DISCOVERY IN CHILD PORNOGRAPHY CASES AFTER ADAM WALSH: 20 QUESTIONS

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1. What restrictions does the Adam Walsh Act place on defense access to discovery in child pornography cases?

On July 27, 2006, the Adam Walsh Child Protection and Safety Act, Pub.L.No. 109-248, 120 Stat. 587 (2006), was signed into law. One provision of that law, codified at 18 U.S.C. §3509(m) restricts defense access to property or material that constitutes child pornography. Section 3509(m) provides:

> **(m) Prohibition on reproduction of child pornography**. –
>
> **(1)** In any criminal proceeding, any property or material that constitutes child pornography (as defined by §2256 of this Title) shall remain in the care, custody and control of either the government or the court.
>
> **(2)(A)** Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate or otherwise reproduce any property or material that constitutes child pornography (as defined by §2256 of this Title) so long as the Government makes the property or material reasonably available to the defendant.
>
> **(B)** For the purposes of (A), property or material shall be deemed to be reasonably available to the defendant if the government provides ample

> opportunity for inspection, viewing, and examination at a government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

2. What was the law governing the production of this material prior to the Adam Walsh Act?

Prior to the enactment of 18 U.S.C. §3509(m), access to computer data containing child pornography was governed by Fed. R. Crim. P. 16. Under Rule 16, the government bears the burden of showing good cause to restrict discovery. Before Adam Walsh, it was not uncommon for the defense to receive a mirror image copy of the computer hard drive, subject to a protective order restricting dissemination of the material. Several cases specifically recognized the defendant's right to obtain a copy of the hard drive under Rule 16:

a. ***United States v. Hill***, 322 F. Supp. 2d 1081, 1091-93 (C.D. Cal. 2004), *aff'd on other grounds*, 459 F.3d 966 (9th Cir. 2006) (finding that the defendant would be "seriously prejudiced" if counsel and the defense expert were denied copies of the materials; emphasizing the expert's need to use his own tools in his own lab, that traveling to the government facility and obtaining permission each time the expert wanted to examine the computer was unduly burdensome, and the lawyer's need for repeated access to the evidence in preparing for trial).

b. ***United States v. Frabizio***, 341 F. Supp. 2d 47 (D. Mass. 2004) (following Hill).

c. ***United States v. Cadet***, 423 F. Supp. 2d 1 (E.D.N.Y. 2006) (ordering that defense counsel receive a copy of computer files under Fed. R. Crim. P. 16: "there is no greater risk in granting defense counsel a copy of the files for the preparation of its defense under a suitable protective order than exists in the government's maintenance and use of the files in preparation of its own case").

Other cases have upheld orders denying the defendant copies of computer data where the defendant failed to show any prejudice from the denial of such access. *See United States v. Kimbrough*, 69 F.3d 723, 731 (5th Cir. 1995); *United States v. Horn*, 187 F.3d 781, 792 (8th Cir. 1999).

3. If the statute only limits access to material or property that "constitutes child pornography," who decides if the material is child pornography?

a. Arguably, a determination that material constitutes child pornography undermines the presumption of innocence since there has been no finding beyond a reasonable doubt that the material is child pornography. *Cf. United States v. Turner*, 367 F. Supp. 2d 319, 325-26 (E.D.N.Y. 2005) (identifying persons as "crime victims" under the Crime Victim Rights Act before conviction could infringe on defendant's presumption of innocence). Thus far, courts have rejected defense claims that there must be a formal determination that the material or property constitutes child pornography. *See United States v. Battaglia*, 2007 WL 1831108 (N.D. Ohio 6/25/07) ("where, as here, there is an indictment, a federal grand jury has already found probable cause to believe that the material at issue is child pornography. That is sufficient."); *United States v. Renshaw*, 2007 WL 710239 (S.D. Ohio 3/6/07).

b. Consider whether there is any benefit to requesting a pretrial hearing or determination on whether the material constitutes child pornography (such as where the images themselves raise significant question about whether the person depicted is a minor).

c. In *Battaglia* and *Renshaw*, the requested material was the material charged as child pornography in the indictment. In some cases there will be other material that the government claims is child pornography that is not the subject of any charges and therefore has not been found by the grand jury to be child pornography.

4. Does §3509(m) prohibit the district court from ordering production of material deemed to be child pornography?

No. The statute provides that the court shall deny a defense request for the material only if "the government makes the property or material *reasonably available* to the defendant." Thus, the court should order the production of the material if it has not been made "reasonably available" for examination by the defense.

Also consider that §3509(m)(1) requires that the materials remain in the "care, custody and control" of the government or the court. Evidence that is provided to the defense under a protective order forbidding further disclosure may be considered evidence that is in the control of the court. *See, e.g.*, *United States v. Butler*, 988 F.2d 537, 543-44 (5th Cir. 1993).

5. What does "reasonably available" mean?

Under §3509(m)(2)(B), material is "reasonably available" if the government provides "ample opportunity for inspection, viewing, and examination at a government facility. "Ample opportunity" is not defined in the statute.

In *United States v. O'Rourke*, 470 F. Supp. 2d 1049, 1055-56 (D.Ariz. 2007), the court concluded that "ample" means "'generous or more than adequate in size, scope or capacity'" *(citing Webster's New Collegiate Dictionary* 39 (1981)). *See also United States v. Knellinger*, 471 F. Supp. 2d 640, 645 (E.D.VA 2007) (*citing O'Rourke* and finding that "§3509(m)(2)(B) requires, at a minimum, whatever opportunity is mandated by the Constitution; therefore, an opportunity that is 'generous' or 'more than adequate' may, in some circumstances, require more access than what would be mandated by the Constitution alone").

6. Doesn't 18 U.S.C. §3509(m) interfere with my client's rights to due process, a fair trial, effective assistance of counsel, and compulsory process?

The statute clearly creates an uneven playing field for the defense in many cases. While government experts have unlimited access to the material that is the subject of the criminal charge, defense experts must make appointments to review the material and conduct their examination under government supervision. Nonetheless, every court that has considered the issue has

determined that §3509(m) is not unconstitutional on its face because the Court may order production of a copy of the material if necessary to provide "ample opportunity" for inspection by the defense. In *Knellinger*, 471 F. Supp. 2d at 644, for example, the court held:

> while the statute does not define "ample opportunity," that term must be read to include at least every opportunity for inspection, viewing, and examination required by the constitution. If read in that way, any opportunity for inspection that falls short of that mark would enable a court to order a copy given to the defendant for inspection outside a "government facility."

Likewise in *O'Rourke*, 470 F. Supp. 2d at 1056, the court construed §3509(m) to mean that "the government must either give the defense team due-process-level access to the hard drive at a government facility or must give the defense team a copy of the hard drive. So construed, the statute is not unconstitutional." *See also United States v. Sturm*, 2007 WL 1453108 (D.Colo. 5/17/2007) (following *O'Rourke* and *Knellinger*); *United States v. Battaglia*, 2007 WL 1831108 (N.D. Ohio 6/25/07) (following *O'Rourke*, *Knellinger*, and *Sturm*); *United States v. Doane*, 2007 WL 1500301 (E.D. KY 5/21/07); *United States v. Butts*, 2006 WL 3613364 (D.Ariz. 12/6/06); *United States v. Johnson*, 456 F. Supp. 2d 1016 (N.D. Iowa 2006).

In *State v. Boyd*, 160 Wash. 2d 424, 158 P.3d 54 (2007), the court suggested that the failure to provide the defendant with a mirror image of the hard drive for independent testing by a defense expert would violate the right to effective representation and a fair trial. Although a state case, *Boyd* is worth reviewing.

Defense counsel should challenge the constitutionality of §3509(m) as applied whenever the failure to provide a copy of the material hinders the defense. As discussed below, any such challenge should specifically identify how the defendant will be harmed by denying the defense team a copy of the alleged child pornography.

7. Does §3509(m) apply if my client is charged with an offense that occurred before July 27, 2006?

E*x post facto* challenges to 18 U.S.C. §3509(m) are likely to be rejected on the ground that the provision is merely procedural. In several cases, courts have

found that the statute does not implicate *ex post facto* concerns because it does not punish the defendant for an act that was not a crime when allegedly performed nor impose greater punishment for a crime committed before the law's enactment. *E.g., United States v. Butts*; *United States v. Battaglia*.

8. Does §3509(m) violate the separation of powers doctrine?

Defense claims that §3509(m) violates the separation of powers between the legislature and the judicial branches thus far have been rejected. *Knellinger*, 471 F. Supp. 2d at 644; *Butts*, 2006 WL 3613364.

9. Has any court granted a defendant's request for a copy of the hard drive on the grounds that examination at the government facility was insufficient?

Yes. In *Knellinger*, the court ordered the government to produce a copy of the hard drive to ensure Knellinger an ample opportunity to examine it and "to give his counsel an opportunity to participate in that examination in order to evaluate its ramifications for the legal defenses Knellinger might raise."

In *Knellinger*, the court held an evidentiary hearing on the defendant's claim that examination of the computer evidence at a government facility would be inadequate. The defense presented testimony from a defense lawyer who testified that one viable defense to a child pornography charge is that real minors were not used to produce the images. The defense lawyer further testified that computer experts were essential to presenting such a defense.

Knellinger also presented testimony from two digital video experts who could analyze the images. One witness testified that it would cost him $540,000 to review the materials at a government facility as compared to $135,000 in his own office, not including transportation of the equipment. Knellinger's experts expressed doubts about their ability to transport their expensive computer equipment from Ohio to Virginia.

10. Should I raise constitutional challenges and request a copy of the hard drive in every case?

No. As a practical matter, there are cases where §3509(m)'s restrictions do not pose a hardship to the defense. Weak, unnecessary challenges will make bad law.

11. How do I demonstrate that a copy of the computer data is necessary to the defense of the case?

In a nutshell, your ability to obtain a copy of the hard drive depends on convincing the court that it is not fair to require your expert to do all his or her work in a government facility. You need to show more than inconvenience. You need to identify specifically how the failure to produce a copy of the hard drive impairs your ability to defend your client in the particular case. Often times the defense will be in a much stronger position to request production of the alleged child pornography after first attempting to review the evidence in the government facility. That is especially true as the case approaches trial and the need to constantly reexamine the evidence becomes more critical.

a. Hire an expert.

b. Conduct a preliminary review of the evidence.

c. Review all discovery.

d. Identify potential defenses.

e. Identify specific types of computer analysis that must be done to pursue your defense. *See United States v. Sturm*, 2007 WL 1453108 (D. Colo. 5/17/07) (rejecting claim that §3509(m) is unconstitutional in part because defense made no effort to examine computer data or reach accommodation with government and offered only hypothetical scenarios that would interfere with defense of case).

i. If disclosure will harm your defense, consider *ex parte* request. *See* Fed. R. Crim. P. 16(d)(1).

f. Submit affidavits from counsel and experts identifying the reasons a copy of the hard drive is essential to the defense.

i. Educate the court. Do not assume the court knows anything about conducting a computer forensic examination for the defense.

g. Be demanding about your right to review material at a government facility.

i. Agents hate babysitting defense lawyers and their experts.

ii. Very time-consuming process.

iii. Process is even more time-consuming if the agents have to transport an in-custody defendant to review the material.

h. Document in writing the problems you encounter when conducting inspection at a government facility.

i. Include details regarding time spent waiting, facilities used, restrictions set.

ii. Keep track of anything FBI does while you are there in terms of recording/keeping log of what you and your expert are doing.

iii. Keep track of what discovery is available when – sometimes new discovery materials or programs presented only after your expert was present.

iv. Present to court asking for hearing to request protective order – not given reasonable availability or ample opportunity.

i. Request an evidentiary hearing.

i. Provides an opportunity for discovery by cross-examining government's computer experts about the nature of their examination, the time it took, equipment used, time preparing reports, time consulting with prosecutors, etc.

12. What types of forensic examinations might my expert perform?

a. Data carving.

b. Identifying passwords.

c. Internet history.

d. Internet files.

e. Graphics.

f. E-mails.

g. Keyword searches.

h. The "Shadow."

i. Establishing accuracy of time stamp on computer.

j. Looking for patterns of use to identify user.

k. Comparing usage on different computers to identify user.

l. Searches for viruses.

m. Searching for remote access and evidence of hacking.

13. What is the cost of conducting the forensic examination of the computer?

Obviously each case is different. The examination often will be expensive because it is such a time-consuming process. It is fair to say it usually will be more than the $500 approved by the court in *United States v. Johnson*, 456 F. Supp. 2d 1016, 1020 (N.D. Iowa 2006), and less than the figures identified in *Knellinger*.

14. How is the defense impaired by having to examine the hard drive at a government facility?

In *State v. Boyd*, 160 Wash. 2d 424, 158 P.3d 54, 60-61 (2007), the court summarized the reasons a computer expert requires a copy of the hard drive:

> [G]iven the nature of the evidence, adequate representation requires providing a "mirror image" of that hard drive; enabling the defense attorney to consult with computer experts who can tell how the evidence made its way onto the computer. Forensic review might show that someone other than the defendant caused certain images to be downloaded. It may indicate when the images were downloaded. It may reveal how often

> and how recently images were viewed and other useful information based on where the images are stored on the device. *See* Amicus Br. of WACDL at 10-14. Expert analysis of the application or program used to acquire the images may be useful. Providing a copy enables the expert to test that application or program using the same type and version of computer operating system as was used by the defendant, a difference that may alter how the program runs, stores data, and so forth. Amicus Br. of WACDL, App.A. at 9-10. Analysis may also reveal that the images are not of children. *See, e.g., Knellinger*, 471 F. Supp. 2d at 647. This analysis requires greater access than can be afforded in the State's facility.
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> Preparation may require lengthy access even where there are few images. *See United States v. Fabrizio*, 341 F. Supp. 2d 47 (D.Mass. 2004) (defense expert needed to reconstruct government expert's work). The need for copies may flow also from constraints on experts such as access to the necessary tools and sufficient time. *See United States v. Hill*, 322 F. Supp. 2d 1081, 1091-93 (C.D. Cal. 2004) (distinguishing the demands of narcotics analysis from that of zip disks), *aff'd on other grounds*, 459 F.3d 966 (9th Cir. 2006).

Among the problems created by requiring examination of a government facility are the following:

a. **Expense** - travel, time waiting for assistance, repeated trips, inefficiency caused by inferior equipment, time wasted by the expert waiting for computer to perform tasks.

b. **Equipment problems.** I have had an out of town expert waste an entire day due to the FBI's computer crashing repeatedly.

c. **Discloses to the government the identity of your expert and the nature of his or her examination.** If the expert is required to use government equipment, his or her analysis can be discovered from the hard drive. Even disclosure of the programs the expert intends to run

to analyze the computer may alert the government to the defense theory and effectively reveal information obtained from the client.

d. **Impairs the lawyer's ability to consult with his expert.** It often is necessary for the expert to walk counsel through portions of his examination and demonstrate on the computer how he arrived at certain conclusions. This is very difficult to do in the presence of FBI agents.

e. **Exposes work product, including likely defense strategies.** The examination also may effectively disclose information received from client.

f. **Interferes with preparation by generally restricting access to business hours.** It also requires counsel and experts to set aside large blocks of time. Potential interference with client's speedy trial rights.

g. **Precludes lawyer from obtaining information from the expert quickly.** Defense counsel and the expert need to frequently revisit, reexamine, and reevaluate the computer evidence. Additional questions often arise later as additional discovery or information is received. Disparate pieces of information that may at one time seem unrelated can suddenly become important requiring further examination and analysis. When the expert has a copy of the evidence, these tasks can sometimes be performed in minutes, but they may take hours when the evidence is exclusively in government custody.

h. **Interferes with ability to prepare trial exhibits.**

i. **Severe interference with ability to prepare for trial as constant reference to the computer data is required.**

j. **In some cases, your expert's examination will educate the government's experts about techniques and methods they do not know about.**

15. Doesn't the Work Product Doctrine afford the defense a "zone of privacy" to prepare its case?

Yes. Requiring that computer data be examined at a government facility will interfere with that zone of privacy in many cases. In *Hickman v. Taylor*, the Supreme Court recognized:

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

329 U.S. 495, 510-11 (1947).

The work product doctrine grants attorneys "a zone of privacy within which to prepare the client's case and plan strategy, without undue interference." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014 (1st Cir. 1988). The work product doctrine applies in criminal as well as civil cases. *United States v. Nobles*, 422 U.S. 225, 236 (1975). "Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." *Id*. at 238.

An informative discussion concerning the work product doctrine's application in criminal cases is found in *United States v. Horn*, 811 F. Supp. 739 (D. NH. 1992). In *Horn*, the government stored 10,000 discovery documents at a private company's offices where the defendants could inspect the documents and arrange for copying. Defense counsel and an expert consultant went to review the documents for the purpose of locating material for cross-examination, preparing defense witnesses, and to develop defense trial tactics and strategy. The defense selected twenty-two pages to be copied. Unbeknownst to the defense, a extra copy of the requested documents was made for the government. The court held that the government's conduct intruded on the attorney work product privilege and the defendant's Sixth Amendment right to counsel.

Horn noted the following regarding the work product doctrine:

> Work product includes ordinary work product and opinion work product. Ordinary work product consists of documents and tangible things prepared in anticipation of litigation by or for an opposing party. In the civil context, courts generally afford ordinary work product only a qualified immunity, subject to a showing of substantial need and undue hardship. Opinion work product, consisting of the mental impressions, conclusions, opinions or legal theories of an attorney, deserves special protection.
>
> Courts have held that defense counsel's selection and compilation of documents in preparation for pretrial discovery fall within the highly-protected category of opinion work product. ...[T]he selection process itself reveals counsel's mental impressions as to how evidence relates to issues and defense in the litigation.

Horn, 811 F. Supp. at 745-46 (citations omitted).

The government's copying of the selected documents prejudiced the defense because those documents "might never have been noticed or discovered by the government from among the approximately 10,000 documents or, if noticed, their significance might never have been apparent or recognized." The same considerations come into play when a defense computer expert conducts searches for specific computer data and those searches are revealed to the government.

16. If the court orders the government to produce a copy of the hard drive, what types of restrictions will there be on my use of the material?

As the Washington Supreme Court warned in *Boyd*, 158 P.3d at 62, "[d]efense counsel is personally and professionally responsible for any 'unauthorized' distribution of or access to the evidence." If disclosure is ordered, any protective order must be scrupulously adhered to. Examples of the conditions that have been imposed in protective orders are found in many cases including *Boyd*, and *Hill*, 322 F. Supp. 2d at 1092-94, which contains a sample order.

17. If my effort to obtain a copy of the hard drive fails, what can I do to limit the prejudice to my case?

a. Your expert is likely to have suggestions on ways to keep his or her work product as confidential as possible under the circumstances, but consider the following measures:

i. Insist that the expert be permitted to perform the analysis on the expert's own equipment.

ii. Obtain a court order that allows the expert to provide a clean hard drive to be used for the analysis that will be left secured at the government facility between examinations. This procedure allows the expert to use his own equipment and programs and maintains confidentiality in his work.

iii. Obtain a court order prohibiting law enforcement agents from being present while the analysis is performed.

iv. In *United States v. Butts*, 2006 WL 3613364 (D.Ariz. 12/6/06), the court found that the following conditions ensured that the defendant received "ample opportunity" to conduct his examination:

> The government has assured Defendant and the Court that this office will be locked at all times and has offered to secure a court order for the door which would restrict access to the room, thereby protecting defense counsel's hardware and work product. The government has also made assurances that Mr. Dworkin can access the office whenever the government facility is open; can use his cell phone while working in the government-supplied office; can have a locking safe in which to store his computer and equipment when away from the facility; and can have access to the Internet while working at the facility.

18. Does the Adam Walsh Act restrict defense access to computer data in state child pornography prosecutions?

No. *See State v. Boyd*, 160 Wash. 2d 424, 158 P.3d 54, 59 n.4 (2007); *State ex rel. Tuller v. Crawford*, 211 S.W. 3d 676, 679 (Mo. Ct. App. 2007).

See also State v. Brady, 2007 WL 1113969 (Ohio Ct. App. 2007) (pursuant to protective order by state trial court, defense expert (who also was a lawyer) received a copy of the alleged child pornography. Subsequently, the FBI executed a search warrant at the expert's home and seized the material. The court of appeals affirmed the trial court's dismissal of the case against the defendant on the ground that the federal action effectively denied him the ability to retain an expert to assist in his defense). Apparently, review of the decision is pending.

19. What other resources can you recommend?

a. Ian N. Friedman and Christina Walter, *How the Adam Walsh Act Restricts Access to Evidence,* THE CHAMPION, 12 (Jan./Feb. 2007).

b. Amy Baron-Evans and Sara Noonan, http://www.fpdpaw.org/pdf/Adam-Walsh-Part01.pdf

c. Amicus Brief of Washington Association of Criminal Defense Lawyers in *State v. Boyd*, 160 Wash. 2d 424, 158 P.3d 54 (2007).

d. Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE (ABA 4th ed. 2001).

e. Craig Ball, Computer Forensics for Lawyers Who Can't Set a Digital Clock, http://www.craigball.com/CF_0807-Digital%20Clock%20article%20only.pdf

20. Were you able to come up with 20 questions about discovery and Adam Walsh?

No.