Internet Pornography and Child Exploitation

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Introduction

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Ten years ago, the FBI launched the Innocent Images Initiative to target individuals who were trafficking images of child pornography or enticing children online, *available at* http://www.fbi.gov/publications/innocent.htm. In its first year, 113 cases were opened and ninety-nine indictments or informations were filed. Last year, 2,402 cases were opened and 946 indictments or informations were filed. In that ten-year period, the number of convictions increased more than 1300%, from sixty-eight convictions in 1996 to 994 convictions in 2005. A total number of 4,822 defendants have been convicted since the inception of the Initiative. Focusing exclusively on federal prosecutions, in 2005, there were 1576 prosecutions for violations of federal child exploitation laws, up from 540 prosecutions in 1996.

Despite all the hard work undertaken by federal, state, and local law enforcement, the available information reveals that the scope of the dangers facing children continues to grow. The National Center for Missing and Exploited Children operates the Cyber Tipline, where individuals can report instances of child exploitation, including the possession, creation, or distribution of child pornography. In 1998, the Cyber Tipline received 3,267 reports of child pornography. In 2004, the Cyber Tipline received 106,119 reports, marking more than a thirty-fold increase in child pornography in a six-year period. In that period, the victims involved in the child pornography became younger and younger, and the sexual activity in the images became more graphic and extreme. Recent empirical studies also support the proposition that individuals who consume child pornography are often also child molesters, which suggests that the rise in volume of child pornography available online translates into a very real danger for children.

As the law enforcement successes to date have not been able to keep up with the appetite for child pornography, and the technological advancements that make finding and sharing child pornography faster and easier than ever, the Department of Justice launched Project Safe Childhood (PSC) in May 2006. PSC is a national initiative that will coordinate federal, state, and local law enforcement efforts to prosecute those who sexually exploit children. The goal of PSC is to enhance the national response to the growing threats posed by online sexual solicitation, abuse, and child pornography, to America's youth. The program consists of five components.

- The first component is the creation of integrated partnerships of federal, state, and local law enforcement to investigate and prosecute offenders and identify, rescue, and assist victims.
- Next, these partnerships will participate in coordinated national initiatives to pursue evidentiary leads sent out as a result of a national operation.
- The third component of PSC is increased federal involvement in child exploitation cases so that all the resources of the federal government are brought to bear to ensure that investigations of child exploitation crimes are effectively conducted and that offenders receive optimal punishment for their crimes.
- PSC also calls for the training of federal, state, and local law enforcement to ensure that law enforcement keeps up with technological advances.
- Finally, PSC seeks to increase efforts to raise community awareness and educate the public about the dangers facing children from sexual exploitation and abuse facilitated by technology.

In addition to PSC, Congress recently passed significant legislation to help combat child exploitation. On July 27, 2006, President Bush signed H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006, into law. Among other provisions, the Act improves the sex offender registration program, creates a new federal offense for failure to register as a sex offender, and provides that compliance with sex offender registration requirements must be a condition of both probation and supervised release. The Act also increases penalties for

federal sex abuse and child sexual exploitation crimes, particularly in cases involving repeat offenders. In addition, the Act authorizes funding for PSC, provides for the civil commitment of dangerous sex offenders, and authorizes several grant programs that will help protect children. The Act also directs that, in criminal proceedings, child pornography images must remain in the control of the government or the court, thereby protecting the victims from the risk of further dissemination of the images. Finally, the Act creates a new statute of limitations provision which provides that an indictment can be brought at any time for certain child exploitation crimes, including most child pornography offenses.

This *United States Attorneys' Bulletin* supplements the Quarterly Newsletters issued by the Department's Child Exploitation and Obscenity Section, and is intended as a guide to prosecutors of federal child exploitation crimes and to assist them in meeting the goals of PSC. The articles cover four topics.

- Two articles deal with establishing federal jurisdiction, evidence gathering, and child victim issues. These articles analyze recent and encouraging developments in the area of federal jurisdiction, the threshold issue facing any federal prosecution. One article focuses on various methods of establishing federal jurisdiction in the most common child pornography cases. The second article parses the still-forming landscape of federal jurisdiction in sex tourism and child prostitution cases, including cases based exclusively on intrastate activity.
- Three articles pertain to the topic of evidence gathering. As the majority of child exploitation crimes involve computers, one article details what constitutes sufficient probable cause in a search warrant application seeking to seize computer materials and other electronic storage media. Once the computer has been successfully seized, it must be properly and thoroughly analyzed. As such, one article discusses the critical role that computer forensics play in child exploitation crimes. Finally, an article demystifies the often daunting process of obtaining foreign evidence in sex tourism cases.
- By far the most sensitive aspect of child exploitation cases is the proper handling of child victims and child witnesses. A pair of articles addresses the issues involved, one focusing on the provision of services to prostituted youth and the other on methods of preparing child witnesses to testify.
- Finally, there is one case study focusing on a successful prosecution of a defendant for violating 18 U.S.C. § 1466A, an obscenity provision prohibiting an individual from trafficking obscene visual representations of children, regardless of whether those children are real or not.

The Department of Justice is deeply committed to targeting and prosecuting sexual predators, abusers, and pornographers who target the most innocent and vulnerable of our society—our children. This *Bulletin* will give prosecutors some of the tools and information needed to become successfully involved in the effort to protect America's children.❖

ABOUT THE AUTHOR

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Federal Jurisdiction in Child Pornography Cases

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I. Introduction

There are two primary ways of establishing federal jurisdiction for all child pornography crimes described in Chapter 110 of Title 18, United States Code. One way is to show that the child pornography was produced using materials that had traveled in interstate or foreign commerce. The other way is to show that the image itself has moved in interstate or foreign commerce, or that the defendant knew, had reason to know, or intended the image to move in interstate or foreign commerce (including via computer). This article outlines these two methods of establishing federal jurisdiction in child pornography cases.

II. Produced using materials

The so-called "produced using materials" jurisdictional element is applicable in cases in which a defendant is charged with producing child pornography under 18 U.S.C. § 2251(a) or (b), or possessing child pornography under 18 U.S.C. § 2252(a)(4)(B) or § 2252A(a)(5)(B). Other child pornography provisions, such as selling child pornography, possessing child pornography with intent to sell, and distributing child pornography to a minor to induce them to engage in an illegal act (the "grooming" provision), also provide the produced using materials prong as one of the jurisdictional elements. *See* 18 U.S.C. §§ 2252(a)(3)(B), 2252A(a)(4)(B), 2252A(a)(6). To be clear, the production and possession statutes both offer two jurisdictional elements.

- The "produced using materials" element.
- The "image traveled" element, that is, the image traveled in interstate or foreign commerce.

A prosecutor need not prove both, but rather may choose one or the other depending upon the evidence of the case. The "image traveled" element will be discussed later in this article.

Prior to the release of the Supreme Court's opinion in *Gonzales v. Raich,* 545 U.S. 1 (2005), several circuits relied on a "market theory" to uphold convictions based on the intrastate possession of child pornography. For example, in *United States v. Angle*, 234 F.3d 326, 338 (7th Cir. 2000), the Seventh Circuit rejected the defendant's constitutional challenge and affirmed a § 2252(a)(4)(B) conviction using the market theory, holding that the statute "prohibits intrastate activity that is substantially related to the closely regulated interstate market of child pornography." In *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000), the Fifth Circuit ruled that the produced using materials jurisdictional element (which was proven in the instant case with evidence that the film used to make the child pornography images had traveled in interstate commerce) was not enough, on its own, to render the application of the statute constitutional. However, the Fifth Circuit ultimately upheld the application of the statute, determining that "it is not irrational for Congress to conclude that to regulate a national commercial market for a fungible good, it must as a practical matter be able to regulate the possession of that type of good—possession that in a real economic sense is never wholly 'local.'" *Id*. at 231. *See also*, *United States v. Rodia*, 194 F.3d 465, 476 (3d Cir. 1999) (affirming a § 2252(a)(4)(B) conviction under the market theory); *United States v. Robinson*, 137 F.3d 652, 656 (1st Cir. 1998) (affirming a conviction under § 2252(a)(4)(B) because the local possession of child pornography "through repetition elsewhere, . . . helps to create and sustain a market for sexually explicit materials depicting minors . . . and thus substantially affects the instrumentalities of interstate commerce").

Not all Courts of Appeals, however, embraced the market theory. In *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), the Ninth Circuit held that the child pornography possession statute was unconstitutional as applied to a simple intrastate possession case where the visual depiction had not

been mailed, shipped, or transported in interstate commerce and was not intended for interstate distribution, or for any economic or commercial use (including quid pro quo trading of child pornography images). *Id.* at 1122-23. Under the Ninth Circuit's analysis, the fact that the images were produced using cameras and film which had been shipped in interstate commerce did not bring the case within the reach of the Commerce Clause. *Id*. at 1124-25. Likewise, the Sixth Circuit found the possession statute was unconstitutional as applied to a case where the only evidence of a connection to interstate commerce was that the photographic paper on which the images were printed was manufactured out-of-state. *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001). *See also*, *United States v. Smith*, 402 F.3d 1303 (11th Cir. 2005); *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004) [hereinafter *Maxwell I*].

The scope of *McCoy* and *Corp* were limited by subsequent opinions from the respective Courts of Appeals. The Ninth Circuit carved out an exception to *McCoy* in *United States v. Adams*, 343 F.3d 1024, 1029-34 (9th Cir. 2003), in which it found that the possession statute was a valid exercise of constitutional power. The Ninth Circuit differentiated *Adams* from *McCoy* by emphasizing that in *McCoy* the child pornography at issue was "home grown," whereas in *Adams*, the child pornography was "commercial" (that is, the defendant did not produce it). *Id. See also*, *United States v. Tashbook*, 144 Fed. Appx. 610 (9th Cir. 2005) (unpublished opinion) (distinguishing *McCoy* both factually and legally from cases in which defendants are charged with producing child pornography). The Sixth Circuit distinguished *Corp* in *United States v. Andrews*, 383 F.3d 374, 375 (6th Cir. 2004), finding a sufficient nexus to interstate commerce in a case in which the defendant produced child pornography using a camera and a computer which had been manufactured outside the state.

The *Raich* opinion had a dramatic impact on the jurisprudence of the produced using materials jurisdictional element. As will be seen, the reasoning in *Raich* has been used to expressly overrule prior decisions that had ruled that the possession or production statute was unconstitutional as applied to intrastate cases. Specifically, the District of Columbia, Fourth, Sixth, Tenth and Eleventh Circuits have all relied on *Raich* to uphold intrastate child pornography convictions when the evidence presented to prove a nexus to interstate commerce was that the materials used to produce the image had traveled in interstate commerce. Indeed, since the issuance of the *Raich* opinion, no Court of Appeals which has examined the application of the produced using materials jurisdictional element to intrastate cases has found the provision to be unconstitutional.

The Eleventh Circuit provides a clear example of the impact *Raich* had on the vitality of the produced using materials jurisdictional element. As noted above, the Eleventh Circuit originally ruled that a child pornography possession conviction could not stand when the sole connection to interstate commerce was evidence that the child pornography was saved onto disks, which were manufactured outside of the state and thus, had been shipped in interstate commerce. *Maxwell I*, 386 F.3d at 1059-60. The Eleventh Circuit held that the legislative findings concerning the national and international market for child pornography were insufficient to support a conviction, because there was no evidence suggesting that the defendant's conduct would impact interstate commerce. *Id.* at 1063-64.

The Supreme Court reversed and remanded *Maxwell I* to the Eleventh Circuit in light of *Raich*. *United States v. Maxwell*, 126 S.Ct. 321 (Oct. 3, 2005). On reconsideration, the Eleventh Circuit reversed its decision in *Maxwell I*. *United States v. Maxwell*, 446 F.3d 1210 (11th Cir. 2006) [hereinafter *Maxwell II*]. In light of *Raich*, on remand, the Eleventh Circuit held that the proper question was

> whether Congress could rationally conclude that the cumulative effect of the conduct by Maxwell and his ilk would substantially affect interstate commerce—specifically, the interstate commerce Congress is seeking to eliminate. Viewed in this light, there is nothing irrational about Congress's conclusion, supported by its findings, that pornography begets pornography, regardless of its origin. Nor is it irrational for Congress to conclude that its inability to regulate the intrastate incidence of child pornography would undermine its broader regulatory scheme designed to eliminate the market entirely....

Maxwell II, 446 F.3d at 1218 (dicta). The Eleventh Circuit concluded that, under its

interpretation of *Raich*, "it is within Congress's authority to regulate all intrastate possession of child pornography, not just that which has traveled in interstate commerce or been produced using materials that have traveled in interstate commerce." *Id*.

In *United States v. Chambers*, 441 F.3d 438 (6th Cir. 2006), the Sixth Circuit upheld a conviction for possession of child pornography under 18 U.S.C. § 2252(a)(4)(B). At trial, the United States offered proof that the Polaroid film which was used to produce the images had been manufactured in Massachusetts or the Netherlands. The Sixth Circuit ruled that the evidence established a sufficient nexus to interstate commerce. *Id.* at 454-55. The Sixth Circuit's decision in *Chambers* is a logical extension of its holding in *United States v. Gann*, 160 Fed. Appx. 466 (6th Cir. 2005), which held that the United States is not required to prove the defendant intended to place the images in the stream of interstate commerce. The *Chambers* opinion resolved the tension in the Sixth Circuit between the *Corp* and *Andrews* decisions. The *Corp* analysis is no longer viable in light of *Raich* and *Chambers*.

As noted above, the *Maxwell II* and *Chambers* opinions are in accord with other circuits that have applied the *Raich* analysis to the produced using materials jurisdictional element. *See*, *United States v. Sullivan*, 451 F.3d 884, 890-92 (D.C. Cir. 2006) (application of § 2252A to intrastate possession of child pornography case is not violative of Commerce Clause); *United States v. Jeronimo-Bautista*, 425 F.3d 1266, 1272 (10th Cir. 2005) (upholding conviction for production of child pornography under § 2251 when the materials used to produce the contraband had traveled in interstate commerce); *United States v. Grimmett*, 439 F.3d 1263 (10th Cir. 2006); *United States v. Forrest*, 429 F.3d 73, 78-79 (4th Cir. 2005) (upholding conviction for production and possession of child pornography where cameras used to produce the images were manufactured out-of-state).

The Ninth Circuit has not decided a case concerning the produced using materials prong since the *Raich* opinion was issued. As such, the *McCoy* decision has not yet been explicitly overruled. *But see*, *Tashbook*, 144 Fed. Appx. 614 at n.2 (questioning whether as applied challenges brought under the Commerce Clause were still viable in light of *Raich*). As for the market theory cases, *Raich* did not invalidate the holdings of those cases, although it does provide a new argument in support of federal jurisdiction.

Given these consistent holdings, one way to establish federal jurisdiction in cases alleging production or possession of child pornography is by offering evidence that the pornography was produced using materials that had traveled in interstate or foreign commerce. That evidence can pertain to cameras used to capture the image, photographic paper on which the image was printed, or tapes on which the video was filmed. Prosecutors typically offer testimony or provide business records to show where the factories or warehouses of the manufacturer of the material are located. A prosecutor can also try proving this element by creating an inference that the materials traveled in interstate commerce (this is often done if the prosecutor cannot ascertain the brand of the material used by the defendant). For example, a prosecutor can admit evidence that there are no plants or factories, in the state of prosecution, that manufacture the given material. Therefore, the material must have been imported across state lines.

As a final note for possession cases, courts have held that a defendant "produces" an image or video or child pornography when he saves such an image to a computer, CD-Rom, or disk. Therefore, the produced using materials element can be satisfied in a possession case by showing the location of manufacture of any media on which the defendant saved the child pornography. *See*, *e.g.*, *Angle*, 234 F.3d at 341 (computer graphic files are "produced" when computer equipment that has traveled in interstate commerce is used to download or copy the images).

III. The image traveled in interstate or foreign commerce

The other way to establish federal jurisdiction, in most child pornography cases, is to prove that the image traveled in interstate or foreign commerce. In some cases, such as production cases, 18 U.S.C. § 2251(a), (b), and (c); advertising cases, 18 U.S.C. § 2251(d); and transportation cases, 18 U.S.C. §§ 2252(a)(1) and 2252A(a)(1); the government must show that the defendant moved or knew the image would be moved in interstate commerce. In other instances, the United States must show the image crossed

state lines at some point, but need not show that the defendant was responsible for the interstate movement, including receipt, distribution, and possession of child pornography. 18 U.S.C. §§ 2252(a)(2), 2252(a)(4), 2252A(a)(2), and 2252A(a)(5).

To establish federal jurisdiction using the "images traveled" jurisdictional element, it is important to fully understand the receipt, distribution, and transportation provisions. In general terms, in receipt and distribution counts, the images traveled element attaches to the image itself, but not to what the defendant did with the image. In transportation, it is the defendant's action that causes the image to travel in interstate or foreign commerce.

In the majority of federal receipt cases, the evidence shows that the defendant received the image from out-of-state. However, a careful reading of the receipt provisions reveals that a federal receipt case can be based on intrastate receipt, if the prosecutor can show that the image received by the defendant had moved in interstate or foreign commerce prior to its delivery to the defendant (methods for proving that are discussed below). That is, if evidence shows that the image moved in interstate commerce, the government only need prove that the defendant knowingly received the image, without having to address the source of the image. A simple example of an intrastate receipt case would be a defendant receiving a European child pornography magazine from his neighbor. The magazine traveled in foreign commerce from Europe to the neighbor, and then the defendant received it.

Likewise, the distribution provisions do not require that the defendant give the image to someone out-of-state. In all distribution cases, the prosecutor must prove that the image in question traveled in interstate or foreign commerce prior to its distribution by the defendant. The prosecutor, however, does not need to prove where the defendant distributed the image. The prosecution can proceed whether the defendant distributed the image within or outside of his state. Put another way, the distribution provision always requires the government to show that the image traveled in interstate commerce, but never that the defendant was the one who caused the image to cross state lines. Referring to the example in the preceding paragraph, the neighbor could properly be charged with distributing child pornography.

Therein lies the difference between distribution and transportation of child pornography. The prosecutor must separately show that the image traveled in interstate or foreign commerce and that the defendant distributed it to someone, whether interstate or intrastate, if using the distribution charge. On the other hand, the use of the transportation charge requires the prosecutor to prove that the defendant sent the image across state lines, but not evidence as to where the image came from, or was, prior to the defendant's acquisition. In most cases, transportation is the proper and simpler charge to prove. For example, if a defendant produced child pornography, and e-mailed it to someone in another state, the proper charge to levy against the defendant is production and transportation. On those facts, since the image did not travel in interstate or foreign commerce prior to being e-mailed, a distribution charge could not stand.

There are several ways to establish that an image traveled in interstate or foreign commerce. Most often, computer forensics can provide the necessary evidence to establish jurisdiction. That topic is discussed in more detail in another article in this issue, but in general terms, computer forensics can trace the path an image took into or out of the state.

Another way to establish federal jurisdiction is to prove that the image was produced outside the state of prosecution. In *United States v. Halter*, 402 F. Supp. 2d 856, 857 (S.D. Ohio 2005), the defendant was charged with possession of child pornography. He moved to dismiss the indictment, arguing that 18 U.S.C. § 2252 was an unconstitutional exercise of Congress's authority under the Commerce Clause, both facially and as applied. *Id*. at 862. The District Court rejected the defendant's challenge, concluding that the government had met its jurisdictional burden by presenting evidence that the images in the indictment had been produced in Great Britain, Florida, Illinois, and Pennsylvania and, therefore, had moved in interstate and foreign commerce. *Id*. All of the images charged in *Halter* depicted known victims whose abusers had been arrested and convicted. Agents involved with the investigation of the production of those images testified at trial, identifying not only the victims, but furniture in the photos, which they recognized from the search sites. The government also introduced certified copies of the conviction of the producers of the child pornography images.

Similarly, in *United States v. Richards*, 401 F. Supp. 2d 834, 844 (M.D. Tenn. 2005), the defendant, charged with possession and attempted possession of child pornography, moved to dismiss the indictment on the grounds that the government could not establish a connection with interstate commerce. *Id.* at 842. After an evidentiary hearing, the court found that the defendant had access to the Internet and that his computer yielded known victims in pictures identified as the "Paraguay series." *Id*. at 844.

In *United States v. Venson*, 82 Fed. Appx. 330, 331 (5th Cir. 2003), the court upheld a conviction for possession and receipt of child pornography. Images of a well-known series of child pornography originating in Texas were found on the defendant's computer in Louisiana. *Id*. The Court reasoned that because the government provided evidence that the images had been produced in Texas, the images had been placed on the Internet at the time they were produced, and that the defendant downloaded the images from the Internet, the jury was justified in finding that they had moved in interstate commerce. *Id*. at 332.

- **Note of caution**: when relying on where the images were produced to establish an interstate nexus, a prosecutor must take care that the evidence is not based on inadmissible hearsay. For example, if the government knows an image was produced in Florida only because the victim told the agent, the agent cannot testify to that fact.

A prosecutor can also establish an interstate nexus in a child pornography case by showing that an image was transmitted via the Internet. *See, United States v. MacEwan*, 445 F.3d 237 (3d Cir. 2006) (holding that child pornography obtained via the Internet had been transmitted in interstate commerce); *United States v. Hair*, 2006 WL 1073056 (11th Cir. Apr. 25, 2006) (finding that images received via the Internet had traveled in interstate commerce); *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) (holding that "[t]ransmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce."). There are several methods available to prove that images were transmitted via the Internet and, therefore, traveled in interstate commerce.

In some cases, the image itself provides proof that it was transmitted via the Internet. For example, in *United States v. Ellyson*, 326 F.3d 522 (4th Cir. 2003), the defendant was charged with possessing images that contained superimposed Internet addresses and logos for child pornography Web sites. The court found that such information, combined with testimony from an agent who was familiar with the nature of the superimposed Web sites, was sufficient to establish that the images had been transmitted via the Internet. Accordingly, the court held that the interstate commerce nexus had been established. *Id.* at 533; *see also*, *United States v. Runyon*, 290 F.3d 223, 242 (5th Cir. 2002) (finding that an embedded Web site address and embedded language describing the child pornography available at that Web site established that the image had been transmitted via the internet); *United States v. Henriques*, 234 F.3d 263 (5th Cir. 2000) (noting that "internal evidence," such as a Web site address embedded on an image, can support the inference that a defendant obtained the image from the Internet).

Another way to prove that an image was transmitted via the Internet is to examine where it is found on a defendant's computer. In *United States v. Hilton*, 257 F.3d 50 (1st Cir. 2001), the defendant was charged with possessing child pornography images that were found in a "MIRC" [Mu/moo Internet Relay Chat] subdirectory, which contained software used in conjunction with Internet chat rooms. *Id.* at 54. In addition to the physical location of these images, the time and date features of each image suggested that they had been transmitted via modem. *Id.* Together, these factors led the court to conclude that the evidence established that the charged images had been transmitted via the Internet and, therefore, had traveled in interstate commerce. *Id.* at 55.

Of course, the government must do more than merely show that a defendant had child pornography on his computer and had an Internet connection. It must provide evidence that independently links every charged image to interstate commerce. For example, in *Henriques*, the defendant was convicted of possession of three images of child pornography. At trial, the government directly linked two of the three images to the Internet, but merely relied on the fact that the defendant owned a computer and subscribed to an Internet service provider to

establish that the third image had also moved in interstate commerce. *Henriques*, 234 F.3d at 266 -67. The Fifth Circuit reversed the defendant's conviction, holding that the government is required to "independently link all of the images upon which a conviction is based to the Internet." *Id.* at 266. The court went on to explain that "[i]f we did not require the government to independently link each image to interstate commerce, we would allow the government to obtain a conviction without proving beyond a reasonable doubt each element of the crime." *Id.*

Therefore, in determining which images to charge in child pornography cases, prosecutors must consider how to establish the required interstate commerce nexus for each image. In many cases, proof that an image was transmitted via the Internet can satisfy this jurisdictional element. While there are many ways to demonstrate transmission via the Internet, care must be given to independently establish that every charged image actually traveled in interstate commerce.

IV. Conclusion

In federal child pornography cases, the two primary ways of establishing federal jurisdiction are to show that the child pornography was produced using materials that had traveled in interstate or foreign commerce, or to show that the images themselves have moved in interstate or foreign commerce or that the defendant knew, had reason to know, or intended the images to move in interstate or foreign commerce (including via computer). In each child pornography case, federal prosecutors should be prepared to demonstrate one of these bases for federal jurisdiction.❖

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Establishing Federal Jurisdiction in Child Prostitution and Sex Tourism Cases

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I. Introduction

The United States is committed to fighting the international problem of sex trafficking of minors. Children are victimized through prostitution both domestically and overseas, where American sex tourists exploit economically-vulnerable children. Federal prosecutors now have powerful statutory tools to combat the sex trafficking of minors. These statutes utilize Congress's broadest subject matter jurisdiction, and allow for the prosecution of

domestic child prostitution cases that involve no interstate travel or communication. Sex tourism prosecutions against U.S. citizens may now be brought where the sexual exploitation occurred entirely outside of the United States. The use of these statutes will often trigger challenges involving the limits of Congress's authority under the Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, and other sources of Congressional power. This article outlines the jurisdictional bases applicable to child prostitution and child sex tourism cases and provides arguments supporting the constitutionality of statutes that can be used to prosecute the sex trafficking of minors.

II. Child prostitution cases

Federal child prostitution cases rest on two groups of statutes.

- The Mann Act statutes found at 18 U.S.C. §§ 2421, 2422, and 2423(a) and (b).
- The sex trafficking provision located at 18 U.S.C. § 1591.

A. Mann Act statutes

The Mann Act Statutes available for use in a child prostitution case are §§ 2421 (transportation generally), 2422 (coercion and enticement) and 2423(a) and (b) (transportation of minors or travel). These statutes depend on one of two things for federal jurisdiction.

- The defendant or victim traveled in interstate or foreign commerce, as is the case for §§ 2421, 2422(a), 2423(a), and 2423(b).
- The defendant used the mail or any facility or means of interstate or foreign commerce for Section 2422(b).

In interstate or foreign commerce. To establish jurisdiction for most of the Mann Act provisions, the United States must prove that the victim was transported or traveled in interstate or foreign commerce (§§ 2421, 2422(a), and 2423(a)), or that the defendant traveled in interstate or foreign commerce (§ 2423(b)). Congress's use of the term "in commerce" has a distinct and well-settled meaning. Specifically, the phrase "in commerce" signals Congressional intent to use more limited authority under the Commerce Clause to regulate the channels of interstate commerce and to regulate and protect the instrumentalities of commerce, or persons or things in interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *see also United States v. Ballinger*, 395 F.3d 1218, 1231 (11th Cir. 2005) (en banc).

At its simplest level, "in interstate or foreign commerce" requires the defendant or victim to have actually crossed state or national boundaries. *United States v. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) (upholding the interstate stalking provisions of 18 U.S.C. § 2262(a)(1), noting that the "Supreme Court has repeatedly said crossing state lines is interstate commerce regardless of whether any commercial activity is involved"). In the context of child prostitution, a defendant can be convicted for transporting victims or coconspirators across state lines. *United States v. Holland*, 381 F.3d 80, 84-85 (2d Cir. 2004) ([T]he language of the Mann Act "makes no distinction between victims and coconspirators for purposes of imposing liability on the person who transports another; the defendant need only have transported an 'individual,' either adult or minor depending on the relevant section, to be guilty under the Act."). Further, the defendant need not have personally transported the victim across state lines. *Id.* at 86-87 ("recruiting the women, persuading them to travel, purchasing the bus tickets, and accompanying them on the journey" constitutes transporting victims in interstate commerce).

Channels of commerce include "the interstate transportation routes through which persons and goods move." *Ballinger*, 395 F.3d at 1225-26 (quoting *United States v. Morrison*, 529 U.S. 598, 613 n.5 (2000)). These channels include highways, *see*, *e.g.*, *Pierce County v. Guillen*, 537 U.S. 129 (2003) and *United States v. Pappodopoulos*, 64 F.3d 522, 527 (9th Cir. 1995), as well as railroads, navigable waters, and airspace. *See*, *e.g.*, *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 516-18 (1941); *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 683 (1883); *United States v. Ho*, 311 F.3d 589, 597 (5th Cir. 2002). Telecommunications networks have also been deemed channels of interstate commerce. *See*, *e.g.*, *Ho*, 311 F.3d at 597.

Although child prostitution crimes are necessarily economic in nature, Congress's authority to regulate the channels and instrumentalities of interstate commerce does not depend on the regulated activity having any commercial aspect. *See*, *e.g.*, *Caminetti v. United States*, 242 U.S. 470, 491-92 (1917). *See also Wright*, 128 F.3d at 1275; *United States v.*

Cummings, 281 F.3d 1046, 1049-50 (9th Cir. 2002). The majority of federal child prostitution cases will involve charges of transporting a minor interstate for purposes of prostitution under Section 2423(a), and will not be vulnerable to attack on Commerce Clause grounds. Another reason to charge § 2423(a) in addition to § 1591, where applicable, is that under § 2423(a) the government need not prove that the defendant knew the person transported was a minor. *See, e.g.*, *United States v. Griffith*, 284 F.3d 338, 349 (2d Cir. 2002); *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001).

Instrumentalities of interstate commerce. Section 2422(b) criminalizes the use of "the mail or any facility or means of interstate or foreign commerce" to persuade, induce, entice, or coerce a minor to engage in prostitution or any criminal sexual activity. Congress is also empowered to regulate the instrumentalities of interstate commerce, or the people and things themselves involved in interstate commerce, including automobiles, airplanes, boats, and shipments of goods. *See*, *e.g.*, *Perez v. United States*, 402 U.S. 146 (1971); *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995). Instrumentalities of commerce also include the Internet, pagers, telephones, and mobile phones. *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004). For child prostitution cases brought under § 2422(b), the jurisdictional element may be met by showing the defendant used telephones or the Internet to entice the victim to engage in prostitution.

Significantly, case law suggests that § 2422(b) can be applied to cases of intrastate use of an instrumentality of interstate commerce, such as in-state phone calls. *Lopez*, 514 U.S. at 558. *See also United States v. Giordano*, 442 F.3d 30, 40 (2d Cir. 2006) (18 U.S.C. § 2425, which prohibits use of a facility or means of interstate commerce to transmit information about a minor to encourage illegal sexual activity, applies to the purely intrastate use of a facility, such as telephone); *United States v. Hornaday*, 392 F.3d 1306, 1310-11 (11th Cir. 2004) (§ 2422(b) may be applied to intrastate use of instrumentality of interstate commerce); *United States v. Gilbert,* 181 F.3d 152, 158 (1st Cir. 1999) (telephone used to make in-state bomb threat "is an instrumentality of interstate commerce and this alone is a sufficient basis for jurisdiction based on interstate commerce").

Jurisdiction under § 2422(b) rests on the defendant using an instrumentality *of* interstate commerce. Other federal statutes require use of an instrumentality *in* interstate commerce, which is typically considered a narrower jurisdictional element. In cases involving those statutes, many courts have upheld their application to intrastate use of the given instrumentality. *See*, *e.g.*, *United States v. Gil*, 297 F.3d 93, 99-100 (2d Cir. 2002) (mail fraud statute can be applied to intrastate mailing); *United States v. Photogrammetric Data Servs., Inc.,* 259 F.3d 229, 249-52 (4th Cir.2001) (upholding constitutionality of mail fraud statute as applied to intrastate mailing placed with private or commercial interstate carriers); *United States v. Marek,* 238 F.3d 310, 320 (5th Cir. 2001) (upholding conviction under the federal murder-for-hire statute, 18 U.S.C. § 1958, based on intrastate wire payment to a hit man via Western Union, "a quintessential facility *in* interstate commerce" that Congress may regulate under the second *Lopez* category); *United States v. Wadena,* 152 F.3d 831, 853 (8th Cir.1998) (depositing checks into FDIC-insured institution was sufficient nexus with interstate commerce to uphold money laundering conviction under 18 U.S.C. § 1957); *United States v. Baker,* 82 F.3d 273, 275-76 (8th Cir.1996) (upholding a conviction under the Travel Act, 18 U.S.C. § 1952(a), based on an extortion victim's use of an automatic teller machine (ATM) that "triggered an entirely intrastate electronic transfer" between two local banks, because interstate network of ATMs is a facility in interstate commerce). There is strong support for the use of § 2422(b) to reach intrastate cases of enticement or coercion.

B. Section 1591

Title 18, United States Code, Section 1591(a), enacted as part of the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1464, states in pertinent part:

> (a) Whoever knowingly -
>
> > (1) in or affecting interstate or foreign commerce . . . recruits, entices, harbors, transports, provides, or obtains by any means a person . . . knowing that force, fraud, or coercion described in subsection (c)(2) will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18

years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

A commercial sex act is further defined in 18 U.S.C. § 1591(c)(1) as a sex act "on account of which anything of value is given to or received by any person."

The jurisdictional element in § 1591 differs from the jurisdictional element in some of the Mann Act provisions in one key respect. As discussed above, most Mann Act provisions can only be applied to cases where the defendant or minor actually crossed state lines. The jurisdictional element in § 1591, however, is broader in that it applies to activity that takes place in *or* affecting interstate or foreign commerce. Therefore, § 1591 could be applied either to interstate or to intrastate sex trafficking activity.

Congressional regulation of sex trafficking under § 1591 is supported by several independent sources of constitutional power. In enacting § 1591, Congress invoked the full range of its Commerce Clause power, regulating not only the channels and instrumentalities of interstate commerce, but also intrastate activities having a substantial effect on interstate commerce. As discussed below, Congressional authority to prohibit sex trafficking also stems from the Thirteenth Amendment to the United States Constitution, which authorizes Congress to pass whatever laws are necessary for the abolition of slavery in all its forms.

Commerce Clause jurisprudence. Article 1, Section 8, Clause 3 of the United States Constitution gives Congress the power "[t]o regulate Commerce with Foreign Nations, and among the several states, and with the Indian tribes." Since its decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court, with few exceptions, has interpreted the Commerce Clause expansively, upholding many exertions of legislative authority. Recent limitations on the Commerce Clause power concerned activity that was not economic in nature.

In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Court addressed the constitutionality of the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), which prohibited possession of a firearm within a thousand feet of a school. Because the statute criminalized purely intrastate conduct without any connection to an economic activity and without including any jurisdictional hook to "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce," the Court found that it exceeded the scope of Congress's commerce power. *Id.* at 560-61. In reaching this conclusion, the Court recognized Congress's authority under the Commerce Clause to: (1) "regulate the use of the channels of interstate commerce"; (2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "regulate those activities having a substantial relation to interstate commerce." *Id.* at 558-59.

The Supreme Court further defined Congressional authority under the third *Lopez* category in *United States v. Morrison*, 529 U.S. 598 (2000), by emphasizing four factors for lower courts to consider in determining whether a given activity "substantially affects" interstate commerce. These factors include: (1) whether the regulated activity is commercial or economic in nature; (2) whether the statute contains an express jurisdictional requirement; (3) whether the statute or its legislative history contains congressional findings articulating the effect of the regulated activity on interstate commerce; and (4) whether the activity's effect on commerce is direct, as opposed to attenuated. *Id.* at 610-12.

The Supreme Court's recent decision in *Gonzales v. Raich*, 125 S. Ct. at 2211 (2005), made clear that, of these factors, the most important and often decisive factor is the first—whether a statute regulates commercial activity. *Id.* at 2211 (the limitation in cases such as *Morrison* "casts no doubt" on statutes that directly regulate economic activity). In *Raich*, the Court held that the Controlled Substances Act (CSA), Pub. L. No. 91-513, 84 Stat. 1236 (codified in scattered sections of 21 U.S.C.), was an appropriate exercise of Congress's power to regulate activities that substantially affect commerce, even where applied to the intrastate growth of marijuana for personal medical consumption. *Id.* at 2215. In reaching its holding, the Court in *Raich* distinguished the CSA from the statutes struck down in *Lopez* and *Morrison*, which "did not regulate economic activity." *Id.* at 2210. The Supreme Court's decision in *Raich* confirmed Congress's authority to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on

interstate commerce." *Id.* at 2205-06 (citing *Perez v. United States*, 402 U.S. at 151 and *Wickard v. Filburn*, 317 U.S 111, 127-28 (1942)). It is essential to note that it is the economic character of the *class* of regulated activities that controls under *Raich*, rather than the economic character of any particular individual conduct reached by a statute.

Given the *Raich* Court's emphasis on whether the statute regulates commercial activity, § 1591 falls squarely within Congress's Commerce Clause power as the statute, by its very terms, applies to economic activity. As noted above, an element in all § 1591 cases is that the victim will be caused to engage in a "commercial sex act." The Ninth Circuit has already recognized the "essential economic character" of conduct involving a "commercial sex act." *United States v. Clark*, 435 F.3d 1100, 1115 (9th Cir. 2006) (discussing commercial sex acts defined in 18 U.S.C. § 2423(f)(2), which takes its definition from § 1591(c)(1)). In short, § 1591 has no application other than to economic activity. This alone is sufficient to satisfy the first prong of the analysis under *Morrison*.

Section 1591 is also part of a broader Congressional regulation of commercial activity. The sex trafficking of minors is a lucrative commercial enterprise. Tragically, children are treated as valuable commodities in the burgeoning illegal sex trade. Unlike one-time sales of weapons and narcotics, children are sold over and over again. According to the UNITED STATES DEP'T OF STATE, TRAFFICKING OF PERSONS REPORT 9 (2005), "[t]he profits from human trafficking fuel other criminal activities." The Federal Bureau of Investigation estimates that human trafficking generates $9.5 billion in annual revenue and is closely connected with money laundering, drug trafficking, document forgery, and human smuggling. *Id.* Unlike the activities involved in *Lopez* and *Morrison*, the conduct regulated by § 1591 is economic.

Turning to the fourth *Morrison* factor, the effect of sex trafficking on interstate commerce is direct, rather than attenuated. Where a statutory scheme regulates economic activity, the effects of the activity reached by the statute may be aggregated in considering the nexus to interstate commerce. *See*, *e.g.*, *Raich*, 125 S. Ct. at 2208. Because the impact of the regulated activity is considered in the aggregate, individual instances of conduct falling under the statute must only have a *de minimis* effect on interstate commerce to be within Congress's reach under the Commerce Clause. As recognized by the Court in *Raich*, the Supreme Court has "reiterated that when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 2206 (internal quotation marks omitted). Thus, even if a single instance of the regulated activity has only a trivial effect on commerce, and/or if the class of activities regulated substantially affects commerce in the aggregate, then the conduct falls within Congress's commerce power.

Furthermore, under *Raich* and other controlling precedents, courts assessing the scope of Congress's authority under the Commerce Clause "need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Id. at 2208.

Under the rationality standard, the Supreme Court's decision in *Raich* demonstrates the constitutionality of § 1591. In *Raich*, the Court held that Congress had the power to prohibit intrastate cultivation and possession of marijuana for one's own medicinal use in compliance with California law. *Id.* at 2205-06. Prior decisions established federal regulatory power over any home consumption of a commodity for which a national market exits. The *Raich* Court found that the challenged application of the CSA was within Congress's commerce power because Congress had a rational basis to conclude that production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market for that substance. Thus, the Court identified the need to federally regulate purely intrastate activities "if [Congress] concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.*

Section 1591 criminalizes activity that is quintessentially economic, unlike the statutes at issue in *Lopez* and *Morrison*, and Congress has a rational basis to exercise its authority to regulate this conduct by all individuals if, in the aggregate, the economic activity is subject to federal control. As discussed above, child prostitution is an illegal activity for which there is an established interstate market and it is clearly economic in nature. Section 1591 is an essential part of a larger

prohibition against child prostitution, in which the broad regulatory scheme would be undercut by the inability to prohibit purely intrastate child prostitution. Therefore, in light of *Raich* and its predecessors, purely intrastate child trafficking cases squarely fit within Congress's authority under the Commerce Clause.

Although the second and third *Morrison* factors are not dispositive of the issue, their application to § 1591 further supports the statute's constitutionality. Unlike the statute that was found unconstitutional in *Lopez*, § 1591 provides its own jurisdictional element that requires the government to prove beyond a reasonable doubt that the trafficking of children was "in or affecting interstate commerce." Without question, the second prong of the *Morrison* test is satisfied in this case.

Finally, in enacting the TVPA, Congress made formal legislative findings connecting the statute to interstate commerce. The TVPA was enacted to address, in part, the sex trade and trafficking of persons across borders and into the United States. Congress found, in part, that:

> As the 21st Century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year. . . . Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest growing source of profits for organized criminal enterprises worldwide. Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. . . . Trafficking in persons substantially affects interstate and foreign commerce.

TVPA of 2000, Pub. L. No. 106-386, 114 Stat. 1464 at § 102 (codified at 22 U.S.C. § 7101). As § 1591's legislative history contains congressional findings that sex trafficking, both internationally and in the United States, affects interstate commerce, these findings bolster the argument that Congress has the authority to regulate intrastate child prostitution.

Title 18 U.S.C. § 1591 is also a valid exercise of Congress's power under the Thirteenth Amendment to "abolish slavery of whatever name and form and all its badges and incidents." *Bailey v. Alabama*, 219 U.S. 219, 241 (1911). Section Two of the Thirteenth Amendment grants Congress authority to pass laws that are even broader than the prohibition imposed by the Amendment itself, including authority to pass all laws that are "necessary and proper" for the obliteration and prevention of slavery. U.S. CONST., amend. XIII, § 2; *Civil Rights Cases*, 109 U.S. 3, 20-21 (1883). The purposes and findings of the TVPA explicitly acknowledge that trafficking in persons is a "modern form of slavery," and further state that

> [t]he right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded.

TVPA of 2000, Pub. L. No. 106-386, 114 Stat. 1464 at § 102(b)(22) (codified at 22 U.S.C. § 7101(b)(22)). Thus Congress plainly intended to use the Thirteenth Amendment as a source of authority when it passed the TVPA.

Based on the above, § 1591 is a proper exercise of Congress's Commerce Clause authority. No court, however, has yet explicitly ruled on the issue. In a case prosecuted jointly by the Child Exploitation and Obscenity Section (CEOS) and the United States Attorney's Office for the Southern District of Florida, however, the first challenge to the application of § 1591 to a purely intrastate case is currently pending before the Court of Appeals for the Eleventh Circuit. CEOS will gladly provide assistance to any prosecutor facing such a constitutional challenge to the statute. The defendant in *United States v. Evans*, Southern District of Florida, Case No. 05-20444, pled guilty to one count of violating § 1591 and one count of violating § 2422(b). He reserved the right to contest the constitutionality of § 1591 as applied to the facts of his case. The defendant and his victim, a fourteen year-old girl, were both based in the Miami area. Using threats and physical force, Evans prostituted the child. Although Evans did not take the victim across

state lines, he did provide her with condoms and a cell phone, both of which were manufactured outside the state of Florida.

When considering the defendant's motion to dismiss the indictment, the district court's analysis focused on the third and fourth *Morrison* factors, namely whether Congress determined that sex trafficking affects interstate and foreign commerce and whether defendant's actions had the requisite direct affect on interstate and foreign commerce. As to the first issue, the court rejected the defendant's argument that the statute was intended only to reach activities that involve the crossing of boundaries, holding that the term trafficking has a broad meaning. The district court concluded that "Congress had a rational basis for concluding that failure to regulate the coercive use of children in intrastate commercial sex acts would undermine its comprehensive approach" to combat national and international sex trafficking. *Id.* (Court Order of Nov. 25, 2005).

As for the second issue, the district court found the defendant's use of condoms and cell phones to be a sufficient connection to interstate commerce. (In addition, the United States also argued that medications which were manufactured abroad, and that the victim took for treatment of HIV and sexually transmissible diseases, also provided a nexus to interstate commerce. Because the district court found that it was unclear how much of the victim's health needs arose before she was prostituted and how much was a direct result of being prostituted, it did not consider that evidence in its analysis.) Defendant Evans has appealed the district court's ruling. We are cautiously optimistic that the Eleventh Circuit will affirm the district court in finding that Congress has the power to regulate intrastate child prostitution crimes that affect interstate and foreign commerce.

III. Sex tourism statutes and the commerce clause

The limits of Congress's power under the Commerce Clause are also being tested by the recent expansion of federal laws addressing the overseas sexual exploitation of minors by United States citizens. Title 18, United States Code, Section 2423(c), included in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650, extends the reach of "sex tourism" statutes to criminalize acts taking place entirely outside of the United States. Title 18 U.S.C. § 2423(c), entitled "Engaging in illicit sexual conduct in foreign places," allows for the prosecution of "a United States citizen or an alien admitted for permanent residence . . . who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person." The phrase "illicit sexual conduct" is further defined in § 2423(f) to include a sex act with a person under eighteen years of age that would be illegal under chapter 109A (if the act took place in the special maritime or territorial jurisdiction of the United States) or a commercial sex act (as defined in 18 U.S.C. § 1591) with a person under eighteen years of age.

Congress passed the provision now contained in 18 U.S.C. § 2423(c) to address difficulties with then-existing 18 U.S.C. § 2423(b), which "requires the government to prove that the defendant traveled with the intent to engage in the illegal activity. Under this section [the new 2423(c)], the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country." H.R. REP. 108-66 (2003) (Conf. Rep.), 108th Cong., 1st Sess. 2003, *as reprinted in* 2003 U.S.C.C.A.N. 683, 686. The prior version of § 2423(b) did not cover extraterritorial activity, even if the defendant had, in fact, traveled abroad. Under the old statute, the crime was traveling in interstate or foreign commerce for the purpose of having sex with a minor. Therefore, the crime was completed once the defendant began traveling in the United States with the intent of exploiting children. The removal of the intent requirement significantly alters the analysis of Congressional authority, since criminal acts prosecuted under § 2423(c) take place entirely outside of the United States.

While this article discusses power under the Commerce Clause, prosecutors defending this statute should also consider arguing alternative sources of Congressional power. Please feel free to contact CEOS Trial Attorney Wendy Waldron or the CEOS duty attorney at (202) 514-5780 to discuss legal and practical issues regarding sex tourism prosecutions. One source of authority for extraterritorial legislation is Congress's inherent power over United States citizens. *See, e.g., Blackmer v. United States*, 284 U.S. 421, 436-37 (1932) (characterizing legislative power over

United States citizens overseas as being a "power inherent in sovereignty"). Extraterritorial legislation, such as § 2423(c), is also supported by Congress's plenary power to legislate in external affairs and matters touching on foreign relations. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936) (explaining that the "broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs"); *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1076 (9th Cir. 1998) (finding that although the immigration power is not enumerated in the Constitution, it has been "universally acknowledged that Congress possesses authority over immigration policy as 'an incident of sovereignty'") (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889)).

Congress's power to enact § 2423(c) is also grounded in its authority to pass legislation to implement treaties entered into by the United States, specifically the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (hereinafter Protocol). Protocol, S. Doc. No. 106-37B. The Protocol was ratified by the United States Senate on June 18, 2002, and calls on states to criminalize extraterritorial acts of sex tourism and child prostitution. *See* 148 CONG. REC. S5718 (daily ed. June 18, 2002).

While the defense of Congressional authority to enact § 2423(c) will center primarily on the Commerce Clause, this enumerated power should be interpreted against the backdrop of Congress's broad authority over matters touching on foreign relations and to regulate the conduct of United States citizens overseas.

A. Foreign commerce clause

The primary source of authority for § 2423(c) is the Foreign Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Foreign commerce is defined in 18 U.S.C. § 10 as "commerce with a foreign country." Foreign commerce is typically defined in judicial opinions as including commerce or travel between the United States and any other country. *See, e.g., United States v. Hersh*, 297 F.3d 1233, 1245 (11th Cir. 2002)*; United States v. Montford*, 27 F.3d 137, 139-40 (5th Cir. 1994).

Courts have recognized that there are fewer limits on Congressional power to regulate foreign commerce than on its power to regulate interstate commerce. *See, e.g., United States v. Bredimus*, 352 F.3d 200, 208 (5th Cir. 2003) ("[t]he Supreme Court has long held that Congress's authority to regulate foreign commerce is even broader than its authority to regulate interstate commerce.") (citing *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 448 (1979)). The broader nature of Congressional authority to regulate foreign commerce stems, in part, from the fact that foreign commerce is "pre-eminently a matter of national concern." *Japan Line*, 441 U.S. at 448.

The comprehensive nature of Congressional power under the Foreign Commerce Clause also derives from the fact that such legislation does not implicate the concerns over powers reserved to the states. Concern over the balance between state and federal power lies at the heart of jurisprudence discussing the limits of Congressional power under the Commerce Clause. *See*, *e.g., N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 27 (1937); *Lopez*, 514 U.S. at 549; *Morrison*, 529 U.S. at 608-09. The cases in which the Supreme Court has limited Congress's power to regulate interstate commerce do not support similar limitations on Congressional authority under the Foreign Commerce Clause.

B. *United States v. Michael Clark*

The new extraterritorial provisions of § 2423(c) were recently upheld by a panel of the Court of Appeals for the Ninth Circuit in *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006). In a two-to-one decision, the court in *Clark* rejected the claim that the statute exceeds Congressional power to regulate foreign commerce and violates the Due Process Clause. This case is the first circuit court decision addressing the constitutionality of the extraterritorial jurisdiction provided by § 2423(c).

The defendant in *Clark* made frequent trips back and forth between the United States and Cambodia, during which he admittedly engaged in sexual acts with minors. *Id.* at 1104. The indictment challenged in *Clark* concerned a single trip between the United States and Cambodia. Clark was arrested in Cambodia in June 2003. *Id.* at 1103. The lower court in *Clark* had also rejected the defendant's claim that § 2423(c) was beyond Congress's constitutional authority, finding that the statute was within Congress's power to regulate the channels of foreign commerce. *United States v. Clark*, 315 F. Supp. 2d 1127, 1133-34 (W.D. Wash. 2004).

The Ninth Circuit's *Clark* decision recognizes Congress's "sweeping powers over foreign commerce" and notes that the Supreme Court has never invalidated a statute as exceeding Congress's power to regulate foreign commerce. *Clark*, 435 F.3d at 1109, 1113. The court also emphasizes that legislation involving extraterritorial conduct does not implicate the federalism concerns at the heart of the Supreme Court's Commerce Clause jurisprudence. *Id.* at 1111-13.

Because of these important distinctions, *Clark* abandons the categorical framework used to analyze Congress's power over interstate commerce in the domestic context. Instead, the court makes a more general finding that the combination of travel in foreign commerce and engaging in commercial sexual activity while abroad "implicates foreign commerce to a constitutionally adequate degree." *Id*. at 1114. The *Clark* holding is limited to commercial sex acts with minors, and relies heavily on the "quintessentially economic" nature of the regulated conduct. *Id*. at 1115.

While the *Clark* decision declines to apply the traditional Commerce Clause framework, it also recognizes that § 2423(c) is within Congress's authority to regulate the channels of foreign commerce. *Id.* at 1116 (noting that this authority continues even after use of the channels of foreign commerce has ceased). In an important footnote, the court in *Clark* also departs from the commerce power altogether, recognizing that "Congress's plenary authority over foreign affairs may also provide a sufficient basis for § 2423(c)." *Id*. at 1109 n.14. The court also rejected the defendant's due process challenge, finding that the application of § 2423(c) to the extraterritorial acts of a United States citizen is permissible. *Id*. at 1108-09. The *Clark* decision provides great support for the argument that § 2423(c) is within Congress's power to regulate foreign commerce. Although there are strong arguments supporting the constitutionality of § 2423(c) when applied to noncommercial conduct, prosecutors may want to specify the commercial definition of "illicit sexual conduct" in the indictment, when applicable, in order to be in the strongest position should this issue be litigated.

C. Traditional Commerce Clause analysis also supports § 2423(c)

Prosecutors outside the Ninth Circuit who rely on the noncommercial definition of "illicit sexual conduct" should also argue that § 2423(c) is constitutional under the Supreme Court's traditional Commerce Clause framework in which § 2423(c) is best characterized as regulating the channels of foreign commerce.

While the Ninth Circuit opinion in *Clark* contains only brief mention of Congress's authority to regulate the channels of foreign commerce, the district court opinion contains a more extensive discussion, finding that § 2423(c) is a proper regulation of the channels of foreign commerce. 315 F. Supp. 2d at 1133-34. The district court decision also highlights the international dimensions of the conduct addressed by § 2423(c), explaining:

> [T]his statute addresses a problem of grave international consequences that does affect channels of foreign commerce. The exploitation of children by United States citizens, even when that exploitation occurs by those who travel outside of the United States, is considered by the President of the United States to be a significant problem that the United States has committed to address . . . . Government action in this area also clearly implicates foreign policy and public health concerns.

Clark, 315 F. Supp. 2d at 1135.

As noted by the district court in *Clark*, the constitutionality of § 2423(c) is also supported by cases involving 18 U.S.C. § 1204(a), the International Parental Kidnapping Crime Act (IPKCA). Cases upholding IPKCA demonstrate that Congressional authority to regulate channels of foreign commerce extends to noneconomic activity and does not require intent at the time of travel. In *United States v. Cummings*, 281 F.3d 1046 (9th Cir. 2002), a panel of the Ninth Circuit Court of Appeals held that the provision prohibiting the retention of a child outside the United States to obstruct parental rights was within Congress's authority to regulate. *Id.* at 1049. In explaining its holding, the court emphasized that Congressional authority under the Commerce Clause includes the regulation of noneconomic activities that "affect, impede, or utilize the channels of commerce" and noted that "[t]he cessation of movement does not preclude

Congress's reach if the person or goods traveled in the channels of foreign commerce." *Id.* at 1049-50. *See also United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 735-36 (E.D. Va. 2003) (federalism concern that was a "principal basis" for the Supreme Court's recent limitations on Congress's commerce power was "strikingly absent from this case," further noting that, while child custody is typically an area of state concern, it occurred in the "context of international kidnapping, a quintessentially international problem in need of a national response.").

The IPKCA cases demonstrate that it is not necessary to show that a person traveled in commerce with specific illegal intent, or engaged in commercial activity, to fall within Congressional authority to regulate foreign commerce. In fact, the wrongful retention of a child abroad is more remotely connected to such channels than the actual exploitation of a child by defendants, as required by § 2423(c). Defendants charged under § 2423(c) are actively using the channels and instrumentalities of foreign commerce to go back and forth between the United States and places where they engage in illicit sexual conduct with minors. This is true even if it cannot be shown that they possessed the intent to engage in such acts at the outset of their outbound travel.

In the domestic context as well, Congress's power to regulate the channels of interstate commerce is not restricted to situations where the government demonstrates illegal purpose while in transit or to cases involving economic activity. A strong case on this issue is *United States v. Ballinger*, 395 F.3d 1218 (11th Cir. 2005) (en banc), *cert. denied*, 126 S.Ct. 368 (2005). In *Ballinger*, the defendant appealed his convictions for intentionally destroying religious property in violation of 18 U.S.C. § 247, which provides for the punishment of those who intentionally deface, damage, or destroy any religious real property because of the religious character of that property, when the offense is in or affecting interstate commerce. *Id.* at 1224, quoting 18 U.S.C. § 247. The statute challenged in Ballinger contained no requirement that the defendant traveled in interstate or foreign commerce, or that any such travel was undertaken with the intent to destroy religious property in the destination state. *Ballinger* held that the challenged statute was within Congress's power to regulate both the channels and instrumentalities of commerce, which includes prohibiting the use of such channels to facilitate the commission of illegal acts, or to "promote . . . the spread of any evil or harm to the people of other states from the state of origin." *Id.* at 1226 (quoting *Brooks v. United States*, 267 U.S. 432, 436 (1925)). The court declined to decide whether the statute might also be upheld as a regulation of activities that substantially affect interstate commerce. *Id*. at 1227.

In explaining the broad reach of Congress's power to regulate commerce, the en banc decision in *Ballinger* noted several statutes falling within Congress's power to regulate the channels of commerce that do not require travel with a specific illegal purpose. *Id.* at 1230, n.7. *Ballinger* broadly defines the scope of Congress's power to regulate commerce, asserting that there is "no doubt that the commerce power contemplates congressional regulation of the channels and instrumentalities of commerce in order to prevent their use to facilitate harmful acts, which may be consummated—and whose effects ultimately may be felt—outside the flow of commerce." *Id.* at 1228. This precedent further helps to refute any argument that a statute must require proof of illegal intent at the time of travel to fall within Congress's power to regulate the channels and instrumentalities of commerce.

Section 2423(c) is also within Congress's power to regulate activities that substantially affect foreign commerce. Like the other facets of its commerce power, Congress's authority to reach activities that substantially affect foreign commerce should be assessed in light of its greater power over foreign commerce. Section 2423(c) should also be assessed in light of the fact that it regulates economic activity, which is central to Congress's commerce authority. *See, e.g*., *Raich*, 125 S.Ct. at 2211.

Section 2423(c) involves the regulation of economic activity in two respects. It requires travel in foreign commerce, which, in the majority of cases, will be done via commercial means. It also prohibits commercial sexual activity with minors. Although § 2423(c) prohibits noncommercial sexual activity in some cases, the link to commerce is nonetheless clear. Congress has drafted § 2423(c) and (f) so that some applications will directly regulate economic activity. Furthermore, there is a close link between the prohibited activity and the affect on foreign commerce where defendants travel in

foreign commerce and spend money derived from U.S. sources to pay for hotels and even for the sexual activity itself.

While § 2423(c) does not contain Congressional findings regarding the impact of the regulated activity on foreign commerce, courts have recognized that "when the challenged statute regulates activity that is plainly economic in nature, no jurisdictional hook or congressional findings may be needed to demonstrate that Congress properly exercised its commerce power." *United States v. Peters*, 403 F.3d 1263, 1273 (11th Cir. 2005). *See also Raich*, 125 S.Ct. at 2208.

In assessing Congress's power to enact § 2423(c) under these standards, it is clear that both the commercial and noncommercial activities covered by this section further the federal interest in eliminating the international commercial sexual exploitation of minors. Using the rational basis standard mandated by *Raich* to consider the activities covered by § 2423(c) in the aggregate, Congress clearly had a rational basis for concluding that the activities of multiple United States citizens who travel overseas and engage in the commercial and noncommercial sexual exploitation of minors substantially affect foreign commerce.

IV. Conclusion

Recent changes in federal laws governing sex trafficking and sex tourism, coupled with the changing landscape of Supreme Court Commerce Clause jurisprudence, mean that federal prosecutors have more tools than ever to use to combat the sexual exploitation of children. Federal prosecutors are no longer limited to pursuing child prostitution cases that involve interstate or foreign travel, or to cases of sex tourism where the evidence shows the defendant intended to engage in commercial sex prior to starting his travel. A full understanding of the outer limits of federal jurisdiction is necessary in order to make proper charging decisions, as federal prosecutors can now consider initiating intrastate cases, as well as sex tourism cases, where all the illegal conduct occurred overseas.❖

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Ensuring Convictions Through Successful Search Warrants

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I. Introduction

Whether a child exploitation investigation involves the receipt, possession, or distribution of child pornography, a predator enticing a minor to travel to enable his abuse, or even a pimp advertising the availability of minors as "escorts," a computer is typically used to facilitate some aspect of the crime. The computer can, in and of itself, be the crime scene. Gaining access to the computer used will provide a wealth of evidence, and is critical to convict and appropriately punish the offender. In most cases, the computer, or the activity documented on a target's computer, establishes the critical interstate nexus needed for federal child exploitation offenses. Evidence obtained from computer searches may even alleviate the need for minor victims to testify at trial. In sum, establishing probable cause for a search warrant for an offender's computer is an essential part of almost all computer-facilitated child exploitation investigations.

Obtaining computer evidence requires a two-prong analysis. There must be probable cause to believe the computer is in the location to be searched, such as the target's residence, motor vehicle, or work place, and probable cause to believe evidence of a crime will be found on that computer. Of course, probable cause must exist at the time of the search. This issue is often litigated in child exploitation search and seizure cases, as defense attorneys frequently argue that probable cause is lacking because the information relied upon is stale. Other potential issues include failing to present evidence that the target actually downloaded or saved images and establishing probable cause to search for and seize all items requested in the search warrant application, including child erotica.

II. Overcoming staleness

Staleness can arise in many contexts. Consider a typical case where a nationwide investigation has identified thousands of subscribers to a Web site offering images of children engaging in sexually explicit conduct. Leads are sent out and law enforcement is asked to follow-up, as appropriate. A district receives several leads for targets who purchased memberships between eight and twelve months prior to the date the leads were received. Is this information stale? In many jurisdictions, without more information showing that there is probable cause to believe the offender still has the images, the information is considered stale. The defense's staleness argument, however, can be overcome.

In assessing whether the supporting facts are stale, consideration must be given to the "age of those facts [as well as] the nature of the [underlying] conduct. . . ." *United States v. Marino*, 664 F.2d 860, 867 (2d Cir. 1981); *see also United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997). The passage of time itself is not a dispositive factor. *See United States v. Shomo*, 786 F.2d 981, 984 (10th Cir. 1986); *see also United States v. McCall*, 740 F.2d 1331 (4th Cir. 1984). In assessing the nature of the underlying conduct, courts have consistently relied upon the use of "expert language" outlining the recognized behaviors of child pornography collectors, as well as statements discussing the ability of computer forensic examiners to retrieve files that have been deleted. Illustrating a pattern of activity exhibited by the target or activity that is continuing in nature may also defeat staleness arguments.

A. The appropriate use of "expert language"

The use of expert language must be carefully considered and used only in appropriate cases. Expert language has frequently included the following statements or some version thereof.

- Individuals who collect child pornography often maintain their collections that are in a digital or electronic format in a safe, secure and private environment, such as a computer

and surrounding area. These collections are often maintained for several years and are kept close by, usually at the collector's residence, to enable the collector to view the collection, which is valued highly.

- Individuals who collect child pornography prefer not to be without their child pornography for any prolonged time period. This behavior has been documented by law enforcement officers involved in the investigation of child pornography throughout the world.

Expert language has been relied upon consistently by federal courts. In *Lacy*, the court found the affidavit "provided ample reason to believe the items sought were still in [the defendant's] apartment" even though the information contained in the affidavit was ten months old. The court relied upon the affiant's explanation "that collectors and distributors of child pornography value their sexually explicit materials highly, 'rarely if ever' dispose of such material, and store it 'for long periods' in a secure place, typically their homes." *Lacy*, 119 F.3d at 746. In *United States v. Hay*, 231 F.3d 630 (9th Cir. 2000), focusing on the totality of the information contained in the affidavit, including boilerplate language regarding the affiant's experience with individuals who collect child pornography, the court found the affidavit "provide[d] a substantial basis for the probable cause determination." *Id.* at 636. In *United States v. Diaz*, 303 F. Supp. 2d 84 (D. Conn. 2004), the court found the activities the defendant had engaged in, coupled with the expert language, was sufficient to establish probable cause to believe there would still be evidence of his crimes even after sixteen months had passed. *Id.* at 91. The court relied upon the expert language contained in the affidavit holding "child pornographers retain materials for significant lengths of time." *Id*.

Expert language should not be used indiscriminately. Two considerations when deciding whether to rely on expert language in the affidavit are whether the affiant spoke directly to the expert and whether that expert is able to link the proclivities of individuals who collect child pornography to the target. In other words, can the expert say that the target is an individual who collects child pornography and the behaviors and common characteristics of child pornography collectors are attributable to him. For example, in *United States v. Gourde*, 440 F.3d 1065 (9th Cir. 2005) (en banc), the court found

> "[t]he affidavit concluded by identifying facts about [the defendant] that made it fairly probable that he was a child pornography collector and maintained a collection of child pornography and related evidence: [He] 'took steps to affirmatively join' the website [which] 'advertised pictures of young girls' . . . engaged in sexually explicit conduct . . . . [He] remained a member for over two months, although he could have cancelled at any time . . . [He had] access to hundreds of images . . . [and] any time [he] visited the website, he had to have seen images of 'naked prepubescent females with a caption that described them as twelve to seventeen-year-old girls.

Id. at 1068 (quoting from the affidavit of probable cause).

Failure to make this important connection between the behaviors and characteristics of child pornography collectors and the target is frequently fatal. In a Ninth Circuit case *United States v. Weber,* 923 F.2d 1138 (9th Cir. 1990), an affidavit contained extensive language about child molesters, pedophiles, and collectors of child pornography. This language did not save the government from suppression. The court found the affidavit failed to state "even a conclusory recital that the evidence of [the defendant's] demonstrated interest in child pornography–consisting of one proven order-places him in the category of those pedophiles, molesters, and collectors about whom the [expert] has expertise." *Id.* at 1341.

In the Fifth Circuit, a district court came to the same conclusion and granted a motion to suppress evidence obtained from the execution of a search warrant, finding that the affiant had merely taken several pages of another agent's language regarding the behaviors of pedophiles and inserted that language in his own affidavit of probable cause. *United States v. Carlson*, 236 F. Supp. 2d, 686, 688 (S.D. Tex. 2002). The affidavit contained extensive discussion of not only the behaviors of pedophiles, but of preferential child molesters and collectors of child pornography. The district court found this language was not "case-specific." *Id.* at 688. In particular, the agent "never alleged that [the defendant] was a pedophile . . . [or] how [the defendant] fit the patterns." *Id*. "Evidence about the behavior of a class of people is relevant only if the affidavit shows that the target of the search is a

member of the class. Otherwise, the description is mere fluff . . . ." *Id*. at 691.

B. The ability to retrieve deleted files

In *Hay*, in addition to including expert language about child pornography collectors, the affidavit also contained information about the ability of computer forensic analysts to retrieve deleted files. *Hay*, 231 F.3d at 636. In holding that the facts supporting the search warrant application were not stale, the court found "that even if [the defendant] had deleted the files, they could nevertheless be retrieved by a computer expert." *Id.*

Other federal courts have given weight to such statements. In *United States v. Abraham*, No. CR 05-344, 2006 WL 1344303 (W.D. Pa. May 17, 2006), the court found probable cause existed even after a four-month period of time between one identified occasion of distributing child pornography and the search warrant application, in part because of language in the affidavit indicating that "even if the image in question had been deleted or not even downloaded . . . it was possible for any trained forensic examiner to retrieve the image from [the] computer." *Id.*

Deleted file retrieval language has included the following language or some tailored version thereof.

> Computer files or remnants of such files can be recovered months or even years after they have been downloaded onto a hard drive, deleted or viewed via the Internet. Electronic files downloaded to a hard drive can be stored for years at little or no cost. Even when such files have been deleted, they can be recovered months or years later using readily-available forensics tools. When a person "deletes" a file on a home computer, the data contained in the file does not actually disappear; rather, that data remains on the hard drive until it is overwritten by new data. Therefore, deleted files, or remnants of deleted files, may reside in free space or slack space – that is, in space on the hard drive that is not allocated to an active file or that is unused after a file has been allocated to a set block of storage space – for long periods of time before they are overwritten. In addition, a computer's operating system may also keep a record of deleted data in a "swap" or "recovery" file. Similarly, files that have been viewed via the Internet are automatically downloaded into a temporary Internet directory or "cache." The browser typically maintains a fixed amount of hard drive space devoted to these files, and the files are only overwritten as they are replaced with more recently viewed Internet pages. Thus, the ability to retrieve residue of an electronic file from a hard drive depends less on when the file was downloaded or viewed than on the particular user's operating system, storage capacity, and computer habits.

C. Demonstrating continuing behavior

In addressing the issue of staleness, courts have also given weight to activity that is continuing in nature; hence, demonstrating a pattern of activity. In *United States v. Harvey*, 2 F.3d 1318 (3d Cir. 1993), the defendant received thirteen mailings offering child pornography between two and fifteen months before the search warrant execution. In denying a motion to suppress based on staleness, the court relied on the defendant's history and pattern of activity stemming back to his convictions for sexually assaulting minors in 1977. *Id.* at 1323. In *Diaz*, the court relied upon activity that was continuing in nature, occurring over a two-year period, in finding the information relied upon was not stale. 202 F. Supp. 2d at 92. Other courts have also relied upon an established pattern of activity, in conjunction with expert language about the behaviors of child pornography collectors, to support a finding of probable cause. *See United States v. Peden*, 891 F.2d 514, 518 (5th Cir. 1989); *United States v. Cox*, 190 F. Supp. 2d 330, 333 (N.D.N.Y. 2002).

III. Documented downloading not necessary

Another challenge that may be encountered is the lack of information that a target actually downloaded any images of children engaging in sexually explicit conduct after purchasing a Web site membership. The question that is litigated is if it is possible to establish probable cause without such evidence. In *Gourde,* the Ninth Circuit recently answered this question affirmatively. The defendant belonged to a Web site that advertised the availability of images of young girls engaged in sexually explicit conduct. Monthly memberships were offered and would renew, if not cancelled. The defendant remained a member of the Web site for over two months. During this time, the defendant had unlimited access to

hundreds of images of children engaging in sexually explicit conduct. The *Gourde* court found that, even though the act of joining the Web site was not necessarily difficult, the defendant's actions "could only have been intentional and were not insignificant." *Gourde,* 440 F.3d at 1070. The defendant "became a member and never looked back . . . ." *Id*. at 1071. The court further described the defendant as "not an accidental browser." *Id.* at 1070. Ultimately, the court found there was no need for the affidavit to reflect evidence that the defendant actually downloaded images from the Web site offering child pornography, "[T]he affidavit left little doubt that [the defendant] had paid to obtain unlimited access to images of child pornography knowingly and willingly, and not involuntary, unwittingly, or even passively." *Id*. at 1071. (The court also made note that the affidavit contained both expert language of the behaviors of child pornography collectors, as well as the ability of computer analysts to retrieve even deleted images to support probable cause.)

Similar arguments have been made suggesting that failure of law enforcement to seek out information proving or disproving whether a target downloaded any images of child pornography are fatal to the probable cause analysis. These arguments also failed. This issue was also addressed in *Gourde*. The court held it was irrelevant whether or not downloading information was obtainable by law enforcement, and therefore could have been included in the affidavit, because that information is not necessary to establish probable cause. "[T]his additional data would have transformed a 'fair probability' to a 'near certainty' that [the defendant] had received or possessed illegal images." *Id*. at 1073. Of course, a "near certainty" that evidence of a crime is present at the location to be searched is not required for a search warrant. *See Illinois v. Gates,* 462 U.S. 213 (1983).

Other courts have reached the same conclusion. In one case, an affidavit contained information indicating that child pornography collectors typically download images after obtaining access to a Web site, without actually being able to demonstrate that the defendant had done so. In rejecting the motion to suppress, the court found proof of download after a membership purchase was not necessary to establish probable cause. *United States v. Wilder*, No. CRIM.A. 04-10217-GAO, 2005 WL 1106922, at *7 (D. Mass. May 6, 2005). *See also Abraham*, 2006 WL 1344303, at *4.

IV. Probable cause applicable to all items in search warrant application

It is essential that there is probable cause to search for and seize all items requested in the search warrant application. Moreover, it is necessary to identify all materials sought to be seized. In some cases, justification for a broad range of material can be supplied by the proper use of expert language. For instance, if the only evidence is that the target distributed several images of child pornography via his computer on a certain date and time, there may also be probable cause to search for still photographs and videotapes depicting images of minors engaging in sexually explicit conduct, as well as magazines, books, correspondence, and other visual media.

In most child exploitation investigations, it is also appropriate to request permission to search for and seize evidence of child erotica. "Child erotica" has been described as "any material, relating to children, that serves a sexual purpose for a given individual." *See* KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 65 (4th ed. 2001). This may include images of children that are not sexually explicit, sexual aids, drawings, and even fantasy writings. Expert language may include the following statements.

- Individuals who collect child pornography may collect sexually explicit or suggestive materials, in a variety of media, including photographs, magazines, motion pictures, video tapes, books, slides and/or drawings or other visual media. Child pornography collectors oftentimes use these materials for their own sexual arousal and gratification. Further, they may use these materials to lower the inhibitions of children they are attempting to seduce, or to demonstrate the desired sexual acts.
- Individuals who collect child pornography almost always possess and maintain their "hard copies" of child pornographic material, that is, their pictures, films, video tapes, magazines, negatives, photographs, correspondence, mailing lists, books, tape recordings, etc., in the privacy of their home or some other secure location. Child pornography collectors typically retain

pictures, films, photographs, negatives, magazines, correspondence, books, tape recordings, mailing lists, child erotica, and video tapes for many years.

- Individuals who collect child pornography may receive sexual gratification, stimulation, and satisfaction from contact with children, or from fantasies they may have viewing children engaged in sexual activity or in sexually suggestive poses, such as in person, in photographs, or other visual media, or from literature describing such activity.

The evidentiary value of such material has been acknowledged by federal courts. Letters containing sexual references to children and showing the defendant's pedophiliac nature have been held admissible. *United States v. Cross*, 928 F.2d 1030 (11th Cir. 1991). Permissible testimony has also included information about how pedophiles derive sexual satisfaction from nonsexual photographs of children. *Id*. at 1050.

In *United States v. Caldwell*, 1999 WL 238655, No. 97-5618 (6th Cir. Apr. 13, 1999), in finding child erotica admissible to show knowledge and intent, the court stated that

> child erotica is probative of knowledge for two reasons. First, the more child pornography and child erotica that was present, the more likely [the defendant] had knowledge that his stash contained more than the adult pornography he claimed was the extent of his awareness. Second as [the detective] testified, investigators often look for child erotica as an indicator of the presence of child pornography: learning that [the defendant] acquired and displayed child erotica increases the probability that he enjoyed child erotica, which makes it more likely that he enjoyed child pornography, which makes it more likely that he knowingly possessed and distributed child pornography.

Id. See also United States v. Campos, 221 F.3d 1143 (10th Cir. 2000) (despite only having evidence the defendant possessed two images depicting child pornography, search warrant was not overly broad by authorizing the search for child erotica and related materials).

Once again, expert language, when used appropriately, can provide ample justification for seeking this kind of material. As noted above, however, the use of such statements is not enough if the affidavit fails to attribute the behaviors described to the target.

V. Conclusion

Obtaining evidence against those who exploit children is of the utmost importance in order to convict and punish them appropriately. Assuring there is probable cause to support search warrants in child exploitation cases will go a long way in clearing neighborhoods of those who seek to harm the youngest members of society. In preparing these affidavits, it is important to remember the fundamental principles of search and seizure jurisprudence. An affidavit in support of a search warrant need only establish "a fair probability that contraband or evidence of a crime will be found in a particular place," *Gates*, 462 U.S. at 238, and "[a] magistrate need not be certain that the items will be found on the premises" before authorizing a search warrant. *United States v. Rabe*, 848 F.2d 994, 997 (9th Cir. 1988). Accordingly, affidavits need not conclusively establish that child pornography is present on a particular computer at a particular place, but only a fair probability that it is.❖

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How Computer Forensics Can Dramatically Improve a Case

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I. Introduction

A fifty-year-old male target used Yahoo! Instant Messenger to attempt to entice a thirteen-year-old girl to engage in sexual activity. Unbeknownst to him, the thirteen-year-old girl actually was an undercover agent of the FBI. After several chat sessions, the target drove sixty miles across state lines to meet the girl at a prearranged location and was arrested upon his arrival. He had a digital camera, condoms, and alcohol, in his possession at the time of arrest. The undercover FBI agent conducted a by-the-book investigation. Therefore, the government has a watertight enticement case and the target cannot raise entrapment as a defense. Without a thorough forensic examination of the target's computer, the prosecutor does not know what other child exploitation offenses, if any, he has committed. This article outlines how computer forensics can help find additional offenses in order to ensure that the defendant is held accountable for all crimes committed.

II. The target of the investigation has likely committed other child exploitation offenses

Is it not probable that a fifty-year-old man who is willing to drive sixty miles to have sex with a thirteen-year-old has also possessed, received, or distributed child pornography? Since he brought a digital camera with him, which indicates his desire to take sexually explicit pictures of the child he expected to meet, is it not possible that he has already produced child pornography? Finally, is it not conceivable, that he has enticed other minors online, or met with other minors before?

An offender who is driven to commit an enticement offense by his sexual interest in children is likely to be driven to commit other child sexual exploitation offenses. In the example given, the target probably has not just enticed the thirteen-year-old girl, but may also have a complex network of children he is currently trying to entice. Moreover, the target may be communicating with other pedophiles. Pedophiles often seek validation from other like-minded individuals. They trade stories about past, present, and future abuses against children, and exchange photos and videos of children engaging in sexual activity. Offenders will often maintain their child pornography collections in a well-organized manner, cataloging the images by known series, ages, or type of sexual activity. *See generally*, Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis,* National Center for Missing & Exploited Children (2001).

As offenders gain validation from others for their behavior and their pornography collections grow, they seek out new images or more extreme images. The ultimate prize may be images they produce. In a study conducted in 2000, Dr. Andres E. Hernandez questioned fifty-four inmates who were voluntary participants in the Sex Offender Treatment Program at the Federal Correctional Institution in Butner, North Carolina. These offenders had only been convicted of either possessing or distributing child pornography. Of the offenders questioned, nearly 80% admitted to having prior sexual contact crimes against minors. More disturbing, 62% of these individuals had no documented record of these crimes as they had never been detected. Andres E. Hernandez, *Self-Reported Contact Sexual Crimes of Federal Inmates Convicted of Child Pornography Offenses*, Highlights from a poster presentation presented at the 19th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Offenders, San Diego, California (Nov. 2000), at 1-3.

Based on this information, the chances are that the target is neither a first-time child sex offender nor an individual who only uses his computer to entice minors to engage in sexual activity. The link between contact sex abuse crimes against minors and Internet-facilitated child exploitation crimes, such as enticement and child pornography offenses, is very real, and one that should be explored in this investigation. There may be other victims and evidence that will yield additional charges that can greatly improve the case against this target.

III. Obtaining the target's computer

Another article in this issue, *Ensuring Convictions Through Successful Search Warrants*, 54 UNITED STATES ATTORNEYS' BULLETIN 19 (Nov. 2006) outlines how to establish probable cause for search warrants in child exploitation cases. For purposes of this example, assume that the following facts establish probable cause to search the target's home computer and computer-related media.

- The target's chat discussing sexual acts with minors.
- The target's travel to meet the undercover agent.
- The target traveling with a digital camera, condoms, and alcohol.
- Statements from an expert describing the link between contact child sex offenders and child pornography, as well as the common characteristics of child pornography collectors.

Today's personal computer (PC) can be an almost infinite source of the most damning evidence available. Thorough forensic analysis of the target's computer can uncover all of his child exploitation offenses, thereby allowing prosecution for all of the crimes.

IV. The statutory framework

The additional offenses committed by the target that thorough computer forensic analysis may identify are possession, receipt, transportation, distribution, and production of child pornography. *See* 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5) (possession); §§ 2252(a)(2) or 2252A(a)(2) (receipt); §§ 2252(a)(1) or 2252A(a)(1) (transportation); §§ 2252(a)(2) or 2252A(a)(2) (distribution); and § 2251 (production). Title 18 U.S.C. § 2260 also criminalizes certain extraterritorial child pornography offenses, but will not be discussed in detail in this article. Before turning to how computer forensic analysis can establish that these offenses occurred, a brief summary of the statutes is in order.

A. Possession

The most basic child pornography charge, and the one requiring the least specific proof, is a possession charge. The prosecutor must prove that the target knowingly possessed an image of child pornography, and one of two forms showing an interstate nexus to attach federal jurisdiction. Another article in this issue, outlines how to establish federal jurisdiction in these cases. Alexander Gelber, *Federal Jurisdiction in Child Pornography Cases*, 54 UNITED STATES ATTORNEYS' BULLETIN 3 (Nov. 2006). It is not necessary to demonstrate how the defendant received the image or what he did or intends to do with it, just that he knowingly possessed it.

There are at least three important reasons to charge possession of child pornography in an enticement case, if that charge is supported by the evidence.

- The child pornography evidence can be important in refuting a fantasy defense (the chat was all fantasy), as it will demonstrate a sexual interest in children.
- The sentencing guidelines for simple possession can be significant, particularly if certain enhancements apply. If, for example, a defendant has over 600 images, used a computer, had prepubescent images, and had images of sadistic or masochistic conduct, he or she would have an offense level of 31, or 108-135 months for criminal history category I.
- As the sentencing guidelines are now advisory, it is critical to present a complete picture of the defendant, an individual who possessed images of children being sexually abused and who wanted to replicate those abuses by gaining access to a child.

B. Receipt

Logically, if an individual is in possession of child pornography, then he or she must have received it at some point. Despite this inevitable

overlap, the punishments associated with receipt are much greater than those associated with simple possession, and as receipt carries a burden of proof not present in possession cases, there is no risk of multiplicity. If the prosecutor can prove receipt, the defendant will face a five year statutory mandatory minimum sentence. Moreover, if the defendant has a qualifying prior federal or state conviction related to the sexual exploitation of children, he or she will face a fifteen-year statutory mandatory minimum.

The sentencing guidelines for receipt offenses also have significant enhancements. In a common scenario, a defendant will begin with a base offense level of 20 (if there is evidence of trading, the base level is 22). If he used a computer, and his offense involved prepubescent material, images of sadistic or masochistic conduct, and 600 or more images, he would have an offense level of 35, or 168-210 months for criminal history category I.

C. Transportation or distribution

As noted above, those who have a sexualized interest in children often seek validation for their deviant predilections, and in their efforts to collect child pornography, will trade their collections to other like-minded individuals. Additionally, they may send images of child pornography to minors with whom they are chatting online in an effort to legitimize their sexual advances toward them by demonstrating it is common or will be fun. Because these tactics or practices are common, an investigator should always look for evidence of transportation or distribution of child pornography. If the forensics can uncover evidence of this behavior, significant statutory and guideline sentencing repercussions will result for the target. Like a receipt charge, a mandatory minimum sentence of five years is statutorily imposed for a first offense, and a mandatory minimum sentence of fifteen years is imposed if a defendant has a qualifying federal or state conviction related to the sexual exploitation of children.

Under the sentencing guidelines, a typical case involving distribution may have a base offense level of 22. If the offender used a computer, distributed with an expectation of receipt of a thing of value, and the offense involved prepubescent images, images of sadistic or masochistic conduct, and 600 or more images, the offender would have an offense level of 40, or 292-365 months for an offender in criminal history category I.

D. Production

With the advent of digital recording devices and associated software, anyone can now produce photos and videos of startling quality at relatively low cost. Most importantly in this context, offenders can now avoid photo labs entirely and can produce, store, manipulate, trade, and print images with the click of a button from the privacy of their own homes. Accordingly, the possibility that the target has produced child pornography should always be considered when conducting a child exploitation investigation.

Production of child pornography carries a fifteen-year mandatory minimum sentence for a first conviction. If the offender has a prior qualifying federal or state conviction relating to the sexual exploitation of children, the statutory mandatory minimum is twenty-five years. Thus, if a single image of child pornography that the target produced on his computer is discovered, he will face a significant sentence. Under the sentencing guidelines, if the target produced child pornography images of a thirteen-year-old, he will have a base offense level of 32. If the offense involved the commission of a sexual act or sexual contact, and the use of a computer to solicit the participation of the minor, the target would have an offense level of 38, or 235-293 months for a category I offender, if the child is between twelve and sixteen-years of age.

V. How computer forensics can establish these enhanced offenses

A. Forensics to prove possession

Finding images of child pornography on the computer is a great start, however, it is only a start. The target may have several defenses to attempt to explain the presence of child pornography on his computer. Moreover, the elements of the possession statutes require that the government prove not only that the defendant possessed these files, but also that he knew he possessed them. The most compelling evidence in this regard is the ability to establish two facts.

- The defendant viewed the file.
- The defendant did not delete the file from the computer's hard drive.

Establishing the second of these facts is simply a matter of determining whether or not the file in question was active on the computer. This is not a question of forensics so much as a matter of determining the list of files on the computer at the time of seizure. On the other hand, establishing the first of these facts—that the defendant actually viewed the file—requires that the examiner explore the various "breadcrumbs" that the Windows Operating System (Windows OS) creates during the course of normal computer use. Oftentimes, an examiner can not only pinpoint which files were recently opened on a computer, but also can tell the exact time and date this activity occurred.

In order to determine whether a particular image or movie was viewed, the forensic examiner can examine three main sources of data.

- Link files.

Link files are the most common (and effective) measure of determining which files have been viewed. These files are generated by the Windows OS and can easily be located by searching for files that end with the .LNK extension. Windows creates these files in order to provide the user with shortcuts to their most recently-used documents. By clicking on the START menu button of the computer and clicking on "My Recent Documents," this feature will provide a list of files that were recently opened. The ability of Windows to create this list is based on the link files it generates during the course of opening these files. In essence, every time a data file is opened, Windows automatically creates a "link" file by the same name that points, or "links," to the location of the opened file. It creates these files in the "Recents" folder of the computer and reads them every time the "Recent Documents" function is accessed. Forensically, it is easy to not only recover the link files in this folder, but also to recover any previously deleted link file.

These files are only created by the Windows OS when a file has been opened. Consequently, the forensic expert is certain that the existence of a link file indicates that the user has, in fact, opened a particular file. Because the link file is created instantaneously when the underlying file is opened, the creation date and time of the link file is used to prove the exact moment the file was opened. It should also be noted that link files are stored by user profile, meaning that if there is more than one user on the computer, the location of the link files can determine which user profile was responsible for its creation.

- Index.dat file.

This is often mistakenly referred to as the Internet History file. While it does contain information related to the internet browsing history of a user, the index.dat file also records certain files that were opened from the user's computer using the browser. This is most often the case with image files that, by default, open directly in Internet Explorer. Windows OS records this information in the index.dat file for several reasons, the most notable of which is to allow the operation of the "forward" and "back" buttons in Internet Explorer. This file also assists in the "History" feature of Internet Explorer, whereby a user can review the list of sites they visited in the past day, week, or month.

Forensically, the data in the index.dat file is used in the same way the link files are used, that is to prove a defendant looked at a particular file. The index.dat file is particularly useful since most computer users do not know that it exists, nor would they be able to delete the file if they did. The Windows OS requires this file to run properly and will not allow the user to tamper with it. More importantly, the data is not readily readable without forensically translating it into a human-readable format and generally cannot be altered or modified in any way; thus making it a reliable indicator of the activity conducted through Internet Explorer.

Finally, the index.dat file is not altered in any way when the "Clear History" and "Clear Cache" commands are used in Internet Explorer. When data from this file is translated into a readable format, it appears as a series of entries, often in a spreadsheet format, detailing every Web page visited and every file viewed from the Internet Explorer browser. Further, files viewed in Internet Explorer will show their exact location on the computer at that time. Finally, the index.dat file includes a time and date stamp for every entry, and thus provides an exact time and date that a defendant viewed a particular file. Like link files, index.dat entries are created individually for every user profile on the computer, allowing an examiner to determine which user was responsible for the activity found in these files.

- Windows registry.

The registry is a large database that Windows uses to keep track of almost every piece of software or hardware with which a computer comes in contact. In the case of software, Windows uses the registry to identify what software has been installed on the computer and how it is configured. In many instances, the registry will keep a list of files that a particular piece of software has opened in the past, or the last directory from which a file has been opened. Consider WinZip, a compression program that allows users to store a large quantity of files in one "Zip" file. This is not only a convenient way of storing a collection of images, but it also reduces the size of the Zip file to take up less space than the sum of the underlying files. In the registry, WinZip keeps track of the last ten Zip files that it has created or accessed, and the directory path of each Zip file. Additionally, the registry also indicates which directory opens by default when the WinZip program is started. This information can successfully combat any claim that a user did not know what Zip files are, how they got on his computer, or that he ever looked at the individual files inside of them.

Since the registry holds information on just about every program installed on the computer, an analysis of their individual settings can assist greatly in understanding how the computer was used and which programs were used to view which types of files.

Failing these methods for identifying information regarding a particular file, forensics can often assist in providing circumstantial evidence. For example, the directory structure of a defendant's hard drive can show a meticulous effort to organize individual images into age group, gender, and other preferences. These cataloging preferences can circumstantially prove that a defendant reviewed an image in order to place them in the correct folder. Additionally, time/date analysis of individual files may show that a file has been moved from its original location to a different area of the hard drive. Lastly, forensic analysis can often show that a file has been copied to external media, such as CDs or USB thumb drives, even if those items were not recovered.

B. Forensics to prove receipt

Logically, when contraband is found on a defendant's computer and it is known he did not produce it, it is generally accurate to say that he received the contraband. It would also be accurate to say that he received it in interstate commerce given what is known about the workings of the Internet. Of course, being able to say this and being able to prove it are two different things.

Good receipt charges will almost always require a thorough forensic examination to show the interstate nexus and the on or about date associated with that receipt. If the computer being examined is the same computer used to obtain the file from the Internet, forensic analysis can often show the time, date, and method used to acquire the file. There are a number of ways to conduct this analysis, but it is often dependent on the specific technology used by the defendant. While it is not possible to cover every conceivable method for obtaining a computer file, the following is a list of common methods used in obtaining child pornography and the forensic evidence that proves it.

- File downloaded from a Web page.

In the previous section, the "index.dat" file was discussed as a means to show that a defendant looked at a file. It can also be used to show that a file was downloaded from a specific Web site. Consider that the index.dat file records every Web page visited and every file viewed through the browser. When a user accesses a Web page, and subsequently saves an image file from that Web page, the index.dat file will show two consecutive entries: (1) the Web site address and immediately after it, (2) the location where the file was saved on the computer. Further, the time/date recorded in the index.dat file will correspond to the creation time/date of the file itself.

- Image/movie received through instant messaging.

Most instant messaging programs will record activity, such as Webcam transmissions and file transfers, as part of its chat archives. It is often possible to recover this data by forensically searching the areas of a computer hard drive, commonly referred to as unallocated space, that retains deleted or discarded files. (When computers delete or discard files, they remain in unallocated or free space on the hard drive until they are overwritten by other files.)

- Newsgroups.

Virtually every newsgroup program employs some type of database to assist it in avoiding files that it has previously downloaded. This database

can show the exact date, time, and filename of each of the files that it downloads, and will often do so indefinitely. Outlook Express, which is the standard Windows program for accessing newsgroups, saves this information in what are called DBX files. A DBX file is created for each newsgroup the user was subscribed to and contains the messages downloaded for that newsgroup. Conversely, a newsgroup program like PixNewsPro creates a centralized database for every file downloaded, the date/time, and the size of the file. It uses this to ensure that it only downloads unique files across different newsgroups.

- E-mail.

Similar to newsgroups, every E-mail program has some method of storing messages that are saved in its inbox. These messages can easily be recovered by examining the program files used to store messages in the inbox. The message itself contains time and date information, as well as the geographic location from which it originated. In cases where the defendant used a Web-based mail service such as Yahoo! Mail or Hotmail, forensic analysis can often recover whole or partial messages from temporary Internet files and Windows OS files used to assist in Web browsing, as well as attachments to those messages. In many cases, even data that has been deleted from temporary Internet files can be reconstructed from deleted areas (unallocated space) of the hard drive to reproduce e-mail messages.

Regardless of what program or method the offender uses to receive data, the offender is often required to complete a significant number of steps to configure the program so that it can obtain contraband. For example, a Web site may have a number of bookmarks configured, newsgroup programs must be subscribed to access newsgroups containing child pornography, and Instant Messaging programs require configuration settings in order to allow incoming files. All of this information can be examined by conducting a thorough forensics exam and used to show the defendant's intent to acquire child pornography. In addition to showing these affirmative steps, forensics can also be used to show what the user does with the files upon receipt. A forensic analysis can determine when the files were viewed, if they were moved, or similar actions that prove the defendant's guilt.

C. Forensics to prove transportation/ distribution

Similar to the analysis for receipt discussed above, forensics can recover a number of data points that will assist in charging transportation or distribution. Luckily, the primary methods for distributing images are the same as they are for receiving them. The only difference is that the forensic examiner is now looking for data indicating images sent out in e-mails, newsgroups, or through instant messages, rather than receiving data. Again, this analysis is based on the specific technology and program used to transfer or distribute the files.

D. Forensics to prove production

In instances where a target is suspected of having produced child pornography, forensics can quickly assist in determining how an image becomes digitized by examining what is known as EXIF data. EXIF (Exchangeable Image File Format) is an industry standard used in digital imaging that allows devices to embed picture-specific data into every image they create. This information often consists of the make and model of a particular camera, the time and day the picture was taken, as well as camera settings such as F-Stop, depth-of-field, and other photography related data. Practically every digital camera, including Webcams and phones, includes this data in the images it creates. A forensic examiner can quickly extract this information from every image on the target's computer hard drive and compare it to cameras that were seized as part of the investigation. This is especially helpful in cases where a defendant has thousands of images on his computer. This allows the prosecutor to focus his or her production investigation on images that contain information pertaining to the defendant's camera. With this information, the prosecutor will be able to determine if any of the child pornography images on the defendant's computer are "home-grown" images that he produced (versus commercial images which will not contain EXIF data), and identify the specific camera that took the photos.

VI. Conclusion

The prevalence of child pornography and child predators on the Internet is staggering. Child sex offenders believe that the computer provides anonymity and unlimited access to children and child pornography. Simply put, they believe they

can navigate the online world with impunity and without repercussion. Unknowingly, these predators leave a trail in the computer with every click of the mouse, as they attempt to satisfy their perverse desires. A comprehensive forensic analysis of the computer can reveal this data and confirm what child exploitation investigators and prosecutors often suspect, that the initial lead concerning the target is simply the tip of the iceberg. ❖

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Obtaining Foreign Evidence in Child Sex Tourism Cases

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I. Introduction

United States law enforcement, in an overseas location, informed the United States Attorney's office that the Indonesian Police arrested an American businessman named "Timothy" for suspected sexual exploitation of minors. He was seen entering his hotel room with two minor boys, and police later found sexually explicit images of numerous young boys in his hotel room. The photographer is not visible in any of these photos. The Indonesian government arrested him and later found the two boys depicted in the images. The boys told police that they were fourteen years old. The Indonesian police notified U.S. law enforcement. The government of Indonesia decided to deport Timothy, rather than to attempt to prosecute him.

Given these facts, it is not feasible to charge Timothy with child pornography offenses because there is no evidence that he intended to bring the images into the United States. Title 18 U.S.C. § 2251A(b) may apply, if there is proof that the defendant purchased or otherwise obtained custody or control of a minor for the purpose of producing child pornography and that, in the course of that conduct, the defendant traveled in foreign commerce. Similarly, charges under 18 U.S.C. § 2423(b) are problematic, because the USAO lacks evidence of his illicit intent at the time that he left the United States. The best alternative, taking these facts into consideration, may be to prosecute Timothy under 18 U.S.C. § 2423(c), which prohibits U.S. citizens from traveling in foreign commerce and then engaging in illicit sexual conduct with minors while overseas.

Child sex tourism is a pervasive international problem. American sex tourists travel widely, looking to exploit children made vulnerable by extreme poverty and deprivation. These predators plan their trips carefully to minimize their risk of arrest while exploiting economically-disadvantaged children. One anonymous contributor advised his fellow pedophiles in the North American Man/Boy Love Association's (NAMBLA's) bimonthly newsletter as follows.

> Weigh the pros and cons of becoming involved yourself in sex tourism overseas. Seek and find love from American boys on a platonic, purely emotional level. For sexual satisfaction, travel once or twice yearly overseas. You might get arrested overseas for patronizing a boy prostitute. But the legal consequences of being caught patronizing a boy prostitute in a friendly place overseas will be less severe.

Anon., *Letter to a Young Boy-Lover* NORTH AMERICAN MAN/BOY LOVE ASSOCIATION'S BULLETIN, Jan./Feb. 30, 1993 at 30. Sex tourists use impoverished countries as their sexual playgrounds, and they do so because they feel they can act with impunity.

The limited ability of some foreign countries to protect their children from commercial sexual exploitation may justify, to some extent, these predators' feelings of invulnerability in those countries. In Indonesia, for example, End Child Prostitution in Asian Tourism International (ECPAT) recently reported that "general awareness and understanding of the grave nature of sexual crimes against children is low. Accordingly, Indonesian laws and legal procedures fail to protect children sufficiently from commercial sexual exploitation and are not in compliance with international standards…." Antarini Arna, *et al.*, *Report on Laws and Legal Procedures Concerning the Commercial Sexual Exploitation of Children in Indonesia*, ECPAT INTERNATIONAL 1 (Dec. 2004) *available at* http://www.eldis.org/static/DOC17645.htm. Simply put, effective law enforcement systems do not exist in many nations to adequately protect children from sexual exploitation. Also, in many countries, Americans caught sexually exploiting minors are able to bribe their way out of trouble.

Before § 2423(c) was passed in 2003, there were only a handful of prosecutions of American sex tourists. Now, § 2423(c) and select federal statutes provide an avenue by which American citizens can be punished in the United States for exploiting children abroad. The aggressive enforcement of this statute will make U.S. citizens accountable for the exploitation of minors overseas. Cases in which the bulk of the evidence and witnesses are located overseas are difficult to prosecute. This article describes how to meet some of the obstacles that are faced in obtaining relevant foreign evidence and prosecuting perpetrators like Timothy.

II. Gathering evidence

At the outset, there is very little evidence proving that Timothy engaged in illicit sexual activity while in Indonesia. However, both formal and informal channels exist that can be used to obtain evidence from overseas sources.

Informal methods of assistance will frequently provide investigative leads quickly and without much difficulty. Formal methods can be more time-consuming and frustrating, but are sometimes necessary to obtain relevant evidence or to obtain evidence in a form that will later be admissible in federal court.

A. Formal channels

A formal request is necessary whenever a prosecutor wishes or needs to use compulsory measures to accomplish any of the following.

- Compel testimony.
- Obtain documents.
- Search and seize evidence.
- Undertake any action regarded by the foreign country as a judicial act (in some cases including depositions—or even informal interviews—of witnesses, freezing assets, or obtaining criminal records).
- Obtain information protected by a country's bank secrecy laws, including whether an account exists; or to obtain documents in a form admissible at trial (these include such items as bank or business records needing certification under 18 U.S.C. § 3505, which require an affidavit by the custodian of the records attesting to the facts surrounding their making and maintenance, and public records admissible under Federal Rule of Evidence 902(3) and (4)).

The formal options include letters rogatory, treaties, or other specific agreements, including bilateral and multilateral treaties. The appropriate (and available) formal channel in any given case depends on the information sought and country with which the prosecutor is dealing. The letter rogatory is the traditional procedure in which a court in one country requests a court in another country, as a matter of comity, for assistance. This is a costly, time-consuming, and uncertain procedure, but is often the only formal option in countries with which the United States has not made other arrangements.

To bypass the cumbersome letters rogatory, the United States has entered into Mutual Legal Assistance Treaties (MLATs) with over fifty foreign governments. These treaties compel the participating governments to cooperate in gathering testimony and evidence. Additionally, Mutual Assistance Agreements (MAAs), administered by the Department of Homeland Security's Immigration and Customs Enforcement (ICE), allow customs agents to acquire evidence through contacts in the foreign government. Executive agreements and multilateral treaties can also form the basis for investigative cooperation. In ascertaining which methods apply to a particular country and case, prosecutors should contact the Criminal Division's Office of International Affairs (OIA) for assistance.

Each of these formal procedures is significantly more time-consuming than the informal methods of gathering evidence. Even treaty-driven requests can be subject to delays, but letters rogatory are especially slow-moving. It may take more than a year to execute a letter rogatory.

The United States and Indonesia have not arranged for an MLAT or MAA. Consequently, those mechanisms for assistance in compelling disclosure of evidence against Timothy are unavailable. Therefore, any evidence that is not obtained through informal channels must be sought via letter rogatory. This is a laborious process that may not bear fruit in a reasonable amount of time, so every effort should be made to obtain evidence by informal means.

B. Informal channels and cooperation with foreign law enforcement

Depending on the law of the country to which the request is made, the assistance available through informal requests may include interviews of witnesses by police, information about hotel registers or ownership of real property, and surveillance. An FBI, Drug Enforcement Administration Legal Attaché, or ICE Attaché stationed in the foreign country can advise what evidence can be obtained on a police-to-police basis and can coordinate with foreign police authorities. Authentication of evidence is discussed below, however, informal assistance may not always produce evidence in a form admissible in a U.S. court proceeding. In addition to drawing from investigations in sex tourism cases, information in this article regarding informal and formal channels for gathering evidence was adapted from SARA CRISCITELLI, DEP'T OF JUSTICE, FEDERAL NARCOTICS PROSECUTIONS 185 (2004).

C. U.S. law enforcement investigations overseas

In many cases, U.S. law enforcement is able to conduct investigations independently in a foreign country. This includes following leads and searching for, and interviewing, victims and witnesses. During the investigation of Timothy, ICE agents may be able to conduct videotaped interviews of the minors without the assistance of foreign law enforcement, to assist the AUSA in organizing the investigation and ultimately seeking indictment. The extent of permissible U.S. law enforcement activity varies greatly from country to country, however, and it is critical to determine the permissible scope of U.S. law enforcement activity overseas.

The voluntary consent of a cooperating defendant or witness may be insufficient to obtain evidence or assets, without resorting to formal procedures, in some countries. A number of countries view voluntary cooperation as an infringement on national sovereignty, regardless of the individual's willingness. It is possible that agents or prosecutors traveling to foreign countries without proper clearance to interview witnesses, obtain evidence, or arrest a defendant for extradition, are committing a criminal violation under the law of that country. Indeed, it may even be a criminal offense for a foreign investigator or prosecutor to telephone a witness

(*e.g.*, in Switzerland). It is necessary to check with OIA before pursuing voluntary cooperation.

III. Authenticating documents

Timothy's customs form was acquired, which proved that he was in Indonesia during the time that several of the sexually explicit images were taken. ICE agents also obtained the hotel guest registry showing that he occupied Room 214 during his stay. The manager allowed the ICE agent to photograph that room. The background of the room matches many of the sexually explicit images.

Now that these important documents have been obtained, it is necessary to authenticate them. The authentication of foreign documents involves coordination with consular officials or foreign witnesses. Special consideration must also be given as to whether authenticated documents are subject to a Confrontation Clause challenge following the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

A. Public and nonpublic foreign documents

Federal Rule of Evidence 902(3) governs the authentication of foreign public documents. It provides that extrinsic evidence as to authenticity is not required for admissibility of the following.

> A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

FED. R. EVID. 902(3). The "final certification" can either be made by a consular official of the foreign country assigned to the United States, or by an American consular official (generally in the foreign country). Additionally, if the parties have been given a reasonable opportunity to investigate the authenticity of the document, the court may order, upon good cause shown, that it be admitted without the final certification. *Id.*

Foreign customs or border control records can be key documents in a sex trafficking case. In *United States v. Wing*, 450 F.2d 806 (9th Cir. 1971) (predating Rule 902(3)), the defense stipulated that a border-crossing document was an official record of the Mexican Government, but reserved objection to its materiality and accuracy. *Id.* at 810-11. On appeal, defendant asserted that the document contained hearsay. The court rejected the argument on the grounds that the document was an official record of a foreign country falling within the purpose and scope of the business records exception to hearsay. *Id.* at 811-12.

Title 18, United States Code, Section 3505 provides that foreign business records are admissible upon a showing similar to that required for domestic business records, and requires that notice be given of an intent to offer such records at arraignment, or as soon as practicable thereafter. As long as these records are certified by the records custodian subject to a criminal penalty for a false statement under foreign law, they should be admissible.

Foreign hotel records may often be crucial in sex tourism cases. In *United States v. Hing Shair Chan*, 680 F. Supp. 521 (E.D.N.Y. 1988), the government sought to introduce records from a hotel in Hong Kong, showing that the defendant stayed at the hotel. *Id.* at 522. The government did not have an authenticating witness, but rather relied upon a certification by the hotel's front office manager that the records were accurate. *Id.* at 524. The certificate preparation occurred before a Hong Kong judicial officer and indicated that the person making the certificate knew that he was subject to penalty under Hong Kong law if he made false statements. *Id.* The court found that the certificate was sufficient and admitted the records. *Id.* at 525-26. The opinion reprints the certificate. *See id.* at 527-28.

B. Confrontation Clause considerations

While Rule 902(3) and 18 U.S.C. § 3505 remove barriers relating to the admissibility of public and nonpublic documents, the Supreme Court's decision in *Crawford* may well subject foreign records to a Confrontation Clause challenge. The Ninth Circuit addressed this problem, in part, in *United States v. Hagege*, 437 F.3d 943 (9th Cir. 2006), when the defendant objected to the admission of foreign bank records under § 3505 on Confrontation Clause grounds.

Id. at 956. The government offered, for admission in evidence, records from Israeli and Luxembourgian banks, accompanied by written certificates of authenticity. *Id*. at 948. The court noted that § 3505 provides for the admission of foreign records as long as a foreign certification attests that the requirements of the statute are met. *Id*. at 956. The court concluded that bank records are among the types of statements considered by the Supreme Court in *Crawford* to be nontestimonial, and therefore, held that foreign business records admitted under § 3505 are not subject to the *Crawford* requirement of confrontation. *Id*. at 958.

The Ninth Circuit noted that the foreign certifications attesting to the authenticity of the records were not admitted into evidence, and thus did not consider whether the certifications would have violated the Confrontation Clause under *Crawford*. *Id*. at 958 n.6. If sought, the admission of the actual certification affidavit may raise Confrontation Clause issues.

IV. Obtaining admissible depositions

In addition to the documentary evidence that proves that Timothy stayed at the hotel in Jakarta, the ICE agent located and interviewed two of the boys who appeared in sexually explicit images. Several hotel employees had seen Timothy take the boys to his room, and they recognized them as homeless children who frequently hung out at a nearby park. The testimony of these children is necessary to prove that Timothy engaged in sexual activity with them (and took the photographs). In order to have this testimony admitted, however, every effort should be made to bring the witnesses to the United States to testify because recent developments in Confrontation Clause jurisprudence raise questions regarding the admissibility of foreign depositions taken outside the physical presence of the defendant.

As a general matter, witnesses located overseas who are not citizens of the United States are beyond the subpoena power of U.S. courts. *See, e.g., United States v. Gifford*, 684 F. Supp. 125, 128 (E.D. Pa. 1988), *aff'd*, 892 F.2d 263 (3d Cir. 1989). In addition, child victims of prostitution often lead very unstable lives and may be difficult to find as trial approaches. These factors require the AUSA to determine, as soon as possible after indictment, whether the defendant is likely to proceed to trial or plead guilty. The AUSA should also consider filing a motion under 18 U.S.C. § 3509(j) to expedite the proceedings, due to witnesses moving or forgetting details of the events. If a trial is likely, consider trying to bring select key witnesses, such as the minor victims, to the United States for depositions under Federal Rule of Criminal Procedure 15 (Rule 15). These depositions are admissible at trial under Federal Rule of Evidence 804(b)(1) (Rule 804) if the witness becomes unavailable despite the government's good-faith effort to produce him or her for trial. It is not recommended that significant resources be expended to bring witnesses from overseas for grand jury proceedings because such testimony is not admissible at trial.

Until very recently, if foreign national witnesses were not willing to travel to the United States to testify at legal proceedings, depositions under Rule 15 in the foreign country normally sufficed to place their testimony before the fact finder. If the witnesses were later unwilling to come to the United States, despite a good-faith effort by the government to produce them for trial, it was generally the rule that depositions should be admissible under Rule 804(b)(1).

The admissibility of extraterritorial depositions is somewhat more complicated in light of *Crawford*, however. Overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), the *Crawford* Court held that where out-of-court "testimonial" evidence is at issue, the Sixth Amendment does not permit such evidence to be admitted against an accused, regardless of its "reliability," unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *See Crawford,* 541 U.S. at 61.The Court did not provide a comprehensive definition of "testimonial," but held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. In light of *Crawford*, the deposition testimony of an unavailable foreign national is inadmissible at trial (absent a waiver) unless defense counsel had an opportunity to cross-examine the foreign national during the deposition.

It is crucial to afford defense counsel an opportunity to cross-examine the witnesses and to provide the defendant with the ability to participate in a meaningful way, through dedicated telephone lines or video-conferencing. The government should offer to cover all travel

expenses for defense counsel under Rule 15(d) and accommodate scheduling concerns of the defense. Once these steps have been taken, defense counsel has had the opportunity to cross-examine witnesses at the depositions and may be said to have forfeited these rights if he or she chose not to attend the depositions.

It is not clear, however, how the admissibility of Rule 15 depositions will be affected by the fact that the defendant, unlike defense counsel, will almost never be able to attend a deposition in a foreign country. Two circuits recently held that a defendant's right to face-to-face confrontation was violated when the government arranged for the trial testimony of unavailable foreign witnesses via two-way video-conferencing. *See United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc); *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005). In both of these cases, the courts applied *Maryland v. Craig*, 497 U.S. 836 (1990), which governs the parameters of the defendant's right to face-to-face confrontation at trial. However, the Supreme Court has rejected the applicability of *Craig* to prior statements of unavailable witnesses. *See, e.g., White v. Illinois*, 502 U.S. 346, 358(1992) ("*Craig* involved only the question of what in-court procedures are constitutionally required to guarantee a defendant's confrontation right once a witness is testifying. Such a question is quite separate from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations.").

Yates and *Bordeaux* are arguably inapposite in determining the admissibility of Rule 15 depositions. Instead, prosecutors should rely on cases which have recognized that neither Rule 15 nor the Confrontation Clause of the Sixth Amendment requires face-to-face confrontation of witnesses at foreign depositions. *See United States v. Siddiqui*, 235 F.3d 1318, 1324 (11th Cir. 2000); *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998); *United States v. Gifford*, 892 F.2d 263, 265 (3d Cir. 1990); *United States v. McKeeve*, 131 F.3d 1, 8 (1st Cir. 1997); *United States v. Walker*, 1 F.3d 423, 428 (6th Cir. 1993); *United States v. Salim*, 855 F.2d 944, 950-52 (2d Cir. 1988). So long as the depositions satisfy the twin dictates of *Crawford*, namely unavailability and opportunity for cross-examination, the Confrontation Clause should not bar the admission of such depositions. *See United States v. Williams*, 116 Fed. Appx. 890, 891 (9th Cir. 2004) (noting that *Crawford* provides the controlling Confrontation Clause requirements for admissibility of taped depositions).

In light of the current uncertainty surrounding the admissibility of foreign depositions not attended by defendants, the primary approach in sex tourism cases should be to transport the witnesses to the United States so they can testify at proceedings physically attended by the defendant.

Though, in this hypothetical, the relevant witnesses are all foreign nationals, it is worth noting that there is a different mechanism for obtaining testimony of American citizens abroad. Title 28 U.S.C. § 1783 provides that a federal court may subpoena an American national residing overseas to return to the United States to testify if "it is necessary in the interest of justice." This statute also allows a court to compel an American national living overseas to produce documents. While there is not very much recent case law applying this statute, it nevertheless is a tool of which prosecutors should be aware.

V. Overcoming Fourth Amendment concerns regarding evidence seized abroad

When Indonesian authorities arrested Timothy, they seized a camera, photographs, CDs, condoms, video games, and clothing for young boys. ICE agents were not involved in the actual search and seizure, but generally work with Indonesian authorities on trafficking investigations. As noted above, Indonesian police turned over the evidence soon after seizing it. Timothy's defense counsel moves to suppress this evidence.

The question of whether evidence obtained through a search of a U.S. citizen and his property overseas is admissible in a U.S. criminal proceeding turns on how the search was initiated, planned, and executed. Although the Fourth Amendment is not used to direct the internal policies of another country, the more involved U.S. authorities become in the initiation, planning, and execution of a foreign government search (enough to rise to the level of a "joint venture"), the more likely federal courts in the United States are to scrutinize the search under the Fourth Amendment.

Federal courts will usually allow the admission of evidence gained in foreign searches executed without a warrant or a determination of probable cause, as they have generally held that the Fourth Amendment does not apply to searches conducted by foreign governments in their sovereign territory. *United States v. Janis,* 428 U.S. 433, 455, n.31 (1976); *United States v. Behety,* 32 F.3d 503, 510 (11th Cir. 1994); *Birdsell v. United States,* 346 F.2d 775, 782 (5th Cir. 1965). This rule applies whether or not the persons arrested are American citizens. *United States v. Rosenthal,* 793 F.2d 1214, 1230 (11th Cir. 1986).

The Supreme Court has refused to extend the exclusionary rule to such searches because the "prime purpose of the exclusionary rule, if not its sole one, is to deter unlawful police conduct." *Janis*, 428 U.S. at 446. The exclusionary rule is not applicable as a useful deterrent when foreign governments commit the act. *Id*. *See also Rosenthal*, 793 F.2d at 1230 (foreign police conduct will not be deterred by punitively excluding such evidence in American courts).

There are two rarely-used exceptions to the general rule admitting evidence resulting from foreign searches and arrests, neither of which applies in the instant case. These exceptions apply (1) where the foreign officials engage in actions that are so extreme that they "shock[] the judicial conscience," or (2) where U.S. law enforcement officials substantially participated in the search, or the foreign officials conducting the search were actually acting as agents for the U.S. Government (sometimes referred to as the "joint venture" doctrine). *See Rosenthal*, 793 F.2d at 1230-31; *Behety*, 32 F.3d at 510; *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968).

Because of the small number of cases in which evidence has been suppressed for shocking conduct behavior, it is not clear just how outrageous the actions must be before a court will exercise its supervisory authority to enforce the exclusionary rule. One case illustrating such shocking conduct is *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), in which the court held that the Fourth Amendment was violated when the defendant, an Italian national, was forcibly abducted by Uruguayan agents, tortured, interrogated for seventeen days, drugged, and returned to the United States for trial. Although *Toscanino* is a seizure rather than a search case, it nevertheless illustrates an example of behavior by foreign officials which shocked the judicial conscience, triggering Fourth Amendment scrutiny.

It is doubtful that either of the exceptions to general admissibility applies in Timothy's case. The U.S. Government was unaware that Timothy's room was searched until after the search occurred. Therefore, he cannot argue that the Americans were directing the search. Furthermore, the search was not undertaken in a manner that "shocks the judicial conscience." In general, where joint venture exists, evidence should not be suppressed if the procedures of the foreign country were followed.

VI. Conclusion

Effective communication with investigators in the country of interest is essential in obtaining evidence and finding witnesses crucial to the prosecution of sex tourism cases. Investigation and prosecution of a case against Timothy and like-minded individuals are complex and time-consuming. Planning ahead to deal with these complexities, many of which have been addressed here, is critical to the protection of past and future victims of Americans who prey on children overseas.❖

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Providing Victim-Centered Services to Prostituted Youth

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I. Introduction

Unfortunately, the commercial sexual exploitation of American youth, through prostitution, is a phenomenon occurring every day in the United States. The victims of this abhorrent form of human trafficking face danger from both the pimps who prey on them and the customers who purchase their sexual services. They are at great risk of physical injury resulting from crimes involving rape and perversion. EVA J. KLAIN, PROSTITUTION OF CHILDREN AND CHILD SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES 96 (Apr. 1999). Moreover, they are more likely to fall victim to substance abuse, associative and personality disorders, and other problems which place them at high risk for suicide. *See* John Read et al., *Assessing Suicidality in Adults: Integrating Childhood Trauma as a Major Risk Factor*, 32 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 367 (2001). The provision of victim-centered services is critical for this vulnerable population, not only to tend their physical and psychological wounds, but also to ensure their availability as witnesses during the critical stages of sex-trafficking prosecutions.

II. Understanding child victims of prostitution

Children who have been exploited in the U.S. commercial sex industry typically are not innocent, cherub-faced moppets begging to be rescued. Far from coming across as innocent victims, prostituted children often present themselves as hostile, obnoxious, violent, and skillfully manipulative offenders. MARY P. ALEXANDER, NANCY D. KELLOGG, PHYLLIS THOMPSON, *Community and Mental Health Support of Juvenile Victims of Prostitution*, Chapter 19, MEDICAL, LEGAL & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 397 (G.W. Medical Publishing 2005). "Child victims of prostitution readily recognize fear, disdain, frustration and lethargy . . . and they are experts at provoking alarm, frustration, and anger." *Id.* Moreover, they display typical runaway behaviors that make them uncontrollable, noncompliant, and highly likely to abscond. THINK OF THE CHILD FIRST COMMITTEE, DEL. DEP'T OF SERVS. FOR CHILDREN, YOUTH, AND THEIR FAMILIES, RESOURCE NEEDS FOR YOUTH WITH RUNAWAY BEHAVIORS 3 (2005). Therefore, during the investigation and prosecution of cases that involve child victims of prostitution, it is helpful to understand why these child victims behave the way that they do.

Children most often enter prostitution after becoming detached from mainstream society and suffering through a myriad of experiences that range from being kicked out of their homes and/or schools to being shuffled through the juvenile neglect and justice system. MARY P. ALEXANDER, ET AL, *supra*, at 400.Those at highest risk for exploitation are those children who have been abandoned by their adult caretakers, victimized by physical, sexual, and emotional abuse, or institutionalized in the foster care system. JAMES A.H. FARROW, *Psychosocial Context Leading Juveniles to Prostitution and Sexual Exploitation*, Chapter 16 MEDICAL, LEGAL & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 340 (G.W. Medical Publishing, Inc. 2005).

Girls involved in prostitution are generally "managed" by pimps or other adult actors, and, in contrast, boys are more likely to be "self-employed" and to consider themselves as "hustlers." *Id.* Among these girls, the incidence of intra-familial sexual abuse is very likely to precede their entry into prostitution, with estimates ranging from a low of 31% to a high of 67%. *Id.* at 341. Pimps are able to capitalize on the past traumatic experiences of these girls through a combination of manipulation and violence. They are able to successfully cultivate a child's already fractured sense of reality and magnify their belief that the world really is against them. *Id.* at 345. The pimps then solidify their

status in their victims' minds as being their only source of protection and support.

Immediately upon entry into the street-based commercial sex industry, known colloquially as the "Life" or the "Game," girls are trained by their pimps to lie or withhold information from law enforcement. SARA ANN FRIEDMAN, WHO IS THERE TO HELP US: HOW THE SYSTEM FAILS SEXUALLY EXPLOITED GIRLS IN THE UNITED STATES 24 (2005). They are indoctrinated into a world wherein the pimp is worshiped as a demigod to be revered and obeyed. *Id.* The girls are specifically and forcefully directed never to acknowledge the existence of, or reveal the identity of, their pimp to law enforcement. Any infraction against the strict rules of behavior results in severe punishment, as does any attempt to leave the pimp's "stable" or "family." *Id.*

The result of this indoctrination process is that girls become complicit in their own victimization and employ a set of survival skills founded on the notion that they can not trust anyone. ALEXANDER ET AL., *supra*, at 400. Consequently, girls who are victimized through prostitution are "reluctant to seek help and unwilling to give information that may result in their arrest, placement in a shelter, or return to their families." KELLOGG, *supra*, at 349. Therefore, when dealing with a sexually exploited child, a prosecutor must address whatever trauma may have caused the child to become prostituted in the first place, as well as the powerful relationship that exists between the pimp and the child. Doing this requires earning the trust of a child who has long lost the ability to do so.

III. Navigating their unique service needs

In December 2002, the U.S. Department of Justice (Department), Office of Justice Programs, hosted a national summit to consider the problem of prostituted children and youth. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, U.S. DEP'T OF JUSTICE, PROTECTING OUR CHILDREN: WORKING TOGETHER TO END CHILD PROSTITUTION 1 (2002). The resulting set of recommended policy considerations and action steps specified that prostituted children should be treated as victims, not as offenders, and should also be provided with greater access to services—in particular, services that are victim sensitive. *Id.* at 3. The underlying theory supporting these recommendations was if prostituted children received the appropriate services and care, they would be more likely to make an appearance in court. *Id.* at 6. In short, victims who receive the services they need make better witnesses at trial.

Care and treatment of physical injuries resulting from rape and assault at the hands of pimps and customers are obvious service needs for prostituted youth. To help these children ultimately break the cycle of victimization and permanently leave their lives of prostitution, services must also address their need for educational, emotional, mental, and physical health support. ALEXANDER ET AL., *supra*, at 410. Like all victims of child sexual abuse, prostituted children should be evaluated by medical and mental health providers to make certain they receive comprehensive consideration of their treatment and safety needs. KELLOGG, *supra*, at 349.

A. Education and occupational therapy

Children who engage in prostitution drop out of school at earlier ages and have fewer constructive hobbies than other children. FARROW, *supra*, at 342. Therefore, educational opportunities, such as General Educational Development (GED) programs or job-skills training, can be significant factors in enabling prostituted youth to obtain the financial, educational, and emotional independence necessary to break their dependence on pimps and other exploiters. ALEXANDER ET AL., *supra*, at 411.

B. Substance abuse treatment and counseling

"The use of hallucinogens, stimulants, inhalants, narcotics, marijuana, and alcohol is twice as high among runaway children who become involved in prostitution." KELLOGG, *supra*, at 255. As a result, these children are at increased risks for overdose and permanent kidney, liver, and brain damage. Brian M. Willis and Barry S. Levy, *Child Prostitution: Global Health Burden, Research Needs, and Interventions,* 359 LANCET 1417 (2002). All child victims of prostitution should be screened for substance addiction and abuse. KELLOGG, *supra*, at 364. If necessary, compulsory drug withdrawal, detoxification, and drug counseling should be provided. ALEXANDER ET AL., *supra*, at 407.

C. Mental health evaluation and counseling

Child victims of prostitution are at a high risk of suicide and post-traumatic stress disorder resulting from "serious long-term psychological harm, including anxiety, depression, and behavioral disorders." R. Deisher, J. Farrow, K. Hope, C. Litchfield, *The Pregnant Adolescent Prostitute*, 143 AM. J. DIS. CHILD 1162 (1989). Some argue that children victimized through prostitution often lose their individual identities and become only what their pimps/masters want them to be. Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Post Traumatic Stress Disorder,* 2 J. OF TRAUMA PRACTICE, 33-74 (2003). Individual and group therapy sessions can be instrumental in overcoming the emotional and psychological injuries associated with commercial sexual exploitation. ALEXANDER ET AL., *supra*, at 410. Of course, prostituted children who exhibit active suicidal or homicidal ideation should be immediately referred for psychiatric evaluation. KELLOGG, *supra*, at 355.

D. Infectious disease testing and treatment

"When runaway behavior and prostitution are linked, the risk of medical problems escalates significantly." *Id.* at 349. Prostituted children are highly susceptible to diseases, such as hepatitis-B, gonorrhea, syphilis, chlamydia, and human immunodeficiency virus/acquired immune deficiency syndrome (AIDS) because they have multiple sex partners daily. NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN (NCMEC), FEMALE JUVENILE PROSTITUTION: PROBLEM AND RESPONSE, at vii (2d ed. 2002). Moreover, studies have shown that prostituted children are actually at higher risk of sexually transmitted diseases (STDs) than their adult counterparts because their status as children makes them less able to negotiate the use of condoms. Willis & Levy, *supra*, at 1417-22. Accordingly, comprehensive STD testing and, if necessary, treatment must be provided to child victims of prostitution. KELLOGG, *supra*, at 356, 363, 366.

The victim services' coordinators in the Department's Criminal Division and in the ninety-three U.S. Attorneys' offices, as well as local child protective services agencies, may provide invaluable assistance in obtaining appropriate services for child victims of prostitution. The nonresidential programs listed below are examples of nongovernmental organizations dedicated to serving child victims of prostitution and may be helpful in efforts to locate additional service providers.

- Girls Education and Mentoring Service (GEMS), New York, NY, *available at* http://www.gems-girls.org.
- Sisters Offering Support (SOS), Honolulu, HI, *available at* http://www.soshawaii.org.
- Paul & Lisa, Inc., (Connecticut/New York), *available at* http://www.paulandlisa.org.
- You Are Never Alone (YANA), Baltimore, MD, *available at* http://www.yanaplace.com.
- Standing Against Global Exploitation (SAGE), San Francisco, CA, *available at* http:// www.sagesf.org.

IV. Placement options

The lives of prostituted youth are marked by violence and the constant threat of such things as robbery, kidnapping, beatings by pimps or johns, and even death. Given this level of significant and ongoing abuse, child victims of prostitution may need specialized placement designed to address their particular needs. FRANCIS T. SHERMAN, DETENTION REFORM AND GIRLS: CHALLENGES AND SOLUTIONS 22 (2005). Unfortunately, precious few programs possess the training and expertise to comprehensively address the special needs of child victims of prostitution. FRIEDMAN, *supra*, at 44.

A. The traditional model

Historically, victims of child prostitution have often been handled within the framework of a local juvenile justice system. Despite the increasing number of girls entering the juvenile justice system, "policies and programs for juvenile offenders are largely designed for boys with a focus on short-term security," rather than the long-term provision of supportive services. *Id.* at 43. Traditional programs tend to treat victims in a fragmented fashion which fails to address not only the evidence of their victimization, but also its underlying causes. ALEXANDER ET AL., *supra*, at 397. For instance, facilities may provide treatment for substance abuse, STDs, or physical assault, but they may fail to address the sexual victimization of prostituted children or their security, education, and social skills needs. *Id*. This problem of fragmented treatment is compounded by the fact that the juvenile victims of prostitution are

"reluctant to disclose abuse and the[ir] tendency to avoid treatment until their physical health and mental health are severely affected." *Id.*

Of additional concern is the fact that when they are placed in group homes or other juvenile detention facilities, child victims of prostitution are often commingled with other children who have been arrested for drugs, assault, theft, or other categories of delinquent behavior. FRIEDMAN, *supra*, at 43. At the first available opportunity, most girls will run directly back to their pimp, believing that the street is safer than a group home. *Id.* Pimps recruit girls from places where they are known to be, including group homes and detention centers. *Id.* at 33. "Sometimes he will find a new recruit through one of his prostitutes in a group home who brags about her boyfriend and convinces a girl to run away with her." *Id.* In many cases, even girls in group homes for nonsex-related crimes will be recruited and enter prostitution for the first time. *Id.* at 43.

B. Specialized placement options

Obtaining suitable shelter for trafficked children is critical. Unfortunately, the lack of specialized placement options for trafficked children may complicate efforts to provide these children the services they need. Of particular concern is that for the 25% to 35% of boys engaged in prostitution who identify themselves as either gay, bisexual, or transgendered, finding appropriate shelter is even more difficult because the boys are "frequently subject to abuse from other children." ALEXANDER ET AL., *supra*, at 412, 409. Currently, only three residential programs in the United States are specifically designed to serve child victims of prostitution.

- Angela's House, established by the Atlanta Women's Foundation in cooperation with the Juvenile Justice Fund, is a six-bed facility that accepts referrals from anywhere in Georgia, and is devoted to female child victims of prostitution ages thirteen through seventeen. The 120-day program features emergency therapy, medical and psychological assessments, and long-range care and treatment planning. At the conclusion of the program, girls transition into other safe placements where follow-up services can be administered. Angela's House, Atlanta, GA. The Juvenile Justice Fund, *available at* http://www.juvenilejusticefund.org (last visited Aug. 25, 2006).
- Children of the Night, founded in 1979 by Dr. Lois Lee, offers a home to girls ages eleven to seventeen who have been involved in prostitution. This highly successful program includes a twenty-four bed, staff-secure facility providing room, board, clothing, on-site schooling, counseling, and emotional support to female child victims of prostitution, and accepts referrals from anywhere in the United States. Upon arrival at Children of the Night, girls receive fresh clothing and hygiene kits and, if available, are assigned to private bedrooms (each with its own bath). Next, the girls are assigned a primary caseworker who coordinates their medical and psychological care, academic assessments, and other social service needs. Some children remain at Children of the Night from three months to a year, with Dr. Lee and her staff working to obtain a subsequent placement that is appropriate for their needs, such as foster homes, group homes, drug programs, mental health programs, or special education programs. Other girls remain with the program (or return to the program) and achieve either college placement or enrollment in Children of the Night's independent living program. Children of the Night, Van Nuys, CA, *available at* www.childrenofthenight.org.

  Residents of Children of the Night's independent living program follow a highly structured regimen that includes attending an on-site school, where the curriculum is individually tailored to their specific needs and designed to ensure that they reach age-appropriate grade levels in all subjects before completion of the program. With the help of caseworkers, residents are also required to formulate "life plans" while attending independent living classes, participate in sports and recreational activities and also evening workshops in crafts, yoga, twelve-step meetings, poetry, and AIDS education.
- Most recently, in a cooperative venture with the Edgewater Center for Children and Families and Standing Against Global Exploitation (SAGE), the city of San Francisco has established The Safe Home or Secure House for Girls. The shelter is

designed to service girls in San Francisco, ages twelve to seventeen, who are victims of commercial sexual exploitation. The SAGE Project, founded by Norma Hotaling, was a recipient of Oprah's Angel Network "Use Your Life" Award. SAGE's mission is to improve the lives of individuals victimized by, or at risk for, sexual exploitation, violence, and prostitution. The Safe Home, which is modeled on SAGE's nonresidential youth program, is the first public-and-privately-funded program of its kind in the country. Girls who enter the program are allowed to remain for time periods ranging from two months to two years. Services available include life-skills building, education, healthcare, trauma recovery counseling, substance abuse prevention and recovery counseling and education, advocacy within legal and medical systems, opportunities for play, creative expression and physical activity, leadership and communication skills development, and access to support through preexisting cultural or spiritual resources. The Secure House for Girls, San Francisco, CA, *available at* www.sagesf.org.

There are no residential treatment programs that admit male child victims of prostitution and none that provide law enforcement secure settings.

C. Secure vs. unsecured shelter facilities

Even though the facilities discussed above can provide all of the service needs of prostituted children, none of them are locked down, secure facilities. Unfortunately, in most cases, prostituted youth either do not want help or are afraid of reprisal from their pimps if they seek help. ALEXANDER ET AL. at 397. Moreover, absent placement in a secure shelter facility, the provision of preventive healthcare and social services and securing health maintenance visits for children involved in prostitution can be extremely difficult. Therefore, placement in detention or other secure facilities often is the only way to ensure that child victims of prostitution receive the care and treatment they require. *Id.* at 399.

While Department policy allows detention of trafficking victims to the extent practicable and allowed by law, the question of whether a prostituted child should be detained or jailed is obviously controversial. *See Attorney General Guidelines for Victim and Witness Assistance* (2005), Article IX(C)(2)(a), *available at* http://www.justice.gov/olp/final.pdf. A number of nongovernmental organizations argue that detaining a child victim of prostitution is inconsistent with the victim-centered approach to prosecuting human trafficking cases, as outlined in Section 107 of the Trafficking Victim Protection Act of 2000 (TVPA). *See* 28 C.F.R. § 1100.31(b) and Pub. L. No. 106-386, § 107, 114 Stat. 464 (2000).

Detaining a juvenile victim is not the ideal way to build the trust and cooperation necessary to ensure successful treatment or facilitate a child's cooperation during a sex trafficking investigation. Once placed in juvenile detention facilities, prostituted children become "generally angry and uncooperative." ALEXANDER ET AL., *supra*, at 399. Nonetheless, detention can often be the safest and most viable option for ensuring their immediate safety and securing their presence at trial. Judges sometimes agree, indicating that because they fear for the girls' safety on the streets and have no suitable alternatives to detention, they are compelled to detain child victims of prostitution, despite believing that they pose little risk to the community at large and would be better served by alternative placements. SHERMAN, *supra*, at 37.

If there are no adequate shelters available to protect a victim of child prostitution, one other option is to hold the child pursuant to a material witness warrant. Like detention pursuant to a juvenile proceeding, using a material witness warrant to secure a victim of prostitution is far from ideal, but it is an available option when there is no better choice. Judges are often willing to grant them because they do not want to be responsible for any harm that might befall the child if she returns to the street. The prostituted children have lacked stability, so sometimes they begin to blossom in detention in a way that they never could on the street or at home. Furthermore, since you know exactly where they are, it is easy to visit them and build a rapport over time before the trial

The biggest problem with using a material witness warrant is that there are no federal juvenile facilities, so the U.S. Marshal will have to contract out to find a suitable place for the child to stay. The services that the child needs probably will not be provided by whatever facility is chosen. Consequently, separate contracts would be needed to provide services such as psychologists, rape counselors, and the like. The

Marshal's Service does not usually transport and detain juveniles, so there may be problems when the victims are needed in court, particularly because juveniles cannot be commingled with adults and the victim must be kept away from the defendant.

On the administrative side, Federal Rule of Criminal Procedure 46 (h) requires that prosecutors report the status of the child held pursuant to a material witness warrant biweekly to the judge. Additionally, the progress towards trial or whatever event is necessary to release the child from detention must also be reported. Finally, counsel for the child may move for a Rule 15 deposition. If the motion is successful, the child has to come in contact with the defendant much earlier and may decompose. Like detention, using a material witness warrant to secure a victim of prostitution is far from an ideal option, but it is available when there is no other choice.

V. Conclusion

Obtaining victim-centered services for children who have been victimized through commercial sexual exploitation involves a number of complex issues. To ensure that these children are able to function successfully as government witnesses, appropriate consideration must be given to the ability of shelter placements to provide an array of intensive services, including counseling, medical treatment, drug treatment programs, remedial education, and vocational education. For some children, nonsecured placements may be preferable when risk of absconding is low and there is an available program with particular experience in meeting the needs of youth who have been involved in prostitution. However, because many children who fall victim to prostitution have histories of running from nonsecure facilities, secure detention may often be a more viable option.❖

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Helping Child Victims and Witnesses Present Effective Testimony

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I. Introduction

With the recent federal law enforcement emphasis on offenses involving child victims, such as interstate travel for sex with a child, child prostitution, and child sex tourism, many federal agents and prosecutors are working with child witnesses for the first time. As any prosecutor who has handled them well knows, criminal cases with child victims and witnesses present unique and sensitive challenges. Children can be very difficult witnesses. To begin with, their immaturity and inexperience significantly impacts their perspective and can greatly compromise their ability to effectively communicate in the difficult environment of a criminal prosecution. Indeed, child witnesses typically find the criminal justice

system to be confusing and intimidating. Consequently, when forced to endure the rigors of preparing for and testifying at trial, including multiple interviews, lengthy delays, public exposure, face-to-face contact with the defendant, and aggressive cross-examination, the experience can be devastating.

Despite these challenges, however, prosecutors can present the testimony of children successfully if they prepare the child for the difficult conditions of an investigation and trial, design a strategy to minimize the trauma of the prosecution process, and find and follow an effective means of communication for the individual child. This article focuses on how prosecutors can effectively prepare children to testify and on how prosecutors can take full advantage of the available legal mechanisms to facilitate the participation of children in trials. Combined with thorough preparation, this awareness will enable prosecutors to reach their evidentiary goals, while still protecting child victims and witness from undue suffering.

II. Tactics to effectively interact with and prepare child witnesses for trial

In the federal arena, prosecutors typically first see child witnesses only after they have been interviewed by law enforcement agents. Prosecutors must, nevertheless, take care to interact with these children as effectively as possible from the very first meeting. (For guidance on investigative interviews of child victims and witnesses, *see generally,* KIMBERLY L. POYER, FEDERAL BUREAU OF INVESTIGATION INVESTIGATIVE INTERVIEWS OF CHILDREN (2006) and MARTHA J. FINNEGAN, FEDERAL BUREAU OF INVESTIGATION, INVESTIGATIVE INTERVIEWS OF ADOLESCENT VICTIMS (2006).) The investigator's relationship and communication with the child is critical, because it comes first. Prosecutors, however, take the witness to trial, and they must ensure that the child's testimony is effective regardless of whether the relationship with the investigator was successful. Even where the interaction between the law enforcement agent and the child witness was beneficial, and especially when it was not, prosecutors must skillfully communicate with these children in order to prepare them to successfully testify at trial.

A. Pre-Interview preparation

In order to effectively interview a child and to reduce the need for repetitive interviewing, the prosecution team should invest time before the interview to become well acquainted with all of the evidence gathered to date, including any previous interviews of the victim or other witnesses of the crime. The members of the interview team should also become acquainted with the child's background, relationship with others involved in the case, especially an alleged abuser, and any infirmities or special areas of anxiety the witness might have. Along similar lines, the interview will flow better if the interviewer has some background about preferred nicknames, family history, and possible motives for false allegations by the child or other person.

In planning the interview, prosecutors should also consider the means and method by which the interview will be documented. The relationship between the interviewer and the child witness is critical, and as the interview develops and progresses, investigative teams often assign a second person to document the statements. The second person may be located in the same room with the interviewer and inconspicuously take notes. If possible, another alternative is to equip the interview room with some form of inconspicuous audio and/or visual recording device.

B. Setting the stage

Interviewing abused children, especially when they are very young, requires interviewers to recognize that an abused child's psyche is both more fragile and qualitatively different from that of a healthy adult's. This condition is true whether the victim is eight and suffered molestation by an uncle or thirteen and forced to work the streets as a prostitute, although the two victims will have very different problems.

Prosecutors are well advised to find an environment that maximizes the child's ability to communicate details of his or her victimization. Many communities offer child advocacy centers with facilities—including audio and visual capabilities—to interview children. Emergency and nonemergency medical facilities sometimes offer beneficial venues as well. Prosecutors should create an environment designed to make the child as comfortable as possible when facilities oriented towards children are not available. The elements of that design will differ with each child, and may depend on such factors

as age and gender. For instance, some prosecutors who frequently interview young children in their office place toys around the office. Certainly, it makes sense to remove, from view, anything that might make the environment any more intimidating to the child than it already is. Finally, it is advisable to respect the child's personal space, and refrain from touching the child.

C. Children's language and memory skills

Remember, children use less sophisticated language and employ different memory patterns than adults. For that reason, the interviewer should take care to speak slowly and use simple vocabulary. Moreover, children are generally less cognizant of dates and times than adults and cannot be expected to recall such things, even when they are being entirely truthful. With this in mind, many prosecutors ask child witnesses to use milestones, such as birthdays, to pin down times and places. To narrow down the time of year, the interviewer might ask the child whether she had on a winter coat or summer clothes during a relevant point in her narrative.

Trying to obtain facts from a child witness can be very frustrating, especially when the child does not want to recount them. It is exceedingly important, however, to be patient with the witness, even if that means taking frequent and/or long breaks. Prosecutors must be mindful that the child witness may have a lower threshold for overload and fatigue than the adult witnesses they are more used to interviewing, and communication difficult enough to begin with is greatly hampered, of course, when the child reaches such a condition.

D. Considering the number of interviews and interviewers

Even the most trustworthy and reliable adult witnesses telling a true story several times can be expected, inevitably, to vary that story in at least slight and innocuous ways. In the context of criminal proceedings though, such minor variations can be blown out of proportion to seem like significantly inconsistent statements. That problem commonly arises when one is interviewing children, especially young children with less developed communication skills, and those who have recently experienced some form of abuse.

As a result, prosecutors should try to avoid situations in which their child witnesses are formally interviewed multiple times. Multiple interviews conducted by different people are, potentially, especially problematic. In many areas, prosecutors are faced with local laws and law enforcement policies dictating layers of interviews by investigators and social service providers before prosecutors conduct their first interview. Where discretion is allowed, however, experts generally recommend just one interview lead by a single person—even if others are present during the interview. A single, well-prepared, well-conducted, and thorough interview will minimize the potential for inconsistent statements and will also eliminate the stress a child witness experiences with each additional interview.

With that caution being given, prosecutors must also recognize when a child is not ready to render a statement effectively and avoid a formal interview until the child is willing. As this article has suggested, child witnesses must be prepared and conditioned to render to strangers their recollection of the facts that they do not wish to recall. The interviewer, who will usually have limited interaction with the child witness going into the interview, should plan to invest the time necessary to build rapport with the child before delving into the details of the crime. Prosecutors are well advised to take whatever time is required to establish the environment and relationship necessary to obtain a successful interview. Once that interview is obtained, however, additional interviews should be avoided, if possible.

E. Replacing multiple interviews with phased interviews

Current research on enhancing the effectiveness of child interviews recommends structuring the interview with distinct phases, each with its own purpose. *See* Poyer, at 9. These phases include:

- Rapport building, in which the purpose is to reduce the child's apprehension and to prevent any confusion about the interviewer's job and how the interview process will work. This helps to ensure that the child feels as comfortable as possible and, therefore, can best concentrate on the substance of the interview.
- Establishing legal competency, in which the interviewer creates a record of the child's competency, including the child's capacity to observe, analyze, remember, and communicate substantive information related to alleged crimes. Ideally, this phase of the

interview should also provide some indication that the child can differentiate truth from falsehood and appreciates the obligation to tell the truth in court.

- Establishing ground rules, in which children are encouraged to speak honestly with the interviewer, including admitting memory lapses and contradicting the interviewer as necessary.
- Completing a nonabuse scenario, in which the interviewer provides an opportunity for the child to practice telling a coherent story by asking the child to relate a story about a benign event before beginning to talk about the abuse.
- Introducing the topic, in which the interviewer raises the subject of abuse without the use of leading language ("I understand that something may have happened to you. Tell me about it from start to finish." or "Tell me the reason that you came to talk to me today.") Interviewers may use dolls and anatomical diagrams, which are especially helpful with young children with limited vocabularies.
- Questioning and clarification, in which the interviewer clarifies legally significant details and resolves inconsistencies.
- Closure, in which the interviewer recaps the account for accuracy, reminds the child that he or she can come back later if more information comes to mind, and answers any questions for the child about the interview experience or prosecution process.

F. Use of specially trained forensic interviewers

The FBI employs a number of highly trained child forensic interview specialists (Victim Specialists). These Victim Specialists are very knowledgeable about children's mental health and cognitive development, and in this way can offer useful insight to the prosecution team. They may even be present for interviews and interact with victims. However, it is FBI policy that these specialists do not conduct interviews, as they are not trained as investigators and the investigative role could conflict with their primary mission to support child victims' well-being.

G. Expert testimony on disclosure patterns of child victims

Child victims of sexual abuse commonly fail to disclose details or even refuse to admit that they are victims of such crimes. There are many reasons for this. In the case of an eight-year-old girl who was taken to Disney World and molested by an uncle, her continued denials might reflect fear, caused by her uncle's threats of disclosing her behavior to her parents. She considers her behavior bad and she has been conditioned by her uncle to blame herself. For a victim of child prostitution who came from a broken family, she may refuse to relate her pimp's exploitation and abuse out of loyalty and love for her abuser.

Regardless of the reason for the denial or inconsistency, the result is either an out-of-court record of statements very different from those rendered by the child at trial or trial testimony that is inconsistent with other factual evidence. Of course, prosecutors can minimize the impact of earlier denials or inconsistencies by "fronting" the issue on direct examination of the victim. This is accomplished by simply asking the child to relate how he or she might have felt scared or embarrassed to initially respond truthfully. The victim of child prostitution might admit to her loyalty and love for her defendant pimp.

If handling the problem in direct examination is a dim prospect, the prosecutor may choose to call an expert witness to explain the common behavioral characteristics of victims of that form of child abuse. Such experts, with broad experience, will say that child abuse victims often deny abuse before later acknowledging their victimization. Experts can also validly say that some victims never come to grips with the abuse they have suffered. Either way, the expert can help resolve the skepticism jurors will have about the child witness's contradictory or incongruous accounts.

H. Corroborating the child's version of events

Corroborating witnesses, where possible, is always important. No prosecutor favors a case built upon a witness whose testimony must be taken at face value. Nevertheless, basing a prosecution on the uncorroborated word of a child victim of sexual abuse is highly problematic for all the reasons suggested in the foregoing paragraphs. Since child sexual exploitation

typically occurs behind closed doors without witnesses, the victim/witness is likely to be difficult to corroborate. Still, because the witness is a child and the defendant is an adult, it will be exceedingly helpful to bolster the credibility of the child's account with evidence that shows truth compared to the defendant's competing version. Moreover, as children might struggle to recall details about dates and places, corroboration in the form of travel records, photographs, and the like, will help show that such uncertainty is not a sign of incredibility.

I. Considering the effect of in-person encounters

The anxiety experienced by a child who is forced to face and testify against the adult who abused her should not be underestimated. Child witnesses who spoke about their abuse successfully in pretrial interviews may become gripped by silence when they sit in the witness box at trial, face-to-face with the defendant for the first time since charges were brought. Although extensive preparation, conditioning, and a pretrial visit to the courtroom may help reduce a child's apprehension, it is likely that no amount of preparation and conditioning will completely eliminate the tremendous amount of anxiety associated with facing the child's abuser in court. Some of the safeguards pursuant to 18 U.S.C. § 3509 described below, however, can minimize the distraction, anxiety, and harm, associated with that confrontation.

III. Legal mechanisms available to protect children and facilitate testimony

Title 18, U.S.C. § 3509, entitled upon enactment "Child Victims' and Child Witnesses' Rights," provides legal mechanisms for protecting children's interests during the trial process.

A. Section 3509(b): Alternatives to live in-court testimony

Under certain circumstances, child witnesses may provide testimony by closed circuit television or by videotape. The attorney for the government, the child's attorney, or a guardian ad litem, may apply for such an order, and the court may grant it if it finds that certain criteria have been met. To grant an order permitting testimony via closed circuit television, the court must find that the child witness is unable to testify in open court because of one of more of the following.

- Fear.
- Substantial likelihood that the child would suffer emotional trauma from testifying.
- The child suffers from a mental or other infirmity.
- The conduct by the defendant or defense counsel causes the child to be unable to continue testifying.

To grant an order authorizing testimony via videotape, the court must find that is likely that, at the time of trial, the child witness would be unable to testify in open court for one of the above enumerated reasons. Therefore, the decision to authorize testimony via videotape obligates the court to consider whether certain circumstances are likely to be present at some point in the future.

The Supreme Court has found that a child victim or witness testifying outside the presence of a defendant does not violate the defendant's Sixth Amendment right to confrontation because states have a compelling interest in protecting child victims of sex crimes. A child may testify using an alternate means as long as a state shows the necessity of taking such measures, such as that the child would suffer additional trauma as a result of testifying in the defendant's presence, *Maryland v. Craig*, 497 U.S. 836 (1990); *see also United States v. Etimani*, 328 F.3d 493 (9th Cir. 2003) (two-way closed circuit television did not violate Confrontation Clause); *United States v. Weekley*, 130 F.3d 747 (6th Cir. 1997) (same); *United States v. Carrier*, 9 F.3d 867 (10th Cir. 1993) (same).

In some cases, however, courts have found Confrontation Clause violations in cases where children were allowed to testify using alternatives to live, in-court testimony under the provisions of 18 U.S.C. § 3509. *See United States v. Moses*, 137 F.3d 894, 898 (6th Cir. 1998) (holding that the trial court erred in permitting closed circuit testimony by relying only on a child's statement that she never wanted to see the defendant again and failing to consider her additional comment that she "was not afraid of him."); *see also United States v. Turning Bear*, 357 F.3d 730 (8th Cir. 2004).

The use of closed-circuit television has been recently challenged on Confrontation Clause

grounds in light of the decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In the wake of that ruling, courts have reached different conclusions about the adequacy of closed-circuit television as it relates to a defendant's Sixth Amendment rights, with decisions turning on the various facts of the cases at hand. For example, in *United States v. Williams*, 116 Fed. Appx. 890 (9th Cir. 2004), the Ninth Circuit rejected a defendant's challenge to his conviction on grounds that the videotaped deposition testimony of a witness in a child prostitution case had been used at trial. The court reasoned that the defendant had waived the right to attend the deposition because the defendant had been made aware of the deposition before it took place, the government attempted to arrange a teleconference for the defendant who could not attend, and the defendant's counsel attended the deposition.

In *Fuster-Escalona v. Florida Department of Corrections,* 170 Fed. Appx. 627, 629 (11th Cir. 2006), the Eleventh Circuit denied the defendant's motion for postconviction relief on Confrontation Clause grounds. In that case, children had been allowed to testify via two-way closed television at trial. The court focused on the fact that the children had been able to see the defendant with this form of closed-circuit television. In this way, it distinguished the case from *Maryland v. Craig*, which involved one-way, closed-circuit television that had not enabled the child witness to see the defendant, an important factor in Confrontation Clause jurisprudence.

On the other hand, some courts have upheld a defendant's post-Crawford challenges to the use of closed-circuit television. In *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005), a defendant who had been convicted on charges of aggravated sexual abuse, appealed the district court's decision to allow the alleged victim to testify via two-way closed circuit television. The appellate court held that the lower court's finding that the alleged victim was afraid of both the defendant and of testifying in front of the jury (the child's fear of the defendant was only one reason, and not the dominant one, why she could not testify in open court) was insufficient under the Confrontation Clause. The court found that a confrontation via this two-way, closed-circuit falls short of the face-to-face standard because it does not provide the same truth-inducing effect.

Similarly, in *United States v. Thunder*, 438 F.3d 866 (8th Cir. 2006), the Eighth Circuit overturned a defendant's conviction of aggravated sexual abuse on Sixth Amendment grounds. At trial, the district court judge closed the courtroom during the testimony of the child victims, without having had any hearings and without articulating particularized findings. As a result, the appellate court found that the order was not narrowly tailored to advance a compelling government interest, and it therefore concluded that the defendant's Sixth Amendment rights had been violated.

While it seems clear from the case analysis above that courts will continue to decide the Confrontation Clause issues associated with out-of-court testimony of child witnesses on a case-by-case basis, the cases also advise prosecutors to make a very good record for necessity. In the case of both videotaped and closed-circuit testimony, prosecutors should ensure that the record clearly reflects that the child is unable to testify in open court due to one or more of the enumerated reasons, such as a fear of the defendant or that the child would suffer emotional trauma if forced to testify in the presence of the defendant, and that the court makes specific findings to that effect.

B. Section 3509(c): Competency examinations

Under 18 U.S.C. § 3509(c), child witnesses are presumed to be competent to testify. A party seeking a competency examination in the face of this presumption must file a written motion and provide an offer of proof that the child is incompetent. A court will only order a competency examination if it determines that compelling reasons for such an examination exist. A mere allegation that a child provides only "a well-drilled narration of the incident" as opposed to something more authentic, is insufficient to show incompetence, without specific facts or evidence establishing that a child is incompetent. *United States v. Walker*, 261 F. Supp. 2d 1154, 1155-56 (D.N.D. 2003). Even allegations that a child is mildly mentally retarded, substantiated by medical records, do not rise to the level of a "compelling reason" to hold a competency examination without evidence to show the victim "could not 'understand and answer simple questions' . . . or 'understand the difference between truth and falsehood . . . .'" *United States v. Allen J.*, 127 F.3d 1292, 1294-95 (10th Cir. 1997). This strong presumption that children are competent to testify provides a valuable tool for

limiting unnecessary questioning and examination of child witnesses in criminal cases.

C. Section 3509(d): Privacy protection

Title 18 U.S.C. § 3509(d) provides several means by which the names and other information concerning child victims and witnesses can be protected from public disclosure. This section of the statute requires that every person involved in a criminal case, including prosecutors, law enforcement agents, court personnel, the defendant, defense counsel, and the jury, refrain from disclosing any documents, or any information in such documents, concerning a child's name or other identifying information. The statute permits prosecutors to file under seal, all papers that disclose a child's name or other information concerning a child victim, even without first obtaining a court order. The statute also provides that, during proceedings, the court may issue an order protecting disclosure of a child's name or other information concerning the child, if the court finds that such disclosure would be detrimental to the child. These mechanisms should be employed by prosecutors, especially as they serve to alleviate some of the issues associated with the public disclosure of the identities of child victims and witnesses during a criminal case.

D. Section 3509(e): Closing the courtroom

When a child testifies, the court may order that anyone without a direct interest in the case be excluded from the courtroom. Such an order may be made if the court first determines that requiring a child to testify in open court would cause substantial psychological harm to the child or impair the child's ability to communicate. *See* 18 U.S.C. § 3509(e).

E. Section 3509(i): Adult attendant

Another provision that can be used to facilitate child witness testimony is 18 U.S.C. § 3509(i), which gives child victims and witnesses the right to be accompanied by an adult attendant to provide emotional support while the child testifies. *See* 18 U.S.C. § 3509(i). While the adult attendant may not help the child answer questions, the child can hold the attendant's hand or sit on the attendant's lap while testifying. Prosecutors should consider using this tool in cases where a trusted adult would put the child at ease and their presence would help the child to communicate more effectively.

F. Section 3509(j): Speedy trial

In a proceeding in which a child is called to give testimony, the court may, on its own or on a motion by the prosecutor or guardian ad litem, designate the case as being of special public importance. In cases so designated, the court will expedite the proceeding and ensure that it takes precedence over any other case. Prosecutors should consider moving the court to make such a designation in any case involving a child witness. Not only will an expedited schedule minimize the length of time that a child must remain involved with the criminal justice system, but it will also protect against fading memories and dissipating amounts of cooperation over time.

IV. Conclusion

In order to successfully prosecute cases involving child victims and witnesses, prosecutors must be able to effectively interact with these children and present their testimony at trial. A working knowledge of the tactics and legal tools available to protect children in court serves to maximize the effectiveness of children's testimony while minimizing the adverse impact on them.❖

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Prosecuting Obscene Representations of the Sexual Abuse of Children

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I. Introduction

On March 10, 2006, Dwight Whorley was sentenced in the Eastern District of Virginia to 240 months' imprisonment for knowingly receiving obscene Japanese anime cartoons depicting the sexual abuse of children, as well as sending and receiving obscene e-mails that graphically described and glorified the sexual abuse of children. *United States v. Whorley*, No. 05-CR-114 (E.D. Va. filed Mar. 23, 2005). The successful conviction and containment of this recidivist offender was accomplished partly as a result of the enactment of Section 504 of the PROTECT Act on April 30, 2003, codified at 18 U.S.C. § 1466A, which created a new obscenity statute targeting images depicting minors. Section 1466A was part of the legislative response to the Supreme Court's opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which, in relevant part, held that in child pornography cases the government has to prove that the children depicted in child pornography images are real.

The statute has four separate offense provisions: 18 U.S.C. § 1466A(a)(1), (a)(2), (b)(1), and (b)(2). This article discusses in detail the first provision, § 1466A(a)(1), and how it was effectively applied in the prosecution of Dwight Whorley, in combination with two long-standing obscenity and child pornography statutes. Of note, this new provision allows the government to prosecute offenses related to sexually explicit depictions of children, regardless of whether those images are of real children or not. Child exploitation prosecutors should be aware of § 1466A, as it provides another means to prosecute those who commit offenses related to visual depictions of minors engaging in sexually explicit conduct.

II. 18 U.S.C. § 1466A(a)(1)

Section 1466A(a)(1) prohibits the production, distribution, receipt, or possession with intent to distribute of any type of visual depiction, including a drawing, cartoon, sculpture, or painting, that depicts a minor engaging in sexually explicit conduct that is obscene. The elements of the offense are described below.

- Knowingly produces, distributes, receives, or possesses with intent to distribute
- A visual depiction of any kind, including a drawing, cartoon, sculpture, or painting,

  The term "visual depiction" includes undeveloped film and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means (§ 1466A(f)(1)).
- The visual depiction describes a minor engaging in sexually explicit conduct

  The term "sexually explicit conduct" has the same meaning given the term in the child pornography provisions (§§ 2256(2)(A) or 2256(2)(B)).
- The visual depiction is obscene.

  The test for determining whether material is obscene is set forth in *Miller v. California*, 413 U.S. 15 (1973). The *Miller* test consists of three prongs, all of which must be satisfied before material can be found obscene. The test is whether: (1) an average person, applying contemporary community standards, finds that the material taken as a whole appeals to the prurient interest; (2) an average person, applying contemporary community standards, finds that the work depicts sexual conduct in a patently offensive manner; and (3) a

reasonable person, viewing the material as a whole, finds that the material lacks serious literary, artistic, political, or scientific value. *Id*. at 24-25.

The jurisdictional requirement can be met in any one of five ways.

- Any communication involved in the offense is communicated by mail, or in interstate or foreign commerce, or if any means or instrumentality of interstate or foreign commerce is otherwise used in committing the offense.
- Any communication involved in the offense contemplates the transportation of a visual depiction by the mail or in interstate or foreign commerce.
- Any person travels in interstate or foreign commerce in the course of the commission of the offense.
- Any visual depiction involved in the offense has been mailed or transported in interstate or foreign commerce, or was produced using materials that have been mailed or transported in interstate or foreign commerce.
- The offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

The statute also prohibits attempts and conspiracy. Any violation of 18 U.S.C. § 1466(a)(1) is punished as per the penalties for child pornography set forth in 18 U.S.C. § 2252A(b)(1), which includes mandatory minimum terms of imprisonment and increased punishment for persons previously convicted of certain offenses.

III. Dwight Whorley

Dwight Whorley was initially convicted in February 1999, in the Eastern District of Virginia, for receiving child pornography via the Internet in violation of 18 U.S.C. § 2252(a)(2). *United States v. Whorley*, No. 99-CR-75 (E.D. Va. filed Feb. 22, 1999). The investigation that led to this conviction uncovered that Whorley kept handwritten stories describing his sexual fantasies, such as a story entitled "The Kidnaper," which described, in graphic detail, the kidnapping and rape of a seven-year-old girl.

While serving his sentence of thirty-seven months' imprisonment for receiving child pornography, Whorley refused to participate in the Sex Offender Treatment Program offered at the Federal Correctional Institution in Butner, North Carolina. Upon his release from incarceration, Whorley was closely monitored for compliance with his supervised release conditions by a senior United States Probation Officer in Richmond, Virginia.

Whorley promptly began violating the terms of his release by failing to seek employment and falsely reporting to his probation officer that he had applied for numerous jobs. The probation officer also discovered that Whorley was frequenting locations where children were present, such as libraries and shopping malls, and that he was accessing computers without the officer's permission. Whorley's supervised release was revoked and Whorley was sentenced to a twelve month term of incarceration.

Whorley was again caught by his probation officer violating the terms of his supervised release after serving the one year sentence. A patron at a Virginia Employment Commission (VEC) office reported that on March 30, 2004, Whorley was viewing sexually explicit visual depictions of children on one of the computers open to the public for conducting job searches on the Internet. VEC employees confronted Whorley, who surrendered the printouts that he was in the process of retrieving from a laser printer, as well as other printouts that he had in his possession. After observing the content of the printouts, which included three pages of Japanese anime cartoons that graphically depicted prepubescent female children being forced to engage in genital-genital and oral-genital intercourse with adult males, the VEC office manager ordered Whorley to leave the building. After confirming Whorley's identity, and learning that Whorley was listed on the Virginia Sex Offender Registry and under federal supervision, the office manager notified Whorley's probation officer.

Whorley's supervised release was subsequently revoked again and he was sentenced to another twelve month term of incarceration. After learning that Whorley would no longer be under the supervision of the United States Probation Office or the jurisdiction of the United States District Court after he completed serving this term of incarceration, the United States Attorney's Office for the Eastern

District of Virginia and the Criminal Division's Child Exploitation and Obscenity Section (CEOS) decided to prosecute Whorley for the violations of 18 U.S.C. § 1466(a)(1) committed on March 30, 2004.

IV. Computer forensic analysis

Following seizure by the FBI, the computer that Whorley used was analyzed by the CEOS High Technology Investigative Unit. The analysis of the computer's Internet cache showed that up until the time he was caught on March 30, 2004, Whorley had been using the computer for approximately two hours to access a Yahoo! e-mail account registered to him, and to repeatedly access obscene Japanese anime cartoons depicting the sexual abuse of children, including the three which he printed out and surrendered. Analysis of the Internet cache also showed that over a prior two-day period, Whorley had used the same computer to access his Yahoo! e-mail account and to access images posted on a propedophilia Web site depicting the lascivious display of the genitals and pubic areas of actual children. For a detailed discussion of Internet cache, *see* Jill Trumbull-Harris, *Making Your Child Pornography Case Based on Images Found in Internet Cache*, CHILD EXPLOITATION AND OBSCENITY SEC. Q., Sept. 2006, *available at* CEOS.

A search warrant for e-mail content on Yahoo! computer servers in California, and additional forensic analysis of the VEC computer, resulted in the recovery of numerous obscene e-mails sent and received by Whorley that graphically described, among other things, parents sexually molesting their own children.

V. Conviction and sentence

After various motions to dismiss were denied by the district court, *see United States v. Whorley*, 386 F. Supp. 2d 693 (E.D. Va. 2005), a jury convicted Whorley of violating three separate statutes.

- Whorley was convicted on twenty counts of knowingly receiving obscene visual depictions of the sexual abuse of children in violation of 18 U.S.C. § 1466A(a)(1), based on his accessing the obscene Japanese anime cartoons via the Internet.
- He was convicted of twenty counts of transporting obscene matter in violation of 18 U.S.C. § 1462, based on his sending and receiving obscene e-mails, which graphically described and glorified the sexual molestation of children.
- Lastly, Whorley was convicted of fourteen counts of receiving child pornography in violation of 18 U.S.C. § 2252(a)(2), based on his accessing images depicting the lascivious display of the genitals and pubic areas of actual children.

Because Whorley was previously convicted in February 1999 of receiving child pornography, the mandatory minimum term of imprisonment imposed on each of the counts of conviction under 18 U.S.C. §§ 1466A(a)(1) and 2252(a)(2) was fifteen years. The government brought a motion for an upward departure based on the fact that the statutory minimum sentence, although it exceeded the calculated sentencing guidelines range, still failed to adequately reflect the seriousness of the defendant's past conduct and his likelihood of committing future crimes. The district court granted the government's motion and sentenced Whorley to 240 months' imprisonment to be followed by ten years of supervised release.

VI. Conclusion

The successful prosecution of Dwight Whorley demonstrates how innovative employment of obscenity statutes, in conjunction with a thorough computer forensic analysis, can be used to contain a dangerous individual and help ensure the safety of the children in our communities. Section 1466A allows federal prosecutors to pursue all cases involving visual depictions of minors engaging in sexually explicit conduct regardless of how those visual depictions were produced. Accordingly, not only should federal prosecutors use the statute to prosecute cases involving cartoons, as in Dwight Whorley's case, but they should also consider using the statute to prosecute cases that may be difficult to prosecute under 18 U.S.C. §§ 2252 and 2252A, for example, where it may be difficult to establish that the children depicted in the images are real.❖

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