

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,
vs.
SAMUEL ROGER WORLEY, JR.,
Defendant

STATE'S NOTICE OF MOTION AND
MOTION TO RECONSIDER GRANTING
DEFENDANT'S MOTION TO COMPEL

Warrant No. E-367821

NOW COMES THE STATE OF SOUTH CAROLINA and hereby respectfully requests this Honorable Court reconsider its order dated November 13, 2009, granting the Defendant's Motion to Compel and allow a hearing on this motion. Further, the State asks the Court to deny the Motion to Compel at this time and require accommodations be made for analysis of the hard drive. In support thereof states as follows:

This Court correctly referenced the statutory provisions relevant to this case regarding the possession and distribution of images of child sexual abuse. Section 16-15-410 of the South Carolina Code is clear that possession of the images of children engaged in sexual activity is prohibited by any person other than an employee of a law enforcement agency or prosecuting agency acting in their official capacity in the course of an investigation or a criminal proceeding. S.C. Code Ann. § 16-15-410 (Supp. 2008).

As the Order currently stands, Defense Counsel and his experts will be committing a crime by possessing the images of child sexual abuse. If the images of child sexual abuse remain in custody of law enforcement with access provided to the defense, neither Defendant's counsel, nor his expert, will have possessed the images in violation of section 16-15-410. Further, if the Court grants the Motion to Reconsider and denies the Motion to Compel the State will not be distributing images containing a visual representation of a minor engaged in sexual activity in violation of section 16-15-405(A)(2) of the South Carolina Code (Supp. 2008).

Likewise, possession of child sexual abuse images is illegal under federal law. See 18 U.S.C.A. § 2252(A). While the Adam Walsh Act is not directly applicable to the States, the Act and it's line of cases provides sound guidance on this issue. The Act provides "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 section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant." 18 U.S.C.A. § 3509(m). As this Court correctly determined the State must provide the Defendant with ample opportunity to inspect and examine the hard drive. See U.S. v. O'Rourke, 470 F. Supp. 2d. 1049, 1055 (AZ 2007).

It is the Defendant's burden to establish that ample opportunity to inspect and examine the hard drive has not been provided. See U.S. v. O'Rourke, 470 F.Supp2d 1049, 1060 (AZ 2007). The Defendant must show he has been precluded, either directly or indirectly by the State, from examining or analyzing the hard drive in some manner that is necessary and relevant to his case. See U.S. v. Knellinger, 471 F. Supp. 2d. 640 (E.D. Va 2007).

The State previously explained in its Memorandum and at the hearing on Defendant's motion, the offers given to the Defense for inspection of the evidence. In short, the State initially offered access to the Defense at the SLED Computer Crime Center in Columbia.¹ When Defendant's counsel noted the cost and inconvenience of travel to Columbia from his expert's location in Charleston, the State volunteered to transport an image² of the Defendant's hard drive to the City of Charleston Police Department³, which would retain possession, custody and control of the hard drive. The Defense expert would be given uninterrupted and private access to the image in a secure room at the police department for as long and as often as he needs. Further, Defendant's expert will be allowed to bring in his own computer equipment and forensic tools for analysis.

¹ See attached emails between Defendant's Counsel and the State's Counsel.

² An image is a bit-by-bit replica of the hard drive using write blocking software and hardware. The authenticity of the hard drive image can be verified by Defendant's expert using its SHA value as compared to the original hard drive and should be verified by Defendant's counsel upon each viewing.

³ The Defense's expert resides in the Charleston area and would have easier access.

The State submits that it has made an offer more than reasonable to accommodate the Defense, and that satisfies the U.S. v. O'Rourke factors for ample opportunity. See O'Rourke, 470 F.Supp2d 1049 (AZ 2007). Further, the Defense has failed to show how the State's offer for production will not work. Mere inconvenience does not satisfy Defendant's burden that the State has failed to provide ample access.

This Court found, based on the holding in O'Rourke, the following constituted ample opportunity to inspect, view, and examine the hard drive: (1) examination was to take place at the office of the United States Attorney on a mutually agreed upon date and time, (2) the Government was to provide defense counsel and their experts a private office in which to examine a copy of the hard drive, (3) the Government was to ensure the office was locked and all persons were prohibited from entering the office without the presence of the defense counsel or their expert, (4) and a copy of the Court's order was to be posted on the door of the room. Id. at 1057, 1060.

As applied to the case presently before the Court: (1) examination will take place at the Charleston Police Department on a mutually agreed upon date and time and for as long and often as necessary; (2) the State will provide Defense counsel and his expert a private room in which to examine a copy of the hard drive (defense counsel could review the images with his client as well); (3) the State will ensure the room is locked and all persons are prohibited from entering without the presence of the defense counsel or their expert; and (4) while it has not been proposed as yet, the State is willing to place the Court's order, or any documentation directed, on the door of the room.⁴

This is not a case in which the State has offered only a list of files and paper copies of the images as is alleged in the affidavit provided by Defendant's expert. The State will make an exact duplicate of Defendant's hard drive available to his expert for examination. Defendant's expert indicates in his affidavit he must be able to determine the location of child sexual abuse image files on the computer hard drive, the total number of such files on the hard drive, the length of time the files existed on the system, the users with access to the system, and which

⁴ A proposed order is attached which provides the accommodations the State shall provide.

accounts may have had access to the files. He will be able to make all these findings using the imaged hard drive subject to the accommodations provided by the State.

Further, Defendant's expert indicates he will not be able to extract important data from the images or use his own tools to conduct the forensic analysis. The accommodations offered by the State will provide the Defense with electronic versions of all images just as they appeared on Defendant's hard drive when examined by the State. He will be able to pull all data possible, including meta-data from the images if it existed. Further, as discussed above, Defendant's expert will be able to bring in his own computers and forensic tools for analyzing the hard drive. The only restriction is he will not be able to possess a copy to take out of the Charleston Police Department.

Not only has the Defense failed to refute the fact the State has made the evidence available to him for examination, but he utterly fails to establish any valid reason why his analysis cannot take place pursuant to the above reasonable accommodations. Mr. Johnson provides in his affidavit that "it is imperative to have not only complete access to the system to be analyzed, but to have a copy of that system available for complete forensic examination in an independent laboratory." Defendant's expert also fails to make clear his needs that are not being provided or what equipment he will be unable to use based on the accommodations provided by the State.

This Court correctly determined the State was required to provide access to the evidence; however, this Court erred in finding the access provided pursuant to the above accommodations did not constitute an ample opportunity by Defendant's expert to do an analysis of the hard drive. This case differs from U.S. V. Knellinger, 471 F. Supp.2d 640 (E.D. Va 2007), on which the defense relies. In Knellinger, the defense presented four experts, two of whom "described the great cost and effort that would be required to conduct their analyses in a Government facility" and one of whom stated that his charges would increase by \$400,000.00 if analysis was conducted in a Government facility and that there would be significant problems moving the necessary equipment. See id. at 647. The court, when granting the defense request for a copy of the hard drive containing child pornography reasoned, in part, that the defense's theory required

analysis that could not feasibly be conducted in the facility offered by the United States and that the Government did not present any evidence to the contrary. See id. at 649.

The Defense in this case has made no assertions regarding the inadequacy of the State's accommodations as in Knellinger. In fact, as above-mentioned, when the concern about the cost of travel from Charleston to Columbia was raised, the State offered to accommodate the expert in Charleston. No other fiscal concerns or difficulty with equipment have been raised. Neither has the defense made clear why their theory could not be pursued under present options. To that end, the State has made a clear showing that its offer for analysis is ample.

The State is gravely concerned about releasing contraband in violation of State and Federal law and, additionally, in re-victimizing children. The images and videos in question are not just pictures and movies, but images of real live children being sexually abused. Every time an image is released someone's child or grandchild is re-victimized.

The contraband in this case is similar to the contraband in a drug case or the deadly weapon used in a murder. If a defendant wishes to have drugs analyzed they do not get to leave SLED or the sheriff's office with the one-pound bag of cocaine. However, the contraband in this case is even more sensitive than the evidence in drug or other cases. Once digital evidence is turned over there is no way to monitor what truly happens with it; there is no control, regardless of whether a protective order is issued. If narcotics or a murder weapon are released, the State and Court knows whether the item has been returned which is just simply not so in these cases dealing with electronic images. Digital evidence can be copied and released without any change to the original evidence.

In conclusion, the State asserts that State and Federal law are clear that images of child sexual abuse must remain in the custody of law enforcement absent a showing by the Defense that the State has failed to provide ample opportunity to inspect. Moreover, the State believes such an opportunity has clearly been provided based on the accommodations offered above and there is an extreme lack of evidence showing why the State's proposal is not sufficient. Additionally, should the defense attempt to conduct an examination under the State's proposed

conditions and demonstrate why those conditions are insufficient or too restrictive, the parties may report to the Court and discuss further accommodation. Accordingly, the State respectfully requests that this Honorable Court grant the State's Motion to Reconsider and Deny the Defendant's Motion to Compel. A proposed order is attached for your consideration and signature.

Respectfully submitted,

HENRY D. McMASTER
ATTORNEY GENERAL

By: 
Megan B. Wines
Assistant Attorney General

Columbia, South Carolina
November 25, 2009

From: "Thom White" <Thom@wddlafirm.com>
To: "Susanna Ringler" <SRingler@scag.gov>
Date: 7/13/2009 5:51 PM
Subject: RE: State v. Worley

I understand your position. That's why I say we can put it at a judge's feet, seeking a protective order to assist us all in that regard. My expert is out of Charleston, and my client has rather limited resources. There is no reason for him to have to pay for innumerable trips of the expert to Columbia and back when one visit can copy the hard drive and the expert can examine in the privacy of his own lab, etc. We'll talk, even if it is to discuss acceptance of service of a motion and setting a hearing time. I'll be in touch.

Thom

Thomas H. White IV
Attorney at Law
P.O. Drawer 643
108 West South St.
Union, SC 29379
E-mail address: thom@wddlafirm.com
Phone: 864.427.5657
Cell: 864.466.2122
Fax: 864.429.4744

-----Original Message-----

From: Susanna Ringler [mailto:SRingler@scag.gov]
Sent: Monday, July 13, 2009 5:43 PM
To: Thom White
Subject: RE: State v. Worley

Your expert can have full access to the imaged harddrive at SLED, and can make as many appointments as he/she wants. I cannot consent to a copy of a harddrive full of CP walking out the door.

Susie

Susanna Ringler
Assistant Attorney General
Office of the Attorney General
State of South Carolina
ICAC Division
PO Box 11549
Columbia, SC 29211-1549
Office: 803-734-0913
Fax: 803-734-0917

>>> "Thom White" <Thom@wddlafirm.com> 7/13/2009 5:34 PM >>>
We'll file a motion at the appropriate time to get appropriate, meaningful access. I don't blame you for wanting all the tracks covered!

Thomas H. White IV
Attorney at Law
P.O. Drawer 643
108 West South St.
Union, SC 29379
E-mail address: thom@wtdlawfirm.com
Phone: 864.427.5657
Cell: 864.466.2122
Fax: 864.429.4744

-----Original Message-----

From: Susanna Ringler [mailto:SRingler@scag.gov]
Sent: Monday, July 13, 2009 5:22 PM
To: Thom White
Subject: RE: State v. Worley

I cannot consent to let child porn leave the premises.

Susanna Ringler
Assistant Attorney General
Office of the Attorney General
State of South Carolina
ICAC Division
PO Box 11549
Columbia, SC 29211-1549
Office: 803-734-0913
Fax: 803-734-0917

>>> "Thom White" <Thom@wddlawfirm.com> 7/13/2009 3:50 PM >>>
Susie:

I spoke with my expert this a.m. to make final arrangements for his retention. He is willing to go to SLED Headquarters to review the hard drive, but he wants to copy the entire drive so that he can take it back to his lab to examine more thoroughly. Obviously, he and I want to be protected from prosecution if there is any illegal content. Accordingly, we are requesting a Protective Order. He is to advise me as to the language he prefers and, when received, I will forward a proposed order to you. Quite frankly, if he can go ahead and copy the entire hard drive, it will eliminate a lot of what I call "back and forth" time for all of us...we can get it all up front and not have to continuously communicate "back and forth" that "now I need this, now I need that, etc", though I cannot say that there won't still be some of that!

Thom

Thomas H. White IV
Attorney at Law
P.O. Drawer 643

108 West South St.
Union, SC 29379
E-mail address: thom@wddlawfirm.com
Phone: 864.427.5657
Cell: 864.466.2122
Fax: 864.429.4744

-----Original Message-----

From: Susanna Ringler [mailto:sringler@scag.gov]
Sent: Sunday, July 12, 2009 1:13 PM
To: Thom White
Subject: Re: State v. Worley

Sound good. We will touch base when you get back. I am waiting on discovery. Will send it out as soon as I get it.

Have a great trip!

Susanna Ringler
Assistant Attorney General
PO Box 11549
Columbia, SC 29211-1549
803-734-0913

On Jul 11, 2009, at 10:28 AM, "Thom White" <Thom@wddlawfirm.com> wrote:

> Thanks, Susie. I have made initial contact with a potential expert. I
> will discuss the matter further with him the first of the week and
> will probably make arrangements to hire him. We can then make
> arrangements regarding making the evidence available to him. I'll
> advise my client of the continuance of the first appearance and I
> appreciate your professional courtesies. Can you think of anything you

> want from Chile?
> I could bring you back a token!

>
>

> Thomas H. White IV
> Attorney at Law
> P.O. Drawer 643
> 108 West South St.
> Union, SC 29379
> E-mail address: thom@wddlawfirm.com
> Phone: 864.427.5657
> Cell: 864.466.2122
> Fax: 864.429.4744
>

> -----Original Message-----

> From: Susanna Ringler [mailto:SRingler@scag.gov]
> Sent: Friday, July 10, 2009 1:35 PM
> To: Thom White
> Subject: State v. Worley

>

> Thom,

>

> I got your voicemail. Since Mr. Worley has retained an attorney, I

- > don't know that a 1st appearance is necessary.
- >
- > If he does want a prelim, we can do that on the next available date
- > (it sounds like that is September 8th) and I will wait to send the
- > indictment to the grand jury.
- >
- > Either way, I will let John Anthony with the Solicitor's office know
- > Mr.
- > Worley is excused from his first appearance.
- >
- > As far as viewing the evidence, please just have your expert contact
- > me we can work out setting up an appointment for him/her to go out to
- > SLED to view the hard drive.
- >
- > Please just shoot me an email back to let me know you got this.
- >
- > Thanks
- > Susie
- >
- >
- > Susanna Ringler
- > Assistant Attorney General
- > Office of the Attorney General
- > State of South Carolina
- > ICAC Division
- > PO Box 11549
- > Columbia, SC 29211-1549
- > Office: 803-734-0913
- > Fax: 803-734-0917
- >
- > --- Scanned by M+ Guardian Messaging Firewall ---
- >

--- Scanned by M+ Guardian Messaging Firewall ---

--- Scanned by M+ Guardian Messaging Firewall ---

--- Scanned by M+ Guardian Messaging Firewall ---

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)

IN THE COURT OF GENERAL SESSIONS

SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

vs.

SAMUEL ROGER WORLEY, JR.,

Defendant

PROOF OF SERVICE

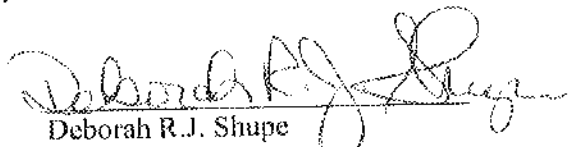
I, Deborah R.J. Shupe, certify that I have served the within State's Motion for Reconsideration on the Honorable John C. Hayes, III, and Defendant by facsimile and by depositing a copy in the United States mail, postage prepaid, addressed to:

The Honorable John C. Hayes, III
Moss Justice Center, 2nd Floor
1675-III York Highway
York, South Carolina 29745

Thomas H. White, IV, Esquire
White, Daimaduros & Dismaduros
108 West South Street
Union, South Carolina 29379

I further certify that all parties required by Rule to be served have been served.

This 25th day of November, 2009.


Deborah R.J. Shupe
Assistant Attorney General
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA }
COUNTY OF UNION }

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,
vs.
SAMUEL ROGER WORLEY, JR.,
Defendant

ORDER

This matter comes before this Court on the State of South Carolina's Motion to Reconsider Granting Defendant's Motion to Compel. At the hearing on the motion, Defendant was represented by Thomas H. White, IV, Esquire and the State by Megan B. Wines, Esquire.

Defendant filed a Motion to Compel Discovery seeking to require the State to provide a copy of the hard drive to Defendant's counsel and Defendant's forensic expert. Defendant's forensic expert sought to analyze the hard drive in his own laboratory, but the State refused to release the hard drive or an image of the hard drive to the Defense. This Court issued an order on November 12, 2009, requiring the State to release a copy of the hard drive to Defendant's counsel and forensic expert subject to a protective order restricting the use and dissemination of the hard drive.

The State has argued this Court should reconsider its Order because the State made appropriate accommodations for Defendant's analysis of the hard drive which would not require either party to violate State and Federal law. Further, the State maintains Defendant and his expert have failed to demonstrate why the accommodations offered by the State are insufficient for a proper analysis of the hard drive.

After careful consideration of all materials filed with the Court as well as argument of counsel, I find the State has made appropriate accommodations. Further, I find Defendant has failed to show, at this time, that the accommodations are insufficient to allow a proper analysis of the hard drive. Accordingly, the Motion to Reconsider is granted and this Court's Protective Order of Discovery is hereby vacated except the portion of the Order beginning with the first complete paragraph on page two through the end of page three which is hereby incorporated by reference into this Order.

Further, the State asks this Court to deny the Motion to Compel Discovery at this time and require Defendant to proceed pursuant to the following accommodations and restrictions on the use of the hard drive. The Court denies the Motion to Compel Discovery at this time, but finds the State shall make the following accommodations for the Defense's analysis of the hard drive:

1. The State will transport a verifiable image of Defendant's hard drive to the City of Charleston Police Department and the hard drive will remain in the City of Charleston Police Department's possession, custody, and control.
2. Defense counsel and Defendant's expert(s) are entitled to examine the image of the hard drive at the City of Charleston Police Department at a mutually agreed upon date and time and may remain for as long as necessary. Defense counsel or his expert(s) may return for further examination with agreement from Counsel for the State or her designee.
3. All persons who have, or will have, access to the image of the hard drive, shall file written certifications with this Court that they have reviewed this order and will comply with it. Further, any individual who views or accesses the image of the hard

drive shall certify in writing the date(s) on which the image was viewed or accessed and verify the SHA value of the image reviewed.

4. The image of the hard drive and all contents shall be accessed and viewed only by Defendant, Defense Counsel, and Defendant's expert(s) for purpose of conducting the examination and analysis of the hard drive. It is the intention of this Court that access to and viewing of the hard drive contents be limited to those individuals deemed absolutely necessary by counsel to permit a full investigation and complete preparation of a defense.

5. Defendant shall view the contents of the hard drive only while in the presence of Defense Counsel. In no event shall Defendant be in possession of the hard drive or a copy of the hard drive or any files, images, or videos contained thereon.

6. The State will provide Defense counsel and his expert(s) a private room in which to examine a copy of the hard drive.

7. The State will ensure the room is locked and all persons are prohibited from entering without the presence of Defense counsel or his expert(s).

8. Defendant's expert(s) shall be entitled to bring his own computer or forensic tools and equipment necessary to examine and analyze the hard drive image after proper notice has been made to Counsel for the State, or her designee, regarding the type and amount of equipment to be brought.

9. Proper electrical power will be provided for operation of the computer or forensic equipment.

10. Defendant, Defendant's counsel, and Defendant's expert(s) will not have access to the City of Charleston Police Department's computers or equipment.

11. Defendant, Defense Counsel, and Defendant's expert(s) shall not have access to the Internet and may not be connected to any network which accesses the Internet while conducting an examination or analysis of the image of the hard drive.
12. No copy of the hard drive shall be removed from the City of Charleston Police Department, except by persons authorized by the Office of the Attorney General.
13. Upon completion of the examination the image of the hard drive shall be collected by the Office of the Attorney General or its designee and returned to SLED.
14. A copy of this Court's Order shall be placed on the door to the room and shall remain on the door at all times until Defendant's counsel verifies in writing to this Court that all examination is completed.

AND IT IS SO ORDERED.

_____, 2009
Union, South Carolina

The Honorable John C. Hayes, III,
Judge for the Sixteenth Judicial Circuit