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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA	
v.	No. 3:11-CR-00043-MO 3:11-CR-00242-MO
SETH BEKENSTEIN, a/k/a Seth Rod Laver,	GOVERNMENT'S SENTENCING MEMORDANDUM
Defendant.	Sentencing Date: December 11, 2013

The United States of America, by S. Amanda Marshall, United States Attorney for the District of Oregon, and Gary Y. Sussman, Assistant United States Attorney, submits the following sentencing memorandum for the Court's consideration in these consolidated cases.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is a prolific trader in child pornography who was deeply connected with producers, collectors, and traders in a number of different countries. He has been charged and convicted of both hands-on sexual abuse and child pornography offenses in the past. It has not deterred him. He has received sex offender treatment in the past, to

no avail. He is before the Court after pleading guilty to two new child pornography trafficking offenses – one arising in this District, the other arising in the Northern District of California. Because of his prior federal child pornography conviction, he is facing a 15-year mandatory minimum prison term in each case.

A. The California Investigation.

Beginning in February 2009, a police detective in New Hampshire posing as a 14-year-old boy engaged in a series of online chats with defendant, who was then living in Walnut Creek, California (PSR ¶¶ 13-18). During those chats, defendant sent the detective invitations to his "Multiply.com" social networking page, which contained numerous images and videos depicting child pornography, including depictions of masturbation, oral sex, and anal intercourse between prepubescent boys and either adolescent boys or adult men (PSR ¶ 16). The detective was able to download numerous videos from defendant's Multiply.com page on multiple occasions (PSR ¶¶ 13, 16, 17). Indeed, defendant told the detective that Multiply.com deleted his account multiple times because of the materials he posted. Each time, defendant simply opened a new account, and posted more images and videos of child pornography (PSR ¶¶ 14, 17).

Defendant told the detective that he had eight external hard drives full of "hot stuff" (PSR ¶ 16). Defendant also discussed traveling to New Hampshire to meet the agent for sex, although he wanted to talk to him either by telephone or via web cam to make sure he was really a child (PSR ¶ 15).

The detective notified the Walnut Creek Police Department, who referred the matter to the FBI (PSR ¶ 13). On March 2, 2009, agents executed a search warrant at

defendant's residence, seizing two desktop computers, one laptop computer, nine external hard drives, and numerous DVDs and VHS tapes (PSR ¶ 19). A forensic examination revealed 166 image files and one video file depicting child pornography (PSR ¶ 20).

B. The Oregon Investigation.

In December 2010, Immigration and Customs Enforcement (ICE) agents executed a search warrant at the residence of a child pornography trafficker in Vancouver, Washington (PSR ¶ 21). They recovered a substantial amount of child pornography. They also discovered a printed e-mail from defendant, who by then had moved to Mexico (*id.*). The e-mail contained a password for an encrypted hard drive containing child pornography (*id.*).

An undercover ICE agent assumed the Vancouver suspect's online identity with his permission, and began communicating directly with defendant (PSR ¶ 22). The agent informed defendant that a water pipe had burst in his residence, flooding the residence and destroying his computer equipment, including his collection of child pornography. Defendant readily agreed to help the agent rebuild his collection. Defendant informed the agent that a hard drive containing child pornography was being shipped to him from Austria (*id.*). Defendant also gave the agent access to online file directories containing images and videos depicting child pornography, and sent the agent links to additional files containing hundreds of images and video files depicting child pornography, some of which were stored on an online file hosting service located in the Netherlands (PSR ¶¶ 22-33). The images and videos the agent downloaded included depictions of prepubescent boys engaged in a variety of sexually explicit conduct, including

masturbation, oral sex, and anal intercourse. They also included depictions of sadistic or masochistic conduct. In fact, during one online chat, defendant told the agent that he enjoyed "the bondage and pain thing," and that bondage was "a major turn on for me" (PSR ¶ 30).

Some of the images of child pornography defendant sent to the agent appeared to be homemade, and appeared to involve very young Hispanic boys. Defendant later told the agent that the images were produced in Ecuador by a person defendant knew as "Kenny," an American expatriate and a convicted child molester who was living there (PSR ¶¶ 25, 30). Defendant also referenced "private" images he had obtained from individuals in Russia and Austria, and sent links to some of those "private" images to the agent (PSR ¶ 26). Defendant made plans to travel to the United States, and said he would visit the agent (who was still posing online as the suspect from Vancouver) during his travels (PSR ¶ 34).

On February 9, 2011, a grand jury in the District of Oregon returned an indictment charging defendant with three counts of distributing child pornography and three counts of transportation of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(1) and (a)(2). Defendant was arrested on the resulting warrant on February 11, 2011, when he arrived at the Portland International Airport (PSR ¶ 36). Thereafter, on April 21, 2011, a grand jury in the Northern District of California returned an indictment charging defendant with transportation of child pornography, in violation of 18 U.S.C. § 2252(a)(1).

The California case was transferred to this district under Fed. R. Crim. P. 20, and was consolidated with the Oregon case. On December 9, 2011, pursuant to plea negotiations with the government, defendant pled guilty to the California indictment and to one count of transportation of child pornography in the Oregon indictment. A presentence report was ordered and prepared.

The report identified a base offense level of 22 for each count (PSR ¶ 40). The report added two levels because the images involved prepubescent minors, and five more levels because defendant's distribution of child pornography in the Oregon case was for a thing of value, but not for pecuniary gain, and in the California case, was to a person he believed to be a minor (PSR ¶¶ 41, 42). The report added four more levels because the images involved depictions of sadistic or masochistic abuse, two levels because the offense involved the use of a computer, and five more levels because the offense involved more than 600 images (PSR ¶¶ 43-45). After recommending a three-level reduction for acceptance of responsibility, the report identified a total offense level of 37, a criminal history category of II, and an advisory guideline range, before any departure or variance, of 235-293 months (PSR ¶¶ 51-53, 58, 80).

II. DISCUSSION

A. The Plea Agreement in This Case.

Both cases are covered by a single plea agreement, which is governed by Fed. R. Crim. P. 11(c)(1)(C). The plea agreement sets forth the parties' sentencing guidelines calculations, which mirror those in the presentence report (Plea Agreement, ¶ 7). The agreement also provides for a departure under U.S.S.G. § 5K1.1, discussed more fully

below, based on defendant's cooperation with and assistance to the government in its ongoing investigation, and a joint sentencing recommendation of 15 years' imprisonment, which is the mandatory minimum required for each count of conviction (*id.* at ¶ 10). The agreement also contains a waiver of appeal (*id.* at ¶ 13).

B. The Guideline Calculations in the Presentence Report are Correct.

The guideline calculations are accurately set forth in the presentence report. They match the calculations of the parties in the plea agreement. To the government's knowledge, there are no disputes as to either the offense level calculation or the criminal history score in the report. Defendant's total offense level prior to any departure or variance is 37, his criminal history category is II, and his advisory guideline range is 235-293 months.

C. Motion for Downward Departure.

U.S.S.G. § 5K1.1 allows for a departure, upon the government's motion, where the defendant "has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Among the factors the court should consider in determining the extent of any such departure are "the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered"; the "truthfulness, completeness, and reliability" of the defendant's information or testimony; the nature and extent of his assistance; the danger or risk of injury to the defendant resulting from his assistance; and the timeliness of his assistance. U.S.S.G. § 5K1.1(a). A departure for substantial assistance is considered separately from a reduction for acceptance of responsibility, and "[s]ubstantial

weight should be given to the government's evaluation of the extent of the defendant's assistance." U.S.S.G. § 5K1.1, Application Notes 2, 3.

Very shortly after his arrest, after consulting with counsel, defendant notified the government of his willingness to cooperate and assist in the government's ongoing investigation. He provided agents with access to all of his e-mail and electronic accounts, and provided information concerning others who were producing child pornography or with whom he was trading in child pornography. As a result of defendant's cooperation, agents were eventually able to identify "Kenny," the producer in Ecuador, as Kenneth McVicker III, and were able to gather enough information to secure an indictment in this district charging McVicker with production and transportation of child pornography. McVicker was arrested in Belize and was returned to this district to face those charges. During a post-arrest interview, he admitted sexually abusing numerous young boys in Ecuador, producing images of the abuse, and sending them to various people (including defendant) in Mexico, Canada, Thailand, and India.

After unsuccessfully raising and litigating motions to dismiss the indictment and to suppress evidence, including his confession, McVicker reached a plea agreement with the government in which he pled guilty to a superseding information charging him with travelling in foreign commerce and engaging in illicit sexual activity with a minor, in violation of 18 U.S.C. § 2423(c). McVicker waived his right to appeal and has agreed to a sentence of 30 years' imprisonment, followed by a life term of supervised release.[1] The government would not have been able to successfully prosecute McVicker, a serial child

[1] McVicker's sentencing hearing is scheduled for February 4, 2014, before Judge Simon.

predator and a producer and distributor of child pornography, without defendant's cooperation and assistance.

For those reasons, the government will move the Court for a four-level downward departure under U.S.S.G. § 5K1.1. A four-level departure would reduce defendant's offense level to 33, which, when coupled with a criminal history category of II, results in an advisory guideline range of 151-188 months. The 15-year sentence anticipated in the plea agreement is near the high end of that advisory range.

D. The Appropriate Sentence in This Case.

The sentencing guidelines are now advisory. *United States v. Booker*, 543 U.S. 220 (2005). Nonetheless, they still serve as the starting point and initial benchmark in all sentencing proceedings. *Peugh v. United States*, ___ U.S. ___, 133 S. Ct. 2072, 2080 (2013); *Gall v. United States*, 552 U.S. 38, 49 (2007). They are a statutory factor that sentencing courts must consider when imposing a sentence, *see* 18 U.S.C. §3553(a)(4); *United States v. Rita*, 551 U.S. 338, 347-48 (2007), and "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Rita*, 551 U.S. at 350. Thus, when a sentencing judge's "discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id*. at 351.

While the guidelines are advisory, they are far from superfluous. Sentencing decisions remain "anchored" by the guidelines. *Peugh,* 133 S. Ct. at 2083. The guidelines remain "the lodestone of sentencing," and "cabin the exercise" of a sentencing court's discretion. *Id*. at 2084. At the same time, the Court must also consider all the

factors under 18 U.S.C. § 3553(a), including the defendant's history and characteristics, the nature and seriousness of the offense, the need to provide just punishment and adequate deterrence, the need to promote respect for the law, and the need to protect the public from further crimes committed by the defendant. 18 U.S.C. §§3553(a)(1)-(2). Other factors include "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6), and, where applicable, the need to provide restitution to any victims of the offense, 18 U.S.C. §3553(a)(7). *See also Rita*, 551 U.S. at 347-48 (enumerating the statutory sentencing factors); *Gall*, 552 U.S. at 50, n.6 (same). No claims for restitution have been received in either case.

In *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008), the Ninth Circuit, sitting en banc, summarized the procedures a sentencing court must follow. The Court must first correctly determine the applicable guideline range. *Id*. at 991. The Court must also allow the parties to "argue for a sentence they believe is appropriate," and must "consider the §3553(a) factors to decide if they support the sentence suggested by the parties." *Id*. The Court may not presume the guidelines are reasonable, and should not give them any more or any less weight than any other factor. *Id*. The Court "must make an individualized determination based on the facts," and must explain its choice of sentence "sufficiently to permit meaningful appellate review." *Id*. at 991-92.

In light of all of the facts and circumstances of this case, including defendant's background, history, and characteristics, the nature and prolific extent of his criminal conduct, and his cooperation and assistance, the agreed-upon sentence of 15 years'

imprisonment, followed by a life term of supervised release, is an appropriate and reasonable sentence in this case.

This will be defendant's third conviction for an offense relating to the sexual abuse or sexual exploitation of children. He was convicted of second degree sexual abuse in New York state court in 1987, after he repeatedly slapped the bare buttocks of a boy with a yardstick and put his finger in the boy's anus (PSR ¶ 55). He received a probationary sentence in that case (*id.*). In 2002, he was convicted of three counts of receiving child pornography and one count of possession of child pornography in federal court in the Northern District of California (PSR ¶ 56). He received a sentence of 18 months' imprisonment followed by a three-year term of supervised release in that case (*id.*).[2] He was found in violation of the conditions of supervised release after his probation officer discovered 80 video tapes and DVDs depicting nude minors, and books and written materials referencing minors engaged in sexual activity, at defendant's residence (*id.*).

Defendant attended sex offender treatment during his term of supervised release in the federal case (PSR ¶ 71). He was described as "resistant to treatment" and as displaying "little remorse" for his behavior (*id.*). Twelve weeks of aversion therapy failed to diminish his deviant arousals (*id.*). Defendant elected not to continue treatment (*id.*). In March 2006, he was assessed as presenting a moderate risk to re-offend (*id.*). That risk is now manifest.

[2] Defendant was the beneficiary of an eight-level downward departure in that case (PSR ¶ 56)

Defendant's sexual attraction to young boys continued. While living in California, he repeatedly sent child pornography to who he thought was a 14-year-old boy. He also spoke of traveling to New Hampshire to meet and have sex with the boy. And of course, he continued to traffic in graphic images of the sexual abuse of young boys.

Defendant was well-placed in the nefarious world of child pornography producers and traffickers. He received original images directly from the people who produced them, and passed those images along to other collectors and traders. He traded images and videos with pedophiles in the United States, Ecuador, Russia, and Europe. He arranged for the delivery of an encrypted hard drive containing child pornography to the suspect in Vancouver. He asked that suspect to obtain images child pornography, and send the images to him in Mexico.

Defendant's criminal conduct was both egregious and relentless. But for his cooperation and assistance, the government would be seeking a sentence at the high end of the applicable guideline range, if not an upward departure. However, defendant's cooperation was the key to helping identify and successfully prosecute a serial child molester and pornography producer.

A four-level departure for substantial assistance and a sentence of 15 years' imprisonment recognizes both the serious and repetitive nature of defendant's criminal conduct, and his cooperation and assistance. It provides just punishment, acts as a significant deterrent, promotes respect for the law, and most importantly, protects the public from future crimes defendant might otherwise commit. It is the sentence the Court should impose.

E. A Life Term of Supervised Release is Warranted.

18 U.S.C. § 3583(k) provides for a term of supervised release of five years to life as to each count of conviction. Where "the instant offense of conviction is a sex offense," the "statutory maximum term of supervised release is recommended." U.S.S.G. § 5D1.2(b) (Policy Statement). Each count of conviction falls within the definition of the term "sex offense" set forth in § 5D1.2, Application Note 1.[3]

The Ninth Circuit has repeatedly recognized that a life term of supervised release is appropriate for sex offenders like defendant. *See, e.g. United States v. Overton*, 573 F.3d 679, 682 and 700-01 (9th Cir. 2009) (upholding life term of supervised release term for a defendant convicted of sexual exploitation of a minor, and receipt and possession of child pornography); *United States v. Daniels,* 541 F.3d at 915, 924 (9th Cir. 2008) (upholding a life term of supervised release for a defendant convicted of possessing child pornography because "a lifetime term of supervised release was necessary to punish [the defendant] for his crime, to rehabilitate him, and to protect the public from future crimes by [the defendant]"); *United States v. Cope*, 527 F.3d 944, 952 (9th Cir. 2008) (noting that the Ninth Circuit and other courts have held a life term of supervised release term to be reasonable).

A life term of supervised release is imperative to protect the public from future crimes committed by defendant. He very clearly has a sexual interest in young boys that

[3] The term "sex offense" includes "an offense, perpetrated against a minor, under . . . chapter 110" of Title 18 (not including a record keeping offense), as well as an attempt or conspiracy to commit any such offense. U.S.S.G. § 5D1.2, Application Note 1. Sections 2252 and 2252A fall within Chapter 110, are not record keeping offenses, and, by their nature, are perpetrated against minors.

has not been deterred either by two prior criminal convictions, or by sex offender treatment. He has very clearly demonstrated that he presents a high risk to re-offend. He is very well connected in the world of child pornography trafficking, connections which survived his prior federal child pornography conviction. Defendant will need to be supervised for the rest of his life to ensure that he does not continue to prey on adolescent boys, or traffic in child pornography.

III. CONCLUSION AND SENTENCING RECOMMENDATION

For the reasons discussed above, the government urges the Court to accept the plea agreement of the parties, and to impose concurrent sentences of 15 years' imprisonment on each count, followed by a life term of supervised release.

DATED this 5th day of December 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have made service of the foregoing Government's Sentencing Memorandum on the party named below by electronic case filing at Portland, Oregon, on this 5th day of December 2013:

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