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PROTECTING CHILD VICTIMS' RIGHTS AS VIGOROUSLY AS CRIMINAL DEFENDANTS' WHEN PROSECUTING POSSESSION OR DISTRIBUTION OF CHILD PORNOGRAPHY

Kiel Willmore

Abstract: Among the devastating effects of the worldwide child pornography epidemic is a concerning legal dilemma. Until recently, courts have frequently held that a defendant charged with child pornography offenses has a nearly unrestricted right to receive and view copies of the pornographic evidence as part of discovery of the state's evidence. The duplication, dissemination, and viewing of child pornography is not only a violation of federal law, but is also a further violation of the child victims' privacy and renewal of their abuse. The Washington State Legislature recently enacted Substitute House Bill 2177 ("H.B. 2177"), which amends the legislative findings on the child pornography epidemic, and places certain limits on the discovery of child pornography evidence. These limitations are found in the new statute RCW 9.68A.170. Washington's law is modeled closely on the Adam Walsh Child Protection and Safety Act of 2006, which has withstood numerous federal constitutional challenges. This Comment argues that the Washington State Supreme Court should uphold RCW 9.68A.170 as constitutional, and overrule its earlier decisions in *State v. Boyd* and *State v. Grenning*, which created a per se rule requiring the State to provide child pornography evidence to criminal defendants.

INTRODUCTION

Weldon Marc Gilbert enticed adolescent boys with exotic trips, rides in airplanes and boats, then allegedly lured them into his home where he filmed himself sexually abusing them.¹ His case is pending before the Pierce County Superior Court.² From his jail cell, Gilbert petitioned the court to receive both copies of his videos and a means to view them. Washington's criminal discovery rules³—as construed by the Washington State Supreme Court in *State v. Boyd*⁴ and *State v.*

1. Christina Caron, *Loophole Allows Child Rapist to Watch Child Porn*, ABC NEWS, July 13, 2011, <http://abcnews.go.com/US/washington-rapist-watches-child-porn-jail-law-loophole/story?id=14061524#.T8m7BpIYsjo>; Katharine Q. Seelye, *Furor Over Giving Rape Suspect Explicit Tapes*, N.Y. TIMES, July 31, 2011, <http://www.nytimes.com/2011/08/01/us/01prison.html>; Timothy Stenovec, *Weldon Marc Gilbert, Suspect in Child Rape Case, Allowed to Watch Child Pornography in Jail*, HUFFINGTON POST, July 13, 2011, http://www.huffingtonpost.com/2011/07/13/weldon-marc-gilbert-child-porn-jail_n_897564.html.

2. *State v. Gilbert*, No. 07-1-05618-3 (WA Super. Ct. Pierce County, filed Nov. 1, 2007).

3. WASH. SUPER. CT. CRIM. R. 4.7.

4. 160 Wash. 2d 424, 158 P.3d 54 (2007).

*Grenning*⁵—entitle Gilbert to receive and view a copy of the child pornography evidence without any showing that his viewing the materials is necessary to his defense.⁶

Similar to Washington State law, a defendant charged in federal court with possession of child pornography before 2006 would routinely receive a copy of the pornographic evidence to review in preparation for trial.⁷ The government's surrender of child pornography evidence results in several problematic consequences. Most troubling, every viewing of the pornography constitutes further victimization of the children depicted in the obscene images, regardless of whether the viewing occurs in preparation for trial. There is also a custody and security risk: once the government distributes the pornography to the defense and other expert witnesses, there is no guarantee that the materials will not be further disseminated. Even if unlikely, defense counsel and expert witnesses who receive the pornography risk future prosecution if they fail to return the evidence to the court. Another dilemma—albeit commonly seen as incurable—is that those prosecuting child pornography cases violate federal law themselves whenever they copy and distribute the pornographic evidence.

The United States Congress addressed some of these troubling concerns by passing the Adam Walsh Child Protection and Safety Act of 2006 (“Walsh Act” or “Act”).⁸ Congress made lengthy and important findings regarding the unquestionable vice of child pornography, and recognized the need to stamp out its duplication and distribution.⁹ Specifically, Congress determined that viewing child pornography constitutes a renewed violation of the child victims' privacy and a repetition of their abuse.¹⁰ In response to these findings, Congress created a special exception to the discovery rules in cases involving child pornography. In most circumstances, the Act prohibits the government from reproducing the evidence and mandates securing the evidence in a government facility. However, the Act requires the government to make the materials “reasonably available” for examination by the defense, or else produce a copy of the pornographic evidence upon a showing that receiving a copy is essential to the

5. 169 Wash. 2d 47, 234 P.3d 169 (2010).

6. *See, e.g.*, *State v. Boyd*, 160 Wash. 2d 424, 435, 158 P.3d 54, 60 (2007).

7. FED. R. CRIM. P. 16(a)(1)(E).

8. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 620 (2006) (codified as amended in scattered sections of 8, 18, 21, 28, and 42 U.S.C.).

9. *Id.* at 623–24.

10. *Id.* at 624.

defense.¹¹

Until 2012, Washington State law reflected the pre-2006 federal rules regarding the discovery of child pornography evidence.¹² In *Boyd* and *Grenning*, the Washington State Supreme Court held that under the Washington State Superior Court Criminal Rules (CrR), the State had a duty to provide the defense with copies of the child pornography evidence that it intended to use at trial.¹³ The Court reasoned that denying the defendant this evidence not only violated court rules, but also implicated the defendant's right to due process.¹⁴

The Washington State Legislature responded to the *Boyd* and *Grenning* decisions by enacting Substitute House Bill 2177 ("H.B. 2177"), which took effect in July 2012.¹⁵ The Act's legislative findings express a clear purpose of protecting child victims from repeated abuse and victimization through unnecessary dissemination of the pornography.¹⁶ Patterned after the Walsh Act, H.B. 2177—codified in part at RCW 9.68A.170—requires child pornography evidence to remain in the possession and control of the court or relevant law enforcement agency, and made "reasonably" available for either party's examination.¹⁷ Where copies are necessary to a party's case, the statute shifts the burden to the requesting party to make a "substantial showing" to the court before dissemination may be authorized.¹⁸ Without a substantial showing of need, the court is otherwise prohibited from ordering the reproduction and distribution of such evidence.¹⁹

This Comment argues that the Washington State Supreme Court should overrule its decisions in *Boyd* and *Grenning* in light of Washington's new discovery statute, a constitutionally valid means of balancing the interests of child victims and criminal defendants. Part I provides an overview of the Walsh Act, and federal court decisions

11. 18 U.S.C. § 3509(m)(2)(A) (2011).

12. See WASH. SUPER. CT. CRIM. R. 4.7(a).

13. *State v. Grenning*, 169 Wash. 2d 47, 60–61, 234 P.3d 169, 176–77 (2010); *State v. Boyd*, 160 Wash. 2d 424, 432–33, 158 P.3d 54, 58–59 (2007).

14. See *Boyd*, 160 Wash. 2d at 433–35, 158 P.3d at 59–60; see also *Grenning*, 169 Wash. 2d at 58, 234 P.3d at 175.

15. Substitute H.B. 2177, Chapter 135, 62nd Leg., Reg. Sess. (Wash. 2012) (codified at WASH. REV. CODE §§ 9.68A.001, 9.68A.170, 9.68A.180, and 9.68A.190); see also *History of H.B. 2177*, WASH. ST. LEGISLATURE, <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2177> (last visited Sept. 27, 2012). The state Senate passed the bill 46–0, and the House passed the bill 95 to 0. *Id.*

16. Substitute H.B. 2177 § 1.

17. *Id.* § 2(1)–(2); see also WASH. REV. CODE § 9.68A.170.

18. WASH. REV. CODE § 9.68A.170(4).

19. WASH. REV. CODE § 9.68A.170(2).

upholding the Walsh Act as constitutional. Part II describes how the Washington State Supreme Court previously addressed a defendant's right to this child pornography evidence in *Boyd* and *Grenning*. Part III details the Washington State Legislature's response to *Boyd* and *Grenning*: H.B. 2177. Part IV argues that H.B. 2177's discovery limitations under RCW 9.68A.170 comply with the constitutional requirements of due process and right to counsel, further state legislative goals of protecting children and combating child pornography, and are consistent with other provisions of the Washington State Constitution.

I. FEDERAL COURTS HAVE UPHELD THE WALSH ACT'S LIMITATIONS ON A CRIMINAL DEFENDANT'S DISCOVERY RIGHTS

When determining whether RCW 9.68A.170 comports with a defendant's rights of due process and effective assistance of counsel, the Washington State Supreme Court should look to the statute's roots in the Walsh Act, and the various federal courts opinions upholding the Act. Generally, a criminal defendant in federal court may examine physical evidence in the government's possession in preparation for trial. Before 2006 this included child pornography evidence. In 2006 Congress enacted the Walsh Act, which excluded child pornography from this general discovery rule. Challenges asserting that the Walsh Act facially violates a defendant's due process rights—coupled with arguments regarding a defendant's Sixth Amendment right to effective assistance of counsel—have unanimously failed.²⁰ Numerous federal courts have upheld the constitutionality of the Walsh Act's discovery restrictions, limitations that are nearly identical to those under RCW 9.68A.170.

A. *Congress Enacted the Adam Walsh Child Protection and Safety Act of 2006, Closing the Loophole That Permitted Dissemination of Child Pornography Evidence During Discovery*

In federal court, Federal Rules of Criminal Procedure Rule 16 governs the parties' discovery and inspection of evidence in criminal proceedings.²¹ The rule permits the defendant to copy or photograph

20. See, e.g., *United States v. Shrake*, 515 F.3d 743, 745 (7th Cir. 2008) (upholding statute as facially constitutional); *United States v. Spivack*, 528 F. Supp. 2d 103, 107 (E.D.N.Y. 2007); *United States v. Johnson*, 456 F. Supp. 2d 1016, 1018–19 (N.D. Iowa 2006); see also *United States v. Sturm*, 560 F. Supp. 2d 1021, 1029 (D. Colo. 2007) (holding that the defense's increased cost does not render counsel's performance deficient).

21. FED. R. CRIM. P. 16.

evidence in the government's possession if the item is material to preparing the defense, the government intends to use the item at trial, or the item was obtained from or belongs to the defendant.²² These items may include books, papers, documents, data, and other tangible objects.²³ In cases involving child pornography²⁴ charges, courts have held that a hard drive containing pornographic media qualifies as data, photographs, or tangible objects subject to this discovery rule.²⁵ Rule 16 required the government to produce mirror-image copies of such hard drives to defendants who requested them in preparation for trial.²⁶ This duplication and dissemination contravenes federal law that prohibits any person from knowingly possessing, reproducing, and distributing child pornography.²⁷

To prevent such discovery, Congress passed the Walsh Act in 2006.²⁸ The act amended 18 U.S.C. § 3509 (“§ 3509”)—the applicable statutory provisions on discovery—to include subsection (m), which requires the court or the government to retain control of materials that constitute child pornography in criminal proceedings.²⁹ In passing the Act, Congress made the following findings:

- (A) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and related media.
- (B) Child pornography is not entitled to protection under the First Amendment and thus may be prohibited.
- (C) The government has a compelling interest in protecting children from those who sexually exploit them, and this interest

22. *Id.* 16(a)(1)(E).

23. *Id.*

24. *See* 18 U.S.C. § 2256(8) (2011) (“[C]hild pornography [is] any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where— (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.”); *see also* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002) (invalidating 18 U.S.C. § 2256(8)(B) as unconstitutionally overbroad).

25. *See, e.g.*, *United States v. Hill*, 322 F. Supp. 2d 1081, 1091–92 (C.D. Cal. 2004).

26. *See, e.g., id.*

27. 18 U.S.C. § 2252A (2011).

28. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 620 (2006) (codified as amended in scattered sections of 8, 18, 21, 28, and 42 U.S.C.).

29. 18 U.S.C. § 3509(m)(1) (2011).

extends to stamping out the vice of child pornography at all levels in the distribution chain.

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

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

(F) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.³⁰

The findings outline the importance of protecting child victims against unnecessary duplication and dissemination of child pornography evidence during trial proceedings. In accordance with Congress' findings, § 3509(m) prohibits the government from copying, photographing, duplicating, or otherwise reproducing child pornography in response to a criminal defendant's discovery request, "[n]otwithstanding Rule 16 of the Federal Rules of Criminal Procedure."³¹ The statute thus removes the trial court's discretion in compelling disclosure of the evidence absent a showing of need by the defense.

The statute prohibits dissemination of child pornography evidence "so long as" the materials remain "reasonably available" to the defendant.³² Materials are "reasonably available" where "the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial."³³ How the government satisfies this "reasonably available" standard is discussed in the following subsections.

30. Adam Walsh Child Protection and Safety Act § 501(2)(A)–(F).

31. 18 U.S.C. §§ 3509(m)(1)–(2)(A).

32. *Id.* § 3509(m)(2)(A).

33. *Id.* § 3509(m)(2)(B).

B. Federal Courts Have Upheld § 3509(m) as Facially Constitutional

Federal courts have consistently upheld the validity of § 3509(m) on its face after considering several challenges to the constitutionality of discovery burdens imposed by the statute.³⁴ Challenges asserting that § 3509(m) facially violates a defendant's due process rights, which have generally been coupled with arguments regarding the Sixth Amendment right to effective assistance of counsel, have unanimously failed.³⁵ Although these challenges are based on separate constitutional protections, the courts have analyzed the right to effective assistance of counsel "under the framework of due process"³⁶ because it generally supplies broader protections than the Sixth Amendment.³⁷ Where the courts have found due process to be satisfied, the opinions implicitly agree that a defendant's right to effective assistance of counsel has been satisfied as well.³⁸

1. The Walsh Act's "Reasonably Available" and "Ample Opportunity" Clauses Ensure a Defendant Due-Process-Level Access to Evidence Containing Child Pornography

The primary issue regarding a defendant's due process rights is whether the defendant's access to the pornographic evidence satisfies the

34. See generally Fern L. Kletter, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 3509(m) Prohibiting Reproduction of Child Pornography Used as Evidence in Criminal Trials*, 47 A.L.R. FED. 2d 25 (2010) (providing a general analysis of each of the challenges to the Walsh Act's constitutionality). The courts have considered challenges regarding several constitutional provisions. See, e.g., *United States v. Shrake*, 515 F.3d 743, 745 (7th Cir. 2008) (due process); *United States v. Battaglia*, No. 5:07cr0055, 2007 WL 1831108 (N.D. Ohio June 25, 2007) (ex post facto); *United States v. Spivack*, 528 F. Supp. 2d 103, 108 (E.D.N.Y. 2007) (separation of powers).

35. See, e.g., *Shrake*, 515 F.3d at 745; *United States v. Johnson*, 456 F. Supp. 2d 1016, 1019 (N.D. Iowa 2006) (finding that the limitations on a defendant's discovery right are proper in light of Congress's express desire through the Walsh Act to prevent unnecessary distribution of child pornography); see also *United States v. Sturm*, 560 F. Supp. 2d 1021, 1027 (D. Colo. 2007) (holding that the defense's "increased cost and inconvenience" alone does not "ipso facto render the assistance of counsel deficient, much less so deficient as to fall below an objective standard of reasonableness").

36. See *Spivack*, 528 F. Supp. 2d at 105.

37. *United States v. O'Rourke*, 470 F. Supp. 2d 1049, 1054 n.2 (D. Ariz. 2007).

38. See, e.g., *id.* at 1055 n.2; *Spivack*, 528 F. Supp. 2d at 105–09; *Battaglia*, 2007 WL 1831108, at *4; see also Kletter, *supra* note 34, at § 2 ("In most cases, the courts consider these challenges under the umbrella of due process rather than address each constitutional provision. The gist of the due process challenge is that [the Act] deprives the defendant of a fair trial in restricting the defense team's full access to the alleged pornography. In response to this argument, the courts have universally held, as of this writing, that [the Act] is facially constitutional . . .").

“reasonably available” clause of § 3509(m)(2)(A).³⁹ The statute states that the government has made the pornographic evidence reasonably available if it has provided “ample opportunity” to the defendant to inspect it at a government facility.⁴⁰ Applying the rules of statutory construction, courts have held that § 3509(m) comports with due process on its face because the statute’s “reasonably available” and “ample opportunity” clauses act as safety valves that protect a defendant’s due process rights.⁴¹ Courts have reasoned that where the evidence is not made reasonably available, the statute itself requires the government to produce copies of the child pornography evidence.⁴²

The United States District Court of Arizona was one of the first courts to interpret the “ample opportunity” clause in *United States v. O’Rourke*.⁴³ Applying the canons of construction, the court looked to the plain meaning⁴⁴ of “ample” to interpret the clause, stating:

[Ample opportunity] would mean a more than adequate opportunity to inspect, view, and examine the evidence in question. Such an opportunity is akin to the due process requirement that a criminal defendant be afforded “fair opportunity to defend against the State’s accusations” and be free from “arbitrary or disproportionate” restrictions on his right to confront witnesses and present evidence. *The plain meaning of the statutory language thus appears to be consistent with the requirements of due process.*⁴⁵

The court determined that the government had to give the defendant at least “due-process-level access” or otherwise provide a copy to the defense.⁴⁶ Such an opportunity affords the defendant a fair opportunity

39. See *United States v. Wright*, 625 F.3d 583, 614 (9th Cir. 2010) (determining that whether a defendant’s constitutional rights were violated under the Act hinged on whether the Government made the evidence containing child pornography reasonably available to the defendant); see also *Shrake*, 515 F.3d at 745 (dismissing defendant’s claim because he made no showing that the child pornography evidence was not made reasonably available to him).

40. 18 U.S.C. § 3509(m)(2)(B) (2011).

41. See, e.g., *Spivack*, 528 F. Supp. 2d at 106 (summarizing several federal cases that have construed the “ample opportunity” clause to ensure defendant due-process-level access).

42. See, e.g., *O’Rourke*, 470 F. Supp. 2d at 1055; see also *United States v. Knellinger*, 471 F. Supp. 2d 640 (E.D. Va. 2007).

43. 470 F. Supp. 2d 1049.

44. The court referred to *Webster’s New Collegiate Dictionary* 39 (1981), which defines “ample” as “generous or more than adequate in size, scope, or capacity.”

45. *O’Rourke*, 470 F. Supp. 2d at 1056 (emphasis added) (citations omitted) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Michigan v. Lucas*, 500 U.S. 145, 151 (1991)).

46. *Id.*

to defend against his charges and thus comports with due process—both facially and as applied.⁴⁷ Most courts have followed *O'Rourke's* reasoning and likewise found § 3509(m) comports with due process.⁴⁸

2. *Federal Courts Have Used a Number of Factors to Evaluate Whether Discovery Limitations Satisfy Due Process Under the Ample-Opportunity Standard*

Courts have considered several factors to determine whether a defendant has received ample opportunity—thus satisfying due process—to inspect the evidence. Those factors include the following: location, time allotted for analysis, hours of access, privacy, availability of experts willing to work at a government facility, and cost of moving an expert's equipment to the location. A summary of specific circumstances the courts have found to satisfy ample opportunity is provided below:

Location	Courts have allowed materials depicting child pornography to be stored at a U.S. Attorney's Office, ⁴⁹ an FBI forensics facility, ⁵⁰ a U.S. Marshall's Office, ⁵¹ and a local sheriff's office, ⁵² even if those facilities are located in a state other than where the defense counsel or experts are located. ⁵³
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47. *Id.* at 1055–56 (holding that the statute cannot be unconstitutional as applied because the defense is entitled to receive a copy of the child pornography evidence whenever the defense is not afforded ample opportunity to examine the materials).

48. *See, e.g.,* United States v. Spivack, 528 F. Supp. 2d 103, 106 (E.D.N.Y. 2007) (finding ample opportunity as at least coterminous with constitutional due process); *see also* United States v. Knellinger, 471 F. Supp. 2d 640, 645 (E.D. Va. 2007) (requiring the defense to have at a minimum the same opportunity to review the evidence as mandated by the federal Constitution, else § 3509(m) would be facially unconstitutional). *But see* United States v. Wright, 625 F.3d 583, 615–17 (9th Cir. 2010) (rejecting the opportunity to define “ample opportunity” beyond its plain meaning and determining that the defendant had ample opportunity to inspect the evidence when it was available for review in a U.S. Attorney's office for over fourteen months before trial, despite the defendant's claims that his counsel could not adequately examine the evidence due to budget, timing, and staffing problems).

49. *Wright*, 625 F.3d at 614.

50. *Spivack*, 528 F. Supp. 2d at 108.

51. *O'Rourke*, 470 F. Supp. 2d at 1058.

52. United States v. Bortnick, No. 08–20151–CM, 2010 WL 935842, at *2 (D. Kan. Mar. 11, 2010).

53. *See O'Rourke*, 470 F. Supp. 2d at 1052, 1058 (holding that the hardship of defense counsel's out-of-state traveling to Arizona from Ohio did not implicate due process) (citing United States v. Johnson, 456 F. Supp. 2d 1016, 1020 (N.D. Iowa 2006)); *accord* United States v. Doane, 501 F. Supp. 2d 897, 902 (E.D. Ky. 2007).

Time allotted for analysis	<p>This is a discretionary issue that depends heavily on the amount of discovery and the time necessary for the defense to prepare for trial. Examples include:</p> <p><i>O'Rourke</i>: The defense had approximately ten days to conduct its analysis of forty-six movie files and several hundred still images.⁵⁴ The defense experts used only four and a half hours, and the court found this sufficient.⁵⁵</p> <p><i>Wright</i>: The defense had access to a mirror-image copy of a hard drive for fourteen months leading up to trial.⁵⁶ The discovery included a total of thirteen files of child pornography.⁵⁷ Despite a series of complaints by the expert and defense counsel regarding budget and staffing issues as trial approached, the court found that the defendant had an ample opportunity to review the materials.⁵⁸</p>
Hours of access	<p>Courts have found that a defendant's due process rights are satisfied where the government allows access during regular business hours.⁵⁹ Even access outside of business hours has been permitted upon request.⁶⁰</p>
Privacy	<p>Courts have generally required the defense to have access to a private office within the government facility, prohibited the government or its experts from entering, permitted defense experts to leave their hardware in the office, permitted experts to run software overnight for analysis, and posted the court's order on the office door.⁶¹ The overarching policy of these rules is to protect the work product of defense counsel and defense experts.⁶²</p>

54. See *O'Rourke*, 470 F. Supp. 2d at 1052, 1057.

55. See *id.* at 1052.

56. See *United States v. Wright*, 625 F.3d 583, 615 (9th Cir. 2010).

57. See *id.* at 589.

58. See *id.*

59. See, e.g., *id.* at 615 (permitting experts to leave their equipment overnight in the government facility if necessary); see also *United States v. Flinn*, 521 F. Supp. 2d 1097, 1101 (E.D. Cal. 2007) (approving access during business hours); accord *United States v. Sturm*, 560 F. Supp. 2d 1021, 1024 (D. Colo. 2007).

60. *Flinn*, 521 F. Supp. 2d at 1103.

61. See, e.g., *United States v. O'Rourke*, 470 F. Supp. 2d 1049, 1057 (D. Ariz. 2007).

62. See, e.g., *Flinn*, 521 F. Supp. 2d at 1101 ("An ample opportunity also requires that the analysis be performed in a situation where attorney-client privilege and work product will not be

The courts have unanimously determined that the plain language of § 3509(m) comports with due process both facially and as applied.⁶³ Nonetheless, the courts have noted that even under § 3509(m)'s discovery limitations, the defense can compel discovery of these materials where the government fails to satisfy the “ample opportunity” clause.⁶⁴ Only in a very small minority of cases, however, have the courts found the government's control and possession of child pornography evidence so burdensome that it deprived the defendant of due process such that providing a copy to the defense was necessary.⁶⁵ These opinions, as discussed below, provide a sketch of what might be necessary to show either that the discovery limitations—location, time allotted for analysis, hours of access, and privacy—do not afford the defendant ample opportunity, or that copies of the child pornography evidence are necessary to the defense.⁶⁶

Two courts, in *United States v. Knellinger*⁶⁷ and *United States v. Tummins*,⁶⁸ have found ample opportunity lacking. In *Knellinger*, the defendant—charged with seven counts of child pornography possession—filed a motion to compel the government to furnish him a mirror-image copy of his hard drive, arguing that the constitution entitled him to a copy.⁶⁹ The district court held an evidentiary hearing to determine the validity of § 3509(m).⁷⁰ The court quickly moved its inquiry to the “ample opportunity” clause—referring to it as the Act's “safety valve”—to determine whether the defense was entitled to a copy

easily, accidentally exposed to the government . . .”).

63. *See, e.g.*, *United States v. Shrake*, 515 F.3d 743, 745 (7th Cir. 2008); *United States v. Spivack*, 528 F. Supp. 2d 103, 108 (E.D.N.Y. 2007); *United States v. Knellinger*, 471 F. Supp. 2d 640, 644 (E.D. Va. 2007).

64. *See, e.g.*, *Knellinger*, 471 F. Supp. 2d at 646 (“If ample opportunity has not been provided, the statute itself renders [defendant]'s as applied constitutional challenge moot because the statute permits the Court to provide a copy of the materials to the defense.”); *see also O'Rourke*, 470 F. Supp. 2d at 1056 (finding the statute constitutional as applied because the statute itself requires dissemination where ample opportunity is not afforded the defense).

65. *See, e.g.*, *Knellinger*, 471 F. Supp. 2d at 648–50.

66. *See id.*; *see also United States v. Tummins*, No. 3:10-00009, 2011 WL 2078107 (M.D. Tenn. May 26, 2011). As of May 16, 2012, these are the only two federal cases that have cited the Walsh Act's § 3509(m) and found that dissemination of the child pornography was necessary.

67. 471 F. Supp. 2d 640 (E.D. Va. 2007).

68. No. 3:10-00009, 2011 WL 2078107 (M.D. Tenn. May 26, 2011).

69. *Knellinger*, 471 F. Supp. 2d at 642. Ironically, *Knellinger*'s motion to compel production came just days before Congress passed the Walsh Act, which the government subsequently relied on to deny his request. *See id.*

70. *Id.*

of the evidence.⁷¹

To show that he had not received ample opportunity to review the evidence, Knellinger produced four expert witnesses—one computer forensic expert, two digital video experts, and an experienced child pornography defense attorney—to testify about the difficulties of conducting their examinations at a government facility.⁷² Although the computer forensic expert admitted that § 3509(m)'s limitations did not unduly interfere with his job, the other three witnesses testified to several hardships that the court used to justify its decision to compel the government to disclose the mirror-image hard drives.⁷³

Knellinger's attorney-witness testified that a copy of the materials was "absolutely essential" where a defendant intends to defend against possession of child pornography charges using the virtual-child defense.⁷⁴ The virtual-child defense permits a defendant to present evidence that the alleged pornography does not actually depict images of real children, but rather digitally generated children, which do not constitute child pornography under the law.⁷⁵ Knellinger's two video experts testified that analyzing the videos in a government facility would impose a tremendous burden on them.⁷⁶ One video expert claimed that he would raise his normal fee from \$135,000 to \$540,000, plus the costs of moving his "quite extensive collection of equipment" necessary to mount that particular defense.⁷⁷ He further testified that even if he were to move his equipment to a government facility, his work-product would be compromised to such a degree that he would not be able to provide his services effectively.⁷⁸ The final witness testified similarly, and added that he would not agree to work on Knellinger's case under § 3509(m)'s

71. *Id.* at 644–45 (reasoning that the statute could be facially unconstitutional only where no application of the ample-opportunity clause would be sufficient to protect Knellinger's rights (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987))). The court found that "ample opportunity" required at least a constitutionally mandated opportunity to inspect the evidence, and thus dismissed Knellinger's facial constitutional challenges. *Id.*

72. *Id.* at 646–48.

73. *Id.*

74. *Id.* at 647. The virtual-child defense derives from the U.S. Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

75. *See Ashcroft*, 535 U.S. at 253–55 (invalidating statute that prohibited possession of digitally created images of minors—or persons who appear to be minors—engaged in sexually explicit conduct); *see also Knellinger*, 471 F. Supp. 2d at 647.

76. *Knellinger*, 471 F. Supp. 2d at 647–48.

77. *Id.* at 647.

78. *Id.*

limitations.⁷⁹

The government failed to rebut any of the experts' testimony and offered no evidence of its own during the hearing.⁸⁰ The court held that given the uncontested testimony, the defense was entitled to a copy of the materials.⁸¹ Specifically, the court found that the experts were a necessary component of Knellinger's virtual-child defense.⁸² The court, however, made its discovery order conditional on Knellinger hiring an expert to perform the examination described above, reasoning, "The record establishes that a copy of the hard drive is of no use to the defense unless there is a defense expert to examine the copy."⁸³

Similarly, the defendant in *Tummins* provided almost un-rebutted expert testimony that the limitations under § 3509(m) prohibited his expert from completing an analysis of the pornographic evidence.⁸⁴ The defendant here, however, had actually retained an expert who testified that his company was unwilling to leave its software running overnight in a government facility.⁸⁵ In light of the largely uncontested testimony, the court compelled disclosure of the materials to the defense.⁸⁶

Considered together, these cases show that a combination of the following factors undermines the government's ability to afford a defendant ample opportunity to examine the materials in preparation for trial: the defendant demonstrates that a copy is essential for a virtual-child defense;⁸⁷ the defendant has retained an expert;⁸⁸ the defendant's

79. *Id.* at 647–48.

80. *Id.* at 646 ("The United States presented no evidence."); *id.* at 646 n.5 ("If the United States had wanted to challenge the substantive testimony of these two experts, it could have put on testimony from its own experts. The United States chose not to do so."); *id.* at 648 ("In sum, Knellinger's witnesses established that assessment and presentation of a viable legal defense in Knellinger's case requires expert analysis and testimony The United States presented no witnesses or other evidence to controvert that offered by Knellinger."); *id.* at 649 ("Considering the testimony from the legal and technical experts in this case *and the absence of any opposing evidence*, the Court concludes that, at least in this case, *the record permits no other factual conclusion.*") (emphasis added); *id.* at 649 ("Because the United States did not present evidence that contradicts the evidence put forth by Knellinger, and because Knellinger's witnesses were both credible and relevant, the Court accepts the showing made by Knellinger's experts").

81. *Id.* at 649–50.

82. *Id.* at 649.

83. *Id.* at 650.

84. *United States v. Tummins*, No. 3:10-00009, 2011 WL 2078107, at *5 (M.D. Tenn. May 26, 2011).

85. *Id.*

86. *Id.* at *7.

87. *Knellinger*, 471 F. Supp. 2d at 649.

88. *Id.* at 650; *Tummins*, 2011 WL 2078107, at *5.

experts testify under oath that they are unwilling to examine the evidence under the discovery limitations;⁸⁹ and the limitations would subject the defendant to an exorbitant expense.⁹⁰ But absent a showing that a copy of materials is necessary to the defense, federal courts have upheld the constitutionality of limiting discovery of child pornography evidence under the Walsh Act.

Until 2006, the federal rules of discovery required the government to produce copies of child pornography evidence to the defense for trial. The Walsh Act altered how federal courts handle such evidence by prohibiting unnecessary duplication and distribution to the defense. So long as the materials are made reasonably available to the defense, federal courts have found that a defendant's due process rights are sufficiently protected. However, similar to federal prosecutions before 2006, the Washington State Supreme Court has mandated that criminal defendants are entitled to a copy of child pornography evidence under state criminal rules and under the Fifth and Sixth Amendments.

II. THE WASHINGTON STATE SUPREME COURT HAS HELD THAT DEFENDANTS ARE ENTITLED TO CHILD PORNOGRAPHY EVIDENCE

Criminal Rule 4.7 ("CrR 4.7") governs discovery in state criminal proceedings. It mandates that a prosecuting attorney disclose books, paper documents, photographs, or tangible objects to the defense if the prosecuting attorney either intends to use the materials at trial, or if the materials belong to the defendant.⁹¹ In 2007, the Washington State Supreme Court consolidated three cases involving the possession of child pornography in *State v. Boyd*⁹² and recognized that hard drives containing child pornography⁹³ qualify as discoverable objects under CrR 4.7.⁹⁴ There, the Court required the State to duplicate hard drives,

89. *Knellinger*, 471 F. Supp. 2d at 649–50; *Tummins*, 2011 WL 2078107 at *5.

90. *Knellinger*, 471 F. Supp. 2d at 649. The expense alone, however, has been found insufficient to deprive the defendant of "ample opportunity." See *supra* note 35; see also *United States v. Wright*, 625 F.3d 583, 617 (9th Cir. 2010).

91. WASH. SUPER. CT. CRIM. R. 4.7(a)(1)(v).

92. 160 Wash. 2d 424, 158 P.3d 54 (2007).

93. Washington law does not use the term "child pornography," but rather "depictions of minor engaged in sexually explicit conduct." See, e.g., WASH. REV. CODE § 9.68A.040 (2010). For a definition of "sexually explicit conduct," see WASH. REV. CODE § 9.68A.011 (2010). This Comment uses the terms "child pornography" and "images/depictions/photographs of minor[s] engaged in sexually explicit conduct" interchangeably.

94. See *Boyd*, 160 Wash. 2d at 432, 158 P.3d at 59.

photographs, and videotapes that contained thousands of images of minors engaged in sexually explicit conduct and distribute the copies to the defendants for trial.⁹⁵ Three years later, the Court reaffirmed *Boyd* in *State v. Grenning*.⁹⁶ The Court emphasized that a defendant's right to receive copies of child pornography evidence under *Boyd* did not hinge entirely on the underlying rules of procedure, but also a defendant's constitutional right to a fair trial and effective assistance of counsel.⁹⁷

A. *In State v. Boyd, the Court Held that a Criminal Defendant's Rights of Due Process and Effective Representation Compel the Prosecution to Disclose Child Pornography Evidence Under CrR 4.7(a)*

In *Boyd*, the State charged Michael Boyd with twenty-eight crimes involving five identified victims, some of whom were depicted in hundreds of photographs.⁹⁸ Along with the photographs, the State seized several hard drives and other storage devices in Boyd's possession that contained tens of thousands of images of minors engaged in sexually explicit conduct.⁹⁹ These images supported eleven of Boyd's charges.¹⁰⁰ Before trial, the State permitted Boyd to examine the evidence in a state facility on only two occasions.¹⁰¹ Boyd moved the court under CrR 4.7(a) to compel the State to turn over a mirror-image copy of his hard drive.¹⁰² Boyd argued that he was entitled to the evidence because it was necessary for both his counsel's effective representation and his defense.¹⁰³

The State responded that CrR 4.7(a) did not cover child pornography evidence, and that the trial court could deny Boyd's discovery under CrR 4.7(e)—a rule which permits the trial court to balance the victims' interests with the defendant's right of discovery.¹⁰⁴ The State argued that

95. *Id.* at 429–33, 158 P.3d at 57–59.

96. 169 Wash. 2d 47, 234 P.3d 169 (2010).

97. *Id.* at 54–55, 234 P.3d at 173–74.

98. *Boyd*, 160 Wash. 2d at 429, 158 P.3d at 57.

99. *Id.*

100. *Id.* at 429–30, 158 P.3d at 57.

101. *Id.* at 430, 158 P.3d at 57.

102. *Id.*

103. *Id.* at 431, 158 P.3d at 58.

104. *Id.* at 431–32, 158 P.3d at 58. CrR 4.7(a) normally requires the State to disclose materials, whereas CrR 4.7(e) shifts the burden to the defendant to demonstrate that the evidence is necessary to the defense: “Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant

the disclosure requirement under CrR 4.7(a) only required acknowledging the existence of such evidence to the defense—not producing it.¹⁰⁵ The State asserted that withholding copies of the child pornography protected the victims’ interests and limited further victimization through dissemination of the evidence.¹⁰⁶ The Court disagreed, however, with only Justice James Johnson dissenting.

The Court agreed with Boyd that CrR 4.7(a)(1)(v) controlled the discovery of child pornography evidence.¹⁰⁷ The Court stated that it “could not be any clearer” that mirror-image copies of hard drives, photographs, or video tapes qualified as evidence that the State must disclose during discovery under CrR 4.7(a)(1)(v).¹⁰⁸ Because CrR 4.7(e) refers to materials *not* covered by CrR 4.7(a), the Court rejected CrR 4.7(e)’s balancing test as inapposite in this case.¹⁰⁹ Specifically, the Court focused on the plain language of the rule, stating that “the disclosure mandate [under CrR 4.7(a)] applies equally to all evidence” because “[n]o distinction is made under CrR 4.7(a)(1)(v) between the specific types of tangible evidence the prosecutor must disclose.”¹¹⁰ The Court also rejected the State’s definition of disclosure, relying both on the general usage of “to disclose,” and the underlying policies of the discovery rules, to show that “disclosure” meant duplication and dissemination.¹¹¹

Invoking the constitutional principles underlying CrR 4.7, the Court reasoned CrR 4.7(a) required “meaningful access” to copies of child pornography evidence based on a criminal defendant’s due process rights.¹¹² It described “meaningful access” as disclosure that would “afford opportunity for effective cross-examination, and meet the requirements of due process.”¹¹³ In making its decision, the Court also focused on the Sixth Amendment right to the effective assistance of

material and information not covered by [CrR 4.7(a)]” WASH. SUPER. CT. CRIM. R. 4.7(e)(1). This would have permitted the trial court to consider any potential or unnecessary embarrassment victims might suffer before distributing the pornography evidence to the defense. *Id.* 4.7(e)(2).

105. *Boyd*, 160 Wash. 2d at 432–33, 158 P.3d at 59.

106. *Id.* at 433, 158 P.3d at 59.

107. *Id.* at 432, 158 P.3d at 59.

108. *Id.*

109. *Id.* at 431–32, 158 P.3d at 58–59.

110. *Id.* at 436, 158 P.3d at 60.

111. *See id.* at 433–35, 158 P.3d 59–60.

112. *Id.* at 433–35, 158 P.3d 59–60.

113. *Id.* at 434, 158 P.3d at 59 (emphasis omitted) (quoting *State v. Yates*, 111 Wash. 2d 793, 797, 765 P.2d 291 (1988)).

counsel. It reasoned that defense counsel and experts needed a copy of the pornographic evidence to examine whether defendant downloaded or created the pornography, test the software that was used in the process, and analyze whether the pornography depicted actual images of children (as opposed to digitally manufactured images).¹¹⁴ As such, disclosure was necessary for defense counsel to satisfy its constitutional role.¹¹⁵ The Court reiterated that the State had the burden of establishing the need for appropriate restrictions.¹¹⁶ The Court recognized that its holding “mirror[ed] the approach under federal law *prior* to the passage of the Adam Walsh Child Protection and Safety Act of 2006,” and explained that, even under the Walsh Act, federal courts had compelled disclosure in certain circumstances.¹¹⁷ Although the Court did not expressly hold that the Walsh Act did not preempt state court rules of discovery in criminal proceedings, at least one appellate court in Washington has relied on *Boyd* to do so.¹¹⁸

The sole dissenter in *Boyd*, Justice J. Johnson, argued that the majority’s holding violated the Washington State Constitution as well as important public policy.¹¹⁹ The Washington State Constitution mandates that the criminal justice system afford crime victims “dignity and respect.”¹²⁰ Justice Johnson concluded that compelling discovery of child pornography evidence implicated the child victim’s constitutional privacy rights.¹²¹ Drawing on legislative findings,¹²² he argued that the

114. *Id.* at 436, 158 P.3d at 60–61 (citing *United States v. Knellinger*, 471 F. Supp. 2d 640, 647 (E.D. Va. 2007)).

115. *Id.* at 435, 158 P.3d at 60 (“CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial.”).

116. *Id.* at 433–34, 158 P.3d at 59; *see also* WASH. SUPER. CT. CRIM. R. 4.7(a)(1) (permitting the prosecuting attorney to limit a defendant’s access to some materials through a protective order); *id.* 4.7(h)(4) (“Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party’s counsel to make beneficial use thereof.”).

117. *Boyd*, 160 Wash. 2d at 433 n.4, 158 P.3d at 59 n.4 (emphasis added) (“The [Adam Walsh Act] altered both the burden and the standard of proof. Since its passage courts sometimes refuse to provide copies without also requiring government supervision.”) (citing *United States v. O’Rourke*, 470 F. Supp. 2d 1049 (D. Ariz. 2007); *Knellinger*, 471 F. Supp. 2d 640).

118. *See State v. Norris*, 157 Wash. App. 50, 78, 236 P.3d 225, 238 (2010) (“We hold that section 3509(m) of the Adam Walsh Act does not preempt CrR 4.7 and that the State has an obligation to produce to the defense copies of the photographs it intends to use against Norris at trial.”) (citing *Boyd*, 160 Wash. 2d at 435, 158 P.3d at 60).

119. *Boyd*, 160 Wash. 2d at 441, 158 P.3d at 63 (Johnson, J., dissenting).

120. *Id.* at 449, 158 P.3d at 67 (quoting WASH. CONST. art. I, § 35).

121. *Id.* at 450, 158 P.3d at 67 (citing WASH. CONST. art. I, § 7).

122. *See* WASH. REV. CODE § 9.68A.001 (2010) (prescribing Washington’s duty towards child

Washington State Legislature had made the prevention of sexual exploitation and abuse of children a goal of “surpassing importance,” a public policy that could lawfully burden a criminal defendant’s right to discovery.¹²³

Justice Johnson pointed out that the federal courts had addressed these same problems by upholding the Walsh Act, and maintained that shifting the burden onto the defendant to show the necessity of receiving the evidence did not excessively burden the defendant’s rights.¹²⁴ He further recognized that Arizona and California had also resolved these concerns by shifting the discovery burden to the defense in child pornography cases.¹²⁵ He concluded that the defendants in *Boyd* had not made such a showing, and thus the State should have been permitted to maintain possession and control of the evidence.¹²⁶

B. In State v. Grenning, the Court Affirmed Its Holding in Boyd Was Based on Court Rules and a Criminal Defendant’s Rights to Due Process and Effective Representation

Three years after *Boyd*, the Court in *Grenning* affirmed that a criminal defendant is entitled to a copy of child pornography evidence. The State of Washington charged Neil Grenning with possession of child

victims of sexual exploitation a “sacred trust”); *see also* WASH. REV. CODE § 7.69A.010 (2010) (finding that child victims should be treated with “sensitivity, courtesy, and special care”).

123. *Boyd*, 160 Wash. 2d at 449–50, 158 P.3d at 67 (“It is difficult to comprehend how a court order compelling the State to duplicate and disseminate child pornography evidence can be reconciled with the preservation of the State’s ‘sacred trust’ regarding child sex offense victims.”) (citing WASH. REV. CODE § 9.96A.001).

124. *Id.* at 450, 158 P.3d at 68.

125. *Id.* The Arizona rules of discovery normally require full disclosure, but in cases involving child pornography evidence, the State is permitted to maintain possession of the materials unless:

[R]eproduction or release is necessary to protect a defendant’s right to a fair trial. Such a circumstance may be present when the items must be examined by a [sic] expert in order to determine whether actual minors are depicted in the materials or when a computer hard drive or other digital storage medium must be examined by an expert to determine whether the defendant was responsible . . . but only if the defendant shows that inspection of items under specific conditions offered by the state is not sufficient to protect the defendant’s rights to a fair trial. This rule does not contemplate reproduction or release of such materials simply for the convenience of a lawyer or other agents of a defendant. To protect the rights of potential victims, if reproduction or release is ordered, the court must impose restrictions

ARIZ. R. CRIM. PROC 15.1(j) cmt. 15.1(j) (emphasis added).

California adopted similar measures in 2003, placing the burden of necessity on the defendant: “[N]o attorney may disclose or permit to be disclosed to a defendant, members of the defendant’s family, or anyone else copies of child pornography evidence, unless specifically permitted to do so by the court after a hearing and a showing of good cause.” CAL. PEN. CODE § 1054.10(a) (emphasis added).

126. *Boyd*, 160 Wash. 2d at 450–53, 158 P.3d at 68–69.

pornography after discovering sexually explicit pictures of minors on his computer.¹²⁷ After authorities seized Grenning's hard-drives, which contained the child pornography, the State refused to disseminate copies to the defense and successfully moved the court to issue a protective order for the evidence.¹²⁸ Grenning, his counsel, and expert witnesses were permitted to review the materials only in a state facility during business hours.¹²⁹ Grenning, however, failed to retain an expert witness willing to review the materials under these restrictions and unsuccessfully moved the court to remove its protective order.¹³⁰ Grenning went to trial without an expert witness examining the hard drives.¹³¹ He was convicted of twenty counts of possession of child pornography and sentenced to 117 years in prison.¹³²

While Grenning's appeal was pending, the Court announced its decision in *Boyd*.¹³³ The court of appeals subsequently reversed Grenning's child pornography charges, and the State petitioned for review of that decision, arguing that the State had made the materials available in a facility.¹³⁴ The Court rejected the State's argument, highlighting its holding in *Boyd*, and determined that CrR 4.7(a) and due process considerations entitled Grenning to copies of the evidence.¹³⁵

The Court reasoned that while perhaps its holding in *Boyd* rested on a violation of discovery rules, its holding was of constitutional magnitude.¹³⁶ The Court concluded that under *Boyd*, "as a matter of

127. *State v. Grenning*, 169 Wash. 2d 47, 49–50, 234 P.3d 169, 171 (2010). Grenning was charged with seventy-two counts of child sex crimes, including rape of a child, sexual exploitation of a minor, child molestation, and possession of child pornography. *Id.*

128. *Id.* at 50, 234 P.3d at 171.

129. *Id.* at 50 n.1.

130. *Id.* at 50–52, 234 P.3d at 171–72.

131. *Id.* at 52, 234 P.3d at 172.

132. *Id.* Grenning's child pornography convictions were only a minor fraction of his overall sentence. Grenning was convicted of seventy-one total counts, and sentenced to a total of 117 years in prison. He was sentenced to one year for each charge of child pornography, all to be served concurrently. *Id.*

133. *Id.*

134. *Id.* at 52–53, 234 P.3d at 172.

135. *Id.* at 53–60, 234 P.3d at 172–77.

136. *Id.* at 55, 234 P.3d at 174 ("Nothing in our reasoning in *Boyd* turned on its procedural posture."); *id.* at 58 ("While it is true that *Boyd* rested on a violation of a court rule, we found that the Fifth and Sixth Amendments were implicated . . ."); *id.* at 54–55, 234 P.3d at 173–74 ("We also concluded [in *Boyd*] that denying defense counsel such potentially critical exculpatory evidence went beyond merely violating the court rule and had constitutional implications: 'Courts have long recognized that effective assistance of counsel . . . [is a] crucial element[] of due process and the right to a fair trial.'" (quoting *State v. Boyd*, 160 Wash. 2d 424, 434, 158 P.3d 54, 60 (2007)).

law . . . adequate representation requires providing a ‘mirror image’ of [the] hard drive.”¹³⁷ According to the Court, only after receiving a mirror-image copy of the hard drive could the defense and experts determine whether the materials contained any exculpatory evidence.¹³⁸

Strongly disagreeing that Grenning’s constitutional rights were implicated, Chief Justice Barbara Madsen drafted a lengthy dissenting opinion, to which Justices J. Johnson and Gerry Alexander concurred.¹³⁹ The dissent contended that Grenning’s constitutional rights should not have factored into the majority’s analysis because the State had provided Grenning an adequate opportunity to review the evidence prior to trial.¹⁴⁰ The dissenters argued that the State’s actions comported with the underlying principles of CrR 4.7(a).¹⁴¹ Similar to Justice Johnson’s dissent in *Boyd*, Chief Justice Madsen pointed to the Walsh Act in support of limiting a defendant’s access to child pornography evidence.¹⁴² She wrote:

Given [the Walsh Act], whether a constitutional violation exists in a particular case is essentially determined by asking whether the defendant has been denied reasonable access to the evidence in a child pornography case. Comparison to federal cases in the context of the Adam Walsh Act on this analogous point shows that Grenning had more than an adequate opportunity to engage in discovery.¹⁴³

The dissent pointed out that Grenning had failed altogether to show why receiving a copy of the child pornography evidence was necessary to his defense, reasoning that his defense did not require a substantial examination of the evidence (whereas in other cases an expert might be necessary to determine whether the children depicted in the pornography are digitally created).¹⁴⁴

137. *Id.* at 58, 234 P.3d at 175 (internal quotation marks omitted).

138. *Id.* at 55, 234 P.3d at 174.

139. *Id.* at 61–62, 234 P.3d at 177.

140. *Id.* at 73–77, 234 P.3d at 182–85.

141. *See id.* at 61–81, 234 P.3d at 177–86.

142. *Id.* at 71–72, 234 P.3d at 182 (“The potential for repeated victimization of the children whose images are child pornography stored on computer hard drives was a legitimate basis for the trial judges in this case to issue the protective order and to deny the defendant’s motion for reconsideration. Not only was this true as a general proposition, it was true based on the specific facts of this case.”). The Chief Justice referenced more than ten cases—among others—in which federal courts had upheld the constitutionality of the Walsh Act’s limitations on discovery of child pornography evidence. *Id.* at 74, 234 P.3d at 184.

143. *Id.* at 74–75, 234 P.3d at 184 (emphasis added).

144. *Id.* at 66–67, 234 P.3d at 179–80.

Finally, Chief Justice Madsen explained that her opinion comported with the Court's holding in *Boyd*, where she had concurred with the majority, because the constitutional underpinnings of effective trial preparation and adequate legal representation under CrR 4.7(a)(1)(v) were satisfied in Grenning's case.¹⁴⁵ Boyd had been permitted to review the evidence on only two occasions before trial, whereas Grenning had had unrestricted access to the materials in the state facility.¹⁴⁶

Under *Boyd* and *Grenning*, the Washington State Supreme Court aligned the state's discovery rules in accordance with federal discovery rules pre-2006. The status of Washington's discovery rules, however, recently changed when the State Legislature responded to the Court's decisions in *Boyd* and *Grenning* by enacting H.B. 2177. The newly enacted statute limits a criminal defendant's access to child pornography evidence—similar to the Walsh Act—and prohibits unnecessary duplication and redistribution to protect the rights of child victims.

III. THE WASHINGTON STATE LEGISLATURE RESPONDED TO *BOYD* AND *GRENNING* BY ENACTING H.B. 2177

In 2012 the Washington State Legislature unanimously enacted H.B. 2177.¹⁴⁷ The bill amends current state legislative findings on child pornography¹⁴⁸ to include findings similar to those of the Walsh Act and prefaces those findings with a statement that “the importance of protecting children from repeat exploitation in child pornography is not being given sufficient weight under [*Boyd* and *Grenning*].”¹⁴⁹ The legislation proceeds to outline the importance of protecting children from further exploitation based on the following findings:

- (1) Child pornography is not entitled to protection under the First Amendment and thus may be prohibited;
- (2) The state has a compelling interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain;

145. *Id.* at 80, 234 P.3d at 186 (arguing that because the State made the evidence available to the defense upon request at a state facility, defendant's constitutional rights were not violated).

146. *Id.* at 68–69, 234 P.3d at 180–81.

147. Substitute H.B. 2177, Chapter 135, Laws 2012, 62nd Leg., Reg. Sess. (Wash. 2012); *see also History of H.B. 2177*, WASH. ST. LEGISLATURE, <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2177> (last visited Sept. 5, 2012).

148. *See* WASH. REV. CODE § 9.68A.001 (2012).

149. *Id.*

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

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

(5) It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense. The legislature is also aware that the [Walsh Act] prohibits the duplication and distribution of child pornography as part of the discovery process in federal prosecutions. This federal law has been in effect since 2006, and upheld repeatedly as constitutional. Courts interpreting the Walsh Act have found that such limitations can be employed while still providing the defendant due process. The Legislature joins Congress, and the legislatures of other states that have passed similar provisions, in protecting these child victims so that our justice system does not cause repeat exploitation, while still providing due process to criminal defendants.¹⁵⁰

Using these findings, H.B. 2177 prescribes how child pornography evidence should be handled in criminal prosecutions under several statutes.¹⁵¹ One of these statutes, RCW 9.68A.170, provides:

(1) In any criminal proceeding, any property or material that constitutes [child pornography] shall remain in the care, custody, and control of either a law enforcement agency or the court.

(2) Despite any request by the defendant or prosecution, any property or material that constitutes [child pornography] shall not be copied, photographed, duplicated, or otherwise reproduced, *so long as the property or material is made reasonably available to the parties . . .*¹⁵²

Similar to the Walsh Act, RCW 9.68A.170 defines evidence as “reasonably available” when the prosecution, defense, or other expert has had “ample opportunity for inspection, viewing, and examination of the property or material at a law enforcement facility or a neutral facility

150. *Id.*

151. *See* H.B. 2177, §§ 2–4.

152. WASH. REV. CODE § 9.68A.170(2).

approved by the court upon petition by the defense.”¹⁵³

If necessary to the defense, RCW 9.68A.170 also permits the court to order the production of a mirror-image copy of the evidence to an expert who: (1) has actually been retained by a party; and (2) is prepared to conduct a forensic examination of the evidence while it is located in a designated facility.¹⁵⁴ The party seeking a copy of the materials must make a “substantial showing” that an analysis cannot be conducted in such a facility.¹⁵⁵ Any disclosure is subject to a protective order against further distribution.¹⁵⁶ Other provisions in RCW 9.68A.170 require criminal defendants to review the evidence while in the presence of their attorney, and allow the court to appoint someone to supervise a pro se defendant’s examination of the evidence.¹⁵⁷

IV. THE COURT SHOULD OVERRULE *BOYD* AND *GRENNING* AND UPHOLD RCW 9.68A.170, WHICH BALANCES THE RIGHTS OF CHILD VICTIMS AND DEFENDANTS

Given the many challenges to the validity of the Walsh Act in federal court,¹⁵⁸ it seems likely the Washington State Supreme Court will hear challenges to RCW 9.68A.170 in the near future. This statute respects the constitutional policies underlying CrR 4.7(a), which the Court sought to protect in *Boyd* and *Grenning*, and furthers the Legislature’s goal of protecting children against repeated exploitation. In future cases, the Court should uphold the law as facially constitutional, and overrule its decisions in *Boyd* and *Grenning*.¹⁵⁹

A. *RCW 9.68A.170 Creates an Express Exception to the State’s Duty of Disclosure Under CrR 4.7(a)*

The most apparent reason why the Court should reconsider its holdings in *Boyd* and *Grenning* is because RCW 9.68A.170 alters the underlying discovery rules under which those cases were decided. The

153. *Id.*

154. WASH. REV. CODE § 9.68A.170(4).

155. *Id.*

156. *Id.*

157. WASH. REV. CODE § 9.68A.170(3).

158. *See supra* Part I.B.

159. This Comment’s argument is limited to a challenge against the constitutionality of WASH. REV. CODE §9.68A.170 as pertaining to a defendant’s state and federal due process rights, and Sixth Amendment right to effective assistance of counsel because these are the bases for the Court’s holdings in *Boyd* and *Grenning*.

statute fundamentally changes how child pornography evidence should be handled in criminal prosecutions in several important ways. First, the statute creates an express exception to the rules of discovery by prohibiting the reproduction of pornography evidence “[d]espite any request by the defendant or prosecution.”¹⁶⁰ This prohibition is akin to the Walsh Act’s exception, and sweeps broadly enough to encompass all discovery requests. Thus, despite the normal rules of discovery under CrR 4.7, RCW 9.68A.170 provides an express exception to the State’s duty to disclose child pornography evidence.

Next, the statute shifts custody of the child pornography evidence from the prosecution to the court or other law enforcement agency. CrR 4.7(a)(1)(v) assumes that the prosecution has unimpeded access to the materials in order to copy and distribute them. But RCW 9.68A.170 prohibits even the prosecution from obtaining copies of the materials.¹⁶¹ This change should alleviate the Court’s concern in *Boyd* that the prosecution is otherwise being afforded an unfair advantage during discovery.¹⁶² The statute specifically requires courts to deny any request for child pornography materials from either party—even the prosecution.¹⁶³

A change in the underlying court rules does not necessarily shield the statute from constitutional challenges. The Court held in *Boyd* and *Grenning* that denying defendant meaningful access to the evidence went beyond a mere violation of the court rules and implicated the defendant’s rights to due process and effective representation.¹⁶⁴ Nonetheless, the underlying court rule—CrR 4.7(a)—guided the court’s opinion, and has undergone significant changes by the Legislature. While perhaps the language from the rules of discovery was not *the* deciding factor in *Boyd* and *Grenning*, it was *a* major factor that established the framework for those opinions.

160. WASH. REV. CODE § 9.68A.170(2).

161. Child pornography “shall remain in the care, custody, and control of *either a law enforcement agency or the court.*” WASH. REV. CODE § 9.68A.170(1) (emphasis added).

162. *See* State v. Boyd, 160 Wash. 2d 424, 433–34, 158 P.3d 54, 59–60 (2007) (noting that the principles underlying CrR 4.7 require an even playing field during discovery).

163. WASH. REV. CODE § 9.68A.170(2).

164. In *Grenning*, the Court reiterated that the State’s failure to distribute copies of child pornography evidence in *Boyd* “went beyond merely violating the court rule and had constitutional implications.” 169 Wash. 2d 47, 54–55, 234 P.3d 169, 173 (2010); *see also supra* note 136 and accompanying text.

B. *H.B. 2177's Legislative Findings Support a Reconsideration of Boyd and Grenning*

The amended legislative findings to Washington's child pornography laws provide the support necessary for the Washington State Supreme Court to reconsider its holdings in *Boyd* and *Grenning*. The majority in *Grenning* hinted that it might be open to reconsidering its decision in *Boyd* if the record and argument before it supported doing so.¹⁶⁵ In light of the amended findings under H.B. 2177, the Court must now consider the State's "compelling interest" in eliminating child pornography because every viewing of child pornography constitutes a violation of the victim's constitutional right to privacy.¹⁶⁶

The State argued in *Grenning* that it did not have to redistribute the child pornography evidence under the pre-H.B. 2177 discovery rules—an argument the Court reiterated it rejected in *Boyd*.¹⁶⁷ But now the Court has the Legislature's express intent "to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims," while still complying with a defendant's due process rights.¹⁶⁸ In light of the Legislature's resolve to stamp out reproduction of child pornography, these precise and unequivocal statements should compel the Court to carefully reconsider its holdings in *Boyd* and *Grenning*.

C. *RCW 9.68A.170's "Reasonably Available" and "Ample Opportunity" Clauses Protect a Criminal Defendant's State and Federal Rights to Due Process and Effective Representation*

The limitation on a defendant's discovery rights under RCW 9.68A.170 should pass constitutional muster, both facial and as-applied, because the statute's plain meaning directs that Washington criminal defendants receive at least due-process-level access to child pornography evidence. By its own terms, RCW 9.68A.170 requires that child pornography evidence be "reasonably available," such that the parties and otherwise qualified experts have "ample opportunity" to

165. *Id.* at 55 n.6, 234 P.3d at 174 n.6 ("The dissent would have us revisit [*Boyd's*] test, on the unquestionable grounds that child pornography is a terrible thing. However, *the record and argument before us* does not support taking that step.") (emphasis added)).

166. WASH. REV. CODE § 9.68A.001 (Findings 2–4).

167. *Grenning*, 169 Wash. 2d at 55, 234 P.3d at 174 (quoting *Boyd*, 160 Wash. 2d at 436, 158 P.3d at 61).

168. WASH. REV. CODE § 9.68A.001 (Finding 5).

review the materials in preparation for trial.¹⁶⁹ Federal courts have found that this language satisfies due process, and there is no reason the Washington State Supreme Court should hold differently.¹⁷⁰ Moreover, RCW 9.68A.170 arguably goes further than § 3509(m) of the Walsh Act in protecting defendant's due process rights because it permits the court to approve a "neutral facility" instead of a law enforcement facility for review of the evidence.¹⁷¹ This creates a more even playing field during the discovery process between both parties.

It is important to note that the statute does not obstruct a defendant's access to the child pornography evidence altogether. Rather, it shifts the burden onto the party requesting the materials to retain an expert and make a "substantial showing" that the expert's analysis cannot be completed in a government facility or court.¹⁷² Statutorily shifting the discovery burden onto a criminal defendant is nothing new under Washington discovery rules. For example, CrR 4.7(e) requires the defendant to make a showing of materiality to his or her defense before receiving material not covered by the other discovery rules.¹⁷³ Because RCW 9.68A.170 merely burdens the defendant's right to access child pornography evidence without completely denying access, it is difficult to see how the statute is unconstitutional on its face when it affords a defendant due-process-level access.

One should not infer from *Boyd* that the Court was applying a broader due process standard under the state constitution than the federal due process standard. When addressing Boyd's rights of due process and effective representation, the Court did not reference any authority to support or otherwise indicate that a criminal defendant in Washington is somehow entitled to broader due process rights under the state constitution.¹⁷⁴ On the contrary, Washington precedent shows that due process is a flexible concept governed by the particular circumstances of the crime.¹⁷⁵ Absent the Court's departure from the federal courts' application of due process in the context of child pornography evidence, it seems appropriate that the Court strongly consider the federal courts'

169. WASH. REV. CODE §§ 9.68A.170(1)–(2).

170. *See supra* Part I.B.

171. WASH. REV. CODE § 9.68A.170(2).

172. *Id.* § 9.68A.170(4).

173. *See* WASH. SUPER. CT. CRIM. R. 4.7(e)(1). Unlike CrR 4.7(a), which governs discovery of tangible materials, CrR 4.7(e) regulates discovery of other evidence, such as witness interviews.

174. *See* *State v. Boyd*, 160 Wash. 2d 424, 433–35, 158 P.3d 54, 59–60 (2007).

175. *See, e.g., In re Det. of Stout*, 159 Wash. 2d 357, 370, 150 P.3d 86, 93 (2007) (finding that due-process' "minimum requirements depend on what is fair in a particular context").

unanimity in approving discovery limitations under the Walsh Act when it construes RCW 9.68A.170.¹⁷⁶

Further, the linchpin of the Court's reasoning in *Boyd* was that limitations on CrR 4.7(a) *might* prevent a defendant from adequately preparing a defense,¹⁷⁷ but this concern is no longer well-founded in light of RCW 9.68A.170's "reasonably available" and "ample opportunity" clauses. The Walsh Act's identical provisions have consistently survived constitutional scrutiny.¹⁷⁸ When the Court construes RCW 9.68A.170's clauses to determine whether they comport with due process, it will find itself—as have the federal courts—interpreting "ample opportunity." Like the federal courts, the Washington State Supreme Court is likely to find that this phrase means "a more than adequate opportunity to inspect, view, and examine the evidence in question."¹⁷⁹ Surely a "more than adequate opportunity" to examine child pornography evidence would ensure the defendant a right to adequately prepare a defense.

This conclusion should satisfy the Court's meaningful access requirement under *Boyd*.¹⁸⁰ What the Court has termed "meaningful access" can more properly be understood as what the federal courts have

176. In *State v. Turner*, 145 Wash. App. 899, 187 P.3d 835 (2008), the Washington Court of Appeals found that a defendant's due process rights under the Washington State Constitution were equal to his rights under the federal constitution. *Id.* at 909–10, 187 P.3d at 839–40. Furthermore, in order to extend the protections afforded under the Washington State Constitution, the Court would have to apply the *Gunwall* factors under *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986). See *Turner*, 145 Wash. App. at 909–10, 187 P.3d at 839–40.

177. The Court stated in *Boyd*:

[G]iven the nature of the evidence, adequate representation requires providing a 'mirror image' of that hard drive; enabling the defense attorney to consult with computer experts who can tell how the evidence made its way onto the computer. *Forensic review might show* that someone other than the defendant caused certain images to be downloaded. *It may indicate* when the images were downloaded. *It may reveal* how often and how recently images were viewed and other useful information based on where the images are stored on the device. Expert analysis of the application or program used to acquire *the images may be useful*. Providing a copy enables the expert to test that application or program using the same type and version of computer operating system as was used by the defendant, *a difference that may alter* how the program runs, stores data, and so forth. *Analysis may also reveal* that the images are not of children. This analysis requires greater access than can be afforded in the State's facility.

Boyd, 160 Wash. 2d at 436, 158 P.3d at 60–61 (emphasis added) (internal citations omitted).

178. See *supra* Part I.B.

179. See, e.g., *United States v. O'Rourke*, 470 F. Supp. 2d 1049, 1056 (D. Ariz. 2007).

180. *Boyd*, 160 Wash. 2d at 433–35, 158 P.3d at 59 ("The evident purpose of the disclosure requirement is to protect the defendant's interests in getting *meaningful access* to evidence supporting the criminal charges in order to effectively prepare for trial and provide adequate representation.") (emphasis added).

labeled “due-process-level access.” This reasoning in part persuaded Chief Justice Madsen and Justice Alexander to side against the majority with Justice J. Johnson in the *Grenning* dissent.¹⁸¹ The dissent pointed out that *Grenning* had meaningful access to the evidence because the State had provided him the opportunity (arguably ample opportunity) to examine the evidence.¹⁸² Using this reasoning, Chief Justice Madsen distinguished the Court’s opinion in *Boyd* where the Court held that Boyd had been constructively denied meaningful access to the evidence.¹⁸³ In essence, her argument seems to apply an ample opportunity analysis long before H.B. 2177’s enactment.

The dissent in *Grenning* also properly recognized that a defendant cannot be denied effective representation when defense counsel has been given meaningful access (ample opportunity) to the evidence.¹⁸⁴ Although the *Grenning* and *Boyd* majorities found that effective representation necessitated a copy of the evidence, Chief Justice Madsen’s argument in *Grenning* is logically compelling: put simply, a defendant cannot claim he was denied effective representation where his counsel has had a more than adequate opportunity to examine the child pornography evidence before trial.¹⁸⁵ How can counsel be per se ineffective when afforded an ample opportunity to review the evidence? Claims regarding a criminal defendant’s effective representation are thus better considered under the due process framework.

The *Boyd* and *Grenning* majorities put the cart before the horse by adopting a per se rule that meaningful access can never be limited access.¹⁸⁶ No matter the purported defense to the charges, and without a showing of any actual need to review the evidence, the Court found that copying and disseminating the evidence was necessary to the defense. In light of RCW 9.68A.170’s standards and its federal counterpart, this conclusion is unreasonable. Interestingly, in arriving at its conclusions in *Boyd*, the Court relied in part on *Knellinger*—one of the only cases that has compelled discovery—to show why the defense *might* need a copy

181. *See supra* Part II.B.

182. *State v. Grenning*, 169 Wash. 2d 47, 63–68, 79–80, 234 P.3d 169, 178–80 (2010) (Madsen, C.J., dissenting) (disputing the majority’s factual findings that Grenning could not retain an expert, asserting that absolutely nothing in the record supported the factual findings).

183. *See id.* at 68, 234 P.3d at 180.

184. *Id.* at 74, 234 P.3d at 183 (following the federal court reasoning that a claimed violation of the right of effective representation should be considered under the “due process umbrella”).

185. *Id.*

186. *Grenning*, 169 Wash. 2d at 54, 234 P.3d at 173 (quoting *State v. Boyd*, 160 Wash. 2d 424, 433, 158 P.3d 54, 59 (2007)).

of child pornography evidence.¹⁸⁷ By citing this authority as partial justification for compelling discovery, however, the Court overlooked the crux of the *Knellinger* decision: the *Knellinger* court found the Walsh Act constitutional both facially and as applied.¹⁸⁸ Moreover, in *Knellinger*, the defendant asserted a virtual-child defense, the government failed to rebut any of the defense experts' testimony, and the court refused to compel discovery until the defendant had actually retained an expert to conduct the analysis necessary for a virtual-child defense.¹⁸⁹ The circumstances in *Knellinger* were truly exceptional. Other federal courts have expressly distanced themselves from the *Knellinger* opinion.¹⁹⁰

H.B. 2177 demonstrates the Legislature's concern for criminal defendants' due process rights. In laying out its dual objectives of shielding victims of child pornography against repeat exploitation and protecting a criminal defendant's rights, the Legislature was clear it intended to properly balance the two. According to the Legislature, the limitations on discovery of child pornography evidence could be employed "while still providing due process to criminal defendants."¹⁹¹ The statute aligns Washington's discovery rules more closely to the federal rules regarding discovery of child pornography evidence. Because those federal rules have already withstood thorough constitutional scrutiny, there is little reason why the Washington State Supreme Court should deviate in its result when reconsidering its holdings in *Boyd* and *Grenning*.

187. *Boyd*, 160 Wash. 2d at 436, 158 P.3d at 60–61.

188. *United States v. Knellinger*, 471 F. Supp. 2d 640, 644–46 (E.D. Va. 2007).

189. *See supra* Part I.B.2.

190. *See, e.g.*, *United States v. Wright*, 625 F.3d 583, 616 (9th Cir. 2010) (finding that *Knellinger* is "easily distinguishable"); *United States v. Hornback*, 2010 WL 4628944, at *2 (E.D. Ky. Nov. 8, 2010) (distinguishing *Knellinger* because the defense expert did not testify that moving his own equipment into the government facility was essential to the defense); *United States v. Patt*, 2008 WL 2915433, at *20–21 (W.D.N.Y. July 24, 2008) (requiring defendant to pursue a virtual-child defense before considering compelling discovery); *United States v. Flinn*, 521 F. Supp. 2d 1097, 1102 (E.D. Cal. 2007) (distinguishing *Knellinger* by requiring an expert to be retained before testifying at the evidentiary hearing, refusing an expert's "guesstimation" on how much it would cost defendant, and rejecting financial difficulties as a burden on due process); *United States v. Spivack*, 528 F. Supp. 2d 103, 107–08 (E.D.N.Y. 2007) (noting that even the *Knellinger* court recognized that whether a defendant is afforded due process must be analyzed on a case-by-case inquiry).

191. WASH. REV. CODE § 9.68A.001 (2012).

D. *Public Policy and Other Provisions of the Washington State Constitution Provide Greater Protections for Child Crime Victims, Such that Reasonable Burdens on a Defendant's Access to Child Pornography Evidence Should Be Permitted*

Washington public policy strongly supports protecting the rights of child pornography victims against unnecessary dissemination of pornographic evidence. The Legislature has expressly stated it intends to protect crime victims in general by honoring and protecting their rights.¹⁹² Specifically, child victims are to be treated “with sensitivity, courtesy, and special care,” and their rights should also be protected “in a manner no less vigorous than the protection afforded the . . . criminal defendant.”¹⁹³ Even the state constitution ensures that the victim should be accorded “due dignity and respect.”¹⁹⁴ As Justice J. Johnson correctly asserted, “[t]o order duplication and dissemination of child pornography evidence in a child sex offense trial affords the child victim *neither dignity nor respect*.”¹⁹⁵

Sadly, the *Boyd* majority downplayed the risk of further trauma to victims of child pornography through dissemination of the pornographic evidence, calling it merely an “attendant consequence of trial.”¹⁹⁶ However, the Court should now consider that RCW 9.68A.170 ensures that dissemination occurs only when necessary—after the defense makes such a showing. Thus, while the Court might be correct to assert that child victims will inevitably experience some embarrassment during the prosecution of child pornography cases, the Court now has a means of bolstering the statutory and constitutional protections afforded child victims in Washington State.

The Court has recognized that a victim’s constitutional rights must be harmonized with a criminal defendant’s rights.¹⁹⁷ When interpreting Article I, § 35 of the Washington State Constitution, which assures crime victims “due dignity and respect,” the Court has broadly stated that the article’s language “is without exception.”¹⁹⁸ When considering

192. WASH. REV. CODE § 7.69.010.

193. WASH. REV. CODE § 7.69A.010.

194. WASH. CONST. art. I, § 35.

195. *State v. Boyd*, 160 Wash. 2d 424, 449, 158 P.3d 54, 67 (2007) (Johnson, J., dissenting) (emphasis added).

196. *Id.* at 440, 158 P.3d at 62.

197. *See State v. Gentry*, 125 Wash. 2d 570, 626, 888 P.2d 1105, 1138 (1995) (affirming a victim’s right to introduce a victim impact statement during the penalty phase in a capital case).

198. *Id.* at 628, 888 P.2d at 1140.

that RCW 9.68A.170 guarantees a defendant constitutionally sufficient access to child pornography evidence, the Court should accommodate the special rights of child victims in these limited circumstances.

Finally, as Justice J. Johnson pointed out in his *Boyd* dissent,¹⁹⁹ Article I, § 7 of the Washington State Constitution²⁰⁰ affords citizens substantially greater privacy protections than the Federal Constitution.²⁰¹ This right of privacy must be protected and honored “no less vigorous[ly]” than the constitutional rights of a criminal defendant.²⁰² The Court should heavily weigh how RCW 9.68A.170 properly balances the competing constitutional protections at play when it reconsiders its decisions in *Boyd* and *Grenning*.

CONCLUSION

When RCW 9.68A.170 is challenged, the Washington State Supreme Court should uphold the statute and overrule its decisions in *Boyd* and *Grenning*. Child victims depicted in child pornography are not being protected from repeat exploitation or unnecessary embarrassment under the Court’s decisions. The Court has recognized that its decision in *Boyd*—and later affirmed in *Grenning*—aligned Washington State’s criminal discovery rules with pre-2006 federal discovery rules. However, the Washington State Legislature recently altered the underlying court rules of discovery under H.B. 2177 in the context of child pornography evidence, according state discovery rules with federal discovery rules under the Walsh Act.

The Court should uphold RCW 9.68A.170 against both facial and as-applied challenges because the statute—similar to its federal counterpart, the Walsh Act—ensures a defendant has at least due-process-level access to examine child pornography evidence before trial. By its own terms, RCW 9.68A.170’s ample opportunity standard requires the defense to have a more than adequate opportunity to review the evidence. To prevent improper duplication and distribution of child

199. *Boyd*, 160 Wash. 2d at 450, 158 P.3d at 67.

200. “No person shall be disturbed in his private affairs . . . without authority of law.” WASH. CONST. art. I, § 7.

201. For a general discussion on Washington’s heightened privacy protections under the constitution, compare *State v. Boland*, 115 Wash. 2d 571, 800 P.2d 1112 (1990) (invalidating a police search of a defendant’s trash for narcotics because a defendant has a reasonable expectation of privacy), with a similar case before the Supreme Court of the United States, *California v. Greenwood*, 486 U.S. 35 (1988) (finding that a person has no reasonable expectation of privacy in his or her trash).

202. WASH. REV. CODE § 7.69A.010 (2010).

pornography evidence, the statute requires a party to make a substantial showing that a copy of the evidence is essential. Otherwise, the materials remain safely within the custody of the court or law enforcement agency.

The Court's per se ruling under *Boyd* and *Grenning* is no longer persuasive. RCW 9.68A.170 properly balances a criminal defendant's constitutional rights of due process and effective assistance of counsel with Washington State's goals of protecting children and combating child pornography. The Court should follow the reasoning of the federal courts, which have *unanimously* upheld facial and as-applied challenges to similar discovery limitations under the Walsh Act. The unanimity of the federal courts is instructive.

Public policy and other provisions of the Washington State Constitution also provide compelling support for overruling *Boyd* and *Grenning*. The Legislature's amended findings regarding the vice of child pornography present the Court with a strong argument to stamp out the duplication and distribution of child pornography wherever possible. Moreover, by overruling its decisions in *Boyd* and *Grenning*, the Court will finally supply meaning to provisions in the Washington State Constitution and other statutes aimed at protecting victims' rights—rights that should be protected no less vigorously than a criminal defendant's.