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January 28, 1997

The Hon. J. Frederick Motz
Chief Judge, United States District Court
for the District of Maryland
510 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

RE: United States v. RD
Case No. XXXXXXX

Dear Chief Judge Motz:

We have reviewed the thorough presentence report prepared by Cheryl Thompson, USPO, and have no objections or corrections. Sentencing in this case is scheduled for February 5, 1997 at 9:00 a.m. This letter sets forth Mr. D.'s request for a downward departure.

I. Cooperation Departure Request

Pursuant to paragraph 5(b) of the plea agreement, the government will request a one level departure pursuant to USSG § 5K1.1, and the defense is free to request a further departure on this ground. The defense will request an additional one point departure pursuant to this guideline, based on the nature and extent of Mr. D.'s cooperation, and the truthfulness, completeness, and reliability of the information provided. Further support for the additional one level departure will be presented orally at the sentencing hearing.

II. Additional Requests for Downward Departure

Pursuant to paragraph 5(d) of the plea agreement, the defense may request departures under Chapter Five. The grounds set forth below support our request for a downward departure of 2 levels. Each ground supports this request independently; alternatively, the combination of the grounds, also supports this request. USSG §5K2.0, comment. (backg'd). If this request is granted (and if the Court departs a total of 2 levels pursuant to 5K1.1, see Section I above), Mr. D.'s guideline offense level will be 10, his Criminal History Category is I, and his guideline range will be 6-12 months, which is in a Zone B and makes him eligible for probation with the condition of at least 6 months home

detention. We will request this sentence.

Pursuant to USSG § 5K2.0, a departure may be warranted if "there exists [a] . . . mitigating circumstance . . . of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating a guidelines that should result in a sentence different from that described." See Koon v. United States, _ U.S. _, 116 S.Ct. 2035 (1996); Rybicki v. United States, 96 F.3d 754 (4th Cir. 1996). As the Koon Court recognized, "[t]he goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." Id. at 2053. To this end, the "sentencing judge [must] consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate . . . the crime and the punishment to ensue." Id. Put differently, when considering whether to downwardly depart, sentencing courts should bear in mind that the guidelines were not enacted to eliminate the court's discretion, but merely to prevent widely disparate sentences among similarly situated offenders under similar circumstances.

With these principles in mind, the defense submits that the following grounds for departure take this case outside the "heartland" of cases contemplated by USSG § 2G2.4.

1. Mr. D.'s Benign Conduct Was Outside The Heartland Considered By the Commission.

Section 2252 of Title 18 is aimed at eliminating the harmful effects of sexual exploitation of minors. Guideline 2G2.4, which applies to this case, attempts to uniformly punish all persons in possession of child pornography. The guideline seeks to deter persons who have or may directly harm children, or who may indirectly cause harm by perpetuating the activity through a profit-oriented scheme. Thus, this guideline assumes that all possessors retain one of these qualities. This assumption fails to consider the link between each offender and any actual or potential risk of harm provoked by the offender's act. A closer look at these factors in this case reveals that Mr. D.'s act of possession is "outside the heartland" of other possessors. See United States v. Mark B. Patro, MJG-96-0218R (granting a downward departure in a distribution of child pornography case because the offense was "totally noncommercial" and "involv[ed] only the exchange of images on the Internet" and therefore was outside the heartland).

There is no connection between Mr. D.'s act of possession and any indicia of dangerousness. He has no criminal record. Moreover, the FBI scoured Mr. D.'s background, interviewing agencies with whom he was employed and with whom he was associated; he was never so much as accused of any improprieties. Mr. D. was evaluated by Dr. David Schretlin who determined that Mr. D. is not a pedophile. The government has reviewed this evaluation. Thus, there exists no evidence that his illegal conduct was linked directly or indirectly to harming minors or that he retains any quality indicative of dangerousness.

Mr. D.'s conduct was passive. He possessed child pornography which he received over the internet. His first act of possession was unsolicited; he was sent a graphic image while conversing

with someone on the internet. Mr. D. had no contact with either the perpetrators of any sexual exploitation, or with any victims. He did not procure, promote, or encourage any exploitation. He did not coerce, deceive, or harm anyone. He did nothing to increase the chances that minors would be exploited in the future. He simply downloaded to his computer's storage system, images readily available in the public domain, via the internet.

Mr. D. receives a two point upward adjustment because "the material involved a prepubescent minor under the age of twelve years." USSG §2G2.4(b)(1). This provision seeks to identify and treat even more harshly persons who may pose a harm to prepubescent minors by virtue of their possession of this type of material. Under a literal application of this guideline, Mr. D. receives two additional points. However, a closer examination of the facts of this case uncovers no evidence that Mr. D. falls within this identified class.

He did possess pictures of prepubescent minors; however, he did not solicit these particular types of pictures, rather, they were sent to him in the course of his internet conversations. Further, the majority of pictures he possessed were of older minors, aged 16-19: of the 214 pictures contained in Mr. D.'s computer files, only 12% were of prepubescent individuals; the rest were of individuals ranging anywhere from 16-19.[1] Thus, his possession of some pictures of prepubescent minors does not indicate a penchant for younger children. A failure to consider this mitigating and unusual factor is to treat Mr. D. the same as a person whose possession is solely of prepubescent children, where such possession is a strong indication of a particularized interest in a more vulnerable class of persons. The difference between Mr. D. and the group identified by the Commission can be recognized through a downward departure. Accordingly, when applying the logic behind the provision, to wit: additional punishment is appropriate for possessors of prepubescent material because they are more deviant and pose a higher risk of dangerousness to a more vulnerable class, this case is outside the heartland because there is <u>no</u> indication that Mr. D. is deviant in this way or poses a danger to this group of the public.

Finally, insofar as his conduct embraced only the passive act of possessing, he did nothing that can be said to have a tangible effect on increasing the demand for such materials. He never paid for any of the materials he received on the internet, nor had he ever earned a profit from his conduct. The internet is now widely accessible in the United States and in other countries. The readily available nature of the material he possessed and the customary exchange via e-mail on the internet in no way fuels a demand for more.

Mr. D.'s possession could not have been more benign and atypical. There was no nexus between his conduct and any past instance of exploitation of a child, future propensity for the same, or any profit motive (his or anyone else's). To deny this requested departure subjects him to a sentence disproportionate to his conduct.

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[1] At the time Mr. D. began possessing pictures, he was 25 years old.

2. Mr. D. Has Made Significant Educational and Employment Changes Since Notification of the Investigation In This Case Which Make Him Eligible for A Departure Under USSG §§ 5H1.2 and 5H1.5.

Section 5H1.2 provides that "[e]ducation and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. . ." Section 5H1.5 provides that "[e]mployment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." Factors which are "not ordinarily relevant" may form the basis for a downward departure if they are "present to an unusual degree and distinguish[ ] the case from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purpose of sentencing." USSG §5K2.0; Koon, supra.

Prior to August 1995 when Mr. D. first learned of the pending federal investigation, he was enrolled in a Masters program in Education at Johns Hopkins University. See PSR, paragraph 43. Prior to that he had received his Bachelors of Art in History from St. Joseph's College in May 1989. Id. In furtherance of his pursuits within the teaching profession, Mr. D. held several teaching and education-related positions since his 1989 graduation from college, including Resident Dean at Westfield State College from August 1989 - June 1992, government and writing instructor at Landmark College in Vermont from June 1992 - December 1994, and Assistant Coordinator for Academic Affairs at Johns Hopkins University from January 1995 - December 1995. See PSR, paragraphs 44-46. His coursework, training, and accomplishments were part of his ambition to become a teacher.

Mr. D. took immediate and responsible action with respect to his education and career when he realized the seriousness of his actions. Mr. D. first learned of the investigation in this case in August 1995 when FBI agents confronted him at his jobsite at JHU, informing him of the search warrant, and explaining the probable charges.[2] Responsibly, (and on his own, without advice of counsel), Mr. D. immediately advised his employer of the pending investigation. His employer arranged for a leave of absence beginning in October. In December he resigned from his position at JHU. He completed the semester at JHU, but did not reenroll in the Masters program. He immediately obtained a job as a car salesman at Antwerpen Motor cars in Catonsville. See PSR, paragraph 47.[3]

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[2] Mr. D. fainted upon learning of the search warrant. Upon recovering, he fully cooperated with the FBI agents, bringing them to his home, and providing them with all requested information and documents.

[3] In his 13 months of employment here, he has progressed from salesman to finance manager.

Mr. D.'s elective change of job and reconsideration of career path make this case unusual. First, Mr. D.'s change of job and career path are relevant to the determination of a departure because they are directly related to the charges and consequences of this case. Mr. D.'s soul searching resulted in his own conclusion that his actions would lead to a criminal conviction which would severely alter the professional teaching goals he had set and toward which he had been diligently working. He concluded that his actions would have a direct effect both on his ability to teach and the appropriateness of his being a teacher. His actions of changing career and education tracks will directly and significantly affect his long term professional status, his long held desire to teach, his level of personal fulfillment, and also, quite likely, his income level.

A comparison of this case to other cases likely reveals a degree of responsibility and a level of fundamental life change which is directly related to his actions and his remorse. Accordingly, though not ordinarily relevant, in this atypical case, due to the nature and extent of Mr. D.'s actions, a departure on this ground is warranted.

Conclusion

In summary, as set forth in Section I above, Mr. D. requests that the Court depart 2 levels pursuant to 5K1.1 (from a level 14 to a level 12), and, as discussed in Section II above, that it further depart 2 levels pursuant to either 5K2.0, 18 U.S.C. §3553(b), 5H1.2, and/or 5H1.5 (from a level 12 to a level 10). Mr. D. has no prior criminal convictions (or arrests) and is therefore a criminal history category I. The resulting guideline range is 6-12 months and the defense requests a sentence of at least one year probation, with a condition of 6 months home detention, allowing for work release.

Very truly yours,

KATHRYN R. FREY
Assistant Federal Public Defender

KRF/cw
cc: Joseph Evans, AUSA
Cheryl Thompson, USPO

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