IN THE UNTED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA	**)**	
	)	
v.	**)**	**NO. 4:18-CR-40028-001**
	)	
AARON LLOYD MITCHELL	**)**	

SENTENCING MEMORANDUM BY THE UNITED STATES

Comes now, the United States of America, by and through Duane (DAK) Kees, United States Attorney for the Western District of Arkansas, and for its sentencing memorandum states the following:

PROCEDURAL HISTORY

The defendant, Aaron Lloyd Mitchell ("Mitchell"), is currently pending sentencing for his conviction on one count of Production of Child Pornography, in violation of 18 U.S.C. § 2251(a). This Court's Text Only Order entered on September 25, 2019, instructed the parties to file any Sentencing Memorandum no later than October 7, 2019. Doc. 41. Both parties moved for an extension of the time to file a sentencing memorandum of this matter and the United States was authorized to file any Sentencing Memorandum by November 6, 2019. Doc. 43.

The initial Presentence Investigation Report ("PSR") was disclosed on August 19, 2019 and the final PSR was issued on September 24, 2019. On September 3, 2019, the United States filed two objections to the PSR. Doc. 36. Neither the first nor the second objections offered by the United States impact the PSR. The first objection offered additional information to the Court regarding the response received by the United States from a Tumblr account operated by Mitchell. The second objection offered information for this Court that is known to the Government regarding

Mitchell's conduct while incarcerated. *Id*.

On September 10, 2019, Mitchell offered 12 objections to the PSR. Doc. 37. Objections 1, 8, 9, 10, 11, and 12 have no impact on the Guideline calculation and are therefore unaddressed here. However, objections 2 through 7, when taken together with the defense's later objections to the final PSR, generally object to the Court's consideration of a picture of a sleeping 13 year old girl and: 1. Whether the image with her should be found to be child pornography such to qualify her as a "victim" of the offense and potentially trigger a multiple victim analysis; 2. Whether the video of the 13 year old girl should be considered relevant conduct to the crime of production of child pornography; and 3. Whether Mitchell, when considering the circumstances as a whole, should be considered as having "engaged in a pattern of activity" sufficient to trigger an enhancement under U.S.S.G. § 4B1.5(b). Doc. 37.

The final PSR, issued on September 24, 2019, rejected the substantive objections offered by the defendant as to the enhancements applied in this case and calculated the criminal history category of the Defendant as one (1). PSR ¶ 68. The total offense level for the instant offense is 43, which corresponds to an advisory guideline sentence of 360 months incarceration. PSR ¶ 95, 97. After the issuance of the final PSR, Mitchell offered an additional Response to the final PSR and re-iterated that Mitchell was not a repeat and dangerous sex offender and that the image of the 13 year old is not relevant conduct to the offense of conviction. Doc. 40.

The main issues addressed in this Sentencing memorandum are those addressed by the Defendant's objections, mainly:

a. Whether the videos and images of the 13 year old should be found to be child pornography such to qualify her as a "victim" of this offense;

b. Whether the production of child pornography evidence as it relates to the 13 year old is relevant conduct to the offense of conviction; and

c. Whether Mitchell "engaged in a pattern of activity" sufficient to trigger an enhancement under U.S.S.G. § 4B1.5(b).

The United States anticipates submitting brief testimonial evidence to the Court but will largely rely on the facts contained in the PSR in support of its argument for the applicability of the enhancement and a request for sentence.

DISCUSSION

I. Whether the videos and images of the 13 year old should be found to be child pornography such to qualify her as a "victim" of this offense –

The defendant objected to paragraph 25 of the PSR, which included a still photo of a 13 year old girl and argued that she was not pictured in any child pornography and should not be considered a "victim" of the offense. The Government disagrees.

A 13 year old child is in the photo referenced in Count Three of the Indictment, which was returned on December 13, 2018. During the initial photos received by law enforcement from the National Center of Missing and Exploited Children (NCMEC), there included an image of a 13 year old asleep on her bed wearing a t-shirt and panties. Mitchell's erect penis is exposed in the foreground of the photograph. Along with that image were additional images which appeared to be taken around the same time of close-up images of the 13 year old's crotch, but without Mitchell's exposed penis included.

The FBI then received additional records from Tumblr on March 6, 2019, in response to a federal search warrant for their records. These records included a video that appeared to have been taken during the same time as the photo referenced in Count Three of the Indictment. This video depicted the same 13 year old wearing the same clothing, and sleeping in the same position on the

bed. The video further depicted Mitchell reaching out with one hand and using his fingers to lightly rub the victim's vagina through her underwear. Mitchell then appears to back away and points the camera down to show himself masturbating. Mitchell then approaches the 13 year old victim again and uses his fingers to rub her vagina through her underwear again, this time for a longer period of time. FBI Agent Joe Anders of the FBI Dallas Office, Texarkana Resident Agency, is able to testify that a caption, "I wanna f*** her 13yo p**** so bad" [expletives in original] was posted along with this video to Tumblr.

Federal law defines "child pornography" as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture ... of sexually explicit conduct, where ... such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. § 2256(8)(B). "Sexually explicit conduct" includes the "actual or simulated ... lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(E). The "relevant factual inquiry…is not whether the pictures in issues appealed, or were intended to appeal, to [the defendant's] sexual interests but whether, on their face, they appear to be of a sexual character." *United States v. Kemmerling*, 285 F.3d 644 (8th Cir. 2002). The Eighth Circuit went on to say, a "picture is 'lascivious' only if it is sexual in nature. Thus, the statute is violated, for instance, when a picture shows a child nude or partially clothed, when the focus of the image is the child's genitals or pubic area, and when the image is intended to elicit a sexual response in the viewer." *Id*. at 646.

When taking all of the relevant circumstances into account, the investigation uncovered a video of the defendant approaching a sleeping child, prolonged manipulation of her vagina through her underwear and then a transferred focus of the camera onto his masturbation of his exposed penis. This video was then uploaded to Tumblr with a description of his present intent that he

““wanna f*** her 13yo p**** so bad.” The juxtaposition of these images is contemplated as child pornography by Congress and included in the definition when the federal statute requires only the exposed genitals or pubic area of any person, not just the child.

In interpreting and applying the phrase “lascivious exhibition of the genitals or pubic area of *any* person,” many courts have utilized the following list of factors, which were first set forth in *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986). As the defense has correctly pointed out, the following non-exhaustive list includes: 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. The Dost court emphasized that “a visual depiction need not involve all of these factors to be a ‘lascivious exhibition of the genitals or pubic area.’” *Id*.

With respect to the first factor, as indicated, this video uploaded to Tumblr features a manipulation of the child’s vagina through the underwear and it is the focal point of a portion of the video to the exclusion of the rest of the girl’s body. The defendant’s focus on this area of the child is intentional, prolonged, and photographic evidence of her sexual assault at his hands. The setting of the video is in a bedroom, the most natural place for the occurrence of sexual activity. To ignore or diminish the presence of the bedroom, as suggested by the defendant, would be to render all other private locations common to the sexual experiences of mankind asexual by

comparison. Though some locations, like a shower or a bathroom, may be more intimate, they are not as regularly associated with the sexual act as a bedroom.

The third factor is whether the child is in an inappropriate pose or attire considering the minor's age. It is not as socially appropriate for 13 year old girls to be in their underwear as it would be for an infant or a toddler. At the age of 13, children often have an expectation of privacy in such moments, and as such, the idea that it would be appropriate for a defendant photographing her in this state, in this attire, while sleeping is misguided. Certainly, all 13 year olds are in this state and attire when they are in their private moments, but the fact that the defendant has made a public display of such a private moment, with only her underwear to shield her privates from the defendant's camera and fingers, does not weigh in favor of the defendant. Additionally, it cannot be reasonably argued that it is an appropriate pose captured by the defendant when a portion of his film shows him molesting her through her undergarments. The fourth factor is whether the minor is fully or partially clothed or nude. Admittedly, the girl in this video has a shirt and underwear on while the defendant molests her over her clothes.

In applying the fifth Dost factor (whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity), in this Circuit, it is clear that "the 'lascivious exhibition' is not the work of the child, whose innocence is not in question, but of the producer or editor of the video." *United States v. Horn*, 187 F.3d 781, 790 (8th Cir. 1999). Thus, it is immaterial that the girl depicted in the movie and pictures does not herself appear to be sexually coy or willing to engage in sexual activity. *See United States v. Johnson*, 639 F.3d 433, 440 (8th Cir. 2011) (stating that "images of children acting innocently can be considered lascivious if they are intended to be sexual"). From the defendant's actions in the video to his comments in the posts, there is little doubt that he intended the interaction with her to be sexual.

Finally, in applying the sixth Dost factor (whether the visual depiction is intended or designed to elicit a sexual response in the viewer), courts have considered "contextual" evidence from outside the "four corners" of the visual depiction at issue, particularly in cases where the defendant participated in the visual depiction's production. *United States v. Wallenfang*, 568 F.3d 649, 659 (8th Cir. 2009). In *Wallenfang*, the defendant was convicted of producing photographs of his prepubescent daughter wearing pantyhose and thigh-high stockings, and then posting the images on an Internet newsgroup called "alt.binaries.younggirls.tights." *Id*. at 651-52. On appeal, the defendant argued that the district court had erred in denying his motion for acquittal because the photographs did not depict a lascivious exhibition of the genitals or pubic area. *Id*. at 656. The Eighth Circuit affirmed and found there was sufficient evidence for the jury to conclude that the images were child pornography. *Id*. at 658. In addition to consideration of the Dost factors, the Court also examined whether the pictures portrayed the daughter as "a sexual object." *Id*. at 659-60. The Court found that "[p]lacing erotic photographs of a young child on a website primarily devoted to sexual images gives a jury sufficient evidence to conclude that the child was portrayed as a sexual object." *Id*. at 660.

As in *Wallenfang*, the defendant uploaded his video from his Tumblr account, "cuminmybabygirl" with a tagline regarding his present intent and desires to have intercourse with this child. The defendant also later provided a statement to law enforcement that he "had joined a 'group chat thing' and some of the members had asked him to do things with the girls after he had told them the girls' ages." PSR ¶ 28.

On balance, when weighing all relevant circumstances applicable to defendant's actions in producing this video and its associated still images, they should be considered child pornography and the 13 year old a victim of the production of those images.

II. Whether the production of child pornography evidence as it relates to the 13 year old is relevant conduct to the offense of conviction;

U.S.S.G. § 2G2.1 applies to a conviction for a violation of 18 U.S.C. § 2251(a) (production of child pornography). Some of the complexity in determining what this Court should consider "relevant conduct" to this offense of conviction is caused by the fact that the Guidelines have two separate and distinct definitions of that term. A narrower definition of relevant conduct applies to convictions for production or attempted production and a broader definition applies to all other child pornography offenses. *See* U.S.S.G. § 1B1.3(a). The narrower definition of "relevant conduct," which is set forth in U.S.S.G. § 1B1.3(a)(1), applies to those counts of conviction that do not require grouping under U.S.S.G. § 3D1.2(d). This construct in Section 1B1.3(a)(1) stems from the temporal limitation on acts that may be considered relevant conduct and defines that concept as, "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and …that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.[1]" U.S.S.G. § 1B1.3(a)(1).

When the Guidelines use the term "offense," according to the application note (1)(I) of U.S.S.G. § 1B1.1, it means "the offense of conviction and all relevant conduct under § 1B1.3 unless a different meaning is specific or is otherwise clear from the context." Obviously, a difficult interplay develops between what is the offense of conviction and what is relevant conduct given the separate definitions contained in the Guidelines.

The Government's position is that the picture of the 13 year old is relevant conduct because it occurred "during" the offense of conviction and is still thus encapsulated in the narrower

[1] Omitted from this recitation of the applicable guideline provision is any reference to jointly undertaken criminal activity.

definition for this particular offense. Of note, according to the information received by the FBI, the initial report to the NCMEC on November 3, 2018, was a complaint that the poster on Tumblr's account associated with the defendant "may be currently molesting 5 year old and 13 year old and posting pics." So at least as early as November 3, 2018, the images of child pornography posted to that site included the 13 year old that was part of the investigation and offense conduct. Additionally, image captured in Count One appears to have been taken in the same location as that of the video of the 13 year old girl. The similarities between the production of the images of the two girls do not end there. The defendant utilized the same phone and undertook the same subject matter (the focus on genitals of sleeping children) for both girls. Additionally, they were posted to the same username on the same website within the same narrow time frame. The spate of production of child pornography of these two children are so intrinsically intertwined so as to serve as evidence of one another. Even the defendant, when admitting to his conduct, spoke to both children and the production of images associated with each one.

Similarly, should this conduct had gone to trial- the evidence of the production of the video of the 13-year-old would have been evidence of intent admissible against him in a pursuit of a conviction on Count One. The Eighth Circuit has recently upheld the admission of "res gestae" evidence of a crime similar to that at issue here. *See United States v. Parks*, 902 F.3d 805 (8th Cir. 2018). "Res gestae, also known as intrinsic evidence, is 'evidence of wrongful conduct other than the conduct at issue ... offered for the purpose of providing the context in which the charged crime occurred.' ' *United States v. Campbell*, 764 F.3d 880, 888 (8th Cir. 2014) (*quoting United States v. Johnson*, 463 F.3d 803, 808 (8th Cir. 2006)). 'Such evidence is admitted to complete the story or provide a total picture of the charged crime.' *Id*." *Id*. at 813.

The fact that the defendant uploaded a video of the molestation of the 13 year old, with the caption that he selected, especially in light of the identical location, identical device, and utilizing the same username and website would have all been powerful intrinsic evidence instructive of his intent in capturing the still image in Count One and would likely have been admissible as evidence of the same. Additionally, this conduct occurred *during* his production and transmission of the image in Count One that is illustrated in the Plea Agreement.

Because the production of the video of the 13 year old occurred during the offense of conviction, would have been res gestae to that offense, occurred under identical scenarios within a narrow time frame prior to the discovery of the offense, the Government would urge this Court to consider it relevant conduct under the Sentencing Guidelines.

III. Whether Mitchell "engaged in a pattern of activity" sufficient to trigger an enhancement under U.S.S.G. § 4B1.5(b)

Under U.S.S.G. § 4B1.5(b)(1), "in any case in which the defendant's instant offense of conviction is a covered sex crime…and the defendant engaged in a pattern of activity involving prohibited sexual conduct[,]" the defendant is assessed a five level increase on the offense level after apply Chapter Two and Three enhancements. "Prohibited sexual conduct" is defined in the application notes as "(ii) the production of child pornography." U.S.S.G. § 4B1.5, application note (4)(A). The Courts are further advised that the defendant engaged in a pattern of activity "if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor" and that the Court should consider that without regard to whether it "occurred during the course of the instant offense; or…resulted in a conviction for the conduct that occurred on that occasion." Id. at note (4)(B). Accordingly, the fact that the defendant has neither been charged with nor convicted of an offense related to the 13 year old is of no moment. *United States v. Bevins*, 848, F.3d 835, 840 (8th Cir. 2017) (finding that no conviction was required for the Court to find the

defendant a repeat and dangerous sex offender triggering § 4B1.5(b)(1) consistent with the application note).

"Unless an Application Note is clearly erroneous or in conflict with the Constitution, a federal statute, or the guideline itself, the note is binding on a district court." *United States v. Godsey*, 690 F.3d 906, 910 (8th Cir. 2012). The PSR notes that the defendant created multiple images of child pornography on separate children and, though they are intrinsic evidence of each other, they still occurred on separate occasions. It is clear from viewing the pictures that the two girls are not laying together on the bed at the time that the photos are taken, and it logically follows that they must have been taken on separate occasions, even though the girls have no recollection of the events. The Application Note also makes clear that the pattern of prohibited sexual conduct can take place on two separate occasions and should be considered even if they *did* occur during the course of the instant offense. The Government wishes to be clear that it is arguing that the images of the 13 year old were filmed during the commission of the offense of conviction and should be relevant conduct for all the reasons argued above. However, the Court is encouraged to disregard the fact that the 13 year old's abuse may have occurred during the course of the instant offense and apply this enhancement even though it is considered relevant conduct.

Should the Court accept the Government's argument that the 13 year old was a victim of a child pornography offense, as argued herein, the "prohibited sexual conduct" prong of the application of the Guideline enhancement would be satisfied. The Government would also put on evidence, in the form of providing the images to the Court, that these two images were taken on different occasions (though close in time). The Government could also provide metadata lifted from related images, showing undeleted images of the 13 year old girl sleeping taken

contemporaneously with the defendant's video, and contrasting that with the metadata from the image in Count One.

The image taken in Count One combined with the video of child pornography of the 13 year old are both prohibited sexual conduct against minors taken on two separate occasions and are therefore deserving of the pattern of activity enhancement contained in U.S.S.G. § 4B1.5.

CONCLUSION

For the reasons set forth above, the United States asserts that the 13 year old be considered a victim of this offense, that it be considered relevant conduct for the purposes of applying § 1B1.3(a)(1) and the multiple victim enhancement and that the defendant receive an additional enhancement for being a Repeat and Dangerous Sex Offender Against Minors pursuant to § 4B1.5(b) and for all other appropriate relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ben Wulff, Assistant U. S. Attorney for the Western District of Arkansas, hereby certify that on the 6th day of November, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Matt Hill, Attorney for the Defendant, matthew.hill@fd.org

/s/ Benjamin Wulff
Benjamin Wulff
Assistant U.S. Attorney