

FORFEITURES – PERSONAL PROPERTY IN GENERAL:
RETURN OF NONCONTRABAND FILES INTERMINGLED
WITH CHILD PORNOGRAPHY FILES

State v. Kremer, 2018 ND 61, 907 N.W.2d 403

ABSTRACT

In *State v. Kremer*, the North Dakota Supreme Court formed two holdings that impact property forfeiture stemming from child pornography offenses. First, the court *held* that criminal defendants are not entitled to the return of noncontraband computer files located on the same computer as child pornography files. As a case of first impression in North Dakota, the court relied on federal case law, which has found that nothing in the federal child pornography statutes allows for only a portion of the property to be forfeited. Second, the court *held* that otherwise nonforfeitable property is not subject to forfeiture based solely on the risk that a criminal defendant could use it to access the Internet when his or her sentence forbids him or her to do so. The state argued that Kremer should have forfeited two devices not used to commit the crime. The state asserted that forfeiting the devices was the only way to ensure Kremer would not use the Internet as his sentence dictated. However, the court noted that the state's position ignored the fact that Kremer's sentence did not ban him from using the Internet for the rest of his life, so he was entitled to the return of the two devices. In examining federal case law to determine an area of first impression, the court set a precedent for using federal case law to determine future issues regarding property forfeiture stemming from child pornography offenses. Of significance to North Dakota legal practitioners, federal case law has not only examined technology forfeiture but has also determined that real property may be forfeited when used in child pornography offenses. If the North Dakota Supreme Court were to face an issue of real property forfeiture in this area, it follows that the court would likely follow the example of federal case law again. As a case of first impression, *Kremer* provides concrete guidance for North Dakota lawyers handling forfeiture issues in future child pornography cases.

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I. FACTS

In *State v. Kremer*,¹ James Kremer pleaded guilty to possessing images of sexual conduct by minors under N.D.C.C. § 12.1-27.2-04.1.² Kremer received a sentence of ten years in prison and three years of supervised probation.³ During his first year of probation following his prison sentence, Kremer’s sentence forbade him from possessing “any equipment which allows you to access the Internet.”⁴ During his subsequent years of probation, Kremer’s sentence allowed him to use the Internet only with permission from his probation officer.⁵ In his brief, Kremer argued that this condition violated his

1. 2018 ND 61, 907 N.W.2d 403.
 2. *Kremer*, 2018 ND 61, ¶ 2, 907 N.W.2d 403.
 3. *Id.*
 4. *Id.*
 5. *Id.*

First Amendment rights.⁶ The supreme court did not address this argument, though, because Kremer—who was not represented by an attorney at the forfeiture hearing—waived the issue on appeal by failing to raise it in district court.⁷

Under N.D.C.C. §§ 29-31.1-01(1) and 29-31.1-03, the state moved for forfeiture and destruction of the property involved in Kremer’s convictions.⁸ The property included two laptops, a portable hard drive, a PlayStation 3, a PlayStation 2, and an X-Box.⁹ At the forfeiture hearing, Kremer’s former roommate claimed ownership of one of the laptops and the PlayStation 3.¹⁰ As a result, the state returned both devices to him.¹¹

For the remaining devices, Kremer filed a response arguing that the state needed to preserve information unrelated to the offenses.¹² Specifically, Kremer wanted the government to preserve “all tax information, personal documents, and account information contained on these items.”¹³ Kremer contended that the computer and portable hard drive could be returned to his family after the state removed the offending material.¹⁴ He reasoned that his family could sell the devices after the state preserved the noncontraband information.¹⁵ According to Kremer, his sentence permitted the preservation of the information and sale of the devices.¹⁶

In his brief, Kremer indicated that although he did not have a college degree, he had twenty years of “professional computer experience being a repair and operation technician as well as college level courses in Information Systems and Security.”¹⁷ Additionally, Kremer alleged that programs called “shredders” were available to delete the illicit files so that the files would be unrecoverable once the state returned the property.¹⁸ He alleged that these programs should have been available to law enforcement.¹⁹ However,

6. Appellant’s Brief at ¶ 28, *Kremer*, 2018 ND 61, 907 N.W.2d 403 (No. 20170198).

7. *Kremer*, 2018 ND 61, ¶ 19, 907 N.W.2d 403.

8. *Id.* at ¶ 3.

9. *Id.*

10. *Id.* at ¶ 4.

11. *Id.*

12. *Id.* at ¶ 3.

13. *Kremer*, 2018 ND 61, ¶ 3, 907 N.W.2d 403.

14. *Id.*

15. *Id.*

16. *Id.*

17. Appellant’s Brief, *supra* note 6, at ¶ 24.

18. *Id.* at ¶ 27.

19. *Id.*

Kremer did not give testimony regarding shredders at the forfeiture hearing.²⁰ Likewise, the state's expert witness on this subject did not testify.²¹ The state's understanding from the expert witness was that a seized computer was either fully wiped or left untouched – there was no middle ground as Kremer suggested.²² Therefore, the government argued that the laptop needed to be fully wiped because it contained child pornography.²³

Ultimately, the district court ordered the forfeiture and destruction of the laptop, portable hard drive, X-Box, and PlayStation 2.²⁴ First, it concluded that Kremer used the laptop and hard drive to commit the crime. Second, it determined that the X-Box and PlayStation 2 “enable[d] the defendant to have access to the Internet, an action specifically prohibited by his Criminal Judgment.”²⁵ Kremer appealed the order to the North Dakota Supreme Court.²⁶

II. LEGAL BACKGROUND

As the presence of technology in daily life increases, the frequency of questions regarding technology also increases in court proceedings. In order to understand the court's decision and the impact of this case, four legal concepts must be explored: (1) when property is subject to forfeiture under state and federal law; (2) relevant federal case law regarding the forfeiture of the entire property or portions of the property; (3) federal case law regarding real property forfeitures; and (4) federal case law banning those convicted of child pornography crimes from accessing the Internet.

A. WHEN PROPERTY IS SUBJECT TO FORFEITURE

At issue in *Kremer* was property subject to forfeiture following a child pornography conviction under N.D.C.C. § 12.1-27.2-04.1.²⁷ A related statute, N.D.C.C. § 29-31.01(1)(a) and (b), states that “forfeitable property means . . . property that is illegally possessed . . . [and] [p]roperty that has been used or

20. See *Kremer*, 2018 ND 61, ¶ 4, 907 N.W.2d 403 (indicating Kremer's former roommate was the only person who testified at the hearing).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at ¶ 5.

25. *Id.*

26. *Kremer*, 2018 ND 61, ¶ 1, 907 N.W.2d 403.

27. *Id.* N.D.C.C. § 12.1-27.2-04.1 makes a person guilty of a class C felony “if, knowing of its character and content, that person knowingly possesses any motion picture, photograph, or other visual representation that includes sexual conduct by a minor.” N.D. CENT. CODE § 12.1-27.2-04.1 (2017). The punishment for violating N.D.C.C. § 12.1-27.2-04.1 is “a maximum penalty of five year's imprisonment, a fine of ten thousand dollars, or both.” N.D. CENT. CODE § 12.1-32-01 (2017).

is intended to be used to facilitate the commission of a criminal offense”²⁸ Likewise, under federal law, forfeitable property includes “any property, real or personal, used or intended to be used to commit or to promote the commission of such offense or any property traceable to such property.”²⁹

In other words, when a person uses property to commit a child pornography offense, that property is subject to forfeiture.³⁰ For example, in *United States v. Penry*, law enforcement officials found child pornography on the defendant’s computer and hard drive.³¹ The defendant argued that his property should have been returned because the government failed to obtain a forfeiture order.³² The court cited to a previous decision holding that “seized property, *other than contraband*, should be returned to its rightful owner once the criminal proceedings have terminated.”³³ The court determined that because the defendant used the property in the commission of a crime, the property became contraband subject to forfeiture.³⁴

B. ALL THE PROPERTY VERSUS A PORTION OF THE PROPERTY

The main issue in *Kremer* was the meaning of “property” under N.D.C.C. § 29-31.1-01(1)(a) and (b).³⁵ *Kremer* was a case of first impression for the court.³⁶ As a result, the court examined relevant federal case law to reach its decision.³⁷ Federal case law on this issue raises three main points: (1) the government must have a “legitimate reason” for keeping the property;³⁸ (2) federal statutes do not allow for only a portion of the property to be forfeited;³⁹ and (3) noncontraband files that are intertwined with contraband files are subject to forfeiture.⁴⁰

First, in *United States v. Gladding*, the defendant’s computers were seized upon conviction of child pornography charges.⁴¹ Under Federal Rule

28. N.D. CENT. CODE § 29-31.1-01(1)(a)–(b) (2017).

29. 18 U.S.C. § 2253(a)(3) (2012).

30. *United States v. Penry*, 515 F. App’x 784, 788 (10th Cir. 2013).

31. *Id.* at 786.

32. *Id.*

33. *Id.* at 787 (emphasis added) (quoting *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1212 (10th Cir. 2001)).

34. *See id.* at 787.

35. *State v. Kremer*, 2018 ND 61, ¶ 11, 907 N.W.2d 403.

36. *Id.*

37. *Id.* Forfeiture proceedings under North Dakota law are similar to forfeiture proceedings under federal law. *Id.* (citing *State v. One 1990 Chevrolet Pickup*, 523 N.W.2d 389, 394 n.3 (N.D. 1994)).

38. *United States v. Gladding*, 775 F.3d 1149, 1152 (9th Cir. 2014).

39. *United States v. Noyes*, 557 F. App’x 125, 126 (3d Cir. 2014).

40. *United States v. Wernick*, 148 F. Supp. 3d 271, 276 (E.D.N.Y. 2015).

41. *Gladding*, 775 F.3d at 1150–51.

of Criminal Procedure 41(g), a party may move for the return of seized property.⁴² The party moving for the return of property “bears the burden of proving both that the [property’s] seizure was illegal and that he or she is entitled to lawful possession of the property.”⁴³ The government has the ability to rebut by proving a “legitimate reason” for keeping the property that is “reasonable [] under all of the circumstances.”⁴⁴ One way to rebut the presumption is to prove that the property is contraband.⁴⁵ Furthermore, the difficulty and cost of segregating noncontraband files from contraband files is a “legitimate reason.”⁴⁶ As the court noted:

The Advisory Committee’s Note to Rule 41 confirms the difficulties posed by electronic data in this context: “A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs.”⁴⁷

Similarly, in *United States v. Noyes*, the defendant’s computers were subject to forfeiture as a result of a child pornography conviction.⁴⁸ The defendant requested that noncontraband files be returned to him.⁴⁹ The court denied his request.⁵⁰ Under 18 U.S.C. § 2253(a)(3) – the criminal forfeiture statute for child exploitation offenses – forfeiture is permitted for any property used or intended to be used in the commission of an offense following a conviction.⁵¹ The court reasoned that “there is nothing in the statute which indicates that only a portion of the ‘property’ can be forfeited.”⁵² Accordingly, the court denied the defendant’s request to return the noncontraband files.⁵³

Finally, when noncontraband files are intertwined with contraband files, those noncontraband files are also subject to forfeiture.⁵⁴ For example, in

42. *Id.* at 1152.

43. *Id.* (quoting *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987)).

44. *Id.* (citing other sources).

45. *Id.*

46. *Id.* at 1154.

47. *Gladding*, 775 F.3d at 1154.

48. *United States v. Noyes*, 557 F. App’x 125, 126 (3d Cir. 2014).

49. *Id.*

50. *Id.*

51. 18 U.S.C. § 2253(a)(3) (2012).

52. *Noyes*, 557 F. App’x at 127 (citing *United States v. Hull*, 606 F.3d 524, 528–29 (8th Cir. 2010)).

53. *Id.*

54. *United States v. Wernick*, 148 F. Supp. 3d 271, 276 (E.D.N.Y. 2015); *see also* *United States v. Gladding*, 775 F.3d 1149, 1150 (9th Cir. 2014) (deciding that a criminal defendant is not

United States v. Wernick, the defendant claimed that retention of noncontraband data was outside the scope of the government's warrant.⁵⁵ The court denied the defendant's motion for the return of property.⁵⁶ It reasoned:

The thought being advanced by the defendant is that non-contraband computer data is not part and parcel of the property used to commit the crime . . . but rather a separate and distinct asset . . . untainted by the criminality and, thus, non-forfeitable. However, . . . the non-contraband data is intertwined with its contraband counterparts.⁵⁷

Because the noncontraband and contraband files were intertwined, the court concluded that the defendant was not entitled to the return of the noncontraband files.⁵⁸

C. FEDERAL CASES REGARDING REAL PROPERTY FORFEITURE STEMMING FROM CHILD PORNOGRAPHY CONVICTIONS

When courts convict criminal defendants of child pornography offenses, technology is not the only property that may be subject to forfeiture.⁵⁹ In some cases, real property is subject to forfeiture as well.⁶⁰ In deciding whether real property is subject to forfeiture, courts are required to make four determinations: (1) whether the forfeiture violates the Excessive Fines Clause;⁶¹ (2) whether the property value is less than or near the amount of fines established by the legislature;⁶² (3) whether additional factors speak to the gravity of a child pornography offense;⁶³ and (4) whether there is a substantial connection between the real property and the crime.⁶⁴

First, a court has to determine whether the forfeiture violates the Eighth Amendment's Excessive Fines Clause.⁶⁵ The Eighth Amendment dictates,

entitled to the return of his or her noncontraband computer files when they are intermingled with child pornography files).

55. *Wernick*, 148 F. Supp. 3d at 273.

56. *Id.* at 277.

57. *Id.* at 276.

58. *Id.*

59. See *United States v. Hull*, 606 F.3d 524, 530 (8th Cir. 2010); *United States v. Chase*, 250 F. Supp. 3d 1, 4 (W.D.N.C. 2017), *appeal docketed*, No. 17-4675 (4th Cir. Nov. 1, 2017); *United States v. Young*, No. 5:96-CR-2(DF), 2001 WL 1644658, at *1 (M.D. Ga. Dec. 21, 2001); *United States v. Ownby*, 926 F. Supp. 558, 566 (W.D. Va. 1996).

60. See *Hull*, 606 F.3d at 530; *Chase*, 250 F. Supp. 3d at 4; *Young*, 2001 WL 1644658, at *1; *Ownby*, 926 F. Supp. at 566.

61. *Young*, 2001 WL 1644658, at *1.

62. *Id.* at *2.

63. See *Ownby*, 926 F. Supp. at 564–65.

64. *Hull*, 606 F.3d at 527.

65. *Young*, 2001 WL 1644658, at *1.

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁶⁶ To illustrate, in *United States v. Young*, the court found the defendants guilty of charges stemming from the sexual exploitation of minors.⁶⁷ The jury concluded that the Child Protection Act of 1984 called for the forfeiture of the defendants’ home.⁶⁸ The defendants argued that forfeiture of their home violated “the Excessive Fines Clause . . . of the Eighth Amendment because the house was not sufficiently related to the offenses committed.”⁶⁹

Before a court determines whether a forfeiture is excessive, it must first resolve whether that forfeiture is a fine implicating the Excessive Fines Clause.⁷⁰ For Eighth Amendment purposes, forfeitures are fines “if they constitute punishment for an offense.”⁷¹ The court in *Young* decided the home forfeiture was indeed a punishment for the child pornography offense committed; thus, the forfeiture constituted a fine and was subject to limitation by the Excessive Fines Clause.⁷²

Once a court finds that the Excessive Fines Clause is applicable, it must weigh the gravity of the offense against the fine imposed. Although a child pornography offense is unquestionably grave, that gravity alone does not give the government the power of unlimited forfeiture.⁷³ Therefore, a court can compare the value of the property to be forfeited with the amount of fines established by Congress.⁷⁴ If the property value is less than or near the amount of the fines established by Congress, the forfeiture is constitutional.⁷⁵ In *Young*, the defendants’ property was worth less than the fines they faced for their convictions.⁷⁶ As a result, the court held that the forfeiture of the defendants’ home did not violate the Excessive Fines Clause.⁷⁷

66. *Id.* at *1 (quoting U.S. CONST. amend. VIII).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Young*, 2001 WL 1644658, at *1 (quoting *United States v. Bajakajian*, 524 U.S. 321, 328 (1998)).

72. *Id.*

73. *Id.* at *2.

74. *Id.*

75. *See id.*

76. *Id.*

77. *Young*, 2001 WL 1644658, at *2; *accord* *United States v. Hull*, 606 F.3d 524, 526 (8th Cir. 2010) (“The [district] court said it was ‘comfortable’ that the forfeiture was not a grossly disproportionate penalty in violation of the Excessive Fines Clause, because Hull’s equity in property did not exceed the maximum applicable fine.”); *United States v. Ownby*, 926 F. Supp. 558, 563 (W.D. Va. 1996) (holding forfeiture of the Defendant’s home was constitutional because his property was valued at \$88,737 and he faced statutory fines of \$750,000).

Similarly, in *United States v. Ownby*, the court examined several factors that speak to the gravity of a child pornography offense.⁷⁸ In *Ownby*, under 18 U.S.C. § 2253, the government sought forfeiture of the defendant's computer equipment and residence.⁷⁹ Like in *Young*, the defendant argued that being forced to forfeit his home would violate the Excessive Fines Clause.⁸⁰ The court analyzed several factors in deciding whether the defendant's conduct was grave: (1) whether the record suggested the defendant's conduct was egregious; (2) the number of images the defendant possessed; (3) the period of time over which the defendant engaged in the conduct; (4) the defendant's screen names; and (5) the defendant's trading of images.⁸¹ The court determined that the defendant's "conduct was not egregious" because he did not benefit financially from his criminal activity – nor did he distribute the images to the general public or invite people into his home to view them.⁸² Therefore, the defendant was less culpable, for forfeiture purposes, at least, than someone who used child pornography for financial gain.⁸³

However, other factors spoke to the egregiousness of the defendant's conduct.⁸⁴ First, the massive amount of images the defendant possessed spoke to the egregiousness of his behavior.⁸⁵ In his home, the defendant possessed approximately seventy-six floppy diskettes with 1612 images in total.⁸⁶ Of those 1612 images, 1004 depicted child pornography.⁸⁷ The court found that the high number of images "suggest[ed] a heightened level of culpability on [the defendant's] part."⁸⁸

Second, the court determined that the long period of time over which the defendant engaged in the conduct heightened the level of culpability.⁸⁹ Simply put, the defendant did not engage in the illegal behavior briefly.⁹⁰ Instead, the government demonstrated that his behavior spanned "at least a

78. *See Ownby*, 926 F. Supp. at 564–65.

79. *Id.* at 560.

80. *Id.* at 561.

81. *See id.* at 564–65.

82. *Id.*

83. *See id.* ("Ownby is not nearly as culpable as individuals who, for example, operate obscene bulletin board businesses for profit.").

84. *Ownby*, 926 F. Supp. at 565.

85. *Id.*

86. *Id.* at 561.

87. *Id.*

88. *Id.* at 565; *cf.* *United States v. Hull*, 606 F.3d 524, 530 (8th Cir. 2010) (noting the defendant possessed 262 child pornography images, so the court concluded "that the harm caused by [his] conduct was [not] minimal").

89. *Ownby*, 926 F. Supp. at 565.

90. *Id.*

year and a half to two years.”⁹¹ Third, the Defendant used various “screen names.”⁹² In one instance, he posed as a thirteen-year-old girl and persuaded an underage male to send the defendant a letter and photo of himself.⁹³ Fourth, the defendant’s trading of child pornography heightened his level of culpability.⁹⁴ Although the defendant did not benefit financially from trading child pornography, he traded it nonetheless.⁹⁵ Instead of simply possessing the images, he shared them with others via the Internet.⁹⁶ In doing so, “[the defendant] helped supply a market of illegal wares and, perhaps, expanded its geographic and popular reach.”⁹⁷ Because these factors were present, the court held that the forfeiture of the defendant’s home did not violate his Eighth Amendment rights.⁹⁸

Finally, to demonstrate that forfeiture is appropriate, “the government must also show a substantial connection between real property and the child pornography offenses, although the property need not be ‘indispensable’ to the crimes.”⁹⁹ For example, in *United States v. Hull*, the court convicted the defendant of child pornography offenses under 18 U.S.C. § 2252(a)(1).¹⁰⁰ The district court ordered the defendant to forfeit his real property, which included a house and nineteen acres of land.¹⁰¹ The defendant appealed the district court order.¹⁰² He contended that his house should not have been subject to forfeiture, and even if it was, the acreage should have been excluded from the order because he did not use it to commit the crime.¹⁰³

However, the Eighth Circuit Court of Appeals disagreed and found that the real property enabled him to commit the offenses.¹⁰⁴ The defendant used his desktop computer, which was located in his house, to transmit child pornography.¹⁰⁵ The house enabled the defendant’s computer to be hardwired to the Internet.¹⁰⁶ The Internet connection was necessary to the defendant’s

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Ownby*, 926 F. Supp. at 565.

96. *Id.*

97. *Id.*

98. *Id.* at 566.

99. *United States v. Hull*, 606 F.3d 524, 527 (8th Cir. 2010).

100. *Id.* at 525.

101. *Id.*

102. *Id.* at 526.

103. *Id.* at 527.

104. *See id.* at 527–28 (“The evidence showed a substantial connection—not merely an incidental or fortuitous relationship—between the real property and the offenses.”).

105. *Hull*, 606 F.3d at 526.

106. *Id.*

ability to transmit the images.¹⁰⁷ Indeed, the house enabled the defendant to transmit the contraband in privacy rather than in a public setting, such as a library or coffee shop.¹⁰⁸ This in turn “made it easier for [the defendant] to conceal his crimes from public scrutiny.”¹⁰⁹

Even so, the defendant argued that the statute allowed for division of the property to exclude the nineteen acres of land from the forfeiture order.¹¹⁰ Again, the appellate court disagreed.¹¹¹ First, the defendant’s house and acreage was conveyed as a whole, so it would be a single piece of “property” under the statute.¹¹² Second, the court determined that “nothing in the statute allows the court to order forfeiture of less than this ‘property’” as a single unit.¹¹³ Consequently, due to the substantial connection between the property and the offenses as well as the statutory inability to subdivide the property, the court held the entirety of the acreage was subject to forfeiture.¹¹⁴

D. BANNING INTERNET ACCESS

The defendant in *Kremer* also argued that his probation condition prohibiting him from accessing the Internet violated his First Amendment rights. While the North Dakota Supreme Court did not address this issue here, the Eighth Circuit Court of Appeals has done so. For example, in *United States v. Wiedower*,¹¹⁵ the court convicted the defendant of possessing child pornography.¹¹⁶ Among other things, the defendant appealed the portion of his sentence barring him from using a computer whether or not it was connected to the Internet.¹¹⁷ The court sided with Wiedower, reasoning that it could not uphold “such a broad ban on an ‘important medium of communication,

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Hull*, 606 F.3d at 526.

112. *Id.* at 528.

113. *Id.*

114. *See id.* at 529; *see also* *United States v. Chase*, 250 F. Supp. 3d 1, 3 (W.D.N.C. 2017), *appeal docketed*, No. 17-4675 (4th Cir. Nov. 1, 2017) (holding the Defendant’s residence was subject to forfeiture because he accessed the email account, PayPal account, and server needed to transmit child pornography from the privacy of his residence); *United States v. Young*, No. 5:96-CR-2(Df), 2001 WL 1644658, at *2 (M.D. Ga. Dec. 21, 2001) (citing *United States v. 1181 Waldorf Drive*, 900 F. Supp. 1167, 1173 (E.D. Mo. 1995)) (“The loss of his home weighs little compared to the harmful reach of his moral depravity. . . . Given the close association between his house and his criminal activities, forfeiture of his entire interest in the house is not excessive.”).

115. 634 F.3d 490 (8th Cir. 2011).

116. *Wiedower*, 634 F.3d at 492.

117. *Id.*

commerce, and information-gathering.”¹¹⁸ The court found that the ban was an abuse of discretion because the defendant only possessed child pornography and did not sell, transfer, or produce it – in which case the ban would have been appropriate.¹¹⁹

III. ANALYSIS

In *State v. Kremer*, the North Dakota Supreme Court held that criminal defendants are not entitled to the return of noncontraband computer files that are mixed with contraband computer files.¹²⁰ The court examined the meaning of “property” under the forfeiture statute as well as federal case law to reach its decision.¹²¹ Additionally, the court held that otherwise nonforfeitable property is not subject to forfeiture based solely on the risk that a criminal defendant could use it to access the Internet when his or her sentence forbids him or her to do so.¹²²

A. THE MAJORITY OPINION

On February 22, 2018, the North Dakota Supreme Court decided the outcome of *State v. Kremer*.¹²³ The court decided in favor of the Appellee on the first issue in deciding that “property” under the forfeiture statute included both contraband and noncontraband computer files.¹²⁴ On the second issue, the court decided in favor of the Appellant, deciding that the district court erred “in ordering forfeiture and destruction of [Kremer’s] X-Box and PlayStation.”¹²⁵ Chief Justice VandeWalle wrote the majority opinion.¹²⁶

1. *Meaning of the Term “Property”*

The first issue raised was whether “the district court [erred] in ordering forfeiture and destruction of [Kremer’s] laptop and portable hard drive.”¹²⁷ Kremer argued that the court should have allowed him to present evidence on the process of deleting illicit files so they could not be recovered while

118. *Id.* at 495 (quoting *United States v. Crume*, 422 F.3d 728, 633 (8th Cir. 2005)).

119. *Id.* (citing *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005)).

120. *State v. Kremer*, 2018 ND 61, ¶ 14, 907 N.W.2d 403.

121. *Id.* at ¶ 11.

122. *Id.* at ¶ 17.

123. *Id.* at ¶ 21.

124. *Id.* at ¶ 14.

125. *Id.* at ¶ 18.

126. *Kremer*, 2018 ND 61, ¶ 21, 907 N.W.2d 403.

127. *Id.* at ¶ 11.

preserving other files that did not contain illegal images.¹²⁸ He wanted to use this process to preserve important information, such as tax and bank records, unrelated to child pornography on his devices.¹²⁹

As previously mentioned, the court relied on federal case law to reach its conclusion because this was a case of first impression.¹³⁰ First, in *Noyes*, the court held “there is nothing in [18 U.S.C. § 2253(a)(3)] which indicates that only a portion of the “property” can be forfeited,” and therefore, “the computers as a whole, including all of their files and programs, were subject to the forfeiture order.”¹³¹ Second, in *Wernick*, the court held that the statute did not require that forfeited property be divided into groups based on its function.¹³² Third, federal courts had held that nothing in the statute allowed for only a portion of property to be forfeited.¹³³ Therefore, the court explained that a computer containing contraband, and by extension everything contained on that computer, was subject to forfeiture.¹³⁴ The North Dakota Supreme Court agreed with the federal courts’ conclusions that “property” in this sense included both contraband and noncontraband computer files.¹³⁵ Consequently, the court held that the district court did not err “in ordering forfeiture and destruction of Kremer’s laptop and portable hard drive.”¹³⁶

2. *Forfeiture of Property Not Used to Commit the Crime*

The second issue raised in *Kremer* was whether “the district court [erred] in ordering forfeiture and destruction of [Kremer’s] X-Box and PlayStation.”¹³⁷ Under N.D.C.C. § 29-31.01(1)(a) and (b), Kremer argued that his X-Box and PlayStation were not subject to forfeiture because he possessed them legally and he did not use them to download or store images of

128. *Id.* at ¶ 10.

129. *Id.*

130. *Id.* at ¶ 11.

131. *Id.* at ¶ 12 (quoting *United States v. Noyes*, 557 F. App’x 125, 127 (3d Cir. 2014)).

132. *Kremer*, 2018 ND 61, ¶ 12, 907 N.W.2d 403; *see also* *United States v. Gladding*, 775 F.3d 1149, 1150 (9th Cir. 2014) (holding a criminal defendant is not entitled to return of his or her noncontraband files “when he [or she] has intermingled those files with his [or her] child pornography files”).

133. *See Kremer*, 2018 ND 61, ¶¶ 12–13, 907 N.W.2d 403.

134. *See id.* In *Kremer*, the government believed it was either a full wipe of the laptop or nothing, *see id.* at ¶ 4, because the time spent separating the files would have been difficult and costly. *See Gladding*, 775 F.3d at 1154. Therefore, the difficulty and costliness of preserving Kremer’s noncontraband files would likely have been a “legitimate reason” for the government to keep Kremer’s devices. *See id.*

135. *Kremer*, 2018 ND 61, ¶ 14, 907 N.W.2d 403.

136. *Id.*

137. *Id.* at ¶ 15.

child pornography.¹³⁸ At the district court hearing, the state argued that forfeiture of these items was the only way to ensure that Kremer could not access the Internet upon his release from prison.¹³⁹ However, the court noted that the state's position ignored the fact that Kremer was not restricted from using the Internet for the rest of his life, only for the duration of his probation.¹⁴⁰ Furthermore, the state "cited no authority for the proposition that the possibility a defendant might use otherwise unforfeitable property in an unlawful manner after completion of his criminal sentence renders the property forfeitable."¹⁴¹ As a result, the court held that the district court erred when it ordered the forfeiture of two of Kremer's devices that he did not use to commit the child pornography offense.¹⁴²

IV. IMPACT

Kremer undoubtedly will impact future defendants convicted of child pornography offenses. North Dakota prosecutors, too, should heed *Kremer's* holdings before moving for the forfeiture of a defendant's property. Specifically, Internet prohibition, alternatives to computer forfeiture, and North Dakota's reliance on federal forfeiture laws will influence the outcome of these cases.

A. INTERNET PROHIBITION

As mentioned before, Kremer's sentence forbade him from possessing devices that allowed him to access the Internet during his first year of probation.¹⁴³ In his brief, Kremer argued that this condition violated his First Amendment rights.¹⁴⁴ The court did not address this argument because Kremer waived the issue by failing to raise it in district court.¹⁴⁵

Although not addressed by the supreme court, the probation term is still important to discuss. The Internet is becoming more and more vital to everyday life. People use the Internet to apply for jobs, make medical appointments, shop for groceries, etc. As Kremer's brief asserted, people are even able to access the Internet with what we now consider old styles of cell

138. *Id.* at ¶ 16.

139. *Id.*

140. *Id.* at ¶ 17.

141. *Kremer*, 2018 ND 61, ¶ 17, 907 N.W.2d 403.

142. *Id.* at ¶ 18.

143. *Id.* at ¶ 2.

144. Appellant's Brief, *supra* note 6, at ¶ 28.

145. *Kremer*, 2018 ND 61, ¶ 19, 907 N.W.2d 403.

phones.¹⁴⁶ Importantly, people also use the Internet to access bank accounts, tax records, and other sensitive personal financial information. The reliance that society places on the Internet could have detrimental consequences for those banned from using it.

Similar to the *Wiedower* case, the court convicted Kremer of possessing child pornography.¹⁴⁷ Notably, though, the court did not convict Kremer of selling, transferring, or producing child pornography – which by the Eighth Circuit’s reasoning should have prevented his sentence from banning Internet access.¹⁴⁸ Had Kremer not waived the issue, he likely could have prevailed with the argument that he was not subject to such an Internet ban because he did not sell, transfer, or produce child pornography.¹⁴⁹ North Dakota criminal defense attorneys should be aware of this line of argument for future forfeiture cases.

B. ALTERNATIVES TO COMPLETE COMPUTER FORFEITURE

Although the supreme court did not fully explore the issue of alternative ways to return Kremer’s property, federal cases have looked at alternative methods.¹⁵⁰ The court in *Gladding* suggested that “the district court . . . require Gladding to pay the costs of segregation by having his expert review the electronic storage devices and copy the non-contraband files to the extent otherwise permissible by law.”¹⁵¹ If the defendant paid for the segregating of contraband and noncontraband files, the government’s cost and effort would be lessened, if not eliminated outright.¹⁵² Therefore, the difficulty and cost of segregating files would likely no longer be a “legitimate reason” for forfeiture of noncontraband files.¹⁵³ As the court in *Gladding* suggested, Kremer could have been required to hire an expert and pay the expert to “review the electronic storage devices and copy the non-contraband files to the extent otherwise permitted by law.”¹⁵⁴ If Kremer had paid to segregate the files,

146. Appellant’s Brief, *supra* note 6, at ¶ 35.

147. *Kremer*, 2018 ND 61, ¶ 2, 907 N.W.2d 403; *see also* United States v. *Wiedower*, 634 F.3d 490, 492 (8th Cir. 2011).

148. *See Kremer*, 2018 ND 61, ¶ 2, 907 N.W.2d 403.

149. *See id.*; *see also Wiedower*, 634 F.3d at 495 (holding the defendant was not subject to such a ban because he only possessed child pornography and did not sell, transfer, or produce it).

150. *E.g.*, United States v. *Gladding*, 775 F.3d 1149, 1154 (9th Cir. 2014); *Kremer*, 2018 ND 61, ¶¶ 10–14, 907 N.W.2d 403.

151. *Gladding*, 775 F.3d at 1154.

152. *See id.*

153. *See id.* at 1153–54.

154. *Id.* at 1154.

difficulty and cost would no longer have been a “legitimate reason” for the government to keep his noncontraband files.¹⁵⁵

Perhaps if Kremer had been represented by counsel, he would have had a better chance for the return of his noncontraband files.¹⁵⁶ An attorney would have had more resources and knowledge to call expert witnesses and research this issue more thoroughly. Instead, Kremer notified the district court judge through correspondence that Kremer, as a computer technician, was knowledgeable about removing the offending data so that it could not be recovered while still preserving the noncontraband files.¹⁵⁷ However, neither he nor an expert called on his behalf testified to this knowledge at the hearing, dooming the claim at both the trial and appellate level.¹⁵⁸

The lack of testimony on the subject left a few questions unanswered. First, how much time and effort would it take to remove the contraband files while preserving the noncontraband files? Second, how much would it cost to remove the files? Finally, what type of process, if any, is available for removing the files? The court will have to resolve each of these questions in a future decision.

C. NORTH DAKOTA’S RELIANCE ON FEDERAL FORFEITURE LAWS

Although the North Dakota Supreme Court has not faced the issue of real property forfeiture stemming from child pornography charges, the court likely will face this issue in the future.¹⁵⁹ The court heavily relied on federal case law to decide *Kremer*, so examining federal case law regarding real property forfeiture is important.¹⁶⁰

Had the government sought forfeiture of Kremer’s real property also, this case could have turned out differently. In contrast to the above-mentioned federal cases in which real property was forfeited,¹⁶¹ Kremer did not own the residence where he was living.¹⁶² However, hypothetically, if Kremer had owned the real property, the court could have relied on federal case

155. *See id.* at 1153–54.

156. *See State v. Kremer*, 2018 ND 61, ¶¶ 6–8, 907 N.W.2d 403.

157. *Id.* at ¶ 3.

158. *See id.* at ¶ 4 (noting only Kremer’s former roommate testified at the hearing).

159. *See id.* at ¶ 11 (noting this case was a case of first impression).

160. *See id.*

161. *See United States v. Hull*, 606 F.3d 524, 530 (8th Cir. 2010); *United States v. Chase*, 250 F. Supp. 3d 1, 4 (W.D.N.C. 2017), *appeal docketed*, No. 17-4675 (4th Cir. Nov. 1, 2017); *United States v. Young*, No. 5:96-CR-2(Df), 2001 WL 1644658, at *2 (M.D. Ga. Dec. 21, 2001); *United States v. Ownby*, 926 F. Supp. 558, 566 (W.D. Va. 1996).

162. Appellant’s Brief, *supra* note 6, at ¶ 3.

law to determine if his real property was subject to forfeiture.¹⁶³ If Kremer accessed child pornography from his home, the state likely could have sought forfeiture of that home.¹⁶⁴ First, the court could have compared the value of Kremer's home with the amount of fines established by the North Dakota Century Code.¹⁶⁵ The decision notes that "Kremer pled guilty to three class C felony counts of possessing prohibited materials under N.D.C.C. § 12.1-27.2-04.1."¹⁶⁶ Under N.D.C.C. § 12.1-32-01, the punishment for a class C felony is "a maximum penalty of five years' imprisonment, a fine of ten thousand dollars, or both."¹⁶⁷ Therefore, Kremer could have faced a substantial fine.¹⁶⁸ If Kremer's hypothetical home was valued at less than or near the amount of the fine, forfeiture of the home would have comported with the Eighth Amendment's Excessive Fines Clause.¹⁶⁹

The court would then undertake an analysis of several factors in deciding whether Kremer's conduct was grave: (1) whether the record suggested Kremer's conduct was egregious; (2) the number of images Kremer possessed; (3) the period of time Kremer engaged in the conduct; (4) Kremer's "screen names"; and (5) Kremer's trading of images.¹⁷⁰ The court would also be tasked with determining whether the real property was connected substantially to the child pornography offenses.¹⁷¹ While none of these factors were evident in *Kremer*, they likely will be determinative in a future case regarding the forfeiture of real property for a child pornography offense. North Dakota prosecutors and defense attorneys should keep these factors in mind for subsequent cases.

V. CONCLUSION

In *State v. Kremer*, the North Dakota Supreme Court held that criminal defendants are not entitled to the return of noncontraband computer files that are intermingled with contraband computer files.¹⁷² Furthermore, the court held that otherwise nonforfeitable property is not subject to forfeiture based solely on the risk that a criminal defendant could use it to access the Internet

163. See *Kremer*, 2018 ND 61, ¶ 11, 907 N.W.2d 403.

164. See *Hull*, 606 F.3d at 530; *Chase*, 250 F. Supp. 3d at 4; *Young*, 2001 WL 1644658, at *2; *Ownby*, 926 F. Supp. at 566.

165. See, e.g., *Young*, 2001 WL 1644658, at *2.

166. *Kremer*, 2018 ND 61, ¶ 2, 907 N.W.2d 403.

167. N.D. CENT. CODE § 12.1-32-01 (2017).

168. See *id.*; *Kremer*, 2018 ND 61, ¶ 2, 907 N.W.2d 403.

169. See *Young*, 2001 WL 1644658, at *2.

170. See *United States v. Ownby*, 926 F. Supp. 558, 564–65 (W.D. Va. 1996).

171. See *United States v. Hull*, 606 F.3d 524, 527 (8th Cir. 2010).

172. *Kremer*, 2018 ND 61, ¶ 14, 907 N.W.2d 403.

when he or she is forbidden to do so.¹⁷³ Since the court relied on federal law to reach its decision in *Kremer*, it follows that the court could rely on federal law again when deciding other issues pertaining to this subject.¹⁷⁴ Both of these holdings undoubtedly will impact forfeiture decisions stemming from child pornography offenses in the future.

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173. *Id.* at ¶ 17.

174. *See id.* at ¶ 11.

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