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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

STATE OF KANSAS, )  
-----Plaintiff,) )  
vs. ) )  
 ) )  
-----Defendant.) )

No. 10-CR-15 [REDACTED]

ORIGINAL

MOTIONS HEARING

BEFORE

HONORABLE MARK BRAUN,

taken on the 28th day of September, 2011, commencing at  
the hour of 2:40 p.m., at the Shawnee County Courthouse,  
200 SE 7th Street, Division 12, Room 410, Topeka, Shawnee  
County, Kansas, before Kristine D. McNeil, RPR, Certified  
Shorthand Reporter.

CORRELL REPORTING SERVICE  
5521 SE 61st Street  
Berryton, Kansas 66409  
785/383-2415

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A P P E A R A N C E S

For the Plaintiff: (Telephonically)

Ms. Kristiane Gray  
Assistant Attorney General  
120 SW 10th, 2nd Floor  
Topeka, Kansas 66612

For the Defendant:

Mr. Christopher Joseph  
and  
Ms. Bonnie Boryca  
Attorneys at Law  
1508 SW Topeka Boulevard  
Topeka, Kansas 66612

1                   JUDGE BRAUN: All right. Court, will call  
2 the matter of the State of Kansas versus [REDACTED]  
3 Case No. 10-CR-15 [REDACTED]

4           State appears through Assistant Attorney General,  
5 Kristiane Gray, who appears by telephone. She's been on  
6 the road today.

7           The Defendant's here in person with both of his  
8 attorneys, Chris Joseph and Bonnie Boryca.

9           Counsel, first of all my apologies to all of you and  
10 to Mr. [REDACTED] for the timing of this. This has been  
11 extremely enlightening but also one of those cases that  
12 whoever prevails or doesn't prevail will have every  
13 opportunity and right to appeal. And this may be an issue  
14 that at some point, depending on what happens, belongs in  
15 the Appellate Courts. I have struggled mightily with some  
16 of these issues and am going to do the best I can in the  
17 decisions I make and go from there.

18           Just for the record there were seven total motions  
19 that the Court has that were filed. One is the  
20 Defendant's motion to suppress.

21           No. 2 was the State's motion to admit the State's --  
22 Defendant's statements, which have kind of been  
23 consolidated. I think I refer more to the motion to  
24 suppress instead of the State's motion as well.

25           No. 3 was the State's motion to admit evidence of

1 other conduct pursuant to K.S.A. 60-455.

2 No. 4 was the State's first motion to endorse  
3 additional witnesses, which I believe is moot.

4 No. 5 was the State's motion for a continuance, which  
5 I believe is also moot.

6 Motion No. 6 is the State's motion to endorse  
7 witness, which was dealt with last time I think. That is  
8 moot as well.

9 No. 7 is the Defendant's motion to determine  
10 admissibility of evidence.

11 We are here today in one ruling to decide Motions 1  
12 and 2 on the admissibility of the Defendant's statements  
13 or suppression thereof. The second one we're going to  
14 deal with is the motion to admit evidence pursuant to  
15 60-455, and then the third one will be the motion to  
16 determine admissibility of evidence which dealt with  
17 discovery of some issues and not included in the KBI  
18 report.

19 Counsel, some of this I have outlined and prepared, I  
20 will try to go through that. I'm not necessarily here for  
21 argument, just clarification. If there's clarifications  
22 you need, feel free to take notes and we'll go from there.

23 On the motion to -- the Defendant's motion to  
24 suppress statements and the State's motion to admit the  
25 Defendant's statements. Counsel, both of you have

1 submitted motions or responses and legal arguments on  
2 these issues. We've also had oral argument. And this  
3 issue deals with whether or not the State -- the  
4 Defendant's statements to Detective Wheelles and KBI Agent  
5 Schuetz, whose name is now Whisom, W H I S O M, were  
6 statements of custodial interrogation or statements in a  
7 non-custodial or investigatory investigation, if custodial  
8 Miranda would apply. Miranda was not given in this case;  
9 therefore, they would be inadmissible.

10 If it's non-custodial or investigatory, Miranda would  
11 not be required and I would make that determination. But  
12 if I made that determination then the issues of due  
13 process under whether or not the statements by the  
14 Defendant were the product of his free and independent  
15 will would need to be done as well.

16 For custodial and non-custodial determination the  
17 Court reviewed, as you both provided as well, *State versus*  
18 *Jones* was a case; *State versus Morton* was a case. There  
19 was a case that came out last Friday, *State versus Witt*  
20 that I'm not sure I can technically cite. It's a Court of  
21 Appeals case that is on its way. And I went back to Jones  
22 and Morton so that I would not run afoul of any issues  
23 there, but that's out there as well.

24 But you know, you look one last time and you find  
25 something and you're not sure when to stop and how far to

1 go. But in doing that Justice Lukert in the Jones case  
2 examined the legal inquiry to be done, both parties pretty  
3 much advanced that in their arguments. Justice Lukert, I  
4 think, did a very good job at least from a Judge's  
5 perspective outlining what needs to be done both under the  
6 US Constitution and the Kansas Constitution, and she cited  
7 the *Thompson versus Keohane* case, K E O H A N E, which is  
8 a cite of 516 U.S. 99.

9       There's also some state cases under the State  
10 Constitution, somewhere under Section 10 in the Bill of  
11 Rights, Justice Lukert there cited *State versus Deal* and  
12 *State versus Anthony*, both of those give pretty much the  
13 same focus of kind of a two-pronged inquiry: What were  
14 the circumstances surrounding the interrogation and then  
15 given those circumstances, would a reasonable person have  
16 felt that he or she was not at liberty to terminate the  
17 interrogation and leave. And they may have different  
18 wording in both of those a little bit but that's the  
19 primary inquiry.

20       Justice Lukert then goes on to deal with the fact  
21 that in Kansas there has not been I think she called it  
22 slavish adherence to the factors and talks about how each  
23 case had to be analyzed on its own set of facts or  
24 factors; some of the factors may be present, some may not.  
25 Some may have different levels of importance or different

1 degrees of influence. But again each case has to be  
2 decided on its own as well as the fact that there may be  
3 additional factors. In this particular case, and again  
4 there's eight different factors I'm going to try and run  
5 through them as I've weighed them in this particular case.

6 First of all is when and where the interrogation  
7 occurred. The when isn't a problem; it was I think ten or  
8 10:30 in the morning. Law enforcement executed a search  
9 warrant. The where is kind of the problem that the Court  
10 has, but the Defendant's house was raided was the term the  
11 Defendant used in the interview. But a team of seven or  
12 eight, eight or nine, I can't remember how many people,  
13 but there were eight or nine KBI agents of different  
14 degrees and then one Topeka Police Detective who were part  
15 of a group that knocked on the Defendant's door. And  
16 there was also a commotion that you hear of informing  
17 somebody that their house is being searched and then  
18 different moves by law enforcement to put a Defendant --  
19 or put an individual whose home or business or whatever is  
20 being searched, all security issues clearing the scene.

21 And in this particular case pretty much from the time  
22 Mr. [REDACTED] answered the door until the time he got  
23 into the car, his movement was pretty much directed by law  
24 enforcement. Somebody first asked him to get out on the  
25 landing. From there he was talking to Detective Wheelles

1 and I'm going to call her Schuetz throughout this I hope,  
2 I may end up slipping and calling her Whisom, but the two  
3 of them at the briefing done earlier, their job was to  
4 identify or separate or get Mr. [REDACTED], and then get  
5 him to a spot so they could interview him about this.

6       There were some different comments. He was told that  
7 he was not under arrest. He was told about the warrant,  
8 some general information about the warrant. And at the  
9 time I believe -- I don't know if he had shoes and socks  
10 on or not but had some pants on, did not have a shirt on.  
11 There was some discussion that his wallet was in the house  
12 or apartment. His cell phone was in the apartment. His  
13 keys were in his pocket because he did use those later to  
14 give to Detective Wheelles for searching the vehicle. But  
15 at -- again I don't remember the exact layout or what the  
16 distances were, but there appears to be some distance from  
17 high to low that at this particular apartment complex you  
18 had to go down some stairs where -- again I don't know how  
19 far but to the parking lot. And in the discussion it was  
20 pretty much directed and suggested by law enforcement to  
21 Mr. [REDACTED] that he needed or ought to go down --

22       Are you there?

23       MS. GRAY: Yes. Sorry, my other phone was  
24 ringing, my other cell phone. Sorry.

25       JUDGE BRAUN: All right. That he needed to

1 come down to the vehicle. There was some discussion of  
2 asking to come down, but there was also some direct  
3 suggestion about coming down to the vehicle so we can get  
4 this squared away. He was told to jump in the front seat;  
5 he did. And then -- so from the few minutes from the  
6 police or the KBI agents and the detective arriving to the  
7 time he got in the car, all that movement was directed.  
8 Even when he went back into the apartment to get the  
9 T-shirt, what he could do, where he could go, all that was  
10 directed by law enforcement.

11       Once they get down into the car and then there was  
12 some discussion I think prior to this as well still,  
13 either on the landing or upstairs somewhere, where the  
14 Defendant had some small talk with Detective Wheelles, and  
15 again the word chatting is used throughout by Detective  
16 Wheelles, but there's some discussion where the Defendant  
17 seems somewhat surprised: Oh, you guys are doing an  
18 investigation or something along those lines.

19       So all that factors in. But when they get down to  
20 the car the detective does tell Mr. [REDACTED]: You do  
21 not have to talk to me. You can leave -- you're free to  
22 leave at any point, you're not under arrest. And  
23 Mr. [REDACTED] appears -- and I've listened to the video;  
24 I don't know how many times I read the transcript, a  
25 number of times as well. And sometimes reading the

1 transcript doesn't give you the flavor of what is going on  
2 as much as the intonation of voices that -- the transcript  
3 is very direct and very clean about the detective talks;  
4 Mr. ██████████ talks; detective talks; Mr. ██████████  
5 talks. But when you, you get into listening to it, it's  
6 pretty clear that they're kind of talking to each other;  
7 talking over each other; talking at the same time, and  
8 it's not clear that Mr. ██████████ understands exactly  
9 what's going on here. But he is told he can leave, that  
10 he doesn't have to talk.

11 Now he talks about being nervous; I've never been  
12 raided before, that kind of thing. And in going through  
13 those the second time, I think it's the second time that  
14 the detective tells him that he's not under arrest, that  
15 he can leave and just tell me you don't want to talk  
16 anymore and you're free to leave. He then makes a  
17 suggestion: But it would help you, but it would be good,  
18 you know, just doing that. And the other time he's  
19 talking about that same information. The detective is  
20 trying to explain -- the Defendant is trying to ask  
21 questions and the detective doesn't really stop to make  
22 sure the Defendant understands, he keeps going right then  
23 into the interview.

24 So clearly on No. 1 with regard to where the issue  
25 took place, it wasn't in his home but it was -- obviously

1 it started at his home and he couldn't go in his home. I  
2 mean his home was being taken over by the agents and they  
3 just happened to have a police car where the Defendant  
4 could go for the interview. And the Defendant cites the  
5 Craig Head case and some of that is helpful, some of that  
6 is not.

7 A home, per se, is not custodial; a car, per se, is  
8 not custodial. But one of the comments that the Court  
9 made, that the Judge made in Craig Head had to do with  
10 not -- you know, if you can't be in your home where do you  
11 go? It's the most Constitutionally protected place  
12 around. But there was a line that was not used in the  
13 response that I thought I had here and I don't. The  
14 following line after if you can't -- if you're not going  
15 to the library, if you can't -- where else do you go?

16 It was pretty clear that the Defendant in this case  
17 could not go to his home. His home was not available to  
18 him. He could have stood outside for a couple of hours.  
19 He could have sat in his truck for however long the search  
20 warrant was going to take. But all this was done at the  
21 pretty much direction or suggestion of the -- of the law  
22 enforcement officer. Mainly the detective, but partially  
23 the KBI Agent Schuetz as well.

24 One of the other issues that factors into a couple of  
25 these factors I'm going to highlight because some will be

1 much shorter. There are times when the direction by  
2 Detective Wheelles, who has been in front of me a number of  
3 times, I have no qualms with most of the work he does.  
4 But it's almost parental tone or attitude. I know that as  
5 a kid when my dad said: Mark, will you take out the  
6 trash. That may have been a question but I'm not sure I  
7 had a choice, and I think in some of this it's some of  
8 that same tone, that same issue of maybe it's authority,  
9 maybe it's law enforcement. And the statements by the  
10 detective about what good can come out of this.

11 Factor No. 2 is how long the interrogation lasted.  
12 I'm not worried about that. Oh, let me back up.

13 On Factor No. 1 there were factors that kind of  
14 weighed both sides for custodial and non-custodial. You  
15 know, non-custodial I'm not sure how many times the  
16 detective or an agent needs to say: You're free to go,  
17 you don't have to talk to me. It's also clear that the  
18 Defendant gave -- or let the Defendant -- the officer have  
19 his keys to get into the truck after the conversation had  
20 pretty much ended, but overall I've already talked about  
21 some factors that I believe weigh on the side of  
22 custodial, and for No. 1 I think it does weigh on the side  
23 of being custodial.

24 No. 2 weighs on the non-custodial side. Less than  
25 two hours was not a problem. How many officers were

1 involved again, eight to ten? I don't remember the exact  
2 number, I think there were eight or nine on the KBI team  
3 plus this TPD Detective. There are only two of them  
4 during the interview, and again that kind of goes both  
5 ways. But I think overall that that did not have any  
6 impact other than the Defendant could not go back into his  
7 residence because they were searching it. I mean he had  
8 no ability to make any decisions or move about freely in  
9 his home.

10 No. 4, what the Defendant said and did, again some of  
11 this I've already talked about where the interview or  
12 interrogation -- again you can talk about vocabulary,  
13 interrogation, interview all have kind of militaristic  
14 connotations about -- or connotations about what's out  
15 there. I'm not sure too many defendants and suspects chat  
16 but that's what Detective Wheelles referred to this as.

17 But I still had the problems about the spirit of  
18 control that I talked about earlier and the parental tone,  
19 the authority issues as to whether or not Mr. [REDACTED]  
20 really believed he could leave or had a choice. Again I  
21 believe it's Factor No. 4 that weighs more for custodial  
22 than non-custodial.

23 No. 5. Presence of restraint or actual -- excuse  
24 me, presence of actual physical restrain or other things  
25 equivalent to restrain. Again I don't think this is an

1 issue. There were some parental tones but there were no  
2 weapons drawn. People may have been armed but there was  
3 no force, no intent other than the initial coming into the  
4 residence. Once the Defendant and Detective Wheelles and  
5 Agent Schuetz were in the vehicle that was all pretty  
6 peaceful. Again the vehicle was unlocked, and again there  
7 were cases where the vehicles are custodial; cases where  
8 they're not. I believe this one would weigh into  
9 non-custodial.

10 No. 6, whether Defendant questioned was questioned as  
11 a suspect or a witness. Clearly he was a suspect.  
12 Whatever the search that KBI did and the initial issues  
13 that brought their attention to Mr. [REDACTED] were done,  
14 there was clearly a belief that he had child pornographic  
15 material on his computer and -- but Jones talks about  
16 being a suspect in and of itself does not make it  
17 custodial and it can go both ways.

18 I think in this particular situation it started out  
19 as a chat about who has access to your computer and turned  
20 were to, you know, clear violations of the law but that  
21 again doesn't -- that doesn't matter much to me in this  
22 case nor does the presence of marijuana matter much to me.

23 It's clear in a lot of cases, I know the Defendant's  
24 brief talked about, what rational person would believe  
25 that they wouldn't be arrested if marijuana or some other

1 contraband was in their vehicle and I've seen a number of  
2 cases where it's pretty clear they were not after the  
3 marijuana. Especially if they can verify it for personal  
4 use and not for dealing, which they went into the  
5 marijuana, if I recall correctly, wasn't even the  
6 Defendant's. I think he said somebody else left it there  
7 although he said he apparently does use it sometimes.  
8 This focus was on the child porn and they didn't seem to  
9 worry about the marijuana of the Defendant.

10 No. 7. How the Defendant got to the place of  
11 questioning. The question is whether it's on his own, at  
12 the request of law enforcement or whether he's escorted  
13 somewhere by law enforcement, usually the police station.  
14 In this case obviously he was at his home when the  
15 questioning came to him in the form of a search warrant,  
16 then the request in directions to go down to his vehicle.  
17 And again that kind of ties into No. 1, again how he got  
18 there. Pretty much all of that was directed by law  
19 enforcement. And I note that there was -- if I remember  
20 correctly the dates of offenses in the search warrant were  
21 September 2nd of '09, again the complaint itself wasn't  
22 filed until late August, August 31st I believe of 2010.

23 So what the issues all were out there, but plenty of  
24 time to say: Hey, will you come down for a interview, can  
25 we talk to you. But no, it was clearly to keep him busy

1 during the search warrant and to try to get information  
2 out of him. It made some sense to the officer and to me  
3 as well that comments about noise, outside noise, the  
4 commotion going on, to have it in a quieter place like a  
5 vehicle. But again all that was directed, suggested by  
6 law enforcement. And while again there's factors on both  
7 sides I believe that the -- it's more custodial than  
8 non-custodial.

9 Last one is No. 8. What happened after the  
10 interrogation; was he free to go; was he detained; was he  
11 arrested. Here the Defendant was clearly not arrested.  
12 That would weigh on behalf of being non-custodial. One of  
13 the things that I look at collectively, and I remember the  
14 case law in Jones and Morton, some of the others talked  
15 clearly about this is not a mathematical GF5 or more one  
16 way then go this way. Some have different import, some  
17 have different focus.

18 And collectively, Counsel, I believe that the -- and  
19 what I need to do is that if this was custodial I believe  
20 that the overall -- as the interrogation went, the Court's  
21 going to find that it was custodial. I believe that a  
22 reasonable person in Mr. [REDACTED]'s shoes would not have  
23 felt that he could just get up and leave. Therefore, I'm  
24 going to grant the Defendant's motion to suppress and deny  
25 this State's motion to admit evidence.

1           Now, I've been appealed before and discovered I was  
2 wrong. I have been upheld before. I know that if this --  
3 if I'm wrong on this and it is non-custodial, I would  
4 still have to do the six-point analysis under the regular  
5 due process issues if -- about Miranda. And generally  
6 whether it's the Jones case or the Walker case or some  
7 others, there's six factors, one is mental condition of  
8 the Defendant. I was not moved by Dr. -- is it Logan or  
9 Peterson?

10                   MR. JOSEPH: Logan.

11                   JUDGE BRAUN: -- Logan's testimony or  
12 report other than it deals with the issues that people  
13 often accede to authority. And I talked about that  
14 paternalistic parental idea before. I'm trying to say  
15 parental because there's maternal times that happen there  
16 too and I'm not trying to pick one or the other here but  
17 mental condition, I do not have a problem with.

18           The manner of the interview I did have a  
19 problematic -- that was problematic to me. And to  
20 summarize I would just go back to my statements about  
21 Paragraphs 1, 4 and 7 or Factors 1, 4 and 7 up in the  
22 other area of custodial or non-custodial.

23           Duration was not a problem.

24           Communicating with the outside world. There was no  
25 request to do so. That's not problematic or that's fine.

1           No. 4 was the age, intellect, background. All those  
2 appeared to be fine and normal with the Defendant. That  
3 was okay. Those aren't issues.

4           Fairness of the officer, I go back -- or officers. I  
5 go back to Paragraphs 1, 4 and 7 up in the other  
6 discussion, the same issues would apply there about how  
7 that worked.

8           And then No. 6 is the Defendant's fluency in English.  
9 That's fine. Vocabulary was good.

10           There was a specific question about not being under  
11 the influence. All those things I would find there, that  
12 the Defendant's statements were not the product of his  
13 free and independent will and both sides are free to do  
14 what they need to do with regard to that decision.

15           So again, I'm granting the Defendant's motion to  
16 suppress and denying the State's motion to admit those  
17 statements. Now the other issue comes in 2.

18           Motion No. 2, the State's -- excuse me, Motion No. 3,  
19 the State's motion to admit evidence of other misconduct.  
20 And I don't know, I'm going to editorialize for a second  
21 because I don't usually do that very often. I'm going to  
22 follow the law and I think and -- I hope, but it's  
23 problematic to me. Philosophically I don't know if it's  
24 my issue or anybody else's but again the date of this  
25 offense -- of these offenses, Counts 1 through 14, are all

1 September 2nd. Same date as the execution of the warrant.  
2 And that is where the issues were allegedly on the  
3 Defendant's computer and illegal porn and all that, that  
4 we're dealing with starting Monday.

5 As I said earlier the day of the filing of the  
6 complaint was August 31st of 2010. And I think what is  
7 puzzling to me or problematic to me that isn't going to  
8 affect my ruling but I'm not sure why, that if possession  
9 of the photos now sought to be admitted and if they're  
10 child pornography, why the State did not charge those  
11 offenses of possession in the complaint itself. And I  
12 have not found anything that answers my quandary there in  
13 case law. But having said that, the State wants to use  
14 those photos to establish the Defendant's intent, mainly  
15 that his acts were not innocent or accidental or a mistake  
16 but that it was intentionally done. And as I recall the  
17 State wants to admit six or seven or six to seven  
18 photographs of what -- well, let me back-up further.

19 During the execution of the search warrant there was  
20 an envelope found in the Defendant's apartment in which  
21 there were 65 photos, maybe 63, I can't remember. There  
22 was a couple of photos that were in different packets that  
23 detective or that Agent Schuetz had at the hearing the  
24 other day. But of those 65 photos the Court quickly  
25 scanned/reviewed/looked at those, and it was clear to me

1 that some of them were, =appeared to be anyway to be child  
2 pornography. Others I couldn't tell. Others clear --  
3 clearly appeared to me anyway, to be women who were of  
4 appropriate age and various -- various issues. Or various  
5 scenes or issues depicted. That packet of photographs as  
6 I understand it were in one envelope and were together.

7       The State wants to use six to seven of those to  
8 establish the intent issue, and if I understand the  
9 defense correctly with regard to the 14 images that are at  
10 issue before the Court or the jury starting Monday, the  
11 defense is that the Defendant likes younger adult women,  
12 teen looking but legal, if that's a summary I can make of  
13 that. And that in looking at or downloading other adult  
14 porn were these other items, either through viruses or  
15 through whatever computer issues ended up on his computer,  
16 and may not have been things he specifically thought and  
17 that's sort of my general understanding of what I think  
18 the defense is and that it wasn't intentional.

19       The State wants to use -- well, wants to establish  
20 that those 14 items were clearly intentionally sought,  
21 that he somehow went to the Internet; found these;  
22 downloaded them and there they are on his computer. And  
23 there obviously is a material fact at issue as to what the  
24 Defendant's intent is.

25       And hopefully yes/no, is that accurately stated, Ms.

1 Gray, as to what your position is?

2 MS. GRAY: Yes.

3 JUDGE BRAUN: Okay. Is that fairly  
4 accurately stated, Mr. Joseph, about your position or your  
5 client's position?

6 MR. JOSEPH: Well, I think that -- I mean our  
7 burden is only to announce a general denial which would  
8 put in play that what the Court described and that's  
9 consistent with the cross-examination at the preliminary  
10 hearing.

11 JUDGE BRAUN: I'm going based on what I  
12 heard. There may be other defenses out there that I don't  
13 know about and I'm not trying to limit any legal defenses,  
14 I'm just saying there was a material issue of what the  
15 Defendant's intent was with the items.

16 MR. JOSEPH: I agree that that is the issue,  
17 intent is in play.

18 JUDGE BRAUN: So that's a material fact. I  
19 have to find that they're relevant in the category that  
20 I've got to go through. I've got to determine whether or  
21 not they're relative to prove a material fact. A material  
22 fact has to be in dispute. I have to find that there's  
23 some type of probative value or that the probative value  
24 of the evidence outweighs a potential for producing undue  
25 prejudice. And then I've got to provide a limiting

1 instruction should I make all those findings to advise the  
2 jury of what the specific purpose is for the admission of  
3 the photos. And I think I've seen that outlined in a  
4 number of cases as to what I need to do.

5 I obviously was in Ms. Gray's materials that she  
6 provided to the Court. And again the envelope to me, that  
7 envelope is one set of photos. I don't know whether  
8 there's import in the distinction between videos and still  
9 photos as to whether the still photos came from whatever  
10 source. There were photos in an envelope. I don't know  
11 that there's been a showing that the Defendant downloaded  
12 them. I think that would need to be done but I -- again  
13 if the issue is -- those 65 photos to me they were one  
14 exhibit of which there may be child porn involved and I  
15 don't know.

16 And I think the Defendant misstates some things in  
17 their brief where they talked about a quick look of the  
18 photos or legal images of young women from the site  
19 midart.com and again I have the, I'm going to call,  
20 disclaimer but it's a certification more often or  
21 authentication of age models and aps that -- on the  
22 website for the metart issue that may be true. But my  
23 recollection is not all of them said metart on them.  
24 Others had other things kind of -- I think they were sort  
25 of stamped or embedded on the photos that may have come

1 from a download.

2       Again, again those are facts I don't know. But it's  
3 clear to me that some of the photos are probably child  
4 pornography. They come from multiple sources and it's  
5 more than a barely legal or a legal images kind of -- when  
6 I say barely legal, that's the quoted term in the  
7 Defendant's sup -- or pleadings to me dealing with the  
8 certification. So the metart issues may be there but I  
9 think that there are at least a few photos, whether it's  
10 six to seven whether it's five whether -- I don't know how  
11 many, they may be relevant or I think they are relevant to  
12 show whether or not what the Defendant's intent was, but I  
13 think that the photos need to stay as a group or as one  
14 exhibit because that's apparently how they were found.

15       And if there are ways to distinguish them then that  
16 may be something that the parties can deal with. So  
17 obviously I think that they are probative. I think  
18 they're material. I'm trying to balance the issue of the  
19 other factor that I need to deal with in setting forth  
20 whether probative value outweighs the potential to produce  
21 undue prejudice. And, you know, I don't know -- I don't  
22 know people's habits. There are some things I -- this  
23 could all be extremely prejudicial. Just the fact that  
24 it's dealing with porn, it may be legal to some people and  
25 that's an issue that both sides will have to ferret out

1 during voir dire in picking a jury. Porn itself may be  
2 prejudicial to some people. Or offensive to some people.  
3 It may not be to others. Child porn is a different issue.  
4 How it ends up in somebody's computer, all those -- I  
5 think these issues are relevant. I think they are  
6 probative. I think the material to what the issue is in  
7 dispute as well and if I just say: Gee, you can put in  
8 six or seven photos, is that made -- may too much tie the  
9 Defendant's hands as to what happens with the other 10,  
10 20, 50 photos that may be legal porn but they may still  
11 have some issue.

12 And that is where it comes to me to determine first  
13 of all where that scale falls and if I find that it's --  
14 that the probative value outweighs the potential producing  
15 undue prejudice then I need to come up with a limiting  
16 instruction. I think in the 21st Century computer access,  
17 Internet access, the ease of access to porn, I think most  
18 people are familiar with it. They may have different  
19 feelings.

20 My finding, Counsel, is going to be that these issues  
21 are relevant to prove a material fact at issue. I think  
22 at least at this point I'm going to find that the  
23 probative value does outweigh the potential producing  
24 undue prejudice, but I still think they need to stay as  
25 one exhibit as opposed to 65 exhibits or 6 or 7 or however

1 that goes. And if there are stipulations the parties want  
2 to make about some balance, you know, there could be the  
3 desensitization of a jury, if what we're going to do is  
4 show videos and pictures like this at them. I don't know  
5 those things and I don't know where to go but I also want  
6 both sides to start thinking about a limiting instruction  
7 to, to the jury so we can deal with that at the time if  
8 and when they are presented.

9 I'm assuming, Counsel, that you would want the  
10 limiting instruction done at the time the evidence -- I  
11 think it's required at the time the evidence is offered if  
12 admitted as well as in a jury instruction itself.

13 Any objection to that, Ms. Gray?

14 MS. GRAY: No.

15 JUDGE BRAUN: All right. Mr. Joseph?

16 MR. JOSEPH: No.

17 JUDGE BRAUN: Okay. So you both might be  
18 thinking on where we're heading on limiting instruction.  
19 So I am going to grant the Defendant's motion with regard  
20 to the 6455, and again, with those items being one exhibit  
21 and we'll see where we go with that.

22 Now, the last issue that the Court has before it is  
23 the motion to determine admissibility of evidence. I am  
24 going to determine that that evidence is not admissible.  
25 I think -- and it's unfortunate I know for your case,

1 Ms. Gray, but my concern is the prejudice to  
2 Mr. [REDACTED] at this late stage and not so much late  
3 because of the timing of my decision, but in the lateness  
4 of the filing of the motion -- or the discovery by the KBI  
5 of what the problems were. The fact that it was a direct  
6 contradiction to testimony that Mr. Joseph had elicited  
7 on -- at the preliminary hearing and the strategy  
8 involved, and he's to the point where for him to get his  
9 people -- or I think you said expert, however he was going  
10 to have to respond, it would have been more than the 11th  
11 hour before trial. And I just think that at this stage  
12 that is I guess too bad for the State from the standpoint  
13 of making sure that this is done fairly. I know it may  
14 have -- I don't want to force the Defendant to seek a  
15 continuance based on conduct of the State, so I'm going to  
16 determine as to Motion No. 7 that the evidence is not  
17 admissible.

18 Now, Ms. Gray, any clarifications of the rulings you  
19 need so far?

20 MS. GRAY: No.

21 JUDGE BRAUN: Mr. Joseph, any clarification  
22 you need?

23 MR. JOSEPH: No.

24 JUDGE BRAUN: All right. Am I correct,  
25 then, that all other motions -- and I apologize, Ms. Gray,

1 I kept calling just motion to suppress combining your  
2 motion, but I think all seven motions have been addressed.  
3 Any other issues we need to deal with or know about before  
4 trial Monday?

5 MS. GRAY: Not that I'm aware of.

6 MR. JOSEPH: Jury instructions. I think the  
7 deadline that you set may have already come and gone; and  
8 frankly, I didn't try to comply because I didn't know what  
9 we were looking at evidence-wise so --

10 JUDGE BRAUN: Right. Well, I do a couple  
11 of things. I would like proposed jury instructions as  
12 soon as you get them to me. This is not a trial that  
13 we'll be done by the end of Tuesday from what I can tell.  
14 So I think I've already got Lynn started on some. I also  
15 want you to focus on a limiting instruction as well  
16 because that may happen before the trial's complete, and  
17 obviously as much as I want proposed instructions, I know  
18 that sometimes they depend -- well, there may be one or  
19 two additional, or however we word, instructions proposed  
20 by the defense by the time or at the close of trial.

21 I will tell you I don't know how many jurors were --  
22 are being summoned, this is a Level 5, you both get 8  
23 challenges to get us down to 12. I will tell you I've got  
24 31 that I seat so that I get 28 plus one alternate. The  
25 way I do it you will have a random list and a numbered

1 list. Excuse me, you will have an alphabetical list and  
2 then a random list that is numbered of jurors and we'll  
3 follow the random numbered list.

4 What I do -- some judges do it differently. To me  
5 the highest number remaining, the last juror remaining or  
6 the highest number remaining is the alternate. And he or  
7 she will not be identified until they go back into the  
8 jury room. That way they listen. That way they don't  
9 think they're done. Some of the judges draw straws and  
10 some pick an alternate and they know who they are from the  
11 get-go. I just want to make sure -- I've seen too many  
12 people at the last second just take an alternate to have  
13 an alternate and go forward. If that's what we do I want  
14 to make sure that's the high number.

15 Any problems with that, Ms. Gray? You understand  
16 what I'm talking about?

17 MS. GRAY: Yes.

18 JUDGE BRAUN: All right. Mr. Joseph, any  
19 objection there?

20 MR. JOSEPH: No objection.

21 JUDGE BRAUN: Partly what I was also going  
22 to tell you, I think another division has a nearly  
23 identical trial with 30 or 40 counts. So I don't know  
24 in -- there's not going to be a jury to send people too if  
25 they're offended by some of this but I've requested at

1 least 70 jurors to get 31 and hopefully that will  
2 actually -- I said 70 to 80 not knowing that we'll  
3 actually get that many, so we'll see where we go.

4 Anything else I need to know about before we start  
5 Monday, Ms. Gray?

6 MS. GRAY: No, Judge. I just want to put on the  
7 record that I want to reserve our right to appeal if we  
8 decide to do so, that that was all --

9 JUDGE BRAUN: That's -- I've already looked  
10 that up and you do what you've got to do.

11 Let me also tell you because I know you don't  
12 practice here very often. Sometimes 8:30 or so the jurors  
13 themselves will be in a couple of big rooms, I don't know  
14 if they'll be in my courtroom or not but they will watch  
15 an orientation video. From there they will get about a  
16 ten-minute break. Afterwards it may be nine, 9:15 before  
17 we actually get started so I just thought logistically --  
18 I don't know if you know those things.

19 Mr. Joseph, I know you know those things already.  
20 There's three of you, I'll make sure you each have a  
21 chair. And I don't know what, if any, discussions have  
22 occurred. Do you want my cell number in case there is  
23 some -- what I don't want to have happen is if over the  
24 weekend there is some type of plea agreement, I don't want  
25 75 people or more brought in if we don't have to. So if

1 you reach an agreement, let me -- I'll just give you my  
2 cell number. It's 640-3112. And then I can get ahold of  
3 the jury coordinator. And I think they're usually  
4 directed to look Sunday night at the latest and we'll see  
5 where we go. All right.

6 Any -- did you get that number all right, Ms. Gray?

7 MS. GRAY: Yes, I did, thank you.

8 JUDGE BRAUN: All right. Anything else,  
9 Ms. Gray?

10 MS. GRAY: No.

11 JUDGE BRAUN: Mr. Joseph, anything else?

12 MR. JOSEPH: Not that I can think of.

13 JUDGE BRAUN: All right. Hopefully -- and  
14 again both sides I want to commend you both because this  
15 was not an easy decision. The third one was. But the  
16 suppression issue and the 6455 issue are some of these --  
17 are issues that are going to be bounced around and  
18 litigated and are -- you have your appeal rights to do  
19 what you need to do but it -- I'll tell you it was -- both  
20 of them were close but we'll go from there.

21 We're adjourned then. Thank you.

22 MS. GRAY: Thank you.

23 MR. JOSEPH: Thank you.

24 JUDGE BRAUN: Bye-bye.

25 (Off the record).