

THE NLC MANUAL ON

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PORNOGRAPHY

LAW

CASES & ANALYSIS



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The National Law Center for Children and Families® (NLC) is an educational organization founded in 1991. The NLC is a non-profit corporation in the Commonwealth of Virginia and is a 501(c)(3) entity. Our mission is focused on the protection of children and families from the harmful effects of sexual exploitation and sexually exploitive material by assisting in law enforcement and law improvement.

The role of NLC is:

- *to be a specialized resource to those who protect children and families by drafting, enforcing, and defending state and federal laws addressing the harms of sexual exploitation and sexually exploitive material;*
- *to counsel federal, state, and local legislators about the constitutionality and effectiveness of amendments to existing statutes and local government laws; and*
- *to provide a training and information clearinghouse on the specialized issues involved in sexual exploitation and sexually exploitive material related cases.*

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National Law Center for Children and Families®

Preface

This Manual is designed as an educational tool to aid law enforcement in understanding and successfully investigating and prosecuting crimes involving child pornography and child sexual exploitation. It is anticipated that primarily investigators and prosecutors of cases involving child pornography or child sexual exploitation will use the material presented herein. The emphasis in this Manual has been placed on the questions of law involved in such cases and focuses on the most common fundamental and generic issues involving Constitutional, statutory, and case law arising in connection with such investigations and prosecutions. It is meant to have practical application in contemporary American legal practice, and does not constitute a comprehensive treatment of the psychological, sociological, historical, political, or international law issues involved.

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CHAPTER 1

INTRODUCTION

*“The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance”**

§1.01 Child Pornography Defined

Child pornography has been characterized as “in essence, the permanent record of the sexual abuse of a child.”[†] While the elements and wording of child pornography laws vary, under federal law[‡] and most state laws[§] child pornography consists of three basic elements:^{**}

- (1) *A visual depiction* (these visual depictions can take a number of forms, including photographs, videotapes and DVD recordings, developed or undeveloped film, or other types of computer generated images)
- (2) *of a minor* (child victims range in age from infancy to 18 years; federal law defines “minor” as anyone under 18 years of age)^{††}

* *New York v. Ferber*, 458 U.S. 747, 757 (1982).

† *Effect of Pornography on Women and Children: Oversight Hearings on Pornography, Magazines of a Variety of Courses, Inquiring into the Subject of their Impact on Child Abuse, Child Molestation, and Problems of Conduct Against Women, Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong. 38-39 (1985) [hereinafter *Effect of Pornography*] (statement of Special Agent Kenneth V. Lanning, Behavioral Science Unit, Federal Bureau of Investigation).

‡ See 18 U.S.C. § 2256(8). See also, *infra*, Appendix A (listing selected federal and state laws against child sexual exploitation).

§ See 2005 CHILD ABUSE AND NEGLECT STATE STATUTES SERIES, STATUTES AT A GLANCE. <http://nccanch.acf.hhs.gov/general/legal/statutes/define.pdf> (visited 06/06/2006). The National Clearinghouse on Child Abuse and Neglect Information maintains a website of publications regarding child abuse statutes across the United States. See, <http://nccanch.acf.hhs.gov/general/legal/statutes/search/> (visited 06/06/2006).

** See *New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 495 U.S. 103 (1990); *U.S. v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). See also *U.S. v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), *cert. denied*, 484 U.S. 856 (1987); *U.S. v. Knox*, 32 F.3d 733 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 897 (1995).

†† See 18 U.S.C. § 2256(1).

- (3) *engaged in sexually explicit conduct.* (sexually explicit conduct” has been defined under federal law as actual or simulated sexual intercourse, including vaginal, anal, and oral intercourse; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area.)^{**}

These visual depictions of child pornography are deliberately designed to portray children as sex objects for use by adults:

Child pornography is not an art form. It is documented evidence of sexual molestation and abuse and the continuing victimization of children. These materials graphically depict children, sometimes as young as 2 years of age, engaged in a variety of sexually explicit activities, captured in full color, displayed in magazines, on slides, in photographs, on film, videotape, and now in picture-quality computer images.^{§§}

§1.02 History of the Legal Status of Child Pornography

Child pornography was originally prosecuted under federal and state laws prohibiting the production or dissemination of “obscenity.”^{***} The legal definition of “obscenity” is the product of a

^{**} *Id.* at § 2256(2).

^{§§} *Child Pornography Prevention Act of 1995: Hearing on S. 1237, A Bill to Amend Certain Provisions of Law Relating to Child Pornography, and for Other Purposes, Before the Senate Comm. on the Judiciary*, 104th Cong. 20 (1997) [hereinafter *Child Pornography Prevention Act of 1995*] (statement of Jeffrey J. Dupilka, Deputy Chief Postal Inspector for Criminal Investigations, U.S. Postal Inspection Service). It is important to note that some states include in their definition of child pornography scenarios with children watching, sexual conduct among minors, or sexual acts without reference to adults.

^{***} See, e.g., *Arizona v. Limpus*, 128 Ariz. 371, 625 P.2d 960 (1981) (photographing minor engaged in obscene sexual conduct); *Raymond Heartless, Inc. v. Delaware*, 401 A.2d 921 (Del. 1979) (“Lollitots” magazine); *Gotleib v. Delaware*, 406 A.2d 270 (1979) (“Lollitots,” “Tiny Nudes,” and “Little Girls Together” magazines; and an unnamed film depicting two naked children in a bed engaging in sexual contact with one another); *People v. Green*, 156 Cal. Rptr. 713, 94 Cal.App.3d Supp. 1 (1979) (film “Lollypops No.

line of Supreme Court opinions which have examined the mandate of the First Amendment and determined that certain types of activities that exploit human sexuality are not entitled to protection under the Constitution.^{†††} The present day test for “obscenity” was first articulated by the Court in 1973 in *Miller v. California*.^{***}

A proper comprehension of the legal concept of “obscenity” is essential to a complete understanding of how the laws that proscribe child pornography originated. While child pornography is historically related to the concept of obscenity, under modern constitutional law it is a separate and distinct category of material which is also unprotected by the First Amendment.^{§§§} In other words, child pornography need not be obscene to be unconstitutional. If the material meets the definition of child pornography, the material is unprotected by the First Amendment and is illegal.

Historically speaking, in the adult pornography market, depictions of every imaginable form of sexual behavior, including the most deviant, had been available for some time. Prior to the 1970s, child pornography was not generally recognized as a significant problem in the United States. In the mid-1970s, prosecutions for all forms of illegal pornography were neglected. As fear of prosecution diminished, former taboos fell away, increasing the demand for illicit materials. This ultimately resulted in greatly expanded market for child pornography.^{****}

In the 1982 landmark case of *New York v. Ferber*,^{††††} the U.S. Supreme Court held that child pornography is unprotected by the First Amendment. Before *Ferber*, it had been urged that child pornography could be subject to government regulation *only* where the prosecution established that it was also legally “obscene.” After *Ferber*, the federal government and many states enacted child

9” and various unnamed films); and *People v. Wiener*, 154 Cal. Rptr. 110, 91 Cal.App.3d 238 (1979) (“Lolita – Sex” and “Children Love -- Incestuous Love” magazines).

^{†††} See *Roth v. U.S.*, 356 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973).

^{†††} See discussion, *infra*, at Chapter 4.

^{§§§} See *New York v. Ferber*, 458 U.S. 747, 764 (1982).

^{****} See *Child Pornography and Pedophilia: Report by the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 99th Cong., 2nd Sess. 29 (1986) [hereinafter *Child Pornography and Pedophilia*].

^{††††} 458 U.S. 747 (1982). See, *infra*, Chapter 5.

pornography laws making it a crime to produce, disseminate, or possess child pornography, regardless of whether it meets the test for obscenity. Some states, however, still require the prosecution to establish that the material is also obscene in order to obtain a conviction for a child pornography crime.^{****} This statutory language places a heavier burden on child pornography prosecutions than is required by the Constitution.

§1.03 The Child Victim

Every child is a potential sexual molestation victim.^{§§§§} However, certain groups of children are more susceptible to the traps laid by child molesters and are more likely targets for abuse. Who is at an increased risk?

- Runaway/Giveaway/Throwaway Child (“Missing From Home”)
- Children from Dysfunctional Families
- Children Engaged in Extra-Curricular Activities
- Children Who Use the Internet^{*****}

§1.04 Perpetrator Categories

Perpetrators of crimes related to child pornography and child sexual exploitation include, but are not limited to five basic groups:

^{****} Currently, at least three states (Alabama, California, and Connecticut) either do not proscribe child pornography unless it is also found to be obscene, or incorporate the element of obscenity in a child sexual exploitation statute, usually imposing increased penalties for material which is found to be obscene.

^{§§§§} See *Child Pornography Prevention Act of 1995*, *supra* note §§, at 23 (Prepared Statement of Jeffrey J. DuPilka, Deputy Chief Postal Inspector for Criminal Investigations):

Who are the victims? There is a popular notion that runaways and children from broken homes are the main targets of pedophiles. We have found otherwise. In many cases, the victim is the child “down the street” who has been seduced into a relationship by a trusted adult and then hides the fact because of guilt, shame, blackmail, or, in some instances because, for the first time in their life, they have received attention and what is interpreted to be affection from an adult.

^{*****} Finkelhor, et. al, *Online Victimization, A Report on the Nation’s Youth* (2000)

- (1) Procurers: those who *procure/induce/persuade* a minor to be the subject of child pornography, or to participate or engage in a sexual performance.
- (2) Child Molesters: those who participate or *engage in sex acts* with minors.
- (3) Producers: Those who use a minor in the *production* of child pornography, or who participate in the recordation or production of visual depictions of minors engaging in proscribed sexual conduct.
- (4) Distributors: Those who aid in both commercial and non-commercial *dissemination* of child pornography.
- (5) Collectors: Those who *possess* child pornography (who use it for a number of purposes, including the validation of illegal adult/child sexual practices, personal sexual satisfaction, or as a seduction tool in the actual process of sexually abusing a child).

§1.05 The Purpose of this Manual^{††††}

This manual is a practical manual designed to assist law enforcement efforts against child pornography and child sexual exploitation. It is meant to be a quick practical reference, not an

^{††††} **DISCLAIMER:** This Manual attempts to highlight and discuss certain prominent legal issues raised by child pornography, obscenity, or child sexual exploitation. Because of the scope and magnitude of the topic, the overview herein presented is not a definitive or comprehensive analysis of the matters in question. This Manual is provided as an educational service and a research tool to the public, and is not meant as personal or specific legal advice or analysis. **Although every attempt has been made to provide timely and current information, the Reader is cautioned that statutory or case law frequently changes. The legal authority cited herein is subject to change, and must be specifically updated by the reader.** Although a comparative analysis of selected state law is presented for instructional purposes, **the information contained in this Manual is not state-specific, and does not constitute a complete analysis of the law in the jurisdiction in which the Reader may live, and does not constitute legal advice.** Legal advice must be tailored to the specific facts and circumstances of each case, and guidance must be obtained from personal counsel.

exhaustive treatise. It provides an overview of the law at the federal and state levels as well as a list of resources for further study. Criminal prosecutions involving the sexual exploitation of children are complex. Child victims require comprehensive and specialized treatment. The prosecutor must understand the substantive and procedural issues involving the accused's constitutional rights. This manual seeks to assist in these efforts by demonstrating successful prosecution techniques for child pornography and obscenity cases. It also aims to promote public awareness of the seriousness of child sexual exploitation and its effects upon society.

Likewise, implementing laws against sexual exploitation of children presents a perplexing challenge. This manual discusses legal developments in the field, addressing the underlying data and highlighting workable solutions, in the hope that legislators and professionals in law enforcement and child welfare will be able to make progress in the battle to protect children from sexual abuse.

For the sake of our children and the preservation of our families, the problem of child pornography and child sexual exploitation must be aggressively addressed.

CHAPTER 2

OBSCENITY JURISPRUDENCE: A HISTORICAL PERSPECTIVE

§2.01 Summary of Chapter

This Chapter examines the landmark *Miller* decision and companion cases which set forth the constitutional law of obscenity as it exists today. It also discusses the initial confusion resulting from the *Miller* decision and the subsequent lack of prosecutions against the sale of obscene materials. These factors contributed to the exponential growth and proliferation of child pornography during the late 1970s, which led to the development of a legal test for “child pornography,” separate from the test for “obscenity.”

§2.02 *Miller v. California* (1973) and Companion Cases

Prior to 1973, the controlling Supreme Court case on obscenity was *Roth v. United States*,^{****} in which the Court first held that “obscene material” is not protected by the First Amendment^{§§§§} and articulated a test for determining what is obscene: “whether, to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”^{*****}

In later cases, however, while the Court did not overrule the central holding of *Roth*, it was unable to reach a majority decision on a standard to determine what constituted obscene material.⁺⁺⁺⁺⁺ As the Court would later note, “[i]n the absence of a majority view, [it] was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be

^{****} 354 U.S. 476 (1957).

^{§§§§} “It has been well observed that [lewd and obscene] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* at 485.

^{*****} *Id.* at 489.

⁺⁺⁺⁺⁺ See *Redrup v. New York*, 386 U.S. 767, 770-71 (1967) (noting the different tests of the several justices regarding whether and how “obscene material” should be defined.)

protected by the First Amendment.”^{*****} The Court characterized its role during this time as that of “an unreviewable board of censorship for the 50 states, subjectively judging each piece of material brought before [it].”^{§§§§§§}

It was during this period of confusion that *Memoirs v. Massachusetts*^{*****} was decided, in which a plurality of three justices held that, to support an obscenity charge, three elements must be established: (a) that the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) that the material is *utterly without redeeming social value*.^{††††††}

The addition of the third element altered the *Roth* standard substantially. Where *Roth* presumed obscene material to be without social importance,^{*****} the *Memoirs* test required the state to affirmatively prove that the material was “utterly without redeeming social value.” Despite the evidentiary difficulties of meeting this standard, many state legislatures and courts incorporated this language into their obscenity statutes. This would lead to significant interpretation and enforcement problems in the years following *Miller*.

In June of 1973, for the first time since *Roth*, a majority of five Justices joined together, and rendered a collection of historic landmark decisions in *Miller v. California*^{§§§§§§} and a line of companion cases. Regarding the significance of these cases, the Court commented:

^{†††††} *Miller v. California*, 413 U.S. 15, 23 n.3 (1973).

^{§§§§§} *Id.* Rulings such as the one issued in *Walker v. Ohio*, 398 U.S. 434 (1970), in which the full text of the opinion read, “The judgment of the Supreme Court of Ohio is reversed. [Redrup],” were typical during this period. See Geoffrey R. Stone et al., *Constitutional Law* 1168-71 (4th ed. 2001).

^{*****} 383 U.S. 413 (1966).

^{††††††} *Id.* at 418.

^{††††††} *Roth v. United States*, 354 U.S. 476, 484 (1957) (holding that “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”).

^{§§§§§§} 413 U.S. 15 (1973).

[T]oday, ... a majority of this Court has agreed on concrete guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment. Now we may abandon the casual practice of *Redrup v. New York* and attempt to provide positive guidance to federal and state courts alike.*****

On June 12th, the following decisions were released:

Miller v. California, 413 U.S. 15 (1973)
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)
Kaplan v. California, 413 U.S. 115 (1973)
U.S. v. 12-200 Ft. Reels of Super 8mm Film,
413 U.S. 123 (1973)
U.S. v. Orito, 413 U.S. 139 (1973)

Four days later, the court handed down its decisions in:

Alexander v. Virginia, 413 U.S. 836 (1973)
Heller v. New York, 413 U.S. 483 (1973)
Roaden v. Kentucky, 413 U.S. 496 (1973)

Thereafter, the Court disposed of 67 cases on the docket by vacating the judgments and remanding the cases for reconsideration in light of its rulings in *Miller*.

§ 2.03 Analysis of *Miller v. California*

The facts of *Miller v. California* are as follows. Appellant, as part of a mass advertising campaign, sent sexually explicit material^{††††††††} through the mail to a restaurant in Newport Beach, California, where it was opened by the restaurant manager and his mother. They had not requested the material and complained to

***** *Id.* at 29 (citations omitted).

†††††††† The purpose of the campaign was to advertise the sale of certain illustrated books, referred to by the Court as “euphemistically . . . ‘adult’ material.” The brochures advertised four books entitled “Intercourse,” “Man-Woman,” “Sex Orgies Illustrated,” and “An Illustrated History of Pornography,” and a film entitled “Marital Intercourse.” The brochures, which contained some descriptive printed material, primarily consisted of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed. *Miller*, 413 U.S. at 18.

the police.***** Miller was convicted of distributing obscene material in violation of a California obscenity statute§§§§§§§§ that approximately incorporated the test formulated in *Memoirs*.

On appeal, the Supreme Court once again affirmed the *Roth* holding that obscene material is not protected by the First Amendment and can therefore be regulated by the States, subject to the specific safeguards in the Court’s opinions.***** The Court explicitly rejected the *Memoirs* test, holding that the state is not required to show that the material is “utterly without redeeming social value.”+++++++ The opinion outlined a new three-part test whereby obscenity is determined by applying contemporary community standards, not “national standards.”*****

The *Miller* decision represents an assumption by a majority of the Court that, with the benefit of concrete guidelines to isolate “hard core” pornography (which guidance had been lacking in the past), lower courts could distinguish between commerce in ideas, protected by the First Amendment, and commercial exploitation of obscene material. §§§§§§§§

[1] Exploitation of Hard-Core Sex Is Not “Commerce in Ideas”

The Court recognized that there was a marked difference between “commerce in ideas” and the type of “commercial exploitation of obscene material” presented in the case before them:

[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment “The protection given

***** *Id.* at 17. The Court noted that the adult audience who received the material were “unwilling” recipients: “This case involves the application of a State’s criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.” *Id.* at 18.

§§§§§§§§ Cal. Penal Code §§ 311, 311.2 (1969).

***** *Miller v. California*, 413 U.S. 15, 36-37 (1973).

+++++++ *Id.*

+++++++ *Id.* at 37.

§§§§§§§§ *See id.* at 36.

speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people.” *Roth. v. United States, supra* at 484 (emphasis added). But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.*****

Regulation of patently offensive ‘hard-core’ materials is needed and is permissible:

One can concede that the “sexual revolution” of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive “hard-core” materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.+++++++

The Court specifically rejected the *Memoirs* test of “utterly without redeeming social value” as a constitutional standard, noting that “that concept has never commanded the adherence of more than three Justices at one time.”***** “[It] has been abandoned as unworkable by its author, n4, and no Member of the Court today supports the *Memoirs* formulation.”\$\$\$\$\$\$

[2] The *Miller* Test

Under the *Miller* test, a work may be subject to state regulation where:

***** *Id.* at 34-35.

+++++++ *Id.* at 36.

+++++++ *Miller v. California*, 413 U.S. 15, 24-25 (1973).

\$\$\$\$\$\$\$ *Id.* at 23. Note 4 refers to the dissenting opinion of Justice Brennan (who wrote the *Memoirs* decision) in *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) in which he noted that the *Memoirs* test had “concealed differences of opinion” among the justices and “did not provide a definition covering all situations.” *Paris Adult Theater I*, 413 U.S. at 81-82 (Brennan, J. dissenting).

- (1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (3) taken as a whole, the work does not have serious literary, artistic, political, or scientific value.*****

[3] Judicial Construction of Existing State Laws Invited

The Court noted that “the First and Fourteenth Amendments have never been treated as absolutes,”+++++ but acknowledged the “inherent dangers of undertaking to regulate any form of expression.”***** For these reasons, the second prong of the test requires that state laws regulating obscene materials must be carefully limited to works depicting or describing sexual conduct, and they must define that conduct *specifically*.§§§§§§§§ However, this specificity requirement may be satisfied by the wording of a statute or by authoritative judicial construction of the statute.***** Consequently, the Court held, states need not enact new obscenity statutes because previous laws could be interpreted to satisfy the specificity requirement. If state obscenity laws are thus limited, “the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.”+++++

While stressing that the task of proposing regulatory schemes belongs to state legislatures rather than the

***** *Miller*, 413 U.S. at 24.

+++++ *Id.* at 23.

+++++ *Id.*

§§§§§§§§ *Id.* at 24.

***** *Miller v. California*, 413 U.S. 15, 24 n.6 (1973) (“We do not hold . . . that all States . . . must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate.”).

+++++ *Id.* at 25.

judiciary,^{*****} the Court offered examples of the type of “hard-core” sexual conduct which could be proscribed by a state:

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such places.^{§§§§§§§§§§}

The Court also referred^{*****} to the case of *United States v. 12 200-Ft. Reels of Film*,⁺⁺⁺⁺⁺ decided the same day, which held that if there were ever “serious doubt” about the meaning of the words “obscene,” “lewd,” “lascivious,” “filthy,” “indecent,” or “immoral” as used in the federal obscenity statutes,^{*****} it was “prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific “hard core” sexual conduct given as examples in *Miller v. California*.”^{§§§§§§§§§§} The Court noted, however, that it “must leave to state courts the construction of state legislation.”^{*****} Furthermore, the Court stated that states are free to define other “hard core” acts.⁺⁺⁺⁺⁺

[4] Local Community Standards

Miller held that the trier of fact may measure the essentially factual issues of “prurient appeal” and “patent offensiveness” by the

⁺⁺⁺⁺⁺ *Id.*
^{§§§§§§§§§§} *Id.* at 25-26.
^{*****} *Id.* at 24 n.6.
⁺⁺⁺⁺⁺ 413 U.S. 123 (1973).
⁺⁺⁺⁺⁺ 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462.
^{§§§§§§§§§§} *12 200-ft.Reels*, 413 U.S. at 130 n.7.
^{*****} *Id.*
⁺⁺⁺⁺⁺ *Id.*

standard that prevails in the forum community, and need not employ a “national standard.”^{*****} In this case, California “state-wide” standards were used and approved by the Court. The Appellant had argued that “national standards” should apply, “in order to avoid unconscionable burdens on the free flow of interstate commerce.”^{§§§§§§§§§§§§§§§§} The Court responded that “obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines.”^{*****}

[5] Disposition of Case

The judgment of the appellate court was vacated and the case was remanded for further proceedings not inconsistent with the First Amendment standards established by the *Miller* opinion.

§ 2.04 Analysis of *Paris Adult Theatre I v. Slaton*

The second significant case decided that day further expanded the new obscenity doctrine by addressing whether privacy and consent are relevant to obscenity regulation.

In *Paris Adult Theater I v. Slaton*,^{*****} the state of Georgia brought a civil action to enjoin the exhibition of two obscene films that were being shown at two “adult” theaters in Atlanta.^{*****} Photographs of the theater entered into evidence showed a conventional, inoffensive entrance, without any pictures, but with signs indicating that the theaters exhibited “Atlanta’s Finest Mature Feature Films.” On the door was a sign

^{*****} *Miller v. California*, 413 U.S. 15, 31 (1973). “Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable ‘national standards’ when attempting to determine whether certain materials are obscene as a matter of fact.” *Id.* at 31-32.

^{§§§§§§§§§§§§§§§§} *Id.* at 34 n.13.

^{*****} *Id.*

^{††††††††††††††††††††} 413 U.S. 49 (1973).

^{*****} *Id.* at 51-52. The two films in question were “Magic Mirror” and “It All Comes Out in the End,” which depicted sexual conduct characterized by the Georgia Supreme Court as “hard core pornography” leaving “little to the imagination.”

stating: “Adult Theatre -- You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter.”§§§§§§§§§§§§§§§§ The trial judge “assumed that obscenity had been established”***** but nonetheless dismissed the complaints, holding that “the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.”+++++

On appeal, the Georgia Supreme Court unanimously reversed, holding that, even assuming that the adult theaters in question barred minors and gave a full warning to the general public of the nature of the films shown, the films were without protection under the First Amendment. The court concluded that “the sale and delivery of obscene material to willing adults is not protected under the first amendment [sic],”***** that the films in question were hard core pornography, and that the showing of such films should have been enjoined.§§§§§§§§§§§§§§§§

On certiorari, the U.S. Supreme Court held that obscene material does not acquire immunity from state regulation simply because it is exhibited only to “consenting adults.”***** The Court discussed at length the numerous state interests that justify obscenity legislation *other* than the interest in protecting children and the “unwilling adult viewer.”+++++ The Court further held that the material itself is sufficient for determining the question of obscenity (the “material speaks for itself”), so that expert testimony is not required to prove obscenity.*****

§§§§§§§§§§§§§§§§ *Id.* at 52.

***** *Id.* at 53.

+++++ *Id.*

§§§§§§§§§§§§§§§§ *Id.*

§§§§§§§§§§§§§§§§ *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 53 (1973).

***** *Id.* at 57.

+++++ *Id.* at 58. “These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.” *Id.* “[T]here is a ‘right of the Nation and of the States to maintain a decent society’” *Id.* at 59-60, quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

§§§§§§§§§§§§§§§§ *Id.* at 56 n.6.

Once again, the Court reaffirmed the basic *Roth* holding that obscene material has no protection under the First Amendment, citing *Miller v. California*.§§§§§§§§§§§§§§§§ The Court reiterated that it directed its holdings not at thoughts or speech but at depiction and description of specifically defined sexual conduct, which States may regulate within limits designated to prevent infringement of First Amendment rights.***** The Court also reaffirmed the holdings of *U.S. v. Reidel*†††††††††††††††† and *U.S. v. Thirty-seven Photographs*,§§§§§§§§§§§§§§§§ that commerce in obscene material is not protected by any constitutional doctrine of privacy.§§§§§§§§§§§§§§§§

The Court “categorically disapproved” the idea that obscene pornography becomes immune from regulation simply because it is exhibited for private adults only.***** While the states have an interest in protecting juveniles and unconsenting adults from exposure to obscenity, these are not the only interests that justify regulation. The states also have a legitimate interest in regulating obscene material in “local commerce and all places of public accommodation,” within Constitutional safeguards.††††††††††††††††

[F]or us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take. . . . The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren’s words, the States’ “right

§§§§§§§§§§§§§§§§ *Id.* at 69.

***** *Id.*

†††††††††††††††† 402 U.S. 351, 356 (1971).

†††††††††††††††† 402 U.S. 363, 376 (1971).

§§§§§§§§§§§§§§§§ *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 69 (1973), citing *United States v. Orito*, 413 U.S. 139, 141-43 (1973); *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 126-29 (1973).

***** *Paris Adult Theater I*, 413 U.S. at 57.

†††††††††††††††† *Id.*

. . . to maintain a decent society.” *Jacobellis v. Ohio*,
378 U.S., at 199. (dissenting opinion)*****

[1] No Demonstration Of Harm Needed To Ban Obscenity

Paris Adult Theater I held that, as a matter of Constitutional law, no conclusive “scientific” proof that a connection between antisocial behavior and obscene material was needed before a legislative body could reasonably determine that such a connection does or might exist and act to ban obscenity:

The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.*****

The Court also noted that the *Hill-Link Minority Report* of the Commission on Obscenity and Pornography indicated that “there is at least an arguable correlation between obscene material and crime.”*****

***** *Id.* at 68-69.

***** *Id.* at 62-63 (citations omitted).

***** *Id.* ; See also *supra* n. 8:

THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 390-412 (1970). For a discussion of earlier studies indicating “a division of thought [among behavioral scientists] on the correlation between obscenity and socially deleterious behavior,” *Memoirs v. Massachusetts, supra*, at 451, and references to expert opinions that

[2] No Constitutional Right To Acquire Obscenity Exists

The Court reiterated that the government can legitimately impede an individual's desire to see or acquire obscenity, and that there is no constitutionally protected right to acquire obscenity:

Most exercises of individual free choice -- those in politics, religion, and expression of ideas -- are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society

The States, of course, may ... drop all controls on commercialized obscenity, if that is what they prefer, ... but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. ++++++

obscene material may induce crime and antisocial conduct, *see id.*, at 451-453 (Clark, J., dissenting). Mr. Justice Clark emphasized:

“While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other antisocial conduct. For example, Dr. George W. Henry of Cornell University has expressed the opinion that obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce antisocial conduct by the average person. A number of sociologists think that this material may have adverse effects upon individual mental health, with potentially disruptive consequences for the community.

“Congress and the legislatures of every State have enacted measures to restrict the distribution of erotic and pornographic material, justifying these controls by reference to evidence that antisocial behavior may result in part from reading obscenity.” *Id.* at 452-53 (footnote omitted).

+++++ *Paris Adult Theater I*, 413 U.S. at 64.

[3] No “Privacy Right” Protects Access to Obscenity

The Court analyzed and rejected the argument that consenting adults have any Constitutionally based privacy right to access obscenity. The Court explained that its earlier decisions recognizing a Fourteenth Amendment right to privacy had applied only to “personal rights that can be deemed ‘fundamental’ or ‘implicit’ in the concept of ordered liberty.”***** “Nothing, however, in this Court’s decisions intimates that there is any ‘fundamental’ privacy right ‘implicit in the concept of ordered liberty’ to watch obscene movies in places of public accommodation.”\$ The Court noted that commercial ventures such as movie theaters are not considered “private” for the purpose of civil rights litigation and noted that the Civil Rights Act of 1964***** specifically defined motion-picture theaters as places of “public accommodation” covered by the Act as operations affecting commerce.+++++

[4] Disposition of Case

The Court found that nothing precluded the State of Georgia from regulating the allegedly obscene material exhibited in *Paris Adult Theatre I* or *II*, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, met the First Amendment standards set forth in *Miller*. The case was remanded to the Georgia Supreme Court for further proceedings.

§ 2.05 Other Cases

Miller and *Paris Adult Theater I* define the essential principles of constitutional law regarding obscenity. The remaining obscenity cases decided in 1973 served to reinforce the basic holdings of *Miller* and *Paris Adult Theater I* and to illustrate their application in specific contexts. These cases are listed below with a summary of the holdings as they extend or clarify *Miller* and *Paris Adult Theater I*.

***** *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973), citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) and *Roe v. Wade*, 410 U.S. 113, 152 (1973).

Paris Adult Theater I, 413 U.S. at 65.

78 Stat. 243, 42 U.S.C. §§ 2000a(b)(3), 2000a(c).

+++++ *Paris Adult Theater I*, 413 U.S. at 65.

[1] *Kaplan v. California******

Obscene material in book form is not entitled to First Amendment protection merely because it has no pictorial content. The Court emphasized that “any restraint on expression by way of the printed word or in speech should be rigorously scrutinized for possible violation of First Amendment rights.”***** Nonetheless, as with images, “both oral utterance and the printed word have First Amendment protection only until they collide with long-settled position of [the] Court that obscenity is not protected by the Constitution.”*****

[2] *United States v. 12-200 Ft. Reels of Super 8mm Film******

The United States may constitutionally prohibit importation of obscene material even when the importer claims is for private, personal use and possession only.

Congress has broad powers under the Commerce Clause to prohibit importation into this country of contraband, including obscene material.***** The Constitution does not compel an exception for obscene material intended only for private use.*****

***** 413 U.S. 115 (1973).

***** *Id.* at 119.

***** *Id.* at 119-20.

***** 413 U.S. 123 (1973).

***** *Id.* at 125.

***** *Id.* at 129. The Court explained:

Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers “[t]o regulate Commerce with foreign Nations.” Art. I, 8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry. [citations omitted] The plenary power of Congress to regulate imports is illustrated in a holding of this Court which sustained the validity of an Act of Congress prohibiting the importation of “any film or other pictorial representation of any prize

Stanley v. Georgia stands only for the right to possess obscene material in the privacy of one's home. It does not give rise to a correlative right to have someone sell or give it to others, ***** nor is there any right to transport obscene material in interstate commerce. ++++++

[3] *United States v. Orito******

Congress has the power to prevent obscene material, which is not protected by the First Amendment, from entering the stream of commerce, whether by public or private carrier. \$\$\$\$\$\$

The Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce. ***** The zone of privacy that *Stanley* protected does not extend beyond the home. ++++++ Nothing in the Constitution or the *Stanley* case creates a correlative right to receive, transport, or distribute obscene material. *****

[4] *Alexander v. Virginia*\$\$\$\$\$\$\$\$

In a civil obscenity proceeding, a judge can determine the obscenity issue. No jury determination on obscenity is constitutionally required. *****

fight . . . designed to be used or [that] may be used for purposes of public exhibition“[footnote omitted] in view of “the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles *Weber v. Freed*, 239 U.S. 325, 329 (1915).

Id. at 125-26.

***** *Id.* at 128, citing *United States v. Thirty-seven Photographs*, 402 U.S. 363, 376 (1971), and *United States v. Reidel*, 402 U.S. 351, 355 (1971).

+ + + + + *Id.*, citing *United States v. Orito*, 413 U.S. 139, 142-44 (1973).

+ + + + + 413 U.S. 139 (1973).

\$\$\$\$\$ *Id.* at 143.

***** *Id.*, citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-64 (1973).

+ + + + + *Id.* at 143-44, citing *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 126-29 (1973).

+ + + + + *Orito*, 413 U.S. at 141.

\$\$\$\$\$ 413 U.S. 836 (1973).

***** *Id.* at 836.

[5] *Heller v. New York*+++++

An adversary hearing prior to seizure of an obscene film is not required.***** An *ex parte* warrant, issued after a judicial determination of probable obscenity, is constitutionally sufficient.*****

Seizure of an obscene film is constitutionally permissible where: (1) the film is seized for the *bona fide* purpose of preserving it as evidence in a criminal proceeding; (2) the film is seized pursuant to a warrant issued after a determination of probable obscenity by a neutral magistrate; and (3) following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party.

[6] *Roaden v. Kentucky*+++++

[illegible][illegible]

Id. at 490. The Court noted that “because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination [of actual obscenity] suffices to impose a valid final restraint.” *Id.*, citing *United States v. Thirty-seven Photographs*, 402 U.S. 363, 367 (1971). In this case, however, there was “no showing that the seizure of a copy of the film precluded its continued exhibition,” so it was a final restraint. *Id.*

Heller, 413 U.S. at 492. “The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation.”
Id. at 493.

[illegible]

Absent exigent circumstances,***** the seizure of a motion picture film being exhibited to the general public at a commercial theater requires a judicial determination that the film is obscene. Seizure without the authority of a constitutionally sufficient warrant is a prior restraint on expression and, therefore, unreasonable under Fourth and Fourteenth Amendments.*****

\$2.06 The Effect of *Miller* on Obscenity Law Enforcement Efforts

Prior to the *Miller* case, many states had engrafted the language of the *Memoirs* test into state obscenity statutes and ordinances. After *Miller*, the validity of these older statutes was thrown into doubt until they were reaffirmed in an “authoritative construction” by the highest state court. Law enforcement efforts were subjected to numerous interpretive law battles in both state and federal court (which in some instances opposed each other^{*****}), and the cost of enforcing obscenity laws greatly increased. Many state laws were needlessly voided through judicial misconstruction. As a result of this confusion, enforcement of state obscenity statutes nationwide was held in abeyance, and the scope of distribution of all types of obscenity, including child pornography, expanded without significant opposition.

The Supreme Court finally answered some of these questions one year later, in *Hamling v. United States*.^{*****} The Court held that the *Miller* standards did not require a reversal of convictions based on *pre-Miller* conduct:

***** “Where there are exigent circumstances in which police action literally must be ‘now or never’ to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation.” *Id.* at 504. “We . . . take judicial notice that films may be compact, may be easy to destroy or to remove to another jurisdiction, and may be subject to pretrial alterations by cutting out scenes and resplicing reels. But . . . where films are scheduled for exhibition in a commercial theater open to the public, procuring a warrant based on a prior judicial determination of probable cause of obscenity need not risk loss of the evidence.” *Id.* at 505 n.4.

[illegible]

See *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Hicks v. Miranda*, 422 U.S. 332 (1975).

418 U.S. 87 (1974). The case involved a federal action under 18 U.S.C. §1461 (1971), which prohibits the mailing of obscene materials.

The *Miller* cases, important as they were in enunciating a constitutional test for obscenity to which a majority of the Court subscribed for the first time in a number of years, were intended neither as legislative drafting handbooks nor as manuals of jury instructions. . . .

. . . [T]he enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal . . . conduct which had not previously been thought criminal. That requirement instead added a “clarifying gloss” to the prior construction and therefore made the meaning of the federal statute involved here “more definite” in its application to federal obscenity prosecutions. . . .

. . . [O]ur opinion in *Miller* plainly indicates that we rejected the *Memoirs* ‘social value’ formulation, not because it was so vague as to deprive criminal defendants of adequate notice, but instead because it represented a departure from the definition of obscenity in *Roth*, and because in calling on the prosecution to ‘prove a negative,’ it imposed a ‘[prosecutorial] burden virtually impossible to discharge’ and which was not constitutionally required. Since *Miller* permits the imposition of a lesser burden on the prosecution in this phase of the proof of obscenity than did *Memoirs*, and since the jury convicted these petitioners on the basis of an instruction concededly based on the *Memoirs* test, petitioners derive no benefit from the revision of that test in *Miller*.”*****

Had the Court articulated this line of reasoning in *Miller* (and had the Court affirmed Miller’s conviction under a *Memoirs* statute), the havoc to state obscenity law enforcement efforts in the 1970s could have been significantly averted, and the growth of the commercial child pornography market might have been thwarted.

***** *Id.* at 115-17.

Unfortunately, the Court's guidance was too little, too late. The inability to enforce legal restraints against obscene materials permitted the first unabated, wide-spread public exhibition of several heavily marketed X-rated movies and gave greater exposure to pornography in general. In addition, during this period many pornographic films containing sexually explicit depictions of children began to appear. Freed from the fear of immediate prosecution under the obscenity statutes, child pornographers began to openly distribute their exploitative material. This set the stage for 1970's "pornography boom" and unleashed child pornography as its "wholly unanticipated by-product."

See ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT (hereinafter FINAL REPORT) 345 (1986) (noting that "during this period, distribution locations for sexually explicit materials in Los Angeles alone increased from eighteen to over 400," citing Los Angeles Hearing, Vol. I, Robert Peters, pp. 60B).

See *id.* (noting that "most of the materials designed to appeal to paraphilias became prevalent during this period, including those showing harmful homosexual acts, sadomasochism, bondage and discipline, children and animals as well as visuals of ejaculation, urination and defecation.")

See FINAL REPORT at 345. "Child pornography was more commonly available in the 1970s and appeared in commercially produced magazines such as *Moppets* and *Where the Young Ones Are*. Child pornography and materials with depictions of bestiality were openly available at some 'adults only,' pornographic outlets, sold under-the-counter in others and also available through mail-order sales" *Id.* See also *id.* at 345 n.1703 (noting that "[c]hild pornography was sold over the counter in New York City during this period.").

Id. at 130.

[1] The 1970 Report Of The President's Commission On Obscenity And Pornography

In 1967, recognizing the increasing volume of traffic in obscene and pornographic material, Congress declared commercialized obscenity and pornography to be matters of "national concern."***** Three years later, the Presidential Commission on Obscenity and Pornography was formed to analyze the problem and offer recommendations for better controls.

When the Commission reported the results of its investigation later that year, it did not indicate that child pornography was a pressing concern. Child pornography was not mentioned as a discreet "industry" producing sexually explicit materials, and the Commission's Traffic and Distribution Panel reported that "the taboo against pedophilia . . . remained almost inviolate even in the hardest of 'hard-core' materials."***** Concluding that there were no significant problems caused by pornography, the Commission recommended repealing all bans on the distribution of obscenity to adults, which would have included child pornography.*

There is evidence, however, that the Commission knew that sexually explicit materials depicting minors were being distributed in the United States but for some reason chose not to emphasize this in its report. Paul Bender, General Counsel of the 1970 Commission, would later testify before Congress:

[W]hen we studied the market in pornography in 1970 on the Obscenity Commission, and we did an extremely thorough study not only on the market at that time but we spent a lot of time looking at the history of pornography, we found that child pornography has existed for many years just as

***** Act of October 3, 1967, Pub. L. No. 90-100, § 1, 81 Stat. 253, 253 (1967).

***** ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT (Rutledge Hill Press 1986) at 130 [hereinafter FINAL REPORT] citing *Report of the Commission on Obscenity and Pornography* 7-23 (1970).

* *Id.*, citing *Report of the Commission on Obscenity and Pornography* at 57-67 (1970).

pornography has existed for many years. You can find pictures many years old showing children like this. *Certainly in 1970 there were pictures of children.* For example, there was a fairly substantial amount of stuff for male homosexuals showing children.

So, it has been around, for a while. I do not know whether there is a greater traffic in it now than there was earlier. I have no way of knowing what the present traffic is. *But I do know that at least in the recent past there has been traffic in these materials.* I remember magazines that we saw in 1970 which contained pictures of boys and men designed obviously for the homosexual market.”[†]

This testimony indicates that the 1970 Commission knew that some type of child pornography was being distributed when it inexplicably recommended removing *all* restrictions on the distribution to adults of obscene material -- which would have included child pornography. It should be noted that the 1970 Commission’s Majority Report was severely criticized, and its recommendations were overwhelmingly rejected by the President and the Senate.[‡]

[2] Child Pornography Investigations Report Widespread Availability

In the mid-1970s, a number of investigative news reports[§] concerning the widespread availability of sexually explicit

[†] *Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 95th Cong. 109-110 (1977) (hereinafter *Protection of Children Against Sexual Exploitation*) (testimony of Paul Bender, Professor of Law, University of Pennsylvania) (emphasis added).

[‡] See FINAL REPORT, *supra* note 5, at 14.

[§] See *Id.* at 131:

“[In] 1973, . . . the first child pornography ring – involving some fourteen adults using boys under age thirteen for sex and production of pornographic materials – was brought to public view. In the four years that followed police and reporters uncovered a wide range of activities involving the sexual exploitation of children, most of it involving child pornography. Early in 1976 two employees of a large Los Angeles corporation publishing sexually explicit magazines were convicted of

pornographic materials depicting and using actual children set off a wave of public outrage.** Public concern prompted Congress to convene a series of hearings to examine the child pornography market.††

§3.03. Congressional Action

[1] 1977 Congressional Hearings

In 1977, Congress conducted a series of hearings** which focused on the impact and scope of child pornography in the United States. Testimony at these hearings revealed that the problem of child sexual exploitation was more widespread and complex than had previously been thought.

For example, before these investigations, many had assumed that child pornography was produced primarily in Europe,

pandering for hiring a fourteen-year-old girl to engage in numerous acts of photographed sexual intercourse for publication in the company's magazines."

These reports ultimately reached the attention of the United States Supreme Court, who noted in the landmark *Ferber* case:

One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. *Ibid.* "Such magazines depict children, some as young as three to five years of age. . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." *Id.*, at 6. In Los Angeles alone, police reported that 30,000 children have been sexually exploited. *Sexual Exploitation of Children, Hearings before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong., 1st Sess., 41-42 (1977).

New York v. Ferber, 548 U.S. 747, 749 n.1 (1982).

** See *Preying on Playgrounds*, *supra* note 3, at 810. These developments led to the creation of a special Los Angeles Police Department unit devoted to protect the sexually exploited child. See FINAL REPORT, *supra* note 5, at 131 n.401, citing *Sexual Exploitation of Children, Hrgs. Before the Subcomm. on the Judiciary*, U.S. House, 95th Cong., 1st Sess. 63 (1977) [hereinafter *Subcomm. on Crime Hearings*] (statement of Investigator Lloyd Martin, Los Angeles Police Dep't).

†† *Sen. Comm. on the Judiciary Rep. on 1585, Protection of Children Against Sexual Exploitation Act of 1977*, S. Rep. No. 95-438, 95th Cong., 1st Sess. 6 (1977).

‡‡ These hearings involved one Senate and two House subcommittees over 10 dates in four cities. See FINAL REPORT, *supra* note 5, at 132 n. 403.

especially Scandinavia.^{§§} Evidence presented at the hearings, however, indicated that child pornography had become a “highly organized, multi-million dollar” *American* industry, publishing more than 250 different monthly magazines showing children engaged in sexual conduct.^{***} Furthermore, the Committee learned that it was common for photographs or films made in the U.S. to be exported to foreign countries, reproduced, and then re-imported to give the impression that they had been created abroad.^{†††}

In addition, while police had uncovered major child pornography production centers in Los Angeles, New York, Chicago, and other large metropolitan areas,^{***} the committees noted that child pornography operations had also been discovered in non-urban centers such as Port Huron, Michigan, and Winchester, Tennessee.^{§§§} It became evident that child pornography could be produced in any small community because pornographic photographs and films were “generally taken in private homes, hotel rooms, or abandoned buildings.”^{****}

^{§§} FINAL REPORT, at 132 n. 410, citing *Child Pornography and Pedophilia*, Hrgs. Before the Perm. Subcomm. on Investigations, Comm. on Governmental Affairs, U.S. Senate, 98th Cong., 2d Sess., Part 1, pp. 322-37 (1984) (testimony of Kenneth J. Herrmann, Jr., Michael Jupp, and Toby Tyler); *Child Pornography and Pedophilia*, Hearing Before the Perm. Comm. on Investigations, Comm. on Governmental Affairs, U.S. Senate, 99th Cong., 1st Sess., Part 2 (1985) (testimony of Elliott Abrams, et al., members of federal interagency group which traveled to Denmark, Netherlands, and Sweden to discuss problem of child pornography with government officials).

^{***} See FINAL REPORT, *supra* note 5, at 132 (noting also that the founder of the Los Angeles Sexually Exploited Child Unit reported 30,000 sexually exploited children in Los Angeles alone.)

^{†††} *Preying on Playgrounds*, at 811 n. 11, citing *S. Comm. on the Judiciary Rep. on S. 1585, Protection of Children Against Sexual Exploitation Act of 1977*, S. Rep. No. 95-438, 95th Cong., 1st Sess. 6 (1977).

^{§§§} See *Preying on Playgrounds*, at 811 n. 10, citing *Proposed Amendments to the Child Abuse Protection and Treatment Act: Hearings on H.R. 6693 Before the H. Education and Labor Subcomm. on Select Education, the H. Judiciary Comm.’s Crime Subcomm. on Select Education, the H. Judiciary Committee’s Crime Subcomm., and the S. Judiciary Subcomm. to Investigate Juvenile Delinquency*, 95th Cong., 1st Sess. (1977).

^{§§§} *Preying on Playgrounds*, at 811 n. 11, citing *S. Comm. on the Judiciary Rep. on S. 1585, Protection of Children Against Sexual Exploitation Act of 1977*, S. Rep. No. 95-438, 95th Cong., 1st Sess. 6 (1977).

^{****} *Id.*

[2] Protection Of Children Against Sexual Exploitation Act Of 1977

In response to these findings, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977,^{††††} the first major bill to address child pornography on the federal level.

The Act categorically prohibited the production of any “sexually explicit”^{†††††} material using a child under age sixteen, if such material was destined for, or had already traveled in interstate commerce. Stern penalties were imposed for violating these provisions.^{§§§§}

The Act was deficient in several respects. The overwhelming evidence presented in the hearings had indicated that child pornography was predominantly a commercial enterprise. Because of this, the federal law was drafted to prohibit transporting, shipping, mailing, or receiving child pornography in interstate commerce for the purpose of sale or distribution.^{*****} Bartering or simply giving away child pornography, which would later be shown to be the greater part of the problem, was not prohibited by the Act.^{†††††} In addition, the provisions of the Act were restricted to material depicting children engaged in “sexually explicit” activity that was also “obscene” under the *Miller* test.^{†††††} Despite these

^{††††} Pub. L. No. 95-225, § 2(a), 92 Stat. 7 (codified as amended at 18 U.S.C.S. § 2251 *et seq.* (2005)).

^{†††††} The phrase “sexually explicit” was defined at 18 U.S.C.S. §2253 (1979) [redesignated 18 U.S.C. §2256(2)(A) (1986)] to include any conduct involving sexual intercourse of any variety, bestiality, masturbation, sadomasochistic abuse, or “lewd exhibition of the genitals or public area.”

^{§§§§} The law originally called for ten years imprisonment and/or a \$10,000 fine for the first violation, with increasing penalties for subsequent violations. Pub. L. No. 95-225, § 2(a), 92 Stat. 7.

^{*****} See FINAL REPORT, *supra* note 5, at 133.

^{†††††} See FINAL REPORT, *supra* note 5, at 133. However, note that use of the U.S. mail to transmit obscene child pornography could have been prosecuted as the “mailing of obscenity,” which is proscribed by 18 U.S.C. §1461 (2005) (Mailing obscene or crime-inciting matter).

^{†††††} See *id.*, at 133.

shortcomings, the Act was effective in its purpose of eliminating most of the commercial child pornography industry.

The Act was amended several times in the 1980s in response to new factual findings and changes in the legal landscape. After the Supreme Court handed down its decision *New York v. Ferber*,^{§§§§} the Act was changed to eliminate the obscenity and commercial transaction requirements and to redefine “minor” as anyone under age 18.^{*****} It was later amended to ban the production and use of advertisements for child pornography,⁺⁺⁺⁺⁺ to address computer crimes involving child pornography,^{*****} and to increase the minimum penalties.^{§§§§§}

[3] The 1986 Attorney General’s Commission On Pornography

In 1985, another pornography commission was convened, under the authority of the Attorney General, to determine the impact of pornography on society in the United States and to make specific recommendations to contain the spread of pornography. In stark contrast to the 1970 Commission’s lack of concern about the use of minors in pornography, the 1986 Commission identified child pornography as a major problem which demanded strong law enforcement action. The Commission’s *Final Report* states:

This Commission . . . has devoted a very substantial proportion of its time and energy to

^{§§§§} 458 U.S. 747 (1982).

^{*****} Child Protection Act of 1984, Pub. L. No. 98-292, §3, 98 Stat. 204.

⁺⁺⁺⁺⁺ Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 1, 100 Stat. 3510.

⁺⁺⁺⁺⁺ Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, Title VII, Subtitle N, § 7501, 102 Stat. 4485.

^{§§§§§} Child Protection Act of 1984, Pub. L. No. 98-292, §3, 98 Stat. 204; Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 1, 100 Stat. 3510. Another amendment, Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Title I, § 101(a), 110 Stat. 3009-26, changed the Act to prohibit “virtual” child pornography, *i.e.*, images created or manipulated by computer technology to appear to be children engaged in sexually explicit conduct. The Supreme Court, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), held the Act unconstitutional as applied to virtual images that did not involve actual minors. For further discussion, see, *infra*, Chapter 5 of this manual.

examining the extent and nature of child pornography. . . . No aspect of the pornography industry has more occupied the attention of Congress and the general public during the past decade, and this Commission has made a wide range of recommendations for further legislative and public action.*****

The *Final Report* identified four key problems to which child pornography regulation is addressed:

1. Child pornography constitutes a “permanent record” of the sexual abuse to which children are subjected. Those pictures follow the child through adulthood, and the consequent embarrassment and humiliation are harms caused by the pictures themselves, independent of the harm from the circumstances in which the photographs were made.+++++
2. The Commission found “substantial evidence” that child pornography is often used as a tool for molesting children. Pedophiles show their victims pictures of children engaging in sexual activity in order to persuade them that it is not wrong because other children are doing it.*****
3. Photographs of children being sexually abused often constitute an important form of evidence in the prosecution of child molesters. Given the inherent difficulties of using children as witnesses, permitting the photographs to be used as evidence, or criminalizing the making or possessing of such photographs, could facilitate the prosecution of those who sexually abuse children.~~~~~

***** See FINAL REPORT, *supra* note 5, at 130.

+++++ *Id.* at 68.

~~~~~ *Id.*, noting at n. 74 that “there seems to be significant use of adult sexually explicit material for the same purpose. Child molesters will frequently show sexually explicit pictures of adults to children for the purpose of convincing a child that certain practices are perfectly acceptable because adults engage in them with some frequency. . . . We have no doubt that the practice exists, and we have no doubt that it is dangerous insofar as it helps break down the resistance of children to sexual advances by adults . . . .”

~~~~~ *Id.*

4. The Commission determined that the harm to children involved in pornography is “extraordinarily serious,” and suggested that if the sale and distribution of child pornography were “stringently sanctioned,” and those sanctions “stringently enforced,” the market for child pornography might decrease, which might also eliminate the incentive to produce such materials. *****

The *Final Report* concluded that “child pornography is extraordinarily harmful both to the children involved and to society” and recommended that combating all forms of child pornography should “a governmental priority of the greatest urgency.” ++++++

[4] The Child Pornography Prevention Act of 1996 (CPPA).

In order to keep up with advancements in digital imagery technology, and in an effort to modernize federal law by enhancing its ability to combat child pornography in the cyberspace era, Congress enacted The Child Pornography Prevention Act of 1996 (CPPA).

Under CPPA, Congress added 18 U.S.C. § 2252A and amended 18 U.S.C. § 2256 to include within the definition of “child pornography” a visual depiction that “is or appears to be” of an actual minor engaging in sexually explicit conduct which is referred to as “virtual child pornography”. These images are distinct from “morphed” images which include some part of a real child in the image production. The provisions of the act regarding virtual child pornography were ruled unconstitutional in part by the case *Ashcroft v. Free Speech Coalition*. *****

***** *Id.*, noting n.75: “As much as we urge the most vigorous enforcement of child pornography laws with respect both to commercial and noncommercial production, possession, and distribution, we recognize that the problem of child abuse is larger than the problem of child pornography. We urge vigorous enforcement of child pornography laws as an important way of fighting child abuse, but if it is treated as the only weapon, or the major weapon, a great deal that needs doing will remain undone.”

+++++++ *Id.* at 70.

***** 535 U.S. 234, 122 S. Ct. 1389 (2002). It is important to note that *Ashcroft* explicitly did not rule that the provisions of the CPPA that address morphed images in Sec. 2256(8)C were unconstitutional. *Id.* At 242 (“Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real

[5] The PROTECT Act§§§§§§§§

In response to the Free Speech Coalition case, congress considered revising CPPA. The response was codified in the PROTECT Act passed in 2003*****. This act provided a number of revisions to law regarding child pornography. Some of those provisions dealt with items such as pandering of child pornography, virtual child pornography, sex offenders, child abductions, child sex tourism, penalties for misleading internet domain names and other amendments to address child safety issues. The act's pandering provisions have been challenged and called into question by at least one federal appellate court.+++++++

§3.04 State Efforts to Control Child Pornography

In addition to the federal legislation, most states were becoming increasingly aware of child sexual abuse during the 1970s. While Congress had been limited to acting within its Commerce powers, the states had broad police power to prohibit all production and trafficking of child pornography. Currently, all 50 states have some type of prohibition against child sexual exploitation and pornography. The states of Nebraska and Oregon and the District of Columbia do not prohibit individual possession of child pornography. Citation to these statutes and selected cases are annotated in Appendix I.

children and are in that sense closer to the images in *Ferber*. Respondents do not challenge this provision and we do not consider it." See further discussion of CPPA and the court cases surrounding that act in Chapter 5,

§§§§§§§§ PROTECT is an acronym for PROSECUTORIAL REMEDIES AND OTHER TOOLS TO END THE EXPLOITATION OF CHILDREN TODAY ACT OF 2003.

***** 117 Stat. 650 (2003)

+++++++ The 11th Circuit found "the PROTECT Act pandering provision, 18 U.S.C. § 2252A(a)(3)(B), both substantially overbroad and vague, and therefore facially unconstitutional." *United States v. Williams*, 2006 U.S. App. LEXIS 8384 (11th Cir 2006).

CHAPTER 4 *NEW YORK v. FERBER*:

THE SUPREME COURT SEPARATES CHILD PORNOGRAPHY FROM OBSCENITY

*“What is commonly referred to as ‘child pornography’ is not so much a form of pornography as it is a form of sexual exploitation of children..”******

§4.01 Summary

In the United States, modern day child pornography prosecutions rely for the most part upon the legal test for “child pornography” enunciated by the United States Supreme Court in *New York v. Ferber*§§§§§§§§ in 1982. However, prior to *Ferber*, child pornography was successfully prosecuted under laws prohibiting “obscenity.” The latter type of prosecution requires that the subject matter be proven to be “obscene,” as that term was defined in the 1973 decision of *Miller v. California*.*****

After *Ferber*, it is clear that child pornography need not be obscene to be illegal.†††††††† Yet a number of states continue to

†††††††† U.S. Dept. of Justice, Attorney General’s Commission on Pornography, Final Report, at 405 (1986).

§§§§§§§§ 458 U.S. 747 (1982).

***** *Miller v. California*, 413 U.S. 15 (1973).

††††††††† The *Ferber* Court states five reasons for allowing the state to restrict pornographic depictions of children without the requirement that they also be obscene:

1. The states have an interest in safeguarding the physical and psychological well-being of a minor.
2. The depictions are sexually abusive in that they are a permanent record of a child’s participation and lead to the creations of networks which foster further exploitation.
3. The advertising and selling of child pornography provides an economic motive for the illegal production of these materials.
4. The value of these depictions is *de minimis*.
5. Recognition that child pornography is outside the protections of the First Amendment is compatible with decisions making the content of speech

include the word “obscene” in their child pornography laws*****. This places an unnecessary burden on law enforcement efforts to stop child sexual exploitation by requiring prosecutors to prove that child pornography is also obscene in order to obtain a conviction or an increased penalty.

This chapter discusses the holding of the *Ferber* case and reviews the distinctions between “obscenity,” as defined by the *Miller* test, and “child pornography” under the *Ferber* test.

§4.02 Obscenity Defined

Obscene material is not protected by the First Amendment. Thus, a prosecution for possession, distribution, or sale of material found to be obscene will withstand a constitutional challenge. This principle was first articulated by the Supreme Court in *Roth v. U.S.*, which held that “obscenity is not within the area of constitutionally protected speech or press.”***** The Court has never deviated from this constitutional principle.

The precise legal definition of “obscenity” is set forth in the 3-prong test of *Miller v. California*:

- (1) whether the average person, applying contemporary adult community standards, would find that the material, taken as a whole, appeals to a prurient interest in sex (*i.e.*, an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion); and
- (2) whether the average person, applying contemporary adult community standards, would find that the work depicts or describes, in a patently offensive way, sexual conduct (*i.e.*, ultimate sex acts, normal or perverted, actual or simulated; masturbation; excretory

sanctionable if the evils of the speech outweigh the expressive interests at stake.

Ferber, 458 U.S. at 756-62.

***** Supra note 15.

***** 356 U.S. 476, 484-85 (1957).

functions; lewd exhibition of the genitals; or sadomasochistic sexual abuse); and

- (3) whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*****

This principle was reiterated in *Reno v. ACLU*, in which the Supreme Court said that there is an enforceable criminal prohibition under current federal laws against the transmission of obscene material over the Internet and other online services.††††††††††

§4.03 Child Pornography And Obscenity Compared

Before *Ferber*, it was an open question whether the federal Constitution required that child pornography had to be proven to be “obscene” before it could be proscribed. The *Ferber* case made it clear that “child pornography” and “obscenity” are two separate and distinct legal categories of material which are not entitled to Constitutional protection, and that both child pornography and obscenity are subject to governmental regulation under separate legal tests. Today, both “obscene” and “non-obscene”***** child pornography are absolutely banned by federal law and can be regulated by the states.

The goal of Child Pornography laws and obscenity laws are distinct given their subject matter. Consequently, a statutory test has evolved for defining “child pornography” that is separate and

***** *Miller*, 413 U.S. at 24. For a full discussion of this case, see Chapter 4 of this manual.

†††††††††† 521 U.S. 844, 878 n.44 (1997) (noting that “[t]ransmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles.”).

***** As used throughout this manual, “non-obscene” child pornography refers to materials prosecuted under child pornography laws which do not incorporate the obscenity standard as an element of the offense. In such cases, the court does not decide the issue of “obscenity,” as it is irrelevant to the charge. This does not mean that the subject matter could not be found to be legally obscene under the *Miller* definition; it simply means that this determination does not have to be made in order to obtain a conviction under the statute.

distinct from the “obscenity” test. Unlike obscenity, child pornography is evaluated under an objective test in which the effect of the subject matter upon the audience is immaterial. The basic elements of child pornography are:

- (1) a visual depiction,
- (2) of a minor,
- (3) engaged in explicit sexual activity. § § § § § § § § § §

In establishing the less stringent *Ferber* requirement, the Court determined that the subjective senses of the viewers are immaterial to the lasting damage committed against the victims in child pornography cases. In contrast, obscenity laws contain certain subjective elements, which focus upon the use of material and its effect upon the intended recipient audience.

§4.04 *New York v. Ferber* (1982)

In 1982, the Supreme Court first addressed the issue of whether child pornography legislation that did not require an element of obscenity was constitutional.

In *New York v. Ferber*,^{§ § § § § § § § § §} the owner of a New York bookstore specializing in sexually oriented products sold an undercover police officer two films that depicted young boys masturbating. The store proprietor was indicted for violating New York state law^{† † † † † † † † † †} by promoting an obscene sexual

^{§ § § § § § § § § §} See, e.g., *New York v. Ferber*, 458 U.S. 747, 764 (1982).

^{§ § § § § § § § § §} *Id.*

^{† † † † † † † † † †} NY CLS Penal § 263.10, Promoting an obscene sexual performance by a child (“A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than seventeen years of age.”) and NY CLS Penal § 263.15, Promoting a sexual performance by a child (“A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age.”). Note that New York was one of 20 states which had laws prohibiting the dissemination of material depicting children

performance by a minor and by distributing material depicting sexual performances by children under the age of sixteen, regardless of whether the material was obscene. After a jury trial, the defendant was acquitted of the obscenity charge but found guilty under the non-obscene statute. When the conviction was overturned on appeal to New York's highest court, the State sought review by the U.S. Supreme Court.

The Supreme Court considered a single question:

“To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?”*****

The Court answered this question in the affirmative and specifically ruled that child pornography, whether obscene or not, was unprotected by the First Amendment.***** The Court concluded that states had greater leeway to regulate pornographic depictions of children because:

- (1) “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.’”*****
- (2) “The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways:

engaged in sexual conduct regardless of whether the material was obscene. *See Ferber*, 458 U.S. at 749-50, n. 2.

***** *Ferber*, 458 U.S. at 753.

***** *Id.* at 764 (holding that, when a class of materials seriously affects the welfare of children used in its production, “it is permissible to consider these materials as without the protection of the First Amendment.”)

***** *Id.* at 756-57, citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

- (a) [T]he materials produced are a permanent record of the child's participation and the harm to the child is exacerbated by their circulation.+++++
- (b) [T]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."+++++

+++++ *New York v. Ferber*, 458 U.S. 744, 759 n. 10, noting that:

As one authority has explained: "[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." Shouplin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981). See also Child Exploitation 292 ("[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions"); Note, Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U. Mich. J. Law Reform 295, 301 (1979) (hereafter cited as *Use in Pornography*) (interview with child psychiatrist) ("The victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child"). Thus, distribution of the material violates "the individual interest in avoiding disclosure of personal matters."

+++++ *Id.* at 759. The Court continued:

Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. *The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.* Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions. *Cf. United States v. Darby*, 312 U.S. 100 (1941) (upholding federal restrictions on sale of goods manufactured in violation of Fair Labor Standards Act)." (Emphasis added).

- (3) “The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.”\$\$\$\$\$\$\$\$\$\$
- (4) “The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.”*****

The Court held that a state could regulate child pornography separately from obscenity, noting that there was a difference between the legal concept of “obscenity” as articulated in Miller and the legal concept of “child pornography.”

A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed is done so in a patently offensive manner; and the material at issue need not be considered as a whole.††††††††††

The Court also noted that child pornography production is so clandestine as to be impossible to control without criminalizing its distribution as well.

See Sexual Exploitation of Children, Hearings before the Subcommittee on Crime of the House Judiciary Committee, 95th Cong., 1st Sess., 34 (1977) (statement of Charles Rembar) (‘It is an impossible prosecutorial job to try to get at the acts themselves’); *id.*, at 11 (statement of Frank Osanka, Professor of Social Justice and Sociology) (‘[W]e have to be very careful . . . that we don’t take comfort in the existence of statutes that are on the books in the connection with the use of children in pornography There are usually no witnesses to these acts of producing pornography’); *id.*, at 69 (statement of Investigator Lloyd Martin, Los Angeles Police Department) (producers of child pornography use false names making difficult the tracing of material back from distributor). See also, L. Tribe, American Constitutional Law 666, n. 62 (1978); Note, Child Pornography: A New Role for the Obscenity Doctrine, 1978 U. Ill. Law Forum 711, 716, n. 29; Use in Pornography 315 (‘passage of criminal laws aimed at producers without similar regulation of distributors will arguably shift the production process further underground’).

Id. at 760 n.11.

\$\$\$\$\$\$\$\$\$\$ *New York v. Ferber*, 458 U.S. 747, 761 (1982).

***** *Id.* at 762.

†††††††††† *Id.* at 764.

+++++ *Id.*
 §§§§§ *Id.* at 764-65.

Id., citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974).

CHAPTER 5

SPECIFIC LEGAL AND TRIAL ISSUES CONCERNING CHILD PORNOGRAPHY

§5.01 Summary of Chapter

This chapter focuses on legal and trial issues that may arise in the course of a child pornography or child sexual exploitation prosecution. These legal problems include the question of virtual child pornography and federal jurisdiction. Pre-trial motions and the handling of victim witnesses will often take on different dimensions in the context of sexual exploitation and child pornography cases.

LEGAL ISSUES

§5.02 The *Dost* Test

In an effort to describe what makes a nude picture of a minor actionable under child pornography laws, the federal courts have fashioned an analysis of what constitutes lewd for purposes of the Federal Child Pornography Statute, these factors to be analyzed are as follows:

1. whether the focal point is on the child's genitalia or pubic area;
2. whether the setting is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
3. whether the child is in an unnatural pose, or inappropriate attire, considering the age of the child;
4. whether the child is fully or partially clothed or nude;
5. whether the child's conduct suggests sexual coyness or a willingness to engage in sexual activity;

6. whether the conduct is intended or designed to elicit a sexual response in the viewer. ++++++

§5.03 Virtual Child Pornography

When discussing child pornography, the images generally fall into three categories. The distinctions among them are important. The first category, as discussed, includes images of real children engaged in sexually explicit conduct. The remaining categories are defined as follows:

(a) *100% virtual child pornography*: No real child is used to produce any part of this material. However, the resulting image is indistinguishable from that of a real child. These images are commonly referred to as “virtual child pornography.”

(b) *Computer-altered child pornography*: The images of real children are altered, using computer software programs, and the resulting image is also of a child indistinguishable from that of a real child. The actual child or children used may or may not be identifiable. These images are referred to as “morphed images.”

In order to keep up with advancements in digital imagery technology, and in an effort to modernize federal law by enhancing its ability to combat child pornography in the cyberspace era, Congress enacted The Child Pornography Prevention Act of 1996 (CPPA). This act included both forms of child pornography.

§5.04 *Ashcroft v. Free Speech Coalition*

By 2000, five federal Circuit Courts of Appeal had heard cases on the constitutionality of parts of CPPA. In four of these cases, the Appeals Court upheld the constitutionality of the statute, +++++ while one court found it

+++++ *U.S. v. Dost*, 636 F. Supp. 828, 831, affirmed sub nom., *U.S. v. Weigand*, 812 F.2d 1239 (9th Cir. 1987).

+++++ *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), *cert. denied* 528 U.S. 844 (1999); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000), *vacated* 532 U.S. 1014

case.+++++

§5.05 Federal Jurisdiction Challenges

jurisdiction.*****

establish federal jurisdiction.

transported in interstate commerce.

23, National Center for Missing and Exploited Children (2005).

***** See e.g., *United States v. Morales-De Jesus*, 372 F. 3d 6 (1st Cir 2004); *United States v. Holston*, 343 F. 3d 3 (2d Cir 2003); *United States v. Kallestad*, 236 F.3d 225 (5th Cir 2000).

386 F. 3d 1042 (11th Cir. 2004)

***** 402 F.3d 1303 (11th Cir. 2004).

In the *Raich* case, the Supreme Court determined “where Congress comprehensively regulates economic activity, it may constitutionally regulate intrastate activity, whether economic or not, so long as the inability to do so would undermine Congress’s ability to implement the overlying economic regulatory scheme.”\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$

§5.06 Age of Child Victim

A key element of child pornography prosecutions is proving that images depict actual minors. If the children can be identified and located, their testimony is most effective. Frequently, however, children depicted in pornography will not be known or available to the prosecutor. Most jurisdictions, under the general rules of evidence, permit forensic experts to testify as to the age of the participants based on physiological structure and genital

[illegible]

development.***** Some states permit such testimony by statute.*****

Prosecutors should consider what means of proving minority is appropriate to the circumstances. Some jurisdictions permit the finders of fact to rely on their opinions as to the victim's age.***** Whether expert testimony is required to establish age is often determined case by case. The Fifth Circuit has commented:

A case by case analysis will encounter some images in which the models are prepubescent children who are so obviously less than 18 years old that expert testimony is not necessary or helpful to the fact finder. On the other hand, some cases will be based on images of models of sufficient maturity that there is no need for expert testimony. However, in this case, in which the government must prove that a model, who is post-puberty but appears quite young, is less than eighteen years old, expert testimony may well be necessary to 'assist the trier of fact to understand the evidence or to determine a fact in issue.' Fed. R. Evid. 702.*****

Finally, some jurisdictions permit the jury to draw reasonable inferences as to the child's age from the subject's appearance, expert and witness testimony concerning the subject's

***** Pediatricians qualify as child development experts to determine the age of a child depicted in a picture. Others who could qualify as experts include forensic anthropologists and medical examiners.

***** See, e.g., Alabama Code § 13A-12-193(b)(5) (2005).

***** See, e.g., *Pennsylvania v. Robertson-Dewar*, 829 A.2d 1207 (Pa. Super. Ct. 2003) (holding that not every case requires expert testimony and that the fact-finder may determine the age of the person depicted in alleged child pornography image); *Wisconsin v. Holze*, 683 N.W.2d 93 (Wisc. Ct. App. 2004) (same); *New Jersey v. May*, 829 A.2d 1106 (N.J. Super. Ct. App. Div. 2003) (holding that "in particular circumstances, determinations of an age threshold based on outward appearance alone can be seen to be as valid an exercise of common knowledge as of expert opinion.").

***** *U.S. v. Katz*, 178 F.3d 368, 373 (5th Cir 1999).

age, child-like dress, language of the film, advertising, and title of the film or photograph.*****

§5.07 Defenses

[1] “Mistake of Age” Defense

The victim’s age is also an issue when the defendant claims he did not know that the person was a minor when he produced or distributed the pornography. In most jurisdictions, *producers* of child pornography***** are held liable for employing minors as participants even when they do not know the child’s actual age or the illegality of their actions.*****

Regardless of the defendant’s knowledge (*scienter*), children are abused when used in child pornography, just as they are in prostitution or molestation crimes for which mistake of age is not a credible defense.***** For *possession or distribution* offenses,***** it is less clear whether Congress intended knowledge of the victim’s age to be an element of the crime.***** In any event, the Supreme Court has held

***** See, e.g., NY CLS Penal § 263.25 (2005); N.D. Cent. Code, § 12.1-27.2-06 (2005).

***** 18 U.S.C. §2251 (1984)

***** See *United States v. Reedy*, 632 F. Supp. 1415, 1423 (W.D. Okla. 1986) *aff’d*, 845 F.2d 239 (10th Cir.), *cert. denied*, 489 U.S. 1055 (1989) (finding “no constitutional requirement that knowledge of the victim’s age is a necessary element of a prosecution” and that *scienter* is implied in other elements of the statute). *But see United States v. United States Dist. Ct.*, 858 F.2d 534, 540-41 (9th Cir. 1988) (holding that, while knowledge of the minor’s age is not a necessary element of the statute against production of child pornography, the First Amendment requires that a “mistake of age” affirmative defense be entertained in child pornography production cases. Under a mistake of age affirmative defense, “a defendant may avoid conviction only by showing, by clear and convincing evidence that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age.” *Id.* at 543).

***** See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) (noting that “producers are more conveniently able to ascertain the age of performers. It thus makes sense to impose the risk of error on producers.”).

***** 18 U.S.C. § 2252 (1988).

***** *Id.* at § 2252(a)(1) (in which the *scienter* requirement, *i.e.*, the word “knowingly,” is so separated from the phrase “use of a minor” by grammar and punctuation as to appear unrelated); *see also X-Citement Video*, 513 U.S. at 73-78 (discussing the ambiguity of the statute’s language, its legislative history, and the canons of construction for interpreting it).

that the federal statute, though ambiguous on its face, must be read to include a scienter requirement; that is, the prosecution must prove that the defendant knew or should have known that at least one of the performers was a minor. *****

[2] Ignorance of Law Defense

As to distribution or simple possession under federal law, a common defense against child pornography charges is that the defendant did not know the pornographic material at issue constituted “child pornography” when he received it. Courts have uniformly held that a defendant has the statute’s requisite knowledge if he knows of the general character and nature of the sexually explicit material, even if he did not realize the material was legally classified as “obscenity” or “child pornography.”+++++

[3] Entrapment

In child pornography cases in which it has been proven that the suspect voluntarily ordered the material and knew of its character or content, entrapment has routinely failed as an affirmative defense.***** Introducing child pornography previously ordered by the defendant or found during a search of his home can defeat an entrapment defense by establishing that the

***** *X-Citement Video*, 513 U.S. at 73 (holding that, where “the age of the performers is the crucial element separating legal innocence from wrongful conduct,” the statute must be read to extend the scienter requirement to the age of the performers).

+++++ *United States v. Hamling*, 418 U.S. 87, 123 (1974) (holding that the scienter requirement is satisfied where the prosecution demonstrates that defendant knew the content and character of the material, regardless of whether defendant personally considered the material to be “obscene”); *see also United States v. Moncini*, 882 F.2d 401, 405 (9th Cir. 1989) (holding that defendant violated the statute by mailing what he knew to be child pornography, whether or not he knew that his act was illegal).

+++++ *See United States v. Thomas*, 726 F.2d 1191, 1198 (7th Cir. 1984), *cert. denied*, 467 U.S. 1228 (1984) (holding that, where “the Government merely offered an opportunity to commit a crime, coupled with . . . mild inducement,” this does not support a claim of entrapment.).

also put various restrictions on the defense however, including the requirement that all copies (both hard and electronic) of the evidence be returned to the U.S. Attorney, only certain parties should be allowed to view the evidence, the defendant is barred from viewing the evidence, any computer used to view the evidence shall be a “stand alone” computer, disconnected from any network and the defense attorney should be required upon oath to ensure that all requirements have been met and be subject to sanctions if not. *****

[2] Motions *In Limine*

The most common pre-trial motions for prosecutors are motions to suppress and motions to dismiss. However, in sex crime prosecutions, motions *in limine* can be quite effective.

[A] History of Abuse or Sexual Activity

Under “Rape Shield Statutes” it is presumed that a victim’s prior sexual history is inadmissible as evidence. Rape shield laws also apply to child sexual exploitation cases. Prosecutors should note that such statutes are not absolute protections for the victim and exceptions do exist, but they are narrow. In a case in which the minor victim is alleged to have previously had sex with another person, the defense will attempt to question the victim or other witnesses about it at trial. The prosecution should file a motion to prohibit the defense from doing so. If the jurisdiction does not allow evidence of a rape victim’s prior sexual history, ++++++ the same rationale should apply in a child sexual exploitation case. However, the prosecution should be mindful that a molestation case is usually a rape, sodomy, or oral copulation case as well, and in some situations evidence of the victim’s sexual history may be considered relevant. For example, in a federal criminal case the following evidence is admissible (unless excluded on other grounds):

(Ariz. App. Div. 1. Sep 23, 2003) (No. 1 CA-SA 03-0157) review denied (March 16, 2004); Westerfield v. Superior Court, 99 Cal. App. 4th 994, 121 Cal.Rptr.2d 402 (2002); U.S. v. Hill, 2004 WS 1376369 (C.D.C. June 17, 2004); United States v. Cadet, No. 05-CR-918(ILG), 2006 U.S. Dist. LEXIS 13627 (E.D.N.Y. March 29, 2006).

***** *Id.* at *9-*12.

+++++ *See, e.g.*, Fed. R. Evid. 412.

1. Specific instances of sexual behavior by the victim, offered to prove that someone other than the accused was the source of semen, injury or other physical evidence.
2. Specific instances of sexual behavior between the victim and the accused, offered to prove consent. (This purpose would not be relevant in a child molestation case, as it is impossible for a child to consent.)
3. Evidence the exclusion of which would violate the constitutional rights of the defendant.*****

Following the example of the Federal Rules of Evidence, many jurisdictions have statutorily excluded evidence of the victim's sexual history except for the purposes listed above. Consequently, the defense may be required to make a preliminary motion notifying the court of its intent to introduce such evidence. Prosecutors should be vigilant and ensure that the defense has met this burden before introducing this type of evidence.*****

[B] Other Types of *In Limine* Motions

Several types of *in limine* motions may be beneficial in child sexual exploitation cases. For example, jury selection is particularly significant in child pornography or molestation cases. Defense attorneys usually try to eliminate jurors with a perceived religious background, as well as "community-rooted" or the more conservative jurors. The prosecution should consider a motion to limit graphic descriptions of the crime during jury selection***** because defense lawyers may use this

***** Fed. R. Evid. 412(b).

***** Fed. R. Evid. 412(c) requires such a motion in a federal case.

***** For a sample motion *in limine* as to jury *voir dire* in adult pornography cases, see BENJAMIN W. BULL, ET AL., THE PREPARATION AND TRIAL OF AN OBSCENITY CASE 57-85 (1988). A Memorandum of Law should always accompany such motions.

tactic to deliberately offend prospective jurors on the theory that those who respond by voluntarily asking to be excused would probably be “prosecution” jurors. Some prosecutors suggest that the prosecutor should aggressively challenge these tactics in the jury selection phase. Other prosecutors suggest that prospective jurors should not be stuck if they are uncomfortable as could result in a slanted jury pool. .

Another crucial motion *in limine* seeks to establish the conditions under which the victim will testify. In jurisdictions that have codified this procedure, the motion simply reinforces statutory law that established that the case must be tried on its merits rather than by theatrics.

Effective motion practice consists of understanding a case, pinpointing its potential problems, and seeking redress of these problems with motions *in limine*. Even if the motion is initially denied, it will put the court on notice of improper defense tactics that may be employed. Should the defense later try to use this ploy, the prosecution can remind the court that this behavior was anticipated and then renew the motion, which is more likely to be granted.

CHAPTER 6

Search Warrants

§6.01 Summary of Chapter

This chapter focuses on the importance of procedures surrounding the drafting and execution of search warrants.

In all child sexual exploitation cases (especially those involving child pornography), the use of a search warrant may alter the outcome of the trial. Too often, an investigation team fails to secure an adequate warrant. Knowing how to procure a warrant and understanding what to look for when searching are valuable investigative tools.

§6.02 Probable Cause

As in any other investigation, probable cause is the key to receiving approval from a magistrate to serve the warrant. Child pornography, obscenity, and child sex abuse cases, which necessitate the seizure of materials that may be protected by the First Amendment, require no greater quantum of proof to establish probable cause than other types of cases.***** The warrant must be supported by an affidavit setting forth “specific facts” that a crime has been committed and that contraband or evidence of this crime is located at the proposed search site.*****

***** *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986); *United States v. Wiegand*, 812 F.2d 1239, 1241-42 (9th Cir. 1987); *Multi-Media Distributing Co., Inc. v. United States*, 836 F. Supp. 606, 609 (N.D. Ind. 1993); *State v. Dowman*, 855 A.2d 524, 527 (N.H. 2004).

***** *United States v. Newsom*, 402 F.3d 780, 782 (7th Cir. 2005). See, e.g., *P.J. Video, Inc.*, 475 U.S. at 873, 876, 882 (holding that a reasonably specific warrant which gives name, length of film, specific content and character of depictions and theme is sufficient); *United States v. Soderstrand*, 412 F.3d 1146 (10th Cir. 2005) (holding that affidavit stating that witness saw computer disks in safe and viewed one disk that contained nude pictures of children was sufficient to satisfy probable cause that child pornography could be found on that and other disks in the safe); *United States v. Bach*, 400 F.3d 622, 627-28 (8th Cir. 2005) (holding that sufficient probable cause existed to search defendants computer based on chatroom conversations and expert testimony among other things).

case, the magistrate should evaluate “an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment . . . under the same standard of probable cause used to review warrant applications generally.”^{*****} Out of the abundance of caution, however, carefully consider whether each item or category is adequately supported in the affidavit (*i.e.* by specific allegations sufficient to establish probable cause). If only child erotica is specified in the warrant, no special First Amendment considerations apply. However, if child pornography itself is specified, a warrant should include detailed descriptions of the materials.

§6.03 Drafting An Affidavit

When drafting a warrant and affidavit, the relevant items generally fall into three legal categories:

- (1) child pornography;
- (2) adult pornography and child erotica; and
- (3) correspondence, financial records, diaries and notes of the perpetrator’s molestation or pornography activities.

[1] Circumstances Requiring Issuance of a Search Warrant

instrumentalities used in the commission of a crime...”); *see also Miller v. State*, 464 S.E.2d 621, 624 (Ga. Ct. App. 1995) (upholding the seizure of pornographic magazines and videos stating that a warrant may describe only the general class of items sought when it is impossible to obtain an exact description).

^{*****} *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986); *See United States v. Weigand*, 812 F.2d 1239, 1242-43 (9th Cir. 1987), *cert. denied*, 484 U.S. 856 (1987) (holding that “child pornography is not presumptively protected by the First Amendment” and the “under eighteen” language of the warrant was valid even though searchers may mistake the age of a subject and seize constitutionally protected adult pornography); *But cf. United States v. Diamond*, 820 F.2d 10, 12 (1st Cir. 1987) (finding “under the age of 18” language in warrant could be problematic, but declining to decide whether that language expressed sufficient particularity because all materials seized depicted “prepubescent children” also specified in the warrant). *For other cases, see Appendix I.*

The following is a non-exhaustive list of circumstances which will generally give rise to the need for a search warrant:

- (1) someone has observed child pornography or child erotica belonging to the perpetrator or other items that corroborate the child sexual exploitation or abuse, or adult pornography used in seduction;
- (2) another child pornographer or molester has dealt with the suspect and traded/sold/bought child pornography with him;
- (3) the suspect has exhibited adequate predisposition and ordered child pornography as part of a reverse sting;
- (4) the suspect has corresponded with an undercover agent and has sent him or her child pornography as part of a sting; or
- (5) the suspect has indicated that he or she possesses items which corroborate a child's testimony.
- (6) the suspect has made an affirmative effort to become a member of an e-group or a website with a primary purpose of distributing child pornography. *****

[2] Establishing the Existence of Probable Cause

The child victim's testimony often provides adequate probable cause. When interviewing the child, ask questions that will lead to information to use in the warrant affidavit. As in any application for a search warrant, officers should be as detailed and complete as possible in specifying the items they wish to search for, the possible location of each item, and their reasons for believing the item exists in that location.

***** *United States v. Gourde*, 440 F.3d 1065 (9th Cir. 2006); *United States v. Coreas*, 419 F.3d 151 (2^d Cir. 2005), reh'g denied, 426 F.3d 615 (2d Cir. 1995); *United States v. Martin*, 426 F.3d 68 (2d Cir. 2005), reh'g denied, 426 F.3d 83 (2d Cir. 2005).

Some possible situations where a child victim's testimony can be helpful include:

- (1) If a child victim indicates that pornography was shown to him or her, it is imperative to learn the location from which it was retrieved and the last time it was seen.
- (2) If pictures were taken of the child victim, ask the child victim where the photos were taken and get a description of the equipment.
- (3) If a child victim indicates the location of certain relevant items corroborative of the crime.

In addition to specifying in great detail the objects of search warrants, applications for warrants should list *other corroborative details*. What appear to be innocent details can be critical in writing a strong detailed affidavit. An abused child may be able to describe a house or even a room in the house. This information tends to corroborate the child victim's story and convince a magistrate that the premises require searching.

Children can also supply information sufficient to justify a search of the molester's person. Victims may notice unique physical characteristics of perpetrators of sexual offenses. If the questioning is proper and thorough, the existence of an identifying mark might be discovered, and a warrant (or court order) to examine the defendant may be obtained. *****

***** Example: A child claims to have been molested in the perpetrator's trailer, and describes the cracked back of the bathroom door and a missing stove dial in the kitchen. The child contends that the molester kept a camera in the kitchen drawer and used it to take pictures of the victim. The trailer park manager can corroborate the child's claims by showing the investigator notes of the cracked door and missing stove dial on a "walk through" sheet completed for the defendant's trailer. These details should convince the magistrate that the child was inside the trailer and make him more likely to sign the warrant to allow the search for the camera and any photographs. In addition to the camera and photos of the victim, police may be likely to find photos of other children. ***** Example: A boy claimed that a couple in his apartment complex sexually abused him. The boy recalled the woman had a butterfly tattoo on her buttocks that would not be visible unless she had taken her clothes off in the child's presence.

Investigators should explore every possible way of corroborating a child's testimony. An interrogator should ask a child victim for specific information on the location where the abuse took place, particularly if the child victim would be unfamiliar with the setting under any other circumstances. The probability of conviction becomes more likely when the accused claims to have had no involvement with an abused child, but evidence supports the child victim's claim by demonstrating that the child victim was with the suspect at the location of the abuse. ++++++

[3] Expertise Search Warrant

In the drafting of affidavits for sexual exploitation and pornography cases, children are usually the primary sources of information that give rise to probable cause. However, use of the so-called "*expertise search warrant*" allows for seizures of items of which there is no *direct* evidence, but are known to be common to pedophiles. ++++++ Trained investigators have

This statement was used to obtain a search warrant for the body of the female defendant and resulted in plea negotiations.

+++++ *Example:* A child claimed he was fondled by the defendant. The defendant insisted that he never touched the child. The child asserted that the abuse occurred in the defendant's bedroom. The perpetrator again insisted that the child was lying and claimed the child had never been in his bedroom. Effective questioning allowed the child to describe the bedroom and certain areas of the room. One item mentioned by the child was a clothes dresser with a nick that exposed the bare wood. The magistrate signed a search warrant. The police found the dresser and seized it. They also photographed the room, which matched the child's description. The dresser was the single most damaging piece of evidence at trial and the defendant was convicted.

+++++ *See* AMERICAN PROSECUTOR'S RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 37-63 (3d ed. 2003).

See also United States v. Rugh, 968 F.2d 750, 754 (8th Cir. 1992) (holding the expert testimony as applied to the facts of the case was enough to foster a good faith belief in the existence of probable cause); *United States v. Rabe*, 848 F.2d 994, 997 (9th Cir. 1988) (upholding a finding of probable cause based on the Postal Inspector's expert testimony and the seizure of two packages containing child pornography four years earlier); *People v. Donath*, 827 N.E.2d 1001, 1010 (Ill. App. Ct. 2005) (relying partly on expert testimony regarding the habits of child pornography collectors); *People v. Hellstrom*, 690 N.W.2d 293, 301 (Mich. App. 2004) (relying on detective's expert knowledge of pedophiles in upholding a search pursuant to a warrant); *State v. Steadman*, 448 N.W.2d 267, 273 (Wis. Ct. App. 1989) (relying in part on the nine page affidavit of an expert U.S. Customs Investigator who stated his experience revealed that child

§6.04 Specificity

Many types of illegal pornographic materials may appear to be similar. However, in executing a search warrant, law enforcement working child pornography or child sexual exploitation cases must take care not to seize “adult” pornography, *unless it is specified in*

***** In *United States v. Smith*, the Ninth Circuit found that there was sufficient probable cause when the affidavit was taken as a whole even though the magistrate was not shown child pornography photos, but was merely told they contained “sexually explicit conduct.” 795 F.2d 841, 847 (9th Cir. 1986), *cert. denied*, 481 U.S. 1032 (1987). The court noted that interviews with some of the victims, the suspect, and a pediatrician that confirmed the victims pictured were under eighteen supported a finding of probable cause. *Id.* at 847-849. *See also US v. Syphers*, 426 F.3d 461, 465 (2005) (Ideally, copies of such images will be included in all search warrant applications seeking evidence of child pornography crimes. If copies cannot feasibly be obtained, a detailed description, including the focal point and setting of the image, and pose and attire of the subject, will generally suffice to allow a magistrate judge to make a considered judgment.”)

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the affidavit (for example, as constituting evidence of child molestation). Both child pornography and obscenity are illegal and unprotected by the First Amendment.***** However absent exigent circumstances, seizure of “adult” pornography is not generally permitted, except under a search warrant.***** It may also be proper to define illegal materials as “photos depicting minors engaged in sexually explicit conduct” so as to exclude virtual child pornography and prevent overbreadth of the warrant.*****

[1] Items Discovered In Plain View: Secure Scene and Get a Warrant

While courts have consistently ruled that there is no higher standard of proof necessary for seizing material protected by the First Amendment, *the warrant must specifically describe the material sought*. If officers conducting a search see photographs, books, or videos *in plain view*, that appear to be incriminating, the officers should have the scene secured and should get a warrant expressly stating the authority to seize such materials. The United States Supreme Court has ruled that if such materials are seized under the plain view exception, they must be of an obviously incriminating nature.***** Computer screens

***** *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Miller v. California* (adult pornography which is obscene). *See also supra* at §4.03 Child Pornography And Obscenity Compared.

***** *See Heller v. New York*, 413 U.S. 483 (1973) and *Roaden v. Kentucky*, 413 U.S. 496 (1973), discussed *supra* at [5] *Heller v. New York* and [6] *Roaden v. Kentucky*. Where no exigent circumstances exist, the seizure of “adult pornography” without the authority of a constitutionally sufficient warrant has been regarded by courts as unreasonable under Fourth and Fourteenth Amendment standards. The explanation is that the seizure of “adult” pornography is not regarded as unreasonable “simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness.” *Roaden*, 413 U.S. at 504. *See also United States v. Moore*, 215 F.3d 681, 685 (7th Cir. 2000) (distinguishing between protected arguably obscene material and unprotected child pornography).

***** *United States v. Williamson*, 439 F.3d 1125 (9th Cir. 2006).

***** *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971). *See also Horton v. California*, 496 U.S. 128 (1990) (overruling the requirement of inadvertent discovery under *Coolidge*); *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987) (holding that plain view does not include items officers must move or manipulate to discover their incriminating nature).

displaying “screen savers” depicting protected speech do not fall under the “plain view” doctrine if the consent search does not involve computer-related crimes.***** Officers should be very hesitant to seize pornographic material not specified in a warrant. Even though officers may believe that the material is obscene, involves children or is otherwise evidence of a crime, they should secure the area and request permission from the court to seize the material, rather than depending on the courts to admit such materials under the *good faith exception* to the warrant requirement.***** This will avoid any credible allegations of an illegal seizure from the defense.

Additionally, contraband, whether listed in the warrant or not, can be confiscated under the plain view doctrine.***** Items such as *pre-pubescent* child pornography and illegal narcotics can constitutionally be seized if located within the plain view of officers executing a search warrant. However, *post-pubescent* children depicted in sexually suggestive poses may be indistinguishable from adult pornography, which, absent exigent circumstances cannot be constitutionally seized even if located in plain view. *

[2] Seizure of “Other Similar Materials”

Seizure of allegedly obscene adult material (unnamed in the affidavit) may be permitted if the warrant is very detailed. Consider

***** *United States v. Sell*, No. 04 CR 0099, 2005 U.S. Dist. LEXIS 26452 (N.D. Ill. Oct. 31, 2005).

***** *See United States v. Leon*, 468 U.S. 897 (1984). Note that some states have declined to adopt the good faith exception at all on state law grounds. *See e.g. State v. Glenn*, 251 Conn. 567, 861 n.5 (Conn. 1999); *State v. Prior*, 617 N.W.2d 260, 268 (Iowa 2000); *Commonwealth v. Edmunds*, 586 A.2d 887, 888 (Pa. 1991).

***** *Payton v. New York*, 445 U.S. 573, 586-87 (1980).

* *But see U.S. v. Raney*, 342 F.3d 551, 559 (7th Cir. 2003) (holding that adult pornography was properly seized under the plain view doctrine during a search for child pornography because the agents had probable cause to believe the adult pornography was linked to criminal activity given its homemade nature); *U.S. v. Musgrave*, 726 F. Supp. 1027, 1035 (W.D.N.C. 1989) (holding that seizure of adult pornographic videotapes was lawful under the plain view exception because the agents had probable cause to believe that those tapes contained some child pornography and the agents had probable cause to believe that the tapes were evidence of defendant’s predisposition to pornography).

the following warrant which was upheld by the Seventh Circuit in *Sequoia Books v. McDonald*.[†]

... the magistrate issued a warrant authorizing the seizure from the store of not only the nine magazines described in the affidavit but any “magazines, movies, and video tapes containing depictions or portion[s] thereof of the following: Cunnilingus, fellatio, anal intercourse, vaginal intercourse, excretion of semen from penis onto other person, masturbation, vaginal or anal insertion of prosthetic [sic] devices, insertion of tongue into anus; which has if considered as a whole a predominant appeal to the prurient [sic] interest and has no serious educational, literary, artistic or political value and has no socially redeeming value.”*

The Court in *Sequoia Books* ruled that although it was possible that when executing such a search warrant police may seize what is later determined to be constitutionally protected materials, this would not invalidate the search and seizure.[§]

There have been many cases in which courts have considered the validity of warrants which authorize seizure of “*other similar materials*.”** Courts have split on whether to uphold such warrants or to strike them down as unconstitutionally overbroad.^{††} Such clauses are most questionable when encompassing allegedly obscene adult pornography. In 1979, the Supreme Court in *Lo-Ji Sales, Inc. v. New York*, ruled that a search warrant violated the

[†] 725 F.2d 1091, 1093 (7th Cir. 1984).

[‡] *Id.* at 1093.

[§] *Id.* at 1094.

** See e.g., *Andresen v. Maryland*, 427 U.S. 463, 479 (1976) (holding that the phrase “other fruits, instruments and evidence of crime at this [time] unknown” which appeared “at the end of a sentence containing a lengthy list of specified and particular items to be seized” was valid).

†† Compare *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995); *United States v. Layne*, 43 F.3d 127 (5th Cir. 1995); *Supreme Video, Inc. v. Schauz*, 15 F.3d 1435 (7th Cir. 1994); *In re Matter of Search of Kitty’s East*, 905 F.2d 1367 (10th Cir. 1990); *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), with *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984); *United States v. Sherwin*, 572 F.2d 196 (9th Cir. 1977).

Fourth Amendment when it allowed officers to seize any materials in the store which were, in their discretion, obscene.^{##}

When looking for child pornography, clauses authorizing seizure of “other similar materials” are upheld regularly due to the relative ease of identifying images depicting children (obviously under sixteen or eighteen years of age) involved in sexual activity.^{§§}

§6.05 Age of the Individual Depicted

Before applying for a search warrant, investigators need to know the correct statutory age limit which defines “child” for purposes of the applicable child pornography or child sexual exploitation statutes (i.e., the age of legal consent) in their jurisdiction. The age varies from jurisdiction to jurisdiction, with most states being eighteen but many still are 16.

§6.06 Items That May Be Seized

Drafting the search warrant in a child sexual exploitation or child pornography case is the single most important piece of legal work the prosecutor will do. Unfortunately, in many cases, the warrant is written by a police officer and served even before the prosecution knows the case exists. Except in extreme circumstances, this should not happen. While many law enforcement officers are experienced in these cases, an attorney in the prosecuting office which will ultimately handle the case should review the affidavit and draft the actual warrant used, as a matter of

^{##} *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325-26 (1979).

^{§§} See *United States v. Rabe*, 848 F.2d 994, 997-98 (9th Cir. 1988) (holding that search warrant for materials ““depicting minors engaged in sexually explicit conduct as those terms are defined in 18 U.S.C. 2255”” and documents which would serve as evidence of ““the purchase, sale, or trade of sexually explicit depictions of minors or evidence of producing, sale, trade, or purchase of sexually explicit depictions of minors”” was not overbroad. However, the Court noted reservations about whether the seizure of Defendant’s financial and telephone records, without providing any guidelines to aid the officer in determining what may or may not be seized, was impermissibly overbroad.) See also *United States v. Gourde*, 382 F.3d 1003, 1008-09 (9th Cir. 2004); *United States v. Hall*, 142 F.3d 988, 996 (7th Cir. 1998); *United States v. Layne*, 43 F.3d 127, 133 (5th Cir. 1995); *United States v. Koelling*, 992 F.2d 817, 821-22 (8th Cir. 1993); *United States v. Peden*, 891 F.2d 514, 518 (5th Cir. 1989).

case strategy.^{***} For the warrant to be drafted with the requisite specificity, the prosecutor should gather as much information as possible before presenting the application for a search warrant to a magistrate.^{†††}

Another troublesome area is material that the pedophile/molester covets, but that investigating officers may pass by as meaningless, such as child erotica, diaries, or phone logs. Whether one can seize items (including adult pornography in plain view) will generally depend on the statements establishing “probable cause,” as set forth in the affidavit (for example: information about the suspect, and the seized items use as evidence of both criminal conduct and the suspect’s interest in children) and the “totality of the circumstances” as discussed in *Illinois v. Gates*.^{***}

Police must be trained to recognize “plain view” evidence. Evidence of a crime may be seized without a warrant under the plain view exception to the warrant requirement. To rely on this exception, the officer must be in a lawful position to observe the

^{***} See INVESTIGATION AND PROSECUTION, *supra* note 619, at 96, 176-177.

^{†††} See *Maryland v. Garrison*, 480 U.S. 79 (1987); *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976) (holding that language allowing exploratory rummaging was not permitted); *U.S. v. Riccardi*, 405 F.3d 852, 862 (10th Cir. 2005) (“[W]arrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized”) (quoting *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988)). Sometimes fear that evidence may be destroyed requires fast action, but still as much information as possible should be used. Fortunately, *United States v. Leon*, 468 U.S. 897 (1984), permits seizures under the “good faith” exception where agents objectively and reasonably relied on the magistrate’s probable cause determination. But see *supra* note *****. The remedy for items seized without probable cause, which did not survive an objective good faith test, is to sever those particular items seized outside the scope of the warrant and return those items, thereby not invalidating the entire warrant. See e.g., *United States v. Riggs*, 690 F.2d 298 (1st Cir.1982) (adopting severance); *United States v. Christine*, 687 F.2d 749 (3d Cir.1982) (adopting severance); *United States v. Cook*, *supra*, 657 F.2d 730, 734-36 (5th Cir.1981) (adopting severance).

^{***} 462 U.S. 213 (1983) (holding that magistrate must only determine whether there is a fair probability of discovering evidence of a crime given the totality of the circumstances). But see, for example, *Carlisle ex rel. State v. \$10,447.00*, 89 P.3d 823, 830 (Haw. 2004), *People v. Edwards*, 95 N.Y.2d 486, 496 (2000), and *State v. Ibarra*, 812 P.2d 114, 116 (Wash. App. 1991), rejecting the totality of the circumstances test set forth in *Illinois v. Gates* on state law grounds and requiring a stricter showing of probable cause.

evidence, the object(s) to be seized must be in plain view, and its incriminating character must be immediately apparent.^{§§§}

In order to secure a warrant for certain items, prosecutors must educate magistrates regarding characteristics of pedophiles or child molesters. Unless this is done, it may be difficult to convince a judge that requested items that appear innocuous should be seized (such as photographs of children or toys). The key to securing a search warrant authorizing seizure of any requested item is being able to demonstrate that certain types of evidence (*e.g.* ledgers, telephone logs, computer disks, children's photographs, children's toys, and any kind of pornography) are *tools* commonly used by child molesters, which likely were used in a particular case. For example, in certain types of child sexual exploitation cases, the seizure of what appear to be "innocuous" photos of children is justified, because these items are relevant to the charged crime, in the same way that the seizure of an "innocuous" pair of gloves would be justified for certain types of burglary cases.

Officers conducting a search in a child exploitation or child pornography case should look for what experts call "pedophile paraphernalia" or "child erotica,"^{****} and attempt to locate material associated with pedophiles that ordinarily might otherwise be overlooked.^{††††} They should also include information in the affidavit regarding the practice of child pornography collectors to retain their collections.

The parameters of a search warrant cannot be ignored. The real work is questioning the child for details, and educating the judge as to the relevance and importance of all requested items, no

^{§§§} *Horton v. California*, 320 U.S. 128, 136-37 (1990); *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987).

^{****} See KENNETH V. LANNING, *CHILD MOLESTERS: A BEHAVIORAL ANALYSIS*, at 65-69 (4th ed. 2001) [hereinafter *CHILD MOLESTERS*], accessed on July 12, 2005, available at: http://www.missingkids.com/en_US/publications/NC70.pdf.

^{††††} *Example*: A search warrant is executed at a suspect's house with authorization to confiscate *all* evidence of the molestation of a six year-old boy. The officer sees a group of miniature race cars on a shelf and seized them. The child eventually speaks of playing with those items before and after being molested.

matter how innocuous any item may appear at first glance to the uneducated eye.^{****}

Some of the categories that should be considered in the seizure list are:^{§§§§}

- (1) Pictures, negatives, undeveloped film, videotapes or movies of the victim when the child indicates that these were taken of him/her, regardless of the circumstances (undressed, partially dressed, dressed alone, together, with others, etc.);
- (2) Pictures, negatives, videotapes or movies of other children seen by the victim while the victim was with the offender or of other children seen with the offender;
- (3) Pornographic pictures, videotapes, books, magazines or other erotic materials shown to the child in the seduction or teaching process;
- (4) Computer records, journals, diaries or calendars belonging to the suspect, when there is some evidence of their existence;
- (5) Other child pornography;
- (6) Books, magazines, movies (pornographic or not), toys or any other unique items a child saw, read, or played with while with the offender;

^{****} *Example:* An officer stops a car driven by a wanted child molester. Upon serving the arrest warrant, the automobile is impounded. At the station, while the defendant is being questioned, other officers are doing an inventory of the car. A basket of laundry is found in the trunk. Because of adequate training, the officer realizes the significance of having found several children's undergarments in the basket. The suspect has no children of his own and these items become a significant piece of corroborative evidence in the trial.

^{§§§§} AMERICAN PROSECUTOR'S RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE II-33, II-34 (Patricia A. Toth & Michael P. Whalen, eds., 1987).

- (7) Camera or video camera used to take pictures of the child, or developing and printing equipment used by the offender to process the film;
- (8) Items left by the child with the offender, (e.g., pictures, drawings, toys, letters, keepsakes, clothing, etc.);
- (9) Sexual aids or devices used with the child, (e.g., lubricants, condoms, dildos, vibrators, etc.);
- (10) Weapons or items used to threaten or injure the victim;
- (11) Address books, or notations showing victim's address or phone number;
- (12) Bank records, receipts or charge account records showing money withdrawn, checks written or items purchased for the victim by offender;
- (13) Phone records/bills showing calls made to the child victim;
- (14) Other correspondence and business records showing corroborating evidence;
- (15) Other child erotica such as: pedophile manuals, newsletters, bulletins, magazines with children or child's clothing or items, and fantasy writings.

Before referring to the warrant, it is always beneficial to get consent to search from the suspect or someone else with authority to consent.^{*****} This should be done before referring to the warrant, in the event it should later be invalidated.^{†††††} Evidence seized must be carefully marked and bagged so that prosecutors can effectively establish a chain of custody.^{*****} Taking pictures or videotapes of

^{*****} AMERICAN PROSECUTOR'S RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE II-33 (Patricia A. Toth & Michael P. Whalen, eds., 1987).

^{†††††} *Id.*

^{*****} *Id.*

the scene will allow the prosecutor to convey an accurate picture of the crime scene to the judge and jury. §§§§§ A videotape or still photographs of the premises will also help defend against a potential civil complaint alleging that the officers damaged the defendant's property. Never leave a suspect alone during a search, because he or she may try to eliminate or conceal evidence. *****

When evidence is discovered outside the purview of the warrant and affidavit, secure the premises and obtain an additional search warrant.

§6.07 Searches Involving Computers+++++

Computer technology presents a new challenge to the law enforcement community. When executing the search warrant, the discovery of a computer necessitates certain actions. ***** Investigators should secure the computer and not tamper with it until a computer expert arrives at the scene. Also, a search must be conducted for related material, such as disks, entry codes, and phone lists of computer services, etc. So long as the search warrant used to seize a computer was for evidence related to child pornography crimes, a second search warrant is not necessary to search the computer for evidence. If the computer was seized under a search warrant for evidence of narcotics distribution, as in *United States v. Carey*, §§§§§ it may be helpful to obtain a second warrant to search the hardware and software of the computer for evidence of child pornography. *****

Since the molester who used the computer knows this material can be very incriminating, he or she will usually be ready

§§§§§ *Id.*

***** *Id.*

+++++ See Appendix II for a Sample Search Warrant and Affidavit that was used in a case involving child pornography on a computer.

+++++ See, e.g., COMPUTER CRIME AND INTELLECTUAL PROP. SECTION, U.S. DEP'T. OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (2002), available at <http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.pdf> [hereinafter SEARCHING AND SEIZING COMPUTERS].

§§§§§ *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999).

***** *United States v. Grimmett*, 439 F.3d 1263 (10th Cir. 2006).

to implement immediate erasure methods.^{††††††} One of the simplest is to pass a magnet over the disk, erasing the material stored on it

In addition to erasure methods, child pornography possessors sometimes take active measures to hide the pornography in their computers. While a recent study showed that only 20 percent of child pornography possessors had used a method to hide the pornography, the methods used were often sophisticated from encrypted files to partitioned hard drives.^{*****}

§6.08 Arrest Warrant As Basis For A Search Warrant

^{††††††} See *Computer Pornography and Child Exploitation Prevention Act: Hearing on S. 1305, A Bill To Amend Title 18, U.S.C., to Establish Criminal Penalties For the Transmission By Computer of Obscene Matter, Or By Computer or Other Means, of Matter Pertaining to the Sexual Exploitation of Children, and for Other Purposes, Before the Subcomm. On Juvenile Justice, of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1986) (hereinafter *Computer Pornography and Child Exploitation Prevention Act*), at 18-19 (Opening Statement of special agent Kenneth V. Lanning, Behavioral Science Unit, Training Division, Federal Bureau of Investigation), regarding use of computers by pedophiles and describing a case example from the files of the FBI:*

The key to Ralph's meticulous recordkeeping was his computer. The computer contained information about sexual activity with over 400 boys and a few girls. He cross-referenced all the information he maintained on his victims. It contained a sexual history of each of his victims. He used it to keep track of the biorhythm charts of his victims. He also used it as an index for his child pornography collection so that he could locate photographs on specific sexual acts. The computer was accessed by using the name and an assigned bank account identification number of each victim. *The computer also had a self-destruct program which the subject did not have an opportunity to initiate prior to his arrest.* [Emphasis Added.]

^{*****} Janis Wolak et al., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 9-10 (2005), *available at* www.missingkids.com/en_US/publications/NC144.pdf. The study showed that of the 20% that used methods to hide the child pornography, 12% used password protection, 6% used encrypted files, 4% used file servers, 3% used evidence-eliminator software, 2% used remote storage, 2% used partitioned hard drives, <1% used anonymous re-mailers, and <1% used peer-to-peer networks although peer-to-peer technology was new at the time of the study and the numbers could be higher now. *Id.*

Sometimes, probable cause for a search warrant may not exist. However, the serving of an arrest warrant at a suspect's home may supply the necessary probable cause. §§§§§§

§6.09 Anticipatory Searches

Every circuit that has considered the validity of anticipatory search warrants has concluded that they are not *per se* unconstitutional. ***** The need for *anticipatory* search warrants arises when investigators are conducting a child pornography investigation and plan to affect a “controlled delivery.” While not unconstitutional *per se*, however, anticipatory search warrants are often found deficient when not carefully and narrowly drafted. ++++++

§§§§§§ *Example:* The victim is a four-year old child who is not able to supply many details. Investigators determine something else other than the child's statement is necessary for a search warrant. The court issues an arrest warrant, and pursuant to *Payton v. New York*, 445 U.S. 573 (1980), it is served at the defendant's home. Entering the house, officers observe a wall in plain view that is filled with candid snap shots of little children in various innocent poses, a computer terminal with modem, and an entertainment center with dozens of untitled video tapes. This information enables procurement of a search warrant. Significant evidence, including tapes of child pornography, are seized during the raid. This technique provides an opportunity to obtain evidence legally, in a case where investigators are otherwise unable to secure a search warrant.

***** *United States v. Santa*, 236 F.3d 662, 671 (11th Cir. 2000) (citing *United States v. Ricciardelli*, 998 F.2d 8, 11 (1st Cir. 1993); *United States v. Garcia*, 882 F.2d 699, 702-04 (2d Cir. 1989); *United States v. Loy*, 191 F.3d 360, 364 (3d Cir. 1999); *United States v. Goodwin*, 854 F.2d 33, 36 (4th Cir. 1988); *United States v. Wylie*, 919 F.2d 969, 974 (5th Cir. 1990); *United States v. Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991); *United States v. Leidner*, 99 F.3d 1423, 1425-26 (7th Cir. 1996); *United States v. Bieri*, 21 F.3d 811, 814-15 (8th Cir. 1994); *United States v. Hale*, 784 F.2d 1465, 1468-69 (9th Cir. 1986), abrogation on other grounds recognized by *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990); *United States v. Hugoboom*, 112 F.3d 1081, 1085-87 (10th Cir. 1997)). Note, however, that a small minority of state courts have held or recognized that anticipatory search warrants are invalid. See *Ex parte Ronald Lee Wright*, 709 So. 2d 1111 (Ala. 1996); *People v. Poirez*, 904 P.2d 880 (Colo. 1995); *State v. Scott*, 951 P.2d 1243 (Haw. 1998); *Newby v. State*, 701 N.E.2d 593 (Ind. Ct. App. 1998); *State v. Gilepsie*, 530 N.W.2d 446 (Iowa 1995); *State v. Morgan*, 222 P.2d 1056 (Kan. 1977); *State v. Guthrie*, 38 A. 368 (1897) (recognizing rule); *Kostelec v. State*, 703 A.2d 160 (Md. 1997).

+++++ See, e.g., *United States v. Loy*, 191 F.3d 360, 367 (3d Cir. 1999) (finding anticipatory search warrant lacked probable cause to search defendant's home when the tape was delivered to a post office box, but upholding the search based upon the good faith exception); *United States v. Rowland*, 145 F.3d 1194, 1204-1206 (10th Cir. 1998) (finding an anticipatory search warrant lacked probable cause to search defendant's home when the tape was delivered to a post office box); *United States v. Ricciardelli*, 998

When obtaining an anticipatory search warrant from a magistrate, it is important that the event triggering the warrant (e.g. the delivery of child pornography to the suspect's home) is "clear and ascertainable"***** and it is also crucial that the contraband be on a "sure and irreversible course to its destination."§§§§§§§§ Law enforcement must first review the material which will be sent to the defendant prior to applying for a search warrant. This preview is the basis for the affidavit presented to the magistrate. Anticipatory search warrants are appropriate when it is likely that the contraband will be hidden, moved to another location, or in some cases destroyed, if the time is taken to seek a warrant after delivery.

A District Court in *United States v. Flippen* suggested that the use of anticipatory search warrants was improper in child pornography cases.***** The court reasoned that anticipatory warrants were unconstitutional in child pornography seizures because child pornography seizures lacked the sort of exigent circumstances that are present in narcotics investigations (frequently the subject of anticipatory warrants).+++++++ The court

F.2d 8, 12 (1st Cir. 1993) (finding anticipatory search warrant for defendant's home fatally defective because it failed to set forth a specific link between the arrival of the videotape and the defendant's home after the warrant was executed upon defendant retrieving the videotape at the post office); *United States v. Hendricks*, 743 F.2d 653, 654-56 (9th Cir. 1984) (finding anticipatory search warrant lacked probable cause to search his home because there was no support for the assumption that defendant would take the contraband home from the airport).

+++++++ See, e.g., *United States v. Grubbs*, 377 F.3d 1072, 1079 (9th Cir. 2004) (finding anticipatory warrant invalid for failing to specify the triggering event that would establish the necessary probable cause for the warrant's execution), *petition for cert. filed*, 73 USLW 3650 (2005).

§§§§§§§§ *United States v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993).

***** *United States v. Flippen*, 674 F. Supp. 536, 539 (E.D. Va. 1987), *aff'd in unpublished decision on other grounds*, 861 F.2d 266 (4th Cir. 1988) (The Fourth Circuit in its unpublished affirmation, however, stated that anticipatory search warrants were proper in child pornography cases).

+++++++ The District Court distinguished the validity of anticipatory search warrants in drug cases as compared with child pornography cases stating:

The characteristics of drugs and child pornography differ greatly. Upon delivery drugs are used up or immediately distributed On the contrary, child pornography is not used up or distributed upon delivery. The Postal Inspector's . . . affidavit used to secure the search warrants state[d] that recipients of child pornography 'rarely dispose of their collection of sexually-explicit material They almost always

stated it was unlikely the material was in danger of being destroyed, since it was being asserted that pedophiles rarely dispose of or destroy such pornography. This reasoning has not been adopted by other courts,***** however it would be useful for prosecutors to note when obtaining an anticipatory warrant that pedophiles “hide or further disseminate” their collections, in addition to the fact that, if they suspect detection, they may “destroy” the evidence.

§6.10 Locations To Search

The defendant’s home is not the only location where a search should be conducted. Any place where the child has been with an abuser should be searched. Additionally, any vehicle an abuser used to transport the victim to and from a molestation scene should be searched. The child is the best source for this sort of information. Once a vehicle or a location where abuse occurred has been identified, every effort should be expended to obtain a warrant and search those places.

If the defendant is arrested while in the vehicle, inventory searches will suffice. However, if a vehicle is not impounded or probable cause does not exist for searching it, the vehicle can be seized as evidence and then searched in the impound process.

§6.11 Police Behavior

When serving a search warrant, police conduct must be professional and above reproach. Officers must be on guard continuously to avoid even the appearance of impropriety. Remarks which could remotely be construed to be callous or “off color humor” are never appropriate. Unguarded comments can completely undermine an investigation. Nothing damages a case

maintain and possess their collection of materials in the privacy and security of their homes.’

Flippen, 674 F. Supp. at 539.

***** Several courts have upheld anticipatory search warrants in child pornography cases when such warrants are supported by probable cause. *See, e.g., United States v. Edmundson*, 937 F.2d 609 (6th Cir. 1991); *United States v. Dornhofer*, 859 F.2d 1195 (4th Cir. 1988); *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988); *United States v. Hale*, 784 F.2d 1465 (9th Cir. 1986); *United States v. Terry*, 240 F.Supp.2d 922 (S.D. Iowa 2002).

faster than officers who can be portrayed as flippant about their jobs or the investigation. §§§§§§§§

With a child pornography case or where adult pornography or child erotica is found, police conducting the search should avoid commenting on the pictures, films or paraphernalia. The pre-eminent theme of police behavior must be professionalism. *****

§§§§§§§§ *Example:* An arrest warrant is served at the defendant's office where several co-workers are present. During the trial, the co-workers testify to comments made by the officers at the time of arrest. Each says that officers referred to the defendant as a "weenie waver" and the "master of manipulation." The defendant is charged with indecent exposure in front of young girls under the age of twelve (a felony). The jurors snicker when they hear the insults relayed by the witnesses and eventually acquit the defendant, citing the lack of seriousness by the police as a prime factor in their decision.

***** *Example:* A child pornography ring was uncovered. The search warrant was served at the defendant's home, with the defendant, his wife and two children present. After noticing that the adult male depicted in the defendant's child pornography had unusual anatomical characteristics, the officers made crude comments, which were overheard by family members. Moreover, the officers spent a lengthy time viewing the defendant's collection of adult pornography, while at the same time making "laudatory" comments. This information was brought before the jury, and police conduct became an issue at trial which ended in an acquittal. Jury members indicated they were truly disturbed by the unprofessional police conduct.

APPENDIX I

STATE STATUTORY REFERENCE AND CASE LAW ANNOTATIONS: CHILD PORNOGRAPHY

Alabama

(Ala. Code § 13A-12-191 et seq.)

Dannelley v. State, 397 So. 2d 555 (Ala. Crim. App. 1981). During the serving of a search warrant on an unrelated case, the officers were permitted to seize photographs of explicit sexual activity between children and adults. The court's rationale in this pre-*Ferber* case is that the photographs were evidence of production of child pornography, not just possession of child pornography.

Felton v. State, 526 So. 2d 635 (Ala. Crim. App. 1986); also see *Ex parte Felton*, 526 So. 2d 638 (Ala. 1988). This case effectively makes the same argument as the United States Supreme Court made later in *Osborne*. The Alabama Supreme Court in the *Ex parte Felton* decision upheld the lower court's decision. The possession of child pornography is not protected by *Stanley v. Georgia*, 394 U.S. 557 (1969), and therefore may be criminalized.

Poole v. State, 596 So. 2d 632 (Ala. Crim. App. 1992). The court held that *Ferber* placed child pornography in a different category than obscenity. There is no need to invoke the *Miller* test in any material containing children. The test is: does the material contain a child (under age 17) involved in proscribed sexual activity? The court also answered a search and seizure question, allowing the police to seize if the contraband nature of the material is "immediately apparent."

R.K.D., alias v. State, 712 So. 2d 754 (Ala. Crim. App. 1997); *writ denied*, 712 So. 2d 761 (Ala. 1998). Drawings, not actual photographic depictions, of nude adults and minors engaging in sexual conduct did not violate the statute. Also, clothed photos of minors not engaged in sexual acts but kept with these drawings did not cumulate to violate the statute.

Rutledge v. State, 745 So. 2d 912 (Ala. Crim. App. 1999). The Court concluded “that, although the term ‘matter,’ as it is defined in the child pornography statutes, does not explicitly refer to computer images, the language ‘electrical or electronic reproduction’ of a ‘photographic or other visual reproduction’ includes computer images depicting child pornography.”

Girard v. State, 883 So. 2d 717 (Ala. 2003) The charging of multiple images contained on one computer hard drive constituted one count of violation of the statute. The charging based upon each image contained on the hard drive was rejected as being duplicative.

Lanham v. State, 888 So. 2d 1283 (Ala. Crim. App. 2004). The Court held that a European nudist video tape which depicted nude adults and children was obscene as defined under the Alabama Child Pornography Statute. The Court also rejected arguments that the video had serious literary, artistic, political, or scientific value.

Alaska

(Alaska Stat. §§ 16.61.125 and 16.61.127⁺⁺⁺⁺⁺⁺)

Rodriguez v. State, 741 P.2d 1200 (Alaska Ct. App. 1987). The decision to allow an expert witness to

⁺⁺⁺⁺⁺⁺ *Alaska Stat. § 11.61.129 (2005) adopted in 2003 provides for forfeiture of property used in the violation of the Child Pornography Statute.*

testify is in the sole discretion of the trial court. Unless a showing of abuse of discretion exists, the ruling will not be disturbed.

Harris v. State, 790 P.2d 1379 (Alaska Ct. App. 1990). It is unlawful to make an audio recording (in addition to visual) that describes prohibited exploitation of minors.

Arizona

(Ariz. Rev. Stat. Ann. §§ 13-3552 and 13-3553)

State v. Limpus, 625 P.2d 960 (Ariz. Ct. App. 1981). The court rejected the defendant's challenge that the phrases *lewd exhibition* of the *genitals and harmful to minors* in the law were unconstitutionally vague.

State v. Shepler, 684 P.2d 924 (Ariz. Ct. App. 1984). Commercial sexual exploitation of a minor is a crime.

State v. Smith, 753 P.2d 1174 (Ariz. Ct. App. 1987). Transporting photographs of a nude 10-year-old boy from Michigan to Arizona is sufficient to support a conviction for the sexual exploitation of a minor.

State v. Taylor, 773 P.2d 974 (Ariz. 1989). The court upheld a sentence of 85 consecutive life sentences with approximately 3,000 years of mandatory time. The heinous nature of the crimes (producing child pornography and sexually abusing children) coupled with the defendant's prior record for identical behavior convinced the Arizona Supreme Court to allow this very significant sentence to stand.

State v. Valdez, 182 Ariz. 165; 894 P.2d 708 (1994). Possession of one roll of undeveloped film constituted possession of one "visual or print medium." but each photograph on the roll of film did not constitute a separate offense.

State v. Hazlett 205 Ariz. 523; 73 P.3d 1258 (Ariz. Ct. App. 2003) The court rejected an argument that the statute was unconstitutional because it did not require the depiction an identifiable actual child. The Court concluded the statute, “is limited to visual depictions of “actual minors” actually engaged in real or simulated exploitative exhibition or sexual conduct. Therefore, these two statutes do not suffer from the defects found to exist in the provisions of the CPPA invalidated by the Supreme Court.”

Arkansas

(Ark. Code Ann. §§5-27-303, 5-27-304 and 5-27-603)

Gabrion v. State, 73 Ark. App. 170; 42 S.W.3d 572 (Ark. App. Ct. 2001) The Court affirmed a conviction of a possessor of videotapes which showed full frontal nudity of two girls. The term “lewd” as used in the statute was upheld and deemed to apply to the video in question in this case.

California

(Cal. Penal Code §§ 311.3, 311.10, 311.11)

People v. Burrows, 67 Cal. Rptr. 28 (Cal. Ct. App. 1968). Conviction affirmed for employing a child for purposes of producing child pornography even though there was no indication shown of an intent to distribute the pornographic material.

People v. Stockton Pregnancy Control Medical Clinic, Inc., 249 Cal. Rptr. 762 (Cal. Ct. App. 1988). The consent of a child under age 14 is not a defense for the production of child pornography.

People v. Stoll, 783 P.2d 698 (Cal. 1989). The Supreme Court of California reversed the defendant’s conviction because the trial judge refused to allow expert psychological testimony. The rationale is

based on the jury's right to hear all character trait evidence.

In Re Duncan, 234 Cal. Rptr. 877 (Cal. Ct. App. 1987). The court held that any right to privacy a defendant may have in his own home is subservient to the state's interest in protecting the children from abuse by pornography.

United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987). The defendant is allowed to present evidence of "mistake of age" in his defense. The government is not required to prove the defendant actually knew the performer was under age; it is sufficient to prove the defendant knew that the "nature and character" of materials produced were sexually explicit.

People v. Kongs, 30 Cal. App. 4th 1741 (Cal. Ct. App. 1994). This case affirms the California Child Pornography statute following the rationale of the *Ferber* and *Osborne* decisions. The case recognized that the state "may legitimately protect the dignity and psychological well-being of children by forbidding child pornography." Additionally, there is no right to privately possess child pornography. In this case the photography of a minor who was clothed but posed in a sexually suggestive manner was sufficient to violate the statute.

People v. Kurey, 88 Cal. App. 4th 840 (Cal. Ct. App. 2001). The Court allowed for age to be proven to the trier of fact by expert testimony as to the physical development of the minor depicted in the images.

People v. Luera, 103 Cal. Rptr. 2d 438 (Cal. Ct. App. 2001). California child pornography exception for MPAA rated movies was not an unconstitutional delegation of legislative authority.

People v. Spurlock, 114 Cal. App. 4th 1122 (Cal. Ct. App. 2003) “*Ferber* makes clear ‘that states may legitimately protect the dignity and psychological well-being of children by forbidding child pornography.’ (Citations omitted) That interest permits the Legislature, if it sees fit, to proscribe depictions of a partially clad genitalia created for the sexual stimulation of the viewer.”

Colorado
(Colo. Rev. Stat § 18-6-403)

People v. Enea, 665 P.2d 1026 (Colo. 1983). Defendant, who had helped arrange for the sale of child pornography, unsuccessfully challenged the law as unconstitutionally overbroad.

People v. Esch, 786 P.2d 462 (Colo. Ct. App. 1989). A state prosecution for the sexual exploitation of a child was not barred by double jeopardy because the defendant had been convicted on a federal charge of using the mail for child sexual exploitation.

People v. Atencio, 780 P.2d 46 (Colo. Ct. App. 1989). The police were informed by a local film processor that the defendant had taken child pornography photographs. The officers used the information to obtain a search warrant and then delivered the developed film. The court said this is appropriate behavior and good police work because the defendant no longer had a “reasonable expectation of privacy.”

People v. Batchelor, 800 P.2d 599 (Colo. 1990) The Court stated the elements of this offense as, “person commits sexual exploitation of a child if, for any purpose, he knowingly . . . makes any photograph . . . which depicts a child being used for . . . the display of

the human female genitals or pubic area [or] the undeveloped or developing genitals or pubic area of the human female child, . . . for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.”

People v. Bath, 890 P.2d 269 (Colo. Ct. App. 1999). The court concluded that by

“§ 18-3-406(1), C.R.S. (1986 Repl. Vol. 8B), providing for the affirmative defense of reasonable belief, manifests a clear legislative intent that the culpable mental state of "knowingly" does not apply to the age of the victim.”

People v. Gagnon, 997 P.2d 1278 (Colo. Ct. App. 1999). The court determined that, “to convict a defendant of sexual exploitation of a child under § 18-6-403(2)(d), two conditions must be met: (1) the picture must display human genitals or breasts (2) for the purpose of real or simulated sexual gratification or stimulation of one or more of the persons involved. The division found that ‘the obvious intent was to elicit a sexual response in the viewer.’” (Quote is from *People v. Grady*, 2005 Colo. App. LEXIS 758 (Colo. Ct. App. 2005) which is not a final opinion as of 8-7-2005)

Connecticut

(Conn. Gen. Stat. § 53a-196c et. seq. See also definition contained in Conn. Gen. Stat. § 53a-193(13))

State v. Ehlers, 252 Conn. 579, 750 A.2d 1079 (Conn. 2000). The “live performance” in the Connecticut child pornography statute “means that there must be some recording or viewing of, or listening to, a live performance, or a reproduction of a live performance, by a person or persons other than the person or persons simultaneously engaged in the performance.”

Also, the Connecticut age of minority (16) and the term minor as used in this statute were upheld.

State v. Sorabella, 2002 Conn. Super. LEXIS 3422 (Conn. Super. Ct. 2002). The Court found that the Connecticut child pornography statute encompassed computer images. The Court also rejected an overbreadth defense stating that these computerized images were required to be of actual minors and not virtual images. (This is an unreported decision)

State v. Bacon, 2005 Conn. Super. LEXIS 582 (Conn. Super. Ct. 2005). "The court rejects the defendant's argument that the language in (the Conn. Statute) "visual reproduction of a live performance" is the same as the language "computer-generated image or picture" and "is or appears to be" in (The Child Pornography Protection Act of 1996) which was declared unconstitutional in *Ashcroft v. Free Speech Coalition*, (535 U.S. 234). Whether or not the images on the defendant's computer are actual or real children will be left to the trier of fact." (This is an unreported decision)

Delaware

(Del. Code Ann. tit. 11 § 1109 & tit § 1111)

Raymond Heartless, Inc. v. State, 401 A.2d 921 (Del. 1979). Defendant, convicted of distributing obscene photographs of nude minors that graphically focused on their genitals, unsuccessfully claimed that the material was not obscene because it did not depict any sexual activity.

Naughton v. State, 453 A.2d 796 (Del. 1982). Defendant's conviction under federal law for mailing obscene material does not bar state prosecution for producing child pornography.

Fink v. State, 817 A.2d 781 (Del. 2003). Individual photos may be charged separately under the Delaware child pornography statute. Also, being charged with possession and distribution of the same image in two separate counts did not violate the defendant's right against double jeopardy.

District of Columbia
(D.C. Code § 22-3101 et. seq. relative to production. Possession is not addressed in the DC Code.)

Florida
(Fla. Stat. § 827.071, See also, §847.0135, §847.1037)

Griffin v. State, 396 So. 2d 152 (Fla. 1981). Defendant challenged for vagueness the law under which he was convicted of producing or directing obscene photographs of minors and procuring a minor for obscene photographs, but the court held that the law proscribed conduct and not constitutionally protected speech.

United States v. Kleiner, 663 F. Supp. 43 (S.D. Fla. 1987). Information regarding the idiosyncrasies of pedophiles is valid addition to obtain a search warrant to aid the magistrate in determining probable cause. The knowledge element necessary for conviction for distribution is knowledge of the shipment or transportation *not* whether the material is sexually explicit.

Firkey v. State, 557 So. 2d 582 (Fla. Dist. Ct. App. 1989). Having child pornography confiscated prior to the required exhibition did not preclude a conviction.

Brady v. State, 553 So. 2d 316 (Fla. Dist. Ct. App. 1989). A Florida trial judge held that throwing pornography from a car window violated the state's Lewd and Lascivious Conduct statute. The appellate

court, however, reversed and refused to answer the question as to distribution of matter harmful to minors.

State v. Beckman, 547 So. 2d 210 (Fla. Dist. Ct. App. 1989). This is a pre-*Osborne* case that upheld Florida's "mere possession" of child pornography law and based its decision on the *meadows* case. The court ruled that a state has a "compelling interest" in protecting its children.

State v. Tirohn, 556 So. 2d 447 (Fla. Dist. Ct. App. 1990). The court held that a portion of the statute proscribing possession of child pornography was overbroad but it could be severed and the remainder of the statute passed muster. The case was reversed and remanded for action in concert with this decision.

Hicks v. State, 561 So. 2d 1284 (Fla. Dist. Ct. App. 1990). Ignorance of victim's age is not a defense.

Beattie v. State, 595 So. 2d 249 (Fla. Dist. Ct. App. 1992). The defendant responded to an advertisement in a paper placed by United States customs and was subsequently convicted of possession of child pornography. The court reversed his conviction based on his entrapment defense since law enforcement did not know the defendant and created criminal activity where none previously existed.

Schmitt v. State, 590 So. 2d 404 (Fla. 1991), *cert. denied*, 112 S. Ct. 1572 (1992). a search warrant case in which the Florida Supreme Court attempts to balance the right to privacy in the home and the protection of children from sexual abuse. The court held that probable cause was sufficient for the issuance of the warrant. The court also held only a single conviction is allowed under the pornography statute even if there were multiple possessions of prohibited materials.

State v. Parrella, 736 So. 2d 94 (Fl. 4th DCA 1999). Possession of multiple copies of the same child pornography image constitutes only one count of possession with the intent to promote child pornography under Fla. Stat. § 827.071(4). See also, *Wade v. State*, 751 So. 2d 669 (Fla. 2d DCA 2000).

Crosby v. State, 757 So. 2d 584 (Fla. 2d DCA 2000). Clarified the *Wade* case, above, by stating that a person possessing multiple different images could be charged for actual possession under Fla. Stat. § 827.071(5) of each different image. See also, *State v. Farnham*, 752 So. 2d 12 (Fla. 5th DCA 2000) rev. denied 770 So. 2d 157 (Fl. 2000); *Schneider v. State*, 700 So. 2d 1239 (Fla. 4th DCA 1997).

Nicholson v. State, 748 So. 2d 1092 (Fla. 4th DCA 2000). The Court held that, "...sections 827.071(3) and 827.071(5), Florida Statutes, which are aimed at protecting persons under the age of eighteen from being sexually exploited, do not require that a defendant know that the victim is less than eighteen years of age."

Strouse v. State, 2006 Fla. App. Lexis 2575 (Fla. 4th DCA 2006) The court upheld a conviction for possession of child pornography where the image was saved on a computer desktop. The Court noted in dicta that, "To date, the passive viewing on the Internet of child pornography does not violate the law because viewing does not constitute possession" (Note 3, But see, *State v. Roberts*, 796 So. 2d 779 (La. Ct. App. 2001).

Georgia (Ga. Code 16-12-100 and 16-12-100.2)

Conejo v. State, 374 S.E.2d 826 (Ga. Ct. App. 1988). The defendant and his co-defendant were convicted of

producing child pornography. The facts, however, indicated that the defendant saw the photographs taken, but did not in any way participate. The court held that just because he knew they were produced did not place the burden of production upon him.

Thompson v. State, 370 S.E.2d 819 (Ga. Ct. App. 1988). It is a jury question whether the defendant committed a sexual abuse upon a child. It is proper to admit a sexually graphic film into evidence to show the defendant's state of mind toward sexual abuse. The court said, "a child's mind may be victimized by molestation as well" which is a good argument for increased penalties for producers of child pornography.

Aman v. State, 409 S.E.2d 645 (Ga. 1991). The Georgia Supreme Court confronted an attack on the state's child pornography possession law based on *Stanley v. Georgia*. The court followed the United States Supreme Court's reasoning in both *Ferber* and *Osborne* and decided that the children must be protected even over the right to privacy in one's home.

State v. Brown, 551 S.E. 2d 773 (Ga. Ct. App. 2001). The legislature intended for digital computerized child pornography images to be subject to Georgia's child pornography statute.

Hawaii (Haw. Rev. Stat. 707-750 et. seq.)

State v. Shingaki, 648 P.2d 190 (Haw. 1982). Overbreadth challenge to state child pornography law denied.

State v. Kam, 748 P.2d 372 (Haw. 1988). Held HRS § 712-1214(1)A (sale of pornographic materials) unconstitutional based on the absence of a compelling state interest. The court, however, said they were not

deciding if the protection of children accomplished by the ban on child pornography was such a compelling interest.

Idaho
(Idaho Code Ann. 18-1507 & 18-1507A(2))

State v. Claiborne, 818 P.2d 285 (Idaho 1991). This case discussed the use of a tape recorded conversation between the victim and the defendant as a basis for probable cause to obtain a warrant. The trial court granted a pretrial motion to suppress but the Idaho Supreme Court viewed protecting the child as more compelling.

State v. Morton, 91 P.3d 1339 (Idaho 2004). The Court upheld a challenge to the constitutionality of the Idaho statute rejecting an overbreadth argument in that it prohibited the visual depiction of “sexual conduct by children below a specified age.” Additionally, the statute requires “knowingly and willfully” to be proven as to the defendant’s scienter.

Illinois
(720 Ill. Comp. Stat. 5/11-20.1)

People v. Spargo, 431 N.E.2d 27 (Ill. App. Ct. 1982). Defendant unsuccessfully challenged his conviction for exhibiting child pornography to undercover police officer, claiming that it was unconstitutional to prohibit the private noncommercial dissemination or exhibition of child pornography, as well as alleging that the law was unconstitutionally vague.

People v. Schubert, 483 N.E.2d 600 (Ill. App. Ct. 1985). The defendant’s vagueness challenge of a child pornography law was denied (citing Spargo), and the court held at trial the child pornography victim neither needs to be identified, nor is proof of age required. Rather it was permissible for the trier of

fact to assess the Age of a child from viewing the photographs.

People v. Lerch, 480 N.E.2d 1253 (Ill. App. Ct. 1985). Defendant was convicted of a crime of creating child pornography by photographing his nude wife and child in posed positions, with the child's pubic area exposed. His challenge to the law as unconstitutionally overbroad was denied.

People v. Crowell, 495 N.E.2d 1223 (Ill. App. Ct. 1986). The defendant had child pornography in a closed drawer and discovered people looking at the pictures. The court held that the defendant's lack of action to take the photographs away and return them to a non-visible area was sufficient to support a conviction for the "exhibition of child pornography." There is also a discussion of a "mistake of age" defense by the defendant which eliminates subjective ignorance as a factor.

People v. Siler, 506 N.E.2d 756 (Ill. App. Ct. 1987). A discussion of "pro se" representation in a child pornography case. The court said the trial court's decision to allow the defendant to proceed pro se "necessarily includes a determination that the defendant was also fit to stand trial."

People v. Walcher, 515 N.E.2d 319 (Ill. App. Ct. 1987). A harsher penalty for child pornography exhibition than for sexual abuse of a child is justified and is not an abuse of due process because of the serious national problem with child pornography. The court felt that severely punishing those who make and those who distribute child pornography is critical in the eradication of the material.

In re R.G., 518 N.E.2d 691 (Ill. App. Ct. 1988). See criminal case *People v. Daniels*, 518 N.E.2d 669 (Ill. App. Ct. 1987). The court held (in a parental custody

termination hearing) the conviction for sexual abuse and production of child pornography is sufficient to support permanent termination of parental rights.

People v. Geever, 522 N.E.2d 1200 (Ill. 1988), appeal dismissed 488 U.S. 920. Laws prohibiting the knowing possession of child pornography do not violate the First or Fourteenth Amendments, nor the state constitution.

People v. Hebel, 527 N.E.2d 1367 (Ill. App. Ct. 1988), *cert. denied*, 489 U.S. 1085 (1989). The court held in a child pornography or obscenity case an additional element is not necessary to obtain a search warrant. Under Illinois law the necessity for a “lewd” exhibition of the genitals established in *Miller v. California* does not apply to child pornography.

People v. Johnson, 542 N.E.2d 143 (Ill. App. Ct. 1989). This case upheld an Illinois statute on child pornography possession with an intent to distribute. The court uses much of the *Ferber* argument to reiterate that the state has the right to protect children.

People v. Thomann, 197 Ill. App. 3d 488, 554 N.E. 2d 748 (1990). Court said jurors may rely on everyday experience to determine the age of a performer in alleged child pornography.

People v. Ewen, 551 N.E.2d 426 (Ill. App. Ct. 1990). There is no requirement under Illinois law for a photograph depicting a lewd exhibition of a child’s genitals to be obscene in order for it to be prohibited by statute. There is no inconsistency in state law that allows emancipation through marriage at age 16 but prohibits child pornography of those under age 18. The key factor is that state has a “compelling interest” in protecting its children.

People v. Nussbaum, 623 N.E.2d 755 (Ill. App. Ct. 1993). The court held that imposing a ten year sentence on the defendant for child pornography was not excessive since it fell within the statutory guidelines and considered the defendant's past criminality. The trial court's sentence will only be reversed if it has abused its discretion.

People v. Alexander, 791 N.E.2d (Ill. 2003). The provisions of the Illinois Child pornography statute that prohibited virtual child pornography were struck down. However, that definition was severable and therefore the remaining statute was valid.

People v. Normand, 803 N.E.2d 1099 (Ill. App. Ct. 2004). A defendant may present evidence that a child pornography image is "virtual", the State does not have an affirmative duty to prove that child pornography images are not computer generated.

People v. Phillips, 831 N.E.2d 574 (Ill. 2005). A warrant to search the defendant's premises after a computer repairman discovered child pornography and the repairman showed the computer images to police was valid. Also, the age of persons depicted in alleged child pornography case did not have to be proven by expert witness testimony.

Indiana **(Ind. Code 35-42-4-4)**

Smith v. State, 413 N.E.2d 652 (Ind. Ct. App. 1980). Conviction of defendant for distributing an allegedly "obscene" photograph of a naked child, where the photograph depicted no sexually provocative gestures or close-up of genital region, was reversed on appeal. "mere nudity" is not sufficient to support a conviction.

Beach v. State, 411 N.E.2d 363 (Ind. Ct. App. 1980). Defense of entrapment in an “exhibition of obscenity” case was struck down by the court. The defendant was convicted of exhibiting obscenity to another by showing an undercover officer child pornography. The court held that the defendant’s relationship with a known child pornographer, his admitted pedophilic affections, his readiness to show his collection, and his admission that he had previously traded obscenity was sufficient to demonstrate predisposition.

Riffel v. State, 549 N.E.2d 1084 (Ind. Ct. App. 1990). The state’s case rested upon out-of-court statements made by the victim; unfortunately, the victim repudiated the statements concerning the lewd acts during his trial testimony. The court ruled that without an opportunity to cross examine concerning the statements, the out-of-court statements were inadmissible. The court, however, dismissed the defendant’s argument that the events took place in the privacy of his own home and were therefore not prohibited by the statutes. The court reasoned that if the legislature did not want the prohibition to extend to the home, they would have said so.

Thompson v. State, 555 N.E.2d 1301 (Ind. Ct. App. 1990). Prior sexual behavior of the victim is not admissible to prove “mistake of age” defense.

Bone v. State, 771 N.E.2d 710 (Ind. Ct. App. 2002). As to proof of age of the person in the images the fact finder could be an “assessment as to the girl’s age is not only a matter of common sense but also the trier of fact may take into account her overall appearance, including the developmental stage of the girl based upon her breasts, body hair, and other anatomical features.”

Logan v. State, 836 N.E. 2d 467 (Ind. Ct. App. 2005). The Indiana child pornography statute was not impermissibly overbroad. Additionally the terms "sexual conduct" and "possesses" in that statute were not vague.

Iowa
(Iowa Code §728.12)

State v. Gilmour, 522 N.W.2d 595, (Iowa 1994). Mistake of age defense for a producer of child pornography was not allowed by the court. See also, *Gilmour v. Rogerson*, 117 F.3d 368 (8th Cir 1997) (Habeas Corpus review of state decision).

State v. Robinson, 618 N.W.2d 306 (Iowa 2000). The Iowa Child Pornography statute was upheld against a vagueness argument. The case also reaffirmed that there is "no serious literary, scientific, political or artistic value" defense to the possession of child pornography under the Iowa statute.

Kansas
(Kan. Stat. Ann. § 21-3516)

State v. Zabrin, 24 P.3d 77 (Kan. 2001). The Kansas Child Pornography statute was upheld against an overbreadth defense.

State v. Donham, 24 P.3d 750 (Kan. Ct. App. 2001). A person found with multiple electronic child pornography images on floppy disks could only be charged with one violation of the statute.

State v. Liebau, 67 P.3d 156 (Kan. Ct. App. 2003). The Kansas Child Pornography Statute did not cover a step-father covertly videotaping his 16-year-old step-daughter nude in the bathroom as the child was not engaged in "sexually explicit conduct" as defined in the statute.

Kentucky
(Ky. Rev. Stat. Ann. § 531.310 et seq.)

Payne v. Commonwealth, 623 S.W.2d 867 (Ky. 1981). Convictions for use of minors in sexual performances were unsuccessfully challenged on the basis that the law was unconstitutionally vague and overbroad. Other overbreadth challenges to the Kentucky statute have been rejected in *Mattingly v. Commonwealth*, 878 S.W. 2d 797 (Ky. Ct. App. 1993)(“Obscene” and “prurient” were not overbroad);

Bach v. Commonwealth, 703 S.W.2d 489 (Ky. Ct. App. 1985). The court held that “obscene exposure,” required for a conviction under the production of child pornography law, had not been proved. Pictures and film of a 13-year-old in lingerie was insufficient evidence for conviction because nothing in the photographs rose to the level of “hard-core pornography” or other patently offensive conduct. (This case was superseded by statute as stated in the *Logston* case below. *Logston* 973 S.W. 2d at 75).

Logston v. Commonwealth, 973 S.W. 2d 70 (Ky. Ct. App. 1997). Kentucky’s child pornography statute was not limited to items that are “Obscene” under the *Miller* test. In this case the cover videotaping of a child undressing and their genitals were visible in the recording was actionable under Kentucky law.

Hause v. Commonwealth, 83 S.W.3d 1(Ky. Ct. App. 2001). The Kentucky child pornography statute did not encompass virtual child pornography and therefore was constitutional. Additionally the law was not vague with respect of the “appears to be under the age of eighteen,” language of the statute.

Baker v. Commonwealth, 103 S.W.3d 90 (Ky. 2003). Possession of an undeveloped roll of film that

contained child pornography was actionable under Kentucky law.

Purcell v. Commonwealth, 149 S.W. 3d 382 (Ky. 2004). To determine if an image of a child is actionable, “the best approach is to consider all factors, i.e., the nature of the depiction, the intent and demeanor of the child, and the photographer's intent with respect to the effect of the depiction on its intended audience.” Therefore the *Dost* test was the standard under Kentucky law. Thus, the willful display of a child’s genitals in a lewd manner would be a violation of the Kentucky Child Pornography statute.

Louisiana
(La. Rev. Stat. Ann. § 14:81.1)

State v. Rodriguez, 476 So. 2d 503 (La. Ct. App. 1985). The court reviewed probable cause finding by trial court in issuing a search warrant and ruled that the informant’s testimony was sufficient to establish probable cause. The court also held that the victim’s mother testimony coupled with the finding of the photographs was sufficient to factually sustain the conviction.

State v. Lindsey, 491 So. 2d 371 (La. 1986). An intent to sell or distribute copies of the same child pornography is a permissive presumption.

State v. Cinel, 646 So. 2d 309 (La. 1994). The Louisiana Child pornography statute requires the state to prove the defendant knew he possessed images and knew that the persons depicted were below 17 years of age. Section La. Rev. Stat. Ann. § 14:81.1(D) was severed as unconstitutional.

State v. Roberts, 796 So. 2d 779 (La. Ct. App. 2001). The display of child pornography on a computer screen at a public library that was not otherwise saved

or downloaded by the defendant satisfied the “visual reproduction” element of the offense under the Louisiana statute. The case also recognized the *Dost* case’s factors in determining the lewd nature of the statute but noted that the *Dost* factors were not exclusive in making this determination.

Maine
(Me. Rev. Stat. tit. 17A, § 281 et. seq.)

State v. Weeks, 761 A.2d 44 (Me. 2000). The Maine child pornography distribution statute was not impermissibly vague as it did provide notice that the distribution of computerized child pornography images was illegal. (Note decided under prior codification of Me. Rev. Stat. Ann. tit. 17, § 2923)

Maryland
(Md. Ann. Code art. 27, § 11-207 et. seq.)

Outmezguine v. State, 627 A.2d 541 (Md. Ct. Spec. App.), *cert. granted*, 633 A.2d 102 (1993). Maryland Code, Article 27, section 419 (c) states that “[e]very person who photographs or films a minor engaging in sexual conduct” can be prosecuted. The court held that under this section, the state does not have to prove that the defendant had knowledge that the person being photographed was a minor.

Moore v. State, 879 A. 2d 1111 (Md. Ct. App. 2005). The downloading of computer images of child pornography is not a felony (§11-207) but rather a misdemeanor possession charge under § 11-208. The felony statute governs the creation of child pornography on a computer not downloading images.

Massachusetts

(Mass. Gen. Laws Ann. ch. 272, § 29A et seq.)

Commonwealth v. Dane Entertainment Servs., 505 N.E.2d 892 (Mass. App. Ct. 1987), *review denied* 400 Mass. 1101. Commonwealth is not required to prove anything by way of scienter or mens rea beyond the general awareness of the character of the material.

Commonwealth v. Dockham, 542 N.E.2d 591 (Mass. 1989). See also companion case, *Commonwealth v. Tufts*, 542 N.E.2d 586 (Mass. 1989). The appellate court held that a trial judge could rely on his own opinion without the need for expert testimony concerning videotaping a child's testimony (outside the presence of the jury). The court also reiterated that trial judges have broad discretion in allowing expert testimony as to the characteristics of a sexually abused child. Furthermore the court disallowed testimony by the victim's foster mother that the boy "lies a lot."

Commonwealth v. Oakes, 551 N.E.2d 910 (Mass. 1990). The court, using a *Ferber* approach, held that the state has a "compelling interest" in protecting its children from harm. In *Massachusetts v. Oakes*, 491 U.S. 576, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989), the majority felt that child pornography is half speech and half conduct, but in the plurality opinion of Justice O'Connor, she states that child pornography is solely conduct and therefore may be regulated any way the state sees fit.

Commonwealth v. O'Connell, 738 N.E.2d 346 (Mass. 2000). Knowledge of the age of person depicted is required and expert testimony may be used to prove age.

Perry v. Commonwealth, 780 N.E.2d 53 (Mass. 2002). Computer stored images of child pornography constituted a violation of Massachusetts law.

Michigan
(Mich. Stat. Ann. § 750.145c)

People v. Pippin, 25 N.W.2d 164 (Mich.1946). Invitation to 13-year-old boy to enter an automobile is insufficient evidence of an attempt to commit a violation of §28.341.

People v. Search, 335 Mich. 202 (1952). Sufficiency of charging document upheld when indictment tracks the statute.

People v. Wheat, 223 N.W.2d 73 (Mich. Ct. App. 1974). Violation of §28.341 requires element of urging or entreating child to perform.

People v. Riggs, 604 N.W.2d 68 (Mich. Ct. App. 1999). The Court held that “the use of an otherwise benign image of a child exhibiting ordinary nudity to create what could fall within the definition of erotic nudity, is conduct proscribed by the statute. Contrary to defendant's position, the statute does not require that the children actually be engaging in sexual activity at the time the activity is memorialized on tape. Rather, the statute prohibits the making of a visual image that is a likeness or representation of a child engaging in one of the listed sexual acts.”

People v. Tombs, 697 N.W.2d 494 (Mich. 2005) The Michigan child pornography distribution statute requires that “the prosecution must prove that (1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material to be child sexually abusive material at the time of distribution or promotion, and (3) the defendant distributed or promoted the material with criminal

intent. Also, we hold that the mere obtaining and possessing of child sexually abusive material using the Internet does not constitute a violation of (Michigan law).”

Minnesota
(Minn. Stat. Ann. § 617.246 and § 617.247)

State v. Fan, 445 N.W.2d 243 (Minn. Ct. App. 1989), *cert. denied*, 110 S.Ct. 1480 (1990). Statute is not overbroad even though it may touch the First Amendment.

State v. White, 464 N.W.2d 585 (Minn. Ct. App. 1990). Child pornography producers may not use “mistake of age” defense and the statute is not overbroad.

State v. Borden, 455 N.W.2d 482 (Minn. Ct. App. 1990). Promoter of wet T-shirt contest had requisite under child pornography statute when he encouraged lewd exhibitions by minors during the contest.

State v. Fingal, 666 N.W. 2d 420 (Minn. Ct. App. 2003). “The visual depiction must be of an identifiable minor, not a virtual child” under the Minnesota Child Pornography statute.

State v. Brennan, 674 N.W. 2d 200 (Minn. Ct. App. 2004). The search of a defendant’s home for child pornography was sufficient probable cause when the defendant admitted he had downloaded child pornography on his work computer.

State v. Bertsch, 707 N.W. 2d 660 (Minn. 2006). Where possession and distribution of child pornography occurred on the same day, the crimes were not distinguishable under the facts of the case. Therefore the defendant could not be properly convicted on both charges.

Mississippi
(Miss. Code Ann. § 97-5-33)

Missouri
(Mo. Rev. Stat. § 568.100 and § 573.010 et seq.)

State v. Helogoth, 691 S.W.2d 281 (Mo. 1985) (en banc). Conviction under law prohibiting the photographing of nude children for the sexual stimulation or gratification of anyone who might view the material was unsuccessfully challenged on vagueness and overbreadth grounds.

State v. Foster, 838 S.W.2d 60 (Mo. Ct. App. 1992). The court held that: 1) a defendant who photographs other photographs has still committed the offense of the visual reproduction of a live event for the purpose of pornography statutes; 2) a subjective test that focuses on “whether the person’s criminal conduct was caused by the creative activity of the other or by the person’s own predisposition” should be employed rather than an objective test; 3) where the defendant is a known pedophile and responds to a police placed advertisement, although not the target of a specific police operation, he cannot use the defense of entrapment; and 4) diminished capacity was not a viable defense since pedophilia is not a mental disease or defect that renders a defendant unable to appreciate the nature of his conduct.

Montana
(Mont. Code Ann. § 45-5-625)

Griffin v. State, 77 P.3d 545 (Mont. 2003). The Defendant was convicted of possessing child pornography of an actual child. Therefore, his defense that the Montana statute was flawed because of

Ashcroft virtual child pornography decision was rejected.

Nebraska

(Neb. Rev. Stat. § 28-1463.03 et seq. relative to production. Possession is not addressed in Nebraska.)

State v. Burke, 408 N.W.2d 239 (Neb. 1987). The phrase “portrayed observer” is not constitutionally overbroad and the phrase “sexually explicit conduct” is not constitutionally vague.

State v. Jensen, 409 N.W.2d 319 (Neb. 1987). The act of appearing in an obscene film depicting children was prohibited by previous statute; now the production of such a film is also prohibited.

State v. Saulsbury, 498 N.W.2d 338 (Neb. 1993). The court held that in prosecutions under the Child Pornography Prevention Act (Nebraska Revised Statutes, sections 28-1463.01 et seq.), the sexual nature of the photographs must be determined not only by the nature of the photographs but also by the motives of the defendant – whether or not they were for the defendant’s “overt sexual gratification.” The court also delineated the factors that should be considered in determining whether a defendant took the pictures for the purpose of overt sexual gratification or sexual stimulation.

State v. Mather, 646 N.W.2d 605 (Neb. 2002). Each photograph containing child pornography constituted a separate offense under Nebraska law.

New Hampshire

(N.H. Rev. Stat. Ann. § 649-A and §649-B)

State v. Steer, 517 A.2d 797 (N.H. 1986). The prosecution need not prove that the defendant

intended to profit from distribution of child pornography.

State v. Cobb, 732 A.2d 425 (N.H. 1999). Proof of age of persons depicted could be shown by the fact finder's relying on "everyday observations and common experiences." Additionally, each child pornography image constituted a separate offense.

New Jersey

(N.J. Stat. Ann. § 2C:24-4)

State v. D.R., 537 A.2d 667 (N.J. 1988). Crime of endangering welfare of children relates not only to specific conduct, but also to violations of parental duty towards a child.

State v. Sisler, 827 A.2d 274 (N.J. 2003). A defendant who downloaded and printed for his own use child pornography images at a public library was not guilty of second-degree offender under N.J. Stat. Ann. § 2C:24b(4) but rather could be charged under that statute's fourth-degree offense for possession.

New Mexico

(N.M. Stat. Ann. § 30-6A-3)

State v. Rendleman, 82 P.3d 554 (N.M. Ct. App. 2003), *Cert denied*. 84 P.3d 668 (N.M., 2003). Found that an obscenity determination was required for a successful prosecution of an offense under the New Mexico statute.

New York

(N.Y. Penal Law § 263.00 et seq.)

People v. McIntyre, 77 A.D.2d 810, 430 N.Y.S.2d 761 (1980). A series of photographs of a 12-year-old in various stages of "undress" was a "performance" under the statute (2236.05).

People v. Ferber, 441 N.E.2d 1100 (N.Y. 1982). Remand of case following United States Supreme Court decision. Defendant's claims that his conviction for promoting non-obscene films violated his right to freedom of expression and his rights under the New York State Constitution were rejected. See also *People v. Ferber*, 422 N.E.2d 523 (N.Y. 1981).

People v. Godek, 112 Misc. 2d 512, 447 N.Y.S.2d 214 (1982), *cert denied*, 464 U.S. 1047 (1984). Section 263.10 proscribing the promotion of child pornography is constitutional.

People v. Levitz, 137 Misc. 2d 591, 521 N.Y.S.2d 977 (1987). Statute (263.15) prohibiting the promotion of a sexual performance by a child is not overbroad and the element of "commercial exploitation" is unnecessary to a conviction.

People v. Keyes, 141 A.D.2d 227, 535 N.Y.S.2d 162 (1988), *appeal granted*, 538 N.E.2d 365 (1989) A person who purchased videotapes showing children under age 16 engaging in sex acts could be convicted of "promoting" the performance.

People v. Keyes, 597 N.Y.S. 2d 785 (N.Y. App. Div. 1993). The court held that there was no entrapment because police were justified in making contacts with the defendant based on the defendant's prior conviction for promoting the sexual performance of a child and the fact that the defendant's phone number with the words "young boys wanted" was inscribed on a booth in an adult book store.

People v. Gaito, 604 N.Y.S.2d 992 (N.Y. App. Div. 1993). The court interpreted section 263.00 et seq. of the New York Penal Code as meaning that a defendant could still be convicted of the use of a child in a sexual performance even if the defendant only used the

pictures for his private use and did not distribute them commercially.

People v. Gilmore, 678 N.Y.S.2d 436 (N.Y. App. Div. 1998) The Court held that the statute's , "... requirement of a defendant's knowledge of the nature and content of the proscribed material, coupled with the ready availability of an affirmative defense, describes a constitutionally permissible degree of scienter for a State statute in this area, where 'States are entitled to greater leeway in the regulation of pornographic depictions of children'" (Citations omitted).

People v. Horner, 752 N.Y.S.2d 147 (N.Y. App. Div. 2002). The *Dost* analysis of determining whether an image is actionable under New York law was upheld.

People v. Frasier, 752 N.E.2d 244 (N.Y. 2001). There was no affirmative defense for scientific use of child pornography images under New York law. Also, computerized images were actionable under the New York Statute.

North Carolina (N.C. Gen. Stat. § 14-190.16 et seq.)

Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd 320 N.C. 485, 358 S.E.2d 383 (1987). The North Carolina Child Pornography statute is found constitutional.

State v. Howell, 609 S.E.2d 417 (N.C. Ct. App. 2005). Conviction for each child pornography image under North Carolina law was permitted. The Court also clarified that North Carolina law only applied to images of real children and not virtual images.

North Dakota
(N.D. Cent. Code § 12.1-27.2-04.1 et seq.)

Ohio
(Ohio Rev. Code Ann. § 2907.321 et seq.)

State v. Meadows, 503 N.E.2d 697 (Ohio 1986), *cert. denied*, 480 U.S. 936 (1987). Defendant unsuccessfully challenged as unconstitutional a state law prohibiting the knowing possession or control of “material which shows a minor participating...in sexual activity, masturbation, or bestiality.” The court held that the law did not violate the First Amendment and affirmed the defendant’s conviction.

State v. Young, 525 N.E.2d 1363 (Ohio 1988). The Revised Code prohibits photographs, etc., of a nude minor (under age 18) if the nudity constitutes a lewd exhibition or involves a graphic focus on the genitals. Applicable if subject is neither the child nor ward of the person charges. This is the original companion to the *Osborne v. Ohio* case. The Ohio Supreme Court narrowed the definitions of “nudity” to eliminate “morally innocent” photographs. The United States Supreme Court eventually relied on the Ohio Supreme Court’s definitions to uphold the statute.

State v. Ward, 619 N.E.2d 1097 (Ohio Ct. App. 1993). The court held that for a defendant to be convicted of pandering obscenity involving a minor, the “state must prove that he knowingly possessed an obscene photograph.” The court reversed and remanded based on the fact that the photographs that the defendant received as a result of an advertisement sting operation were not the ones that the defendant requested and their admission into evidence was prejudicial error.

State v. Maxwell, 767 N.E.2d 242 (Ohio 2001). The Ohio Child Pornography statute is a strict liability criminal statute.

State v. Anderson, 784 N.E.2d 196, (Ohio Ct. App.2003). The Ohio Child Pornography statute was interpreted to only include images of actual children. It did not prohibit virtual child pornography construed in the case *Ashcroft v. Free Speech Coalition*. See also, *State v. Dalton*, 793 N.E.2d 509 (Ohio Ct. App. 2003); *State v. Eichorn*, 2003 Ohio 3415 (Ohio Ct. App. 2003).

State v. Steele, 2005 Ohio 943 (Ohio Ct. App. 2005). A jury may make the determination whether an image is actual or virtual child pornography. Expert testimony is not required to secure a conviction.

State v. Tooley, 2005 Ohio 6709 (Ohio Ct. App. 2005), appeal granted 2006 Ohio 878 (2006). The prosecution must prove that the image depicts a child. However, the court further commented that it may be more difficult if not impossible to prove whether an image is actual or virtual. That difficulty makes that statute unconstitutional in this court's opinion. But see, *State v. Andersen*, 784 N.E.2d 196 (Ohio Ct. App. 2003). (*Ed. Note: This case is pending on appeal before the Ohio Supreme Court.*)

Oklahoma
(Okla. Stat. Ann. tit. 21, § 1021 et seq.)

Lyons v. State, 787 P.2d 460 (Okla. Crim. App. 1989). The child pornography was discovered during a consensual search for drugs in the defendant's home. The court ruled that the subsequent finding of the pornography followed by a search warrant was sufficient to sustain the conviction.

Davis v. State, 916 P.2d 251 (Okla. Crim App. 1996). The Oklahoma Child Pornography statute applied to computerized images.

Oregon

(Or. Rev. Stat. § 163.670 et seq. relative to production. Possession is not addressed in the Oregon Code.)

State v. Meyer, 852 P.2d 879 (Or. Ct. App. 1993). The Oklahoma Child pornography statutes withstood an overbreadth challenge based upon its use for the term “lewd.” (The case was remanded due to search and seizure issues).

State v. Ready, 939 P.2d 117 (Or. Ct. App. 1997). The Court held “the defense that the videotapes were acquired before the effective date of the statute is not an available defense under the (child pornography) statutes.”

Pennsylvania

(18 Pa. Cons. Stat. Ann. § 6312)

Commonwealth v. McCue, 487 A.2d 880 (Pa. Super. Ct. 1985). Defendant unsuccessfully challenged his child pornography conviction on the basis that there was not transfer of possession or an intent to transfer possession. “Transfer” means a change of possession of pornographic materials from one person to another.

Commonwealth v. Cauto, 535 A.2d 602 (Pa. Super. Ct. 1987). To support a conviction for photography of a nude child the element of sexual stimulation or gratification of the viewer must be proved.

Commonwealth v. Robertson-Dewar, 829 A.2d 1207 (Pa. Super. Ct. 2003). The trier of fact could make a determination of the age of the person depicted.

Expert testimony could be used on a case-by-case basis, but is not required, to prove age.

Commonwealth v. Davidson, 860 A.2d 575 (Pa. 2004). Virtual child pornography is not proscribed under Pennsylvania law.

Rhode Island
(R.I. Gen. Laws § 11-9-1.2 & -1.3)

South Carolina
(S.C. Code Ann. § 16-15-395 et seq.)

South Dakota
(S.D. Codified Laws § 22-22-3)

State v. Martin, 674 N.W.2d 291 (S.D. 2003). The South Dakota Child pornography statute was upheld against an overbreadth challenge. The South Dakota law only applies to real children and does not apply to virtual images of children. The Court rejected the argument that the South Dakota law was flawed “because it lacks an exception for material with serious literary, artistic, political, or scientific value.”

State v. Helland, 707 N.W. 262 (SD 2005). The finding of suspicious file names linked to child pornography in an internet temporary file was sufficient probable cause to issue a search warrant for additional child pornography in the defendant’s computer and office.

Tennessee
(Tenn. Code Ann. § 39-17-1003 et seq.)

State v. Harwood, 2005 Tenn. Crim. App. LEXIS 988 (Tenn. App. 2005), appeal granted 2006 Tenn. Lexis 39 (Tenn. 2006). The Tennessee child pornography statute only applied to actual minors and not virtual

images. Additionally, the statute requires “knowing possession” which allows a defendant the defense that a pop-up ad may not constitute knowing possession. Circumstantial evidence may be used to prove the minority of the person depicted. (*Ed. Note: This case is pending appeal by the Tennessee Supreme Court.*)

State v. Pickett, 2005 Tenn. Crim. App. LEXIS 1076 (Tenn. App. 2005), appeal granted 2006 Tenn. LEXIS 139 (2006). Case reaffirms the virtual images are not prosecutable under Tennessee law. Additionally, the possession of several images, absent specific evidence of when and where each image was downloaded, constitutes one charge of child pornography. (*Ed. Note: This case is pending appeal by the Tennessee Supreme Court.*)

Texas

(Texas Tex. Penal Code Ann. § 43.25 and § 43.26)

Swain v. State, 661 S.W.2d 125 (Tex. Crim. App. 1983). The court held that a “mistake of age” defense shifts the burden of proof to the defendant as in most affirmative defenses. The accused person’s defense of reasonable good faith that the child pornography victim was age 17 or older had not been established.

Foty v. State, 755 S.W.2d 195 (Tex. App. 1988). Victim’s testimony was sufficient to support conviction for inducing a child under age 17 to engage in sexual conduct.

Savery v. State, 782 S.W.2d 321 (Tex. App. 1989). Another pre-*Osborne* case that says the state has the right to ban home possession of child pornography because the state has a compelling interest in protecting its children. Interesting discussion of the use of “hearsay” in building probable cause to allow a search warrant to issue.

Savery v. State, 819 S.W.2d 837 (Tex. Crim. App. 1991). The court addressed the *Stanley v. Georgia* argument in a case of child pornography possession in one's home. The court used the *Osborne* rationale and affirmed the defendant's conviction.

Scott v. State, 868 S.W.2d 430 (Tex. App. 1994). In the execution of a search warrant, the police found a letter in the defendant's post office box that indicated his desire to purchase child pornography and began corresponding with the defendant. The court held that the defendant, subsequently convicted of possession of child pornography, was not entrapped as the police only gave him the opportunity to commit the offense after he had already expressed the desire to possess such materials.

Alexander v. State, 906 S.W.2d 107 (Tx. App. 1995). The Court adopted the Dost analysis in determining lewdness for purposes of determining whether an image constituted child pornography under the Texas statute.

Vineyard v. State, 958 S.W.2d 834 (Tx. Crim. App. 1998). Two "allowable unit(s) of prosecution" for child pornography could be charged for possession of a video tape and a photograph.

Webb v. State, 109 S.W.3d 580 (Tx. Crim. App. 2003). The Texas Child Pornography statute only applies to images of real children and does not apply to virtual images.

Utah **(Utah Code Ann. § 76-5a-2 et seq.)**

State v. Jordan, 665 P.2d 1280 (Utah 1983). The Utah Supreme Court upheld the statute prohibiting the production of child pornography. The scienter requirements of *Ferber* are necessary to uphold a

child pornography statute and the court held that Utah's statute passes constitutional muster. The court specifically addressed the *Miller* standard and held that as far as child pornography is concerned, the three prongs do not apply and all that is required is visual depictions of proscribed acts. The defendant's statutory overbreadth and violation of the right of privacy challenges to his conviction were denied.

State v. Bishop, 753 P.2d 439 (Utah 1988). Production of child pornography and child sexual abuse through photographs are different crimes, with particular elements, and may lead to the filing of distinct and separate charges.

State v. Moore, 788 P.2d 525 (Utah Ct. App.), *cert. denied*, 800 P.2d 1105 (1990). The defendant argued that the pornographic videos were so inflammatory to the jury that his stipulation as to their pornographic nature should be sufficient. The court refused to disturb the trial judge's ruling and held that the jury was entitled to see the material that was alleged to be "harmful to minors" before deciding on the defendant's fate on the charge of "dealing in harmful material to a minor." The legislature expressly prohibited sexual exploitation of all persons under age 18 regardless of marital status.

State v. Workman, 806 P.2d 1198 (Utah Ct. App. 1991), *aff'd*, 852 P.2d 981 (Utah 1993). Insufficient evidence to support conviction for production of child pornography since child depicted was wearing a gymnastics suit.

State v. Morrison, 31 P.3d 547 (Utah 2001). Interpreting the Utah Child Pornography statute, the Court found that, "the legislature's intent that we look to the (child images) materials themselves, not the intent of the possessor, to determine whether they are proscribed as sexually exploitive." Also, the term,

"sexual arousal" was not vague as used in this statute. Additionally, "the determination of whether material depicting a nude minor is designed "for the purpose of sexual arousal of any person, is substantially similar to the determination of whether a visual depiction is intended or designed to elicit a sexual response in the viewer, " and accepted the *Dost* test.

Vermont
(Vt. Stat. Ann. tit, 13 § 2825 et seq.)

Virginia
(Va. Code Ann. § 18.2-374.1 et seq.)

Freeman v. Commonwealth, 288 S.E.2d 461 (Va. 1982). Defendant unsuccessfully challenged his conviction under child pornography production law where he had photographed a 5-year-old girl with genitals exposed posing in erotic postures on his bed, and his statutory vagueness and overbreadth challenges were also rejected.

Foster v. Commonwealth, 369 S.E.2d 688 (Va. Ct. App. 1988). The court said that nudity without a "lewd exhibition" is insufficient for a conviction, however, the showing of photographs of male and female genitalia to a child is sufficient to prove intent to induce the child to submit to sexually explicit material. Decision based on the 1979 version of the statute.

Frantz v. Commonwealth, 388 S.E.2d 273 (Va. Ct. App. 1990). Another case in which a Virginia court indicates that "mere nudity" of a child is not enough for a conviction for production of child pornography.

Washington
(Wash. Rev. Code Ann. § 9.68A.040 et seq.)

State v. Shuck, 661 P.2d 1020 (Wash. Ct. App. 1983). The court upheld the Washington child pornography statute based on the *Ferber* decision. The decision contains a discussion of circumstantial evidence surrounding the defendant's claim to have been married to his two 14-year-old victims. The defendant's overbreadth challenge to child pornography law was rejected.

State v. Holt, 687 P.2d 218 (Wash. Ct. App. 1984). The court held that those who possess child pornography with the intent to sell it are not required to have knowledge of the material. Possession with intent is sufficient for conviction. Those charged with importing the material, however, are required to do so "knowingly" for conviction.

State v. Lodge, 711 P.2d 1078 (Wash. Ct. App. 1985). A discussion of the applicable search warrant law in the area of child pornography and obscenity. The case turned on the necessity for commercial gain. The court held that in possession with intent to distribute the element of commercial gain is present, but it is not the only factor. The court says that an intent to exchange or barter is also sufficient to support conviction.

State v. Davis, 768 P.2d 499 (Wash. Ct. App. 1989). The state has a compelling interest in protecting children from sexual exploitation which does not violate one's constitutional right to privacy by prohibiting the possession of child pornography.

State v. Danforth, 782 P.2d 1091 (Wash. Ct. App. 1989). Statute prohibiting "communication for immoral purposes" is not vague when read to protect children from the production of child pornography.

State v. Farmer, 805 P.2d 200 (Wash.), *modified*, 812 P.2d 858 (Wash. 1991). The Washington Supreme court held that the statute defining the crime of sexual exploitation of a minor is constitutional. The court also held that the state has a legitimate and compelling interest in prohibiting child pornography.

State v. Perrone, 834 P.2d 611 (Wash. 1992). The court found that there was probable cause for a magistrate to issue a warrant to seize evidence of the defendant's correspondence with other child pornography collectors. The court based this on the fact that the police had a list of pedophiles on which the defendant's name appeared, the police had corresponded with the defendant regarding sharing pornography, and the defendant had given the police over 82 films. The court also held that authorizing the police in a search warrant to seize anything that constituted "child pornography" left too much discretion with the police and made the warrant overbroad and invalid.

State v. Rosul, 974 P.2d 916 (Wash. Ct. App. 1999). The Washington Child Pornography statutes did not require specific knowledge of the depicted child's age.

State v. Stellman, 22 P.3d 1287 (Wash. Ct. App. 2001). The Washington Child Pornography statute only applies to images of real children and does not apply to virtual images.

State v. Cannon, 84 P.3d 283 (Wash. Ct. App. 2004). The Washington Child Pornography Statute included a prohibition of possession of digital images.

West Virginia
(W. Va. Code § 61-8C-2 & § 61-8C-3)

Wisconsin
(Wis. Stat. Ann. § 948.05 & § 948.12)

State v. Lubotsky, 434 N.W.2d 859 (Wis. Ct. App. 1988). The court said that if not specifically defined, the word “lewd” must take on its “ordinary and accepted meaning.” The decision concluded that the testimony of the child victim and his mother, even without the photographs being introduced into evidence, was sufficient to support the conviction. The court discussed in-depth the circumstantial evidence.

State v. Steadman, 448 N.W.2d 267 (Wis. Ct. App. 1989). This is a search warrant case that allowed the warrant to stand despite the far-reaching wording near the end of the warrant. The court also discusses the difference between “outrageous government conduct” and entrapment as a defense.

State v. Bruckner, 447 N.W.2d 376 (Wis. Ct. App. 1989). The defendant could be punished for importing child pornography into his state even for personal use. The commerce clause was not violated by this ruling because using the *Ferber* reasoning, the court said the state has a “compelling interest” in protecting its children. The court held that magazines containing children engaged in sexually explicit conduct have *no* First Amendment protection.

State v. Petrone, 468 N.W.2d 676, (Wis.), *cert. denied*, 112 S. Ct. 339 (1991). Defendant’s challenge to jury instructions which allegedly allowed jurors to create their own standard of culpability failed. Jurors may use “common sense” to distinguish between a “lewd or lascivious” pornographic photograph and an

innocent picture without giving detailed definitions about “lewd.”

Wyoming
(Wyo. Stat. Ann. § 6-4-303)

Stambaugh v. State, 613 P.2d 1237 (Wyo. 1980). No indication that legislature wanted to restrict the meanings of the statutory language to anything other than the normal meanings of the words.

Rutti v. State, 100 P.3d 394 (Wyo. 2004). The Wyoming Child Pornography statute was not overbroad regarding the requirement of actual children being depicted. (Note the Wyoming legislature clarified the statute to expressly state it prohibited the depiction of an actual child.)