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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, vs. AUSTIN MATTHEW OTTO, Defendant.	Case No. 2:22cr50 HCN UNITED STATES' SENTENCING MEMORANDUM AND RESPONSE TO DEFENDANT'S OBJECTION TO THE PRESENTENCE INVESTIGATION REPORT Judge Howard C. Nielson, Jr.

The United States of America, by and through Carol A. Dain, Assistant United States Attorney, submits this sentencing memorandum for the Court's consideration in determining an appropriate sentence for the defendant, Austin Matthew Otto ("Otto"), and urges the court to accept the Rule 11(c)(1)(C) agreement of 60 to 144 months' imprisonment and sentence defendant to 144 months' imprisonment.

1. Factual Background

As thoroughly outlined in the Offense Conduct section of the Presentence Investigation Report ("PSR"), Otto was identified from a Google report to the National Center for Missing and Exploited children for uploading child pornography to his account. The uploaded video depicts a completely naked pre-pubescent female exposing her vagina and anus to the camera and penetrating her vagina with her fingers. Investigation of IP addresses led to the identification of Otto. Ultimately, Otto was detained and pursuant to a search warrant, digital evidence and a pair of female child size 6 underwear were seized.[1]

A forensic evaluation was completed on the digital evidence and revealed hundreds of images and videos of child pornography, child pornography filename keyword hits, child pornography web browser hits, including the TOR browser, bookmarks for child pornography sites, playback application showing a history of played child pornography videos, and hidden, named folders containing identified child pornography. Critically, 17 exploitive images of two children, ages 5 and 8, were located on Otto's phone; these were children Otto personally knew and he admitted to taking these photos.[2] In his objections to the PSR, defendant claims these images are not child pornography and should not be used to calculate the sentencing guidelines.

[1] *See* PSR, at ¶ 12 – 16.

[2] *Id*. at ¶ 16 – 18.

2. Procedural Background

On February 16, 2022, a grand jury returned a four-count indictment charging Otto with violations of 18 U.S.C. §§ 2251(a) and (e), 2252A(a)(1), and 2252A(a)(5)(B), Production, Transportation, and Possession of Child Pornography. On June 3, 2024, Otto pleaded guilty to one count of Transportation of Child Pornography, in violation of 18 U.S.C. § 2252(a)(1).[3] Sentencing is set for June 9, 2025.

3. Guidelines

As an initial matter, the Court must calculate the sentencing guidelines correctly. In defendant's sentencing memorandum, he argues that the base offense level should be set by U.S.S.G. § 2G2.2.[4] While defendant is correct that the base offense level for child pornography offenses is generally governed by U.S.S.G. § 2G2.2, in this case the base offense level is properly established by cross-reference to U.S.S.G. § 2G2.1. This is because the Otto's offense involved causing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.[5] As discussed

[3] *Id*. at ¶ 1-2. The PSR at ¶ 2 states Otto pled guilty on July 2, 2024, however docket entry 67 identifies the date of the change of plea as June 3, 2024.

[4] Defendant's Sentencing Memorandum (Dkt. No. 77). Otto is mistaken in his base offense level calculation. Defendant incorrectly sets the base offense level at 18 under U.S.S.G § 2G2.2(a)(1), however, because defendant pleaded to an offense under 18 U.S.C. 2252A(a)(1), the base offense level is 22 under U.S.S.G § 2G2.2(a)(2). Calculating the guidelines with all the enhancements would result in a total base offense level of 35, and after a 3 point reduction for acceptance of responsibility, the total offense level would be 32, resulting in a guideline range of 121 – 151.

[5] *See* U.S.S.G. § 2G2.2(c)(1).

below, Otto's argument that the minor was not engaged in sexually explicit conduct is not supported by established Tenth Circuit law.

4. Application of the Cross Reference Pursuant to U.S.S.G. § 2G2.2(c)(1)

Generally, those convicted of possession of child pornography are sentenced under U.S.S.G. § 2G2.2. A higher base offense level applies, however, when the offense "involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purposes of producing a visual depiction of such conduct. . ."[6] In such a case, the Guidelines require the application of U.S.S.G. § 2G2.1.[7] The PSR recommends application of this cross reference to calculate defendant's guideline range.[8] Defendant objects to the application of the cross reference.

As noted by the Tenth Circuit Court of Appeals, the cross reference in subsection (c)(1) "*is to be construed broadly* and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct."[9]

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[6] U.S.S.G. § 2G2.2(c)(1).

[7] *Id*.

[8] PSR ¶ 27.

[9] *United States v. Garcia*, 411 F.3d 1173, 1179 (10th Cir. 2005) (emphasis in original), quoting U.S.S.G. § 2G2.2(c)(1) comment (n.3) (The 2023 U.S.S.G. manual's identical language is found in commentary note 7).

In *Riccardi*, the Tenth Circuit also recognized "the cross-reference merely implements the common sense notion that a … possessor who [attempted to] manufacture[] the pornography in his possession is both more culpable and more dangerous than one who has received or possessed the pornography and no more."[10] The United States bears the burden of proving the facts necessary to support the enhancement by a preponderance of the evidence.[11]

The United States contends Otto's conduct both permitted and caused the minor to engage in sexually explicit conduct for the purpose of producing a sexually explicit image. To demonstrate that a defendant sexually exploited a child, the United States must prove that a defendant "employ[ed], use[d], persuade[d], induce[d], or coerce[d] any minor to engage in … any sexually explicit conduct *for the purpose of producing* any visual depiction of such conduct."[12] "A 'minor' means any person under the age of eighteen years."[13]

A defendant may "cause" the production of sexually explicit images by "producing an effect, result or consequence…" or "being responsible for an action or

[10] *United States v. Riccardi*, 405 F.3d 852, 873 (10th Cir. 2005) (citing *United States v. Dawn*, 129 F.3d 878, 884 (7th Cir. 1997).

[11] *United States v. Orr*, 567 F.3d 610, 614 (10th Cir. 2009).

[12] 18 U.S.C. § 2251(a) and (e) (emphasis added).

[13] 18 U.S.C. § 2256(1).

result."[14] The United States must establish that the defendant caused a minor to engage in sexually explicit conduct for the purpose of producing a depiction of such conduct.[15]

There is no dispute that defendant possessed photographs of two female children, who at the time of the photos were approximately 3-4 and 7-8 years old. The photos depict, both sexually suggestive,[16] and sexually explicit conduct including:

a. A photo of the 3–4-year-old child completely naked lying face up on a bed with a bed sheet covering the left side of her body.

b. A photo of the 3–4-year-old child laying face up on a bed with her lower half completely naked, so that her naked vagina and anus are exposed to the camera.

c. A photo of both the 3–4-year-old child and the 7–8-year-old child completely naked in a bathtub with their buttocks exposed to the camera.

d. A photo of both the 3–4-year-old child and the 7–8-year-old child completely naked in a bathtub with the 7–8-year-old child's vagina exposed to the camera.

e. A photo of both the 3–4-year-old child and the 7–8-year-old child completely naked in a bathtub with their vagina's exposed to the camera.

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[14] *United States v. Crayton*, 143 Fed.Appx. 77 (10th Cir. 2005) (unpublished) (citing *United States v. Whitesell* 314 F.3d 1251, 1255 (11th Cir. 2002); *see also United States v. Murphy*, 755 Fed.Appx. 941 (10th Cir. 2018) (unpublished).

[15] *United States v. Taylor*, 736 Fed.Appx. 216, 220-221 (11th Cir. 2018)(unpublished).

[16] The United States concedes that not every photo taken by Otto statutorily qualifies as sexually explicit conduct defined in 18 U.S.C. 2256.

f. A photo of both the 3–4-year-old child and the 7–8-year-old child completely naked in a bathtub with their legs spread against the side of the tub and their vaginas exposed to the camera.[17]

Further, as defendant took these photographs himself, he undoubtedly "caused" the children's anus and vagina to be photographed.[18] Otto, however, suggests that the photographs do not "portray sexually explicit conduct" nor meet the definition of sexually explicit conduct because the images do not constitute a lascivious exhibition of the anus, genitals, or pubic are of any person.[19] To support this argument defendant relies on a Missouri Department of Social Services Children's Division conclusion that there was insufficient evidence to support that the 3-4-year-old child suffered abuse or neglect (Pornography), that the photos did not include "manipulation of the girls' labia," and his own conclusion, without legal analysis of the established law in the Tenth Circuit, that the images were not lascivious.[20]

5. Controlling Law in the Tenth Circuit

For over two decades, "lascivious exhibition of the genitals" has been defined in the Tenth Circuit by reference to the non-exclusive list of factors[21] set forth in *United*

[17] PSR at ¶ 19.

[18] See Paragraph 11, Statement in Advance of Plea, where defendant admitted to taking the images of a 3-4 year old child's anus and vagina.

[19] Defendant's Sentencing Memorandum (Dkt. No. 77).

[20] *Id*.

[21] The *Dost* factors include:

States v. Dost.[22] Indeed, the analysis set forth in Dost has been explicitly adopted not only in the Tenth Circuit but multiple other circuits.[23]

In explaining policy reasons for the adoption of *Dost*, the *Wolf* court said "[i]t was a lascivious exhibition because the photographer arrayed it to suit *his* peculiar *lust*.[24] The court elaborated that "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself

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(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; [and]
(6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Dost, 636 F.Supp. 828, 832 (S.D. Cal. 1986).

[22] 636 F.Supp. 828, 832 (S.D. Cal. 1986). *See United State v. Helton*, 302 F.Appx 842, 847 (10th Cir. 2008) ("we have looked to a set of six factors developed in [*Dost*] to determine whether an exhibition is lascivious within the meaning of the statute."); *see also United States v. Wells*, 843 F.Appx 1251 (10th Cir. 2016) (noting there is no dispute that the *Dost* factors control in the Tenth Circuit); *United States v. Wolf*, 890 F.2d 241 (10th Cir. 1989) (affirming a trial court's use of the *Dost* factors in the Tenth Circuit for the first time). *United States v. Isabella*, 918 F.3d 816, 831 (10th Cir. 2019).

[23] *See United States v. Rivera*, 546 F.3d 245, 252-53 (2d Cir. 2008); *United States v. Villard*, 885 F.3d 117, 122 (3d Cir. 1989); *United States v. Steen*, 634 F.3d 822, 827-28 (5th Cir. 2011); *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *United States v. Petroske*, 928 F.3d 767, 774 (8th Cir. 2019); *United States v. Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017); *See also United States v. Price*, 775 F.3d 828, 839-40 (7th Cir. 2014); *United States v. Amirault*, 173 F.3d 28, 31-32 (1st Cir. 1999).

[24] *Wolf,* 890 F.2d at 245 (quoting *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) (emphases in original).

or likeminded pedophiles."[25] It is sexually explicit to the pedophile and not to others, but that is precisely what makes the offender a pedophile. Additionally, a picture of a child's sex organs "so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur" certainly constitutes the child being engaged in sexually explicit conduct under the statute.[26] The court in *Dost* highlighted the intuitive reasoning behind this precedent by saying "[a] child of very tender years, because of his innocence in matters sexual, would presumably be incapable of exuding sexual coyness" which is outside the child's range of experience.[27]

The images the defendant created of the 3–4-year-old child and the 7–8-year-old child satisfy several of the *Dost* factors.[28]

a. Focal Point of the Visual Depiction is on the Child's Genitalia or Pubic Area

The images portray the child's vagina in the foreground. Though the images aren't zoomed in on the child's vagina, the focal point of photo is the genitals. Otto admits in his memorandum that two of the photos of the 3-4-year-old child portray the girl's naked labia at different angles.[29] It is clear Otto intended to photograph the child's vagina.

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[25] *Id.* (quoting *Wiegand*, 812 F.2d at 1244).

[26] *Id*. S*ee also*, *United States v. Al-Awadi*, 873 F.3d 592, 600 (7th Cir.2017)(internal quotations omitted)(The Seventh Circuit has defined lascivious exhibition as "one that calls attention to the genitals or pubic area for the purpose of eliciting a sexual response in the viewer.").

[27] *Dost*, 636 F.Supp at 833.

[28] Not all six factors need to be present in order to bring the depiction under the proscription of 18 U.S.C. § 2256(2)(A)(v). *Wolf*, 890 F.2d at 245.

[29] Defendant's Sentencing Memorandum. (Dkt. No. 77).

b. Sexually Suggestive Setting

The photographs of the naked or partially clothed children with their anus and vaginas exposed are on a bed or in the bathroom, inherently sexual locations. As the Third Circuit explained when addressing similar conduct in *United States v. Larkin*, "showers and bathtubs are frequent hosts to fantasy sexual encounters as portrayed on television and in film," such that a bathroom "is potentially as much of a setting for fantasy sexual activity as is an adult's bedroom."[30] The Tenth Circuit found the Third Circuit's statement "highly persuasive" and adopted it.[31]

c. The Child is Fully Nude or Only Partially Clothed

There is no dispute that the children photographed by Otto were nude or partially clothed in the photographs. Several of the images are of the children completely naked, as one would expect, in the bathtub. The photos of the 3-4-year-old child on the bed are described as having her lower half completely naked.

d. Intended or Designed to Elicit a Sexual Response in the Viewer

Upon the initial encounter with Otto, he suggested to law enforcement that he kept photos, of one of the children in the bath and similar pictures, for the memories and that there was no malicious intent behind the possession of these photos.[32] Otto's sentencing memorandum also suggests that he took the photos of the children in the bath as part of a

[30] 629 F.3d 177, 183 (3d Cir. 2010) (citation omitted).

[31] *United States v. Wells*, 843 F.3d 1251, 1256 (10th Cir. 2016).

[32] PSR at ¶ 16.

common household experience he wanted to remember.[33] Otto further purports that he was looking for a mark on the 3-4-year-old child's labia due to suspected abuse by another individual.[34]

However, during the psychosexual examination, as reported by Dr. Bret Marshall and LCSW Mace Warren, Otto admitted he took pictures of the children engaging in normal hygiene behavior and typical nude behaviors for children.[35] Otto further advised that he took these pictures to use for *sexual gratification through masturbation*.[36] Otto explained that he was sexually attracted to the children only 3 weeks after meeting them, and he had fantasies of engaging in sexual behaviors with them often.[37] After leaving Missouri and moving to Utah, Otto continued viewing and masturbating to the images of the children, until he began "finding, viewing and downloading images and videos of [child pornography] for purposes of sexual gratification and masturbation."[38]

Even without Otto's admissions in the psychosexual evaluation, Otto's child pornography collection evidences that he has a sexual interest in children and images of children. It is simply not believable that he took these particular images for innocent

[33] Defendant's sentencing memorandum (Dkt. No. 77).

[34] *Id*.

[35] Nor does the evidence support Otto's statement that he accidently packed, and kept, the child's underwear.

[36] Alpha Counseling Psychosexual Evaluation at page 6, Index Offense.

[37] *Id*.

[38] *Id*.

purposes. The children's mother told law enforcement that she dated Otto for a very brief period of time, and he never had any legitimate reason to be alone with them, let alone in the bathroom or bedroom with the children while they were naked. While he claimed he took a closeup photo of one child's vagina to see if a mark there was an injury, he never mentioned this to her mother or shared that image with her. To the contrary, he took these images in secret, and kept them, as he kept the other child pornography images he collected. This evidences that he took the images to elicit a sexual response in the viewer – himself.

The images clearly constitute a lewd exhibition of the genitals. Although the children may be unaware of what is going on, their vagina and anus are clearly on display for the "peculiar lust" of Otto with the intent to "arouse or satisfy the sexual cravings of a voyeur."[39] Otto's argument overlooks the statute's plain meaning and conflicts with the Tenth Circuit's interpretation of lascivious exhibition's ordinary meaning (e.g., a depiction of the child's genitals or pubic area designed to elicit a sexual response in the viewer) and does not require the commission of a sex act. Considering all the evidence under the *Dost* factors and the overall content of the images,[40] there is no doubt the images depict lascivious exhibition of the genitals or pubic area.

[39] *Wolf*, 890 F.2d at 245 (quoting *Wiegand*, 812 F.2d at 1244).

[40] Whether an image depicts a lascivious exhibition of the genitals or pubic area instead turns on the "overall content of the visual depiction." *Dost*, 636 F. Supp. At 832.

The statute exists to protect children from being used as sexual objects, which is a violation of their dignity as human persons and harms all of society by objectifying children.[41] Justice requires a predator be punished when robbing a child of his or her dignity every single time it happens, regardless of the child's awareness of, or participation in, the sexual abuse.

Taken in totality, there is ample evidence for the Court to find that the defendant caused a victim to be photographed, and those photographs constitute sexually explicit conduct. Therefore, the Court should apply U.S.S.G. § 2G2.1 in order to correctly calculate defendant's sentencing guidelines.

6. Application of the § 3553(A) Factors

Under Section 3553(a), the sentence imposed must reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public.[42] The sentencing court must also consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."[43] A court that imposes a sentence outside the

[41] 98 Stat 204 (May 21, 1984) ("the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society").

[42] *See United States v. Wilson*, 350 F.Supp.2d 910 (D.Utah 2005) (because Sentencing Commission has "promulgated and honed the Guidelines" to achieve the purposes of Section 3553(a) "considerable weight should be given to the Guidelines in determining what sentence to impose").

[43] 18 U.S.C. § 3553(a)(6).

applicable advisory Guidelines range must state "with specificity" both at sentencing and in the written judgment and commitment order its reasons for doing so.[44]

In the United States' view, a sentence of 144 months is the appropriate sentence in this case. Neither the Dr. Kirkland forensic psychological evaluation or Dr. Connelly psychological evaluation, nor his diagnoses, nor his personal history including his juvenile criminal history provide a factual basis to support a sentence at the low end of the Rule 11(c)(1)(C) range when the seriousness of the offense, the need for specific and general deterrence, and an evaluation of just punishment, are evaluated in this case.

a. Nature and Circumstances of the Offense and Seriousness of the Offense

The United States refers to the summary factual background above and the facts outlined in Otto's PSR for thorough descriptions of the nature and circumstances of the offenses in this case. As already discussed, the seriousness of the offense conduct cannot be downplayed. Otto took sexually explicit photos of young girls to satisfy his sexual desires. And while denying any contact offenses, Otto described his use of child pornography as a "stop gap" for engaging in contact crimes.[45] In addition to producing images of child pornography, Otto possessed hundreds of images and videos that he acquired online. While Otto did not amass a large collection of child pornography, he used advanced and secretive means to acquire his collection.

[44] 18 U.S.C. § 3553(c).

[45] Alpha Counseling Psychosexual Evaluation at page 6, Index Offense.

The court should carefully weigh all the sentencing factors in light of the nature and circumstances and seriousness of the offense conduct. Otto's explanations for his behavior – innocent photos of children at play in the bathtub, memories of common household experiences, accidently keeping children's underwear – all of which minimize his behavior and deny his attraction to children, are worthy of the Court's consideration.

b. History and Characteristics of the Defendant

It is undeniable Otto had a horrific childhood. He grew up in an unstable, abusive environment, spending years in the Utah State hospital and is now diagnosed with Autism Spectrum Disorder, Bipolar Disorder, PTSD, Anxiety, and Pedophilic Disorder.[46] However, as the Alpha evaluation notes, Otto's Autism Spectrum Disorder does not absolve him of either a moral or legal responsibility for his actions.[47]

Otto also has a documented history of violent behavior dating back to his childhood. He was arrested for committing Sodomy on a Child under 14 years old. The case was later dismissed. Otto also was arrested for assaulting a police officer, interfering with an arrest, threating life or property, destruction of property and disorderly conduct. He had more childhood arrests for an assault causing injury, assault against a police officer, and criminal mischief, and was deemed an ungovernable youth for his behavior.

Otto admitted that he has been a child pornography consumer since the age of 19

[46] *Id* at DSM5/ICD-10 Diagnostic Impressions. Also, *see* Dr. Kirkland and Dr. Connelly's evaluations.

[47] *Id* at page 15

with a fascination of the female genitals, particularly the vagina.[48] He fantasizes about using child sexual images for sexual gratification. He has consumed pornography since he was an early teen and has a history of masturbating in public.[49] Otto presents as a Moderate-High risk of sexually reoffending.[50]

Otto's psychosexual evaluation outlines that he has done well in custody. The structure of incarceration has helped stabilize his mental health and while segregated, Otto reports that he has not felt threatened nor been assaulted since his incarceration.[51]

c. Need for the Sentence Imposed to Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment.

The sentence should reflect the gravity of the Otto's conduct. The sentence should be of a type and length that will adequately reflect the harm done or threatened by the offense and the public interest in preventing recurrence of the offense. A sentence at the statutory minimum would offend the seriousness of the offense and the impact on the victims.

d. Need for the Sentence to Afford Adequate Deterrence

Congress, the Supreme Court, and the Sentencing Commission believe general deterrence is a very important factor when considering an appropriate sentence. The logic

[48] *Id* at page 12.

[49] *Id*.

[50] *Id* at page 16.

[51] *Id* at page 7.

of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so more will be produced – 'general deterrence is crucial in the child pornography context[.]'

Deterrence is of particular importance in this case. Despite the fact that Otto and others who have an overwhelming desire for young children may not be deterred even if the sentence for the crimes was life; it is also true that others would certainly not be deterred if Otto received a low sentence. These offenders do talk to each other via the Internet, and they are concerned enough about law enforcement that they encrypt their hard drives, seek foreign websites, and use anonymous phone apps in an effort to prevent detection. There is much to be gained by a significant sentence—increased safety for our children.

e. Need for the Sentence Imposed to Protect the Public from Further Crimes of the Defendant

Many factors outlined in Otto's psychosexual examination point to his likelihood of recidivism. The evidence shows that he is sexually attracted to minors, and he is a serious danger to society and needs to be incapacitated for as long as possible.

f. Sentencing Disparities

The advisory guidelines range "should be the starting point and the initial benchmark" for choosing Otto's sentence.[52] Otto's advisory sentencing guidelines range

[52] *Gall v. United States*, 552 U.S. 38, 49, 128 S.Ct. 586 (2007).

is 168 - 210 months of imprisonment, however the agreement between the parties is 60 – 144 months.

Dismissal of counts 1 and 2 of the Indictment (which includes eliminating his exposure to the 15 year mandatory minimum), and the 11c1c range, and the advisory sentencing guideline range already accounts for everything that has been articulated by Otto.

For these reasons the United States respectfully requests that this Court impose a prison term that will incarcerate Otto for a sentence of 144 months.

DATED this 30th day of May, 2025.

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