

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)
)
State of South Carolina,)
)
Plaintiff,)
)
vs.)
)
Samuel Roger Worley, Jr.,)
)
Defendant.)
)
_____)

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

PROTECTIVE ORDER OF DISCOVERY

FILED
OCT 17 2015
CLERK OF COURT
SOUTH CAROLINA

This matter comes before this Court on a Motion To Compel Discovery regarding the release of certain evidence in this case. Presently, the Defendant is charged with one count of Sexual Exploitation of a Minor pursuant to Section 16-15-405¹ of the S.C. Code of Laws.

The Court heard this matter in York on the 3rd day of October. Defendant was represented by Thomas H. White, IV, Esq., the State by Susanna M. Ringler, Esq.

The Defendant has pleaded not guilty to this charge and has requested discovery under Rule 5 of the S.C. Rules of Criminal Procedure and any exculpatory material pursuant to Brady v. Maryland, 373 U.S. 83 (1963), to include allowing Defendant's retained computer systems forensic expert to make a mirror image of his computer system hard drive confiscated by the State from Defendant's home so that the expert can conduct an analysis of said computer system hard drive² in his own controlled laboratory environment.

The State of South Carolina to date has not complied with this discovery request as to the computer hard drive. The State has expressed its willingness to provide the Defendant and his

¹ §16-15-405 prohibits, in short, production and/or distribution of child pornography as defined in §16-15-375, S.C. Code.

² The material before the Court sometimes uses the term "computer system" and sometimes "hard drive." The Court does not know the difference in the two and here the terms are used interchangeably.

counsel all discoverable matters except for the release of actual images, photographs, or videos which were seized as part of the investigation of this matter. Because the materials are deemed contraband, and therefore illegal to possess, the State has taken the position that it should not release these materials to the defense. Defendant in his Motion to Compel Discovery has recognized the issue and has suggested that a protective order regarding the handling of this evidence would be prudent and in the interests of justice.

The Court has reviewed the State's brief, Defendant's Motion and read U.S. v. Knellinger, 471 F.Supp.2d 640 (E.D. Va 2007). The Court is cognizant of 18 U.S.C.A. § 2252A; § 16-15-405, S.C. Code; § 16-15-410 S.C. Code³; and 18 U.S.C.A. § 3509 (The Adam Walsh Child Protection and Safety Act of 2006), and a consent order from the Ninth Circuit.

One dilemma⁴ in Defendant's request is that possession by the Defense counsel and/or any expert for the defense would be a violation of §16-15-410. Neither defense counsel nor any defense expert is exempt from this statute while law enforcement officers specifically are. Section 16-15-410 carries up to ten years imprisonment for a violation of said section. The South Carolina Rules of Criminal Procedure, particularly Rule 5, Disclosure in Criminal Cases, provide no protection for counsel or his expert from the provision of criminal prosecution under Section 16-15-410 or any other criminal statute. The Court is unaware of any provision of law or rule under which the Court can establish protection from criminal prosecution to Defendant's counsel or his expert.

The fact that the Legislature carved out an exception for law enforcement and not one for Defense counsel/Defense experts gives the Court pause. The canon of construction, *expressio unius est exclusio alterius*, here applies. By only including an exception for law enforcement

³ §16-15-410, S.C. Code prohibits possession of certain material and exempts law enforcement officers from the provisions of this section when acting in their official capacity.

⁴ One may refer to this as a Catch 22.

officers the Legislature, at least impliedly, has denied such exceptions to Defendants. While this may raise some constitutional questions, at this point the statute is clear as to its application.

The dilemma noted above creates an enigma. The Court can grant Defendant's request for discovery, but cannot offer protection to neither defense counsel nor his expert from criminal prosecution under §16-15-410, S.C. Code. The Order herein below is entered under the caveat of this dilemma.

In accordance with § 3509(m), a Defendant's request for a copy of the imaged hard drive should be denied as long as the Government has provided the Defendant and his counsel ample opportunity to inspect, view and examine the hard drive. See U.S. v. O'Rourke, 470 F.Supp.2d 1049, 1055 (AZ 2007); U.S. v. Johnson, 456 F.Supp.2d 1016, 1019 (N.D. Iowa 2006). In addition, it is the Defendant's burden to prove he has not been provided an ample opportunity to inspect and examine the hard drive. See O'Rourke, 470 F.Supp.2d at 1060.

To define what is ample opportunity, the District Court of Arizona said it must look to the ordinary and natural meaning of the words, and determined that it must be "a more than adequate opportunity to inspect, view, and examine the evidence in question." See O'Rourke at 1056. In O'Rourke, the District Court of Arizona held that the Government provided the defense with ample opportunity to inspect, view, and examine the hard drive where the following occurred: (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.

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In this case, Defendant has presented an Affidavit of Alfred L. Johnson who the Court, for the purpose of this Motion accepts to be an expert in forensic expert analysis. Mr. Johnson states, among other things:

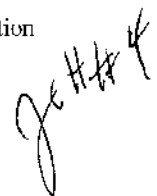
In order to conduct a thorough forensic computer systems analysis, it is imperative to have not only complete access to the system to be analyzed, but to have a copy of that system available for complete forensic examination in an independent laboratory. Such complete and confidential access is critical to the ability to provide any defendant with a zealous defense due to the following considerations (which are supplemental to those factors set forth in the Motion to Compel Discovery in this case). (The considerations are omitted).

The Court finds the rationale of Knellinger persuasive. The Court finds the State's proposal regarding Defendant's expert access to the computer system does not constitute an ample opportunity by Defendant's expert to do an analysis of the hard drive.

Therefore, upon good cause being shown to the Court, and upon subsequent request for the hard drive by Defense counsel⁵, the following is hereby ordered,

1. The State is to release to the attorney for the Defendant who may then release same to his retained expert witness copies and mirror images of all images, photographs, videos etc. which it has in its possession regarding the charge above.
2. The State is to release to the attorney for the Defendant who may then release to his retained expert witness a mirror image copy of any hard drives relative to and obtained through the investigation of this matter.
3. The Defendant himself shall not be allowed to have a copy of these images, photographs, videos, or hard drives, etc., and can only view them in consultation with and in the

⁵ The requirement of further request is predicated on Defendant's counsel and expert having an opportunity to consider and digest the above caveat before seeking to have in their possession material which may be in violation of §16-15-410 S.C. Code.



presence of his attorney or with counsel and his retained expert. Counsel must be present at any and all such viewings.

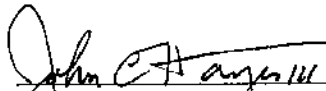
4. Once provided to the attorney for the Defendant and the Defendant's expert, no copies of the materials may be made and the images, photographs, videos, hard drives, etc. cannot be further duplicated.
5. The images, photographs, videos, etc. cannot be shown to anyone other than defense counsel, defendant's forensic expert and defendant as provided in 3. above.
6. The attorney for the Defendant and the retained expert shall maintain the mirror image copy of the images, photographs, videos, hard drives, etc. in a locked safe place that is not accessible by others within the office or offices.
7. A copy of this Court Order shall accompany the materials at all times and the retained expert is bound by the limitations and requirements in this Order and shall sign an acknowledgment of this provision by placing his signature, under Oath, on an acknowledgment filed with the Court.
8. Upon completion of the case, all copies of the images, photographs, videos, hard drives, etc. shall be returned to the South Carolina Attorney General's Office for destruction. No party can maintain any copy or duplicate any image, photographs, or videos provided under this Order. Violation of this provision will result in criminal charges.
9. The attorney for the Defendant is entitled to two copies of the images, photographs, videos, hard drives, etc. so one copy can be provided to Defendant's expert and the other copy is to remain with the attorney for use in preparation with the client consistent with the provision herein.

gc 2/14/5

10. If for any reason counsel is in need of further copies, counsel must apply to the Court of General Sessions with a notice to the Attorney Generals' Office. Defense counsel is prohibited from unilaterally duplicating the materials in order to provide copies to any expert other than the expert already retained, Alfred L. Johnson.
11. Any violation of this Order can be reviewed by the Court in an action for contempt of court, in addition to any other applicable penalty or sanction.
12. At the conclusion of the matter, all parties are required to sign an affidavit that all materials have been returned to the Attorney General's Office and no copies or duplicates were retained and that the materials were not distributed to unauthorized personnel in violation of this Order.

If Defense counsel wishes to again appear before the Court and present any lawful protection the Court may grant him or his expert the Court will be glad to hear counsel and if warranted issue a Supplemental Order hereto.

IT IS SO ORDERED.


The Honorable John C. Hayes, III
Sixteenth Judicial Circuit

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York, South Carolina
November 12th, 2009

