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## Sex Crimes, Cell Phones and the Computer Fraud and Abuse Act

If anyone deserves a longer sentence, it is a sex offender who victimizes minors. But no one would ever have anticipated that a sex offender would receive extra prison time for using a basic cell phone in the furtherance of his crime. Last week the Eight Circuit Court of Appeals upheld the enhanced sentence of the defendant Neil Kramer who pleaded guilty to transporting a female minor in interstate commerce with the intent to engage in criminal sexual activity, Title 18, U.S.C. § 2423(a). Kramer's prison sentence was increased by an extra 2 1/3 years because he had used his cell phone to make calls and text messages to the victim for a six-month period leading up to the offense. *U.S. v. Kramer*, 2011 WL 383710 (8<sup>th</sup> Cir. Feb. 8, 2011). In total Kramer was sentenced to over 13 years in prison.

Under the Federal Sentencing Guidelines, the sentencing judge is permitted to increase the sentence for the crime to which Kramer pled guilty if a computer, as that term is defined by Title 18, U.S. C. § 1030 (e)(1) of the Computer Fraud and Abuse Act ("CFAA"), is used to facilitate the offense. Based on its finding that the cell phone is a computer, the court increased Kramer's sentence by 28 months.

This case illustrates the breadth with which the federal courts are interpreting the definition of a computer. Indeed, the Circuit Court quoted Steve Wozniak, the founder of Apple Computer, for the proposition that "Everything has a computer in it nowadays." *Id.* at \*1. This case not only has ramifications for increasing the length of prison sentences for federal crimes, but it also expands the reach of the CFAA, the federal computer crime statute, to ordinary cell phones.

Kramer appealed his sentence claiming "(1) that application of the enhancement was procedural error because a cellular telephone, when used only to make voice calls and send text messages, cannot be a "computer" as defined in 18 U.S.C. § 1030(e)(1), and (2) that even if a phone could be a computer, the government's evidence was insufficient to show that his phone met that definition." *Id.* The Appeals Court, however, disagreed and affirmed Kramer's sentence.

First, the court rejected Kramer's argument that a basic cell phone that was only used to make calls and text messages could not be a computer because it did not access the Internet. The court relied on the "exceedingly broad language" of § 1030(e)(1) that "[i]f a device is "an electronic ... or other high speed data processing device performing logical, arithmetic, or storage functions," it is a computer." *Id.* at \*2. The court also held that "there is nothing in the statutory definition that purports to exclude devices because they lack a connection to the Internet." *Id.*

Second, the court found that the government provided sufficient evidence that the cell phone was a computer. That proof consisted of "the phone's user's manual and a printout from Motorola's

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website describing the phone's features.” *Id.* at \*3. Thus, the court found that the evidence showed that in making calls the phone’s “processor performs arithmetic, logical, and storage functions.” *Id.* The court also found that “the phone keeps track of the ‘Network connection time,’ which is ‘the elapsed time from the moment [the user] connect[s] to [the] service provider’s network to the moment [the user] end[s] the call by pressing [the end key]’” and that “[t]his counting function alone is sufficient to support a finding that the phone is performing logical and arithmetic operations when used to place calls.” *Id.*

As to the phone’s texting function, the court further found that the phone performed the following computer functions: (1) “the phone stores sets of characters that are available to a user when typing a message” and “[a]s the user types, the phone keeps track of the user’s past inputs and displays the ‘entered text,’ . . . *i.e.*, the message being composed,” (2) “[t]he user may also delete characters previously entered, either ‘one letter at a time’ or all at once,” and (3) “the phone allows the users to ‘set different primary and secondary text entry modes, and easily switch between modes as needed when [they] enter data or compose a message,’ including “iTAP” mode which uses ‘software’ to ‘predict[ ] each word’ as it is entered.” *Id.*

It is hard to argue with the logic of this decision in light of the broad definition of a “computer” as set forth in the CFAA and thus is likely to be followed by other courts.