

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
DAVENPORT DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN WILLIAM GOOL, JR.,

Defendant.

No. CR 06-0544-JAJ

**ORDER**

---

This matter comes before the court pursuant to a sentencing hearing held April 7, 2008. The defendant was present and represented by David Treimer. The government was represented by Assistant United States Attorney Clifford Cronk. The court took evidence and heard oral argument on the application of the Sentencing Guidelines. The court then took the matter under advisement and has not yet imposed sentence.

**OFFENSE CONDUCT**

This case began in May 2006 when the defendant's ex-wife, Tammy Gool, was given a videotape by her son that came from the defendant's residence. It contained video recordings of Tammy Gool and minor girls disrobing in Ms. Gool's basement bathroom and entering the shower. Ms. Gool turned the videotape over to the police.

Upon investigation, the police learned that the defendant lived next door to the victims for several years. The defendant admitted that he performed several remodeling jobs within the residence, including building a shower in the basement area. This project began sometime in the 1990s. He told the police in 2006 that he had been secretly videotaping his wife for ten to fifteen years but that she only became aware of it in 2004. He admitted that he placed a video camera in the basement bathroom and ran an underground cable to his own residence next door. Using this hidden camera, the

defendant videotaped Tammy Gool and minor girls as they disrobed to take showers and other activity. Although the defendant denied videotaping anyone under the age of eighteen years old, it is clear from things such as orthodontia and body piercings that the victims were minors while this taping occurred. The videotaping occurred between the 1990s and approximately 2004.

A forensic examination of the defendant's computer and CDs revealed approximately thirty CDs containing additional child pornography. The investigator found over 1000 images of suspected child pornography. (A number of the images were duplicates. An exact number was not determined.)

The probation office's review of the discovery materials revealed prepubescent minors engaged in sexually explicit or lascivious acts. The predominant age group was between eight and twelve years old. The images included themes of bondage, homosexuality, and sadism. They included the lascivious display of the genitals, fellatio, cunnilingus, and vaginal penetration. The defendant possessed several images of prepubescent females in shower scenes, by themselves and with other prepubescent females. Only the videotapes described above were created by the defendant.

Pursuant to his April 24, 2007, plea of guilty, the defendant was convicted of receiving child pornography between July 2000 and June 1, 2006, in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1) and possessing child pornography on June 1, 2006, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2).

### **THE PRESENTENCE REPORT**

The presentence report appropriately looks to United States Sentencing Guideline § 2G2.2 to determine the offense level. However, because of a cross-reference contained in Guideline § 2G2.2(c)(1), the probation office applied Guideline § 2G2.1. That cross-reference states:

If the offense involved causing, 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, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

The probation office applied the cross-reference because it believed that the offense (the videotapes) involved causing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, and because it believed that the resulting offense level is greater than that determined under Guideline § 2G2.2.

At sentencing, the defendant contended that the cross-reference did not apply because the defendant had not caused a minor to engage in sexually explicit conduct (the lascivious exhibition of the genitals or pubic area) and because his actions in creating the videotapes of the minor girls occurred more than five years prior to the date of the indictment. The defendant contends that he should have a base offense level of 22 and that specific offense characteristics (Guideline § 2G2.2(b) (1, 2, 4, 6 and 7)) brings his offense level up to level 33. After application of a three level decrease for acceptance of responsibility, the defendant contends that, with a criminal history category of I, his Guideline sentence range of incarceration should be between 97 and 120 months.

At sentencing, the government argued that Guideline § 2G2.2 applies. The government contends that the cross-reference under Guideline § 2G2.2(c)(1) is not applicable because the resulting offense level under Guideline § 2G2.1 is not greater than the offense level determined pursuant to Guideline § 2G2.2.

The prosecution and defense disagree about the applicability of two Specific Offense Characteristics under Guideline § 2G2.2. First, the defendant contends that he is eligible

for a decrease of two levels pursuant to Specific Offense Characteristic (b)(1).<sup>1</sup> Second, the government contends that the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor and, therefore, his offense level should be increased by five levels pursuant to specific offense characteristic (b)(5).<sup>2</sup>

The defendant contends that he is entitled to a two-level decrease pursuant Specific Offense Characteristic (b)(1) because his conduct was limited to the receipt of material involving the sexual exploitation of a minor and that he did not intend to traffic in or distribute such material. There is no evidence of an intent to traffic in or distribute child pornography but the government contends that, because of the videotapes, the defendant's conduct was not limited to the receipt or solicitation of this material.

Two issues are presented concerning the videotapes made of the minors in the bathroom of their home. First, the defendant contends that these materials did not involve sexual exploitation because the materials do not portray "sexually explicit conduct". Second, he contends that when the victims of the videotaping were still minors, it was more than five years prior to the commencement of the prosecution and, therefore, it cannot be used as offense conduct. The defendant makes the same two arguments with respect to Specific Offense Characteristic (b)(5).

### **SEXUALLY EXPLICIT CONDUCT**

Pursuant to 18 U.S.C. § 2256, to qualify as "sexually explicit conduct" a visual depiction must be objectively sexual in nature. For purposes of this case, it must involve the lascivious exhibition of the genitals or pubic area of a person. A picture is lascivious

---

<sup>1</sup>If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels. U.S.S.G. § 2G2.2(b)(1).

<sup>2</sup>If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels. U.S.S.G. § 2G2.2(b)(5).

when it "shows a child nude or partially clothed, when the focus of the image is the child's genitals or pubic area, and when the image is intended to elicit a sexual response in the viewer." United States v. Kemmerling, 285 F.3d 644, 646 (8th Cir. 2002). The relevant factual inquiry is not whether the pictures appealed to the defendant's sexual interests but whether, on their face, they appear to be of a sexual nature. Id. Nudity alone does not fit this description; there must be an "exhibition" of the genital area and this exhibition must be "lascivious." United States v. Horn, 187 F.3d 781, 789 (8th Cir. 1999). In Horn, the Eighth Circuit Court of Appeals found helpful the six criteria suggested in United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

Because the minors at issue in this case did not know that they were being videotaped, many of the Dost factors do not directly support a finding of a lascivious exhibition. However, it must be noted that the defendant pointed the camera so as to capture videotape of the minors as they disrobed, entered and exited the shower and dressed again. After making 54 videotapes of this activity, he created a DVD that was a compilation of many of these scenes. It is obvious that the selection of these scenes made the video objectively sexual in nature. There appears to be no other reason for selecting and editing shower scenes of young girls disrobing and then dressing after a shower.

### **CONDUCT PRIOR TO THE FIVE YEAR STATUTE OF LIMITATIONS**

In fashioning an appropriate sentence, the court can consider conduct that occurred outside the applicable five-year statute of limitations. See United States v. Ziskind, 491 F.3d 10, 19 (1st Cir. 2007) (affirming a district court's use of "relevant conduct outside the statute of limitations period in fashioning his sentence"); United States v. Dickerson, 370 F.3d 1330, 1342 (11th Cir. 2004) ("[A] district court may consider conduct occurring outside of the statute of limitations in sentencing."); United States v. Williams, 217 F.3d 751, 754 (9th Cir. 2000) (a "district court may consider as relevant conduct for sentencing

purposes actions which may be barred from prosecution by the applicable statute of limitations”); United States v. Stephens, 198 F.3d 389, 391 (3d Cir. 1999) (“[C]onduct that is not chargeable because the statute of limitations has expired may be considered in determining the appropriate sentence under the Guidelines.”); United States v. Valenti, 121 F.3d 327, 334 (7th Cir. 1997) (“[T]he statute of limitations does not limit what actions a court may consider as relevant conduct when sentencing a defendant.”); United States v. Pierce, 17 F.3d 146, 150 (6th Cir. 1994); (“[C]onduct that cannot be prosecuted under the applicable statute of limitations can be used to determine relevant conduct.”); United States v. Neighbors, 23 F.3d 306, 311 (10th Cir. 1994) (allowing sentencing courts to consider "acts that are part of the same course of conduct or scheme or plan" even if not outside the statute of limitations). 18 U.S.C. § 3661 also allows a court to consider, without time limitation, information concerning the “background character, and conduct” of the defendant. 18 U.S.C. § 3661. There is no merit to the defendant's contention to the contrary.

#### **SPECIFIC OFFENSE CHARACTERISTIC b(5)**

Specific Offense Characteristic (b)(5) is appropriately applied to this defendant. Application Note 1 to Section 2G2.2 states that a “pattern of activity” includes “any combination of two or more separate instances of the sexual abuse or sexual exploitation . . . whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.” U.S.S.G. § 2G2.2 cmt. n.1 (2007). The Sentencing Commission explained that the “conduct considered for purposes of the ‘pattern of activity’ enhancement is broader than the scope of relevant conduct typically considered under § 1B1.3.” U.S. Sentencing Commission Guidelines Manual, App. C at 373, discussed in United States v. Ashley, 342 F.3d 850, 852 (8th Cir. 2003). The videotapes and DVD qualify as a pattern of sexual exploitation.

Upon the foregoing,

**IT IS ORDERED** that the court denies the defendant's request to apply U.S.S.G. § 2G2.2 Specific Offense Characteristic (b)(1) and grants the government's request to apply Specific Offense Characteristic (b)(5). The defendant's total offense level is 37 and his criminal history category is I.

**DATED** this 11th day of April, 2008.

  
\_\_\_\_\_  
JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA