the materials in question. Indeed, the opposite is true: it is the trial system that creates a demand for copying evidence for the jury, and it is the fact of illegal production that creates the need for trial. The trial and possibility of conviction presumably decreases, not increases, the production of child pornography. Worse yet, without seeing at least some of the physical proof, a jury is unlikely to find sufficient

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141. *ACLU v. Ashcroft*, 322 F.3d 240, 261 (3d Cir. 2003), *aff’d*, 542 U.S. 656 (2004). The Court used a similar analysis in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250 (2002), when it implied that the federal child pornography statute was not narrowly tailored to the protection of a real child, holding that virtual images were not “intrinsically related” to child abuse. Despite a link between virtual child pornography and abuse or seduction of an actual child, a protection interest was deemed too indirect to overcome the defendant’s right to freedom of speech when an actual child was not used in the production of the pornography. *Id.* at 250–51.

142. *ACLU v. Ashcroft*, 542 U.S. 656, 668 (2004) (The statute was enjoined, even though the alternative—filtering software—was not a “perfect solution,” because there was no evidence proving that this alternative was less effective than the statutory restrictions.).

143. *See Osborne*, 495 U.S. at 109–10.

144. The court in *Westerfield* considered this same situation while dispelling the argument that allowing discovery of child pornography violated the child pornography statute itself. The analysis in this situation is much the same. *See Westerfield v. Super. Ct.*, 121 Cal. Rptr. 2d 402, 404–05 (Cal. Ct. App. 2002) (stating that the interpretation that discovery would violate the child pornography statute “not only defeats the purpose of the law and exalts absurdity over common sense, but it is also logically flawed”).

evidence to convict beyond reasonable doubt. To then convict would mean the entire loss of the presumption of innocence. The same concept applies when limiting the defense's access to a copy of the evidence for trial purposes.

The risk of further abuse by the additional copy's existence and potential distribution can be overcome through means less restrictive than obliterating the accused's discovery rights. The potential for ongoing abuse occurs because of the victim's knowledge of the images' existence and likely dissemination.<sup>145</sup> It is, then, essential to identify the potential risks to the child specifically inherent in giving a copy of the materials to the defense, and to ascertain an alternative method to eliminate them.<sup>146</sup>

Most pointedly, there is the risk that the defendant actually is guilty, and that he will be given access to the materials which will allow for further abusive dissemination within the distribution chain. This can be addressed simply by emphasizing that it is the defendant's counsel, not the defendant himself, who is to be given charge of the items in question. Additionally, the court may want to include other safeguards, such as requiring that the materials remain in a locked file, and that the defendant not be allowed unaccompanied access. While arguably the same risk of abuse could come from the defense counsel himself or herself, there is no reason to believe that this individual will be less trustworthy than the prosecution.<sup>147</sup> The protective order should include restrictions on making any further copies, except to qualified experts for the purpose of analysis.<sup>148</sup> Similarly, there could be risk that a defense expert will

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145. David P. Shouplin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981) ("A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography."); T. Christopher Donnelly, Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 301 (1979) ("The victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child.").

146. For examples of protective orders used by courts in these child pornography cases, see *United States v. Cadet*, 423 F. Supp. 2d 1, 4-5 (E.D.N.Y. 2006), and *United States v. Hill*, 322 F. Supp. 2d 1081, 1092-94 app. (C.D. Cal. 2004).

147. *United States v. Frabizio*, 341 F. Supp. 2d 47, 51 (D. Mass. 2004) ("[T]here is no reason to think that defense counsel or her expert cannot be trusted . . .").

148. The court's authority to limit distribution of materials gained during the course of discovery is clear. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30-31 (1984). Even in cases where the dissemination would not be criminal, such a protective order does not offend the

abuse his or her position, but no more so can this be assumed than that the prosecution's expert will likewise abuse his or her access.<sup>149</sup> Moreover, the court can place special requirements on choosing a "qualified" expert on both sides to lessen the worry.<sup>150</sup> Any concern that the mere existence of the additional copy could cause later psychological damage to the child is likewise easily solved: the court should specify a time period after termination of any appeal when all copies, including those from experts of both the defense and the prosecution, must be returned to the court. The court may then destroy any extraneous copies, keeping only the original if necessary under court rules of retention.<sup>151</sup>

Arguably, the use of the Internet poses a distinctive concern, in that files viewed or saved on a computer could then possibly be downloaded without the user even knowing.<sup>152</sup> This unauthorized computer access places the image back into the chain of distribution, once again causing immeasurable harm to the child. Though the risk is remote, the vast potential of further harm to the child outweighs any incremental benefit of an Internet connection, unless it is shown that the analysis could not be otherwise accomplished. Without such a showing of necessity, the court should order that any computer on which the files are stored or viewed for analysis

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constitutional right to freedom of speech when good cause is properly shown and disclosure of information gained outside of discovery is not restricted. *Id.* at 37.

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

150. This tactic has been used when allowing a defendant an opportunity to subject drug samples to independent testing. *See, e.g.,* *United States v. Mastrobuono*, 271 F. Supp. 197, 198 (S.D.N.Y. 1967); *United States v. Noel*, 708 F. Supp. 177, 178 (W.D. Tenn. 1989); Phelps, *supra* note 115, at 368.

151. While the knowledge that the court has the sole copy of the sexually explicit material may still "haunt" the child, this alternative protects the government's interest at least as well as not allowing the defense a copy. In either scenario, the original will not be destroyed according to evidence retention rules. Only through the protective order, however, can the court ensure proper control and disposition of the confidential evidence at the appropriate time.

152. This type of computer hacking and theft can occur even with security measures in place. *See generally* RICHARD POWER, *TANGLED WEB: TALES OF DIGITAL CRIME FROM THE SHADOWS OF CYBERSPACE* (2000) (describing various real-life cases where hackers downloaded sensitive files from supposedly secure computers). In fact, in the widely publicized *Puffer* case, a hacker accessed a district clerk's wireless network, but then notified authorities of the potential for breach. *See* Rosanna Ruiz, *Jurors Acquit Man of Hacking System at District Clerk's Office*, HOUS. CHRON., Feb. 21, 2003, at A26. While the defendant was found innocent because he did not compromise any files, the case shows that online information, even in a courthouse, is readily accessible to a sophisticated public. *Id.* (noting that the hacker's activity caused considerable embarrassment to the County).

must not be connected to a network of any kind, or, at minimum, ensure sufficient security programs are in place.

Finally, there may be parts of the images that would not serve an evidentiary purpose but could harm the child-victim by unnecessarily revealing his or her identity to more individuals. Information such as names, faces, tell-tale backgrounds, or other identifiers should be obscured to the extent possible without losing the images' evidentiary usefulness. This element is highly fact specific, and any information to be redacted should be decided in the discretion of the judge.

In sum, the government does have a compelling interest in protecting these victims from further abuse. This duty, however, can be fulfilled through less restrictive alternative means by placing protective boundaries on the sexually explicit items after they are turned over to defense counsel. Broadly restricting the accused from obtaining a copy for his or her defense violates his or her discovery rights and is more than what is necessary to protect the child-victims, and thus should not be allowed.

## V. FINDING THE PROPER BALANCE

Now that the interests of both the child-victims and the accused have been explored, it is time to consider whether either of the two lines of cases, *Kimbrough*<sup>153</sup> or *Westerfield*,<sup>154</sup> found the proper balance between the two interests at play, and, if not, what should be the appropriate solution.

The *Kimbrough* cases denied the accused a copy of the evidence on the basis that the images constituted illegal contraband. The refusal was deemed reasonable unless the defendant showed actual prejudice.<sup>155</sup> This is neither the standard as required by the federal discovery rules (material, government using in case-in-chief, or obtained from accused)<sup>156</sup> nor the constitutional standard as set forth by the Supreme Court in *Brady* (favorable material evidence).<sup>157</sup> Both of these require discovery not only when the defense is actually prejudiced, but also when there is evidence that has the *potential* to

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153. *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995).

154. *Westerfield v. Super. Ct.*, 121 Cal. Rptr. 2d 402 (Cal. Ct. App. 2002).

155. *Kimbrough*, 69 F.3d at 731.

156. *See supra* Part III.A.

157. *See supra* text accompanying notes 120–26.

impact the defense. This line of cases therefore overlooks the defendant's right to discovery, without even considering or relying upon the countervailing interest of the children.

*Westerfield* acted in response to the abuses in *Kimbrough*, but swung the pendulum too far in the opposite direction. The case focused exclusively on granting the accused the full right to discovery, concluding, correctly, that the lack of discovery does in fact potentially prejudice the defense. The court thus found the images material to the defense and required discovery. In vindicating the accused, however, the court neglected to consider the child-victims.

Yet, later cases in this line, beginning with *Cervantes*,<sup>158</sup> began to consider both of the interests at play. These cases maintained that requiring the defendant to show why the materials were needed was an unlawful shift of burden.<sup>159</sup> They rejected arguments that copying, in and of itself, harmed the child-victims, but found that the interest is compelling enough to require extensive protective orders.<sup>160</sup>

To strike the proper balance, a court must ensure that the defendant receives a right to discovery while still protecting the interest of the child-victims. To this end, copying should be required if requested, but must be subjected to a protective order. The protective order should include anything that, in the court's discretion, is necessary for the particular case at hand. Specifically, a judge should consider: removing as much identifying information as possible without forfeiting its evidentiary usefulness, limiting further copying, confining viewing to only experts and counsel in preparation for trial, controlling defendant's access, providing for the evidence's destruction after trial, and restricting network connections when materials are on a computer.<sup>161</sup>

## CONCLUSION

The accused in a child pornography case has both a constitutional and statutory right to production of the images for which they are charged. If this right is denied, the ultimate fairness of the trial is called into question, weakening the basic presumption of innocence

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158. *Cervantes v. Cates*, 76 P.3d 449, 452–53 (Ariz. Ct. App. 2003).

159. *Id.* at 454.

160. *Id.* at 456–57; *see also* *United States v. Cadet*, 423 F. Supp. 2d 1, 4–5 (E.D.N.Y. 2006); *United States v. Hill*, 322 F. Supp. 2d 1081, 1092–93 (C.D. Cal. 2004).

161. *See supra* Part IV.

for the accused. At the same time, the government has a compelling interest in protecting children from abuse. But this interest should not swallow the defendant's rights, and the government must use the "least restrictive" means available when interfering with an accused's rights.<sup>162</sup>

Courts should employ protective orders as an alternative to denying the defense a copy of the sexually explicit materials. These orders should be narrowly tailored to combat the specific risks inherent in allowing additional copies for the defense, specifically limiting further dissemination and the defendant's unaccompanied access. It is only when these interests are mutually considered that both the natural innocence of the children and the presumption of innocence for the accused are preserved.

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162. *ACLU v. Ashcroft*, 322 F.3d 240, 261 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004).