

Look But Don't Copy: How the Adam Walsh Act Shields Reproduction of Child Pornography in Courts-Martial

Captain Sasha N. Rutizer*

I. Introduction

Child pornography cases can be complex, burdensome, and expensive to prosecute. The defense will in most cases request a digital forensic examiner as an expert consultant and witness. This typically is a civilian whom the government must reimburse to review the evidence, create a report, consult with the defense, testify, and travel. In recent years, the defense has begun requesting, as discovery, a forensic duplicate, a bit-for-bit forensic copy of the digital media. What does the law require and what should trial counsel do?

To answer these questions, this article discusses the applicability of the 18 U.S.C. § 3509(m), a child victim's right under Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act)¹ prohibiting the reproduction of child pornography, to courts-martial and provides tips and advice to trial counsel when responding to requests for, and motions to compel, this kind of discovery.

II. Applicability of 18 U.S.C. § 3509(m) to Courts-Martial

"The Constitution grants Congress 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'"² Congress has exercised that authority by creating a system of military justice separate from the civilian one.³ Yet Congress has directed the President to make the Rules for Court-Martial compatible with civilian justice "so far as he considers practicable,"⁴ and the President has directed courts-martial

to apply civilian rules of evidence as far as is practicable.⁵ Military appellate courts "frequently look to parallel civilian statutes for guidance."⁶ The Court of Appeals for the Armed Forces (CAAF) has been cautious "about applying statutes outside the Code to the conduct and review of court-martial proceedings" because it views the Uniform Code of Military Justice as "Congress' primary expression of the rights and responsibilities of servicemembers."⁷ Sometimes, however, it does so.

In so doing, the CAAF has "not turned a blind eye . . . to all statutes outside the Code."⁸ The All Writs Act is one such statute.⁹ Although a strict reading of the Uniform Code of Military Justice (UCMJ) would seem to preclude any proceedings after direct appellate review has been completed, the CAAF and its predecessor, the Court of Military Appeals, has exercised jurisdiction over post-appellate habeas corpus proceedings under the All Writs Act.¹⁰ The Supreme Court has recognized the CAAF's authority to do so.¹¹ In *United States v. Dowty*, the CAAF applied The Right to Financial Privacy Act (RFPA),¹² to court-martial proceedings.¹³ The RFPA tolls any applicable limitation period while the accused avails himself of its procedural protections in seeking redress from district court to the government's attempt to gain access to financial records.¹⁴ The CAAF held that this tolling applies to the five-year limitations period set by UCMJ Article 43 even

* Judge Advocate, U.S. Army. Currently assigned to the Government Appellate Division, Fort Belvoir, Virginia. Previously assigned to the Trial Counsel Assistance Program, Fort Belvoir, Virginia; Defense Counsel at the 25th Infantry Division, Schofield Barracks, Hawaii; Defense Counsel at the 101st Airborne Division (Air Assault), Fort Campbell, Kentucky.

¹ Pub. L. No. 109-248, § 501, 120 Stat. 587 (2006) (codified in 18 U.S.C. § 3509(m) (2011)).

² *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000) (citing *Weiss v. United States*, 510 U.S. 163 (2000)).

³ "Congress has exercised its control over military discipline through the Uniform Code of Military Justice, which 'establishes an integrated system of investigation, trial, and appeal that is separate from the criminal justice proceedings conducted in the U.S. district courts.'" *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998).

⁴ Article 36, UCMJ, empowers the President to prescribe rules for court-martial "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in [federal civilian court]." 10 U.S.C. § 836 (2011), cited in *Dowty*, 48 M.J. at 106.

⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 101(b), (2012) [hereinafter MCM] ("If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply: (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."); see also *id.* MIL. R. EVID. 1102(a). "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.")

⁶ *Dowty*, 48 M.J. at 106.

⁷ *Id.*

⁸ *Id.*

⁹ 28 U.S.C. § 1651(a) (2011). "The All Writs Act provides that extraordinary writs may be issued by 'the Supreme Court and all courts established by Act of Congress.'" *Dowty*, 48 M.J. at 106. The Court of Appeals for the Armed Forces (CAAF) is an Article 1 court. UCMJ art. 141 (2012).

¹⁰ See *Loving v. United States*, 62 M.J. 235, 255–56 (C.A.A.F. 2005).

¹¹ *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969) (citing *United States v. Frischholz*, 36 C.M.R. 306, 307–09 (C.M.A. 1966)).

¹² 12 U.S.C. § 3410 (2011).

¹³ *Dowty*, 48 M.J. at 111.

¹⁴ 12 U.S.C. § 3410.

though UCMJ Article 43 does not mention the RFPA and the RFPA does not mention the UCMJ.¹⁵ In determining whether to apply a statute outside the Code to court-martial proceedings, the general analytical framework was outlined as follows: “[A] generally applicable statute must be viewed in the context of the relationship between the purposes of the statute and any potentially contradictory military purpose to determine the extent, if any, that the statute will apply to military personnel and court-martial proceedings.”¹⁶

We now turn to the discovery restriction enacted as part of the Adam Walsh Act. This provision requires that “in any criminal proceeding, any property or material that constitutes child pornography . . . shall remain in the care, custody or control of either the Government or the court.”¹⁷ It further requires any court to “deny, in any criminal proceeding, any request by the defendant to copy . . . or otherwise reproduce any property or material that constitutes child pornography, so long as the Government makes the property or material reasonably available to the defendant.”¹⁸ This is required “[n]otwithstanding Rule 16 of the Federal Rules of Criminal Procedure.”¹⁹

In the author’s experience, there is some disagreement within the Army Trial Judiciary as to whether the Adam Walsh Act applies at courts-martial. The issue has not yet been decided in published case law.²⁰ Nonetheless, applying the Adam Walsh Act to courts-martial meets the intent of Congress, and there is no countervailing “military purpose” to suggest it should not be so applied.

A. Applying § 3509(m) to Courts-Martial Meets the Intent of Congress

The purpose of this section of the statute is unambiguously stated in the associated congressional findings:

¹⁵ *Dowty*, 48 M.J. at 110–11.

¹⁶ *Dowty*, 48 M.J. at 107 (citing *United States v. Noce*, 19 C.M.J. 11, 17 (C.M.A. 1955)).

¹⁷ 18 U.S.C. § 3509(m) (2011).

¹⁸ *Id.*

¹⁹ *Id.* Rule 16 pertains to Discovery and Inspection, and is similar to Military Rule of Evidence 701. Compare FED. R. CRIM. P. 16, with MCM, *supra* note 5, MIL. R. EVID. 701.

²⁰ The Navy-Marine Court of Criminal Appeals hinted at the answer in *United States v. Jones*, No. 200602320, 2009 CCA LEXIS 356 (N-M. Ct. Crim. App. Oct. 27, 2009), when it found that the military judge did not abuse his discretion by refusing to permit the accused to personally inspect child pornography the day before his guilty plea. The court cited 18 U.S.C. § 3509(m), but did not specifically rule on whether the statute controlled. The CAAF affirmed, *United States v. Jones*, 69 M.J. 294 (2011).

The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disk, and related media. . . . Child pornography is not entitled to protection under the First Amendment and thus may be prohibited. . . . The Government has a compelling State interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. . . . Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse. . . . Child pornography constitutes prima facie contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.²¹

The purpose is clear. Congress wanted to restrict the viewing of child pornography and the repeated violation of victims’ privacy.

One argument against applying this section is that Congress did not specifically use words unique to the military justice system (e.g., Military Rules of Evidence, courts-martial, trial counsel, accused) and instead chose to use the common words of civilian criminal justice (criminal proceeding, Government, Court, Defendant). There is nothing particularly “civilian,” however, about the notion of protecting victims’ privacy. Congress was arguably silent with respect to military justice, but not all silences are pregnant. Perhaps Congress assumed that nothing more needed to be said on the issue in order to accomplish its objective when it specifically wrote “in any criminal proceeding.” “An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.”²²

²¹ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587 (2006).

²² *Burnes v. United States*, 501 U.S. 129, 136 (1991) (quoting *Illinois Dep’t of Pub. Aid v. Schweiker*, 707 F. 2d 273, 277 (7th Cir. 1983)).

B. There is No “Contradictory Military Purpose” Against Application of § 3509(m).

Does a contradictory military purpose exist? Within the UCMJ, it does not;²³ however, Rule for Court-Martial (RCM) 701(a)(2)(A) may arguably provide such a purpose. This rule requires the trial counsel to provide:

any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belonging to the accused.²⁴

But 18 U.S.C. § 3509(m) specifically requires a court to deny discovery “[n]otwithstanding Rule 16 of the Federal Rules of Criminal Procedure,” and that rule also requires the government to provide:

any books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government’s possession, custody or control, and:

- (i) the item is material to preparing the defense;
- (ii) the government intends to use the item in its case-in-chief at trial; or
- (iii) the item was obtained from or belongs to the defendant.²⁵

Ultimately, they are the same requirements in almost the same words. Thus, meeting the discovery requirements of RCM 701(a)(2)(A) is not a specifically *military* purpose that runs contrary to the statute.

Also, RCM 701(g)(2) (like Rule 16(d)(1) of the Federal Rules of Criminal Procedure) gives the military judge authority to regulate discovery and to restrict or deny it “upon a sufficient showing.”²⁶ Congress, by articulating its findings, has provided a “sufficient showing” that applies

²³ While UCMJ Article 46 requires equal access to evidence, there is nothing about applying this statute which is contrary to this rule. Each side has access to the same evidence and there is no unfair advantage to the government.

²⁴ MCM, *supra* note 5, R.C.M. 701(a)(2)(A).

²⁵ FED. R. CRIM. P. 16(a)(1)(E).

²⁶ MCM, *supra* note 5, R.C.M. 701(g)(2).

equally well to military and civilian courts, and thus arguably has simply ordered judges to do something they had the power to do anyway.²⁷ There is no “contradictory military purpose.” The statute should therefore apply.

III. Tips for Trial Counsel—Providing “Ample Opportunity”

It appears thus, that the Adam Walsh Act applies—or should apply—to courts-martial. While some military judges do not believe the act applies, the individual trial counsel should not make that decision. Defense discovery requests for forensic duplicates of media containing child pornography should be denied. The denial should cite the Adam Walsh Act and—this is key—carefully describe how “ample opportunity” for defense inspection will be made.

The issue of ample opportunity has been intensely litigated since 2006, with very promising results for the prosecution.²⁸ Usually, the government was able to show it provided ample opportunity for defense access.²⁹ The major exception has been *United States v. Knellinger*, where the defense theory of virtual child pornography³⁰ required analysis using equipment that was not available in the government facility and that would cost too much to move

²⁷ See *United States v. Jones*, No. 200602320, 2009 CCA LEXIS 356, at *15 (N-M. Ct. Crim. App. Oct. 27, 2009) (upholding decision of trial judge to refuse to allow accused to inspect child pornography before his guilty plea, and citing his power to regulate discovery under Rule for Court-Martial 701(g) in support of that ruling).

²⁸ Many cases ruling on issues of ample opportunity are collected in Fern L. Kletter, *Validity, Construction, and Application of 18 U.S.C.A. § 3509(m) Prohibiting Reproduction of Child Pornography Used as Evidence in Criminal Trials*, 47 A.L.R. FED. 2d 25, §§ 13-14 (2010). As American Law Reports are routinely updated, this report should be consulted for counsel litigating a motion to compel production of digital media containing child pornography.

²⁹ See, e.g., *United States v. Butts*, No. CR 05-1127-PHX-MHM, 2006 U.S. Dist. LEXIS 90165, at *4-5 (D. Ariz. Dec. 6, 2006). The court found that the defendant’s rights to due process were not violated, even though defendant provided a list of reasons why reviewing the approximately one terabyte of evidence at the government location was over burdensome. *Id.* The judge found that the government was willing to make significant accommodations for the defense forensic expert and therefore the defense had ample opportunity to access the evidence. *Id.* *United States v. Spivack*, 528 F. Supp. 2d 103, 107-08 (E.D.N.Y. 2007) (concluding that this case was distinguishable from *Knellinger*, in that there were no virtual images, and the government’s offer to make the evidence available for inspection at two separate government offices satisfied defendant’s due process rights under the Fifth and Sixth amendments). *United States v. Flinn*, 521 F. Supp. 2d 1097, 1101 (E.D. Cal. 2007). Defense expert witness conceded that hardware and software available at the government facility was adequate for defense examination, so that access was sufficient. *Id.* The judge noted that the defense should not be able to circumvent the law by “merely positing conceptual difficulties.” *Id.*

³⁰ Under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002), “virtual” images of what appear to be children were considered protected speech under the First Amendment of the Constitution. When charged under clause 1 or clause 2 of Article 134, UCMJ, no such protection exists.

there, so that the defense theory became impossible to support without the forensic copy.³¹

Typically, the defense employs a digital examiner who does not live near the situs of the court-martial. The government must then arrange or at least pay for the examiner's travel to provide ample opportunity. The local Criminal Investigation Division (CID) office must provide a room, access to the digital media, software, internet access,³² and, to some degree, privacy.³³ This will require coordination with and the cooperation of CID. Trial counsel must work with CID early to coordinate. CID should educate their personnel on this issue, and require their assistance in providing ample opportunity, lest they become the straw that breaks the camel's back.

The government may decide that the office that conducted the digital forensic examination is the best place for the defense expert to access the evidence. Or that office may send a forensic duplicate to another CID, Air Force Office of Special Investigations (OSI), or Navy Criminal Investigative Service (NCIS) office nearer to the defense expert. For example, a defense expert who lives in Portland, Oregon, could travel to Fort Lewis, Washington, to view the evidence, even though the U.S. Army Criminal Investigation Laboratory (USACIL) in Georgia conducted the examination.

The best solution is for CID to treat the defense expert as a member of the defense team, and afford the expert the same professional courtesy as they would a trial or defense counsel. Ideally, CID should give the expert access to a room that does not have reflective glass, as an interview room does, but rather an office or conference room where the stand-alone laptop can be set up. If space is a problem, perhaps covering the reflective glass with newspaper will suffice. There should not be a CID agent in the room with

the defense expert, absent extraordinary circumstances.³⁴ The expert should also be provided reasonable access to the internet. If connection to the installation Wi-Fi is not possible, each CID or SJA office could purchase one portable hot spot for defense expert use.

None of the above will be an option, however, if the contract for the defense expert is not expedited so that funds may be properly obligated. Dilatory processing of a contract may be enough to support a defense claim that they lacked ample opportunity. The contract should include a cap on expenses for the expert's time and also detail how travel arrangements for viewing the evidence are to be made. For instance, if the expert lives in Kentucky and the evidence to be viewed is in Georgia, the expenses for travel should be included in the contract. Very few experts will pay out-of-pocket for travel expenses without a firm contract in place. The government may resolve this issue by setting up the expert's travel through the Defense Travel System (DTS) and paying for his hotel, rental car, and so forth. The objective for the government is to provide ample opportunity for access and be able to articulate the steps taken to ensure it.

If the defense nonetheless moves to compel production of a forensic copy, trial counsel should oppose the motion and put the burden on the military judge to rule on the issue. The trial counsel should not only argue the applicability of the Adam Walsh Act, but the judge's broad power to regulate discovery under RCM 701(g), and the goals articulated by Congress in passing the Adam Walsh Act. The government's efforts to provide ample opportunity for defense access will strongly support both arguments.

If these arguments fail, the trial counsel should ask the military judge to issue a court order that: (a) at all times, the forensic copy will be secured in a safe or in the personal possession of the named expert; (b) without express approval of the court, no person other than the named expert will handle or view the forensic copy; (c) the defense expert will not copy, distribute, or publish any material which could be considered child pornography under the law; and (d) upon completion of his examination, he will return all materials to the entity that provided them. The trial counsel should ask the military judge to require the defense expert to sign the court order, showing that he has read it and will comply. After all, being an expert witness does not grant a citizen the right to retain a permanent collection of child pornography

³¹ United States v. Knellinger, 471 F. Supp. 2d 640, 647-50 (E.D. Va. 2007).

³² Internet access is not for the computer being used to view the child pornography. Rather, it is oftentimes important for the defense expert to conduct internet research contemporaneous with the examination on another computer. Search terms purportedly used by the accused need to be run to see what happens to the operating system as a result of the search. Additionally, hyperlinks associated with the internet activity provide valuable information in order to replicate the internet activity.

³³ Having a Criminal Investigation Division (CID) agent standing in the room watching the defense examination may be considered over burdensome by the military judge, especially as the defense counsel may well wish to be present during the examination and discuss the case with the expert. See United States v. Patt, No. 06-CR-6016L, 2008 U.S. Dist. LEXIS 57318 at *57-58 (W.D.N.Y. July. 24, 2008) (discussing United States v. Winslow, No. 07-CR-00072 (D. Alaska Jan. 28, 2008), in which the judge was "troubled" by a government requirement that a defense expert remain under closed-circuit video surveillance while examining a hard drive containing child pornography, because this requirement would likely reveal "defense strategies and weaknesses," and therefore granted the defense motion to compel production).

³⁴ If the media at issue were examined at a local police department, but were later transferred to CID, then CID may not have a forensic duplicate. In this case, the only media that exists at CID is the original. If this is a micro-SD card for instance, the card will have to be placed into a micro-SD card reader and may or may not be read only/write block protected. In this limited circumstance, it may be necessary to have a CID representative in the room to preserve the integrity of the evidence.

nor does it shield him from prosecution for violation of the law.

carry out the goals of the Adam Walsh Act—“to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims.”³⁵

IV. Conclusion

The Adam Walsh Act should and arguably does apply to courts-martial. When the defense requests forensic copies of digital media including child pornography, the government should deny the request, but provide the defense and its experts appropriate access to such copies at the appropriate CID office. The government’s efforts to provide access are vital to litigating against a defense motion to compel. If the defense succeeds in compelling production, the government should still ask the judge to issue orders to

³⁵ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587 (2006).