UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	**)**	
	)	
v.	**)**	**Crim. No. 1:16-cr-00091-JL**
	)	
BRAD SMITH	**)**	

UNITED STATES' SENTENCING MEMORANDUM AND OBJECTION TO DEFENDANT'S MOTION FOR A DOWNWARD VARIANCE

I. BACKGROUND.

On May 26, 2015, defendant Brad Smith created six videos of himself sexually abusing a three-year-old girl. From 12:42 p.m. to 1:47 p.m., the defendant instructed his victim to perform various sexual acts on him and ultimately placed her on her back, pulled her diaper around her ankles, and raped her. The defendant wore Google glasses while he did so in order to surreptitiously film the abuse.

On April 7, 2017, a jury found the defendant guilty of six counts of manufacturing child pornography in violation of 18 U.S.C. § 2251(a), for which the Sentencing Guidelines recommend a sentence of life imprisonment (Total Offense Level 43, Criminal History Category V). For the reasons set forth in greater detail below, the government proposes an incarcerative sentence of sixty years (720 months) to be followed by lifetime supervised release, a sentence which meets the objectives described in 18 U.S.C. § 3553(a) and accounts for the many aggravating circumstances in this case.

II. THE ADVISORY GUIDELINES.

The guideline range as calculated in the presentence report is correct. However, the report should be amended to reduce the total offense level by three levels to reflect a single group under

U.S.S.G. § 3D1.2. Because the total offense level continues to exceed 43, the total level of 43 should remain the same.

A. Grouping.

The defendant argues that his offenses should be grouped together for purposes of determining the applicable guideline range. The presentence report rejected this approach and divided the charges into three groups under U.S.S.G. § 3D1.2. The report uses three groups on the ground that the time stamps on the images show that the defendant inflicted abuse on the victim on three different occasions: Group 1 (Count 1: 12:43 PM; Count 2: 12:44 PM; Count 3: 12:49 PM); Group 2 (Count 4: 1:30 PM and Count 5: 1:31 PM); and Group 3 (Count 6: 1:49 PM).

In support of his argument, the defendant points out that all counts should be grouped if they "involve substantially the same harm." The defendant contends that only one harm occurred here because there was only one victim and the offenses were part of a single transaction or scheme. The defendant says that so long as the sexual abuse occurred on the same day, there should only be one group.

Section 3D1.2 of the Guidelines does not authorize grouping where the offenses cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm) U.S.S.G. § 3D1.2, Application Note 4. Relying on this provision, the Eighth Circuit has held that grouping is not appropriate where the defendant molested a victim more than once since each act of molestation inflicted a separate and distinct harm upon the child. United States v. Kiel, 454 F.3d 819, 822 (8th Cir. 2006).

The record here demonstrates that the defendant made the incriminating images in just over an hour. Almost 45 minutes elapsed between the end of Group 1 and the start of Group 2 and another 18 minutes elapsed from the end of Group 2 to the start of Group 3. The question here is whether this conduct caused multiple harms to the victim or a single composite harm. This is a difficult question. The closest example provided by the guideline states that a "defendant [who] is convicted of two counts of rape for raping the same person on different days" should not have the counts grouped together. U.S.S.G. § 3D1.2, Application Note 4. It is not clear whether the mention of different days is a rule or merely illustrative since there is little doubt that multiple rapes, even if committed within the same 24-hour period, cause distinct harms to the victim. Nevertheless, the guideline commentary refers to "days" as the operative timeframe. Here, the molestations occurred within an hour and exactly what happened during that hour is not clear.

In the government's view, it is unnecessary to resolve this difficult question here. Even if the total offense level is reduced by three levels to reflect a single group, the total offense level still exceeds 43 and therefore is reduced to 43 by operation of the guidelines. Thus, resolution of this issue is irrelevant. United States v. Goergen, 683 F.3d 1, 4 (1st Cir. 2012). Accordingly, the government requests (without prejudice to argue for multiple groups under similar circumstances in future cases) that the presentence report reflect only a single group.

B. Obstruction of Justice.

Under U.S.S.G. § 3C1.1, an obstruction of justice enhancement "may be based on a finding that the defendant committed perjury during the course of the case." United States v. Maguire, 752 F.3d 1, 5 (1st Cir. 2014). For the enhancement to apply, there must be a preponderance of proof that the defendant deliberately lied about a material matter. United States

v. Shinderman, 515 F.3d 5, 19 (1st Cir. 2008). There must be proof on all elements of perjury – falsity, materiality and willfulness. United States v. Mercer, 834 F.3d 39, 49 (1st Cir. 2016). The guideline specifies that the enhancement applies to a denial of guilt under oath that constitutes perjury.

At trial, the defendant testified that he did not create the images at issue, contrary not only to the overwhelming evidence presented during the trial, but also to his own statements during a post-*Miranda* interview on January 14, 2016 when he confessed to the crime. He also testified that his brother, Matthew Smith created the videos (Mr. Aframe: And you knew it was Matt? Defendant: He's the only other person it could have been) United States v. Smith, 4/7/2017, Transcript at 62. The government subsequently introduced evidence proving that Matthew Smith could not have been the person depicted in the videos.

In addition, the defendant obstructed justice when he testified that he never traded child pornography.

Mr. Aframe: So you've never traded any child pornography?

Defendant: I don't trade child pornography.

United States v. Smith, 4/7/2017, Transcript at 48. Shortly after that denial, the defendant was impeached with his own emails and forced to admit that he did in fact trade child pornography. The defendant admitted to sending an email on October 18, 2013 reading, "this is Emma. I have 50 plus spycam vids of her if you're interested in a trade." The defendant acknowledged that the email contained attachments with nude photographs of his girlfriend's fourteen-year-old daughter. United States v. Smith, 4/7/2017, Transcript at 69-70.When confronted with the photographs, the defendant made the following admissions:

Mr. Aframe: Am I right that at the time those photos were taken [Minor Victim] was either 13 or 14?

Defendant: 14, yes.

Mr. Aframe: 14, okay. Thank you. I'm going to show you one more email from your account, from that same Yahoo account. This is an email from March 18, 2014. It's from you to someone called stillhere@onlineme.NL. And it says sorry, hey sorry this has taken so long to respond. Back to work and busy. I am afraid I have run out of Emma vids. And it goes on. Do I read that right?

Defendant: Yeah.

Mr. Aframe: And in the prior email, Emma vids is what you called those pictures of [Minor Victim]; right?

Defendant: Yes.

Mr. Aframe: So this was a person that you had provided the Emma vids to previously but you had nothing else to provide?

Defendant: Correct.

Mr. Aframe: And the reason you would provide those vids is to get something in return; right?

Defendant: Yes.

Mr. Aframe: Other kinds of pornography?

Defendant: Yes.

Mr. Aframe: Other kinds of child pornography?

Defendant: No.

Mr. Aframe: Only adult pornography?

Defendant: I was looking for adult pornography, yes.

Mr. Aframe: And you did that by offering images of a 14-year-old to other people in the hopes that they would provide you back adult pornography?

Defendant: It wasn't the type of pornography being traded. It was homemade and hidden cam videos.

Mr. Aframe: And homemade pornography is worth a lot in trading; right?

Defendant: Yes.

United States v. Smith, 4/7/2017, Transcript at 74-76.

The defendant also obstructed justice when he testified about the nature of the "knock and talk" at his residence on January 14, 2016. He said that law enforcement officers "interrogated" him for "about two hours." He also stated that the officers "claimed they had all kinds of evidence of [downloading child pornography] at my house" and threatened him, telling him that he would be in serious trouble if he did not cooperate. United States v. Smith, 4/7/2017, Transcript at 49. Both Louisiana State Trooper Georgiana Kibodeaux and HSI Special Agent Erol Catalan testified that the conversation lasted less than an hour and that they did not make any such accusations or threats. This testimony was material as the defendant claimed that the nature of that interaction at his residence justified his decision to give such a detailed "false" confession.

C. The Repeat and Dangerous Sex Offender Enhancement.

The defendant contests the application of a five-level enhancement for the defendant having engaged in a "pattern of activity involving prohibited sexual conduct." U.S.S.G. § 4B1.5. Child pornography production is "prohibited sexual conduct" and "a pattern of activity" is conduct committed on two separate occasions. It is not required that each occasion occur during the offense of conviction or that the defendant was convicted of the conduct underlying the enhancement.

The defendant obviously engaged in prohibited sexual conduct when he created the images that support the counts of conviction in this case. The only issue is whether the defendant engaged in a second instance of child pornography production. Assuming that the creation of the images underlying this case counts only as a single act of prohibited sexual conduct, the

enhancement still applies because the trial evidence demonstrated that the defendant had engaged in a second act of production.

On cross-examination, the defendant admitted that, while living with a woman, he placed a hidden camera in the bathroom to take pictures of the woman's underage daughter.

> Mr. Aframe: And going back to the prior exhibit for a second. How did you acquire these pictures of [Minor Victim]?
>
> Defendant: With a camera placed in the bathroom.
>
> Mr. Aframe: Did you place that camera there?
>
> Defendant: Yes.
>
> ***
>
> Mr. Aframe: And am I right that at the time those photos were taken [Minor Victim] was either 13 or 14?
>
> Defendant: 14, yes.

United States v. Smith, 4/7/2017, Transcript at 73-74. The images that the defendant took of the minor victim constitute child pornography. Some of the photographs focus on the daughter's vagina and others show her from behind while bent over. The defendant obviously believed that the images were sexual in nature since he traded them to others for more pornography. Pictures, almost identical to the ones at issue here, have been held to constitute child pornography. United States v. Theis, 2015 WL 5671377, at *8 (D. Kan. Sept. 25, 2015). Because the defendant engaged in child pornography production on at least two separate occasions, the presentence report properly applied a five-level enhancement under U.S.S.G. § 4B1.5.

D. Double Jeopardy.

The defendant's final argument is that the stacked statutory maximums of 2,160 months (6 counts x 360 months) violated the prohibition against multiple punishments for the same

offense. The defendant says that the government was incorrect in charging each image of child pornography as a separate count. The defendant says that the proper unit of prosecution for child pornography production is the photo session, not the image. Therefore, the defendant argues that he should have been charged with only one count of child pornography production because there was only one photo session, which would establish a maximum sentence of 360 months.

The law does not allow the prosecutor to "divide a continuing crime into bits and prosecute separately for each." Therefore, the prosecutor must limit each charge to the proper unit of prosecution. United States v. Chagra, 653 F.2d 26, 29 (1st Cir. 1981). The appropriate unit of prosecution is defined by the legislative enactment defining the crime. Id. at 31. When Congress has failed to make the unit of prosecution readily ascertainable, the court resolves the doubt as to congressional intent in favor of lenity for the defendant. Bell v. United States, 349 U.S. 81, 83-84 (1955).

The defendant argues that the photo session is the appropriate "unit of prosecution" for child pornography under 18 U.S.C. § 2251(a), by relying primarily on two state cases, one from Washington and one from Nevada. In so doing, the defendant overlooks that three federal circuit courts of appeals have held that the unit of prosecution under the federal child pornography production law, the statute at issue here, is the image. Thus, each image of child pornography may be charged as a separate count, even if the image is of the same victim and was taken during the same photo session. United States v. Fee, 491 F. Appx. 151, 157 (11th Cir. 2012); United States v. Tashbook, 144 F. Appx. 610, 615 (9th Cir. 2005); United States v. Esch, 832 F.2d 531, 541-42 (10th Cir. 1987).

Section 2251(a) makes it unlawful to use a minor to engage in "any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." The Eleventh

Circuit has recognized that the statute is written in broad terms by referring to any image. Fee, 491 F. Appx. at 157. This text "makes clear that Congress proscribed each discreet visual depiction of a minor as a separate offense." Id.

As the Tenth Circuit explained, the way to determine the unit of prosecution is to identify the key element of the federal offense. The court concluded that, in a child pornography production case, the key element is the use of a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction of the conduct. Esch, 832 F.2d at 542. As the court put it, "the fact that multiple photographs may have been sequentially produced during a single photographing session is irrelevant. Each photograph depends upon a separate and distinct use of the children." Id. Thus, each image constituted the proper unit of prosecution under 18 U.S.C. § 2251(a).

III. A SENTENCE OF 720 MONTHS IS SUFFICIENT BUT NOT GREATER THAN NECESSARY TO SATISFY THE STATUTORY SENTENCING FACTORS.

A. Recognizing the Gravity of the Offense.

One of the factors that a district court must consider in sentencing is "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." 18 U.S.C. § 3553(a)(2)(A). Sometimes attributed the conceptual moniker of "just deserts," § 3553(a)(2)(A) carries the need for retribution, and the need not just to punish, but to punish justly. As the Senate reflected in drafting this provision of the sentencing statute:

> This purpose – essentially the "just deserts" concept – should be reflected clearly in all sentences; it is another way of saying that the sentence should reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense.

S. Rep. No. 98-225, at 75-76, 1984 U.S.C.C.A.N. 3258-59. In other words, the punishment should fit the crime. Therefore, the more serious the criminal conduct, the stronger the justification for a protracted sentence.

Here, the gravity of the defendant's conduct cannot be overstated. As a baseline, the sexual exploitation of a child is among the most serious crimes prosecuted in this district, an "act repugnant to the moral instincts of a decent people." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002). As both the Supreme Court and Congress have recognized time and again, protecting children from sexual abuse and exploitation constitutes a particularly compelling government interest "of surpassing importance." New York v. Ferber, 458 U.S. 747, 757 (1982).

Not only was this defendant convicted of one of the most serious crimes prosecuted in this district, but he committed it in a particularly repugnant manner. The most poignant evidence of the harm this defendant caused is the look of fear in the young victim's eyes in one of the videos. However, the defendant not only harmed the three-year-old child, but devastated her family. The defendant was not a stranger, but a close friend, someone who spent years gaining the trust of the victim's parents. At trial, the victim's father testified about how he employed the defendant at his factory, and when that did not work out, gave him a second chance working on his family farm. He described how he invited the defendant into his home for holidays. The defendant, in fact, became so close to the victim and her family that they considered him as a potential legal guardian for their two daughters.

Whether the defendant committed the crimes for his own sexual gratification, or to create new child pornography material to trade and bolster his extensive collection, the harm to this young child and her family is undeniable and irreversible. In light of the severity of the defendant's conduct, a considerable sentence is essential to recognize the seriousness of his

crime and the potential harm that it caused, not just to the victims, but to the community at large. 18 U.S.C. § 3553(a)(2)(A) (citing the need for a sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense).

B. Achieving the Critical Goal of Deterrence.

Achieving adequate deterrence, which is imperative in the regime of child pornography sentencing, also demands the imposition of a protracted sentence. 18 U.S.C. § 3553(a)(2)(B). In setting punishments, Congress has taken a particularly hard line on child exploitation offenses, in part to achieve the public policy objective of eradicating the market for child pornography. See United States v. Pugh, 515 F.3d 1179, 1197-98 (11th Cir. 2008) (collecting congressionally mandated changes to the child pornography guidelines).

In accordance with that objective, many courts have recognized that "[g]eneral deterrence is crucial in the child pornography context[,]" and a sentence that incorporates only a superficial term of imprisonment "would [not] meaningfully deter [this defendant] or anyone else." United States v. Bistline, 665 F.3d 758, 767 (6th Cir. 2010); see also Osborne v. Ohio, 495 U.S. 103, 109-10 (1990) ("It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."); United States v. Robinson, 778 F.3d 515, 520-21 (6th Cir. 2015) ("[G]eneral deterrence is crucial in the child pornography context . . . ."); Pugh, 515 F.3d at 1194 (11th Cir. 2008) (holding that the deterrence objective of sentencing is "particularly compelling in the child pornography context"); United States v. Goff, 501 F.3d 250, 261 (3d Cir. 2007) ("[D]eterring the production of child pornography and protecting the children who are victimized by it are factors that should have been given significant weight at sentencing. . . ."). Imposing a lighter sentence on a defendant convicted of a child pornography offense, particularly a

defendant convicted of manufacturing child pornography, "tends to undermine the purpose of general deterrence, and in turn, tends to increase (in some palpable if unmeasurable way) the child pornography market." Pugh, 515 F.3d at 1194.

Here, both specific and general deterrence are paramount concerns. The defendant exploited at least two child victims. In both cases, he did so by fostering a close relationship with the victims' parents who then trusted him with access to their children. He is a recidivist who still has not taken responsibility for his actions. He needs to be deterred. The sentence should also be severe enough to make a statement to others with access to children that this conduct is reprehensible.

C. Protecting the Public

Finally, a meaningful sentence is required to protect the public. 18 U.S.C. § 3553(a)(2)(C). The defendant has proven himself to be an extremely dangerous person. Unlike many child pornography defendants, this defendant has an extensive criminal history in the second-most-serious criminal history category V. His convictions indicate a history of violence. When he was asked to describe his job as an infantry member in the military, he said, "they kill people and break stuff." United States v. Smith, 4/7/17, Transcript at 5. When describing why his transition to civilian life after serving in the military was difficult, he explained, "[i]t's kind of hard to be in charge of everything, you know, where you're the law, where you're, you know, you kind of decide who lives and dies and what happens on a regular basis, and then you come home and there's a lot of other laws and a lot of people telling you what to do . . ." United States v. Smith, 4/7/17, Transcript at 7-8. Even without considering the charged crimes, the defendant's cavalier statements about violent acts and his criminal history indicate that he poses a danger to the community.

More importantly, however, this defendant has proven himself to be the most dangerous kind of sexual predator. He is not the typical child pornography collector spending his time behind a computer screen, but a charismatic man who was able to gain the trust of the two families whose children he exploited. He also had an extensive child pornography collection which he seemed to boast about when talking to Trooper Georgiana Kibodeaux. Although the defendant told the Trooper that he had a preference for young girls who he described as "jail bait," he said his collection included everything, even pornography involving babies. He used hidden cameras to document his sexual exploits and during his interview with police, appeared to take pride in his sexual conquests and his collection of diverse and bizarre pornography. When describing the types of pornography he collected, he told officers that he is a "danger junkie" who likes things that are "forbidden." United States v. Smith, 4/7/2017, Transcript at 68. This defendant is a repeat offender, with a violent criminal history, and an apparent inability to control his sexual impulses. He is an individual from whom the community needs protection.

D. *Consistency with Other Sentences Imposed in this District*.

A sixty-year sentence is consistent with sentences imposed in other comparable cases in this district. Robert Joubert was convicted after trial of three counts of sexual exploitation of children and one count of possession of child pornography. Two of the videos at issue in that case depicted the defendant placing a nine or ten-year-old boy's hand on the defendant's penis. The third depicted the lewd or lascivious exhibition of the minor boy's genital area. This Court sentenced the defendant to 480 months (40 years) in prison. Smith's conduct was substantially more egregious than that of Joubert. This defendant raped a three-year-old child, conduct which he admits constitutes a sadistic act. In addition, this defendant obstructed justice at trial and

engaged in a pattern of conduct by creating child pornography of another child as well. He deserves a sentence that reflects his significantly more serious crime.

In September 2010, Ronald Goergen pleaded guilty to four counts of sexual exploitation of children. The charges were that over a period of several years, Goergen took still pictures and videos of three minor girls engaged in explicit sexual activities or poses and then distributed the material. Goergen received a sentence of 60 years in prison. Although there were three victims in that case, the defendant accepted responsibility by pleading guilty. A comparable sentence in this case, in which the defendant went to trial and obstructed justice, would appropriately reflect the similarly serious circumstances of both cases.

In 2009, Dominic Pace pleaded guilty to one count of sexual exploitation of a child, one count of sales of child pornography, and one count of possession of child pornography. The defendant abused a female approximately five years old and the abuse that was the subject of the 2251(a) charge was similar to that in this case. The defendant and the government entered into a negotiated disposition for a 40-year sentence. In that case, the defendant was charged with only one count of sexual exploitation of a child and was himself a victim of childhood sexual abuse. Although the nature of the defendant's abuse of the young child was similar to that here, the mitigating factors and fact that the defendant entered into a negotiated disposition with the government, warranted his lower sentence.

IV. CONCLUSION.

"Serious" is not an appropriate description of the defendant's conduct. He has exhibited a pattern of gaining access to children by gaining the trust of their parents and abusing that trust by committing one of the most heinous crimes our society recognizes. This defendant obstructed justice and to this date, has refused to take responsibility let alone show remorse for his actions.

He is the definition of a sexual predator and his history demonstrates that he is a risk to recidivate. He is a danger to the community, and an extended period of imprisonment is warranted. For these reasons, and the reasons set forth above, the government recommends a sentence of 720 months' imprisonment, followed by lifetime supervised release.

Respectfully submitted,

JOHN J. FARLEY
United States Attorney

August 25, 2017

/s/ Seth Aframe
Assistant U.S. Attorney
United States Attorney's Office
53 Pleasant Street, 4th Floor
Concord, New Hampshire 03301

/s/ Georgiana L. Konesky
Assistant U.S. Attorney
United States Attorney's Office
53 Pleasant Street, 4th Floor
Concord, New Hampshire 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this filing was electronically served upon counsel for the defendant.

/s/ Georgiana L. Konesky_____
Georgiana L. Konesky
Assistant U.S. Attorney

August 25, 2017