

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA)
)
V.) No. 2:02-CR-59
)
BILLY SCOTT BEWLEY)

SUPPLEMENTAL REPORT AND RECOMMENDATION

Defendant is charged in a two-count indictment; Count 1 charges him with *producing* a visual depiction of a minor engaged in sexually explicit conduct [18 U.S.C. § 2251(a)], and Count 2 charges him with *possessing* such visual depictions [18 U.S.C. § 2252(a)(4)(B)]. Defendant earlier moved¹ that the indictment be dismissed, insisting that the two statutes are unconstitutional because they exceed Congress's authority under the Commerce Clause² to the United States Constitution. That motion was referred to the Magistrate Judge and, in the ensuing report and recommendation, it was reported to the District Judge that the *facial* constitutionality of the two statutes was upheld by the Sixth Circuit in *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001). However, the *Corp* panel went on to hold that the statutes could be unconstitutional *as applied to a given defendant*, depending upon the specific facts that precipitated the charges against him. The *Corp* panel listed some factors or considerations which the trial court should consider in determining whether a specific defendant's activities were

¹Doc. 14.

²Art. I, § 8, Clause 3.

so “substantially related” to interstate commerce that a prosecution and conviction under the foregoing statutes could be sustained. In the Report and Recommendation, the Magistrate Judge suggested to the District Judge that the determination of whether defendant Bewley’s activities were “substantially related” to interstate commerce using the *Corp* criteria should be made during the course of the trial. With this suggestion the District Judge disagreed, directing the Magistrate Judge to conduct a further evidentiary hearing with regard to defendant’s specific activities and their “substantial relationship,” or lack thereof, to interstate commerce. *See*, Order, Doc. 32. That hearing was held on January 14, 2003, and January 21, 2003. The Magistrate Judge now submits this Supplemental Report and Recommendation to the District Judge.

Before reviewing the testimony of the various witnesses who testified at the hearing, some background information is necessary to put that testimony in a meaningful context. This prosecution resulted from evidence seized as a result of a search warrant issued by this Court on March 28, 2002, upon the application of Postal Inspector David Dirmeyer. Reduced to its essence, Inspector Dirmeyer’s affidavit filed in support of his application for the search warrant recited that Ms. Leslie Cowden reported to him and Detective Phillip Robinette that she had been told by her daughter Amanda that, while Amanda was visiting in the home of her father (defendant), she discovered a computer disk that contained sexually-explicit photographs of Leah Camper, who was a friend of Amanda, and a minor. The affidavit further recited that Ms. Cowden told Inspector Dirmeyer and Detective Robinette that, although Amanda originally was quite angry after discovering the disk and its contents, she had since

reconciled with her father and, in light of that reconciliation, Inspector Dirmeyer did not interview Amanda.

The search warrant was issued, *and the disk as described by Amanda to her mother, Ms. Cowden, was discovered and seized.* Defendant subsequently was indicted as described above.

At the hearing, eight witnesses were called to testify by the government, and one witness was called by the defendant. The testimony of each witness will be summarized successively.

THE GOVERNMENT’S WITNESSES

Leslie Cowden:

Ms. Cowden is thirty-five years of age and, as noted above, is the mother of Amanda. The defendant is Amanda’s father; Ms. Cowden and defendant were never married.

Ms. Cowden and defendant met approximately nineteen years ago, at which time Ms. Cowden was fifteen years of age; defendant then would have been twenty-one. At first, Ms. Cowden and defendant were just friends. However, she was ingesting a “lot of pills” provided to her by defendant (and others) and, to quote her, “things went downhill from there.” Her relationship with defendant evolved into a sexual one, and she became pregnant with Amanda. Ms. Cowden was sixteen when Amanda was born. Approximately a year and a half after the birth of Amanda, Ms. Cowden was again impregnated by defendant, ultimately giving birth to a son when she

was nineteen years of age. The defendant kept her well supplied with prescription drugs throughout this relationship. Sometime after the birth of their son, Ms. Cowden and defendant parted company, and it is obvious that the parting was acrimonious; that acrimony persists to this day. Sometime after the dissolution of their relationship, defendant showed her sexually-explicit photographs of her which Cowden claims were made while she was under the influence of drugs. Defendant claimed that he had made 500 copies of the photographs, and he threatened to disseminate them all over Hawkins County if she did not conform her conduct and activities as he demanded.

Ms. Cowden confirmed that she told Postal Inspector Dirmeyer what he recited to this Court in his affidavit filed in support of his application for a search warrant. She indicated that Amanda was “furious” because her father was dating a girl Amanda’s age, but she later reconciled with him.

Ms. Cowden acknowledged that she recently told Amanda that, if Amanda lied to this Court during this hearing, she could be charged with perjury and sentenced to a term of imprisonment.

Dustin Scott Crawford:

Mr. Crawford testified that he knows the defendant “from the streets,” first meeting him at the home of his twin cousins, Joseph and Jeffery Crawford, who were then sixteen years of age. Crawford testified that defendant simply “hung out there,” that he had pills in his possession most of the time, and that he would sell those pills to anyone who wanted to buy them. Crawford testified that defendant sold the pills to Joseph and Jeffery, and that he also purchased pills from defendant.

Crawford testified that on one occasion, approximately a year ago, defendant asked him if he would agree to allow defendant to take pictures of him having sex with a teenage girl, Leah Camper, so that the photograph could be “put on the Web.” Crawford testified that he declined the request. Crawford also testified that defendant, again approximately one year ago, said something about selling young girls’ underwear over the internet service, “E-Bay,” as well as posting on the internet pictures of those girls. Crawford said he never knew the ages of any of the girls with whom defendant associated, but he did know they were friends of Amanda, and of course Amanda was fifteen or sixteen years of age at the time.

On one occasion, Crawford had a “dope-for-gun” transaction with defendant.

On cross-examination, Crawford acknowledged that he has a number of convictions for drug possession, forgery, and domestic assault. He also acknowledged that he had never seen any internet pictures of young girls posted by defendant.

Crawford himself dated Leah Camper for a few months.

Ashley Painter:

Ms. Painter, currently nineteen years of age, lives with Mr. Dustin Crawford. She met defendant through her association with Crawford, at her house in Kingsport, in the summer or fall of 2001. As she described it, defendant and Mr. Crawford “just hung out together,” and she got drugs from defendant on one or two occasions.

She knew that defendant and Leah Camper were seeing each other when

Leah was only sixteen or seventeen years of age.

Danielle Bailey:

Although called by the government as a witness, it was immediately apparent that Ms. Bailey had no interest in assisting the government in its prosecution of defendant. She is Amanda's best friend and was a rather reluctant witness, to put it mildly.

Ms. Bailey denies that defendant ever supplied her with drugs. She also denied telling Detective Robinette that she was approached by Amanda, at defendant's urging, to see if she would pose for him in her panties. She testified that she feels completely comfortable around defendant, that he is a very nice person, and that he was always a source of emotional and even monetary support.

Phil Robinette:

Mr. Robinette has been a detective with the Rogersville Police Department for the past eleven years. He has been associated with law enforcement since 1977.

He related that he was contacted by the National Center for Missing and Exploited Children in March 2002 with regard to a report to that organization by Leslie Cowden regarding what she had been told by her daughter Amanda. Detective Robinette has known defendant for many years, and is aware that he has prior narcotic and firearms convictions.

On March 28, 2002, Detective Robinette participated in the execution of the search warrant issued by this Court for defendant's residence in Rogersville, Tennessee. Defendant's computer and a computer disk were seized, and also a quantity of

drugs.

Defendant was interviewed by law enforcement agents, and Detective Robinette overheard at least a part of it. Specifically, he heard defendant relate that he indeed had taken photographs of Leah Camper, but when he did so, she was clad in a black outfit and posing as a witch.

Detective Robinette found defendant's digital camera at a pawn shop; it was manufactured by Sony Corporation and made in Japan.

Detective Robinette interviewed Danielle Bailey approximately one and a half weeks prior to the hearing in Rogersville and, according to Robinette, Danielle Bailey told him that she at one time was approached by Amanda, at defendant's request, to see if she would agree to pose for him in her panties. This interview was not taped or reduced to writing. As pointed out in the synopsis of Bailey's testimony, Bailey denies this conversation occurred.

David Dirmeyer:

Inspector Dirmeyer has been a postal inspector for thirteen years, and part of his duties involves the investigation of obscenity and child pornography. He participated in the search of defendant's residence on Highway 66 in Rogersville, and he seized the computer and the disk, both of which were turned over to Inspector Tom Evans at the Knoxville Police Department.

Inspector Dirmeyer interviewed Leah Camper on March 27, 2002, and then re-interviewed her in mid-December. He acknowledged that Camper's and defendant's relationship appeared to be "consensual," to the extent a seventeen-year-old girl can

validly consent to a forty-year-old man.

Leah Camper:

Ms. Camper, the alleged victim, turned eighteen years of age on February 4, 2002. She first met defendant in July or August of 2001, at the home of Joseph and Jeffery Crawford. Defendant was there to sell a gun to Dustin Crawford.

Ms. Camper has known Amanda since they were both in middle school, seven or eight years ago. She first learned that defendant was Amanda's father the night she met him at the Crawfords' home. Defendant provided pills – Xanax – to Camper on numerous occasions, and even daily for some period of time. When Dustin Crawford was sentenced to a term in jail, she began seeing defendant intermittently, and finally began seeing him on a daily basis. The relationship started out merely as “friends,” but ultimately the relationship became sexual, and defendant kept her well-supplied with drugs. She testified that she had sexual relations with the defendant at his parents' house, her house, a motel in Surgoinsville, and at the houses of various friends.

Ms. Camper then identified copies of the digital photographs of her that were retrieved from the computer disk seized from defendant's residence. Some of the photographs were taken at her house, others at the motel in Surgoinsville.³ In many of the photographs she appears in a bra and panties. All of them are and were intended to be sexually suggestive but not all are “sexually explicit” as defined by statute. Nevertheless, there is no question about some of the photographs. In two of the

³Remarkably, defendant managed to photograph his own reflection in a mirror in the room where he took some of the photographs.

photographs, Ms. Camper's genitalia are exposed. In several of the photographs, she appears to be masturbating.⁴

Ms. Camper testified that defendant sometimes talked about other girls posing for him, but she did not testify regarding the ages of those girls or women.

Camper's and defendant's relationship ended sometime in 2001, at which time she was pregnant.

Ms. Camper testified that the pictures were taken while she was under the influence of pills supplied by defendant. The pills notwithstanding, she did know the defendant was taking the photographs and she did not object.

Ms. Camper mentioned that there were other photographs of her, including one where she was standing in a cornfield, clothed in black; presumably, this is the photograph mentioned by defendant while he was being interviewed subsequent to the search of his house.⁵

Camper testified that she was certain that defendant knew she was under the age of eighteen at the time of their relationship and particularly at the time the pictures were taken. In this regard, she testified that defendant told her, when they were visiting in someone's home, to "keep quiet about being under eighteen."

Thomas Evans:

Mr. Evans is a Senior Evidence Technician with the Internet Crimes Unit of the Knoxville, Tennessee Police Department. To describe him succinctly, he is an

⁴See Exhibit 1, Images 04434, 04438, 04462 and 04463.

⁵These images were retrieved from the hard drive of defendant's computer, as discussed in the following section regarding Thomas Evans' testimony.

expert regarding computers and the retrieval of information from computer hard drives and data storage accessories, such as compact disks. Postal Inspector Dirmeyer delivered to Mr. Evans the computer, various compact disks, and the digital camera seized from the defendant. The disks were Memorex Recordable manufactured in either Taiwan or Japan; the digital camera was a Sony, manufactured in Japan.

After determining that neither the computer's hard drive nor compact disks had been tampered with, Mr. Evans began searching for images and e-mail messages. Regarding images or pictures on the computer's hard drive, Evans retrieved those photographs of Leah Camper which were identified by Ms. Camper during her testimony. In addition, there were other photographs of Ms. Camper on the hard drive, including the "witch's outfit" photographs, and one or two others, none of which are sexually explicit. Evans also retrieved an image of a nude female torso, but it is assumed that it is not Ms. Camper's torso.⁶

The "witch's outfit" pictures were located in temporary internet files, suggesting to Mr. Evans that they had been downloaded by Mr. Bewley from the internet. This brings to mind several questions, of course: Since Mr. Bewley undeniably made these photographs himself, with his digital camera, why would he find it necessary to download them from the internet? In other words, he could have loaded them onto his computer's hard drive directly from his digital camera. Moreover, there was no evidence retrieved from the computer that these images were placed on the

⁶The nude photographs of Ms Camper show that she has a tattoo on her stomach, whereas the image of the nude torso has no such tattoo. Therefore, unless Ms. Camper's tattoo was removable, the image of the nude torso is of someone other than Leah Camper. In any event, there was no testimony regarding the identity of the nude torso.

internet from his computer. In any event, these particular image files, whether downloaded from the internet or not, are not sexually explicit. Those photographs of Ms. Camper which undeniably are sexually explicit, although on the computer's hard drive, were located in files that give no indication that they were downloaded from the internet. In other words, these images were downloaded directly from Mr. Bewley's digital camera.

Mr. Evans also retrieved a number of e-mail messages between Ms. Camper and defendant. Ms. Camper's messages to defendant revealed that she believes him to be a source of support, stability and understanding in her life; she professes her love for Mr. Bewley. Defendant, in a message to Ms. Camper dated September 23, 2002, made reference to an important conversation they had just concluded that evening, and he encouraged her to "take control of [her] life Now!", and he encouraged her to "stop some of the things [she was doing] and get control back into [her life]" As an aside, these salutary words of encouragement are rather paradoxical in light of Mr. Bewley's sexual relationship with Ms. Camper, and they are grotesquely hypocritical when considered alongside the drugs he supplied to her.

Apparently no images – i.e., pictures – were attached to any of the e-mails between Ms. Camper and defendant. Indeed, there was no evidence that any of the sexually explicit images were put on, or retrieved from, the internet, apart from Officer Evans' testimony that the "witches" photographs were found in temporary internet files, a matter already discussed.

DEFENDANT'S WITNESS

The only witness called by the defendant was Amanda Morelock Alexander, a/k/a Amanda Cowden. She is, of course, defendant's daughter and the daughter of Leslie Cowden. Ms. Alexander turned eighteen years of age on September 28, 2002.

Ms. Alexander testified that Danielle Bailey is her best friend, and she emphatically denied that she ever told Ms. Bailey that her father wanted to take sexual photographs of her.

She denied telling her mother that she had seen a computer disk at her father's house that contained pictures of Leah Camper. Rather, she testified that she told her mother that she saw pictures only of "Pam," an adult school teacher.

To put it bluntly, Amanda is not believed. To put it even more bluntly, she committed outright perjury. Ms. Cowden could have learned of the computer disk containing the pictures of Leah Camper only from her daughter. And, of course, that computer disk in fact exists, and it contains the sexually explicit pictures of Leah Camper as Ms. Cowden reported.

STANDARD OF PROOF

At the outset, it must be decided which burden of proof applies when the Court is to determine if defendant's activities so substantially affected interstate commerce that this prosecution may proceed. Is it "beyond a reasonable doubt," or by a preponderance of the evidence?

The obvious place to begin the analysis is with the statutes themselves:

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

18 U.S.C. § 2251.

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who —

• • • •

(4) either —

• • • •

(B) knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed including by computer, if —

- (i) the producing of such visual depiction involves the use of any minor engaging in sexually explicit conduct; and
- (ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252(a)(4)(B).

Section 2256(1) defines a “minor” as anyone under the age of eighteen; and

§§ 2256(2)(C) and (E) define “sexually explicit conduct,” among other things, as

actual or simulated masturbation, or as “lascivious exhibition of the genitals or pubic

area.”

As far as Congress was concerned, the *elements* of an offense under § 2251, which obviously the government must prove beyond a reasonable doubt, are:

- (1) that the defendant intentionally employed or used a “minor,”
- (2) to engage in “sexually explicit conduct,”
- (3) for the purpose of producing a visual depiction of that sexually explicit conduct, and
- (4) the defendant knew or had reason to know that the visual depiction would be transported in interstate commerce, *or* that visual depiction was produced using materials that had been mailed or transported in interstate or foreign commerce.

Similarly, Congress defined the elements of an offense under § 2252(a)(4)(B) as:

- (1) knowing possession of one or more visual depictions of a minor engaged in sexually explicit conduct, and
- (2) the visual depiction itself was transported in interstate commerce, *or* the visual depictions were produced using materials which were shipped or transported in interstate commerce.

The Court of Appeals would not take it upon itself to rewrite the statute by adding substantive elements to the offense as already defined by Congress. Thus, it necessarily must be presumed that the criteria or factors listed in the *Corp* opinion are *jurisdictional* factors. Indeed, the *Corp* court itself said as much:

[W]e assume, along with the *Rodia* and *Robinson* courts, that *Morrison* and *Lopez* have required that the jurisdictional components of constitutional statutes are to be read as meaningful restrictions [on the statutes’ scope].

236 F.3d 325, 328.

Thus, the question: Is the court’s subject matter jurisdiction in a criminal case determined by facts proven by a preponderance of the evidence, or by a greater quantum of proof? Defendant was unable to find any cases on point, but nevertheless

argues that, inasmuch as the jurisdiction at issue involves that of a court in a *criminal* case, then the standard or quantum should be “beyond a reasonable doubt.” Like the defendant, this Court could find no cases that answered the question of what quantum of proof is required to establish the court’s jurisdiction in a federal criminal case. However, where venue is at issue in a criminal case, it has been held that the standard for proving such is by a preponderance of the evidence, not proof beyond a reasonable doubt. *See, United States v. Fells*, 78 F.3d 168 (5th Cir. 1996); *United States v. White*, 611 F.2d 531 (5th Cir.), *cert. denied* 446 U.S. 992 (1980); *United States v. John Bernard Industries, Inc.*, 589 F.2d 1353, 1361 (8th Cir. 1979); *United States v. Jenkins*, 510 F.2d 495, 498 (2nd Cir. 1975). Although recognizing that venue may be waived,⁷ and is not jurisdictional in the technical sense of that word, it nevertheless could be described loosely as “quasi-jurisdictional” and the cited cases are persuasive with respect to the issue regarding burden of proof to establish subject matter jurisdiction. Therefore, the Court concludes that the appropriate standard of proof for a district court to utilize in determining its jurisdiction in a criminal case is a preponderance of the evidence.

FINDINGS OF FACT

Using that standard, the Court summarizes its factual findings as follows:

1. Defendant used a digital camera, manufactured in Japan, to take sexually-explicit photographs of Leah Camper;
2. At the time those photographs were made or taken, Ms. Camper was approximately seventeen and a half years of age;

⁷See, *United States v. Branan*, 457 F.2d 1062 (6th Cir. 1972).

3. At or near the time these photographs were made, defendant and Ms. Camper periodically engaged in sexual relations;
4. Defendant was over the age of forty when the foregoing occurred;
5. Inasmuch as Ms. Camper was under the age of eighteen at the time defendant had sexual relations with her, he was guilty of statutory rape under Tennessee Code Annotated § 39-13-506;
6. Defendant created and fostered an emotional and supportive relationship between himself and Ms. Camper;
7. Defendant supplied illegal prescription drugs to Ms. Camper during their relationship, and the subject photographs were taken while she was under the influence of those drugs;
8. In approximately 1983, defendant established a similar relationship with Leslie Cowden, at which time defendant was twenty-one and Ms. Cowden was fifteen years of age;
9. Defendant had a sexual relationship with Ms. Cowden, and took sexually-explicit photographs of her during the term of their relationship;
10. The termination of the relationship between Leslie Cowden and defendant was acrimonious; to compel Ms. Cowden to do or not do certain things, defendant threatened to disseminate copies of these photographs to the general public in Hawkins County, Tennessee;
11. Defendant also supplied Ms. Cowden with illegal drugs during the term of their relationship;
12. Defendant asked Mr. Crawford if he would be willing to be photographed having sexual relations with Leah Camper and for those photographs to be posted on the internet;
13. Defendant mentioned placing the photographs of girls on the internet and attempting to sell their panties on E-Bay, although there was no evidence regarding the ages of any of the girls which defendant had in mind in this regard.

There was no evidence from which this Court could find that defendant placed any photographs of Leah Camper, or any other minor, sexually explicit or otherwise, on the internet.

ANALYSIS

The *Corp* panel aptly noted that the mere inclusion of a jurisdictional element in the statutes does not, in and of itself, insure the constitutionality of the statutes in a given case because, even if the jurisdictional element is present (here, use

of a foreign-manufactured camera and disk), that element might have only a negligible effect on interstate commerce. *Corp, supra*, at 330, 331. Today, interstate commerce is extremely pervasive – i.e., practically everything we use, even for the most mundane and ordinary activities, is made or shipped in interstate commerce. Therefore, unless a realistic limit is placed on Congress’s reach under the Clause, *all* claims could be federalized, however minor. Thus, there must be a case-by-case inquiry to see if the defendant’s activities *substantially* affected interstate commerce. *Id.*, 331. The *Corp* opinion lists a number of factors that the trial court should consider in determining whether a specific defendant’s activities substantially affected interstate commerce, thereby triggering the court’s jurisdiction:⁸

Was defendant involved, or did he intend to be involved, in the distribution or sharing with others of the pictures in question?

Was the minor an “exploited child” or victim in a real and practical sense?

Did defendant take advantage of a much younger child, or use the imagery for abusive or semi-commercial purposes?

Did the pictures depict explicit and graphic images of children engaged in sexual activity, particularly children “about” fourteen years of age or under, for commercial or exploitive purposes?

Were multiple children depicted?

Were the children otherwise sexually abused?

Is there evidence that defendant repeatedly engaged in such conduct or other sexually-abusive conduct with children?

Did defendant move from place to place, or state to state, and repeatedly engage in production of such pictures of children?

Id., 332, 333.

⁸It is doubtful that the Corp panel intended this to be an exhaustive listing.

The *Corp* panel does not suggest that any one of these factors is more important than the others, nor does *Corp* suggest that all of these questions must be answered in the affirmative before a “substantial nexus” to interstate commerce is established. Indeed, the presence of any single factor could substantially affect interstate commerce, especially if it was extremely serious. On the other hand, whereas any one factor might not significantly affect interstate commerce, the existence of a number of them could do so. Therefore, it is not inappropriate to suggest that the *Corp* opinion effectively holds that the egregiousness of the defendant’s conduct is directly proportional to the extent of the nexus to interstate commerce.⁹

The facts will be considered in light of the jurisdictional criteria set forth in the *Corp* opinion:

Was there any distribution or sharing of the pictures?

There was no evidence that the photographs of Leah Camper were actually distributed. The government’s argument that he had the *capability* to do so, and that he had queried Crawford regarding his willingness to be photographed while having sexual intercourse with Leah Camper and for those photographs to be placed on the internet by defendant, is not sufficient to satisfy this jurisdictional criterion. Neither is this criterion satisfied by defendant’s remark to Crawford that he intended to post pictures of girls on the internet and then sell their panties on E-Bay. There was no evidence of any action on the part of defendant to follow through on this purported intent, and there

⁹Lest the point be overlooked, the jurisdictional elements set forth in the statutes themselves also must be present – e.g., use of material shipped in interstate commerce.

was no evidence that he had posted photos, pornographic or otherwise, at any time in the past.

Did the defendant intend to distribute or share the pictures of Leah Camper?

All that was said in the paragraph preceding could be repeated herein.

Defendant's statements of intent, unaccompanied by any overt action on his part to put his words into action, do not satisfy this criterion.

Was the minor an "exploited child" or victim in any real or practical sense?

This question must be answered in the affirmative. Defendant was over the age of forty, and he was engaged in a sexual relationship with a seventeen-year-old girl. Although she was sexually experienced, the fact remains that defendant was committing a state criminal offense – rape. Defendant used his age, i.e., his "maturity," to establish a relationship of trust and affection between himself and the minor female. He took advantage of her immaturity and her disenchantment with the other men (boys?) in her life. Worst of all, defendant provided illegal prescription drugs to Ms. Camper, using her drug dependency to his advantage. In short, defendant exploited Leah Camper.

Was this a situation where an adult was taking advantage of a much younger child or using the imagery for abusive or semi-commercial purposes?

As already noted, there is no evidence from which this Court reasonably could conclude that defendant seriously intended to utilize the photographs of Ms. Camper for *commercial* purposes. Nevertheless, there can be no doubt that defendant

was taking advantage of Ms. Camper, not only because of her age and lack of maturity, but also because of her dependence upon prescription drugs, and her psychological need for a supportive male in her life. Further, based upon his actions with respect to Ms. Cowden nineteen years ago, it is not beyond reason to believe that defendant, if sufficiently provoked, would threaten to use the photographs of Ms. Camper for “abusive” purposes, viz., extortion.

Did the pictures depict explicit and graphic images of children engaged in sexual activity, particularly children about fourteen years of age or under, for commercial or exploitive purposes?

Two of the photographs depict real or simulated masturbation; thus, the images depict “sexual activity.” How “graphic” or “explicit” those images are depends upon the eye of the beholder; suffice it to say that there is no doubt about the purported activity the viewer is to perceive.

The *Corp* opinion consistently makes reference to “child” or “children” and, earlier in the opinion, the panel noted that under the common law, a “child” was someone under the age of fourteen. The criminal statutes at issue do not speak of children; rather, they refer to *minors*. A minor is statutorily defined to be a person under the age of eighteen. Thus, Ms. Camper was over seventeen and not a “child” under the common law; she was a minor under these statutes and was likely so under most other statutes in this country. Respectfully, either age, fourteen or eighteen, is an arbitrary determination, the first made by the common law and the second by the Congress of the United States. As our Western society and culture have evolved, we have collectively determined that twelve-year-old children should not be married; we

have determined that although a twenty-year-old may vote and serve in the military forces of this country, he or she may not consume alcohol. To serve as President of the United States, a person must be thirty-five years of age; not thirty-four and a half, but thirty-five. And so it goes. There must be a defining line drawn somewhere, and Congress has determined, in the statutes at issue, that the line should be drawn at eighteen years of age. As noted earlier, defendant's sexual activity with Ms. Camper constituted statutory rape under the laws of Tennessee, and likely would constitute statutory rape in the majority of states in this country. Ms. Camper's "consent" to those sexual relations is utterly irrelevant and, by the same token, her ostensible consent to pose for the sexually-explicit photographs taken by defendant is also irrelevant. In short, Ms. Camper did not have the power to consent, and defendant is charged with that knowledge.

Lastly, there is no evidence from which this Court could conclude that defendant seriously intended to use these photographs for commercial purposes. However, he had used similar photographs in the past for "exploitive purposes" – he threatened to distribute copies of sexually-explicit photographs of Ms. Cowden unless she conformed her conduct to what defendant demanded.

Were multiple children pictured?

No.

Were the children otherwise sexually abused?

At or near the time the subject photographs were taken by defendant, he was engaged in sexual relations with Ms. Camper, who was then less than eighteen years of

age. Thus, he committed statutory rape under the laws of Tennessee.

Was there evidence that the defendant repeatedly engaged in such conduct or other sexually abusive conduct with children?

Defendant had a virtually identical relationship with Leslie Cowden nineteen years ago, although Ms. Cowden at the time of that relationship was only fifteen years of age.

Did the defendant move from place to place and repeatedly engage in production of such photographs?

He did not.

CONCLUSIONS

If the facts demonstrated that defendant placed the image of Camper on the internet, there would be no question regarding this Court's jurisdiction or, better stated, regarding the "substantial nexus" between defendant's activities and interstate commerce. It would be, in the current parlance, a "slam-dunk." But there is no evidence he did so, or that he seriously intended to do so. But the lack of such evidence is not dispositive of the issue under consideration, as previously discussed.

In taking the sexually-explicit photographs of Ms. Camper, defendant used a digital camera manufactured in Japan, and he also used a data storage medium, the compact disk, that was manufactured in either Taiwan or Japan. Defendant's use of the camera and compact disk thus satisfied the jurisdictional elements of the statutes: he used materials that were transported in interstate or foreign commerce. Nevertheless, these two facts alone establish only a highly attenuated nexus or relationship to

interstate commerce and, under *Corp*, there must be something more to uphold the court's subject-matter jurisdiction. And there are other facts, *coupled with defendant's use of the foreign-manufactured camera and compact disk*, that create a more substantial nexus to interstate commerce: defendant's previous relationship, sexual and otherwise, with a fifteen-year-old female, and the photos he took of her; his distribution of illegal drugs to both minor females during the course of his relationship with them; his threats to distribute the photographs of Cowden to force her to comply with his demands; and his age (forty) at the time he took the photographs of Camper. Defendant's conduct was sufficiently egregious to constitute a substantial connection to, or impact upon, interstate commerce.

It is again recommended that defendant's Motion to Dismiss the Indictment be DENIED and that this matter proceed to trial.¹⁰

Respectfully submitted:

DENNIS H. INMAN
UNITED STATES MAGISTRATE JUDGE

¹⁰Any objections to this report and recommendation must be filed within ten (10) days of its service or further appeal will be waived. 28 U.S.C. § 636(b)(1)(B) and (C). *United States v. Walters*, 638 F.2d 947-950 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).