

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

File No: 1:15-cr-194

v.

Hon. Robert Holmes Bell  
United States District Judge

SETH PICCOLO,

Defendant.

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**DEFENDANT’S SENTENCING MEMORANDUM AND  
REQUEST FOR VARIANCE**

On July 20, 2016, this Court will sentence Seth Piccolo for distribution and possession of child pornography. The sentencing guidelines as calculated by the United States Probation Department call for a sentence between 210-262 months. Mr. Piccolo makes two legal objections to the scoring of the guidelines based on the undisputed facts in the presentence report. First, he contends that his conduct does not constitute trading or bartering sufficient for a five-level enhancement under the guidelines. Second, Mr. Piccolo should be given a minimal or minor role adjustment based on his role in the offense. In addition to his objections, Mr. Piccolo respectfully moves this Court to exercise its discretion and vary from the sentencing guidelines range based upon the nature and circumstances of the offense and the history and characteristics of Mr. Piccolo.

**BACKGROUND**

As detailed in the presentence report, Mr. Piccolo accessed an Australia-based child pornography website called The Love Zone (“TLZ”) starting in June 2014.

Because TLZ was an illegal website featuring child pornography, the proprietors of that website made extensive efforts to ensure that those that accessed the site were actual participating members and not law enforcement officers. Those wishing to view the materials on the TLZ had to follow specific rules to gain access to the site. (PSR ¶ 16, PageID.132) For example, the proprietors of the website required users to upload, i.e. send to the website, an image or link to an image of child pornography at least once per month. *Id.* If users did not follow the rules, then they would be no longer have access to the site.

Mr. Piccolo is a well-educated man who is capable of following directions. (PSR ¶ 67, PageID.138) On five occasions over the course of six months (once per month), Mr. Piccolo uploaded a video or image of child pornography pursuant to the rules of the TLZ website. (PSR ¶ 17-23, PageID.132-133) Mr. Piccolo viewed videos and images on the website or linked to the website, and commented on videos and images that he saw. *Id.* Unbeknownst to Mr. Piccolo, at some point during that six month period, the Australian government seized control of TLZ and operated and surveilled the site as its members continued to upload, download and view child pornography. After the Australians had identified the IP Addresses of some of the participants on the site, including Mr. Piccolo's, they shut the website down. (PSR ¶ 24, PageID.133)

After the Australians provided Mr. Piccolo's name to the FBI, federal agents obtained a search warrant, searched his home in Grand Rapids and seized the family laptop. (PSR ¶ 25; PageID.133) The FBI conducted a forensic examination of the laptop but "did not find child pornography." *Id.* Evidence of Mr. Piccolo's participation on

TLZ was found on the machine, including file paths connecting that computer to TLZ.

Id.

## ARGUMENT

### **I. Mr. Piccolo Did Not Trade or Barter in Child Pornography, and His Five Uploads were not “Sophisticated and Extensive.”**

The presentence report adds five offense levels (or about 7-8 years) to Mr. Piccolo’s proposed guidelines pursuant to USSG § 2G2.2(b)(3)(B) because he “traded child pornography” in exchange for a “thing of value.” (PSR ¶ 37.) Here, Mr. Piccolo did not barter or trade child pornography. Unlike defendants that collect child pornography and then share it with others through file-sharing software, Mr. Piccolo uploaded images onto the TLZ website as directed for the sole purpose of gaining access to view pornography. He found those images or links to images on the TLZ website and downloaded them, and then uploaded them later on the same site. In other words, he moved the images from one location on the website to another so that he could gain access to the site. Mr. Piccolo uploaded an image or video once per month, or five times total because the operators of the website (and later Australian law enforcement) required that he upload once per month, otherwise, he would lose access. The process of uploading the video was more of a litmus test than a bargained for exchange. Mr. Piccolo did not “share” his collection of child pornography with others, because he did not have one. Indeed, when investigators searched his computer they did not find a single image of child pornography.

In its rationale for why Mr. Piccolo should be charged a five-level increase for trading or bartering child pornography pursuant to USSG § 2G2.2(b)(3)(B), the probation officer suggests that he used “special software” that allowed him to share his files with

others. (Addendum to PSR; PageID.144) The probation officer notes that using special software to set up significant sharing of child pornography merits the enhancement. *See, e.g., United States v. Emmons*, 524 F. App'x 995, 999 (6th Cir. 2013) (use of file sharing program along with online chat promising to “throw so[me] folders up” for another collector sufficient for enhancement). Contrary to this assertion, Mr. Piccolo did not use a special file-sharing program or even have a collection of child pornography to share. Even if he did use a file-sharing program – which he did not -- he would qualify for the enhancement only if the use of that program was “sophisticated and extensive.” *United States v. Hardin*, 437 F.App'x 469, 474 (6th Cir. 2011) (the defendant’s use of file-sharing program Limewire was sufficiently “sophisticated and extensive” to merit enhancement.)

Here, Mr. Piccolo’s transmission of files on five occasions so that he could access TLZ website can hardly be characterized as “sophisticated and extensive.” Mr. Piccolo uploaded the minimum to comply with the rules – once per month for five months. The images he uploaded were not from his personal collection, because he did not have a personal collection. In the Addendum to the presentence report, the Probation Officer states that forensic examiners located “hundreds of videos, contact sheets, images and posts depicting child pornography” on Mr. Piccolo’s computer. (Addendum to PSR; PageID.144.) This is untrue. Mr. Piccolo’s computer contained no images or videos, only file paths that suggest that he had viewed those images or videos at one time.

While he admits that he was a member of TLZ, that membership alone should not merit a five level increase in his guidelines as a distributor seeking remuneration. Because there

was nothing sophisticated or extensive about his activities, and Mr. Piccolo did not trade or barter in child pornography, the enhancement should not apply.

**II. Mr. Piccolo Played a Minimal or Minor Role in this Offense.**

Mr. Piccolo has acknowledged that he uploaded images to TLZ five times from June until December 2014 for the purpose of accessing TLZ website. According to the presentence report, Mr. Piccolo uploaded those images at the request of the “TLZ administrators.” (PSR ¶ 15; PageID.131-132) Those administrators “mandated” that only certain types of material was allowed on the website. *Id.* Mr. Piccolo followed the administrators’ rules, but they were their rules, not his.

Mr. Piccolo had nothing to do with the broader offense of operating TLZ, or the large-scale distribution of child pornography. He was not a creator or an administrator of the site. He did not manufacture or create any child pornography. He did not have a collection of child pornography that he shared with the larger group of members of TLZ. His involvement could not have been more minimal without losing access on the site, and he asks that this Court give him a mitigating role adjustment pursuant to USSG § 3B1.1.

In responding to Mr. Piccolo’s objection, the Probation Officer contends that the mitigating role reduction applies only “when there [is] more than one participant involved in the offense [and] Mr. Piccolo is the sole defendant in this case.” (Addendum to PSR; PageID.145) There is a difference between a “sole defendant” and a sole “participant,” and the minimal or minor role reduction applies if there is more than one participant. *See United States v. Groenendal*, 557 F.3d 419, 427 (6th Cir. 2009) Here, the government charged Mr. Piccolo with distribution of child pornography for uploaded images onto the TLZ website. Distribution of anything suggests at least two participants. As discussed

above, there were many others involved in this offense, including the proprietor of TLZ and its many administrators. In relation to those individuals, Mr. Piccolo's role in the offense was clearly minimal or minor.

In *United States v. Groenendal*, 557 F.3d 419, (6th Cir. 2009), the Sixth Circuit vacated and remanded the sentence of the District Court after it failed to consider whether a defendant, who had distributed child pornography "three times" to others, should receive a "minor" or "minimal" role adjustment. *United States v. Groenendal*, 557 F.3d 419, 426 (6th Cir. 2009). When considering whether this reduction could apply, the Court noted that Groenendal was less culpable than those to whom he distributed the child pornography and "Groenendal's undisputed and remarkable repentance; unlike most pornography addicts, he sought professional help on his own initiative and has reformed his behavior."

Like Groenendal, Mr. Piccolo had a limited role in the distribution of child pornography. He uploaded child pornography five times for the purpose of accessing the website and never created, shared or possessed a "collection" of child pornography. Also like Groenendal, Mr. Piccolo has sought help for his addiction even before he was caught and has exhibited "undisputed and remarkable repentance." He has never hidden his addiction from his wife or his pastor from whom he has confessed his problems and sought help.

Mr. Piccolo's conduct in this case is minimal in that he is "plainly among the least culpable of those involved in the conduct of a group." USSG § 3B1.2, cmt. nn.1, 3-5. To lump Mr. Piccolo in with the purveyors of the site in which he was ensnared is unfair and unjust and creates an unwarranted disparity between wrongdoers. TLZ had thousands of

members, was recognized internationally as a central repository of child pornography, and its proprietor was a notorious pedophile.<sup>1</sup> The administrators also drafted extensive rules and regulations for members, and the Australian and United States governments prosecuted the creators and administrators of the website. In contrast, Mr. Piccolo was a member of the website for about five months, during which time he uploaded preexisting images that were already on the website so that he could view other images. He did not have any involvement with creating or producing any child pornography, nor did he have any involvement with running the website. He followed the rules so he could see the images on the website.

Based on these factors, Mr. Piccolo argues that he is a minimal or minor participant. As a mere viewer of a product that was created and distributed by other individuals with significantly more involvement, Mr. Piccolo is properly described as one of the least culpable members of the participants that distributed child pornography on TLZ.

### **III. Mr. Piccolo Asks that this Court Vary from the Guidelines Range.**

During his change of plea hearing, Mr. Piccolo acknowledged that his actions were selfish and destructive. He admitted that he has long struggled with pornography addiction and has resolved to overcome his demons. Mr. Piccolo has voluntarily sought

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<sup>1</sup> Upon information and belief, the TLZ website was operated by an Australian man named Shannon McCooole. McCooole operated the website on the dark web and established the rules designed to promulgate the production and distribution of child pornography. McCooole profited by running the website and accepted donations to keep the site operating. McCooole encouraged others to upload and post child pornography, and recruited others to help administer the site. He was later convicted of several counts of child molestation.

therapy long before he was charged with any crime. He makes no excuses, and is prepared to serve at least five years (the mandatory minimum) in prison for his crimes.

The punishment proposed by the guidelines does not fit the crime. Mr. Piccolo respectfully requests that this Court exercise its discretion and vary from the advisory guidelines range. A variance is warranted because (1) the guidelines' range over-represents the nature and circumstances of the offense and (2) other than Mr. Piccolo's instant offense he is an upstanding citizen and family man who has absolutely no criminal record.

**A. The Guidelines Range Over-represents the Nature and Circumstances of the Offense.**

Mr. Piccolo was first discovered as a user of TLZ when Australian authorities took over the TLZ website. The proprietors of TLZ designed the website to allow users anonymity when they visited the site, but after the Australians took it over, they unmasked the IP addresses of many of those who used the site, including Mr. Piccolo. The Australians watched as TLZ users entered the site, viewed, uploaded and downloaded child pornography and left comments. After gathering evidence against a host of users from the United States, authorities turned over a list of names of U.S. citizens to the U.S. law enforcement.

The investigation uncovered that Mr. Piccolo visited the TLZ website five times to upload images and that he made comments about some of the images. He has always contended that the images he uploaded came from the TLZ website and he uploaded them only to gain access to the site. For this offense, the guidelines suggest an appropriate sentence is somewhere between 17½ and 22 years years in Federal prison.



Mr. Piccolo acknowledges that he entered TLZ for the purpose of viewing child pornography and that he followed the site's rules. He never collected any child pornography on his computer or any other storage device. Indeed, when Federal Agents seized and performed a forensic examination of his computer, they found no videos or images containing child pornography. (PSR ¶ 25, "The agent did not find child pornography." PageID.133) Consistent with his statement, agents found file paths that showed his involvement on the TLZ website, and that Mr. Piccolo has been viewing child pornography.

Mr. Piccolo failed to adequately cope with his addiction to pornography. His moral failure led him to, in his own words, "act selfishly" and participate in this heinous industry. The guidelines, however, make no distinction between Mr. Piccolo and the purveyor's of the website itself. Recently, the Sixth Circuit denied an affirmative appeal by the government seeking to reverse the district court after it found that guidelines of 262-327 months were "off the mark." *United States v. Collins*, 2016 LEXIS 11879 (6th Cir. June 29, 2016). In *Collins*, the defendant used peer-to-peer file sharing software to download child pornography. Investigators searched his computer and found 19 videos and 93 images depicting child pornography. Collins went to trial, and although he had previously confessed, testified and disavowed his prior statements. The jury convicted Collins. After the verdict, the Court polled the jury as to an appropriate sentence. The jurors "sentences" ranged "from zero to 60 months' incarceration, with a mean of 14.5 months and median of 8 months." *Id.* The Court sentenced Collins to the mandatory minimum sentence of 60 months in prison.

The government appealed and expressed dissatisfaction with the manner in which the district court exercised its discretion when sentencing Collins. The Sixth Circuit affirmed the sentence, holding that, “Federal law provides nearly unfettered scope as to the sources from which a district judge may draw in determining a sentence.” Id. p. 4. The Court rejected the government’s claims of error holding that the district court provided “a sufficiently detailed explanation of why he believed neither specific nor general deterrence compelled a longer sentence.” Id. p. 6.

Mr. Piccolo asks this Court to recognize that the guidelines in his case do not reflect the gravity of his offense. While he technically distributed child pornography five times, that is the extent of his distribution, and he did so only to gain access to TLZ. Although he “possessed” more than the arbitrary 600 images referenced in guidelines, a search of his computer found none. The images he viewed included children under the age of 12 and would be considered “sadistic,” but nearly all child pornography cases fit that definition. And, he used a computer to commit a crime that for all practical purposes cannot be committed without one. All of those factors are germane to almost all child pornography cases, yet they result in dramatic increases in the guidelines range. Mr. Piccolo asks that this Court consider his actual conduct when considering the guidelines and fashioning an appropriate sentence.

**B. The History and Characteristics of Mr. Piccolo Warrant a Variance from the Guidelines.**

Mr. Piccolo was born in East Grand Rapids, Michigan. His biological father was not present during his childhood, and he was raised by his mother and step-father. He graduated from Godwin Heights High School in 1989. He attended Grand Valley State

University and graduated with a degree in Psychology. He later married and he and his wife Janet have two boys, Jackson (7) and Henry (5).<sup>2</sup> He has worked hard to support his family as a contractor and maintenance man. He no history of drug use or abuse. He has served in the military. He has never committed a crime. He has volunteered at his Church for years; and he and his wife have taken foster children into their home. He has tremendous support in the community.

Absent his present conviction, Mr. Piccolo has lived a productive life. He has not, however, been able to exorcise completely his demon of pornography. He and his wife have tried through therapy and faith-based counseling to control his addiction to pornography. For the most part, they have been successful. For the period between June and December 2014, however, Mr. Piccolo went to a dark place succumbing to the pressure and engaging in selfish behavior. He knows and knew then that his behavior was wrong, which is why he did not actively store or keep any child pornography. He recognizes the error of his ways, and hopes that this Court will find that he is not defined by his issues with child pornography.

Mr. Piccolo has tremendous support from his community, friends and family. He has earned that support through years of honest, hard-working living. He asks that this court consider that, absent this incident, he is viewed by those who know him best as an honest family man that cares about others and has worked hard to follow a good path in life.

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<sup>2</sup> Shortly after the federal government searched the Piccolos' home, child protective services were contacted. That organization did a home visit, and found the Piccolo children to be well-adjusted and well-cared for. No further visits were made.

Dated: July 13, 2016

Respectfully Submitted,

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