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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

United States of America, Plaintiff, vs. Matthew Schwier, Defendant.	)	Case No. 3:17-cr-00095 SLG

A period of excludable delay under 18 U.S.C. 3161(h)(1)(F) may occur as a result of the filing/granting/denying of this motion/pleading. As of the date of this filing 36 days remain before trial must commence pursuant to the Speedy Trial Act

SUPPLEMENT TO
C-3 MOTION TO COMPEL DISCOVERY AND PRODUCTION OF EVIDENCE: TORRENTIAL DOWNPOUR SOFTWARE

Comes now, Matthew Schwier, by and through counsel, Robert M. Herz of the Law Offices of Robert Herz, P.C. hereby files this supplement pursuant to this court's oral order from October 3, 2019 at the Final Pre-Trial Conference regarding the testing and protocols discussed in the *U.S. v. Gonzalez*, 2:17-cr-001311-DGC.

There is no law enforcement privilege that precludes disclosure of material evidence.

The government argues that *Roviaro v. United States*, 353 U.S. 53 (1957), gives it a "privilege" not to disclose material evidence to Mr. Schwier. To the contrary, the *Roviaro* Court reversed the defendant's conviction, finding prejudicial error in the government's refusal not to disclose the name of its informer who "was the only witness in a position to amplify or contradict testimony of government witnesses." *Id.* at 64.

The U.S. Supreme Court and the Ninth Circuit have yet to recognize or reject a "law enforcement privilege." *Shah v. Dept. of Justice*,714 Fed. Appx. 657, 659 n.1 (9th Cir. 2017). No such privilege exists in *Roviaro*, which instead recognized a

limited "informer's privilege" that allows the government "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." 353 U.S. at 59.

Shah does not consider whether such a privilegewould comport with the sixth amendment rights of confrontation and compulsory process and the fifth amendment right to due process. Even in *United States v. Pirosko*, 787 F.3d 358 (6th Cir. 2015), where the defendant did not show materiality and the court upheld non-disclosure, the court cautioned that "this conclusion should not be read as giving the government a blank check to operate its file-sharing detection software sans scrutiny. As a general matter, it is important that the government's investigative methods be reliable, both for individual defendants like Pirosko and for the public at large." 787 F.3d at 366.

In *Roviaro*, the Supreme Court noted that:"[t]he scope of the privilege is limited by its underlying purpose." 353 U.S. at 60. Defense counsel does not intend to share the disclosed material with anybody other than his trial team, who often work under
protective orders. Thus,there is no danger that child pornography distributors could find a way to avoid detection and thus render that tool of law enforcement ineffective, as the government claims. The government's argument presumes that somehow there will be wide disemintion of the software to the public. Mr. Fischbach is the firewall. He has previously been granted National Security clearance and no one has suggested he ever violated his oath to maintain those national security secrets. He has been subject to many non-disclsoure agreements and protective orders. No one has ever accused him of violating any. Balancing the government's concerns which do not rise to level of a recognized privilege with those of the defendant which are grounded in the fifth and sixth amendment, the so-called "law enforcement" privilege must give way.

The Court in *Roviaro* also ruled that "[a] further limitation on the applicability of the

privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60-61. "In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Id.* Thus, in *Roviaro*, the Court held that the privilege must give way. Because the informer, John Doe, was the person to whomRoviaro was accused of selling heroin,"his identity and testimony [were] highly material" and should have been disclosed. *Id.* at 62-63. The informer was "the sole participant, other than the accused, in the transaction charged" and "the only witness in a position to amplify or contradict the testimmony of government witnesses". Id. at 64.

The Torrential Downpour software and its associated materials plays the same role in this case that John Doe played in *Roviaro*. The program and its materials constitute "the only witness in a position to amplify or contradict the testimony" of SA Allison, the person who (according to the search warrant affidavit) downloaded child pornography from a remotely located computer on November 22, 2016. Not one scrap of contemporaneous evidence aside from date generated by Torrential Downpour software supports his claim.

This case is different from Gonzalez, and thus the test(s) that the defense wants to run are different.

The tests in Gonzalez as designed by the defense retained forensic examiner appeared aimed at answering specific questions pertinent to the facts of that case. In this case there are no .torrents on Mr. Schwier's alleged media that are relevant, and there is no data on the source computer or media that is relevant, unlike in the Gonzalez case. The Gonzalez defense identified nine tests it wanted to conduct in that case. See, *U.S. v. Gonzalez*, 2:17-cr-1311, at Doc. 86, Order of Court, August 27, 2019 at pg.3-4. And while these tests are of some interest, they do not address the specific issues identified in this case by the defense. As to the Gonzalez tests, tests 1 & 2 would not need to be run in this case if the government makes the same concessions it made

in Gonzalez. as described by the court. See, *U.S. v. Gonzalez*, 2:17-cr-1311, at Doc. 86, Order of Court, August 27, 2019 at pg. 8 lines 6-17 and pg.10 lines 6-10. The court also granted the defense request to conduct tests 3 & 4, and the parties agreed to tests 7, 8, & 9. The Gonzalez court noted that the main point of contention between the parties was whether the defense could have access to the ICAC COPS database. Id. at pg 3 line 19-21. The defense in this case does not need access to the ICAC COPS database.

The Gonzalez tests largely test the functionality of the software. The defense in this case wants to run a specific examination to test for a particular hypothesis, a particular condition that the defense believes it may have uncovered. And while the defense in this case does not need access to the ICAC COPS database, it does howeve r require that the government provide the .torrents that Torrentail Downpour Receptor identified as being files of interest and that were relied upon by SA Allison in conducting his Torrential Downpour searches in October and November of 2016.

To date no independent third party testing of Torrential Downpour has been done. And the testing done to date does not appear to meet basic scientific standards.

Mr. Schwier is not aware of any independent third party testing that has been done to date on Torrential Downpour. So far it appears that testing, to the limited extent that it exists, has been conducted by Detective Erdely. He is co-developer of the software and it appears he may have a financial interest and is a beneficairy of financial support provided by DOJ for the software. This appears to include as much as $4.4 million dollars in the last ten years in grants from the Department of Justice and does not include separate licensing fees received for the software. He has a clear bias and interest to show that the software works, and a clear interest in not releasing the program to anyone who wants to prove it may not work as intended. Indeed, testing by the software's co-developer engenders problems with confirmation bias. This is not how the scietific method works. Erdeley's hypothesis is that his software works as advertised. To test this hypothesis the scientific method requires testing the null hypothesis--- testing designed to prove

that the software does not work. If one is using the scientific method one does not design and run tests to show the software works rather you test for failure. Indeed, none of the reported testing appears to comply the the ISO/IEC/IEEE 29119 Software Testing-4: Testing Techniques. This standard is recognized by the National Institute of Standards and Technology (NIST) and by the Department of Justice. See also, National Institute of Standards and Technology, "Methodology Overview," published February 22, 2018 at [https://www.nist.gov/itl/ssd/software-quality-group/computer-forensics-tool-testing-program-cftt/cftt-general-0.]. The Erdely testing is designed to prove the functionality of the software, whereas the defense proposed testing will be designed to see it causes one particular or a set of particular circumstances.

The proposed defense test(s) is subject to attorney-client privilege and attorney work product doctrine. The defense will agree to disclose the particulars to the court in an ex parte proceeding only.

The circumstances to be tested by the defense team were identified by and during the defense forensic computer examination that has been on-going and largely conducted at the Orange County RCFL since May. It is also based upon information provided by Mr. Schwier to counsel. This examination has allowed Mr. Fischbach to identify specific data and files that are relevant to the proposed testing. Revealing the proposed test(s), and what data it is based upon would reveal attorney work product and attorney client privileged communications. Mr. Schwier will not disclose this information in court to the government, nor is he required to.

In other contexts, such as the issuance of Rule 17 subpoenas, the courts recognize that the defense need not disclose information that reveals attorney-client communications or work product or defense trial strategy. See, e.g., *United States v. McClure,* 2009 W.L. 937502 (E.D. Cal. 2009); *United States v. Crutchfield* (2014 W.L. 2569058 (N.D.Cal. 2014). The *McClure* and *Crutchfield* decisions both find that revealing defense trial strategy constitutes good cause for accepting the subpoena application *ex parte*. Local rules in other Districts

within the Ninth Circuit specifically authorize seeking a 17(c) subpoena *ex parte* for good cause and "good cause" is defined as, among other matters, avoiding the revelation of defense trial strategy. Even the trial court's protective order in *Budziak* (see attached) protected the testing and data generated by the defense tests from disclosure to the government.

In no other forensic field is the defense required to tell the government what independent tests it wants to run on any particular evidence. Whether the evidence is a controlled substance, or a hair, or DNA, so long as the evidence is material to the defense, the defense has a right to test and determine for itself what tests to run. If the results are not favorable the defense is not required to share that information with the government and need not use the results at trial. If the results are favorable the defense has the option of revealing the results and relying on those test results at trial. Of course, here the defense has no way to know in advance what the test results will show and whether the defense will intend to rely upon those results at trial. Mr. Schwier should not be required to disclose that information unless the defense intends to rely upon the evidence at trial. The test results could influence what type of defense Mr. Schwier intends to mount, and could affect his decision to proceed to trial or rather seek some sort of plea agreement. The data being relied upon and the test results are all matters that affect defense strategy, and thus pursuant to the fifth amendment and sixth amendment this information is privileged and not subject to disclosure.

Moreover, in no other defense testing of evidence is the defense required to conduct tests at a government facility. Here, the contraband evidence (actual images of child pornography) is subject to the restrictions imposed by the Adam Walsh act, and that evidence by statute must remain in government custody. The Torrential Downpour software is not contraband and not subject to those strictures. Moreover, the software is not classified as "Confidential Information" covered by the Confidential Information Procedures Act (CIPA) 18 U.S.C. App. 3 et seq. The defense has concerns whether the FBI offices can properly accommodate defense testing without the defense revealing privileged information, due to the

circumstances of the tests proceeding in a government facility. Moreover, Mr. Fischbach will require specific hardware and network configurations to conduct his tests and again the FBI may not be able to accommodate those needs. Mr. Fischbach's laboratory is already configured and set up to accommodate the testing contemplated.

Nevertheless, attached to Mr. Schwier's supplement brief, is a copy of the protective order issued by Judge Whyte in the *Budizak* case after the Ninth Circuit remand. This order fullly addresses the government's concern about protecting the software from *public* disclosure. Mr. Schweir respectfully suggests the court largely adopt the terms of this order, with notable exceptions, rather than the one utilized by the court in Gonzalez. Paragraph #3 is not applicable to this case and the defense sees no justifiable reason to conduct the testiing at a government facility. But the defense does agree with those terms of the *Budziak* Order holding that testing should not occur under the supervision or participation of the government, and that testing and results should remain confidential until the defense indicates that it intends to rely upon the tests and results at trial.

DATED at Anchorage, Alaska, this 15th day of October 2019.

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CERTIFICATE OF SERVICE
I hereby certify that on Oct 15, 2019, a copy of the foregoing Supp to C-3 Motion to Compel was served electronically on Assistant United States Attorney's Office s/ Robert Herz