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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
)	
vs.)	
)	
JODI ANN ARIAS,)	CR 2008-031021-001
)	
Defendant.)	MOTION TO PRECLUDE WITNESS
)	(REFERRED TO AS PSEUDONYM)
)	
)	(Assigned to the Honorable
)	Sherry Stephens)
)	

The State of Arizona, by the undersigned Deputy County Attorney, requests that the witness who will be asking to testify under a Pseudonym (hereafter "Pseudonym") be precluded as a witness in this trial.¹ Pseudonym is one of the individuals who completed a large portion of the examination of the victim's Compaq Presario laptop and its hard drive.

The State made an oral motion prior to the holiday recess asking the court to order the interview of Pseudonym and another

¹ Defense counsel has requested that the witness' name not be used in any pleadings or proceedings and instead asked that this individual be referred to using a pseudonym.

individual. Defense counsel objected arguing that they were not witnesses who would be testifying at trial. The court indicated that it was inclined to order them to submit to an interview citing Rule 15.2(g), Ariz.R.Crim.P. and asked the prosecutor to submit the request in pleading form.

By pleading filed December 22, 2014, the State requested that the court order Pseudonym and the other individual submit to an interview. The State's request is currently pending before the court.

By electronic correspondence sent on New Year's Eve, December 31, 2014, at 4:47 p.m. defense counsel Laurence Nurmi indicated that these two individuals would be available for an interview "on January 2, 2014 (sic), after Mr. Neumoister's interview is done." He failed to inform the State that they would now be called to testify at trial.

By e-mail sent on Friday, January 2, 2015, at 4:57 p.m. defense counsel Laurence Nurmi contradicted his earlier statements to the court and indicated for the first time that it was his "intent that [Pseudonym] will be our first witness when we return." Prior to the holiday recess, defense counsel indicated to the court and prosecutor that his first witness on Monday, January 5, 2015 would be Bryan Neumeister.

The interview of Bryan Neumeister was conducted on Friday, January 2, 2015 beginning at 10:00 a.m. Defense counsel failed to notify the prosecutor that he had changed his mind and Neumeister

would no longer be called on Monday. He also failed to inform the prosecutor during the approximately four hour interview that Pseudonym would be called to testify first on Monday. During that same interview, co-counsel Jennifer Willmott confirmed to the prosecutor that Neumeister was the only witness scheduled to testify on Monday.

In his interview on January 2, 2015, Neumeister revealed that his "basic thing is doing audio, video, and photography." *January 2, 2015 Transcript, page 139.* He also corrected his evidentiary hearing testimony of November 21, 2014 and December 4, 2014, and explained that most of the hard drive analysis was performed by either Pseudonym or the other individual.

Q. This is your information. That is you - that is what your training has taught you if a file is zeroed out, and then you are giving me the description of what you believe it is. In other words, when a file is zeroed out, you are telling me that you don't have a timestamp on it; right?

A. Correct.

Q. You don't know when it was deleted?

A. That's correct.

Q. What else don't you know?

A. That would be more in [Pseudonym's] ballpark than mine.

January 2, 2015 Transcript, page 83.

Q. Okay. That is - that is what you think you were talking about, okay.

The June 19th, 2009, incident-

A. Okay.

Q. -- what did you do with regard to that?

A. I saw on a timeline that the computer had been fired up.

Q. "Fired up" means what to you?

A. Turned on.

Q. Okay.

A. And then I called [Pseudonym] to take a look at it.

Q. Okay. When you say that you saw it was fired up, what did you find, besides that it had been turned on?

A. That - well, according to [Pseudonym] - again, I went to [Pseudonym] with it. He - he would have to testify to it basically.

January 2, 2015 Transcript, pages 127-128.

A. So once - once you fire it back up, it is going to change again. Depending on what updates were installed means - you have to ask [Pseudonym], but whatever updates were installed, it is going to change various parameters.

January 2, 2015 Transcript, page 130.

Q. And how was the computer turned on on that day?

A. I don't know. You will have to ask [Pseudonym].

Q. How was it turned off?

A. I don't know. You will have to ask [Pseudonym].

Q. You know you testified as to how it was turned off.

A. I think I testified it was a hard shutdown.

Q. Okay, yeah. And did you get that information from [Pseudonym]?

A. Yeah.

January 2, 2015 Transcript, pages 131-132.

Q. Okay. And the times - where did you get the times that you testified about?

A. From [Pseudonym].

Q. So all of the times that you got were from him?

A. That's correct.

January 2, 2015 Transcript, page 132.

Q. And the first item that you turned over was - was an E01 file, though, wasn't it?

A. If it was, then it was made by [Pseudonym], because I didn't do an E01 file.

Q. Okay. So if we have an E01 file, [Pseudonym] made it?

A. Yeah, because I didn't do an E01 file.

January 2, 2015 Transcript, page 137.

A. Malware is mainly software that is used to track what you do and -

Q. Who puts it out there?

A. Oh, all kinds of different companies do. I mean, it is going to be all different reasons. But, again, what I did was detect what was there, or [Pseudonym] can break down each one. All of these - all of these things have been reversed engineered, and he has helped reverse engineer a lot of these things.

January 2, 2015 Transcript, pages 144- 145.

Q. When you say "redirecting," what are you talking about?

A. Well, there is different kinds of - and again, I would rather have [Pseudonym] explain these things, because he can actually do a better job of it than I can.

January 2, 2015 Transcript, page 145.

Q. Okay. The Smitfraud, what is that virus associated with?

A. Smitfraud is a virus that -- again, I would rather [Pseudonym] explain it, but the tough part about of Smitfraud is you can't get rid of it without going into safe mode. In other words, you need to come out of your normal operating system and activate that computer in a safe mode to eliminate Smitfraud. It is a tough virus.

January 2, 2015 Transcript, page 147.

A. I think there are 22, or something like that. Let me see. 23.

Q. And Spybot S & D, when was that installed?

A. You would have to ask [Pseudonym]. I don't know. I just made a list of everything and turned it over to the guys.

January 2, 2015 Transcript, page 149.

A. Well, DLL files, for example, dynamic link libraries. In other words, it controls what links to what. Anything -- for example, on a computer, people think, okay, there is -- you know, with the internet, for example there is like on history file. You know, like one history. There is actually very many. But they will be in the registry in different places. So there might be 20 different files. Even though you deleted a few, you might still find stuff in another file. So these privacy sweepers, for the most part, are pretty good at cleaning off any kind of traces of what you've done, because of a lot of these also -- like, some of these privacy things also, when they take off your internet history or your history.dat files, they also shred them, which makes them not really recoverable.

Q. Okay. Can [Pseudonym] recover them even though they have been shredded?

A. You would have to ask him. Some things can be recovered. If you know what type of -- what type of shredder was used, it could be reverse engineered, but you would have to ask him.

January 2, 2015 Transcript, pages 151-152.

Q. How about visiting an internet site? Does it always go to the registry?

A. No, not always.

Q. How does that work?

A. It can go to the history.dat file. It can go to the registry if it was part of -- you know, again, you are going to have to ask [Pseudonym] the specifics of that. But it depends on the program. I mean, most files are going to -- if you install a program, you are going to see traces of it in the registry.

January 2, 2015 Transcript, page 153.

A. Yes. Or entered it with a pen. Basically, it has to be manually entered. It can't be brought in by another program.

Q. And that work involving that was done by somebody else, not you?

A. That was by [second individual].

Q. Okay. And did [Pseudonym] do that work, or not? Which one was manually entered in --

A. Actually --

Q. Go ahead.

A. Actually, [Pseudonym] is working on that right now. He is verifying [second individual's] work. And we are basically looking down to certain files to see how they got there.

January 2, 2015 Transcript, page 155.

A. Everything -- everything -- everything from the inception of the computer from when --

Q. Purchased?

A. Yeah. Built to June 1st

Q. 2008?

A. Yeah.

Q. Was what, shredded?

A. I don't know. You will have to ask [Pseudonym]. It is not there. Put it this way, there is no record of anything prior to that in the history.dat file.

January 2, 2015 Transcript, page 156.

Q. From purchase to June 1st, I understand that. And how do you know that it was shredded if it is not there?

A. Well, you would have to ask [Pseudonym]. I don't know if it was shredded. It was deleted. It is not there. I mean, you can't have a computer without a history.dat file unless you delete it. Everything you do in your computer is going to go in the history.dat file.

January 2, 2015 Transcript, page 157.

Q. No, from purchase to June 1st of 2008.

A. No, but from the history file is gone.
Q. In other words, there isn't any?
A. As far as -- as far as the browser that I'm looking at, no. Again, there is 23 or so different history files on there, so you need to ask [Pseudonym] about that. I just went by searching for porn sites. I didn't go through every last piece of stuff.

January 2, 2015 Transcript, pages 158-159.

Q. There is 94 porn entries from that time to --
A. Yes.
Q. When is the first one?
A. I don't have the dates. I just have the files. [Pseudonym] can give you the dates. But these are manually -- manually typed in. In other words, these were searched. Words were typed in, and these things came up from the searches.

January 2, 2015 Transcript, page 160.

Q. What was the shutdown on June 10th of 2008?
A. It was a normal shutdown.
Q. It was a normal shutdown on June 10th, you've got.
And who do you get that from?
A. [Pseudonym].

January 2, 2015 Transcript, page 161.

Q. Well, there is a difference between being traced porn and actually somebody going to the porn site.
A. Well, no. There is also -- if you look at that report, the people -- it was definitely searched and viewed.
Q. And that report that is there; right? And this is after June 1 of 2008; right?
A. No, no. That is actually stuff that was viewed throughout the history of the computer. And, again, [Pseudonym] can go through that stuff.

January 2, 2015 Transcript, page 162.

Q. What are you saying is, his report generally, it includes times that -- where porn was viewed before June 1 of 2008?

A. Yeah. It should -- it should have everything that is -- was ever done on that computer as far as -- except for deleted files. But he would be able to tell you -- [Pseudonym] would be able to tell you exactly what files were viewed from the computer. Because these weren't downloads. These were things that were you went to the internet and you watched them on the internet, unless you downloaded the Zlob player, which, you know, is saying you need to watch this with this player.

Q. So what you are saying is that we are looking at the Zlob player as a -- and, then, that is where we are getting the information?

A. No.

Q. No?

A. You are going to have to ask [Pseudonym], again, on that, because he said there is plenty of indications that these sites were viewed rather than just -- they were actually viewed from the computer.

January 2, 2015 Transcript, page 163.

Q. So you then went the first time. Then you went a second time. Why did you go a second time?

A. The second time was to do a different type of clone. I wanted -- the first time I did, I just captured what was on there, because I thought -- it was said there was no porn. I didn't -- most of the time when I deal with the police department file, what they say is on there is on there. In this case, it was completely opposite of what they said was on there. So I wanted to get a complete clone so I could look for deleted files.

Q. Right.

A. And, then, [Pseudonym] went through that clone, and he found out there was 70,000 zeroed out files. So --

Q. The first clone?

A. No.

Q. Your clone?

A. No, the second one. The one that was complete raw data.

January 2, 2015 Transcript, page 163-164.

On Friday, January 2, 2015 approximately 3 hours after the interview of Neumeister was completed, defense counsel notified the prosecutor that he was now calling Pseudonym as his first witness on Monday instead of Neumeister. Although one day is insufficient time to conduct a meaningful interview and adequately prepare for cross examination, the State attempted to make it work by requesting that Pseudonym's interview be scheduled for Sunday, January 4, 2015 at 8:00 a.m.² Defense counsel instead scheduled the interview for 10:00 a.m. Defense counsel's refusal to accommodate the prosecutor's request to interview Pseudonym at 8:00 a.m. did not provide sufficient time for a meaningful interview and an opportunity to obtain a transcript necessary to prepare for cross examination prior to Pseudonym's testimony Monday morning.

The failure to allow the interview of Pseudonym to take place prior to his trial testimony is more egregious considering that a report consisting of over 7,000 pages was disclosed on January 2, 2015 after Neumeister's interview. The State also needs to interview Pseudonym to determine his participation in the creation of the report.

² The State had already scheduled a court reporter to attend the interview at 8:00 a.m.

Therefore, pursuant to Rule 15.7(a), Ariz.R.Crim.P., it is requested that the court preclude Pseudonym from being called as a witness at trial. Alternatively, the State requests that the court grant the relief sought in its motion filed on December 22, 2014 and order that Pseudonym submit to a meaningful interview to be conducted a week prior to his testimony.

SUBMITTED this 4 day of January, 2015.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/ Juan M. Martinez
/s/ Juan M. Martinez
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
4 day of January, 2015 to:

The Honorable Sherry Stephens
Judge of the Superior Court

Laurence Nurmi
2314 E. Osborn Road
Phoenix, Arizona 85016

BY: /s/ Juan M. Martinez
/s/ Juan M. Martinez
Deputy County Attorney