

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA)
)
 v.) NO. 3:05-cr-00185
) JUDGE TRAUGER
)
TIMOTHY RYAN RICHARDS)
a/k/a CASEY MASTERSON)
a/k/a ALBERT REDMAN)
a/k/a CASEY LEE)

RESPONSE TO MOTION TO RECONSIDER

The United States of America, by and through S. Carran Daughtrey, Assistant United States Attorney for the Middle District of Tennessee, and Kayla Bakshi, Trial Attorney for the Child Exploitation and Obscenity Section of the Department of Justice, respectfully requests this Court deny defendant's Motion to Reconsider Second Motion to Compel Production of Discovery and Motion to Declare Statute Unconstitutional, Docket Entry #124, filed on September 20, 2006.

The government has made the evidence reasonably available to the defense. For example, all of the digital material including the Berry and Mitchell computers have been made available to the defense expert in Washington State. Furthermore, the government has made *duplicate* copies of the servers and materials seized from Richards home available to the members of the defense team in Nashville to facilitate their convenient review of the material. The government also has made the Berry computers and one of the Mitchel computers available in Nashville and is in the process of making the two remaining Mitchel computers available. This is true even though the government does not expect to use any evidence from the Mitchel computer.

Thus, the material has been made more than reasonably available to the defense and no

constitutional infirmity exists for the statute 18 U.S.C. § 3509(m).

Factual Background

Subsequent to the hearing before the Court on September 7, 2006, the parties met and began discussing when the evidence review would begin. The parties initially agreed that the defendant would begin review of evidence on Tuesday, September 12, 2006. The government did not refuse a request to begin this review on Monday, September 11, 2006; rather, there were conflicts for both the defense and government on that Monday that made Tuesday a more convenient starting date.

Of significance, since April 2006, the defense has had copies of the servers and electronic evidence seized from defendant's home. The defense elected to send these copies to their expert witness, who is in Washington State, and thereby made the evidence inaccessible to the rest of the defense team in Nashville. The defense could have chosen to keep their copies of that electronic evidence to Nashville, Tennessee for review by the defendant, the attorneys, and an expert. Likewise, the defense expert could have relocated to Nashville in order to facilitate the team's review. Notwithstanding these facts, the government provided duplicate copies of this material in Nashville in order to facilitate convenient review of the material.

When the Adam Walsh Act became effective on July 27, 2006, the government was prohibited from distributing copies of other materials requested relating to Justin Berry's hard drives and Gregory Mitchel's hard drives. With Court sanction, the government instead offered to make *duplicate* copies of the remaining materials available for the defense team for viewing in the FBI facility located closest to the defense computer consultant in Washington State and in the Federal Building in Nashville Tennessee. The government also offered to make the materials related

to the servers and the defendant's home equipment available to the Nashville team *even though they had received their own copy of this material* prior to the enactment of the Adam Walsh Act.

The government has been able to make the remaining materials available to the defense and has provided nearly a full *duplicate* set of the materials to the defense in Nashville. Specifically, the defense consultant has made use of access to the remaining materials in Washington State since September 20, 2006. The defense team in Nashville had access to the duplicate copy of most of the material, including the material from the defendant's home and Justin Berry's computers since September 12, 2006. Before the defense had finished reviewing that material, more was provided. On September 21, 2006, the government made available the servers and some of the Mitchell material as well. A duplicate copy of Mitchel's computers will be available in Nashville on or about October 2, 2206.

However, as articulated above, this duplicate copy will merely facilitate the convenient review of the material for defense counsel. The government fulfilled its discovery obligation by providing full access to the material to the defense team, which elected to locate the material in Washington state. Defense counsel represented to the government that their expert would be available on Wednesday, September 20, 2006. The government made these drives available on that date by providing copies of the Berry and Mitchel evidence at a forensic lab close to the defendant's expert, Jason Sprowl. The closest staffed facility for such a review is in Yakima, Washington, approximately 85 miles from Kennewick, Washington. In fact, even as the defense complains to this Court about not having had reasonable opportunity to view the Mitchel drives, their consultant has been reviewing them. It was the defense team's choice to work in separate places. All in all, this situation can hardly be characterized as being in violation of the requirement that the

government make the evidence reasonably available to the defense, particularly since the defense already has their own copies of the vast majority of evidence that they have elected to house in Washington State. Furthermore, as the defense knows, the government has no plans to even utilize the content of Mitchel's drives during the trial. Thus, this evidence is not even discoverable, although the government has sought to be as cooperative as possible.

Worth noting is that remedy sought from this motion to compel is non sequitur. The technical difficulties that the government experienced in getting exact copies of the remaining material shipped undamaged and setup for review would have occurred even if the copies had been sent directly to the defense. It has nothing to do with whether the materials were being shipped to the FBI or to the defense counsel's office. In fact, the problems are probably more easily resolved because the FBI computer personnel are familiar with each other and government systems.

Argument

A. The Government Has Complied with the Requirement Under 18 U.S.C. § 3509(m) That the Government Make Evidence Reasonably Available to the Defense.

The law requires that the material be made *reasonably available* to the defense. Neither the law nor the Constitution requires that the contraband be made limitlessly available. As described above, the defense already has its own copy of the vast majority of material. It even has access to a duplicate copy of the material since the defense lawyers and consultants continue to elect to work in separate places. The defense consultant has access to the small amount of remaining material at the local FBI office, and the defense team in Nashville will soon have available a duplicate copy of that material. The "reasonably available" of the evidence is patently clear.

Furthermore, just as in other areas that concern constitutionally mandated discovery, such

as *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), there is also no such thing as a *per se* violation. Rather, the impact of the prosecution's failure to disclose certain material turns on whether the evidence is material or whether there was a reasonable likelihood that disclosure would have affected the outcome. *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (a *Brady* violation turns on more than non-disclosure of exculpatory material; there cannot be a *Brady* violation "unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict"); *Giglio*, 405 U.S. at 154 (the evidence at issue must be material, and a new trial would be appropriate if the false testimony could in any reasonable likelihood have affected the jury's decision).

In this latest round of Motions to Compel, the defendant has listed conclusory statements instead of actual examples of grievances. The defense asserts that the ability to examine the material "only under government supervision and only with approval of the government" [Doc 125-5]. No harm is articulated and no actual prejudice can be reasonably inferred. The government has already made provisions so that the government can uphold its duty to victims by safeguarding against abuse of the contraband with its role in facilitating defense preparation. Furthermore, no one performing the safeguarding role is communicating any kind of information to the prosecution team about trial strategy.

As for exhibits, the only limitation would be if the defense desired to make exhibits that contained child pornography. However, even if the defense lawyers received copies of the remaining materials, the existing protective order would prohibit them from making such copies of the contraband in their own offices as well. In this way, the example cited is wholly unrelated to the remedy sought by this motion. It should therefore be rejected. For any other exhibits, the

government has no objection to the production of such and would be amenable to any reasonable suggestion for their creation. As described above, secrecy about the nature of the exhibits is a non-issue because the people facilitating the production of any such non-contraband exhibits do not communicate about anything more than logistics.

B. Title 18 Section 3509(m) Is Constitutionally Valid.

1. *The Statute Does Not Violate the Due Process Clause.*

The Supreme Court has held that a defendant's due process rights are violated only when the unfairness complained of fatally infects a trial. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). As the Supreme Court noted in *United States v. Augenblick*, 393 U.S. 348, 352 (1969), "unfairness in result is no sure measure of unconstitutionality." The government takes seriously the allegations made by the defendant, and sees no benefit from a conviction that is unfairly obtained. However, there is a significant legal difference between inconvenience to defense counsel and experts, and constitutional infringements on a defendant's right to a fair trial. The Supreme Court has said that "a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten that the proceeding is more a spectacle or trial by ordeal than a disciplined contest." *Id.* at 356 (internal citations omitted). The issue posed by Section 3509(m), then, is not whether the multi-city defense team has been inconvenienced or may have to work harder to represent their client, but whether any added burden rises to the level of a constitutional problem. In this case, that has not happened.

The case of *United States v. Husband*, 246 F.Supp.2d 467 (E.D.VA 2003), clearly establishes that it is possible for the defendant to have a right to a fair trial when he has access to,

but not possession of, child pornography. In *Husband*, the defendant sought possession of the contraband at issue in order to “have an expert examine the tape and attempt to determine the age of the individual appearing on the tape.” 246 F.Supp.2d 468. The Court rejected the defendant’s due process claims, holding that it “will not order that contraband be distributed to defendant or his counsel.” *Id.* at 469. However, in order to protect the defendant’s interests, the Court also ordered that the tape must be made available with twenty-four hours notice and that the government provide a private space in which the expert can work. Therefore, even if this statute did not exist, the Court could still fashion a system in which the contraband stays in control of the government without compromising the defendant’s ability to prepare his case.

Examining the courts’ resolution of discovery issues in narcotics cases is instructive. The issue of providing defense counsel with access to alleged controlled substances has been decided by the Federal district courts in at least three states. In *United States v. Noel*, 708 F. Supp. 177, 178 (W.D. Tenn. 1989), the Western District of Tennessee stated that although the defendant was entitled to an opportunity to test and analyze the alleged controlled substance, “if the tests cannot reasonably be made in the offices of the United States, the government shall provide a minimum sample to defense counsel” but that “[t]he government may have an agent accompany he sample while in the possession of defense counsel or the expert.”

Further, when a defendant indicted for unlawfully selling and distributing depressant or stimulant drugs requested that he be provided all “tangible objects . . . within the possession of the Government,” as provided for in Rule 16(a)(1)(C), the Eastern District of Illinois directed that the inspection of the drugs be made “in the presence of a government agent.” *United States v. Reid*, 43 F.R.D. 520, 522 (N.D. Ill. 1967).

Finally, in finding that the defendant was entitled to inspect and analyze the alleged narcotic drugs, the Southern District of New York commanded that “[t]his inspection and analysis must be made at the office of the government’s chemist . . . subject to reasonable safeguards, and under the government’s supervision.” *United States v. Bentvena*, 193 F. Supp. 485, 498 (S.D.N.Y. 1960). As these cases make clear, a constitutionally acceptable compromise can be struck between the government’s need to control contraband and the defendant’s need to prepare his case.

2. ***The Statute Does Not Deprive Defendant Richards of Effective Assistance of Counsel.***

As articulated above, there is no such thing as a *per se* violation. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972), *Strickler v. Greene*, *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The defendant has listed conclusory statements instead of actual examples of grievances. The defense asserts that the ability to examine the material “only under government supervision and only with approval of the government” [Doc 125-5]. The government has already made provisions so that the government can both uphold its duty to victims by safeguarding against abuse of the contraband *as well as* facilitate defense preparation. As previously stated, no one performing the safeguarding role is communicating any kind of information to the prosecution team about trial strategy.

As for exhibits, the only limitation would be if the defense desired to make exhibits that contained child pornography. However, even if the defense lawyers got their wish to have copies of materials in their hands, the existing protective order would prohibit them from making such copies of the contraband any way. In this way, the example cites is wholly unrelated to the remedy sought by this motion. For any other exhibits, the government has no objection to the production

of such and would be amenable to any reasonable suggestion for their production.

Also as described above, secrecy is a non-issue because the people facilitating the production of any such non-contraband exhibits are not sharing any such information with the prosecution team. Moreover, like the government, the defense has already disclosed much of its defense strategy via expert disclosures pursuant to Fed. R. Cr. P. 16(b)(1)(C). In sum, the defense fails to offer anything but general and theoretical complaints that fall far short of constitutional significance.

3. *The Statute Does Not Violate the Compulsory Process Clause.*

The defense also throws in to this latest motion, a claim without support that the defense is being prejudiced because it can not use the evidence as a witness. Even witnesses in the forms of human beings are not available without limits to the defense *or the prosecution*. Abiding by reasonable restrictions to safeguard competing and far more compelling interests does not abridge the defendant's rights with respect to compulsory process.

4. *The Statute Does Not Violate the Ex Post Facto Clause.*

The defense also tries to assert that the statute violates the *ex-post facto* clause. As a matter of black letter law, a law has an impermissible ex post facto approach either when it changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to the enactment of the law. That designation would only apply if a law were to criminalize actions that were legal when committed; or to aggravate a crime by bringing it into a more severe category than it was at the time it was committed; or change or increase the punishment prescribed for a crime, such as by adding new penalties or extending terms. In the context of the rule of evidence it

would be deemed to be an issue only if the change made the conviction for a crime more likely than it would have been at the time of the action for which a defendant is prosecuted. As described in detail above, the only thing at stake with respect to the defendant's access is the convenience of the defense team, and not access. If the defense team fails to take steps - even if inconvenient - to prepare the defense, then it is that diligence and not the law that caused the harm to their case. *See* CJS CONSTLAW § 582.

Moreover, the only example cited by defense on this point is that the intended effective date of revisions to the 18 U.S.C. § 2257 provides for a ninety day grace period for compliance. That statute confers affirmative responsibilities upon purveyors of sexually explicit content. The ninety day grace period that the defendant cites would serve to provide these people a reasonable amount of time to comply with the revised statute. There is no affirmative responsibility that is at issue with respect to this discovery. The effective date of the 18 U.S.C. § 3509 (m) is July 27, 2006 without qualification.

Conclusion

For all of the aforementioned reason, the government respectfully submits that it has complied with this Court's orders and that the statute is constitutional. Thus the government requests defendant's motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served electronically or by mail to the following:

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s/ S. Carran Daughtrey
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