

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Newport News Division

UNITED STATES OF AMERICA)	
)	
)	Case No. 4:22-cr-48
)	
MICHAEL NICHOLAS COVEY,)	
)	
Defendant.)	

SENTENCING POSITION OF THE UNITED STATES

The United States by and through counsel, Assistant United States Attorneys Lisa R. McKeel and Peter G. Osyf, files this Position on Sentencing. For the reasons set forth *infra* and to be argued at sentencing, the United States respectfully recommends a downward variance from the properly calculated applicable advisory guidelines range. Specifically, the government recommends a term of imprisonment of 360 months.¹

Statutory Considerations

On September 22, 2022, the defendant pleaded guilty to Counts One, Four, and Five of his eight-count Superseding Indictment. Counts One and Four charged the defendant with Sexual Exploitation of Children, in violation of 18 U.S.C. § 2251(a), each which carries a mandatory minimum term of imprisonment of 15 years, and a maximum possible term of imprisonment of 30 years. Count Five charged the defendant with Receipt of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(2), which carries a mandatory minimum term of imprisonment of 5 years,

¹ The government’s 360-month recommendation is a fifty-year downward variance from the properly calculated applicable advisory guideline range which is restricted to the statutory maximum of 960 months for the defendant’s conduct. (PSR ¶ 77).

and a maximum possible term of imprisonment of 20 years. The court may sentence the defendant to any term of years of imprisonment greater than 15 years but less than the statutory maximum of 80 years.

Impact of the Plea Agreement

The parties entered into a plea agreement and the United States acknowledges the defendant's acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels pursuant to U.S.S.G. § 3E1.1(a). Additionally, because the defendant's timely notification of his intention to enter a plea of guilty, permitted the United States to avoid preparing for trial and permitted the United States and the court to allocate their resources efficiently, the United States filed a motion for an additional point reduction under U.S.S.G. § 3E1.1(b).

Sentencing Guidelines Calculation

The United States Probation Department prepared a pre-sentence report (PSR) which detailed the offense of conviction and the characteristics of the defendant. In calculating the offense level for the defendant, the probation officer first grouped Counts Four and Five pursuant to U.S.S.G. § 3D1.2(c) and assigned a base offense level of 22 under U.S.S.G. § 2G2.2(a)(2). The defendant's offense level was increased by two (2) points pursuant to U.S.S.G. § 2G2.2(b)(2) because of material involving a prepubescent minor or a minor who had not attained the age of 12 years. Pursuant to U.S.S.G. § 2G2.2(b)(4)(A) and (B), four (4) additional points were attributed to defendant's offense level because the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler. Five (5) points were added to defendant's offense level pursuant to U.S.S.G. § 2G2.2(b)(5) for engaging in a pattern of activity involving the sexual abuse or exploitation of a minor. Under U.S.S.G. § 2G2.2(b)(6), another two (2) points were added to the defendant's

offense level for utilizing a computer or interactive computer service for the possession, transmission, receipt, or distribution of the material. An additional five (5) points were added pursuant to U.S.S.G. § 2G2.2(b)(7)(D) because the defendant's offense involved more than 600 images of child pornography. The defendant received an additional two (2) points for willfully obstructing or impeding, or attempting to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and the obstructive conduct related to the defendant's offense of conviction and any relevant conduct; or a closely related offense, in accordance with U.S.S.G. § 3C1.1. This resulted in an Adjusted Offense Level of 42 for Counts Four and Five. (PSR ¶ 33).

Next, the probation officer assigned a base offense level of 32 for Count One pursuant to U.S.S.G. § 2G2.1(a). The defendant's offense level was increased by four (4) points pursuant to U.S.S.G. § 2G2.1(b)(1)(A) because the offense involved a minor who had not attained the age of 12 years. Because the defendant knowingly engaged in distribution, two (2) additional points were added under U.S.S.G. § 2G2.1(b)(3). Another two (2)-point enhancement was added pursuant to U.S.S.G. § 2G2.1(b)(5) because the defendant was a parent, relative, or legal guardian of the minor involved in the offense. This resulted in an Adjusted Offense Level of 40 for Count One. (PSR ¶ 41).

Pursuant to U.S.S.G. § 3D1.4, the probation officer appropriately conducted a Multiple Count Adjustment which yielded a Combined Adjusted Offense Level of 44. (PSR ¶¶ 42 - 45). Finally, a five (5)-point Chapter Four Enhancement was applied in accordance with U.S.S.G. § 4B1.5(b)(1) based on defendant's engagement in a pattern of activity involving prohibited sexual conduct qualifying him as repeat and dangerous sex offender against minors. These enhancements increased the defendant's adjusted offense level to 49. Applying the three-point reduction addressed above, the defendant's total offense level is 46. (PSR ¶ 49). Because defendant's

offense level exceeds the highest level on the sentencing guideline table – even with his three-point reduction – his total offense level is to be treated as 43 pursuant to U.S.S.G. Chapter 5, Part A (comment n.2).

The probation officer also calculated a criminal history level for the defendant. Because the defendant has no prior convictions, he received a total criminal history score of zero (0) which establishes a criminal history category of I pursuant to U.S.S.G. Chapter 5, Part A.

As a criminal history category I defendant with a de facto offense level of 43, the defendant would have an advisory guideline sentence of life. Because defendant’s combined statutory maximum for his offenses of conviction is 80 years were they to run consecutively, his sentencing guideline calculation is restricted to 960 months.

Statutory Sentencing Factors under 18 U.S.C. § 3553(a)

As outlined *supra*, the appropriate sentencing recommendation calculated under the guidelines is restricted to 960 months. The United States will now address the statutory factors that support its recommendation for a sentence of 360 months.

A. Nature of the Offense

Few, if any, criminal offenses so shock the consciousness of humanity as those involving the most vulnerable and innocent members of society. The defendant’s offenses of conviction involve two counts of one of the more egregiously disturbing of such violations, the sexual exploitation of children. Far more common are the only slightly less-chilling offenses of receipt, distribution, or possession of child pornography – of which, receipt of child pornography is also among defendant’s offenses of conviction in this case. These more common, voyeuristic acts – where the common plea of such offenders is that the judicial system should show mercy because their crimes fall short of *directly* impacting victims like those who are “hands-on” offenders – fuel an abhorrent industry that irreparably damages children worldwide. But here, the defendant can

make no such empty claim. In addition to the unknown number of children's lives he indirectly affected as a voyeur who perpetuated and fed the multimillion-dollar international industry of child pornography, fueling the global epidemic of sex trafficking minors, defendant's two other offenses of conviction have inflicted much deeper wounds. The conduct of the defendant will leave lasting scars upon those for whom he should have cared and loved most, his family.

The catastrophic repercussions from his actions will negatively impact lives long after he is released from incarceration. The direct victimization of the children in defendant's life who trusted him will suffer from his conduct in ways that can take a lifetime from which to recover, if ever at all. This cannot be expressed more profoundly than by looking at the yet-to-be impact upon Jane Doe's life as she is now a "known series" victim for the National Center for Missing and Exploited Children after defendant distributed at least two images and three videos of sexually explicit content he created with her. There is no retracting those images or videos. They shall remain in cyber circulation indefinitely and there is no telling if, when, or how many times they may retraumatize Jane Doe throughout her life or the repercussions she may have to endure because of them.

The nature of the defendant's offense is abhorrent, creating lifelong damage in the innocent, and should weigh heavily upon the Court's consideration.

B. History and Characteristics of the Defendant

The defendant is a 39-year-old male, born in Des Plaines, Illinois. (PSR at 2 and ¶ 56). By all accounts, the defendant seems to have enjoyed a quality childhood within a loving and supportive family, one in which he "was close to his family throughout." (PSR ¶ 56). By his own words, defendant's parents "provided him and his siblings with more than the basic necessities and there was no physical or sexual abuse in his childhood." (*Id.*). He "was a quiet child and teenager and was always well-behaved;" he "stayed busy as a teenager as he spent his free time doing

homework and working.” (*Id.*). The defendant is married and fathered a son now 15 and a daughter now 11. (PSR ¶ 58).

Standing 5’ 10” and weighing 190 lbs., defendant lives with high blood pressure, high cholesterol, and irritable bowel syndrome, all for which he takes medication. (PSR ¶¶ 60 - 62). Defendant receives monthly veteran’s benefits “based on a 40% disability for traumatic brain injury residuals, 10% for left shoulder strain and 10% for tinnitus and an overall combined rating of 70%”. (PSR ¶ 63). Defendant is also inflicted with PTSD from his military and law enforcement service. (PSR ¶¶ 64 - 65). Although the defendant does not appear to have any illicit substance abuse issues, he absolutely has a problematic history with alcohol. (PSR ¶ 66).

The defendant graduated high school in 2001 and earned a Bachelor’s degree in Criminal Justice Administration from Phoenix University on-line in 2011. (PSR ¶¶ 67 - 68).

The defendant’s criminal history is laid out *supra*.

The defendant served in the United States Marine Corps for four years beginning in 2001 and received an Honorable Discharge in 2005. (PSR ¶ 71). He then went on to serve as a Newport News police officer for more than 16 years, achieving the rank of sergeant and obtaining several accolades. (PSR ¶ 70). But defendant’s would-be laudable employment record is tarnished by his conduct. As a person sworn to serve and protect those in need and in trouble in society, his predatory conduct is a betrayal that disgraces not only himself but the organizations to which he belonged. Even once caught, defendant demonstrated zero respect for the oaths to uphold the law he took and, a month after his arrest, he nearly implicated a fellow officer in his obstruction scheme. Thankfully, the other officer remembered and honored his sworn duty once he discovered the defendant’s deception. (ECF No. 31, Def. Statement of Facts at 6; PSR ¶ 7-12).

Worse still than defendant’s professional hypocrisy, is the betrayal of the relationship with defendant’s known victims in this case. The defendant’s characteristics demand a significant

term of incarceration here and it is no surprise that his guidelines would call for a life term were he not statutorily capped at 80 years.

The defendant is a smart, educated, and capable man who grew up in a loving and supportive environment. He is, for the most part, physically healthy, and had everything in life most aspire to one day have or achieve. There is simply no excuse for his conduct. The defendant is not a victim by any means, and those who are in this story, are suffering, and will continue to, indefinitely.

C. Need for Just Punishment

There are few offenses more deserving of or in need for just punishment than defendant's offenses of conviction, particularly given the significant relationship with the victims. (PSR ¶ 58). The defendant did not just violate the law, but the bond and trust of relationships that should have been sacred.

D. Deterrence

The two types of deterrence at issue are general and specific. On the issue of general deterrence, the public must have confidence that the activities of the defendant are treated with the utmost seriousness. The public must look at the actions of the defendant – sexually exploiting children and receiving child pornography – and know that such conduct commands a significant punishment. Those inclined to consider committing crimes like those of the defendant must be made to pause and think of the consequences that follow. An imprisonment term of 360 months is sufficient to properly deter the public generally from committing such offenses.

As for specific deterrence, the government is skeptical that any term of imprisonment may sufficiently deter the defendant from committing similar future offenses. His offense conduct is reprehensible, but the manner in which he lived his life throughout, and even once apprehended, is chilling. Similarly situated defendant's accept responsibility immediately and rarely obstruct

justice. They also tend to live lives indicating an awareness of their socially unacceptable predilections – in relative solitude, in the shadows, generally quiet and anti-social. Defendant’s behavior was far different, brazenly overt at times yet carefully crafted to deceive all those around him. This too will have repercussion in the lives of his victims. The defendant was ultimately caught because of information inadvertently provided from another individual, not because he “slipped up” or “got sloppy.” (*See* ECF No. 31, Def. Statement of Facts & PSR ¶ 7).

The defendant lived a dubious double life and fooled all those around him. He exquisitely covered his tracks and even attempted to again once caught by stashing another phone known to contain additional contraband. Often in these cases, it is the defendant’s own conduct that gets him caught. Not so here. Were it not for another individual’s illicit conduct, the defendant may not be before this Court at all. That is why the scope of defendant’s conduct will likely never be fully known.

The defendant was aware enough of his illicit compulsions to carefully deceive all those close to him while subtly flaunting it in their faces. Specific deterrence may never be achieved.

E. Need to Protect Society

The community is owed a duty by this Honorable Court and its government to be protected by those willing and compelled to prey upon the most vulnerable members of society. Defendant’s behavior addressed above, and the fact that he may never be sufficiently specifically deterred from his compulsions, only underscores the importance of this sentencing factor. If the defendant’s illicit desires cannot be quelled and he is so capable of avoiding detection, the Court must prioritize protecting members of society from his conduct, especially when those targeted members are young children. If the defendant was willing and able to victimize the children in this case, what could possibly dissuade him from harming others?

F. Avoiding Sentencing Disparities

The sentencing range for defendants of sexual exploitation of minors crimes is vast and the Court should consider the advisory guideline range specific to this defendant as an appropriate starting point. Defendant's offense level is quite literally off the chart by six (6) points, (or three (3) accounting for his 3-point reduction for acceptance). Upon consideration of the egregious facts specific to this case, the lack of significant mitigating factors here, and the government's concerns above, 180-months of imprisonment is insufficient and the government's recommendation for a 50-year downward variance from the restricted guideline range is not just reasonable, but gracious.

