

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

JUN 11 2007

Stephan Harris, Clerk
Cheyenne

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 07-CR-32-B
)	
NATHANIEL SOLON,)	
)	
Defendant.)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND
DENYING DEFENDANT'S "MOTION FOR RELEASE OF MIRROR IMAGE OF HARD
DRIVE OR IN THE ALTERNATIVE MOTION TO DISMISS"

This matter is before the Court upon Defendant's Motion to Dismiss and "Motion for Release of Mirror Image of Hard Drive or in the Alternative Motion to Dismiss". Upon reading the briefs, hearing oral argument and being fully advised, the Court **FINDS** and **ORDERS** as follows:

I. BACKGROUND

Defendant was indicted on one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). Defendant states that the charge stems from an investigation conducted by the Wyoming Internet Crimes Against Children Task Force (ICAC). According to the Defendant, as a result of the investigation, a search warrant was issued. The search warrant

allowed the ICAC agents to seize a computer and peripheral computer equipment at the Defendant's residence.

Unlike the typical claim that the Government seized too much, the Defendant complains the agents in this case seized too little. Specifically, the Defendant complains that the agents improperly seized only a hard drive and a few other items, when they should have seized the entire computer system. Defendant insists that the agents' failure to seize the entire computer system destroyed evidence:

Without the entire computer system, it cannot be ascertained, amongst other things, what images were actually viewable by the Defendant. Data could be stored on the hard drive without it being viewable.

* * *

Additionally, without the system as a whole, other evaluations are impossible. It is impossible to run a complete virus scan on the system.

(Memorandum in Support of Motion to Dismiss at 4.)

II. DISCUSSION OF MOTIONS

A. MOTION TO DISMISS INDICTMENT

Defendant urges the Court to dismiss the indictment under California v. Trombetta, 467 U.S. 479 (1984), because the Government improperly destroyed evidence, denying him due process. The Court finds, however, that the Defendant's argument is unpersuasive. The Court is not persuaded because the Defendant

fails to point to any evidence that the Government destroyed. During the hearing, Defendant's counsel admitted that he could not actually state that there had been any destruction of evidence. Trombetta is accordingly not applicable to the facts as presented by the Defendant.

In this case, Defendant merely speculates that the parts of the computer system which the agents did **not** seize may have been altered since the seizure of the hard drive. The Court, however, does not equate possible alterations by the Defendant or his family to a destruction of evidence by the Government. To the extent the Defendant wishes to challenge the integrity of the entire computer system, he must do so at trial. The integrity of the system and the Defendant's ability to view the alleged images will be questions of fact for the jury. The motion to dismiss should consequently be denied.

The Defendant also argues that without the entire system, Defendant cannot perform certain computer tests and evaluations. To alleviate the Defendant's concern, the Court will require the Defendant and the Government reposit all of the computer components in their possession with the Clerk of Court pending trial as set forth below.

B. MOTION FOR RELEASE OF MIRROR IMAGE OF HARD DRIVE OR IN THE ALTERNATIVE MOTION TO DISMISS

The Defendant maintains that 18 U.S.C. § 3509(m) impermissibly limits his ability to reproduce the images on the seized hard drive. Section 3509(m) provides that:

(m) Prohibition on reproduction of child pornography.--

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, 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.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

Defendant insists that the statute's prohibition on making a copy of the hard drive violates his Sixth Amendment right to effective assistance of counsel and his Fifth Amendment right to due process. Defendant explains that the statute's restrictions

result in these constitutional violations because the Defendant's experts must analyze the hard drive at the Government's facility where ICAC personnel are present. Defendant asserts that by examining the hard drive in the presence of the Government, the Defendant necessarily "roadmaps" his defense theories to the Government.

The Court is not persuaded by Defendant's vague assertion of constitutional violations. Defendant's unsupported arguments are insufficient to show that § 3509(m) is unconstitutional on its face or as applied. As to any facial challenge, the Court agrees with the conclusion reached by the district court in United States v. Johnson, 456 F. Supp. 2d 1016, 1019 (N.D. Iowa 2006):

The court holds that § 3509(m) is not unconstitutional on its face. The statute's requirement that all child pornography used in criminal trials shall remain in the possession of the government or the court does not unduly burden the rights of defendants to fair trials. The statute imposes no restrictions upon what defendants may or may not introduce at trial. Section 3509(m) only restricts who may possess the child pornography and whether the child pornography may be copied. These restrictions on custody, care, control and copying are reasonable.

The Court further finds that the Defendant has not shown that the statute is unconstitutional as applied. Defendant complains that his right to effective assistance of counsel has been

impaired, but he does not provide any legal authority to support his claim. Defendant's vague assertions of possible prejudice also fail to show a due process violation. Due process guarantees that a criminal defendant will be treated with fundamental fairness essential to the very concept of justice. United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982). The acts complained of must be of such quality as necessarily prevents a fair trial. Id. Defendant has not shown that he has been denied fundamental fairness. In fact, he admits that the personnel at the ICAC offices have made every reasonable effort to allow defense counsel and experts to view the evidence within the constraints of § 3509.

Although the Court finds that no constitutional violation has been established, to assure access to the evidence, including the entire computer system, and to assure that the hard drive and the entire system are properly preserved for trial, the Court finds that the hard drive and any copy of the hard drive made by the Government, should be deposited with the Clerk of Court. The Defendant should also deposit with the Clerk of Court the remaining computer components which made up the entire system at the time of seizure, but which were not seized by the agents. Access to the evidence by both the Government and the Defendant shall be as set

forth below.

III. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Defendant's Motion to Dismiss and Motion for Release of Mirror Image of Hard Drive or in the Alternative Motion to Dismiss are **DENIED**.
2. The Government shall deposit with the Clerk of Court the original hard drive seized in this matter and any copy of the hard drive. The original hard drive shall be sealed to maintain a proper chain of custody. The Government may create a copy of the original hard drive, provided the Defendant and the Government agree to the conditions under which a copy is made and provided that the copy is made in the presence of the Defendant's counsel and experts which the Defendant requests to be present. The Government shall deposit the copy of the hard drive with the Clerk of Court.
3. The Defendant shall deposit with the Clerk of Court all remaining components and peripherals which were part of the computer system at the time the hard drive was seized, but which components and peripherals were not seized.
4. The Defendant and the Government shall each file in this matter an identification sheet. The sheet shall identify each computer component which the party deposited with Clerk of Court. The identification shall include a detailed description of each component. The Government and the Defendant shall also provide an identification sticker for the Clerk of Court to place on the component identified, which sticker shall be placed on the components by the Clerk of Court at the direction of parties.
5. Both parties shall have access to the entire computer system, provided that all examinations and inspections of the evidence deposited with the Clerk of Court shall be

made in the presence of the opposing party and in the presence of the Court's information technology staff, Beth Conley or Zane Smith.

Dated this 11th day of June, 2007.


UNITED STATES DISTRICT JUDGE