GINAL

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA	)	
	)	**Criminal No. 07-CR-0032-B**
Plaintiff,	)	
v.	)	
NATHANIEL SOLON,	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO PRODUCE MIRROR IMAGE OF HARD DRIVE OR IN THE ALTERNATIVE TO DISMISS

COMES NOW, the United States of America, by and through its attorney, James C. Anderson, Assistant United States Attorney for the District of Wyoming, and hereby respectfully submits the following as the Government's response to the Defendant's Motion to Produce a Mirror Image of the Defendant's Hard Drive or

in the Alternative to Dismiss:

I. INTRODUCTION

The Defendant has been indicted by the Federal Grand Jury for the District of Wyoming with one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). On May 4, 2007, outside the date for the filing of motions, the Defendant filed a motion seeking an order requiring the United States to produce a copy of the Defendant's hard drive, which contains images of child pornography, or in the alternative to dismiss the charge on file herein. The Defendant, without citation to authority in support of his position, generally alleges his rights to due process and effective assistance of counsel have been violated because the Government is prohibited by 18 U.S.C. § 3509(m) from releasing child pornography to the defense.

The Defendant's claim is without merit and should be denied by this court.

II. FACTS

As the result of an investigation relating to the trading of child pornography on Internet file sharing sites, Immigration and Customs Enforcement Special Agent Nicole Balliett identified a computer in Casper, Wyoming, offering to share child

pornography with other computer users using a file sharing network. Through the use of administrative subpoenas Balliett was able to determine the computer was located at 439 Melrose, Casper, the residence of the Defendant, Nathaniel Solon. On September 20, 2006, Balliett obtained a Federal search warrant authorizing the search of the Defendant's residence for items relating to child pornography. The search warrant was executed by Balliett and other members of the Wyoming Internet Crimes Against Children Task Force[1] on September 21, 2006. The Defendant was present during the search. When questioned about his use of file sharing networks the Defendant admitted he had downloaded adult pornography but no child pornography.

The search warrant issued by Magistrate Beaman authorized agents to seize any computers and/or computer systems within the residence. Agents did find a computer belonging to the Defendant but did not find it necessary to take the entire computer

[1]The Wyoming Internet Crimes Against Children Task Force(ICAC) is a law enforcement task force comprised of 5 Wyoming Division of Criminal Investigation agents, 1 Federal Bureau of Investigation agent, and 1 Immigration and Customs Enforcement Bureau agent (Balliett). ICAC is tasked with investigating crimes relating to the online exploitation of children. The task force leader, Flint Waters, has received both national and international recognition for his outstanding efforts in developing techniques to investigate these types of crimes.

system. Rather the agents removed the computer's hard drive[2] from the computer and elected to leave the remainder of the system behind. The agents decided not to seize the entire system because upon their initial preview of the digital files contained on the hard drive of the computer did not reveal any images of child sexual abuse. This fact, coupled with the Defendant's insistence he was innocent of any wrongdoing, lead the agents to only take the hard drive from his computer. However, a subsequent forensic exam of the hard drive did reveal images of child sexual abuse within unallocated space on the hard drive. This indicates the child pornography had been present on the hard drive in the form of individual files and the Defendant deleted those files. Approximately 8 to 10 viewable child pornography files were found by

[2] The term "hard drive" is actually short for "hard disk drive." The term "hard disk" refers to the actual disks inside the hard drive. However, all three of these terms are usually seen as referring to the same thing -- the place where data is stored within a computer, that is the locale within a computer system where files and folders are physically located. A typical hard drive in a desktop computer is only slightly larger than an adult's hand, yet can hold over 250 GB of data (approximately 80 million pages of data). The data is magnetically stored on a stack of disks that are mounted inside a solid encasement. These disks spin extremely fast (typically at either 5400 or 7200 RPM) so that data can be accessed immediately from anywhere on the disks within the drive. Because data is stored magnetically it stays on the hard drive disks even after the power supply is turned off. When a user saves data or installs a program on his/her computer, the information is typically placed on the hard disk. The hard disk is a spindle of magnetic disks, called platters, that record and store information. The hard drive transmits data back and forth between the central processing unit of the computer and the disk.

the examiner and all had been deleted on September 20, 2006, the day before the search.

The Defendant has filed a motion to seeking an order from this court requiring the Government to produce a copy of his hard drive (which would necessarily include images of child sexual abuse) or in the alternative dismiss the charge pending against him. While the Defendant states that the Government has been cooperative in allowing the Defendant's counsel and his putative experts to examine the evidence seized in this matter, the Defendant claims it is time consuming and expensive to travel to Cheyenne to examine the digital evidence in this matter. To date, Defense Counsel and individuals hired by the Defense to assist in the examination of evidence in this matter have been to the ICAC offices on 2 occasions. The Government has made a copy of the Defendant's hard drive for examination by the defense and will continue to cooperate with the Defense in to insure that the Defendant has access to the evidence in this matter. Additionally, the Defense claims that by examining the digital evidence at the ICAC offices it is providing the Government with a "roadmap" as to the defense it intends to develop in this matter. Thus the Defense, in direct contravention of 18 U.S.C. § 3509(m), asks this court to require the Government to

turn over child pornography to the defense or to dismiss the charge pending herein.

The Government contends that the Adam Walsh Child Protection and Safety Act of 2006 (the "Walsh Act") as set forth in 18 U.S.C. § 3509(m), prohibits the Government from making copies of child pornography or the media in which it is contained. The Government further contends that the images of child pornography have been - and will continue to be made - "reasonably available" to Defense counsel and any putative defense experts at the Wyoming ICAC Office in Cheyenne. Because the images have been made available to Defense Counsel, and the Government has made a copy of the Defendant's hard drive "reasonably available" to any putative defense expert at a government facility, the Motion should be denied, and the Court should find no constitutional or statutory violation.

III. APPLICABLE LAW

A. THE STATUTE IN QUESTION - 18 U.S.C. § 3509(m)

18 U.S.C. § 3509(m) prohibits the reproduction of child pornography and mandates that it be kept in the care, custody, and control of either the Government or the Court. 18 U.S.C. § 3509(m)(1). The Court is required to deny any request for the duplication of the images of child pornography, so long as the Government makes the

material "reasonably available" to Defendant. 18 U.S.C. § 3509(m)(2)(A). In determining whether the material has been made "reasonably available," a reviewing Court must decide whether the Government has provided "ample opportunity" for its inspection, viewing and examination at a Government facility by the defendant, his attorney, or his expert witnesses. 18 U.S.C. § 3509(m)(2)(B). The relevant Congressional findings in support of Section 3509(m) are:

(2) The importance of protecting children from repeat exploitation in child pornography:

(A) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and related media.

(B) Child pornography is not entitled to protection under the First Amendment and thus may be prohibited.

(C) The Government has a compelling State interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain.

(D) Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.

(E) Child pornography constitutes prima facie contraband as such should not be distributed to, or copied by, child pornography defendants or their attorneys.

(F) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the Government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.

Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2), 120 Stat. 587 (July 27, 2006).

Clearly, Congress was concerned about the reproduction of these images, because of its concern for the victims and their continuing victimization. In enacting § 3509(m), Congress tried to strike a balance between protecting the victims and preventing the proliferation of their images, and the defendant's right to a fair trial.

Consequently, after balancing these concerns, Congress prohibited the duplication of these images unless the Court found that the Government had not provided "ample opportunity" for the defense to review the material.

B. CASE LAW - ADAM WALSH ACT

Since the passage of the Walsh Act, § 3509(m) has been litigated before district courts on similar grounds to those raised by the Defendant in this case. Most district courts have rejected this challenge.

Recently, the United States District Court for the District of Arizona, in *United States v. O'Rourke*, 470 F.Supp.2d 1049, 1054-1060 (D. Ariz. 2007) rejected a due process challenge to § 3509(m), and held that the Government had shown that it had provided the defense with ample opportunity to review a hard drive. In *O'Rourke*, the Government was ordered to make the hard drive available at the United States Attorney's Office to the defense, in a private room. The defense in O'Rourke challenged this order claiming, *inter alia*, that the review at the Government's facility resulted in a roadmap of the defense's analysis being left on the Government computer; and that a review at this facility hampered the expert and counsel's ability to speak freely. Id. at 1058-59.

The District Court rejected these claims because the defense experts were free to use their own computers to avoid any such roadmap, and the Government was willing to make the hard drive available at the Marshal's Office or other facility where the defense could review the hard drive and confer privately. *Id.* See also *United States v. Butts*, 2006 WL 3613364 (D. Ariz. 2006) (Slip. Op.) (same result in case involving voluminous amount of evidence because Government offered to provide an empty, locked office for defense expert to work in; agreed to restrict access to the office; agreed that the expert could be present on days that the facility was open; and provided a safe for the expert to lock his equipment in the same office); *United States v. Johnson*, 456 F.Supp.2d 1016, 1019 (N.D. Iowa 2006) (holding that § 3509(m) is not unconstitutional and noting that child pornography is like other contraband like firearms and drugs which cannot be removed from the Government's possession); *United States v. Renshaw*, 2007 WL 710239 (S.D. Ohio 2007) (Slip. Op.) (rejecting challenge based on work product, and finding that although Section 3509(m) may "inconvenience" trial counsel and defense experts, it does not preclude a defendant from preparing his case for trial, and the "safety valve" language explicit in the statute - which allows the court to order production of the

material - is inconsistent with a due process violation); *United States v. Glembin*, 2006 WL 2460866 (D. Nev. 2006) (Slip. Op.) (denying motion to copy material on grounds that Government had indicated its willingness to make it available for examination); *United States v. Hough*, Case No. 06-CR-39-C (W.D. Ky. December 6, 2006) (rejecting constitutional argument when the Government had offered to allow agent to bring hard drive to defense expert for examination on portable machine, and/or meet with defense expert to explain the Government's examination process, or to allow defense expert to independently examine hard drive while it was in Government's custody; and holding that defendant's unsubstantiated concern that he could not find an expert to abide by these restrictions was not tantamount to a constitutional violation)(copy attached); *United States v. Brobst*, Case No. 06-CR-00055-DWM (D. Mont. February 27, 2007) (denying dismissal based on constitutional challenges and holding that § 3509(m) overrides Rule 16, and defense counsel's standing as an officer of the Court does not override congressional intent and that the inconvenience of inspection in another city did not rise to the level of a constitutional violation. Also see January 8, 2007 Order of court denying motion to make copy of hard drive)(copies attached).

The District Court for the Eastern District of Virginia reached a different result. In *United States v. Knellinger*, 471 F. Supp.2d 640 (E.D.Va. 2007), the District Court held that the Walsh Act was not unconstitutional but held on the facts of that case that the Government had failed to provide the required "ample opportunity" to examine the hard drive at a Government facility. The Government contended that it had provided defendant with an adequate opportunity for inspection because it had provided the hard drive in a private room at the FBI's office.

The defendant in *Knellinger* called several witnesses, but the Government put on no evidence. One of the defense witnesses was a defense lawyer who testified that a "viable defense" was whether the children depicted in the images are real. *Id.* at 646-647. Other witnesses testified that they intended to perform digital video analysis to explore the "virtual child" defense; and that the cost of doing such analysis was in excess of half a million dollars based on the travel involved; and that they may not even choose not to be retained as experts in light of the practical restraints of the Walsh Act. *Id.* The Government cross-examined these experts and argued, among other things, that the putative attack was a "fairy tale" defense because none of these experts were personally aware of any case in which the pornography

had been produced using "virtual children." *Id.* at 648.

The District Court refused to foreclose the opportunity to pursue a potentially viable legal defense despite its novelty. *Id.* The District Court also accepted the un-rebutted testimony of the defense witnesses about the practical and financial burdens imposed by undertaking a digital video analysis of the hard drive at the FBI's office. *Id.* at 649. The District Court then ordered the production of the hard drive to the defense, conditioned upon the defense notifying the Court that it had retained an expert witness to conduct the examination. *Id.* at 650.

Knellinger is clearly distinguishable from this case. Perhaps most importantly, the defense has not suggested that the single charged image in this case does not depict a real child or that it wishes to submit the Government's evidence in this matter to the type of analysis suggested in *Knellinger*. Moreover, this case involves a digital video, not a still image. The Government would suggest that the technology simply does not exist at this point in time to create a virtual child in a digital movie such as the charged image in this case. Additionally, other images possessed by the Defendant that will be introduced pursuant to Rule 404(b) are of known victims. Consequently, there is no basis for a "virtual child" defense in this case. Further,

while the Defendant and his putative experts must travel to Cheyenne to examine the evidence in this matter, there has been no showing that any examination the defense examiners might want to perform cannot be conducted at the ICAC office.

C. PRE WALSH ACT CASE LAW

The effect of § 3509(m) is to ensure that the discovery of child pornography, as illegal contraband, is handled in a similar manner to other contraband, such as automatic weapons or narcotics. The District Court for the Northern District of Iowa in *Johnson* recognized that child pornography is like other contraband such as firearms and drugs, which cannot be removed from the Government's possession. *United States v. Johnson*, 456 F.Supp.2d at 1019.

The courts have permitted defense attorneys and experts neither unrestricted possession of, nor unsupervised access to, narcotic contraband. See, e.g.,*United States v. Noel*, 708 F. Supp. 177, 178 (W.D. Tenn. 1989). The Government sees no reason why the courts may create an exception to the normal discovery process for contraband, but when Congress codifies that procedure with respect to a particular class of contraband, it is claimed to be unconstitutional. The Government is aware of no case permitting the defense unrestricted possession of, or access to, narcotics

or firearms. If case law directs defense attorneys and experts to conduct their analysis of narcotics at a law enforcement facility under the supervision of a law enforcement officer, there is no reason why the same procedure should not be used for child pornography, since child pornography is no less illegal, dangerous, and harmful in its own way than narcotics or firearms, and unlike narcotics and firearms, which are a consumable or fixed quantity, child pornography can be copied, duplicated, and distributed endlessly and effortlessly.

Nonetheless, child pornography is sometimes perceived as a lesser form of contraband compared to narcotics or firearms. This remains true despite the fact that "[t]he prevention of sexual exploitation and abuse of children constitutes a Government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 755 (1982). See also *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is 'compelling.'") As the Court noted in *Osborne*, child pornography victims are violated twice: first, at the time the child engages in sexual activities while the permanent visual depiction is being made, 495 U.S. at 109, and then again when those visual depictions are distributed and viewed

by others. *Id.* at 111. ("The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come.")

At the end of the day, § 3509(m) formalizes a procedure for the discovery of this contraband that has been accepted by several courts, both before and after the passage of the Walsh Act. See *United States v. Husband*, 246 F.Supp.2d 467 (E.D.VA 2003) (approving of procedure whereby child pornography was made available for inspection but defense was not given its own copy); *United States v. Kimbrough*, 69 F.3d 723, 731 (5th Cir. 1995) (same); *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999) (same).

§ 3509(m) may, at times, be burdensome and inconvenient. It creates inconveniences for the Government as well because it requires providing access to defense teams for review and analysis of child pornography stored in Government facilities. That inconvenience neither rises to a level of a constitutional violation nor provides a basis for invalidation of the statute, particularly in light of the Supreme Court's position that it has generally sustained legislation aimed at protecting the physical and emotional well-being of children even when the laws operate in sensitive areas of constitutionally protected rights. *Ferber*, 458 U.S. at 757.

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V. CONCLUSION

Based upon the foregoing the United States would respectfully submit that the Defendant's motion should ~~be denied~~.

DATED this 16 day of May, 2007.

Respectfully submitted,
MATTHEW H. MEAD
United States Attorney

By: _____
JAMES C. ANDERSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS** upon the following by placing the same in the United States mail, postage prepaid and dated this 16 day of May, 2007:

Mr. Frank Chapman
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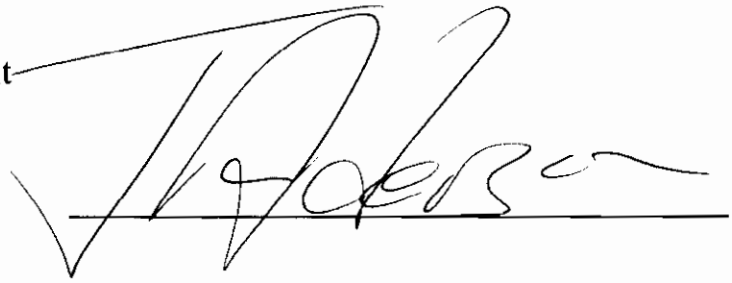

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

UNITED STATES OF AMERICA,	)	CR 06-55-M-DWM
Plaintiff,	)	
vs.	)	ORDER
JERALD ELMO BROBST,	)	
Defendant.	)	

I. Introduction

On October 20, 2006, the Grand Jury charged Defendant Jerald Elmo Brobst in a three-count indictment for violations of 1) 18 U.S.C. § 2252A(a)(2), receipt of child pornography; 2) 18 U.S.C. § 2252A(a)(5)(B), possession of child pornography; and 3) forfeiture under 18 U.S.C. § 2253(a). The Court originally set a trial date for January 16, 2007 but then granted a continuance until February 26th based upon a motion by Brobst. The Court previously denied a motion for independent analysis of the physical evidence in order to comply with 18 U.S.C. § 3509(m) and the Adam Walsh Child Protection and Safety Act. Brobst has filed four suppression motions and a motion to dismiss. All the

motions are dismissed except for the motion to suppress the pre-*Miranda* statements, which shall be the topic of the suppression hearing.

II. Factual Background

On July 11, 2006, the Lake County Sheriff's Office received a report from a contractor that there was child pornography in Brobst's Big Fork residence. The contractor, Ken Gerg, reported that earlier that day he had been moving a filing cabinet at Brobst's home when he found a stack of pictures behind it. The top picture was of a naked young female in a sexual position. P. Br. 2 (consolidated response brief). Gerg was nervous, did not examine any further photos, and left. *Id.*

Detective Daniel Yonkin met with Justice of the Peace Chuck Wall and received a search warrant for the residence. In his application Yonkin used 31 Driftwood Lane as the address for Brobst's residence, which was based upon Gerg's report. P. Br. 2. The warrant described the residence as a "single story, single family, ranch style dwelling with shingle roof, located at 31 Driftwood Lane, Woods Bay, Montana." D. Br. 1 (1st motion brief). The search warrant, which Judge Wall signed, failed to reflect a change in the address system that was instituted in February 2006 for purposes of an enhanced 911 system. The new address assigned to the Brobst residence was 32877 Driftwood Lane. D. Br. 2.

Yonkin and two other law enforcement officers then proceeded

to Brobst's residence.[1] Upon arrival they noticed a tree with a sign posted on it that had the name "Brobst" and the new address. There was also a mailbox with "Brobst" on it. P. Br. 2-3; D. Br. 2. Yonkin spoke with a neighbor and confirmed the residence belonged to Jerry Brobst.

Brobst was not home and so the officers entered via an open window. They subsequently found the filing cabinet described by Gerg and found 28 pages of material that contained numerous illicit photos of children. P. Br. 3; D. Br. 2. Brobst arrived, but the Parties offer different facts regarding whether the search was in progress or complete when he arrived. Allegedly the officers told Brobst to come inside and then prevented him from moving freely within the residence. D. 3rd Br. 2. The officers told him they had a search warrant for his home, gave him a copy, and then asked him if the illegal photos they found were his. P. Br. 3. He allegedly stated that since the house was his and the photos were in the house then they were his as well. *Id.* He told the officers that no one else resided there and he then reasserted his ownership of the photos. *Id.*

The officers arrested Brobst, seized numerous items, and transported Brobst to the Lake County Detention Center. Later on officers gave Brobst his *Miranda* warning and then interviewed him. P. Br. 3. In the taped interview, Brobst admitted to

[1] At the location of Brobst's residence there is another single story, single family, ranch style home with a shingle roof nearby. There is also a garage that looks similar to the two residences. D. Br. 2.

Yonkin that he had started ordering child pornography approximately three years before. *Id.* Brobst further admitted printing the pictures. Notably, Brobst's counsel, Peter Leander, called during the interview and requested that it cease. Yonkin told Brobst about Leander's request, Brobst followed Leander's advice, and the interview was over. P. Br. 3-4.

III. Analysis

A. The Search Warrant Satisfied the Particularity Requirement and is also Supported by the Good Faith Exception.

Despite the use of the residence's prior address, the search warrant described the residence with sufficient particularity. The Fourth Amendment requires that a warrant particularly describe the place to be searched. U.S. Const. amend. IV. "The test for determining the validity of a warrant is whether the warrant describes the place to be searched with 'sufficient particularity to enable law enforcement officers to locate and identify the premises with reasonable effort,' and whether any reasonable probability exists that the officers may mistakenly search another premises." *United States v. Mann*, 389 F.3d 869, 876 (9th Cir. 2004) (quoting *United States v. Turner*, 770 F.2d 1508, 1510 (9th Cir. 1985)). Sufficient particularity must exist so as to give meaningful guidance to the searching officers. *United States v. Clark*, 31 F.3d 831, 836 (9th Cir. 1994) (citation omitted), *cert. denied*, 513 U.S. 1119 (1995). "[I]t need only be reasonably specific, rather than elaborately detailed." *United States v. Rude* 88 F.3d 1538, 1551 (9th Cir.

1996) (citation and internal quotation marks omitted), *cert. denied*, 519 U.S. 1058 (1997).

At first blush the failure to include the new address coupled with the proximity of a similar home might appear to cripple the warrant, but a review of the Ninth Circuit's *Turner* decision shows otherwise. In *Turner*, the court found the search warrant valid despite the use of the wrong street address on a street where there were four homes. 770 F.2d at 1509. The court noted that the warrant included the correct description of the house (and that none of the nearby homes looked similar), but the warrant listed an address two-tenths of a mile away in a location unknown to the agents. *Id.* at 1510. However, the court found the warrant description sufficiently particular given that, among other things, the agent on the scene knew which house was to be searched and did, in fact, search the correct home. *Id.* at 1511. Interestingly, as a point of dicta the court cited to a precept that in instances where details are misstated in a warrant the name of a location "will prevail" over the address. *Id.* (citation omitted). The observations from *Turner* show that the search warrant satisfies the constitutional mandates.[2]

[2] The Ninth Circuit relied on some of this logic more recently in *United States v. Mann*, 389 F.3d 869, 877 (9th Cir. 2004). *Mann*, a Montana case, is not factually apposite but the reflections by the court are instructive. It noted that both *Mann* and *Turner* involved rural situations. The *Mann* Court reviewed that in *Turner*, "the address in the warrant was reasonable for the location intended." *Id.* Like *Turner*, the *Mann* Court also cited the importance of the investigating agent's knowledge of which home was meant to be searched. *Id.*

Here, the warrant addressed a home that, based on the description in the warrant, was similar to a home nearby. Due to a technicality the address was out-dated. Significantly two signs associated with the residence affirmed that the home was the correct one. This case differs from *Turner* and *Mann* in the respect that the agents there had previously watched the homes they eventually searched, but it is the reference by those courts to the subjective knowledge of the investigating agents that is important. In this case the signs posted at the residence and the confirmation by the neighbor gave the agent similar assurance that the home was correct despite the old address. He knew, as it was put in *Turner*, "which premises were intended to be searched." 770 F.2d at 1511. Additionally, the dicta from *Turner*—signs trump addresses—favors the validity of the warrant. As the *Mann* Court surmised, "the address in the warrant was reasonable for the location intended." 389 F.3d at 877.

Brobst discounts the applicability of these cases because of the rural nature of the surroundings in those cases and the fact that the agents in those cases had personally watched the homes before seeking the warrants. The rural nature from *Mann* does distinguish it from the facts here, but it is that court's continued reliance on *Turner* that was notable. And although the home in *Turner* was in a rural area, it, as here, was on a road with a few other homes.

Moreover, as Brobst acknowledges in his reply brief, those

courts' approvals of the warrants were partially based upon the knowledge of the investigating agents that the locations searched were the places that were intended to be searched. D. Rep. Br. 2. These observations-which were outside the four corners of the warrants-suggest that here, where Yonkin was able to confirm that the home he wanted to search was indeed the Brobst residence despite the address, the subjective knowledge supports the validity for the warrant.

The Court also notes the Ninth Circuit's observation in *United States v. Alexander*: "The particularity requirement inquires into the sufficiency of the description of the premises to be searched, and tests whether 'the officer with a search warrant can with reasonable effort ascertain and identify the place intended." 761 F.2d 1294, 1300 (9th Cir. 1985) (quoting *Steele v. United States*, 267 U.S. 498, 503 (1925)). The search warrant and Yonkin's reasonable efforts satisfy this behest.

Moreover, the good faith exception applies. The good faith exception to the requirement of a valid search warrant may apply if an objectively reasonable basis existed for the mistaken belief of the existing officers that the warrant was valid. *Massachusetts v. Sheppard*, 468 U.S. 981, 987-88 (1984). The inquiry is "whether a reasonably well-trained officer would have known that this particular search was illegal despite the magistrate judge's authorization." *United States v. Clark*, 31 F.3d 831, 835 99th Cir. 1994) (citation omitted), *cert. denied*, 513 U.S. 1119 (1995). Factors include whether the police misled

the magistrate judge or whether the magistrate judge abandoned his or her judicial role by issuing a warrant or relying "on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 923 (1984) (citation and quotation marks omitted).

Neither party addresses this point, but this is a case that readily fits the good faith exception. Yonkin set forth a strong case for probable cause in the affidavit and thought he adequately described the residence in the warrant only to be tripped up by a recent, technical change to the address. There is no indicia of police or judicial misconduct. The good faith exception is a final measure that denies the motion.

B. The Motion to Suppress all Statements due to a Lack of a Valid Search Warrant is Denied.

Brobst's second motion is predicated on a finding that the search warrant was invalid. He argues all of his statements, both before and after the *Miranda* warning, should be suppressed because they emanate from the violation of his Fourth Amendment rights. Were the warrant ruled invalid he would have a point. However, since the warrant complied with constitutional mandates and is supported by the good faith exception, the motions lacks merit.

C. The Motion to Dismiss is Denied because its Characterization of 18 U.S.C. § 3509(m) and its Effects on the Defendant is Without Merit.

Defendant makes six points for dismissal concerning 18

U.S.C. § 3509(m) and the Adam Walsh Child Protection and Safety Act of 2006, alleging that it impedes due process guarantees, fair trial rights, and the Sixth Amendment's right to confront witnesses and evidence. None of his arguments compel dismissal. As stated in this Court's January 8, 2007 Order denying the motion for independent analysis and duplication of the computer hard drive:

> One of the provisions of the act, section 504, amended 18 U.S.C. § 3509 through the addition of subsection (m), which prohibits the reproduction of child pornography. § 3509(m) specifically states that child pornography "shall remain in the care, custody and control of either the Government or the court." It further enumerates that this law prevents defendants from copying or otherwise reproducing the subject child pornography. It specifically directs courts to deny such requests for reproduction under Rule 16 of the Federal Rules of Criminal Procedure as long as the evidence is made "reasonably available." 18 U.S.C. § 3509(m)(2)(A). Thus, the Court cannot grant Brobst's motion.

Brobst's new motion covers similar ground. He states the case should be dismissed because 1) officers of the court (counsel) are entitled to control the alleged pornography; 2) criminal defendants enjoy the presumption of innocence; 3) the new law contradicts Rule 16; 4) the law is fundamentally unfair and prejudicial; 5) it violates his due process rights; and 6) it is unconstitutional because it presumes the material in possession is contraband.

Brobst is not entitled to possess or duplicate the material regardless of counsel's standing or Rule 16. The Court already addressed the first and third points. The Congress enacted the law to protect children and to ensure this the law specifically

precludes duplication and distribution. As discussed, the new law overrides Rule 16 (which Congress also approved). Counsel's standing as an officer of the court does not override congressional intent as manifested through a constitutional law. Those arguments fail.

In his second point, Brobst also reminds the Court that he is innocent until proven guilty. This presumption, which the Court ensures, does not equate to an unfettered right to reproduce or possess child pornography. And contrary to Brobst's argument, the availability of the evidence for inspection by the defense team enables Brobst to adequate representation as well.

Brobst's argument concerning fairness and prejudice covers ground already ruled on by the Court's prior order addressing inspection. The material is available and it will not be unduly burdensome and costly for Brobst to access the material in Helena.

In his fifth point, Brobst contends that his due process rights under the Fourteenth Amendment will be violated if he does not have the opportunity to view the subject material. Brobst again misses the mark because as stated by the law and through this Court's Order, the material must be made reasonably available for inspection. Consequently, while it may be inconvenient for Brobst to inspect the material in Helena, the inconvenience does not rise to a level that infringes his constitutional rights. Due process rights are only violated when the matter of unfairness fatally infects a defendant's trial.

See United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982).

Brobst's last challenge alleges that because the pornographic material may not actually depict minors the statute undermines his constitutional rights. His line of reasoning recites a number of ways images can be manipulated and how the evidence must be found authentic. He also notes that images can appear to have minors when they are actually adults. What Brobst fails to do is link these points, which are valid, to how the requirements of the statute are unconstitutional and why he will not receive a fair trial when the evidence will have to be substantiated in front of a jury. Brobst's defense team will have the opportunity to examine and attack the evidence as necessary. He will enjoy his full panoply of rights at trial and specifically, the burden will be on the United States to demonstrate element by element that Brobst violated the law. If the United States cannot prove that the material contains minors or that the images are not authentic, then Brobst will not be convicted.

Therefore, the motion to dismiss is denied.

E. The Motion to Suppress Items Seized is Denied because Probable Cause Existed to Authorize Seizure under the Warrant.

Brobst argues that the officers seized items that should be suppressed because they were outside the scope of probable cause and the search warrant was unconstitutionally broad. A warrant "must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be

seized." *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986) (citation omitted).

As the United States pointed out, the Ninth Circuit has found probable cause supports the seizure of "an entire computer system" in a child pornography case where it was "likely to evidence criminal activity." *United States v. Lacy*, 119 F.3d 742, 746 (9th Cir. 1997) (citation and internal quotation marks omitted). The *Lacy* Court found that where "[t]he government knew Lacy had downloaded computerized visual depictions of child pornography, but did not know whether the images were stored on the hard drive or on one or more of his many computer disks" the generality of the application and the warrant were acceptable. *Id.* This logic applies here as well.

The search warrant specifically charges the officers to seize "photographs depicting children engaged in actual or simulated sexual conduct, computers, compact disks, floppy disks, hard drives, memory cards, printers, and other portable digital devices, DVD's, and video tapes and any other evidence of the commission of the offense(s) of SEXUAL ABUSE OF CHILDREN [state charge]." Brobst asserts that the application for the warrant contained probable cause only to seize a computer tower, printer, and printed material. D. Rep. Br. 1. Consequently, Brobst claims that the seizure of an array of computer items (see Exhibit I, the return on search warrant) is unwarranted where there was no probable cause. He also specifically claims that of an iPod, a camera, some marijuana, and a handgun were outside the

scope of the items approved by the warrant.

As in *Lacy*, the officers here had probable cause to believe that Brobst was engaged in a criminal enterprise that involved the nexus of child pornography and his computer; thus, all of the items seized related to the computer and possibly related to the production of the materials, including the iPod and the camera were authorized to be seized. The handgun and marijuana were validly seized as contraband but they should not be admitted as evidence because of relevance. The motion is denied.

IV. Conclusion

Accordingly, IT IS HEREBY ORDERED that the first suppression motion (dkt #16) is DENIED;

IT IS FURTHER ORDERED that the second suppression motion (dkt #18) is DENIED;

IT IS FURTHER ORDERED that the motion to dismiss (dkt #24) is DENIED;

IT IS FURTHER ORDERED that the last suppression motion (dkt #36) is DENIED; and

IT IS FURTHER ORDERED that the suppression hearing set for February 20, 2007 shall address the third suppression motion (dkt #20).

DATED this 6th day of February, 2007.

DONALD W. MOLLOY, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	CR 06-55-M-DWM
vs.	)	ORDER
JERALD ELMO BROBST, Defendant.	)	

Defendant Brobst has been indicted for receipt and possession of child pornography in violation of 18 U.S.C. § 2252A. Trial is currently set for February 26, 2007. Brobst has filed a motion for independent analysis of physical evidence and for protection order. Brobst seeks a duplicate image of his computer hard drive for an independent forensic examiner. The Court cannot legally grant the relief Brobst requests.

Access to this evidence is limited pursuant to the July 27, 2006 passage of the Adam Walsh Child Protection and Safety Act of

2006. One of the provisions of the act, section 504, amended 18 U.S.C. § 3509 through the addition of subsection (m), which prohibits the reproduction of child pornography. § 3509(m) specifically states that child pornography "shall remain in the care, custody and control of either the Government or the court." It further enumerates that this law prevents defendants from copying or otherwise reproducing the subject child pornography. It specifically directs courts to deny such requests for reproduction under Rule 16 of the Federal Rules of Criminal Procedure as long as the evidence is made "reasonably available." 18 U.S.C. § 3509(m)(2)(A). Thus, the Court cannot grant Brobst's motion.[1]

In a case such as this, the new law creates difficulties for a defendant because it limits discovery opportunities. The practice in Montana in the past has been for the United States to provide clones of the hard drives to designated experts in the limited circumstances where experts were needed. The new law curtails this practice. The United States acknowledges that to meet its burden it must provide reasonable opportunity for Brobst's expert to examine the hard drive at the state lab in Helena. The United States further attests that Brobst, Brobst's attorney, and a private investigator have already visited the lab

[1]The Court notes that Brobst cites extensively to case law, but those cases are inapposite because they pre-date the Adam Walsh Child Protection and Safety Act of 2006.

and viewed the material. The Court expects the United States will continue to make the evidence reasonably available to Brobst and Brobst's defense team.

Brobst also moves for a protection order but he does not substantiate why that is appropriate or exactly how it is connected to the motion for independent analysis. That aspect of the motion is also denied.

Accordingly, IT IS HEREBY ORDERED that the motion for independent analysis and for protection order (dkt #22) is DENIED.

DATED this 8th day of January, 2007.

Donald W. Molloy, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CRIMINAL ACTION NO. 06-39-C

UNITED STATES OF AMERICA, **PLAINTIFF,**

V. **ORDER**

REGINALD HOUGH, **DEFENDANT.**

* * * * * * * * * * * *

This matter is before the court on the defendant's motion for discovery and to declare 18 U.S.C. § 3509(m) unconstitutional (DE 27). The court, having reviewed the record and being otherwise advised, will deny the motion.

I. Background

On September 14, 2006, the court entered an order granting the defendant's motion "to obtain the assistance of a computer expert to examine the computer and hardware, software, e-mail, and all other aspects relating to the computer seized by government authorities" in this matter. (DE 24 at 1.) On October 16, the defendant filed a motion for a continuance, arguing that the parties needed additional time to brief issues raised by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 504, 120 Stat. 587, 629, which added subsection (m) to 18 U.S.C. § 3509. The court entered an order on October 19, 2006 (DE 26), granting the motion to continue and ordering the parties to file simultaneous briefs on this issue, with responses and replies to follow. On

November 2, 2006, the defendant filed the motion at hand, requesting that the court "find Title 18 U.S.C. § 3509(m) unconstitutional" and "order the United States to provide an accurate copy of any and all materials taken from the home of the Defendant . . . to enable examination by an expert witness to be employed by the Defendant, outside a 'Government facility.'" (DE 27-1 at 1.)

II. Analysis

18 U.S.C. § 3509(m)(1) provides that "any property or material that constitutes child pornography . . . shall remain in the care, custody, and control of either the Government or the court." Section 3509(m)(2)(A) requires courts to deny, "in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography . . . so long as the Government makes the property or material reasonably available to the defendant." Property or material that constitutes child pornography

> shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

18 U.S.C. § 3509(m)(2)(B).

The government has given the defendant three alternative means of access to the pornographic material at issue in this case. First, the government suggests that the government "expert who performed the forensic examination in this case

[might] bring a copy of the hard drive and a portable forensic machine to meet with defense counsel" and the defendant's expert. (DE 29 at 2.) Second, the government suggests that the government's expert might "meet with defense counsel and any computer expert retained by the defense to demonstrate and explain the examination process" used by the government on the hard drive. *Id.* Third, the government has offered to "[a]llow the defense expert an opportunity to independently examine the hard drive while the hard drive remains in the custody of the government." *Id.* at 2-3. The government argues that by making these offers, it has given the defendant "ample opportunity" to examine the hard drive, and therefore the government concludes that the "reasonably available" standard of 18 U.S.C. § 3509(m)(2)(B) has been met.

The defendant argues that 18 U.S.C. § 3509(m) is unconstitutional because, by limiting his access to evidence while allowing the government full access to evidence, it violates his constitutionally guaranteed rights to due process, a fair trial, and the effective assistance of counsel. The defendant also claims that although he has located potential expert witnesses, he has not found any who are willing to examine the hard drive at issue in a "Government facility." (DE 27 at 3.) Therefore, the defendant asks this court to declare § 3509(m) unconstitutional and to allow his expert to copy the hard drive, subject to a list of restrictions.[1]

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[1] For example, the defendant suggests that his expert "would keep these evidence copies in a locked safe in his office except while being actively utilized by him or his staff" and that "[w]ithin, say, 30 days of the termination of this matter (including any appeal)," the expert and defense counsel "would return copies of the

"A district court cannot . . . override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. 'Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought.'" *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)). In general, "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions"; therefore, "[a] defendant's interest in presenting such evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)).

Other courts have already recognized that "[t]he manifest purpose of [18 U.S.C.] § 3509(m) is to prevent the unauthorized release and redistribution of child pornography that law enforcement officers and the government have gathered for use in a criminal trial." *United States v. Johnson*, --- F. Supp. 2d ----, 2006 WL 2796828, at *2 (N.D. Iowa Sept. 27, 2006); *see also* Adam Walsh Child Protection and Safety Act, § 501(2)(F), 120 Stat. at 623 (finding that "[i]t is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accomodations for the inspection . . . of such material for the purposes

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retained computer evidence and the evidence files to the Assistant United States Attorney, or anyone so designated in her place and stead." (DE 27 at 9.)

of mounting a criminal defense"). In passing this statute, Congress expressly balanced the rights of a defendant to mount a vigorous defense with the need to prevent repeated child pornography.

18 U.S.C. § 3509(m) "assures that each defendant is given every reasonable opportunity to prepare his or her defense" by requiring "that defendants, their attorneys and their experts be given 'ample opportunity for inspection, viewing, and examination' of the child pornography." *Johnson*, 2006 WL 2796828, at *3 (quoting 18 U.S.C. § 3509(m)(2)). This is a limited and reasonable restriction on the right of a criminal defendant to present relevant evidence, and the court cannot re-weigh these priorities and arrive at a new result. Therefore, the court finds that the statute is not facially unconstitutional.

Moreover, 18 U.S.C. § 3509(m) is not unconstitutional as applied to the defendant in this case. The defendant has essentially argued that the statute should be declared unconstitutional because he claims – without documenting his efforts – that he cannot find an expert witness willing to examine the hard drive in a government facility. But this potential problem, like the similar problem at issue in *Johnson*, "has nothing to do with the constitutionality of § 3509(m)." *See* 2006 WL 2796828, at *3. Congress has weighed "the public interest in prohibiting the dissemination of child pornography used in criminal trials with the public interest in reducing the costs of expert services for the indigent" and reached a balance "in favor of the public interest in prohibiting dissemination" of child pornography. *Id.*

If the defendant cannot find an expert witness willing to abide by the restrictions of § 3509(m), then he should file a motion for assistance pursuant to 18 U.S.C. § 3006A(e),[2] but his present, unsubstantiated difficulties do not show that the application of 18 U.S.C. § 3509(m) to this case violates his constitutional rights. Accordingly,

IT IS ORDERED that the motion for discovery and to declare 18 U.S.C. § 3509(m) unconstitutional (DE 27) is **DENIED**.

Signed on December 6, 2006

Jennifer B. Coffman, Judge
United States District Court

[2] This should not be construed as a suggestion that such a motion is necessary.