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SUPREME COURT
STATE OF WASHINGTON

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON
CLERK

STATE OF WASHINGTON, Respondent,

v.

MICHAEL BOYD, Petitioner

&

STATE OF WASHINGTON, Petitioner,

v.

LEE GILES and MAUREEN ELIZABETH WEAR, Respondents.

BRIEF OF AMICUS CURIAE
THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN

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I. INTEREST OF AMICUS CURIAE

The National Center for Missing & Exploited Children ("NCMEC") is a non-profit organization founded in 1984. Operating in partnership with the Office of Juvenile Justice and Delinquency Prevention at the United States Department of Justice ("OJJDP"), NCMEC is devoted to preventing child abduction, locating missing children and assisting families that have suffered through such an experience. NCMEC also focuses on child exploitation, an increasingly difficult task given that the growth of the Internet has made it exponentially easier to distribute child pornography and otherwise victimize children. NCMEC sponsors initiatives such as the CyberTipline, through which citizens and Internet Service Providers report apparent child pornography and efforts to solicit children. The CyberTipline receives approximately 1000 reports per week, with a total number of reports being received since its inception of 404,891. As a result, NCMEC works extensively with both federal and state law enforcement agencies and prosecutors regarding the investigation and disposition of these cases. NCMEC also assists with the Internet Crimes Against Children ("ICAC") training, offered by OJJDP and designed to provide law enforcement agencies and prosecutors with resources to improve their ability to fight online threats to children.

NCMEC has a unique perspective on the extent to which offenders use computers and related technology to create and traffic in child pornography and engage in other forms of child exploitation. NCMEC is also extremely familiar with the manner in which repeated dissemination of these

child abuse images re-victimizes the child victims. As amicus, NCMEC can provide this Court with valuable background as to the dynamics of the re-victimization these children face every time these images are distributed and the continuing harmful psychological effects in addition to providing insight as to why child pornography is distinguishable from other forms of illegal contraband.

II. ISSUE PRESENTED

Do defendants have a right to have their attorneys obtain physical possession of child pornography in order that they may view the child pornography images and utilize them in pretrial interviews of witnesses and does the dissemination of these images in this manner create significant harm to the victims depicted in these images?

III. STATEMENT OF THE CASE

The National Center for Missing & Exploited Children specifically adopts the Statement of the Case presented by the State of Washington as its Statement of the Case.

IV. ARGUMENT

CHILD PORNOGRAPHY IS CONTRABAND AND THE REPRODUCTION OF THESE IMAGES SEXUALLY AROUSES OFFENDERS AND RE-VICTIMIZES THE CHILD.

Child pornography is a photographic record of child sexual abuse.

Child pornography is used as a means to sexually arouse offenders of children. Sharon W. Cooper, et. al., Medical, Legal & Social Science Aspects of Child Sexual Exploitation, Volume 1 at 199 (2005). Pedophiles will often have collections of child pornography. Id. It is part of the pedophilic psychology. Offenders will exchange images with each other not only to get aroused but also to “normalize” and gain support for their illicit behavior. Id. By showing these images to children, the offender lowers the child’s inhibition to participate in sexual acts and also “educates” them about how to perform sexual acts. Id.

The harm caused by the reproduction and distribution of these images is self-evident. The children depicted in these images are often humiliated and shamed into silence from disclosing the crimes that were committed upon them. Id. They are fully aware that the photographs and other digital images are permanent reminders of the abuse that they suffered. Id. Knowing that these images are distributed exponentially over the internet for profit only serves to traumatize them further. Knowing that these images are reproduced to others, including the defendant and his attorney, re-victimizes them. Id.

Internet pedophilia was first discovered by law enforcement officials in the early 1990s. Id. The internet provided the opportunity for sexual offenders to share their private collections with others. Id. Anyone, anywhere can access these images which depict children being subject to indecent and abusive behavior. The United Nations estimates that the prostitution and exploitation of children has profited \$5 billion globally. United Nations, Sale of Children, Child Prostitution and Child Pornography, (Note by the Secretary General, September 20, 1995). It was estimated that in 1996, between 100,000 and 300,000 children were sexually exploited through prostitution and child pornography in the United States. End Child Prostitution, Child Pornography, and Trafficking of Children for Sexual Purposes (ECPAT) International, Regional report prepared for: the World Congress Against Commercial Sexual Exploitation of Children, (August 1996, Stockholm, Sweden).

The above-referenced statistics present the grim and tragic reality surrounding the crime of child sexual abuse and the crime of making a digital record of the abuse occurring. The statistics demonstrate the reason why the proliferation of these images is so harmful to the victims as well as society in general.

- A. Courts have consistently concluded that child pornography is contraband.

Although the issue of discovery rights in child pornography cases is frequently litigated, courts and Congress have long considered child pornography to be contraband. In U.S. v. Horn, 187 F.3d 781 (8th Cir. 1999), the United States Court of Appeals for the Eighth Circuit held that the lower court did not abuse its discretion in denying defendant's request for copies of videotapes, since the tapes were "prima facie contraband." The Court found that the Government's offer to allow defendant's expert to view the tapes was sufficient. Horn, 187 F.3d 781 (8th Cir. 1999). Similarly, in U.S. V. Kimbrough, the United States Court of Appeals for the Fifth Circuit held that the Government's refusal to allow a defendant to copy seized child pornography as part of the discovery process did not violate discovery rules, since it was "illegal contraband." Kimbrough, 69 F.3d 723 (5th Cir. 1995). The United States District Court for the Eastern District of Virginia also reached the same conclusion, reasoning that since child pornography is subject to forfeiture under 28 U.S.C. 2254(a)(1), it can be considered contraband, and thus, the defense may not be provided a copy. U.S. v. Husband, 246 F.Supp.2d 467 (E.D. VA 2003).

These cases and their progeny, support the conclusion that a defendant's constitutional rights to a fair and impartial trial, including the right to effective assistance of counsel, can be fully protected as long as the defendant has the opportunity to view and analyze the evidence. If the

Government provides a reasonable opportunity for inspection and examination, the rights of the defendant are not unconstitutionally impacted even though the images are not reproduced to them. See U.S. v. Cox, 190 F.Supp. 2d 330 (N.D.NY 2002); Nevada v. Second Judicial District of the State of Nevada, 89 P.3d 663 (2003); Cervantex v. Cates, 206 Ariz. 178, 76 P.3d 449, 409 (Ariz. App.Div. 1 2003), review denied (March 16, 2004) and U.S. v. Eggers, 2007 U.S. Dist. LEXIS 5217 (D.Neb. Jan. 24, 2007) (discovery of child pornography can only be given to defense counsel when the items remain fully in the custody and control of the government).

The United States Supreme Court fully recognized the harmful effects of child pornography when it concluded that “the victimization of children involved [in child pornography] does not end when the pornographer’s camera is put away....The pornography’s continued existence causes the child victims continuing harm by haunting those children for future years.” Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). The Supreme Court re-emphasized this finding in the Ashcroft decision. The Court fully understood the harmful impact these images have on the child victims when it concluded that child pornography is “a permanent record of a child’s abuse, [its] continued circulation...would harm the child who has participated. Like a defamatory statement, each new publication...would cause new injury to the child’s reputation and emotional well-being.”

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

Congress specifically addressed this issue with the passage of the Adam Walsh Child Protection and Safety Act. Signed into law on July 27, 2006, the Walsh Act clearly states that child pornography cannot be copied in the discovery process. “A court shall deny...any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography...so long as the Government makes the property or material reasonably available to the defendant.... [M]aterial shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility.” Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

The Courts and Congress have been able to fully examine the need to balance the rights of the defendant versus the protection of the victim. The majority of these cases conclude that the defendant’s rights can be protected even in the absence of his or her counsel physically having possession of the child pornography images.

B. Offender studies demonstrate the link between viewing child pornography and committing sexual crimes against children.

In testimony before the House Homeland Security Subcommittee, a

representative from the FBI, Michael J. Heimbach, discussed the findings of a study that correlated the connection between child pornography and child molestation. Internet Child Pornography: Hearing Before the H. Sub. Comm. On Crime, Terrorism and Homeland Sec., 107th Cong. (2002) (testimony of Michael J. Heimbach, Crimes Against Children Unit, Criminal Investigation Division, FBI). In November 2000, Dr. Andres E. Hernandez, PsyD., the Director of the Sex Offender Treatment Program for the Federal Bureau of Prisons, presented the results of his study of child pornography offenders entitled, "Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders." Id. Dr. Hernandez had examined 54 federal inmates who were convicted of child pornography. Dr. Hernandez' data indicated that the majority of the persons in his study convicted of child pornography offenses actually molested significant numbers of children without detection by the criminal justice system. The study also indicated that "these offenders target children in Cyberspace in a similar manner as offenders who prey on children in their neighborhood or nearby park. They seek vulnerable children, gradually groom them, and eventually contact them to perpetrate sexual abuse." Id. Dr. Hernandez concluded that 76 percent of the child pornographers or travelers (those who travel or intend to travel interstate for the purpose of having sex with a minor) who participated in his study

admitted to having committed contact sex crimes which went undetected by the criminal justice system. These offenders had an average of 30.5 child sex victims each. Id.

Similar conclusions were reached by the National Juvenile Online Victimization Study. Janice Wolak, et. al., Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study, (The National Center for Missing & Exploited Children 2005). Beginning in July 1, 2000 and continuing for a period of 12 months, this study analyzed the arrests and prosecutions of sexual offenders using the internet. Id. The findings of the study demonstrate the graphic nature of the images seen in these cases as well as the significant impact this crime has on society. Id. Law-enforcement agencies nationally made an estimated 1,713 arrests for Internet-related crimes involving the possession of child pornography during the 12 months. Id. Most had images of prepubescent children (83%) and images graphically depicting sexual penetration (80%). Id. Approximately 1 in 5 arrested child pornography possessors (21%) had images depicting sexual violence to children such as bondage, rape, and torture. Id. Thirty-nine percent had at least 1 video with moving images of child pornography. Id.

These studies show why child pornography is considered to be contraband. It not only depicts a crime scene occurring; it is utilized by the

offenders to target children, sexually abuse them and in turn, exchange the images with other offenders for purposes of sexual gratification and profit. These reasons demonstrate why the dissemination of these images, even to defense counsel in preparation for trial, should not be turned over as discovery. The judicial system should not participate in increasing the amount of child pornography in the stream of commerce nor allow a defendant to enjoy the fruits of his crime by viewing these images repeatedly without limitation.

- C. The continual dissemination of child pornographic images perpetuates the crime of child sexual abuse and repeatedly victimizes the children depicted in these images.

Child pornography is a unique crime. The children depicted in these images are shown engaging in sexual activity with adults and/or other children. The victims of child pornography are often under the age of 13 years and the images will frequently depict multiple victims. Eva J. Klain, et. al., Child Pornography: The Criminal Justice System Response, The American Bar Association on Children and the Law for The National Center for Missing & Exploited Children (March 2001). The impact to children is significant and severe. Children who are victims of child exploitation suffer long-term emotional injuries. Browne A., Finkelhor D., "Impact of Sexual Abuse: A Review of the Research," Psychol. Bull. (1986), John E.B. Myers, et.al., The APSAC Handbook on Child

Maltreatment, (2nd Ed. 2002). The psychological harm suffered continues into adulthood and impacts their ability to form healthy relationships with other individuals. Id.

Child-sex-abuse victims experience symptoms of distress during the period of sexual exploitation, at the time of disclosure, and in the post-traumatic phase. Klain, supra, at 10, 11. In addition to any physical injuries they suffer in the course of their molestation, such as genital bruising, lacerations, or exposure to sexually transmitted diseases, child victims experience depression, withdrawal, anger, and other psychological disorders. Such effects may continue into adulthood. Id.

Child victims also frequently experience feelings of guilt and responsibility for the abuse and betrayal, a sense of powerlessness, and feelings of worthlessness and low self-esteem. Id. Younger children tend to externalize stress by re-enacting sexual activities through play, while adolescents may experience negative effects on their growing sexuality as a result of inappropriate early sexual experiences. Id.

Because of this, courts and legislatures have long recognized the need for special protection of child sexual abuse victims, finding that the state has a legitimate and significant interest in the protection of children. The Washington State Legislature recognized this when enacting the Washington Revised Code section 26.44, the statute pertaining to the

abuse of children and mandatory reporting. Wash. Rev. Code § 26.44.

The Legislature stated that

“[t]he children of the state of Washington are the state's greatest resource and the greatest source of wealth to the state of Washington. Children of all ages must be protected from child abuse. Governmental authorities must give the prevention, treatment, and punishment of child abuse the highest priority, and all instances of child abuse must be reported to the proper authorities who should diligently and expeditiously take appropriate action, and child abusers must be held accountable to the people of the state for their actions.”

Wash. Rev. Code § 26.44 c. 259 § 1 (1985).

The Washington Legislature enacted several provisions specifically giving special protections for child abuse victims, including eliminating certain privileges with regard to child sexual abuse, special hearsay statutes and allowing testimony via closed circuit television. See Wash. Rev. Code §§7.69, 5.60.060, 9A.44.120, and 9A.44.150. The Legislature also prohibited the disclosure of the identity of child sexual abuse victims. Wash. Rev. Code §10.52.100.

Child sexual abuse victims also have certain constitutional rights pursuant to the Washington Constitution. The Victims of Crimes Rights Article is designed to ensure that victims of crimes are accorded due dignity and respect. Wash. Const. Art. I, § 35.

The repeated reproduction of child pornography in an uncontrolled setting re-victimizes these children. Their identities are not only published but the actual images of their victimization can be shown to anyone,

anywhere, at anytime. The only tool a sexual offender needs to commit this crime is a computer. If the defendants are allowed to obtain copies of the child pornography images seized in these matters, showing them to the defendant and utilizing them in pre-trial interviews, the victims' identities will not be protected. The victims will not be afforded due dignity and respect. Dissemination of these images, even through the process of discovery, furthers the harm caused by the child sexual exploitation industry and exposes the victims to further shame and humiliation.

As well-reasoned in the State of Washington's briefs, reasonable restrictions may be placed on the viewing of the images. Allowing defense counsel and their experts to view the images in a government-controlled setting allows the defendants' constitutional rights to be protected, while at the same time ensuring that the rights of the victims' are given due consideration and import. Allowing the defendants unfettered access to these images is not necessary to protect their constitutional rights. It will only serve to perpetuate the crimes of the child victims depicted in the images.

V. CONCLUSION

For all the foregoing reasons, The National Center for Missing & Exploited Children joins the State of Washington in requesting that the

protective order in the Boyd case should be affirmed and the order requiring the State to provide Giles and Wear with copies of the contraband should be reversed.

Respectfully submitted this 20th day of February, 2007.

/s/ Margaret M. Zimmer

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Deputy Director

Office of Legal Counsel

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