

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON**

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION NO. 2:05-00040

DAVID A. HICKS

UNITED STATES SENTENCING MEMORANDUM

Comes now the United States of America, by L. Anna Forbes, Assistant United States Attorney for the Southern District of West Virginia, and pursuant to this Court's January 23, 2007 Order, submits this Memorandum in support of the United States position regarding sentencing issues.

BACKGROUND

On January 23, 2007, following a six-day jury trial, defendant was convicted for offenses relating to the production, receipt and possession of child pornography. On March 8, 2007, the United States Probation Office prepared a draft presentence investigation report ("PSIR") to which the parties responded. Sentencing is currently scheduled for April 19, 2007.

DISCUSSION

I. GUIDELINE CALCULATION AND RELEVANT CONDUCT

The November 5, 2003, edition of the United States Sentencing Guidelines has been used to calculate defendant's sentence in the instant case due to the application of the ex post facto clause of the United States Constitution.

II. DISCUSSION OF RELEVANT FACTORS PURSUANT TO 18 U.S.C. § 3553(a)

A. The nature and circumstances of the offense and the history and characteristics of the defendant

The United States believes that the PSIR adequately sets forth the nature and circumstances of the offense and the history and characteristics of defendant. However, the United States submits the following additional information for the Court's consideration:

1. Seriousness of the Offenses

In conducting this analysis, the United States requests that the Court give significant weight, in this and all child exploitation cases, to Congress' clearly articulated intent that child molesters, pornographers and others who prey on and exploit children be subjected to severe penalties. The United States urges this Court to be mindful that in enacting the PROTECT Act, Congress was cognizant that "[c]hild pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the abuse of children." PROTECT Act, § 501(12), 117 Stat. at 678. The Supreme Court has recognized the government's compelling interest in ensuring that the laws involving child pornography remain strong and effective by the imposition of "severe" penalties. New York v. Ferber, 458 U.S. 747 (1982) (The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product). The child pornography industry "causes the child victims continuing

harm by haunting the children in years to come.” Osborne v. Ohio, 495 U.S. 103, 109-11 (1990).

There are few, if any, more serious crimes than those related to the sexual exploitation of children. For each image of child pornography, a child was, at a minimum, subjected to sexual abuse and personal degradation, and in many instances were brutally and repeatedly raped, all for the purpose of capturing, preserving and memorializing the offense for future sale on the child pornography market. The children most often used in the production of pornography are orphaned, are runaways, or come from families that either do not or cannot protect them. Many of these children live in poor neighborhoods in far-away places such as Russia, Germany, and Thailand; many others, such as the child who is the subject of Count Six, live amongst us here in the United States.

The sexual abuse or rape of the child who was used in the making of each pornographic image is, of course, a separate and devastating felonious act. David Allen Hicks had a grotesque appetite for such material. He amassed thousands of images of children being forced to perform sexual acts, or on whom sexual acts were performed. For David Allen Hicks, and others who share his dark interests, the innocence of thousands of children has been irretrievably lost.

David Allen Hicks did not merely possess child pornography and collect it from the Internet. He also manufactured it. Evidence at trial established that defendant used his older daughter to

bring her friends into his home. He encouraged her to invite her third, fourth or fifth grade friends to spend the night. "Sleep-overs" at defendant's house were nearly a nightly occurrence. Defendant spent a lot of time with the girls while they were there. He was the only adult present. He photographed them extensively, voyeuristically and obsessively. He touched them in ways that made them uncomfortable. He barged uninvited into rooms when they were undressing or bathing. They slept in his bed. He fostered an environment where he would have opportunities to view and photograph the girls to satisfy his own sexual needs. The child ("A.K."), who is depicted in the images that are the subject of Counts One and Two of the indictment, spent more time in defendant's home than any other of his daughter's friends. By cultivating an environment where the children were conditioned to tolerate and accept his offensive conduct, defendant succeeded in using A.K. to create child pornography.

2. History and Characteristics of Defendant

Evidence at trial established that defendant molested "K.C." on at least two occasions. The first occurred in his home while he was sleeping with K.C. in his bed. K.C. testified that defendant crawled on top of her while she was sleeping and rubbed his erect penis back and forth over her buttocks. The second instance occurred during a vacation to Myrtle Beach, South Carolina in the summer of 2004. At the time, K.C. was nine years old and had just finished third grade. At trial, K.C. testified in graphic detail

of defendant's sexual molestation of her in the outdoor shower near the beach and condominium where they were staying. In addition to the sexual molestation of K.C., at trial there are innumerable instances of defendant's inappropriate contact with other children.

Additionally, as evidenced by his testimony at trial, his post-conviction correspondence with this Court and his response to the PSIR, defendant is an extraordinarily untruthfully individual. At trial, defendant lied under oath about relatively inconsequential items (e.g. his grade point average); he lied about consequential matters (e.g. he denied taking the photographs through the window blinds of the girls swimming, or ever showing S.P. the bathtub photographs of A.K., or taking inappropriate photos of C.A.); and he repeatedly lied about highly consequential events, namely, the circumstances underpinning each of the charges against him (e.g. the environment he fostered in his home, who took the photographs of A.K., and who was responsible for the child pornography on his computer and how the child porn came to be stored on the CDs. In his correspondence with this Court and in his presentence objections, he has directly and indirectly accused a wide variety of people, including about a half dozen little girls, their parents and an FBI agent, of lying and committing perjury. He has further accused the Senior United States Probation Officer responsible for his pretrial supervision, Ms. Lee Cueva, of not returning his "several" phone calls concerning his interaction with Sheriff's deputy while he was on bond. (Ms. Cueva, after

checking her work journal, has advised that she never received any such phone calls from defendant). Defendant denies ever telling the Sheriff's deputy that he was loading photographs at the cheerleading competition. He even denies ever walking around in his house in his underwear, notwithstanding the fact that one of the many photos introduced into evidence at trial depicts defendant sitting on his livingroom couch wearing nothing other than a pair of white boxer shorts and holding A.K. in his lap.

Defendant has a history of molesting children. With respect to his character, evidence of defendant's dishonesty is substantial.

B. Section 3553(a) (2) (A): The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense

The United States submits that a life sentence, as calculated in the PSIR, will reflect the seriousness of defendant's offense, satisfy the need to promote respect for the law, and will provide just punishment.

C. Section 3553(a) (2) (B): The need for the sentence imposed to afford adequate deterrence to criminal conduct

The United States agrees with the Offense Level computation set forth in the PSIR, and urges the Court to accept the calculations. For the reasons already stated above, a life sentence will afford adequate deterrence to criminal conduct involving the sexual exploitation of minor children.

D. Section 3553(a)(2)(C): The need for the sentence imposed to protect the public from further crimes of the defendant

The United States believes that, for the reasons already stated, a life sentence will protect the public from further crimes of the defendant.

E. Section 3553(a)(2)(D): The need for the sentence imposed to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

The United States believes that defendant would benefit from participation in sex offender treatment programs offered by the Bureau of Prisons during service of a term of imprisonment.

F. Section 3553(a)(3): The kinds of sentences available

The presentence report does an adequate job of addressing this factor.

G. Section 3553(a)(4): The kinds of sentence and sentencing range established by the Guidelines

_____The presentence report does an adequate job of addressing this factor. See also discussion in section "A" above.

H. Section 3553(a)(5): Pertinent Policy Statements

_____As noted at the introduction to this memorandum, Congress has clearly articulated its intent that those who prey on and exploit children be subjected to severe penalties. 18 U.S.C. § 3553(b)(2); USSG §§ 5K2.0 & 5K2.22. Sections 5K2.0 and 5K2.22 are pertinent policy statements in child exploitation cases. Those provisions sharply limit the availability of downward departures from the

Sentencing Guidelines in child exploitation cases. These provisions reflect Congress's intent that child molesters and pornographers be sentenced below the applicable Guideline range in the rarest of circumstances, namely age and extraordinary physical impairment, neither of which are at issue in this case. Accordingly, downward departure from the advisory Guideline range is factually and legally unavailable in this case.

I. Section 3553(a)(6): The need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct

The United States believes that a life sentence will preclude disparate treatment between defendant and other similarly situated defendants convicted of similar conduct.

J. Section 3553(a)(7): The need to provide restitution to any victims of the offense

The PSIR does an adequate job of addressing this factor.

III. NAME AND TESTIMONIAL PROFFER OF WITNESSES SUPPORTING RELEVANT CONDUCT

The United States does not anticipate calling witnesses at the sentencing hearing.

IV. LIST AND TESTIMONIAL PROFFER OF WITNESSES REGARDING NON-GUIDELINE SENTENCING FACTORS

The United States does not anticipate calling witnesses at the sentencing hearing.

V. ESTIMATE OF TIME BELIEVED TO BE REQUIRED FOR THE SENTENCING HEARING

The United States believes the sentencing hearing will require

approximately one hour.

VI. LEGAL ISSUES PERTINENT TO THE SENTENCING DETERMINATION

A. Sentencing Enhancements

Defendant has denied in blanket form essentially all incriminating factual matters contained in the Offense Conduct section of the PSIR. Although he believes his Offense Level should be a Level 29 rather than a Level 43, he offers no explanation why. He offers no legal authority for any position.

The PSIR recommends adjustments and enhancements for numerous factual aggravating circumstances that cannot be reasonably or, in some instances, credibly disputed. For example, the offenses clearly involved children less than 12 years old (§ 2G2.1(b)(1) -- defendant stipulated to this fact at trial);) defendant was the temporary caretaker of the children when they were in his home (§ 2G2.1(b)(2) - defendant admitted that he was present in the trailer when the photographs of A.K. were taken); defendant committed perjury at trial and attempted to influence the testimony of his children (§ 3C1.1- see discussion regarding defendant's characteristics *supra*); some of the images portrayed sadistic and masochistic conduct (§ 2G2.1(b)(3) a video depicting the violent rape of a very small child who was tied up with rope was played for the jury at trial); defendant engaged in a pattern of activity involving the sexual exploitation of children (§ 2G2.2(b)(5) - he molested K.C. twice, he touched other children inappropriately, he created and possessed numerous photos of A.K., K.C., C.A. where

their genitalia, breasts or buttocks were exposed); defendant does not deny his computer was used to receive and store the child pornography (§ 2G2.2(b)(5)); defendant did not deny at trial that more than 600 images of child pornography were found on his computer (§ 2G2.2(b)(6)(D)).

With respect to the five-level enhancement pursuant to USSG § 2G2.2(b)(2)(B), evidence at trial showed that defendant received child pornography through his shared folder using the peer-to-peer file sharing program Kazaa. The operational premise of file sharing programs like Kazaa is that the more files a user places in his shared folder (and thereby make available to other Kazaa users), the more files he can receive. Evidence at trial demonstrated that when items reside in a Kazaa shared folder, they are available for distribution to other Kazaa users. Under Application Note 1 to § 2G2.2(b)(2)(B), the term "distribution" means "any act, including production, transportation, and possession with intent to distribute...." In a case that was decided just a few days ago, the Eighth Circuit affirmed application of this enhancement on facts virtually identical to this case. See United States v. Griffin, No. 06-2905 (8th Cir. April 3, 2007).

Defendant also objects to the characterization of children other than A.K. as a "victim." The United States needs additional time to consult with the children and their parents on this issue and conduct follow-up legal research on the point. The United

States will supplement its sentencing memorandum on this point prior to sentencing.

CONCLUSION

_____The United States respectfully submits this Sentencing Memorandum for the Court's consideration in the sentencing of defendant in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing "United States Sentencing Memorandum" has been electronically filed and service has been made by virtue of such electronic filing on the following counsel of record this the 5th day of April 2007, to:

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