IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

REPORT AND RECOMMENDATION

JACOB MEDINA,

16-cr-49-wmc

Defendant.

REPORT

Jacob Medina has been charged with four counts of knowingly and intentionally using a minor (KV #1) to engage in sexually explicit conduct for the purpose of producing child pornography in violation of 18 U.S.C. § 2251(a), one count of advertising child pornography in violation of 18 U.S.C. § 2251(d)(1)(A), and one count of possessing child pornography, in violation of 18 U.S.C. § 2252(a)(4). Dkt. 27. Before the court for report and recommendation are Medina's motions:

1) To dismiss the production counts (Counts 1-4), or in the alternative, to order the government to produce the instructions that were presented to the grand jury for its consideration when deciding whether to indict him on these counts, dkts. 24 & 31; and

2) To dismiss the advertising count (Count 5), on the ground that § 2251(d)(1)(A) is an overbroad statute that violates the First Amendment.

As discussed below, I am recommending that both motions be denied.

ANALYSIS

I. Motion to Dismiss Counts 1-4

Counts 1 through 4 of the superseding indictment charge Medina with violating 18 U.S.C. § 2251(a). Specifically, in Count 1 the grand jury charged:

> Between in or about December 2015 until April 7, 2016, exact date unknown, in the Western District of Wisconsin, the defendant,
>
> JACOB F. MEDINA,
>
> knowingly and intentionally used a minor, Known Victim (KV) #1, to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, using materials that had previously been transported in interstate commerce, specifically, MEDINA used an HTC Desire 510 cell phone, serial number SH53DY402600, to produce a visual depiction labeled "a0e2470c-fed4-47c3-adeb-51ecbe9c3c31" of KV #1 engaged in sexually explicit conduct.

Counts 2 through 4 are worded identically to Count 1 but charge different images.

Medina argues that Counts 1-4 must be dismissed for lack of evidence. More specifically, he contends that, based on the facts as revealed in the government's discovery materials,[1] there is insufficient evidence from which to find that Medina's purpose when engaging KV in sexually explicit conduct was to produce child pornography. According to Medina, the evidence shows indisputably that he had sex numerous times with KV over many months, but the evidence fails to show that the few images of sexually explicit conduct produced during these sex acts was anything other than incidental. *Ergo*, posits Medina, there is no evidence that he engaged in sexually explicit conduct with KV *for the purpose* of producing child pornography.

[1] Medina summarizes these facts in his brief. Dkt. 24, pages 1-6.

The government disputes Medina's version of the facts. Moreover, it contends that his motion cannot be decided in advance of trial.

The government is correct. Although Fed. R. Crim. P. 12 authorizes a defendant to file pretrial motions, such motions are limited to those "that the court can determine without a trial on the merits." Rule 12(b). Thus, a defendant may file a motion challenging the indictment for lack of specificity or failure to charge an offense. Rule 12(b)(3). In ruling on such motions, however, the court considers only the face of the indictment and whether it sufficiently charges an offense. *United States v. White*, 610 F.3d 956, 959 (7th Cir. 2010). The court does not consider whether any of the charges have been established by evidence or whether the government can ultimately prove its case. *Id*.

Here, Medina does not argue that the indictment is insufficient on its face to apprise him of the crime with which he is charged or to allow him to evaluate any potential double jeopardy problems. Instead, Medina asks the court to look beyond the four corners of the indictment and to consider his summary of the material facts----which he purports to be undisputed—and to find that these facts fail to establish a violation of § 2251(a). However, there is no such thing as summary judgment in criminal cases. *United States v. Moore*, 563 F.3d 583, 586 (7th Cir. 2009). *See also United States v. Yasak*, 884 F.2d 996, 1001 (7th Cir. 1989) ("A motion to dismiss is not intended to be a summary trial of the evidence.") (internal quote marks omitted); *United States v. Di Fonzo*, 603 F.2d 1260, 1263 (7th Cir. 1979) ("The defendant is not permitted to transcend the four-corners of the indictment in order to demonstrate its insufficiency."). Moreover, the

government disputes the facts as presented by Medina. Thus, even if Medina's motion were procedurally appropriate under Rule 12, it would fail on substantive grounds.[2]

Medina points out that courts sometimes decide "purely legal" matters before trial, but none of the cases he cites is on point. In *United States v. Pope*, 613 F.3d 1255, 1261 (10th Cir. 2010), and *United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988), there was no objection by the government to the defendant's proposed facts or to the court's consideration of the dismissal motion before trial. In *United States v. Covington*, 395 U.S. 57 (1969) and *United States v. Ponto*, 454 F.2d 657 (1971) the defendants' motions raised legal defenses that had nothing to do with the alleged offenses and that barred prosecution in the first place. In *Covington*, the defendant asserted that the Fifth Amendment privilege against self-incrimination necessarily provided a complete defense to the charge of failing to prepay the transfer tax provisions of the Marihuana Tax Act. In *Ponto*, the defendant argued that he could not be guilty of refusing to submit to induction because the local draft board had misclassified him.

Contrast this case, in which Medina's asserted defense to the production count is impossible to determine without considering the factual circumstances surrounding the alleged offense; moreover, the government disagrees with Medina's version of the facts. Contrary to Medina's contention, the determination whether he engaged in sexually explicit conduct with KV for the purpose of producing child pornography is a fact question, not a legal question. Accordingly, it is a question for the jury to answer. The court should deny this motion.

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[2] Identical motions were brought by the defendants in *United States v. Vogel*, 16-cr-45-wmc, dkt. 45, and *United States v. Gilbert*, 16-cr-49-jdp, in which the defendants both were represented by the same lawyers who are representing Medina. In those cases, the defendants conceded on reply that they could not prevail on their motions to dismiss in light of the government's disagreement with their proposed facts. Counsel have made no such concession in this case.

II. Motion for Production of Grand Jury Instructions, Counts 1-4

As a fallback position, Medina asks the court to order disclosure of the instructions that the grand jury received before it returned the indictments in this case. Medina wants to make sure that the grand jury "understood the law before signing the indictment." Specifically, Medina argues that the grand jury should have been instructed that, to find probable cause that defendant engaged a minor in sexually explicit conduct for the purpose of producing a visual depiction, it had to find that producing child pornography was "the dominant or principal or compelling purpose" for the sexual conduct and not merely incidental thereto. Because § 2251(a) is "complex," argues Medina, clarification is necessary to make sure he is not being forced to defend a charge for which there was no reasonable cause to believe him guilty.

Medina acknowledges that I considered and rejected this argument in *United States v. Vogel*, 16-cr-45-wmc, dkt. 45.[3] (In a recent opinion and order, District Judge James Peterson denied an identical motion in *United States v. Gilbert*, 16-cr-50-jdp, relying largely on my reasoning in the *Vogel* report and recommendation.) Medina offers no reason why his case is different. Accordingly, for the reasons expressed in my report and recommendation in *Vogel,* I recommend that the court deny Medina's motion for production of the grand jury instructions.

[3] The government voluntarily dismissed its indictment against Vogel before the district court ruled on the report and recommendation.

III. Motion to Dismiss Count 5

Count 5 of the superseding indictment charges:

> Between on or about April 3, 2016 to on or about April 5, 2016, in the Western District of Wisconsin, the defendant,
>
> JACOB F. MEDINA,
>
> knowingly caused to be made and published a notice and advertisement offering to produce, display, and distribute visual depictions, the production of which involved the use of a minor engaging in sexually explicit conduct and which depiction was of such conduct, and such advertisement was transported using a means and facility of interstate and foreign commerce, that is through the internet using Snapchat.
>
> (In violation of Title 18, United States Code, Section 2251(d)(1)(A)).

18 U.S.C. § 2251(d)(1)(A), punishes anyone who

> knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering . . . to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction . . . [the production of which] involves the use of a minor engaging in sexually explicit conduct and [which depicts] such conduct . . . [provided certain jurisdictional elements involving interstate commerce are satisfied].

Medina contends that §2551(d)(1)(A) violates the First Amendment because it prohibits a substantial amount of non-criminal, protected speech. Although Medina does not contend that *his* alleged advertising activity was constitutionally protected, he need not make that showing in order to wage a facial attack on the statute. *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) ("The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges.").

Nonetheless, Medina faces a significant burden in showing that the statute is void. The overbreadth doctrine is "strong medicine" applied to strike down a statute "only as a last resort."

Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). To succeed on his challenge, Medina must show that § 2551(d)(1)(A) poses a "real" threat to constitutionally-protected speech, and further, that the statute's overbreadth is "substantial . . . judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-614 (1973). The fact that Medina might be able to hypothesize impermissible applications of the statute is not enough. *United States v. Williams*, 553 U.S. 285, 303 (2008).

The first step in an overbreadth challenge is to construe the statute. *Id*. at 293. Both Medina and the government point to a closely-related child pornography statute, 18 U.S.C.A. § 2252A(a)(3)(B), which I shall refer to hereafter as the "pandering statute," as a point of comparison. The pandering statute punishes anyone who knowingly:

> . . . advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, *any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe*, that the material or purported material is, or contains--
>
> (I) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> (ii) a visual depiction of an actual minor engaging in sexually explicit conduct . . .

18 U.S.C.A. § 2252A(a)(3)(B)(emphasis added).

Congress enacted the pandering statute in 2003 as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, P.L. 108-21, 117 Stat 650, Sec. 503 (April 30, 2003), in response to the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Court said Congress had gone too far in the Child Pornography Prevention Act of 1996 (CPPA) when it expanded the federal prohibition on child pornography to include sexually explicit images using so-called

"virtual children" or adults that "appeared to be" children. By including virtual images or materials that "appeared to be" of a child engaging in sexually explicit conduct, said the Court, the CPPA captured works that were neither obscene under *Miller v. California*, 413 U.S. 15 (1973), nor produced by the exploitation of real children, as in *New York v. Ferber,* 458 U.S. 747 (1982). The Court also struck down a provision that defined child pornography to include any sexually explicit materials "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that the materials depict "a minor engaging in sexually explicit conduct." This provision was overbroad, said the Court, because it had nothing to do with whether the sexually explicit materials actually involved actual minors, but instead dealt with how the speech was presented: "The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie . . . [and criminalizes its possession] even when the possessor knows the movie was mislabeled." *Id*. at 257-58.

Congress attempted to rectify these concerns the following year, enacting a new pandering statute, 18 U.S.C.A. § 2252A(a)(3)(B), which is quoted above. This statute does not require the actual existence of child pornography, but rather targets "the collateral speech that introduces such material into the child-pornography distribution network." *Williams*, 553 U.S. at 293. Further, "[t]he statute's definition of the material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller*: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *Id*.

In *Williams*, 533 U.S. 285, the Court found that the revised statute was not overbroad. Before assessing the statute's reach, the Court noted five features that were important to its analysis:

> (1) the statute includes a scienter requirement, *id*. at 294;
>
> (2) the statute's "string of operative verbs" was reasonably read as having "a transactional connotation . . . [*i.e.*] the statute penalizes speech that accompanies or seeks to induce a transfer of child pornography—via reproduction or physical delivery–from one person to another[;]", *id*.;
>
> (3) the phrase "in a manner that reflect the belief" contains both subjective and objective components, *id*. at 295-96;
>
> (4) the phrase "in a manner . . . that is intended to cause another to believe" contains only a subjective element," *id*. at 296;
>
> (5) unlike in *Free Speech Coalition*, § 2252A(a)(3)(B)(ii)'s requirement of a "visual depiction of an actual minor" made clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene), *id*. at 297.

Against this construction of the statute, the Court found no overbreadth problem. In the Court's view, the statute reflected the principle that "offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection." *Id*. at 298. Stated differently, "offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment." *Id*. At 299.

Circling back to this case, Medina argues that the statute that he is accused of violating, § 2251(d)–which I will refer to hereafter as the "advertising statute"–is broader in scope than the pandering statute, § 2252A(a)(3)(B), and therefore is subject to an overbreadth challenge. First, Medina argues that § 2251(d) "may capture the pandering of virtual child pornography," (which the First Amendment protects) because the statute does not say that it applies only to visual depictions of "actual" minors. Dkt. 33, at 5. This argument is not persuasive. Although it is

true that the statute does not use the word "actual," there is nothing to suggest that Congress meant to criminalize anything other than advertisements to obtain or provide visual depictions involving a real child. *Cf. United States v. Franklin*, 785 F.3d 1365, 1369-70 (10th Cir. 2015). (Congress adopted § 2251(d) to "capture all advertisements or notices targeting individuals interested in obtaining or distributing child pornography."). Unlike the statute that the Court struck down in *Free Speech Coalition*, § 2251(d) makes no reference to visual depictions that "appear to be a minor" or otherwise criminalize "virtual pornography" or pornographic images of adults who are made to appear to look like minors. As the government points out, § 2251(d)(1) uses the word "minor," which is defined as any person under the age of 18. 18 U.S.C. § 2256(1). Further, § 2251(d) is a subsection of § 2251, which criminalizes the production of child pornography, which involves an actual minor. I agree with the government that the notices or advertisements targeted by § 2251(d) are those– and only those– seeking or offering to receive or distribute actual child pornography.

Even if this is the case, argues Medina, § 2251(d) still is overbroad because it lacks a subjective intent element. According to Medina, a crime is committed simply upon the making, printing, publishing of, or upon causing to be made, printed or published an advertisement seeking to receive or offer child pornography, regardless whether the person who made, printed or published the advertisement actually intended to seek or offer child pornography. The government and other courts agree with this understanding of the statute. *Accord* Govt.'s Br. In Opp., dkt 37, at 9 (noting that advertising provision's mens rea language applies specifically to the advertisement itself); *United States v. Pabon-Cruz*, 255 F. Supp. 2d 200, 211 (S.D.N.Y. 2003) ("The core prohibited conduct [under § 2251(d)] is posting a 'notice or advertisement' seeking

or offering to take certain actions with respect to depictions of minors engaged in sexually explicit activity . . . the crime is complete when the defendant advertises his willingness to receive the material.").

Medina contrasts the absence of an explicit subjective intent element with § 2252A(a)(3)(B), which specifies that the materials pandered must either reflect the belief, or be intended to cause another to believe, that the materials depict a minor engaged in sexually explicit conduct. But the reason this mens rea language is necessary under § 2252(A)(a)(3)(B)is because that statute is broader: a defendant can be convicted of pandering even if he did not offer or solicit actual child pornography depicting real children engaged in sexually explicit conduct. As just discussed, however, the advertising statute, § 2251(d), targets only the publishing of offers to receive or to provide images depicting actual minors engaging in sexually explicit conduct. *Accord United States v. Pabon-Cruz*, 255 F. Supp. 2d 200, 211 (S.D.N.Y. 2003) (intent element of § 2251(d) applies only to publishing of advertisement for visual images, "which becomes a crime whenever the images *in fact* involved the use of actual minors in sexual activity.") (emphasis in original).

Medina challenges § 2251(d)'s built-in assumption that "all people who make, print, or publish advertisements seeking to receive child pornography actually intend—by necessity—to seek or offer child pornography." Br. In Reply, dkt. 38, at 3. Although Medina recognizes that in most cases, this assumption will be true, he argues that it is not *always* true. In particular, he argues, researchers and scholars in the field of criminology or social work studying child pornography may have legitimate reasons to publish or share an advertisement seeking to provide or receive child pornography. According to Medina, these scholars would be guilty of

violating § 2251(d) if they published or shared with other academics notices or advertisements they discovered in chat rooms and internet newsgroups. This argument is not compelling.

It is true, as Medina points out, that courts have interpreted the "notice or advertisement" element broadly to include jargon-coded posts made to private online forums and descriptive fields used to describe files made available on file-sharing networks. *See, e.g., United States v. Sewell*, 513 F.3d 820 (8th Cir. 2008) (text in descriptive fields describing content of files containing child pornography shared on Kazaa network constituted notice or advertisement to distribute child pornography), *United States v. Rowe*, 414 F.3d 271, 276 (2d Cir. 2005) (notice or advertisement may rely on jargon and need not be explicit in its communication of an offer), and *United States v. Christie*, 570 F. Supp. 2d 657, 656-666 (D. N.J. 2008) (nondescript hyperlinks counted as notices or advertisements). Yet in each of these cases, it was plain from the circumstances that the defendant's intent in posting the notice was to offer or to obtain child pornography to/from another person. *Sewell*, 513 F.3d at 822 (examining how Kazaa file-sharing process worked to conclude that "in the context of the Kazaa program, placing a file in a shared folder with descriptive text is clearly an offer to distribute the file"); *Rowe*, 414 F.3d at 276 (defendant's decision to post notice "Offering: Preboys/girls pics" to "preteen00" chat room "peppered with queries such as 'anybody with baby sex pics for trade?'" was plainly for single purpose of advising others that he had child pornography available for trade); *Christie*, 570 S. Supp. 2d at 666 (posting of hyperlink to password-protected website dedicated primarily to exchange of child pornography sufficient to constitute notice under § 2251(d)). In other words, "context matters," a principle that Medina expressly endorses in his brief. Dkt. 33, at 7.

Against this backdrop, the possibility that the government would prosecute a researcher who merely republishes in an article or on his own computer network notices or advertisements created by others for the purpose of conducting academic research strikes the court as infinitesimal. The legitimate targets of § 2251(d) are offers to provide or requests to obtain child pornography, which are "categorically excluded from the First Amendment." *Williams*, 553 U.S. at 299. Even assuming, *arguendo*, that the statute could be applied to the researcher in the scenario envisioned by Medina, I am not convinced that such impermissible applications would amount "to more than a tiny fraction of the materials within the statute's reach." *Ferber*, 458 U.S. at 773. Under these circumstances, § 2251(d) is "not substantially overbroad and ... whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S., at 615–616. In short, while Medina's overbreadth argument is not fanciful, neither is it persuasive.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), and for the reasons stated above, I recommend that defendant Jacob Medina's two motions to dismiss, dkts. 24 & 31, be DENIED.

Entered this 20th day of March, 2017.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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March 20, 2017

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Re: United States v. Jacob Medina
Case No. 16-cr-49-wmc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before April 3, 2017, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by April 3, 2017, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,
/s/ S. Vogel for
Connie A. Korth
Secretary to Magistrate Judge Crocker

cc: William M. Conley, District Judge