IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

v.

00-CR-61-C

DAVID DANIEL ANDERSON,

Defendant.

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Defendant David Anderson has filed 1) a motion to reconsider; 2) a letter of special requests for trial; and 3) objections to the report and recommendation entered by the United States Magistrate Judge.

Defendant's motion to reconsider is directed to my order directing that his trial will be held in Madison, Wisconsin, rather than in Eau Claire. In support of his motion, defendant argues that it is difficult for him to travel as far as Madison, that he has friends in Eau Claire that would provide him proper bedding consisting of a styrofoam egg crate-type mattress and flannel sheets, and that his friends would provide for him financially while he is in Eau Claire. These factors do not change my opinion that the trial should be held in Madison. Defendant has shown that he is capable of traveling long distances. I see no reason why he could not travel

to Madison. With the trial beginning on Monday, he could leave on Saturday and take the trip in easy stages. As far as the styrofoam egg crate mattress and flannel sheets, he can bring his own and use them on the bed in any motel room he rents. As to the financial cost of staying in Madison, that is an unfortunate consequence of the prosecution of the charges against defendant, but it is not one that overrides the opposing concerns of the Assistant United States Attorney. Moreover, as the magistrate judge explained in his report, defendant is not without the necessary funds to cover his stay here.

As to defendant's request for special consideration during the trial, certain of his requests can be accommodated. For example, defendant will have an opportunity to move around approximately every two hours. It is my ordinary procedure to have recesses at approximately those intervals. If defendant suffers from diarrhea, he is free to leave the courtroom at any time without seeking court permission in advance. However, I will not delay the start of trial until 10:00 a.m. That would unreasonably shorten the trial day and work an inconvenience on the jurors who have to give up their jobs and other responsibilities for their jury service.

I turn then to defendant's objections to the magistrate judge's report and recommendation. Defendant objects to the magistrate judge's decision that the prosecution of defendant raises no First Amendment questions. Defendant argues that the entire statute

should be held unconstitutional because it is void for vagueness. Defendant argues that the language of the statute is vague because it refers to sexually explicit images that "appear to be a minor." He complains that if the United States Attorney believes an image is a minor then certain conduct would be a crime whereas if someone else would look at the image and think it is a younger looking adult, the conduct would not be criminal. As I understand the evidence the United States intends to introduce at trial, the "appears to be a minor" language will be largely irrelevant. If, as the United States suggests, the images are of young children, the issue will not even arise. It would be difficult for defendant to argue that the statute did not provide adequate knowledge to a person of ordinary intelligence that the law prohibits possession and distribution of sexually explicit pictures of young children, whatever his concerns are about distinguishing between older minors and young adults. (Defendant is not attacking the aspect of the statute that allows prosecution for possession or dissemination of "visual depictions" of computer-generated images. He confines his challenge to the alleged difficulty of distinguishing between actual minors and apparent minors.) See, e.g., United States v. Hilton, 167 F.3d 61, 761 (1st Cir. 1999) ) "To the extent the [Child Pornography Prevention Act] criminalizes the possession, reproduction or distribution of a visual representation of an actual minor, engaged in sexual conduct," it is constitutional (citing New York v. Ferber, 458 U.S. 747 (1982) and Osborne v. Ohio, 495 U.S. 103 (1990)) cert. denied, 120 S. Ct. 115 (1999)).

Defendant objects to the magistrate judge's recommended denial of his motion to suppress statements that were obtained from him in violation of his Miranda rights. After

reviewing the transcript of the evidentiary hearing and the report and recommendation, I find no reason to disagree with the magistrate judge's conclusion that defendant did not show that he was in custody, so as to trigger his Miranda rights, or that his statements could not be considered voluntary because of the totality of the circumstances in which he made them. Defendant does not cite any facts he believes the magistrate judge interpreted incorrectly or any facts that the magistrate judge overlooked that might require a different conclusion.

Defendant objects to the magistrate judge's recommendation to deny the request for trial in Minneapolis and instead to move the trial to Eau Claire. I see no justification for transfer of this case to Minneapolis, for all the reasons listed by the magistrate judge. In addition, I see no good reason for holding the trial in Eau Claire, given the inconvenience to the Assistant United States Attorney. As I have noted, defendant is able to travel when he wants to. He has traveled to Madison on at least two occasions without any apparent difficulties.

ORDER

It is ORDERED that the defendant's motion to reconsider the denial of his request to hold trial in Eau Claire is DENIED; the defendant's requests for special consideration during trial are GRANTED and DENIED as explained in this order; and the magistrate judge's recommendations made in his order of October 26, 2000 are ADOPTED as the court's own.

Further, it is ORDERED that defendant's motion to dismiss the indictment on First Amendment grounds is DENIED; defendant's motion to suppress statements taken in violation

of his Miranda rights or given involuntarily is DENIED; and his motion to move the place of trial is DENIED as well.

Entered this 8th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge