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State v. Gillespie Appellant's Support Brief Dckt. 39426

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	
Plaintiff-Respondent,	NOS. 39426 & 39427
v.	BINGHAM COUNTY NOS. CR 2011-5618 & CR 2008-6083
CHASE DALTON GILLESPIE,	APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW
Defendant-Appellant.	

STATEMENT OF THE CASE

Nature of the Case

Chase Dalton Gillespie asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 155 Idaho 714, 316 P.3d 126 (Ct. App. 2013). Within this opinion, the Idaho Court of Appeals dealt with two issues of first impression in Idaho. Mr. Gillespie asserts that the Court of Appeals' opinion on both questions was in conflict with prior precedent from this Court and from the Court of Appeals, and therefore asks that this Court grant his Petition for Review.

In addition, Mr. Gillespie asks this Court to revisit its holding in *State v. Zaitseva,*[1] to the extent this holding may be interpreted to apply to claims of double jeopardy involving the simultaneous possession of multiple items of contraband that have come into the defendant's possession as part of a single incident.

Idaho Supreme Court Case Nos. 39426 and 39427 have been consolidated for purposes of appeal. In 39427, Mr. Gillespie was convicted, following a bench trial, of two counts of possession of sexually exploitative material for a non-commercial purpose under former Idaho Code sections 18-1507 and 18-1507A. Under the former version of these statutes that were operative at the time of Mr. Gillespie's alleged offenses, digitally reproduced visual material depicting minors was not included within the definition of "sexually exploitative material" – only mechanically, electronically, or chemically reproduced visual material was included in the definition of this offense; the legislature did not add a provision for digitally reproduced material until July of 2012.

The Court of Appeals held the material Mr. Gillespie was alleged to have possessed – two images of minors engaged in explicit sexual conduct contained on a single thumb drive – was within the ambit of "sexually exploitative material," as that term was defined at the time of his s alleged offenses. Mr. Gillespie asserts that, in light of the intervening changes made to Idaho Code section 19-1507 (*hereinafter,* Section) and the related legislative history, his possession of the thumb drive containing digital image files was outside the scope of "sexually exploitative material" as that term was defined at the time of his alleged offense. Accordingly, he asks that this Court grant his Petition for Review on this issue.

[1] 135 Idaho 11 (2000).

The second question resolved by the Idaho Court of Appeals is whether, under the then-existing versions of Idaho Code sections 18-1507 and 18-1507A (*hereinafter,* Sections), the district court's entry of two convictions of possession of sexually exploitative material for a non-commercial purpose violated Mr. Gillespie's constitutional right to be free from multiple prosecutions for a single offense under the Double Jeopardy Clause of the Fifth Amendment. The Idaho Court of Appeals found that Mr. Gillespie's two convictions did not offend the constitutional prohibition against double jeopardy. Mr. Gillespie asserts that his two convictions for this offense, where he only possessed one thumb drive containing multiple images, violated this constitutional provision because there is no evidence the legislature intended multiple punishments in such circumstances under former Section 18-1507A. He further asserts the Court of Appeals' conclusion to the contrary is likely contrary to this Court's precedent, United States Supreme Court precedent and from the Court of Appeals' own precedent.

In 39426, Mr. Gillespie pled guilty to possession of sexually exploitative material, received a withheld judgment, and was placed on probation. Following his subsequent admissions to two probation violations, the district court revoked his probation and sentenced him to ten years, with two years fixed. Mr. Gillespie was also sentenced to ten years, with three years fixed, for each of his convictions in 39427. The court ordered all three sentences to run consecutively to one another. Mr. Gillespie asserts that the Idaho Court of Appeals erred when it determined that the sentences imposed by the district court in both 39426 and 39427 were not excessive, and therefore, not an abuse of the district court's discretion.

Statement of the Facts & Course of Proceedings

39426

In 39426, Chase Gillespie entered into a binding plea agreement with the State in which he pled guilty to possessing sexually exploitative material for a non-commercial purpose, in exchange, he would receive a withheld judgment for this offense and a term of probation no longer than five years. (Tr., p.1, L.4 – p.17, L.25; 39426 R.[2], pp.105-108.) The district court agreed to these terms, and Mr. Gillespie received a withheld judgment with an underlying period of probation of five years. (Tr., p.101, L.9 – p.115, L.22; 39426 R., pp.129-132.)

Thereafter, the State filed a report of probation violations allegedly Mr. Gillespie had violated the terms and conditions of his probation by viewing pornography and having a sexual relationship with another probationer. (39426 R., pp.151-152.) Mr. Gillespie eventually admitted to these violations. (Tr., p.122, L.4 – p.124, L.20.) However, the district court delayed disposition on these violations pending the outcome of Mr. Gillespie's criminal trial in 39427, wherein he was charged with two counts of possession of sexually exploitative materials. (Tr., p.125, L.19 – p.131, L.18.)

Following Mr. Gillespie's convictions in 39427, the district court held a consolidated disposition and sentencing hearing. The district court revoked Mr. Gillespie's probation and executed a sentence of ten years, with two years fixed, for his conviction in 39426 of possessing sexually exploitative materials for a non-commercial purpose. (Tr., p.304, L.21 – p.305, L.10;

[2] Because there are multiple volumes of electronic Clerk's Records in this consolidated appeal, citations made herein to the Clerk's Records are made in accordance with the Idaho Supreme Court Case Number for which the Clerk's Record was generated. In addition, there appears to be a slight disparity between the page numbering listed internally on the documents contained within the electronic records and the pagination reflected in the programming used to access this record. For purposes of clarity, citations to the Clerk's Record in this case are made in accordance with the page numbers listed on the documents contained within the Clerk's Record.

39426 R., pp.179-180.) Thereafter, Mr. Gillespie filed an Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion seeking a reduction of his sentence, but did not submit new or additional information in support of his request for leniency. (39426 R., p.183.) The district court denied this motion without a hearing. (39426 R., pp.195-199.) Mr. Gillespie then filed a motion and affidavit seeking reconsideration of the district court's denial of his Rule 35 motion, which the district court denied as an improper successive Rule 35 motion seeking leniency. (39426 R., pp.202-204, 217-219.)

Mr. Gillespie timely appealed from the district court's order revoking his probation in 39426 and executing his sentence of ten years, with two years fixed. (39426 R., p.185.)

39427

In 39427, it appears the State originally filed an Information alleging one count of possessing sexually exploitative material for a non-commercial purpose.[3] Thereafter, Mr. Gillespie and the State agreed to try the matter to the district court and entered into a stipulation regarding the factual and legal matters that were before the trial court for its resolution during the bench trial. (39427 R., pp.11-13.) As part of this stipulation, the parties agreed that the only images and/or videos that were the subject of Mr. Gillespie's prosecution were two images reflected in the State's information, that these images were both contained on

[3] The State's original Information and Amended Information are not present in the record in this case. The district court, during Mr. Gillespie's bench trial, re-arraigned Mr. Gillespie on the subsequently filed Information that is reflected in the record because Mr. Gillespie was apparently only bound over by the magistrate on one of the two counts alleged in the State's original criminal complaint – which is likewise not in the record in this case. (Tr., p.132, L.22 – p.153, L.11.) The trial court expressed concerns that the stipulation of the parties to go forward on two charges, when Mr. Gillespie was only bound over by the magistrate on one of these two, would not be sufficient to confer jurisdiction upon the court. Therefore, the State dismissed its original and amended Informations and re-filed a criminal complaint and Information during this trial. (Tr., p.132, L.22 – p.153, L.11.) Only the subsequently filed criminal complaint and Information are present in the record on appeal.

the same thumb drive (marked as "State's Exhibit 1"), and that any additional images or videos on this drive would not be the subject of a future prosecution. (39427 R., pp.12-13.) The parties further stipulated that the images at issue were of "minors engaged in sexually explicit conduct" as defined under the then-operative version of Section 18-1507(2)(f). (39427 R., p.13.) Additional stipulations included that the thumb drive was in Mr. Gillespie's possession, that this possession was for a non-commercial purpose, and that the possession took place in Blackfoot, Idaho. (39427 R., p.13.)

Regarding the issues at stake for the trial court's resolution, three were identified as being the only questions for the court. The first issue was whether Mr. Gillespie's possession of the images was knowing and willful for purposes of former Section 18-1507A. (39427 R., p.13.) The second issue was whether "possessing multiple images and videos on a single digital device is a single possession or whether each image or video may be prosecuted individually." (39427 R., p.13.) The final question for the trial court's resolution was whether, given the format of the images Mr. Gillespie was alleged to have possessed, the images met with the definition of "sexually exploitative material" under the then-existing version of Section 18-1507(2)(k). (39427 R., p.13.)

On the day of Mr. Gillespie's bench trial, the district court expressed reservations about the fact that the parties had entered into a private agreement permitting the State to bring two charges against Mr. Gillespie, when he was only bound over by the magistrate on one count. (Tr., p.132, L.22 – p.153, L.11.) Accordingly, and by agreement of the parties, the State dismissed the charges and re-filed the criminal complaint and Information against Mr. Gillespie that same day. (Tr., p.132, L.22 – p.153, L.11.) The Information alleged Mr. Gillespie

committed two counts of possession of sexually exploitative material for a non-commercial purpose.[4] (39427 R., pp.9-10.)

Thereafter, Mr. Gillespie was arraigned by the district court on both counts of possession of sexually exploitative material for a non-commercial purpose. (Tr., p.132, L.22 – p.153, L.11.) Mr. Gillespie further waived his right to a jury trial in open court following a colloquy with the court regarding his jury trial rights. (Tr., p.153, L.19 – p.156, L.10.) The prior stipulations entered into by the parties were thereafter incorporated into the record for purposes of Mr. Gillespie's bench trial. (Tr., p.156, Ls.18-20.)

The State's first witness was Detective Paul Hardwicke. (Tr., p.160, L.16 – p.161, L.2.) Detective Hardwicke testified he worked as a computer specialist within the detective unit of the Blackfoot Police Department. (Tr., p.161, Ls.3-5.) In this capacity, the detective testified he had received an eight gigabyte thumb drive, along with another thumb drive and two memory sticks, from another officer. (Tr., p.161, L.6 – p.161, L.25.) The officer accessed the thumb drive at issue, marked as State's Exhibit 1. (Tr., p.162, L.17 – p.163, L.25.)

Regarding the two images that the parties stipulated were present on this thumb drive, Detective Hardwicke testified that, although he could not be certain, in his training and experience, it was his belief that the images were loaded onto the drive as a result of some unidentified peer-to-peer internet file sharing program. (Tr., p.165, Ls.10-22.) Such programs generally use an internet connection to download files from another person's computer based upon certain parameters for the type of files desired. (Tr., p.165, L.23 – p.167, L.1.) An

[4] In this case, Mr. Gillespie's charges of two counts of possessing sexually exploitative material for a non-commercial purpose were brought under former Section 18-1507A (Repealed). This provision has since been eliminated by the Idaho State legislature. *See* 2012 Idaho Laws Ch. 269 (S.B. 1337).

individual using such programs may either select the files individually or download multiple files at once. (Tr., p.167, L.2 – p.167, L.9.) The detective also testified that, depending upon the query used in searching for files using file sharing software, it was possible that a person could download images other than those that the person was seeking. (Tr., p.185, Ls.14-24.)

Detective Hardwicke could not testify how the images were placed on the thumb drive, what software was used to download the files, or how many times the files had been transferred prior to being placed on the thumb drive. (Tr., p.170, L.3 – p.171, L.11.) He also could not testify when the folders containing the images were made, or whether the date and time the folders were last accessed reflected that the images were actually viewed, as opposed to being downloaded by the file-sharing software. (Tr., p.175, L.174, L.25 – p.176, L.23.) Moreover, the detective had no evidence that Mr. Gillespie had ever personally accessed these files or viewed the images contained on the thumb drive. (Tr., p.184, Ls.21-24.)

In addition, Mr. Gillespie's computer was recovered by police and did not contain any information that was on the thumb drive. (Tr., p.187, Ls.19-25.) While the files themselves may not be contained on the computer upon being transferred to the thumb drive, the detective testified there should be some reference to the download in the computer operating system or the computer's registry. (Tr., p.188, Ls.2-17.) However, there was no such trace of these files on Mr. Gillespie's computer. (Tr., p.188, Ls.15-17.) His computer likewise did not contain any peer-to-peer software sharing programs. (Tr., p.189, Ls.3-6.)

The State next called Blackfoot Police Department Detective Luis Chapa. (Tr., p.196, Ls.8-22.) In the course of his investigating Mr. Gillespie's charged offenses, Detective Chapa spoke twice with Mr. Gillespie. (Tr., p.197, Ls.2-3.) In his first discussion with Mr. Gillespie, conducted at the request of Mr. Gillespie's probation officer, Detective Chapa testified

Mr. Gillespie stated he had no child pornography on his computer, but he also admitted to having another computer at an earlier time. (Tr., p.197, L.4 – p.200, L.25.)

Detective Chapa's second discussion with Mr. Gillespie occurred at the police station. (Tr., p.201, L.20 – p.202, L.15.) Detective Chapa asked Mr. Gillespie why he had two different thumb drives in his possession.[5] (Tr., p.202, L.24 – p.203, L.4.) According to the detective, Mr. Gillespie responded that the first drive contained child pornography, and the second thumb drive contained files he used for his college studies. (Tr., p.203, Ls.5-10, p.204, Ls.12-14.)

Detective Chapa also testified, Mr. Gillespie admitted that he received the thumb drive containing pornography from another individual, M.P. (Tr., p.205, Ls.1-6.) Mr. Gillespie stated that this had happened on previous occasions. (Tr., p.205, Ls.7-9.) The detective acknowledged Mr. Gillespie denied ever having personally viewed any of the images contained on the thumb drive; and indicated at least once that he was guessing as to the contents of the drive. (Tr., p.206, L.8 – p.207, L.22.)

Following Detective Chapa's testimony, the State called Officer Aaron Leach of the Blackfoot Police Department to testify. (Tr., p.210, Ls.12-23.) Officer Leach was among the officers who searched Mr. Gillespie's car in investigating the alleged offenses. (Tr., p.211, Ls.3-11.) Inside the car, the officer found a receipt and packaging for a laptop computer. (Tr., p.211, Ls.12-16.) Additionally, Officer Leach found two thumb drives on Mr. Gillespie's person while conducting a search incident to arrest. (Tr., p.214, Ls.13-23.) These were voluntarily turned over by Mr. Gillespie to the officer. (Tr., p.214, L.22 – p.215, L.5.) According to Officer Leach, Mr. Gillespie stated there was child pornography on the drives and that he had received them

[5] According to the factual stipulation of the parties, the second thumb drive contained no images or videos of minors engaging in sexual activity. (39427 R., p.12.)

from M.P. (Tr., p.215, Ls.6-15.) The officer also claimed that Mr. Gillespie admitted to having looked at the images on the drives with M.P. (Tr., p.215, L.12 – p.216, L.2.)

The final witness for the State was one of Mr. Gillespie's probation officers, Officer Trevor Sparrow. (Tr., p.227, L.18 – p.228, L.16.) Officer Sparrow spoke with Mr. Gillespie as part of the criminal investigation in this case. (Tr., p.229, Ls.2-4.) When asked by the officer about a box in his car from a laptop computer, Officer Sparrow testified that Mr. Gillespie stated he had used the computer to look at pornography, but then felt guilty and threw the computer away. (Tr., p.229, L.9 – p.230, L.2.) Police never recovered this computer. (Tr., p.230, Ls.9-21.) The officer also testified Mr. Gillespie informed him the thumb drive "possibly" had child pornography on it – that he didn't know for sure, but that he assumed there was since he had received similar drives from M.P. before that contained child pornography. (Tr., p.231, L.2 – p.233, L.21.)

After the presentation of the State's evidence, Mr. Gillespie moved the court for a judgment of acquittal, arguing he did not knowingly and willfully possess reproduced visual material since he had not actually viewed the images themselves, which were stored as raw data on the thumb drive. (Tr., p.234, L.20 – p.235, L.25.) He also argued the digital format of the information on the thumb drive did not qualify as electronically produced visual material for purposes of the definition of sexually exploitative material. (Tr., p.236, L.1 – p.237, L.6.) The State, in turn, argued the images contained on the thumb drive qualified as electronically reproduced visual material. (Tr., p.237, Ls.10-20.) The district court denied Mr. Gillespie's motion to dismiss "at this point" at his trial. (Tr., p.238, Ls.5-7, p.238, L.21 – p.239, L.20.)

Mr. Gillespie testified on his own behalf. He denied he had ever accessed the thumb drive or downloaded any images on to it. (Tr., p.242, L.2 – p.243, L.10.) He further testified he

had given the drive to M.P. so that M.P. could put some music and animated videos on to it for him. (Tr., p.243, Ls.11-14.) However, Mr. Gillespie testified he was. subsequently informed by M.P. that M.P. had put additional files on the drive because M.P. didn't want his probation officer to search his computer and find the files that M.P. had transferred to the drive. (Tr., p.243, Ls.11-25.) Although Mr. Gillespie did not directly access or view the contents of the drive, he assumed M.P. placed child pornography on there because M.P. had previously given Mr. Gillespie a thumb drive containing child pornography. (Tr., p.244, Ls.1-9.) Mr. Gillespie claimed he deleted the pornography off the drive the previous time that M.P. had given him a similar thumb drive. (Tr., p.244, Ls.10-12.) Although he admitted telling police officers there was probably child pornography on the thumb drive, Mr. Gillespie denied having any actual knowledge of the drive's contents. (Tr., p.245, Ls.6-12.)

Following the presentation of the evidence, the trial court delayed ruling on both the question of whether the digital images stored on the thumb drive fell within the definition "sexually exploitative material" – and, more specifically, whether they qualified as electronically reproduced visual material – as well as whether one digital storage device containing multiple images files could give rise to multiple convictions under former Section 18-1507A. (Tr., p.263, L.21 – p.164, L.3.) Instead, the district court requested that both Mr. Gillespie and the State brief the issue prior to the court ruling on these questions. (Tr., p.263, L.21 – p.163, L.3.)

In its brief, the State implicitly argued that multiple convictions for possession of sexually exploitative material should be permitted where different children are depicted in each image forming the basis for multiple charges. (39427 R., p.18.) Additionally, the State argued the thumb drive was in Mr. Gillespie's possession, and the two images contained thereon, qualified as "sexually exploitative material" under the then-existing version of Section 18-1507,

in light of persuasive precedent from Washington state interpreting that State's own child pornography statute. (39427 R., pp.18-19.)

In his brief, Mr. Gillespie asserted that the thumb drive in his possession, and its contents, did not qualify under the definition of sexually exploitative material because the information stored on the thumb drive was in a purely digital format – i.e., the information was merely a series of "ones and zeroes" and required the proper software and operating system in order to be "recombined to form distinguishable data" or an actual visual image. (39427 R., pp.22-23.) He further argued numerous other jurisdictions had affirmatively altered their criminal statutes dealing with possession of child pornography to expressly include digital materials, but that Idaho had not done so. (39427 R., pp.24-26.) Given this, Mr. Gillespie asserted the thumb drive in his possession did not qualify as "sexually exploitative material" as that term was defined when he was alleged to have committed his offenses, and that the district court should not find him guilty. (39427 R., p.26.) Additionally, Mr. Gillespie asserted that, under Idaho's statutory scheme and in reference to Idaho's model pattern jury instructions, he could not be charged with two separate offenses for simultaneous possession of two images on the same thumb drive. (39427 R., pp.26-27.)

The district court subsequently entered findings of fact and conclusions of law on both the question of whether the possession of image files on a thumb drive qualified as "sexually exploitative material" and the question of whether Mr. Gillespie could face multiple charges based upon his simultaneous possession of two images in digital format on a single thumb drive. (39427 R., pp.32-41.) The trial court answered both questions in the affirmative. (39427 R., pp.32-41.)

Regarding Mr. Gillespie's claim that he could not face multiple charges based on his single possession of one thumb drive, the district court erroneously held this claim of "multiplicity" had to be raised prior to trial under Rule 121(b) of the Criminal Rules. (39427 R., pp.37, 39-40.) As an alternative ground, the district court ruled that charging multiple counts was permissible because the policy of the statute was to protect children, that allowing multiple convictions to be entered would further this policy, and because the statute permitted the State to charge an individual based upon the possession of a single image. (39427 R., pp.39-40.)

The district court also concluded the images contained on the thumb drive in Mr. Gillespie's possession fell within the definition of "sexually exploitative material" that existed at the time of his charged offenses. (39427 R., pp.38-39.) The court did so on the basis of the finding that images downloaded onto a computer or a thumb drive are "electronically reproduced," and therefore fall within the definition of "sexually exploitative material." (39427 R., pp.38-39.) Accordingly, the district court entered an order finding Mr. Gillespie guilty of both counts of possession of sexually exploitative material for a non-commercial purpose. (39427 R., pp.40-41.)

The court sentenced Mr. Gillespie to ten years, with three years fixed, for each count of possess sexually exploitative material for a non-commercial purpose. (Tr., p.300, L.14 – p.301, L.4; 39427 R., pp.55-57.) The district court also ordered these sentences to run consecutively – not only to one another, but to Mr. Gillespie's underlying sentence of ten years, with two years fixed, in 39426 as well. (Tr., p.301, Ls.5-6, p.305, Ls.7-10; 39427 R., pp.55-57.)

Thereafter, Mr. Gillespie filed a Rule 35 motion seeking a reduction of his sentence, but did not submit any new or additional information in conjunction with this request for leniency. (39427 R., p.63.) The district court denied this motion without a hearing. (39427 R., pp.75-79.)

Mr. Gillespie then filed a motion to reconsider the denial of his Rule 35 motion, supported by an affidavit. (39427 R., pp.81-84.) The district court denied this motion for reconsideration as an impermissible successive motion seeking leniency, relying upon several cases from the Idaho Court of Appeals. (39427 R., pp.97-99.)

Mr. Gillespie timely appealed from his judgments of conviction and sentences in 39427. (39427 R., p.64.)

Court Of Appeals Decision

On appeal, Mr. Gillespie raised two substantive challenges to his conviction in 39427, as well as challenging the district court's sentencing dispositions in both 39426 and 39427. In a published opinion, the Idaho Court of Appeals affirmed Mr. Gillespie's judgments of conviction and sentences in both 39426 and 39427, and rejected all of his claims on appeal. Thereafter, Mr. Gillespie petitioned this Court for review of his case.

ISSUES

1. Should this Court grant Mr. Gillespie's Petition for Review?

2. Did the district court err in 39427 when it determined the thumb drive in Mr. Gillespie's possession fell within the definition of "sexually exploitative material" under the versions of Section 18-1507 and Section 18-1507A that were in effect at the time of Mr. Gillespie's alleged offenses?

3. Did the district court err in 39427, and violate Mr. Gillespie's constitutional right against double jeopardy, when it entered two convictions to possessing sexually exploitative material for a non-commercial purpose when Mr. Gillespie possessed, only a single thumb drive that contained multiple images?

4. Did the district court err in 39426 when it revoked Mr. Gillespie's probation and executed a sentence of ten years, with two years fixed?

5. Did the district court impose excessive sentences, and thereby abuse its discretion, when it sentenced Mr. Gillespie to ten years, with three years fixed, for each count of possessing sexually exploitative material in 39427; with these sentences to be served consecutively to each other and to Mr. Gillespie's sentence in 39426?

ARGUMENT

I.

This Court Should Grant Mr. Gillespie's Petition For Review Because The Idaho Court Of Appeals Determined Substantive Issues Of Law Never Before Addressed By This Court, And Further Resolved Those Issues In A Manner Inconsistent With Prior Precedent From This Court And From Its Own Prior Precedent

A. This Court Should Grant Mr. Gillespie's Petition For Review Because The Idaho Court Of Appeals Determined Substantive Issues Of Law Never Before Addressed By This Court, And Further Resolved Those Issues In A Manner Inconsistent With Prior Precedent From This Court And From Its Own Prior Precedent

1. This Court Should Grant Mr. Gillespie's Petition For Review Because The Idaho Court Of Appeals Ignored The Clear Statement Of Purpose From The Idaho State Legislature Regarding The Purpose And Effect Of The 2012 Amendments To Sections 18-1507 And 18-1507A; And Because This Opinion Is Further Inconsistent With Prior Precedent From This Court And The Court of Appeals

At the time Mr. Gillespie was accused of having committed the offenses of possessing sexually exploitative material for a non-commercial purpose, the definition of sexually exploitative material did not include **digitally** produced or reproduced material, but did encompass **electronically** produced or reproduced material. The material Mr. Gillespie was alleged to have possessed was a single thumb drive device containing multiple data files with images of minors engaged in sexually explicit conduct. The question for the Court of Appeals was therefore whether possession of a thumb drive with purely digital information files on it fell within the ambit of Section 18-1507 and former Section 18-1507A – as those statutes existed at the time of Mr. Gillespie's alleged offense.

The Court of Appeals reasoned that the addition of the category of "digitally" produced material to the provisions of Section 18-1507 did not add anything new to the statute. (*Gillespie*, 155 Idaho at 719.) Instead, the court reasoned that "a change to the application or meaning of a

statute is not the reason for legislative amendment; the legislature also makes amendments to clarify or strengthen the existing provisions of a statute." (*id.* at 719, 20.)

Mr. Gillespie asserts that this conclusion was in error. First, this conclusion is at odds with the legislature's own statement of purpose for the amendments to Section 18-1507 in 2012. In its Statement of Purpose for these changes, the legislature explained:

> The purpose of this bill is to restructure the format of the child exploitation law to make it easier to follow, update definitions to more closely match technological trends that exist in today's society, and more clearly differentiate penalties based upon the severity of the crime. Definitions will now be contained in a separate section. **Some of the definitions in the code are being updated to incorporate modern technology. The vast majority of materials depicting the sexual exploitation of children that are exchanged, traded, downloaded, or possessed are obtained by multiple methods via the Internet. The current law does not address all of these ways because of the way technology has progressed.** The current law often does not differentiate clearly between possession type crimes and other exploitation. Changes in technology have made some of these crimes much more difficult or impossible to prosecute. This legislation provides updated language that addresses multiple new ways children are being exploited, so that the charged crime(s) more accurately describe the illegal behavior and associated penalties considering the current and potential future technology.

See Appendix A (emphasis added).[6]

Accordingly, contrary to the Court of Appeals' rationale, the Idaho Legislature was not merely seeking to "clarify or strengthen existing provisions," by adding the term "digitally produced or reproduced" materials – it was **incorporating** these materials because the prior law **did not address** all manners of committing the offense of possessing sexually exploitative material. It is so well established as to be axiomatic that the legislature's statement of purpose is an authoritative source for interpreting any ambiguous statute. *See, e.g., State v. Stover*, 140 Idaho 927, 931-932 (2005); *State v. Giovanelli*, 152 Idaho 717, 719 (2012). However, the Idaho

[6] For ease of this Court's reference, the text of the Statement of Purpose for the 2012 amendments to Section 18-1507 have been attached as "Appendix A" to this brief.

Court of Appeals chose to ignore the clear statement of purpose provided by the legislature in resolving the effect of the 2012 amendments. Mr. Gillespie submits this was error and therefore asks that this Court grant his Petition for Review.

In addition, the Court of Appeals' resolution on this issue likely conflicts with two other well-established principles of statutory construction that have long been recognized by this Court. First, the interpretation put forth by the Court of Appeals renders the 2012 amendments made by the legislature a functional nullity. This is contrary to the principle of statutory construction that, where a statute is substantively amended, it is presumed that the legislature intended to effectuate a change by that amendment. *See, e.g., State v. Leavitt*, 153 Idaho 142, 146 (2012); *Athey v. Stacey,* 142 Idaho 360, 366 (2005); *McKenney v. McNearey*, 92 Idaho 1, 4 (1967).

Second, to the extent that there was any ambiguity as to whether the addition of the category of digitally produced or reproduced material was intended to effectuate an expansion of the statute to items not previously covered under former Sections 18-1507 and 18-1507A, the rule of lenity mandates the ambiguity ought to have been resolved in Mr. Gillespie's favor. *See, e.g., State v. Anderson*, 145 Idaho 99, 103 (2008); *State v. Jones*, 151 Idaho 943, 947 (Ct. App. 2011).

Because the Idaho Court of Appeals' opinion addressed a substantive issue of first impression in this case, and did so in a manner likely inconsistent with legislative intent as well as prior precedent from this Court and the Court of Appeals, Mr. Gillespie asks that this Court grant his Petition for Review.

2. This Court Should Grant Mr. Gillespie's Petition For Review Because The Court Of Appeals Decided An Issue Of Substance When It Decided The Double Jeopardy Issue In This Case With Regard To A Charge Of Possession Of Sexually Exploitative Material, And Further Decided The Issue In A Manner Likely Inconsistent With Prior Precedent From The United States Supreme Court, This Court, And The Idaho Court Of Appeals

The Idaho Court of Appeals in this case was also asked to resolve a second issue of first impression: whether the possession of a single thumb drive containing multiple image files of children engaged in sexual conduct constituted a single count – as opposed to multiple counts – of the offense of possessing sexually exploitative material for a non-commercial purpose. The Court of Appeals determined, relying primarily upon the case of *State v. Zaitseva* 135 Idaho 11 (2000), that such possession constituted more than one offense. Mr. Gillespie submits this conclusion is in conflict with prior precedent from this Court, the United States Supreme Court, and the Court of Appeals.

From the outset, it is entirely unclear as whether the opinion in *Zaitseva* is actually applicable to a claim of a violation of double jeopardy. Among the protections of the double jeopardy clause is the protection against multiple **punishments** for the same offense. The Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980). In *Zaitsava*, the defendant was charged with, and convicted of, multiple counts of possession of a forged instrument based upon the simultaneous possession of multiple documents in various states of preparation for use as a check. *Zaitsava*, 135 Idaho at 13-14. The Opinion in *Zaitsava* references only a challenge to the initial charges brought against the defendant – whether the decision to **charge** a defendant with multiple counts under these facts was permissible. It does not, on its face, address the issue of multiple convictions. *Id.* Moreover, the majority opinion nowhere discusses double jeopardy or references the Double Jeopardy Clause of the Fifth

Amendment. It is further worth noting that appellate counsel has been unable to uncover a single opinion – other than the Court of Appeals' opinion in this case – that relies upon Justice Walters' majority opinion when attempting to analyze the proper unit of prosecution for double jeopardy purposes.

Even assuming the *Zaitsava* opinion could be construed as a double jeopardy analysis, Mr. Gillespie asserts this opinion appears to be an outlier in this Court's jurisprudence, and is in conflict with United States Supreme Court precedent. The sole fact that led the *Zaitsava* majority to approve multiple prosecutions for a single incident of possessing multiple items was the use of the term "any" in the statute that defined the offense. *Zaitsava*, 135 Idaho at 14. However, the United States Supreme Court has looked at functionally identical language contained within the Mann Act, and has found that only one offense was committed despite the statutory use of the term "any." *See Bell v. United States*, 349 U.S. 81, 82-84 (1955).

The defendant in *Bell* was charged with two violations of the Mann Act for transporting two women across state lines for an immoral purpose. *Bell*, 349 U.S. at 82. The Mann Act criminalized the knowing interstate transportation of "**any** woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." *Id* (emphasis added). Despite the use of the term "any," the Court held lenity required this ambiguity be construed in the defendant's favor and against the imposition of multiple punishments. *Id.* Therefore, because there was only one act of transportation – the *actus reus* for the offense – there could only be one conviction under double jeopardy principles. To the extent that the *Zaitseva* Opinion, reading the term "any" in isolation of the other statutory provisions, deemed this term to *ipso facto* authorize multiple convictions, the opinion is contrary to Supreme Court authority and should be revisited.

Moreover, as is set out more fully below, it would appear that all other precedent from this Court and the Court of Appeals with regard to double jeopardy multiplicity issues looks to whether the possession was contemporaneous and part of a single incident of possession. *See State v. Major*, 111 Idaho 410, 414 (1986); *State v. Lloyd*, 103 Idaho 382, 383 (1982); *State v. Moffatt*, 154 Idaho 529, 533-534 (Ct. App. 2013). The Court of Appeals' holding in this case is particularly surprising, given its recent conclusion in *Moffatt* that, "it is generally held that when a person commits multiple acts against the same person during a single criminal incident and each act could independently support a conviction, for purposes of double jeopardy the 'offense' is typically the episode, not each individual act." *Moffatt*, 154 Idaho at 533. In this case, there was only a single act of possessing a single device containing more than one digital image file. Accordingly, the Court of Appeals' Opinion in this case appears to be at odds with precedent from the United States Supreme Court, this Court, and its own case law. In light of this, Mr. Gillespie asks that this Court grant his Petition for Review.

II.

The District Court Erred In 39427 When It Determined The Thumb Drive In Mr. Gillespie's Possession Fell Within The Definition Of "Sexually Exploitative Material" Under The Versions Of Sections 18-1507 And 18-1507A In Effect At The Time Of Mr. Gillespie's Alleged Offenses

A. Introduction

The State alleged Mr. Gillespie possessed two digital image files that were contained on a single thumb drive in support of its charges of possession of sexually exploitative material for a non-commercial purpose. However, the Idaho Legislature did not amend the definition of "sexually exploitative material" – a necessary element of this charge – to include digitally produced or reproduced material until July of 2012. Because the image files Mr. Gillespie was alleged to have possessed were digitally reproduced material, and because digitally reproduced

material was not subsumed in the definition of "sexually exploitative material" until over one year after Mr. Gillespie was alleged to have committed the charged offenses, he submits the district court erred when it determined the images contained on the thumb drive fell within the ambit of "sexually exploitative material" for purposes of his convictions.

B. Standard Of Review

This Court reviews issues of statutory interpretation *de novo*. *See, e.g., State v. Schulz*, 151 Idaho 863, 865 (2011).

C. The District Court Erred In 39427 When It Determined The Thumb Drive In Mr. Gillespie's Possession Qualified As Electronically Produced Visual Material Under The Versions Of Sections 18-1507 And 18-1507A That Were In Effect At The Time Of Mr. Gillespie's Alleged Offenses

Mr. Gillespie asserts the district court erred when it determined that his possession of a thumb drive, containing video or image files, qualified under the definition of "sexually exploitative material" that existed at the time of his charged offense.

Although the two statutes at issue in this case, Sections 18-1507 and 18-1507A, were greatly altered (and Section 18-1507A was actually eliminated) between the time Mr. Gillespie was alleged to have committed his offense and the time of the filing of this brief, it is the version of this statute in effect at the time of the alleged commission of the offense that controls. *See, e.g., State v. Koseris*, 66 Idaho 449, 453-454 (1945).

"It is a well-settled principal of law that criminal statutes must be strictly construed." *State v. Thompson*, 101 Idaho 430, 437 (1980). In interpreting a statute, this Court looks first and foremost to the literal words used in the statute. *State v. Shanks*, 139 Idaho 152, 154, (Ct. App. 2003). When the statute is clear and unambiguous on its face, this Court gives effect to the statute as written without engaging in any statutory construction. *Id.* "An act cannot be held

criminal under a statute unless it clearly appears from the language used that the legislature so intended." *State v. Herrera-Brito*, 131 Idaho 383, 387 (Ct. App. 1998).

Because the legislature is empowered to define criminal acts, courts generally lack authority to alter the statutory formulations of an offense. *See, e.g., Thompson v. State*, 138 Idaho 512, 516 (Ct. App. 2003). Given this division of powers, courts should always strive to give effect to statutes as written, which commonly involves interpreting a statute to give effect to every word and seeking to avoid an interpretation that avoids treating any language as mere surplusage. *Shanks,* 139 Idaho at 155.

In addition, Idaho courts have long held that, when a statute is amended by the legislature, a presumption arises that a change in the application of the statute is intended. *See, e.g., State v. Leavitt*, 153 Idaho 142, 146 (2012); *DeRousse v. Higginson*, 95 Idaho 173, 176 (1973); *State v. Long*, 91 Idaho 436, 441 (1967).

In this case, Mr. Gillespie was charged with two counts of possession of sexually exploitative material that the State alleged had both occurred, "on or about February 16, 2011." (39427 R., pp.9-10.) These charges were both brought under Section 18-1507 and then-existing Section 18-1507A. (39427 R., pp.9-10.) At the time of his alleged offenses, Section 18-1507A defined the offense of possession of sexually exploitative material for a non-commercial purpose as the knowing and willful possession of "sexually exploitative material", as that phrase was defined within the then-existing version of Section 18-1507, for other than a commercial purpose. Section 18-1507A (Repealed). Prior to the 2012 amendments, Section 18-1507(2)(k) defined the phrase "sexually exploitative material" as, "any photograph, motion picture, video, print, negative, slide or other mechanically, electronically, or chemically reproduced visual

material which depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct." *See* 2012 Idaho Laws Ch. 269 (S.B. 1337).

However, radical changes were made to both of these statutes in 2012 – the provisions of Section 18-1507 were re-numbered, the definition of "sexually exploitative material" within Section 18-1507 was greatly expanded, and the provisions of Section 18-1507A were eliminated entirely. *See* 2012 Idaho Laws Ch. 269 (S.B. 1337). These changes to the definition of "sexually exploitative material" included the addition of the term "digitally" to the type of produced or reproduced visual material that could support a charge of exploitation of a child. *Id.*

In addition to the general presumption this Court applies to changes in a statute – namely that alterations reflect that a change in the application of the statute is intended – the legislative history for these broad changes in 2012 makes clear that the addition of "digitally" reproduced visual material to the definition of "sexually exploitative material" effectuated an expansion of the scope of conduct covered by the statute to include types of images that were not previously covered under its definition. In its Statement of Purpose for these changes, the legislature explained:

> The purpose of this bill is to restructure the format of the child exploitation law to make it easier to follow, update definitions to more closely match technological trends that exist in today's society, and more clearly differentiate penalties based upon the severity of the crime. Definitions will now be contained in a separate section. **Some of the definitions in the code are being updated to incorporate modern technology. The vast majority of materials depicting the sexual exploitation of children that are exchanged, traded, downloaded, or possessed are obtained by multiple methods via the Internet. The current law does not address all of these ways because of the way technology has progressed.** The current law often does not differentiate clearly between possession type crimes and other exploitation. Changes in technology have made some of these crimes much more difficult or impossible to prosecute. This legislation provides updated language that addresses multiple new ways children are being exploited, so that the charged crime(s) more accurately describe the illegal behavior and associated penalties considering the current and potential future technology.

Appendix A.

As expressly acknowledged by the legislature in its statement of purpose, the alteration of the definitions contained in Section 18-1507, which includes the addition of **digital** visual materials to the definition of "sexually exploitative material," was done because the prior version of the statute did not address all the ways that modern technology enabled sexual images of children to be distributed or possessed. *See* Appendix A. Because the images Mr. Gillespie was alleged to have possessed were in purely digital form, these images were digitally produced or reproduced visual material. At the time he was alleged to have committed the charged offenses, Section 18-1507 did not subsume digitally reproduced visual material within the definition of "sexually exploitative material."

It was not until after Mr. Gillespie was alleged to have committed his offenses that the legislature expanded the scope of Section 18-1507 to include digitally reproduced material. *See* 2012 Idaho Laws Ch. 269 (S.B. 1337). Accordingly, because it is the version of the statute in effect at the time of Mr. Gillespie's alleged offenses that controls the definition of his offense, and because this version of the statute did not criminalize possession of digitally produced or reproduced visual material, Mr. Gillespie submits his possession of two images contained solely on a thumb drive did not fall within the scope of "sexually exploitative material" under the operative definition of that term.

Finally, to the extent that there is any ambiguity, Mr. Gillespie submits that this ambiguity must be resolved in his favor and strictly construed against the State. "The rule of lenity states that criminal statutes must be strictly construed in favor of defendants." *State v. Anderson*, 145 Idaho 99, 103 (2008) (quoting *State v. Barnes*, 124 Idaho 379, 380 (1993)). Under the operation of this rule, any ambiguity in a criminal statute must be construed against

the state and in favor of the accused. *See Brown v. State*, 137 Idaho 529, 536 (Ct. App. 2002). Under an application of the rule of lenity, and under the relevant principles of statutory interpretation, Mr. Gillespie submits that the district court erred when it concluded his possession of a thumb drive containing two digital images of minors engaged in sexually explicit conduct fell within the purview of the definition of "sexually exploitative material" that applied to his offense.

III.

The District Court Erred In 39427, And Violated Mr. Gillespie's Constitutional Right Against Double Jeopardy, When The It Entered Two Convictions Of Possession Of Sexually Exploitative Material For A Non-Commercial Purpose When Mr. Gillespite Possessed A Single Thumb Drive That Contained Multiple Images

A. Introduction

Regarding Mr. Gillespie's assertion of a double jeopardy violation, the district court held first that Mr. Gillespie had waived this claim by not raising it prior to trial pursuant to Criminal Rule 12(b); and, second, that Idaho's statutory scheme would permit two convictions for possession of sexually exploitative material where Mr. Gillespie was shown to have possessed a single thumb drive with two separate images on it. Mr. Gillespie asserts the district court erred in both aspects of its ruling.

The provision of Criminal Rule 12(b) dealing with claims of double jeopardy, by its terms, deals only with allegations of *former* jeopardy, and pertinent case law makes clear that claims of a double jeopardy violation in the form of multiplicity of convictions are not subsumed within this rule. Second, a review of the pertinent statutes, coupled with the statement of legislative intent, shows the unit of prosecution for possession of sexually exploitative material is the possession itself, regardless of the number of images that are simultaneously possessed.

Moreover, to the extent there remains any ambiguity as to the unit of prosecution for possession of sexually exploitative material, principles of lenity require this ambiguity be resolved in favor of the defendant and against interpreting the statute to permit multiple prosecutions. Because the unit of prosecution for his charged offense was his act of possession – even if the single possession subsumed multiple images – the district court erred and violated Mr. Gillespie's constitutional rights against double jeopardy when it determined multiple prosecutions were constitutionally and statutorily permissible in this case.

B. Standard Of Review

Whether a defendant has been twice placed in jeopardy for the same offense in violation of the Fifth Amendment is a question of law that this Court reviews *de novo*. *See, e.g., State v. Bush*, 131 Idaho 22, 33 (1997). Additionally, the question of whether a particular crime is a greater or lesser included offense of another for double jeopardy purposes is likewise a question of law that this Court reviews *de novo*. *State v. Bryant*, 127 Idaho 24, 29 (Ct. App. 1995).

C. The District Court Erred When It Determined Mr. Gillespie Waived His Double Jeopardy Argument Under Criminal Rule 12(b)

The district court, in this case, incorrectly ruled the State was constitutionally permitted to bring multiple charges of possession of sexually exploitative material against Mr. Gillespie, even though he had only engaged in a single possession of a data storage device that contained multiple image files. As one of two bases for permitting the State to bring multiple charges against Mr. Gillespie in this case, the district court ruled Mr. Gillespie had waived this claim by not raising it prior to trial pursuant to Criminal Rule 12(b). However, under the pertinent standards for claims of a double jeopardy violation due to the multiplicity of the charges, the district court's holding does not withstand scrutiny.

First, this ruling conflicts with the plain language of Criminal Rule 12(b)(6), which, by its very terms, requires a double jeopardy objection to be raised **only** where the objection is based upon **former** jeopardy. *See* I.C.R. 12(b)(6). Mr. Gillespie was not asserting he could not be prosecuted for multiple counts in this case based upon having been convicted or acquitted of these offenses in prior proceedings. By its plain terms, this rule does not apply to the allegation of a multiplicity-type double jeopardy violation, which is the basis of Mr. Gillespie's objection in this case.

The constitutional prohibition against double jeopardy, as contained in the Double Jeopardy Clause of the Fifth Amendment, consists of three separate protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a prosecution for the same offense after a conviction; and (3) it protects against multiple punishments for the same offense. *Vitale*, 447 U.S. at 415. It is only the third type of a double jeopardy violation that is at issue in this case, and this type of double jeopardy violation is not one that is rooted in former jeopardy.

This is made clear by Idaho case law directly addressing this issue. *See State v. Bryan*, 145 Idaho 612, 614-615 (Ct. App. 2008). In *Bryan*, the defendant was charged with two separate violations of the same statute relating to operating a commercial vehicle in excess of permissible weight limits. These violation were based upon the State's bifurcation of the weight carried by the tractor-trailer into two units that were carried on two separate axles of the same vehicle. *Id.* at 613. Following the presentation of the State's evidence, the defendant in *Bryan* asserted that the multiple prosecutions represented a double jeopardy violation. *Id.* This claim was denied, and his appeal to the district court on these grounds was likewise denied. *Id.* at 613-614.

The State in *Bryan* attempted to argue the defendant's double jeopardy claim, based upon multiplicity grounds, was waived under Criminal Rule 12(b) because he had not raised it prior to trial. *Bryan*, 145 Idaho at 614. The *Bryan* Court rejected this argument holding it "was foreclosed by the plain language of Rule 12(b)(6)," along with prior precedent. *Id.* "The rule requires that a 'motion to dismiss based upon *former* jeopardy" must be raised prior to trial.'" *Id.* (emphasis in the original). But the defendant's double jeopardy claim in *Bryan* was not based on former jeopardy, i.e., that he had been **previously** acquitted or conviction of the charged conduct. Accordingly, the *Bryan* Court held that Criminal Rule 12(b) did not apply to his claim of a double jeopardy violation based upon the multiplicity of his charges and convictions. *Id.* at 614-615. Because the defendant in *Bryan* had presented his argument to the trial court following the State's presentation of evidence at his trial, and because the court ruled on this claim, the *Bryan* Court held the issue was properly preserved. *Id.* at 615.

This holding is in accord with the prior Idaho Court of Appeals' Opinion in *Bates v. State*, 106 Idaho 395, 402 (Ct. App. 1984). The defendant in *Bates* challenged his convictions for both assault with a deadly weapon and attempted rape. *Id.* at 401. The State argued the defendant had waived any double jeopardy objection by failing to raise it prior to entering his guilty plea. *Id.* at 402. The *Bates* Court rejected this argument and held:

> While it is true that a "motion to dismiss based on former jeopardy" must be raised prior to trial or the claim is waived, such a motion was not available to Bates in this case. He had not been either convicted or acquitted at an earlier time of the offenses with which he was charged. Instead he contends that convictions *in the same proceeding* of both a higher and lesser included offense or, in the alternative, two convictions arising out of a single act violates the right to be free from double jeopardy. In this sense, then, double jeopardy is somewhat different from "former jeopardy." This difference is especially evidence when it is remembered that the state, in an information charging a particular offense, may properly allege a lesser included offense. Since Bates had not been formerly convicted or acquitted of the offenses to which he pled guilty, he had not been in

> "former jeopardy" and had no right to a dismissal of either charge prior to trial. Thus he did not waive his right to raise his double jeopardy claim.

Bates, 106 Idaho at 402 (emphasis in the original) (internal citations omitted).

In this case, the district court, in determining that Mr. Gillespie's assertion of a double jeopardy violation on multiplicity grounds was waived under Criminal Rule 12(b), relied upon the Idaho Court of Appeals decision in *State v. Casano*, 140 Idaho 461 (Ct. App. 2004). (39427 R., pp.39-40 n.20.) However, the court's reliance on *Casano* was misplaced.

The challenge raised in *Casano* was not a double jeopardy violation, but was rather a claim involving jury instructions. *Casano*, 140 Idaho at 465-466. Moreover, to the extent that the *Casano* Opinion may be read to hold that a double jeopardy challenge based upon multiplicity must be raised prior to trial pursuant to Criminal Rule 12(b), this opinion is in error and has been implicitly overruled by the Idaho Court of Appeals in subsequent cases. The *Casano* opinion was issued by the Court of Appeals in 2004. However, less than four years later, the very same judge who authored the *Casano* opinion also penned the subsequent case of *Bryan*. *See* and compare *Casano*, 140 Idaho at 461, with *Bryan*, 145 Idaho at 612. To the extent that there is any conflict between the holdings of these two cases, the more recent of the two opinions would control. *See State v. Goodlett*, 139 Idaho 262, 265 (Ct. App. 2003).

In addition, the *Casano* Opinion – insofar as it may be read to hold that a double jeopardy challenge for multiplicity must be raised prior to trial – is erroneous in that it relied upon a similar but **not** identical federal rule for its rationale. In *Casano*, the court based its holding that the defendant waived his challenge to his multiple convictions on federal precedent, concluding that the federal corollary to Criminal Rule 12(b) was "identical." *Casano*, 140 Idaho at 466. This was incorrect. While the provisions between Criminal Rule 12(b) and Federal Rule 12(b) are similar, there is one critical difference.

Idaho Criminal Rule 12(b) has an express provision governing double jeopardy claims, and only requires that assertions of former jeopardy be raised prior to trial – not claims of multiplicity. *See Bryan*, 145 Idaho at 614-615; I.C.R. 12(b)(6). In contrast, Federal Rule of Criminal Procedure 12 does not contain any provision specific to claims of double jeopardy – it merely addresses motions alleging a defect in the institution of the prosecution, in the indictment or information; or motions to suppress evidence, to compel discovery, or to sever the charges. *See* F.R.Cr.P. 12(b)(3). In addition, federal courts have recognized a distinction between a challenge to the form of a charging document on multiplicity grounds and a challenge to the entry of multiple convictions and imposition of multiple sentences on double jeopardy principles. *See United States v. Zalapa*, 509 F.3d 1060, 1063-1064 (9th Cir. 2007).

In this case, from the outset of his trial, Mr. Gillespie challenged the State's legal authority to seek multiple convictions for possession of sexually exploitative material based upon his single possession of the thumb drive that contained multiple image files. This challenge was a direct assertion of a double jeopardy violation in the multiplicity of the State's charges. Such a claim is not required under the Idaho Criminal Rules to be brought prior to trial, because it is not a claim of former jeopardy. Accordingly, the district court erred when it held that Mr. Gillespie had waived his claim of multiplicity by not raising it prior to trial.

D. The District Court Erred When It Held Mr. Gillespie Could Be Twice Convicted Of Possession Of Sexually Exploitative Material For A Non-Commercial Purpose When Mr. Gillespie Possessed A Single Thumb Drive That Contained Multiple Images On It

Mr. Gillespie asserts the district court erred when it determined that, under former Section 19-1507A, the State could seek multiple convictions for a single possession of a thumb drive that contained multiple image files.

As has been noted, the Double Jeopardy Clause of the Fifth Amendment protects, *inter alia*, against multiple punishments for the same offense. *Vitale*, 447 U.S. at 415. The first step in an analysis of whether multiple convictions for the same offense would violate double jeopardy is to determine the unit of prosecution for the particular offense. A "unit of prosecution" is the manner in which a criminal statute permits a defendant's conduct to be divided into discrete acts for purposes of prosecuting multiple offenses. *See Woellhaf v. People*, 105 P.3d 209, 215 (Colo. 2005). Once the legislature defines the unit of prosecution for an offense, "that prescription determines the scope of protection under the Double Jeopardy Clause." *Id; see also Sanabria v. U.S.*, 437 U.S. 54, 69-70 (1978). To determine the unit of prosecution, appellate courts look exclusively to the statutes that define the offense. *Woellhaf*, 105 P.3d at 215.

The Idaho Supreme Court has addressed the importance of the distinction of whether a course of conduct constitutes one offense or several offenses. In *State v. Major*, the Court noted the distinction is important because, "to charge a defendant with two offenses when only one was committed violates the defendant's right against double jeopardy." 111 Idaho 410, 414 (1986). The *Major* Court suggested pertinent considerations as to whether a course of conduct is a single incident, including whether the actions were undertaken as part of a common scheme or plan that reflected a single, continuing impulse or intent. *Id.*

It is worth noting the Fifth Amendment guarantees against double jeopardy are primarily a restraint on the power of the courts and prosecutors based upon principles of separation of powers. *See Brown v. Ohio*, 432 U.S. 161, 165 (1977). Once the legislature has defined the scope of an offense and fixed the punishment for it, "courts may not impose more than one

punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Id.*

With these principles in mind, Mr. Gillespie asserts there is no evidence of any legislative intent to permit multiple charges to issue under former Section 18-1507A where a defendant is in possession of multiple images contained on a single thumb drive. The clearest indication of this can be found in the language of former Section 18-1507A itself. The text of this statute, as it existed at the time of Mr. Gillespie's charged offense, contained within it a statement of the legislature's purpose in enacting this former provision:

> It is the policy of the legislature in enacting this section to protect children from the physical and psychological damage caused by their being used in photographic representations of sexual conduct which involves children. It is, therefore, the intent of the legislature to **penalize the possession of photographic representations** of sexual conduct which involves children in order to protect the identity of children who are victimized by involvement in the photographic representations, and to protect children from future involvement in photographic representations of sexual conduct.

I.C. § 18-1507A(1) (Repealed).

What is notable about this statement of intent is the repeated use of the phrase "photographic representations," with regard to the unit of prosecution. Idaho Courts have previously interpreted the use of the plural form, when defining the unit of prosecution for an offense, to interpret the statute to mean that multiple acts will only constitute a single offense under the statute. *See, e.g., State v. Stewart*, 149 Idaho 383, 390-392 (2010). In indicating that the legislative purpose was to define the offense of possessing sexually exploitative material in terms of possessing photographic **representations**, rather than possessing **each** photographic representation, the legislature has expressed its intent that a single act of possessing multiple images constitutes a single unit of prosecution.

Moreover, the unit of prosecution subsequently defined for this offense is the act of "possession." I.C. § 18-1507A(2) (Repealed). In this case, Mr. Gillespie was not charged with repeated acts of possession at different times – he was charged with the single possession of one thumb drive that contained multiple images. *See Girard v. State*, 883 So.2d 717, 719-723 (Ala. 2003) (finding that single possession of multiple obscene images on a single computer disk would only support one conviction for possessing obscene matter where the statute at issue set forth the criminal action as possession).

Additionally, the statute defining the offense of possession of sexually exploitative material at the time Mr. Gillespie was alleged to have committed this offense defined the unit of prosecution as possession of "any sexually exploitative material." I.C. § 18-1507A(1) (emphasis added). There are two items of significance in this definition – the use of the term "any" to modify the phrase "sexually exploitative material," and the use of the term "material" itself as a collective noun. The United States Supreme Court in *Bell v. United States* explained why the inclusion of the term "any," in defining the scope of the unit of prosecution, has significance in determining the unit of prosecution. *See Bell v. United States*, 349 U.S. 81, 82-84 (1955).

In *Bell*, the defendant was charged with two counts of violating the Mann Act based upon his act of transporting two women across state lines for an immoral purpose. *Bell*, 349 U.S. at 82. While there were two women involved in the transportation, there was only one trip with all three parties traveling across state lines within the same vehicle. *Id.* The Mann Act criminalized the knowing interstate transportation of "**any** woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." *Id* (emphasis added). Based upon this language, the U.S. Supreme Court determined that Congress had not clearly expressed the intent to fix multiple punishments where there were multiple women transported, but only one act of actual

transportation. *Id.* at 82-84. Accordingly, the Court held that lenity required this ambiguity be construed in the defendant's favor and against the imposition of multiple punishments against the defendant. *Id.*

The principles set forth by the Court in *Bell* have been recently applied by the Supreme Court of Missouri when that court was confronted with an issue virtually identical to the one presented to this Court. *See State v. Liberty*, 370 S.W.3d 537, 546-553 (Mo. 2012). In *Liberty*, the Supreme Court of Missouri reversed seven of the defendant's eight convictions for possession of child pornography, partly because the statute in question prohibited the defendant's possession of "any obscene material," as that term was defined by statute. *Id.* (emphasis added). The *Liberty* Court held the proscription against the possession of "any" of the material defined as obscene by the statute was ambiguous, "for it could reasonably be interpreted to permit either a single prosecution or multiple prosecutions for a single possession of eight still photographs of child pornography." *Id.* at 548. Because the statute was susceptible to two interpretations, both of which were reasonable, the *Liberty* Court held the statute was ambiguous as to the unit of prosecution, and lenity therefore demanded the ambiguity be "resolved against turning a single transaction into multiple offenses." *Id.* at 548-549 (quoting *Bell*, 349 U.S. at 84).

In addition, this conclusion is in accord with that of numerous other jurisdictions that confronted with similar issues regarding the proper unit of prosecution for the possession of sexual material depicting minors. *See, e.g., Girard*, 883 So.2d at 719-724; *State v. Valdez*, 894 P.2d 708, 712-713 (Ariz. Ct. App. 1994); *State v. Muhlenbruch*, 728 N.W.2d 212, 214-216 (Iowa 2007); *State v. Donham*, 24 P.3d 750, 754-756 (Kan. Ct. App. 2001) (finding the proper unit of prosecution for double jeopardy purposes for crime of sexual exploitation of a child is each

floppy disk containing unlawful images, rather than each individual image)[7]; *Liberty*, 370 S.W.3d at 546-553; *State v. Ballard*, 276 P.3d 976, 981-985 (N.M. Ct. App. 2012); *State v. Sutherby*, 204 P.3d 916, 919-922 (Wash. 2009).

Moreover, Idaho case law involving multiplicity issues in other possession-based criminal offenses guides this Court with regard to determining the proper unit of prosecution. This Court in *Major* articulated the test for the unit of prosecution for possession-based offenses. This Court first noted the importance of determining the unit of prosecution in "crimes of possession, which involve knowledge or awareness of control over something rather than an act or omission to act." *Major*, 111 Idaho at 414. In light of these special considerations, the *Major* Court defined the test for determining the unit of prosecution for any crime of possession. That test is, "were the items possessed as part of 'a single incident or pursuant to a common scheme or plan reflecting a single, continuing [criminal] purpose or intent....'" *Id.* at 414 (alteration in the original) (quoting *State v. Lloyd*, 103 Idaho 382, 383 (1982)). After articulating this test, the Court in *Major* held the defendant committed only one offense under the statute, since her act of possession of stolen property was part of a single incident and because she received all items of the stolen property at the same time. *Id.* at 414-415.

Following the *Major* opinion, the Idaho Court of Appeals addressed a similar issue regarding the unit of prosecution for the offense of possession of stolen property where the property in question was taken from separate victims during separate burglaries. *See Brown v. State*, 137 Idaho 529, 535 (Ct. App. 2002). Despite the fact that the property was alleged to have

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[7] The statute that the defendant was convicted of in *Donham* has since been repealed by the Kansas State Legislature (along with numerous other sexual offenses under Kansas law), and the offense re-numbered and substantively revised. *See* K.S.A. 21-5510. The pertinent text of the Kansas statute operative at the time of the *Donham* Opinion, K.S.A. 21-3516(a)(2), is set forth in the *Donham* Opinion. *See Donham*, 24 P.3d at 754.

been taken from different victims at different times, the court in *Brown* determined the defendant's multiple convictions violated double jeopardy protections against multiple punishments for the same offense. *Id.* at 535-536.

The *Brown* Court reasoned the gravamen of the offense for possession of stolen property was not the taking of the property from its owner, but the subsequent possession or retention of that property once it has been unlawfully taken. *Id.* at 536. Additionally, to the extent that there was any ambiguity as to the proper unit of prosecution, the court in *Brown* held that, "the rule of lenity compels us to construe it in favor of the accused." *Id.* at 536-537.

As was the case in *Major*, the evidence in this case shows Mr. Gillespie received the thumb drive containing the images at issue as part of a single incident in which all of the images were received at the same time. *See Major*, 111 Idaho at 414. And, just as was the case for the offense at issue in *Brown*, the gravamen of the offense for Mr. Gillespie's charges of possessing sexually exploitative material for a non-commercial purpose is the act of the possession itself – it does not involve actual production or taking of the images at issue. *See Brown*, 137 Idaho at 536. As such, and consistent with controlling case law regarding determinations of the unit of prosecution for possession-based offenses, Mr. Gillespie could only be charged with one count of possession of sexually exploitative material for a non-commercial purpose.

Finally, it is apparent the Idaho Legislature is aware of how to set forth its own intent to authorize multiple punishments for contemporaneous violations of the same statute, as there are numerous examples of where the legislature has done so. For example, in the statutes at issue in *Bryan*, the legislature incorporated within the statute express language permitting multiple convictions for more than one violation of the same statute – even when the multiple violations are committed at the same time. *See* I.C. § 49-1013(4); *Bryan*, 145 Idaho at 617. Similarly, the

legislature has established by statute, that the penalties for manufacture or delivery of a controlled substance where children are present are to be in additional to any other fine or term of imprisonment for any other offense, "regardless of whether the violation of the provisions of this section and any of the other offenses have arisen from the same act or transaction." *See* I.C. § 37-2737A(5); *State v. Osweiler*, 140 Idaho 824, 825-827 (2004).

Although the Idaho legislature is cognizant and capable of setting forth its intent to permit multiple convictions based upon the same underlying action or transaction, the legislature has never expressed any intent to authorize cumulative punishments for a single possession of a data storage device containing multiple image files. Accordingly, the multiple convictions entered against Mr. Gillespie for possessing sexually exploitative material for a non-commercial purpose violated the protections afforded by the Fifth and Fourteenth Amendments against double jeopardy, and the district court erred when it determined otherwise.

IV.

The District Court Abused Its Discretion In 39426 When It Revoked Mr. Gillespie's Probation And Executed His Sentence Of Ten Years, With Two Years Fixed, For His Conviction Of Possessing Sexually Exploitative Material For A Non-Commercial Purpose

Mr. Gillespie asserts the district court abused its discretion when it revoked his probation and executed his sentence of ten years, with two years fixed, because this sentence is excessive. The standards of this Court's review for such claims on appeal are set forth in the Idaho Court of Appeals' Opinion in *State v. Hoskins*:

> When a trial court revokes a defendant's probation, the court possesses authority under I.C.R. 35 to *sua sponte* reduce the sentence. The decision whether to do so is committed to the discretion of the court. Rule 35 also allows the defendant to file a motion for reduction of a sentence within fourteen days after issuance of an order revoking probation, and Hoskins filed such a motion here. A motion for a sentence reduction under this rule is essentially a request for leniency which is addressed to the sound discretion of the sentencing court. On appeal, our criteria

> for review of rulings on Rule 35 motions are the same as those applied in determining whether the original sentence was reasonable. The defendant bears the burden of showing that the sentence is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution. Our focus on review is upon the nature of the offense and the character of the offender. When we review a sentence that is ordered into execution following a period of probation, we do not base our review upon only the facts existing when the sentence was imposed. Rather, we examine all the circumstances bearing upon the decision to revoke probation and require execution of the sentence, including events that occurred between the original pronouncement of the sentence and the revocation of probation.

State v. Hoskins, 131 Idaho 670, 672 (Ct. App. 1998) (internal citations omitted).

Given the compelling nature of the mitigating evidence in this case – and, in particular, Mr. Gillespie's own shocking history of personal victimization and abuse – Mr. Gillespie asserts that the district court's sentence of ten years, with two years fixed, is excessive and therefore constitutes and abuse of the court's discretion.

The extent of the abuse suffered by Mr. Gillespie was apparent from the earliest stages in this case. Mr. Gillespie was targeted by bullies during his sixth grade year in school. (Presentence Investigation Report (*hereinafter,* PSI), p.19.) One of his peers started a series of rumors that Mr. Gillespie was homosexual. (PSI, p.19.) This bullying escalated to the point where Mr. Gillespie was actually stabbed in his torso with a pencil and then choked by another student. (PSI, p.19.) His school did little to intervene – one counselor told him to just ignore the torments of his peers, and the student who stabbed and choked him was only suspended from school for a couple of days. (PSI, p.19.) Mr. Gillespie did not have any friends among his peer group. (PSI, p.19.) Eventually, the bullying got so bad that one of his teachers intervened and approached the vice-principal at Mr. Gillespie's school. (PSI, p.19.) Unfortunately, the bullying never stopped and Mr. Gillespie eventually snapped and made several bomb threats against the school. (PSI, p.19.) These threats were purely empty from Mr. Gillespie's point of view – in his

words, "(he) didn't have a bomb and wouldn't know how to make one if (his) life depended on it." (PSI, p.19.)

While attempting to cope with the threats and violence that he faced from the other students at his school, Mr. Gillespie was also being raped and prostituted by older high school students when he was approximately twelve or thirteen years old. (PSI, p.83.) One student in particular arranged for men ranging in age from 20-50 years old to have sex with Mr. Gillespie, and this older teenager then profited from this abuse. (PSI, p.90.) Mr. Gillespie eventually began to engage in prostitution of his own initiative at around fourteen or fifteen years old. (PSI, p.83.) On several occasions, the men Mr. Gillespie was paid to have sex with would also physically beat him during the course of their encounters. (PSI, p.90.)

This sexual abuse expanded from direct, personal encounters to performing sexual acts for money on the internet. (PSI, p.90.) The same older student who was prostituting Mr. Gillespie established a website that sold and displayed photographs and videos of Mr. Gillespie performing sexual acts, as well as providing live webcam sessions for money. (PSI, p.90.) By his estimate, Mr. Gillespie probably did "webcam shows" three or four times a week from the time he turned thirteen. (PSI, p.24.)

Likely as a result of the trauma and abuse visited upon Mr. Gillespie in his most formative years, Mr. Gillespie presently suffers from a host of mental conditions and disorders. Among his reported diagnoses are depression, anxiety disorders, post-traumatic stress disorder, and attachment disorder. (PSI, p.71.) Mr. Gillespie suffers from several panic attacks a month, which involve debilitating symptoms such as shaking, an inability to move, rapid heart rate, and difficulty breathing. (PSI, p.84.) He has recurrent nightmares in which he re-lives his abuse as a result of his post-traumatic stress disorder. (PSI, p.84.)

The district court also heard testimony directly from Richard Meyers, who performed the psycho-sexual evaluation during Mr. Gillespie's initial sentencing hearing. (Tr., p.35, Ls.9-22.) Given Mr. Gillespie's past history of being sexually abused by older men on the internet, Mr. Meyers testified unequivocally that incarceration in Mr. Gillespie's case would be of no real value in terms of protection of society, and would almost certainly damage Mr. Gillespie further. (Tr., p.48, L.22 – p.50, L.5.) This conclusion was likewise reflected in the second PSI that was prepared for use in the court's joint disposition and sentencing hearings in 39426 and 39427. The presentence investigator stated bluntly his belief that, if Mr. Gillespie were to be incarcerated rather than placed in the retained jurisdiction program, "he will be victimized again." (PSI, p.79.)

Sadly, Mr. Gillespie did not have the nurturing and support from his natural parents that might have shielded him from his victimization as a teenager. His mother died when he was only a toddler and Mr. Gillespie had no contact with his father from the time he was four years old. (PSI, p.4.) According to the psycho-sexual evaluator in Mr. Gillespie's case, being essentially abandoned by his parents prevented Mr. Gillespie from being able to mature – both cognitively and emotionally – in a healthy manner and ultimately contributed to his underlying offense. (Tr., p.39, L.11 – p.40, L.2.)

Despite all of the distortions to Mr. Gillespie's cognitive and emotional well-being that were caused by his horrific childhood, Mr. Gillespie has, as an adult, finally achieved some insight into his underlying offenses. According to his psycho-sexual evaluator, he has acknowledged and expressed remorse for his actions. (PSI, p.95.) As important, Mr. Gillespie now appears to recognize the serious need for him to receive treatment to address the predilections that led to his offenses. (PSI, p.95.) The acceptance of responsibility, expression

of remorse, and recognition of the need for fundamental self-change are all critical indicators of Mr. Gillespie's rehabilitative potential. In recognizing the corner that had been turned by Mr. Gillespie, the psycho-sexual evaluator noted, "this may be an opportune moment for placement of Mr. Gillespie back on probation," although this recommendation was made with significant and strict caveats regarding the level of treatment and supervision that Mr. Gillespie would require.

The district court's aggregate, unified sentence of ten years represents the statutory maximum the court could impose for possessing sexually exploitative material for a non-commercial purpose. *See* I.C. § 18-1507A (Repealed). Although the court only ordered two years of this sentence to be fixed, it should be remembered the court also ordered each of Mr. Gillespie's sentences (all of which were ten years, although with lesser fixed terms) to be served consecutively. Particularly in light of the uniquely compelling mitigation that is present in this case, Mr. Gillespie respectfully submits the district court's sentence upon revoking his probation in 39426 was excessive, and therefore constituted an abuse of the court's discretion.

V.

The District Court Imposed Excessive Sentences, And Thereby Abused Its Discretion, When It Sentenced Mr. Gillespie To Ten Years, With Three Years Fixed, For Each Count Of Possessing Sexually Exploitative Material In 39427; With These Sentences To Be Served Consecutively To Each Other And To Mr. Gillespie's Sentence In 39426

Where a defendant contends the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Gillespie does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Gillespie must show in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead,* 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown,* 121 Idaho 385 (1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo,* 136 Idaho 138 (2001)).

While it is within the trial court's discretion to determine whether to run multiple sentences of consecutively or concurrently, special scrutiny on the part of the appellate courts applies where the trial court opts to execute consecutive sentences. *See, e.g., State v. Dunnagan*, 101 Idaho 125, 126 (1980); *Cook v. State*, 145 Idaho 482, 486-490 (Ct. App. 2008); *State v. Whittle*, 145 Idaho 49, 52-53 (Ct. App. 2007); *State v. Alberts*, 121 Idaho 204, 207-209 (Ct. App. 1991). The Idaho Court of Appeals in *Cook* noted that whether the criminal incidents in question took place as part of the same criminal conduct or course of conduct, is an important consideration upon review of multiple sentences ordered to run consecutively. *Cook*, 145 Idaho at 489.

Although the seriousness of Mr. Gillespie's offenses should not be diminished or minimized, neither should the mitigating factors that are present in this case. By the prosecutor's

own account at Mr. Gillespie's sentencing, with regard to Mr. Gillespie's own victimization in the past and his "miserable life," the prosecutor wasn't sure if he had ever "seen or heard of a case this bad." (Tr., p.288, Ls.2-7.) These words were not hyperbolic – they were an honest and measured reaction to the tragic circumstances that Mr. Gillespie endured in his youth and that, equally tragic, led Mr. Gillespie to the current current offenses.

The horrific nature of the violence, sexual predation, rape, psychological abuse, and mental illness that Mr. Gillespie has struggled to cope with since his most formative years are set forth more fully above. *See* Point IV, *supra*. For the same reasons the district court's sentence in 39426 was excessive, the district court's additional sentences of ten years, with three years fixed, for each count of possessing sexually exploitative materials were likewise excessive in 39427. Critically for this Court, the specific determination by the district court to run each of these sentences consecutively constituted a particular abuse of discretion, as there appears to be little justification in the record doing so. *See, e.g., Alberts*, 121 Idaho at 207-209 (citing the lack of apparent justification on the part of the trial court in setting the defendant's sentences to run consecutively as an important factor in finding the underlying sentences excessive). Accordingly, Mr. Gillespie asserts the district court's sentences imposed in this case are excessive, and therefore constitute an abuse of the court's discretion.

CONCLUSION

Mr. Gillespie asks this Court to grant his Petition for Review. In addition, in 39427, Mr. Gillespie asks this Court to vacate his judgment of conviction and sentences for both counts of possessing sexually exploitative material for a non-commercial purpose, with prejudice because the conduct alleged by the State was not rendered criminal under the versions of Sections 18-1507 and 18-1507A in effect at the time of Mr. Gillespie's alleged offenses. In the alternative, Mr. Gillespie requests this Court to vacate one of his convictions for possession of sexually exploitative material because the entry of two convictions violated his constitutional protections against double jeopardy.

In 39426 and 39427, Mr. Gillespie also asks that this Court reduce his sentences as this Court deems appropriate.

DATED this 11th day of April, 2014.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of April, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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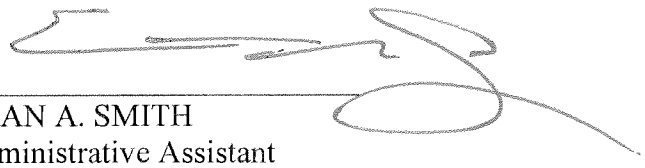

EVAN A. SMITH
Administrative Assistant

SET/eas

APPENDIX A

STATEMENT OF PURPOSE

RS21245

The purpose of this bill is to restructure the format of the child exploitation law to make it easier to follow, update definitions to more closely match technological trends that exist in today's society, and more clearly differentiate penalties based upon severity of the crime.

Definitions will now all be contained in a separate section. Some of the definitions in code are being updated to incorporate modern technology. The vast majority of materials depicting the sexual exploitation of children that are exchanged, traded, downloaded and possessed are obtained by multiple methods via the Internet. The current law does not address all of these ways because of the way technology has progressed.

The current law often does not differentiate clearly between possession type crimes and other exploitation. Changes in technology have made some of these crimes much more difficult or impossible to prosecute. This legislation provides updated language that addresses multiple new ways children are being exploited, so that the charged crime(s) more accurately describe the illegal behavior and associated penalties considering the current and potential future technology.

FISCAL NOTE

There is no known negative fiscal impact to the state general fund. Local impact will vary depending on prosecutorial decisions, as is the case with other crimes.

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