IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF OF *AMICUS CURIAE* NAVY-MARINE CORPS APPELLATE GOVERNMENT
v.	)	DIVISION
Justin M. GURCZYNSKI, Private (E-1) United States Army, Appellee	)	Crim.App. Dkt. No. 20160402 USCA Dkt. No. 17-0139/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN SUPPRESSING EVIDENCE OF CHILD PORNOGRAPHY A DIGITAL FORENSIC EXAMINER DISCOVERED DURING A SEARCH FOR APPELLEE'S COMMUNICATIONS WITH A CHILD VICTIM.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals had jurisdiction under Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (2012). This Court has jurisdiction under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

Appellant's Statement of the Case is accepted.

Statement of Facts

Appellant's Statement of Facts is accepted.

Summary of Argument

Pursuant to Rule 26(a) of this Court's Rules of Practice and Procedure, the Navy-Marine Corps Appellate Government Division agrees with and supports the position taken by the Army Government Appellate Division in its Brief on behalf of Appellant on the certified Issue. Additionally, the lower court erroneously relied on the forensic examiner's subjective intent in analyzing whether he exceeded the scope of the warrant.

Argument

THE SUPREME COURT HAS REJECTED TESTING LAW ENFORCEMENT'S SUBJECTIVE INTENT UNDER THE "PLAIN VIEW" DOCTRINE. HERE, THE WARRANT AUTHORIZED LAW ENFORCEMENT TO REVIEW THE FILES IN APPELLEE'S DIGITAL MEDIA FOR EVIDENCE RELATED TO HIS INDECENT ACTS WITH A MINOR. IN REFUSING TO APPLY THE PLAIN VIEW DOCTRINE TO THE DISCOVERY OF CHILD PORNOGRAPHY ON THAT MEDIA, THE LOWER COURT IMPERMISSIBLY RELIED ON THE FORENSIC EXAMINER'S SUBJECTIVE INTENT IN ANALYZING WHETHER HIS SEARCH EXCEEDED THE SCOPE OF THE WARRANT.

Amicus joins in Appellant's Brief of December 21, 2016, and writes to supplement Appellant's arguments.

A. Law enforcement's subjective intent is irrelevant to application of the plain view doctrine.

The Fourth Amendment's protection against unreasonable searches and seizures generally requires a warrant, subject to certain limited exceptions. *United States v. Katz*, 389 U.S. 347, 357 (1967) (citations omitted). The "plain view" doctrine is among those exceptions—"if an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Horton v. California*, 496 U.S. 128, 133-34 (1990) (citing *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)).

In *Horton*, the Supreme Court established three conditions for application of the plain view doctrine to permit evidence from warrantless searches: (1) the officer must be lawfully in the place where the seized item was in plain view; (2) the officer must have had "a lawful right of access to the object itself"; and (3) the item's incriminating character must be "immediately apparent." *Id*. at 136-37. The Court explicitly rejected an "inadvertence" condition, which would require that law enforcement *unintentionally* view the incriminating evidence. *Id.* at 138-40 (repudiating the "inadvertence" condition in the plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

Rather than requiring an inquiry into the subjective intent of law enforcement, the *Horton* Court demanded only "scrupulous adherence" to a warrant's requirement for particularity and "that a warrantless search be

circumscribed by the exigencies which justify its initiation." *Id*. at 139-40. "Once those commands have been satisfied and the officer has a lawful right of access . . . no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent." *Id*. at 141. As the Court made clear:

> The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in the area and duration by the terms of the warrant or a valid exception to the warrant requirement.

Id. at 139.

B. Because the warrant here authorized law enforcement to review each file on Appellee's digital media, the plain view doctrine permits seizure of the child pornography discovered there regardless of the examiner's subjective intent.

1. The scope of the warrant did not require the examiner to employ a particular methodology in reviewing Appellee's digital media files.

Both the Military Judge and the lower court cite *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), for the notion that the warrant's scope did not include a search for child pornography. (J.A. 3, 168); *United States v. Gurczynski*, ARMY MISC. 20160402, 2016 CCA LEXIS 541, at *5 (A. Ct. Crim. App. Sept. 6, 2016). But the holding in *Carey* is a vestige of the "inadvertency" requirement rejected in *Horton*. In *Carey*, the officer who was authorized to search for evidence of drug crimes discovered child pornography images on the appellant's computer, and thereafter continued to search for additional child pornography files. 172 F.3d at

1271-73. The Tenth Circuit refused to apply the plain view doctrine, writing, "Under these circumstances, we cannot say the contents of each of those files were inadvertently discovered." *Id*. at 1273.

As the *Horton* Court made clear, however, inadvertency is no longer a condition of the plain view exception; instead, the scope of a warrant is analyzed objectively. 436 U.S. at 138-41; *see also United States v. Williams*, 592 F.3d 511, 522 (4th Cir. 2010) (refusing to apply an inadvertency requirement to the plain view exception because "the scope of a search conducted pursuant to a warrant is defined *objectively* by the terms of the warrant and the evidence sought, not by the *subjective* motivations of an officer").[1]

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[1] On a motion for rehearing in *Carey*, the Tenth Circuit acknowledged the inapplicability of the inadvertency requirement:

> Because the government contends we failed to properly follow *Horton v. California*, 496 U.S. 128, 130 (1990), we recognize inadvertence is not a Fourth Amendment requirement. We note, however, "inadvertence is a characteristic of most legitimate 'plain-view' seizures." *Id*. As such, the fact that Detective Lewis did not inadvertently come across the pornographic files is certainly relevant to our inquiry. Our holding is based, however, on the fact that Detective Lewis impermissibly expanded the scope of his search when he abandoned the search for drug-related evidence to search for evidence of child pornography.

United States v. Carey, 172 F.3d 1268, 1277-1278 (10th Cir. 1999). Neither Appellee, the Military Judge, nor the lower court suggests the examiner here ever "abandoned" a search for evidence articulated in the warrant. Rather, the examiner's testimony about his search for communications between Appellee and the minor victim was corroborated by the examiner's logs. (J.A. 21, 94-112.)

Nor must warrants authorizing a search of computer files "contain a particularized computer search strategy." *United States v. Brooks*, 427 F.3d 1246, 1251 (10th Cir. 2005). In recognition that criminals often "hide, mislabel, or manipulate files to conceal criminal activity," *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011), courts routinely accept broad searches of computers. *See, e.g.*, *United States v. Mann*, 592 F.3d 779, 782 (7th Cir. 2010); *United States v. Burgess*, 576 F.3d 1078, 1092-94 (10th Cir. 2009); *United States v. Adjani*, 452 F.3d 1140, 1150-52 (9th Cir. 2006); *United States v. Grimmett*, 439 F.3d 1263, 1269-71 (10th Cir. 2006). Consequently, as the Tenth Circuit acknowledged in *Burgess*, "there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders." 576 F.3d at 1094.

In the post-*Carey* case of *Williams*, the Fourth Circuit reviewed application of the plain view doctrine to an officer's discovery of child pornography on a computer. 592 F.3d at 521-24. There, the warrant authorized a search of the appellant's computer for evidence of making threats and computer harassment, though the executing officers suspected that the appellant possessed child pornography. *Id*. at. 519-20.

The *Williams* court noted "that a computer search must, by implication, authorize at least a cursory review of each file on the computer" to determine

whether the files fall within the scope of the warrant. *Id*. at 522. Given this implied authorization to check the files on the electronic device, the court in *Williams* held that the executing officer easily met the *Horton* requirements: (1) he was lawfully present at the place where the evidence could be viewed, (2) he was authorized to open and view the files, and (3) the contraband nature was immediately apparent. *Id*.; *see also United States v. Wong*, 334 F.3d 831, 838 (9th Cir. 2003) (holding that plain-view doctrine permits admission of child pornography discovered during a lawful search of computer files for evidence of other crimes); *United States v. Burdulis*, 2011 U.S. Dist. LEXIS 53612, at *37-38 (D. Mass. May 19, 2011) (same); *United States v. Farlow*, 2009 U.S. Dist. LEXIS 112623, at *7 (D. Me. Dec. 3, 2009) (same); *United States v. Crespo-Rios*, 623 F. Supp. 2d 198, 204 (D.P.R. 2009) (noting same in dicta).

Here, as in *Williams*, the examiner met each *Horton* condition for the plain view exception. First, the examiner was lawfully searching within Appellee's digital media. As the lower court recognized, the Military Judge found the warrant authorized Criminal Investigation Command (CID) agents "to search for computers and associated peripheral devices for evidence of 'attempted sexual abuse of a child, abusive sexual contact with a child and other offenses related' to the allegations against [Appellee]." (J.A. 2); *Gurczynski*, 2016 CCA LEXIS 541, at *3. Pursuant to that warrant, CID seized Appellee's computer and "peripheral

items," including his thumb drive, which CID sent to the examiner for review. (J.A. 74-78, 84, 166-67.)

Second, the examiner lawfully accessed the files in Appellee's digital media. The warrant, specifying no particular methodology for review of the media, authorized CID to search for evidence that Appellee had used the seized items "to communicate with the alleged victim of his abuse in order to arrange the meeting where [Appellee] ultimately engaged in indecent acts and sexual contact with the child." (J.A. 2, 66-73); *Gurczynski*, 2016 CCA LEXIS 541, at *3. Such evidence potentially existed in electronic files containing photographs and videos. (J.A. 21-23, 26.) Thus, the examiner was authorized to review each file on Appellee's digital media, including the thumb drive. (J.A. 15-19, 21-23.) Further, as the Military Judge found, files that the examiner searched fell within the permissible date range established by the warrant. (J.A. 166, 169-70.)

Third, the incriminating character of the items was "immediately" apparent when the examiner saw the images of child pornography contained in the files. (J.A. 18-19.)

2. The lower court misapplied *Horton* by relying on the examiner's subjective intent in looking for child pornography to analyze the scope of the search.

The Military Judge failed to analyze the application of the plain view doctrine to the examiner's discovery of the child pornography files. (J.A. 3);

Gurczynski, 2016 CCA LEXIS 541, at *5-6. On appeal, however, the lower court rejected application of the plain view doctrine, finding that, in searching for child pornography, the examiner violated the first *Horton* condition "by exceeding the scope of the warrant." *Id*. (citing *Horton*, 496 U.S. at 136-37).

This analysis misapprehends *Horton*'s objective test of a warrant's scope when applying the plain-view exception: so long as the examiner's search was "confined in the area and duration by the terms of the warrant," the examiner's subjective intent to find child pornography "should not invalidate its seizure." *See Horton*, 496 U.S. at 139; *see also* Mil. R. Evid. 316(c)(5)(C); *Williams*, 592 F.3d at 522; *Wong*, 334 F.3d at 838; *Burdulis*, 2011 U.S. Dist. LEXIS 53612, at *37-38; *Farlow*, 2009 U.S. Dist. LEXIS 112623, at *7.

Further, the lower court's analysis mistakes the nature of the warrant, which contained no limit of a specific search methodology. (J.A. 66-73.) Because evidence of Appellee's indecent acts and sexual contact could have been "hid[den], mislabel[ed], or manipulate[d]" anywhere in Appellee's files, the examiner was authorized to review each file on Appellee's digital media. *See Stabile*, 633 F.3d at 237. Thus, viewed objectively, the scope of the warrant properly included "looking in many (perhaps all) folders and sometimes at the documents contained within those folders." *See Burgess*, 576 F.3d at 1094. Because the examiner's

search did not exceed the scope of the warrant under this correct analysis, the plain view doctrine applies.

Conclusion

Wherefore, *Amicus* respectfully requests that this Court set aside the lower court's ruling and find that the plain view doctrine permits admission of this evidence.

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Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on Counsel for Appellant and Appellee on January 3, 2016.

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