REGULATING DEFENSE DISCOVERY OF CHILD SEXUAL EXPLOITATION IMAGES

Relevant Case Law Supplement

PRE-3509(m) DECISIONS FAVORING RESTRICTED ACCESS

These courts generally accepted the rationale that because child pornography is *per se* contraband production pursuant to general discovery rules may and should be restricted. The cases do not discuss the Due Process ramifications of restricting access – either because the issue was not argued or because the court avoided it.

U.S. v. Kimbrough

69 F.3d 723 (5th Cir. 1995)

The government refused to provide copies to defense. The defendant argued a violation of Due Process and right to effective assistance of counsel. The government offered access to defense expert at Customs Service office, US Attorney's Office or defense counsel's office or to take the evidence to the defense expert's office. Defendant moved for dismissal based on violation of Rule 16. District Court denied motion and Court of Appeals upheld, finding that the defendant had not demonstrated prejudice.

U.S. v. Horn

187 F.3d 781 (8th Cir. 1999)

Rule 16 authorized court to restrict discovery and it was appropriate to do so for obvious contraband. Court left open possibility that some types of exams desired by defense may require giving copy to counsel

U.S. v. Husband

246 F. Supp. 2d 467 (E.D. Va. 2003)

Tape taken from defendant's residence is contraband and court will not order it distributed to defendant or counsel. Allowing access at government facility satisfied Rule 16. Court ordered that tape be available to defense attorney and expert on 24 hours notice and that private room and equipment be provided by government for them to view and inspect it. Defense did not have to identify their expert in advance. Relies on *Kimbrough* and *Horn*.

Florida v. Ross

792 So.2d 699 (Fla. Dist. Ct. App. 2001)

Florida discovery rules parallel Rule 16. Follows *Kimbrough*. District Court can fashion remedies to allow defense expert to view evidence without disclosing identity.

PRE-3509(m) DECISIONS REFUSING TO RESTRICT ACCESS

These cases evaluate the issue in the context of the existing discovery rules and do not address a Constitutional Due Process issue.

U.S. v. Hill

322 F. Supp. 2d 1081 (C.D. Cal. 2004)

Court *(J. Kozinski, sitting by designation)* noted material was clearly covered by Rule 16 and that *Kimbrough* line of cases stand only for proposition that the trial court does not abuse discretion when it grants restrictions to accessing contraband. That line of cases, however, does not mandate that a decision denying restrictions is an abuse of discretion. The Court found that the defendant would be "seriously prejudiced" if counsel and expert did not have copies. The government had sought an order limiting analysis at government facility under supervision of agent. Court noted government had not established that defense counsel and expert could not be trusted with material. Court rejected analogy to drugs because drugs could be analyzed in one sitting by expert – not so with digital evidence (but no showing of extended need). Extensive, detailed Protective Order is attached as an appendix.

U.S. v. Fabrizio

341 F. Supp. 2d 47 (D. Mass. 2004)

Follows *Hill*. Adopts extensive Protective Order patterned after one in *Hill*.

U.S. v. Cadet

423 F. Supp. 2d 1 (E.D. N.Y. 2006)

Government asserted that because child pornography is contraband the government was not obliged to provide it in discovery (*Kimbrough*). The Court was stinging in its rebuke of that position: "Government's bald assertion of privilege conflates its mandatory discovery obligations [under R. 16] with the right to apply to court for protective … order." R. 16 does not have a "contraband" exception.

The better practice for the government would have been to make motion for protective order, and set out rationale for government interest in restricted access overriding the defense/due process interest in full disclosure.

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Cervantes v. Cates

76 P.3d 449 (Ariz. 2003)

Adopted the approach taken in *Westerfield v. Superior Court*, 99 Cal.App.4th 994, 121 Cal.Rptr.2d 402 (4th Dist. CA Ct. App. 2002). Arizona discovery rule also patterned after Rule 16; however, Arizona rule allowing protective order mandated consideration of least restrictive alternative unlike Rule 16. Court criticized the government's reliance on *Kimbrough* for the proposition that it is the defendant's burden to demonstrate need and lack of prejudice. As stated in *Cervantes*, the moving party has the obligation to demonstrate good cause.

FEDERAL DECISIONS FINDING "AMPLE OPPORTUNITY" UNDER 3509(m) **AFFORDED**

All federal cases that have addressed the issue have found that 3509(m) met the Constitutional requirement of Due Process by affording defendant an "ample opportunity" to inspect and examine the evidence, that is, that "ample opportunity" = due process.

U.S. v. Wright

625 F.3d 583 (9th Cir. 2010)

Citing *Knellinger*, the defendant argued that he was prevented from properly conducting his defense by being forced to view the computer files from a government facility. The court distinguished *Knellinger* because Wright's expert was given fourteen months to conduct an examination which satisfies the "ample opportunity" requirement. Further, his expert testified that the terms were sufficient for a proper examination. The defense also argues, under *Shrake*, that they were entitled to "access on equal terms", meaning they wanted an equal amount of time as the prosecution to examine the evidence. The court finds that *Shrake* did not hold that equal time was necessary to satisfy equal terms.

U.S. v. Patt

2008 WL 2915433 (W.D.N.Y. 2008)

Defendant's expert required to spend a significant amount of extra time searching files at government facility, whereas it would have been much easier at the expert's office. These impediments were the reason for the due process challenge as the expert was not able to sufficiently complete a review of the files. Held, no due process violation existed as there was an ample opportunity to review the files.

U.S. v. Stewart

2012 WL 917558 (E.D. Mich. 2012)

Court refused to allow defendant to conduct additional examinations in an attempt to prove cropped images of adults rather than minors. The defendant had already had two opportunities to examine the computers which went "beyond the requirements of the Due Process Clause, the Federal Rules of Criminal Procedure, and the statute."

U.S. v. Healey

2012 WL 213611 (S.D.N.Y. 2012)

Government sent a mirror image to another state for analysis by defendant's expert at an FBI office, and allowed access from March through September. At the request of defense counsel, the court also gave six additional weeks for inspection. Counsel never argued the terms were problematic and could not make such an argument after the trial.

U.S. v. Johnson

456 F. Supp. 2d 1016 (N.D. Iowa 2006)

Upheld 3509(m) against both a claim that it was facially unconstitutional and unconstitutional as applied. As to the facially constitutional argument, the court found that providing the defendant "ample opportunity" to inspect and examine = Due Process. As to the "as applied" argument, the defendant contended that he was indigent and that the court had only authorized an expenditure of $500 which was inadequate given the expense to examine the material at a government facility. The court rejected the argument as not raising a Due Process issue. The defendant's proper remedy was to justify the greater expense in an *ex parte* application to the court.

U.S. v. Sturm

560 F. Supp. 2d 1021 (D. Colo. 2007)

Court adopted *O'Rourke* and *Knellinger* insofar as it held 3509(m) to be constitutional. As this case did not involve virtual child pornography issues (as in *Knellinger*), there was no due process violation. Defense also argued that because of the increased cost and inconvenience associated with accessing the information, ineffective assistance of counsel existed. However, the court did not find this argument convincing.

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U.S. v. O'Rourke

470 F. Supp. 2d 1049 (D. Ariz. 2007)

Defendant argues that experts were denied Internet access at the government facility, which was needed to properly analyze the files and that the hard drive was infected with malware, which severely hindered their work. However, the court noted that the experts did not sufficiently communicate their problems with the government, making this argument invalid without any further evidence.

Upheld 3509(m) against both a claim that it was facially unconstitutional and unconstitutional as applied.

Court rejected two statutory construction arguments: (1) Defense counsel was "officer of court", therefore, he could possess tape as "court"; and (2) Statute contradicts Rule 16 and Rule 16 should be controlling.

Construed "ample opportunity" to mean "more than an adequate opportunity to inspect, view, and examine the evidence in question." Thus construed, 3509(m) met Due Process standards.

Rejected defense contentions as follows: (1) argument that using government computers would leave a roadmap for government investigators is resolved because the government allowed defense experts to utilize their own equipment; (2) argument that restriction to government facility hindered defense communication was resolved by government making the files available at a location where defense counsel and experts could meet privately; (3) increased costs for experts (forced to travel from Ohio to Arizona), though hardship, do not generally implicate due process; (4) inconvenience of defense counsel reviewing files at government facility rather than own office is not a Due Process issue because it does not deny defendant opportunity to defend himself; (5) maintaining confidentiality of defense experts notwithstanding the sign-in requirements can be enabled by court order preventing the government from contacting the experts to learn the defense.

U.S. v. Flinn

521 F. Supp. 2d 1097 (E.D. Cal. 2007)

An ample opportunity requires: (1) "the government [to] supply reasonably up-to-date tools (hardware and software) and facilities [in order to] construct a reasonable, available forensic defense," (2) "ability of a defense expert to utilize his or her hardware or software", and (3) "that the analysis be performed in a situation where attorney-client privilege and work product will not be easily, accidentally exposed to the government, and in a facility which is open to the defense at its request during normal working hours, and to the extent feasible, during non-working hours."

Defendant made an argument using *Knellinger's* cost considerations, but the court rejected it at least temporarily, giving defendant a chance to present specific reasons why off-site examination was necessary.

Defense offered extensive testimony why examination at the government facility would be inadequate. In the final analysis, the reasons offered by the defense were generic to child pornography cases and not specific to the case at hand. The court rejected the arguments and outlined certain requirements for the examination: (1) The expert was to be given private space without direct surveillance; (2) the expert must either have access to the available software at the site or be permitted to bring his own; (3) the expert is to have full access at all open hours and be reasonably accommodated for after-hours access; (4) the government may not inspect the material the expert takes off site so long as the expert certifies that he has not removed child pornography.

U.S. v. Doane

501 F. Supp. 2d 897 (E.D. Ky. 2007)

Followed rulings of *O'Rourke* and *Knellinger*, holding that requiring an expert to travel to the government facility is not unduly burdensome and provides "ample opportunity."

U.S. v. Spivack

528 F. Supp. 2d 103 (E.D.N.Y. 2007)

Defendant argued problems concerning "time, equipment, and unfettered access," making a *Knellinger* argument. The court refused to apply *Knellinger* as there were no virtual child claims and defendant did not inform the court concerning costs of an examination.

ACCORD:

U.S. v. McNealy

2008 WL 5060668 (S.D. Miss. 2008)

U.S. v. Gaynor

2008 WL 113653 (D. Conn. 2008)

U.S. v. Tyson

2007 WL 2859746 (W.D.N.Y. 2007)

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DECISIONS FINDING "AMPLE OPPORTUNITY" UNDER 3509(m) **NOT AFFORDED**

U.S. v. Knellinger

471 F. Supp. 2d 640 (E.D. Va. 2007)

Upheld 3509(m) against both a claim that it was facially unconstitutional and unconstitutional as applied. The determination whether an "ample opportunity" exists is a factual one and, necessarily, must be made on a case-by-case basis.

Defendant asserted a virtual child defense under *Ashcroft*. Based on the record developed, the required analysis would be extensive and would require equipment not apparently available at the government facility. Given the expense and difficulty of moving the equipment, the court found that examination at the government facility would not be an "ample opportunity".

Defendant argued that the expense of outside experts transporting equipment to the government facility would deter experts from conducting an analysis (cost would rise from $135,000 to over $500,000). Because of such deterrence, and considering the importance of having expert witnesses review the data, it is necessary to order production of a copy of the hard drive to the defense.

- Note that *Spivack* refused to apply *Knellinger* because there was no virtual child defense asserted. Compare to Tennessee's *Allen* case where *Knellinger* influenced the decision without a virtual child defense.

Nonetheless, since the defendant had not yet hired an expert to conduct the type of analysis sought, the court ordered that a copy of the evidence would be made available only after the defendant certified that he had retained an expert.

U.S. v. Bortnick

2010 WL 935842 (D. Kan. 2010)

Unlike other cases, the experts were required to be physically searched each day after leaving the government facility - including a search of computer files. The expert testified that he would be required to transport privileged information which, if obtained by the government, would injure the defense. This search made the opportunity to examine the evidence unreasonable. Held, the government had to allow access without a search, but could require the expert to certify in writing that he was not taking child pornography. If the government is unwilling to comply, they must allow access at a safe room in the district court's building.

U.S. v. Winslow

2008 U.S. Dist. LEXIS 66855 (D. Alaska 2008)

Citing limited hours, limited privacy, limited contact, no Internet access, inadequate preparation time, and damage to equipment, defendant argued that he was denied ample opportunity to examine the files. According to their expert, these factors prevented his staff from doing an adequate job. The government required the experts to view the files under video surveillance (recording video, but no audio). Citing *Flinn*'s requirement that they be allowed a private room, the court held that the surveillance did not provide ample opportunity to conduct discovery, even if it is not focused on the computer monitor. Also, as they were not allowed to use telephones or Internet and cell service was unavailable, ample opportunity did not exist. The government was ordered to provide the defense with a copy of the hard drive.

STATE DECISIONS POST-3509(m)

State v. Boyd

158 P.3d 54 (Wash. 2007)

Construes Washington discovery rules as mandating that a copy of the evidence be provided to the defense. The only appropriate role of a protective order is to restrict who has access to the copy and how it must be maintained and returned.

The state had the burden to establish the need to restrict distribution of evidence, and in turn, the defendant need not establish that effective representation necessitates a copy of the evidence. The court finds that having access outside a government facility is necessary because it (1) allows experts to test more accurately, (2) may reveal the images are not of children, (3) may involve a significant amount of time, and (4) would better allow access to necessary tools. However, the court also sought to restrict it by requiring that the defendant only be allowed to view the evidence under counsel's supervision, defense counsel is personally responsible for unauthorized distribution or access, access by non-counsel must be approved by court order, the evidence must be returned at the end of the criminal proceeding and destroyed by law enforcement,

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that no additional copies may be made, and, among other rules, installation of a firewall to prevent upload to the Internet.

State v. Johnson

2010 WL 1424369 (Ariz. 2010)

Defendant cited concerns of accessibility, security, and access to the files at a government facility. Although the expert might not have around-the-clock access, it was to be granted during regular hours, which is sufficient. A request for reproduction cannot be based on convenience of the defendant's agents. Citing *O'Rourke, Knellinger,* and *Flinn*, the court held that it was necessary to provide a secure location for storing evidence when the expert was not present, which was not offered by the FBI. Therefore, the defendant's right to effectively investigate was undermined. The court found an argument concerning increase of cost to be unpersuasive, but did uphold an argument that the expert needed to access other materials while conducting an investigation. Held, duplication of the hard drive for the defense was appropriate. As the FBI refused to duplicate the drive under 3509(m), the charges were dismissed.

State v. Brady

894 N.E.2d 671 (Ohio 2008)

The defendant argued that the charges against him had to be dismissed because federal law would criminalize the work of any expert in viewing and analyzing the child pornography images to be used against him. The trial court agreed and dismissed the charges. The Supreme Court reversed, noting that 3509(m) provided a basis for an expert to view and analyze the material so long as it remained in the government's possession. Trial court's decision to allow the defense to receive a duplicate of the hard drive prior to trial was an abuse of discretion because the expert could have sufficiently examined the files at the government facility.

State v. Norris

236 P.3d 225 (Wash. 2010)

Citing *Brady*, the state argued that images of child pornography should not be released to the defense in order to comply with 3509(m) and because it was not necessary as the images could be viewed at a government facility. However, the court held that 3509(m) did not preempt their laws. Also, although *Brady,* an Ohio case, is influential, "Ohio courts do not appear to require prosecutors to copy and share evidence in these cases" although Washington's Supreme Court mandates it.

State v. Bowser

772 N.W.2d 666 (Wis. 2009)

The court determined that the fact that images are so easily distributed on the Internet provides good cause for restricting where the images are viewed. Also, the defendant's expert testified that he would be inconvenienced by having to move his office to the government facility, but a sufficient examination was possible. However, the court was clear in saying that its decision was simply to hold that the trial judge did not abuse his discretion, and they were not attempting to create a rule. Given the specific arguments of each side, it would have also been reasonable for the judge to have ruled for the defense.

In response to passage of 3509(m), Wisconsin Department of Justice Criminal Investigation established a singular protocol for defense access to child pornography material. District Court denied the defense request for a copy of the material and entered a protective order requiring the defense expert to examine the material in a State facility in accordance with the established protocol.

Court of Appeals was careful to note that: (1) determination of whether to enter the protective order was in the discretion of the trial court; (2) the trial court had the discretion to have ordered a copy produced to the defendant under appropriate limiting circumstances; (3) the government bore the burden to demonstrate good cause, but once they had done so by showing the inherent danger in distribution of child pornography, the defense had the burden of demonstrating why the protocol restrictions would impede the defense; and (4) the determination can only be made on a case-by-case basis.

State v. Grenning

174 P.3d 706 (Wash. Ct. App. 2008)

Citing the *Boyd* case extensively, *Grenning* is unique because the defendant was charged, in relevant part, with child rape rather than possession of child pornography. Here, law enforcement had obtained images in which the defendant could be identified conducting such acts. The trial court, seeking to prevent further dissemination of the images, only allowed access

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through a government facility. The Court of Appeals upheld this decision.

However, the appellate court also dealt with the issue of possession of child pornography. Here, they found that it was necessary for the defense to obtain a copy for use outside the government facility. A lack thereof justified reversal of the conviction.

234 P.3d 169 (Wash. 2010)

The Supreme Court affirmed with regard to the possession charge, finding that there was only a minimal risk that defense counsel would disseminate the images and that not providing defense with a copy was a violation of the defendant's rights of due process and a fair trial. The court noted that analysis may reveal that the images are not of children, and in order to conduct such an examination, it must be done outside of the state's facility. Citing their decision in *Boyd*, the court ordered a new trial.

The issue of the images used in the child rape charge was not appealed.

State v. Wells

No. A06-1942, 2007 Minn. App. Unpub. LEXIS 1001 (Minn. Ct. App. 2007)

Court of Appeals affirmed district court denial of a copy to the defense after establishing procedures similar to those required by 3509(m) for inspection and examination of the evidence.

State v. Bilski

2011 WL 408790 (NJ Sup. Ct. App. Div. 2011)

Trial court ordered that the defense could not get a copy of the images and videos, but the prosecutor was to make them available on request and with 48 hours' notice. The defendant and his counsel viewed the files twice. On appeal, the court found that procedure to be sufficient, and held that a flexible state rule on the issue was preferable to a bright-line rule like 3509(m).

State v. Allen

2009 WL 348555 (Tenn. Crim. App. 2010)

The court held that 3509(m) does not apply to states because it was not explicit in the statute. 3509(m) contains no expression of Federal preemption under the Supremacy Clause of the Constitution. Since the statute is a procedural matter, referencing Federal Rules of Criminal Procedure, it is inapplicable to state court proceedings.

Also, citing *Knellinger*'s cost and inconvenience issues, the court found dissemination of the evidence to the defense to be proper.

- *Accord*: *State ex rel. Tuller v. Crawford*, 211 S.W.3d 676, 679 (Mo. Ct. App. 2007); *State v. Norris*, 236 P.3d 225 (Wash. Ct. App. 2010).

EQUAL ACCESS CONCERNS

U.S. v. Shrake

515 F.3d 743 (7th Cir. 2008)

The District Court had denied the defendant's request for a copy of the digital evidence but the government later provided a copy to its own outside expert for analysis. On appeal the Court of Appeals criticized the government for doing so and made it clear that it would have granted a renewed request for equal access had the defendant sought it. The court noted that there is "a substantial difference between 'the Government' and people who provide services to the United States under contract," and that the government was required to maintain custody of the files. Citing *Wardius v. Oregon*, 412 U.S. 470 (1973), the court noted that access obtained by government experts must also be provided to defense experts. However, in this case, the defense did not seek access on equal terms so no remedy was necessary. Instead the defendant sought preclusion of the government expert's testimony. The District Court denied that request and the Court of Appeals upheld that decision.

MISCELLANEOUS

Doe v. Boland

630 F.3d 491 (6th Cir. 2011)

Defense attorney's creation of digitally "morphed" pornography to show how difficult it would be to know all of the ages involved was not allowed. "If Congress did not want defense counsel to view, let alone possess, existing child pornography without governmental oversight, it is hardly surprising that Congress opted not to permit expert witnesses to create and possess new child pornography."

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