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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No. CR-10-0252-S-EJL
)	
vs.)	GOVERNMENT’S SENTENCING
)	MEMORANDUM
STEVEN KUTZNER,)	
)	
Defendant.)	
)	
)	
)	

Steven Kutzner pled guilty to possessing obscene visual representations of the sexual abuse of children in violation of 18 U.S.C. § 1466A(a)(2). Kutzner stipulated that the Court could consider the fact that he had received and possessed images of real children as relevant conduct for purposes of sentencing. (Plea agreement, p. 7.) The evidence shows that, besides the obscene material that he pled guilty to possessing, Kutzner had been downloading, receiving and viewing sexually explicit images of actual children for eight years. He avoided being charged with a child pornography offense because he used wiping programs to delete the images from his computer. So, while

Kutzner pled guilty to possessing obscene *fictional* representations of the sexual abuse of children, he also has a long history of viewing sexually explicit images of *real* children. Recognizing this, and considering the totality of the circumstances, the parties have agreed to recommend a sentence of imprisonment within the range specified by the United States Sentencing Guidelines, as described in the presentence report. Justification for this recommendation is set forth in the following discussion.

1. Background of the investigation

Kutzner's case was brought to the attention of investigators from DHS/ICE by the German Federal Police, Child Pornography Unit, which had identified a number of suspects in the United States who were sharing a known child pornography file via a peer-to-peer file sharing network. According to the investigation, Kutzner offered to share a known child pornography file on the "eDonkey2000" network on October 4 & 5, 2008. This lead was forwarded to DHS/ICE agents in Boise, who contacted Kutzner at his home on August 25, 2009. Kutzner was cooperative and consented to a search of his computer. An Idaho State Police Computer Forensics Examiner conducted an on-site preview and observed illegal material.

2. Forensic findings and admissions by the defendant

A search warrant was obtained, and the examiner conducted a forensic review of the computer. He found a folder labeled "Porn" that contained six hundred and thirty two (632) image files, seventy (70) of which were animated images graphically depicting minors engaging in sex acts, including the following representative samples:

- A. A cartoon depiction of the Homer Simpson cartoon character (an adult) sitting on a couch and receiving oral sex from the Lisa Simpson cartoon character

(a minor). This file was found on the C drive of KUTZNER's computer in a folder titled "Porn." This file was saved into this folder on July 28, 2009.

B. A cartoon depiction of the Bart Simpson cartoon character (a minor) standing up nude and receiving oral sex from the Maggie Simpson cartoon character (a toddler) who is also nude. The Maggie Simpson character also has a pacifier inserted into her vagina and the Bart Simpson character has a commentary bubble over his head that states, "Ah, you're little sucker! You like it, Maggie, don't you? I guess this thing tastes better, than your pacifier!" This file was found on the C drive of KUTZNER's computer in a folder titled "Porn." This file was saved into this folder on July 28, 2009.

C. A cartoon depiction of the Lisa Simpson cartoon character (a minor) kneeling down under what appears to be the underside of a horse or pony and holding an erect penis in her hand. She is nude and appears to be covered with a liquid substance and is licking her lips. A caption over the images reads, "See, Marge, she loves her new pony." "But Homer, we can't afford it. And besides, she's naked and playing with his THINGIE!" This file was found on the C drive of KUTZNER's computer in a folder titled "Porn." This file was saved into this folder on July 28, 2009.

D. A cartoon depiction of the Maggie Simpson cartoon character (a toddler) nude and engaging in vaginal sex with the torso of what appears to be a male adult character. The caption above the images reads, "A little shoving can go a long way...." This file was found on the C drive of KUTZNER's computer in a folder titled "Porn." This file was saved into this folder on July 22, 2009.

(Plea Agreement, p. 5-6)

The parties have stipulated that seventy of these images are obscene. "For a work to be obscene it must appeal to the prurient interest, be patently offensive in light of community standards, and lack serious literary, artistic, political, or scientific value. *United States v. Schales*, 546 F.3d 965, 972 (9th Cir. 2008). Kutzner admitted that he

downloaded these images from the Internet website "Imagefap," which is a pornography gateway site with links to many different genre of pornography, including obscene cartoons.¹

Besides the obscene cartoons, the forensic examiner discovered in the folder labeled "Porn" five-hundred-and-twenty-four (524) pornographic image files, most of which depict what appears to be teenaged females. The identity of the young people depicted is unknown, and it is difficult to tell beyond a reasonable doubt whether any of the females are less than 18 years of age, however, none are prepubescent.

Kutzner's computer also contained more than eight-thousand files containing images child erotica involving younger children, many of them prepubescent. "Child erotica" refers to non-nude or semi nude photographs and videos of children in sexually suggestive poses that are not themselves images of child pornography, but still fuel the sexual fantasies of pedophiles and others who have developed a sexual interest in minors. The majority of the files were found in the Windows Recycler or in Unallocated Space on Kutzner's computer. (Plea agreement, 7). The search warrant affidavit sworn out by ICE SA Daren Boyd describes some of these files:

1. A photo of what appears to be a real female child, approximately six to

¹ The evidence would have supported charging Kutzner with violating 18 U.S.C. § 1466A(a)(1)(A), knowing receipt of obscene visual representations of the sexual abuse of children, for which the penalty is a minimum of five years, up to 20 years imprisonment. A violation of 18 U.S.C. § 1466A(a)(2), the crime to which Kutzner pled guilty, subjects the offender to the same maximum term of imprisonment as someone convicted of possession of sexually explicit images of minors. The maximum term of imprisonment is 10 years. However, the term of supervised release for violating § 1466A is limited to a maximum of three years, whereas the term of supervised release for a child pornography offense is five years to life. *United States v. Moriarty*, 429 F.3d 1012, 1024 (11th Cir. 2005).

seven years of age sitting on a chair with her arms behind her head and her right leg raised to expose her pubic area. The child is wearing underwear but the focal point of the photo appears to be the child's pubic area and it appears as if the photo was taken to elicit sexual arousal from the viewer.

2. A photo of what appears to be a real female child, approximately two to three years of age sitting on the ground with her knees bent and pushed out to the side exposing her pubic area. The child is wearing underwear but the focal point of the photo appears to be the child's pubic area and it appears as if the photo was taken to elicit sexual arousal from the viewer.
3. A photo of what appears to be a real female child, approximately six to seven years of age sitting on the ground with her knees bent and pushed out to the side exposing her pubic area. The child is wearing underwear but the focal point of the photo appears to be the child's pubic area and it appears as if the photo was taken to elicit sexual arousal from the viewer.

(Affidavit for search warrant, MS No. 09-6705, p. 13).

These images are not cartoons. They depict *real* children in poses that a person with a sexual interest in minors would likely find sexually provocative. The fact that Kutzner saved images like these, that skirt the edge of what the law defines as a lascivious display of the genitals or pubic area,² in such large quantities strongly suggest that Kutzner has a sexual interest in prepubescent female children.

According to the psychosexual evaluation, Kutzner admitted that “he started viewing child pornography . . . approximately eight (8) years ago.” (Psychosexual evaluation, p. 3). He claimed that “[h]e was initially viewing adult pornography but he was looking for something more taboo, which eventually led him to viewing child pornography. He stated that it became an addiction of sort, in that he would feel guilty,

² See 18 U.S.C. §§ 2252(a) and 2252A and *United States v. Banks*, 556 F.3d 967, 980 (9th Cir. 2009), *citing United States v. Dost*, 636 F. Supp. 828, 832 (S.D.C.A. 1986), listing six non exclusive factors for courts to use in determining whether photographs are a “lascivious exhibition” of the genitals or pubic area.

shameful, and disgusted with himself after he would view the child pornography. He would view it for a period of a few months and then he would stop viewing it for a few months.” (Psychosexual evaluation, p. 3-4). However, “. . . he found himself going back to viewing child pornography again in this cycle that happened over and over again. He stated that his life had been so bland that he saw the viewing of child pornography as “dangerous” and a form of “thrill seeking” because he knew it was wrong and against the law.” (Psychosexual evaluation, p. 4).

Kutzner also admitted using peer-to-peer (P2P) file sharing software to search for and obtain child pornography and obscene images depicting children. P2P software allows the user to enter search terms to search for pictures, movies and other digital content. Search results are presented to the user and the user selects files of interest, and then downloads them from other users around the world. Kutzner admitted using search terms such as "models," "lolita," "teen," "hardcore," "pthc" and "hussy" to locate images of child pornography, including pornographic images of pre-pubescent minors. (Plea agreement, p. 8). The term “lolita” is a “well-known moniker for minor girls,” *United States v. Syphers*, 426 F.3d 461, 466 (1st Cir. 2005), and “often a code word for child pornography.” *United States v. Grimes*, 244 F.3d 375, 379 n. 7 (5th Cir. 2001). The term “pthc” is an abbreviation for “pre-teen hard core,” *United States v. Wilder*, 526 F.3d 1, 4 (1st Cir. 2008), and the term “hussy” is used to describe child pornography newsgroup. *Id.* Recently, a court found that a defendant’s use of the search terms that included "lolita" and “pre-teen” supported a finding that he knew the images he downloaded depicted actual minors. *United States v. McNealy*, --- F.3d ----, 2010 WL 4366921, *8 (5th Cir. 2010).

3. The § 3553(a) Factors

Since *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines are advisory rather than statutorily mandated. However, when imposing a sentence, the Court is required to consider the guidelines, and must fashion a sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3353(a)(2). The § 3553 factors will now be addressed.

A. The Nature and Circumstances of the Offense

The seriousness of the underlying offense and the relevant conduct clearly weighs in favor of a custodial sentence within the guideline range, for the purposes of punishment and promoting deterrence. *See* 18 U.S.C. § 3553(a)(1) and (2)(B). For approximately eight-years, Kutzner intentionally searched for, viewed, downloaded, and saved depictions of the sexual abuse of children, including child pornography, and child erotica, and obscene visual representations of the sexual abuse of children. He also permitted child pornography to be available to others in the shared folder of his P2P software, thereby engaging in conduct that furthered the spread of this material.

Despite his persistent involvement with Internet child pornography images, there was a dearth of actual child pornography evidence on Kutzner's computer. This explained by Kutzner's use of wiping programs to eliminate it. The forensic examiner discovered two different cleaning programs installed on Kutzner's computer, "CCleaner" and "Eraser," both tools that can be used to remove files and clean traces of online activity. The last time "CCleaner" was run on Kutzner's computer was August 24, 2009, the day before the search. The last time "Eraser" was run on Kutzner's computer was August 10, 2009, two weeks before the search. (Plea agreement, p. 7). Kutzner admitted that he installed these

two programs on his computer and used them to eliminate child pornography and other files he had downloaded from his computer. (Plea agreement, p. 7-8).

Where a defendant "volitionally reach[es] out for" images by using search terms known to locate child pornography, and then deletes image links from his cache after viewing the material, this is evidence that he knowingly possessed the images. See *United States v. Tucker*, 305 F.3d 1193, 1205 (10th Cir. 2002). "(T)he ability to destroy is definitive evidence of control." *Id.* at 1267. Evidence that a defendant used two wiping programs to remove images from his computer supports a reasonable inference that he knew child pornography was automatically saved when he downloaded and viewed it. See *United States v. Bass*, 411 F.3d 1198, 1202 (10th Cir. 2005). See also *United States v. Romm*, 455 F. 3d 990, 1000 fn. 13 (9th Cir. 2006) citing *Bass* ("In Bass's attempts to delete the child pornography, the Tenth Circuit found sufficient evidence of Bass's knowledge to support his conviction for knowingly possessing the images found in his cache.")

Like the defendants in *Tucker* and *Bass*, Kutzner sought out, viewed and then removed child pornography from his computer using wiping programs. (Plea agreement, p. 8). Unlike them, insufficient remnants of the child pornography were found on his computer to charge him. However, the evidence permits an inference that he was aware that child pornography was automatically saved to his computer, and took successful steps to eliminate it, suggesting he was a somewhat more sophisticated computer user than the average defendant seen by the court. And while his use of wiping software effectively eliminated the most serious material from his computer, he clearly has an abiding interest in child exploitation images and has been unable to stop himself from repeatedly accessing them via the Internet. This is relevant conduct that supports a sentence of

incarceration within the range specified by the Guidelines.

B. The History and Characteristics of the Defendant

Kutzner led dual lives. On one hand, he was a respected middle school teacher who lived a responsible, crime-free life and, undoubtedly was a positive influence in the lives of many students. But, he also had a secret life, unknown to his friends, family, students and colleagues. In his secret life, he intentionally sought out sexually exploitive material involving young children for purposes of sexual gratification.

According to the psychologist, Kutzner “would view it (child pornography) for a period of a few months and then he would stop viewing it for a few months. However, he found himself going back to viewing child pornography again in this cycle that happened over and over again.” (Psychosexual assessment, p. 4). Kutzner says viewing this material made him feel shameful and guilty, yet he went back again and again, behavior the psychologist referred to as “an addiction to child pornography.” (Psychosexual evaluation, p. 7). Like an addiction to drugs or alcohol, addiction to child pornography is a compulsive behavior not easily overcome. Kutzner told the psychosexual evaluator that “his pending arrest has helped curb his desires to view child pornography in the future.” (*Id.* at 7) However, the evidence suggests that is probably a naive and self-serving assessment. Despite having engaged in chronic pedophilic behavior, according to the psychologist, Kutzner “does not fully acknowledge having had deviant sexual desires or having been sexually aroused by fantasies involving a child.” (Psychosexual evaluation, p. 5).

And while the evaluator suggested that Kutzner’s risk of reoffending is “very low,” *id.* at 7, he candidly acknowledges that “the current research is mixed regarding the risk that individuals who view child pornography pose for committing future contact offenses. The

research [] show[s] that individuals who have prior general offenses, prior sexual offenses, and prior contact sexual offense, pose a much larger risk for future contact offenses than individuals who do not have those prior offenses.” *Id.* Not to be lost in the evaluation of the defendant's risk is the fact that Kutzner was simultaneously engaged in a vocation that placed him in daily close contact with young children of similar age to those whose images he was addicted to viewing for purposes of sexual gratification. The history and characteristics of the defendant weigh in favor of a sentence of incarceration within the range specified by the guidelines. 18 U.S.C. § 3553(a)(1).

C. Just Punishment, Adequate Deterrence and Protection of the Public

Sexual exploitation is one of the most insidious traps confronting children in this country. Both Congress and the United States Supreme Court have found that the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance because of the psychological and physical effects such abuse has on children and their families. In response to the growing epidemic of child pornography, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation Children Today Act (the PROTECT Act, Public Law 108-21) in 2003 to enhance the penalties for crimes involving the sexual exploitation of children. The PROTECT Act also enacted the statute involved in this case, 18 U.S.C. § 1466A, which criminalizes material that has "a visual depiction of any kind, including a drawing, cartoon, sculpture or painting" that "depicts a minor engaging in sexually explicit conduct and is obscene . . . "

One solution in effectively combating the rising tide of the sexual exploitation of children has been for legislatures to authorize penalties severe enough to sufficiently deter those who might have a sexual interest in young children from ever beginning the practice of exploiting

children for sexual purposes and the federal child exploitation statutes and penalty provisions are designed to do precisely that. Notably, the Sentencing Commission revised USSG § 2G2.2 in 2004 so that the base offense level for simply possessing material involving the sexual exploitation of a minor -- including the kind of child obscenity involved here -- is now 18 instead of 15. Congress specifically provided in 18 U.S.C. § 1466A that the penalties for violating this provision are the same as for violating parallel provisions involving child pornography. *See* 18 U.S.C. § 1466A(a) and (b). This suggests that the trend in Congress has been to do everything possible to increase punishment for crimes involving the sexual exploitation of minors because of its consequential effects on children. The sentence of incarceration suggested by the guidelines is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a), and sends the message to Kutzner and others that child exploitation offenses will not be tolerated.

D. Provide the defendant with needed treatment

The Bureau of Prisons maintains sex offender management programs at FCI Marianna (Medium); FMC Devens; FCI Petersburg (Medium); USP Tucson (High); FCI Seagoville (Low); USP Marion (Medium). This multi-component program includes assessment, treatment, specialized correctional management, and population management. Most first time offenders serving a sentence for a non contact Internet crime will have the opportunity to participate in the the non-residential Sex Offender Treatment Program (SOTP-NR), a moderate intensity program designed for low to moderate risk sexual offenders. The typical duration of treatment in the SOTP-NR, according to BOP, is 9-12 months. The Court should recommend that Kutzner participate in sex offender treatment while incarcerated. 18 U.S.C. 3553(a)(2)(D).

E. The Advisory Guidelines Range

Clearly, the Government could have been more aggressive and charged Kutzner with receiving the obscene material rather than simply possessing it, and if it had done so, Kutzner would be facing a five (5) year mandatory minimum term of imprisonment. The agreement to recommend a sentence within the range recommended by the presentence report carries a measure consideration for the positive things Kutzner has done in his life, but not to the extent that it flies in the face of Congress' and the Sentencing Guidelines Commission's judgments that child exploitation offenses should be treated harshly. 18 U.S.C. § 3553(a)(4).

F. The Need to Avoid Unwarranted Sentence Disparities

Kutzner is the first person in the District of Idaho to be sentenced for violating § 1466A, so there are no other similarly situated defendants with whom to compare a range of sentences. However, given that Kutzner has admitted an eight-year history of involvement with sexually exploitive material involving actual minors, this case should be viewed as within the heartland of child crimes that the sentencing range is designed to address. As such, the need to avoid unwarranted sentence disparities weighs in favor of a sentence of incarceration within the range specified by the sentencing guidelines. 18 U.S.C. § 3553(a)(5)(6).

4. CONCLUSION

The Government recommends the defendant should be sentenced to a term of incarceration within the advisory guidelines range. The maximum term of supervised release should be imposed, including the special safety conditions recommended in the plea agreement. The court should also impose a substantial term of community service in lieu of a fine.

Dated: _____

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