

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

UNITED STATES OF AMERICA)	
)	
v.)	CRIMINAL NO. 2:16cr21
)	
JON A. MILLER,)	
)	
Defendant.)	

POSITION OF THE UNITED STATES WITH RESPECT TO SENTENCING

The United States of America, by Dana J. Boente, United States Attorney, and Alyssa K. Nichol, Special Assistant United States Attorney, offers this position paper regarding the sentencing factors stated in 18 U.S.C. §3553(a). The government has no objection to the content of the Presentence Investigation Report (PSR).

The United States moves this Court, pursuant to U.S.S.G. § 3E1.1(b) and based upon the terms of the binding plea agreement in this case, to grant an additional one-level reduction in the defendant’s offense level for acceptance of responsibility. The defendant timely notified the United States of his intention to enter a plea of guilty, thereby allowing the United States to avoid preparing for trial and permitting the United States and the Court to allocate their resources efficiently.

According to the PSR, the correct advisory calculation under the United States Sentencing Guidelines (U.S.S.G. or “Guidelines”) is 151 to 188 months’ imprisonment. Based on the nature of the offense and the defendant’s characteristics and history involving child pornography, the United States asks the Court to impose a sentence of 168 months’ imprisonment and lifetime supervised release.

I. BACKGROUND

On February 17, 2016, defendant JON A. MILLER (“defendant” or MILLER) pleaded guilty to one count of Distribution of Child Pornography in violation of 18 U.S.C. § 2252(a)(2). The Court is scheduled to sentence the defendant on June 8, 2016.

The defendant came to law enforcement’s attention after the social media website Twitter alerted the National Center for Missing and Exploited Children (NCMEC) that an individual utilizing the email address “aaron.jones9991@yahoo.com” and the Twitter handle name “sex_addict_9696” had uploaded images of suspected child pornography to the social media site. NCMEC identified the Internet Protocol address associated with the upload as belonging to the United States Navy Network Information Center in Virginia Beach, Virginia. Accordingly, NCMEC alerted law enforcement agents with the Naval Criminal Investigative Service (NCIS) that a person utilizing the United States Navy Network Information Center was suspected of distributing child pornography. Subsequent investigative efforts identified the defendant, MILLER, as the individual who had uploaded child pornography to Twitter.

A review of the offense material and relevant material reveals that the defendant distributed child pornography on multiple occasions, including the instance that prompted Twitter to notify NCMEC. The images he distributed include the following: a minor female displaying her genitalia to the camera, a prepubescent female performing oral sex on an adult male, a minor female being vaginally penetrated by an adult male, and a naked minor female being restrained by rope as an adult male inserts his penis into her mouth. The defendant is attributed with eleven images of child pornography. Notably, however, on April 27, 2015, in an email response to a request for images of child pornography from another internet user, the

defendant stated, “I had to wipe my computer. Things seemed a little dicey. I need to collect again somehow.”

The defendant’s lascivious fascination with children as sexual objects expands beyond the actual instances where he distributed child pornography. The defendant engaged in numerous email conversations with other internet users, wherein he would discuss violently raping female children. Specifically, he told a Yahoo user that, “I would love to rip apart a young pussy. I fantasize about grabbing one from the mall and having my way with her...just turn her into your personal factory/cumdump.” On another occasion, he claimed that an eleven or twelve year old girl had “jerk[ed] him off a while ago.” He also bragged to another internet user that he had once raped a young woman, who was about seventeen or eighteen years old, and reminisces about how, “[s]he fought so hard.” In a statement to NCIS, he related that he once solicited an underage female to send him a nude picture of herself; this statement could not be corroborated.

II. THE GUIDELINES

The defendant may bring attention to concerns about the current state of the Guidelines dealing with child pornography. Admittedly, there are issues with the child pornography Guidelines, as discussed in the February 2013 Report to Congress by the United States Sentencing Commission. *See* U.S. Sentencing Commission: Federal Child Pornography Offenses (2013) (hereinafter, the Report). In addition, the U.S. Sentencing Commission has recommended several changes to the child pornography guidelines, specifically to enhancements that address the use of infants and toddlers in pornographic material and the use of peer-to-peer file sharing programs. *See*, U.S. Sentencing Commission: Amendments to the Sentencing Guidelines (Preliminary) (April 15, 2016). The proposed 2016 amendments would not affect the

Guidelines' application to this defendant's case. Thus, the current Guidelines are still the correct place to start in determining an appropriate sentence for the defendant.

The government agrees with a number of the Sentencing Commission's conclusions in its 2013 Report. For instance, the commission agrees that non-production child pornography offenses are serious crimes (even without further evidence of hands-on crimes). The Report also states that these are not "victimless" crimes, with which the government whole-heartedly agrees.

The government also agrees that the state of technology and the changes in child pornography "market" have changed child pornography crimes so much that it is not adequately represented by the existing Guidelines. Specifically, the existing Specific Offender Characteristics (SOCs) in the Guidelines may not accurately reflect the seriousness of the offender's conduct or the various degrees of offender dangerousness.

Regardless of the problems with U.S.S.G. § 2G2.2, the Court should take into account the purpose of the 2003 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("PROTECT Act"). The PROTECT Act was, in part, in response to the trend in district courts to downwardly depart and the general inadequacy of sentences in child pornography cases. *See* H.R. Rep. No. 108-66, 108th Cong., 2nd Sess. 58-59 (2003). The threat posed to children by child pornography trafficking has only increased since passage of the PROTECT Act. Specifically, the threat has increased as offenders now trade larger quantities of child pornography and show higher frequencies of images with more explicit and violent conduct toward younger children.

In a March 5, 2013, letter to the United States Sentencing Commission, the Department of Justice (DOJ) recommends revising U.S.S.G. § 2G2.2 with respect to the following SOCs:

- Offender Sophistication: This new SOC would enhance the Guideline range for offenders who used, or advised others, regarding the use of technologies or procedures to evade detection by law enforcement (such as encryption and anonymization). These techniques are frequently used by the most dedicated, sophisticated and dangerous child pornography offenders.
- Distribution: The SOC should continue to augment the guideline for defendants who distributed images, particularly to a minor (and particularly to a minor in an effort to encourage that minor to engage in sexually explicit conduct).
- Image Severity: This SOC should continue to increase the guideline for material that portrays sadistic and masochistic conduct, and should also inversely correlate punishment severity with the age of the victim depicted (e.g. for images of infants, babies or toddlers).

The government does take issue with the Report's conclusion that the recidivism rate of child pornography offenders is not particularly high compared to other offenders and that child pornography offenders can be successfully treated. The "known" recidivism rate is just that- "known." It does not account for the underreported nature of these offenses because they are in the privacy of a defendant's home and are difficult to detect. Further, the new technology available to prior convicted offenders makes it easier for them to not be detected. There is currently no valid risk assessment study or data applicable to these types of offenders. And, with respect to rehabilitation, similarly there is no conclusive research or data.

Again, Congress has not changed the Guidelines as they apply to this case, so their proper calculation is appropriate in a defendant's sentencing. However, even taking into account DOJ's suggested changes, this defendant deserves a sentence of imprisonment that is as consistent as possible with the Guidelines.

III. STANDARDS GOVERNING SENTENCING

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court rendered the Sentencing Guidelines purely advisory, but emphasized that a sentencing court must consider

both the Guidelines and the 18 U.S.C. § 3553(a) factors when making a sentencing decision. *Id.* at 264. The Supreme Court reaffirmed this principle in *United States v. Kimbrough*, 552 S. Ct. 85 (2007), emphasizing that “the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.” *Id.* at 564. Finally, in *Gall v. United States*, 128 S. Ct. 586 (2007), the Supreme Court instructed that the sentencing court should calculate the Sentencing Guideline range, permit the government and the defendant “an opportunity to argue for whatever sentence they deem appropriate,” consider all of the § 3553(a) factors, and finally pronounce a sentence taking into account all of the relevant factors. *Id.* at 596-97. The *Gall* Court further instructed that, in the event that the sentencing court decides to impose a variance sentence, the court “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Id.* (noting that a “major departure should be supported by a more significant justification than a minor one.”).

Applying these standards, the Fourth Circuit has concluded that a sentencing court must: “(1) properly calculate the Guideline range; (2) allow the parties to argue for the sentence they deem appropriate and determine whether the § 3553(a) factors support the sentences requested by the parties; and (3) explain its reasons for selecting a sentence.” *United States v. Simmons*, 269 Fed. Appx. 272 at *1 (4th Cir. 2008) (citing *United States v. Pauley*, 511 F.3d 468, 473 (4th Cir. 2007)).

IV. FACTORS UNDER 18 U.S.C. § 3553(a)

Under 18 U.S.C. § 3553(a), when imposing a sentence, the Court should consider (1) the nature and circumstances of the offense, (2) the history and characteristics of the defendant, (3) the need for the sentence imposed to promote the goals of sentencing, (4) the kinds of sentences

available, (5) the sentencing guideline range, (6) any pertinent policy statement issued by the Sentencing Commission, (7) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and (8) the need to provide restitution to any victims of the offense.

A. Nature and Circumstances of the Offense

The nature of the charge to which the defendant has pleaded guilty, Distribution of Child Pornography, calls for a substantial term of imprisonment. This is not a victimless crime.¹ The victims are and continue to be the children depicted in the images. The “use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child” used in the production of the pornographic material. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990). These images get traded and sent around the world again and again purely for the sexual gratification of defendants like MILLER. Furthermore, when a defendant distributes child pornography images, that distribution feeds a market that preys upon children by creating a demand for the images. *Id.* at 109-11.

In this case, the defendant created and maintained online identifies, including “aaron.jones9991@yahoo.com,” for the purpose of receiving and distributing child pornography. Without individuals such as the defendant who supply child pornography across state and

¹ In *U.S. v. Toler*, 901 F.2d 399 (4th Cir. 1990), which involved the proper grouping of counts for purposes of sentencing under the U.S. Sentencing Guidelines, the Fourth Circuit held that the primary victim with regard to the 18 U.S.C. §2252(a) count is society in general as opposed to the child victim under the 18 U.S.C. §2423 count. In that case, the defendant was prosecuted for both the pictures of the child victim and the transportation across state lines for the purpose of engaging in prohibited sexual conduct. Defendant sought to reduce his sentence on the basis that the charges involved the same victim. Here, the government’s concern is merely to highlight for the Court that the children in the pictures are victims in the sense that they are harmed in various ways by the production of the images as well as by the pictures’ continued circulation after the production. *See Osborne v. Ohio*, 495 U.S. 103 (1990).

national borders, the marketplace for child pornography would not exist. His sophisticated distribution, through the use of a computer, allowed offenders to access child pornography with ease. The defendant furthered the child pornography market by disseminating images and videos depicting graphic and violent abuse. He normalized child pornography by communicating and building relationships with other individuals who sought child pornography for their own sexual gratification.

The defendant is appropriately attributed with enhancements in his overall Offense Level due to specific offense characteristics. The defendant receives a two-point Offense Level enhancement under USSG §2G2.2(b)(2) because the material involved a prepubescent minor. He is also attributed with a four-point Offense Level enhancement under USSG §2G2.2(b)(4) because the material portrays sadistic and masochistic conduct. In some child pornography cases, a sexual act being performed on a prepubescent minor is the sadistic and masochistic conduct in question, and one image forms the basis for the application of both enhancements. In this case, however, the defendant distributed both pornographic images of prepubescent minors and, separately, at least one image of a child being restrained by ropes as an adult male forces her to perform oral sex on him. The depravity of the distinct images in question cuts against any argument that the guidelines are somehow artificially inflated. For these reasons, the facts and circumstances of this case warrant a Guidelines sentence of incarceration.

B. Defendant's History and Characteristics

The defendant's history and characteristics indicate that he has contributed to the normalization of child pornography and that he poses a threat to children. The defendant cultivated his presence in the internet community of child pornography offenders by engaging with like-minded offenders. This defendant is not someone who made an isolated mistake. The

evidence reveals a pattern of behavior, in which the defendant repeatedly put great effort into feeding his prurient interest in the sexual exploitation of children. Furthermore, the fact that he would view child pornography on a Navy and Marine Corps Intranet computer and masturbate at work demonstrates that he is unable to control his sexual urges.

C. Defendant's Criminal History

The defendant has no criminal history.

D. Need to Deter Future Criminal Conduct and to Protect the Public

Defendant's sentence needs to accomplish the twin goals of deterring the defendant from engaging in future criminal conduct and protecting the public. The government avers that, if given the opportunity, the likelihood that MILLER will return to this behavior in the future is strong due to his obvious sexual attraction to minors and inability to control his sexual urges.

E. Need to Provide Treatment to Defendant

Due to the nature of the defendant's crimes, defendant should be ordered to participate in a sex offender treatment substance abuse program while incarcerated and after his release.

F. Need to Avoid Unwarranted Sentencing Disparities

MILLER's history and characteristics, along with his actions related to the crimes of conviction, all support a Guidelines sentence of imprisonment. There is no evidence in mitigation or extenuation that would justify a departure from the Guidelines. The need to avoid unwarranted sentence disparities clearly weighs in favor of a sentence of 168 months' imprisonment. 18 U.S.C. § 3553(a)(6).

