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

UNITED STATES OF AMERICA,

Plaintiff, REPORT AND RECOMMENDATION

v. 00-CR-112-C

FRANK L. BROWN,

Defendant.

REPORT

Defendant Frank L. Brown is charged with violating the Child Pornography Prevention Act ("CPPA"), 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(a)(1). Before the court for report and recommendation are Brown's motion to dismiss the charges because the CPPA is unconstitutional (dkt. 15); motion to suppress physical evidence because the search warrant was invalid (dkt 16); and motion to suppress statements because the police violated his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)(dkt 18).[1]

For the reasons stated below, I am recommending that this court deny all three motions. First, although there is a split in the circuits, I agree with the those courts that have found that the CPPA is constitutional. Second, although Brown raises a valid concern about the search warrant, there is no basis to suppress the evidence seized. Finally, Brown

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[1] I will deal with Brown's motion to strike the "a/k/a" from the case caption in a separate order.

was not in custody for *Miranda* purposes, so he was not entitled be advised of his rights before the agents questioned him.

I. Motion to Dismiss

Brown asserts three First Amendment claims against the CPPA : (1) Congress has no interest in regulating sexually explicit materials that do not portray actual children; (2)The CPPA's child pornography definition is overbroad because it criminalizes the possession and distribution of material protected by the First Amendment; and (3) The "appears to be" and "conveys the image" language of the CPPA is unconstitutionally vague because the phrases do not give a reasonable person notice of the prohibited act.

Brown also raises a brief Commerce Clause challenge to Count 1 of the indictment that I will address at the end of this section.

A. Background

Responding to rapidly advancing computer technology, Congress enacted the Child Pornography Prevention Act of 1996. *See United States v. Acheson*, 195 F.3d 645, 648-69 (11th Cir. 1999). The CPPA was designed to combat the use of computer technology in producing *virtual* child pornography, namely computer-altered images that are practically indistinguishable from visual depictions of actual minors. *See id.* This was an extension of predecessor statutes which defined child pornography in terms of actual minors engaging in

sexually explicit acts. *See Free Speech Coalition v. Reno*, 198 F.3d 1083, 1089 (9th Cir. 1999), *cert. granted sub nom. Ashcroft v. Fress Speech Coalition*, __ U.S. __, 121 S.Ct. 876 (2001). The Supreme Court has upheld these earlier laws against constitutional challenges.

For instance, in *New York v. Ferber*, the Court held that child pornography is not protected by the First Amendment. *See* 458 U.S. 747 (1982). *Ferber* upheld a New York law that banned the promotion of a sexual performance by a child. *See id.* at 750-51. The Court in *Ferber* listed several reason why legislatures should be entitled to greater leeway in regulating pornographic depictions of minors: (1) states have a compelling interest in protecting the physical and psychological well-being of minors; (2) the distribution of photographs depicting sexual activity of minors is related to sexual abuse, because the material represents a permanent record of the abuse, and because the child pornography market must be shut down to control further exploitation of children; (3) selling and advertising child pornography provides an economic motive for the production of such material; (4) the value of permitting depictions of children engaged in sexual conduct is *de minimis*; and (5) classifying child pornography as outside the scope of the First Amendment was consistent with the Court's earlier decisions. *See id.* at 756-64.

In *Osborne v. Ohio*, the Court upheld a statute banning private possession of child pornography. *See* 495 U.S. 103 (1990). The Court reiterated that child pornography has *de minimis* value, and that the government has a compelling interest in preventing harm to children. *Id.* at 108-09. *Osborne* then went one step further and recognized a state interest

in preventing pedophiles from using pornography to seduce other children into sexual activity. *Id.* at 111.

As just noted, the CPPA has expanded the definition of "child pornography" to includes any visual depiction that "appears to be of a minor engaging in sexually explicit conduct," or is distributed in a manner that "conveys the impression that the material is of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D). In other words, a person can violate the CPPA by possessing or distributing of visual depictions that do not portray actual minors engaged in sexually explicit conduct.

> The legislative purposes of the act include the following:
>
> (1) To prevent the use of virtual child pornography to stimulate the sexual appetites of pedophiles and child sexual abusers; (2) to destroy the network and market for child pornography; (3) to prevent the use of pornographic depictions of children in the seduction or coercion of other children into sexual activity; (4) to solve the problem of prosecution in those cases where the government cannot call as a witness of otherwise identify the child involved to establish his/her age; (5) to prevent harm to actual children involved, where child pornography serves as a lasting record of their abuse; and (6) To prevent harm to children caused by the sexualization and eroticization of minors in child pornography.

United States v. Mento, 231 F.3d 912, 918-19 (4th Cir. 2000).

The CPPA provides two affirmative defenses. First, a defendant can avoid culpability by proving that the alleged child pornography was produced using an actual adult, and that the defendant did not promote the material as depicting a minor engaging in sexually explicit conduct. *See* 18 U.S.C. § 2252A(c). Second, a defendant can prove that he or she possessed

less than three pictures and promptly either destroyed the pictures, or reported the matter to the appropriate law enforcement agency. *See* 18 U.S.C. § 2252A(d)

B. Analysis

To support his motion to dismiss, Brown relies heavily on *Free Speech Coalition v. Reno*, 198 F.3d 1083, which found the CPPA unconstitutional. In *Reno*, appellants brought a pre-enforcement declaratory challenge to the "appears to be" and "conveys the impression" language in the CPPA. *Id.* at 1086. The Court of Appeals for the Ninth Circuit held that: (1) Congress had no compelling interest in preventing harm to children not actually portrayed in sexually explicit visual depictions; (2) the statute was unconstitutionally overbroad; and (3) the statute was unconstitutionally vague. *See id.* These are Brown's arguments as well.

As the government points out in the instant case, the Ninth Circuit holds the minority view on these issues. The First, Fourth and Eleventh Circuits have all upheld the constitutionality of the CPPA's child pornography definition. *See United States v. Hilton*, 167 F.3d 61, 65 (1st Cir. 1999); *United States v. Acheson*, 195 F.3d at 648; *United States v. Mento*, 231 F.3d at 915. Although the Supreme Court will have the final word on the CPPA in the near future, I am recommending that this court follow the lead of the courts upholding the statute.

(1) Compelling Government Interest

The CPPA is a content-based statute expressly aimed at curbing a particular category of expression. *Hilton*, 167 F.3d at 68. Because of this, it is the government's burden to establish a compelling interest that is served by the statute, and to demonstrate that the CPPA is narrowly tailored to fulfill that interest. *See Reno*, 198 F.3d at 1091.

In *Reno* the Ninth Circuit held that Congress had not established a compelling interest served by the CPPA. *Id.* at 1092. First, the Ninth Circuit held that the Supreme Court had never recognized a compelling government interest in preventing harm to children victimized by pedophiles. The Ninth Circuit interpreted *Ferber* as recognizing only the narrower governmental interest in preventing harm to children actually depicted in the pornographic material. *Id.* The Ninth Circuit determined that *Ferber* implicitly had held that depictions of non-recognizable minors would be constitutionally protected. *Id.*

Second, the Ninth Circuit rejected the legislative findings that fabricated images of child pornography can lead to additional acts of sexual abuse, because no studies had demonstrated a connection between virtual child pornography and subsequent sexual abuse. *Id.* at 1093-94. The Ninth Circuit held that the Attorney General's Commission on Pornography Final Report, which Congress used to justify the CPPA, predated the problems presented by advancing computer technology and was insufficient to support the government's interest in preventing secondary harm to children. *See id.* at 1094.

The First, Fourth and Eleventh Circuits reached the opposite conclusion, holding that the government has a compelling interest in preventing secondary harm to children. *See, e.g.*, *United States v. Acheson*, 195 F.3d at 650. In *Acheson*, the Eleventh Circuit held that notwithstanding the strict scrutiny requirement, Congress is entitled to greater leeway in regulating pornographic depictions of children. *See id.* (quoting *Ferber*, 458 U.S. at 756). In *Hilton*, the First Circuit held that *Osborne* expressly recognized the government's interest in denying pedophiles access to child pornography. *See* 167 F.3d at 70 (the Supreme Court's recognition of this interest marked "a subtle, yet crucial, extension of a state's legitimate interest to the protection of children not actually depicted in prohibited images"). Finally, in *Mento*, the Fourth Circuit held that Congress had selected the least restrictive method to further the government's compelling interest. *See* 231 F.3d at 921.

As the government observes, the Supreme Court in *Osborne* recognized that the government has an interest in "encouraging the destruction of [child pornography] . . . because evidence suggests that pedophiles use child pornography to seduce other children into sexual activities." 495 U.S. 103, 111; *See also United States v. Hilton*, 167 F.3d at 70. Thus, the Court had recognized the government's interest in protecting children against secondary harm even prior to the existence of virtual child pornography. True, *Osborne* predates the virtual technology concerns raised by the CPPA; nevertheless, *Ferber* held that the government should be given "greater leeway in the regulation of pornographic depictions of children." *See Ferber*, 458 U.S. at 756. Although the statute at issue in *Ferber* only

criminalized photos of actual children, the Court emphasized the state's broad interest in safeguarding the physical and psychological well-being of minors. 458 U.S. at 756. From this, it appears that the Ninth Circuit's narrow readings of *Osborne* and *Ferber* do not accurately capture the Supreme Court's intentions.

Further, the Ninth Circuit erred by concluding that the Attorney General's Commission on Pornography Final Report was insufficient evidence of Congress's interest in preventing secondary harm to children. In *Osborne*, the Supreme Court implicitly relied on the Commission's finding when it recognized the government's interest in preventing secondary harm to children. *See Osborne*, 495 U.S. at n. 7. Additionally, courts should give substantial deference to the predictive judgments of Congress. *See Ferber*, 458 U.S. at 758 (stating that the court would not "second-guess" the legislature's findings). It seems that the Ninth Circuit in *Reno* second-guessed not only Congress's findings, but the Supreme Court's holding as well.

Therefore, I conclude that the government has a compelling interest in preventing "the use of virtual child pornography to stimulate the sexual appetites of pedophiles and child sexual abusers." *See Mento*, 231 F.3d at 919. Brown's argument to the contrary is not a basis to grant his motion to dismiss.

(2) Overbreadth

As a content-based statute, the CPPA must be narrowly drawn so as not to chill the communication of lawful ideas. *See United States v. Hilton*, 167 F.3d at 71. But a statute will

not be invalidated as overbroad unless its overbreadth is real and substantial, judged in relation to the statute's plainly legitimate sweep. *Id.* The Supreme Court admonished in *Ferber* that the overbreadth doctrine is "strong medicine" that should be utilized "only as a last resort." 458 U.S. at 769. So, a statute should not be held invalid merely because it is possible to conceive of a single impermissible application. *Id.* at 772.

The Ninth Circuit held that the CPPA was substantially overbroad. *United States v. Reno*, 198 F.3d at 1096. Based on its finding that the government had no compelling interest in preventing virtual child pornography, the court held that the CPPA was "insufficiently related to the interest in prohibiting pornography actually involving minors to justify its infringement of protected speech." *Id.* Even the First Circuit conceded that, at first blush, the CPPA appeared overbroad because a visual depiction of a youthful-looking adult, as well as artistic depictions, could fit within the definition of child pornography. *See* 167 F.3d at 71.

However, the First Circuit held that when a statute is susceptible to two meanings, one constitutional and one unconstitutional, the court must adopt the latter meaning. *See id.* Turning to the legislative record, the First Circuit noted that the CPPA was designed to target visual depictions "which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct." *Id.* at 72; *See also United States v. Acheson* 195 F.3d at 651; *United States v. Mento* 231 F.3d at 921. Drawings, cartoons, sculptures, and paintings depicting youths in sexually explicit poses

would not fall within the definition of child pornography. *See United States v. Hilton*, 167 F.3d at 72.

The Eleventh Circuit pointed out that the CPPA provided additional protections from overbroad interpretation. *See United States v. Acheson* 195 F.3d at 651-52. First, the CPPA offered an affirmative defense to distributors of explicit material, allowing them to prove that the visual depiction actually was of an adult. *See id*. Further, the government must prove that the defendant *knowingly* possessed or distributed the child pornography. *See id.* The Eleventh Circuit concluded that these safeguards limited the application of the CPPA because prosecutors would focus on images that depicted persons who clearly appeared to be less than 18. *See id.* at 651-52.

Notwithstanding these protections, the First Circuit recognized that prosecutors wrongly could apply the CPPA to youthful-looking adults. *See Hilton*, 167 F.3d at 73-74. Nonetheless, the court held that the "existence of a few possibly impermissible applications of the Act does not warrant its condemnation." *Id.*; *See also United States v. Acheson*, 195 F.3d at 652 ("any potential overbreadth . . . should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.") The proper question is "whether the CPPA poses substantial problems of overbreadth sufficient to justify overturning the judgment of the lawmaking branches." *United States v. Hilton*, 167 F.3d at 74.

The CPPA's child pornography definition was intended to target visual depictions "which are virtually indistinguishable to unsuspecting viewers from unretouched photographs

of actual children engaging in identical sexual conduct." *Hilton*, 167 F.3d at 72. Clearly, Congress's expanded definition of child pornography was not intended to encompass depictions of youthful-looking adults. Further, the CPPA provides additional protections, including: (1) an affirmative defense that the visual depiction was produced using an actual adult, and was not distributed "in such a way as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct; and (2) proof that the defendant knowingly possessed or distributed child pornography. *See* 18 U.S.C. § 2252A. These safeguards make it unlikely that prosecutors will impermissibly apply the law. Finally, courts are better off dealing with a few impermissible applications of the law on a case-by-case basis. *See Hilton*, 167 F.3d at 74. For these reasons, the CPPA, despite its potential for misuse, is not unconstitutionally overbroad.

(3) Vagueness

Finally, Brown argues that the CPPA is void for vagueness. A statute is unconstitutionally vague when it "fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." *United States v. Reno*, 198 F.3d at 1095 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The Ninth Circuit held that the CPPA was void because the "appears to be" language was highly subjective and provided "no measure to guide an ordinarily intelligent person about

prohibited conduct," and because the vague provisions permitted arbitrary and discriminatory prosecution. *Id.*

In contrast, the courts in *Hilton*, *Acheson* and *Mento* held that the "appears to be" standard was objective because Congress intended a jury to decide whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity. *See e.g. United States v. Acheson*, 195 F.3d at 652; *United States v. Hilton*, 167 F.3d at 75. (citing S. Rep. 104-358, at pt. IV(C)). Although one could quibble about the precise location of the line separating a legal depiction from an illegal one, this standard is sufficiently discernible to put a reasonable person on notice as to what constitutes an illegal act under the CPPA. A person of ordinary intelligence can easily determine likely unlawful conduct and conform his conduct accordingly. *See United States v. Hilton*, 167 F.3d at 76. Accordingly, the statute is not vague.

Also, the scope of the statute's knowledge element provides and additional safeguard against arbitrary and discriminatory enforcement of the statute. To establish a defendant's criminal knowledge, the government must prove beyond a reasonable doubt that: 1) The defendant knowingly possessed the depictions; 2) He knew (or believed) that the depictions were sexually explicit; and 3) He knew (or anticipated) that the depictions were of a person who appeared to be under 18 years old. *See United States v. Hilton*, 167 F.3d at 75. Thus, it is not enough for the government to prove merely that a defendant possessed child pornography; it must also prove that the defendant knew (or believed) that what he

possessed constituted child pornography. This is not a strict liability crime: culpability attaches only those who know that they possess material that a reasonably objective person would deem a depiction of minors engaged in sexually explicit conduct.

In sum, although there are legitimate First Amendment questions to be asked of the CPPA, it seems that the answers affirm the constitutionality of the statute. I am recommending that this court deny Brown's motion to dismiss the charges against him.

C. The Commerce Clause

Brown has moved to dismiss Count 1 of the indictment (which charges the possession of child pornography) on the ground that it imposes federal criminal liability upon purely intrastate possession of certain materials in violation of *United States v. Lopez*, 514 U.S. 549 (1995). As the government notes in response, the Seventh Circuit recently considered this argument and rejected it in *United States v. Angle*, 234 F.3d 326, 336-38 (7th Cir. 2000). The court joined the First and Third Circuits in finding that there was a nexus, *via* market theory, between interstate commerce and the intrastate possession of child pornography. *Id.* at 338, *citing United States v. Robinson*, 137 F.3d 652, 656 (1st Cir. 1998) and *United States v. Rodia*, 194 F.3d 465, 479 (3rd Cir. 1999).

Brown protests that the Seventh Circuit's market theory is "convoluted;" perhaps so. It is, nonetheless, the law of this circuit, and I see no basis for this court to deviate from it. Accordingly, I recommend that this court deny Brown's motion to dismiss Count 1 on the ground of a Commerce Clause violation.

II. Motion to Suppress: The Search Warrant

On September 11, 2000, I issued a search warrant for Brown's home in Beloit, Wisconsin. A copy of the warrant, application, and supporting affidavit are attached to Brown's Supporting Affidavit (dkt. 17). Brown challenge the warrant's authorization of "no-knock" entry by the agents and authorization of the seizure of materials relating to "child pornography, child erotica, [and] information pertaining to the sexual interest in child pornography . . .." Search Warrant, Attachment A.

A. No-Knock Entry

Brown argues that the agents' "no-knock" entry into his home violated the Fourth Amendment because the facts upon which I authorized it create an unconstitutional blanket exception to the general "knock and announce" rule articulated in *Wilson v. Arkansas*, 514 U.S. 927 (1995). *Wilson* held that an officer's unannounced entry into a home is unreasonable under the Fourth Amendment in certain circumstances. *See id.* at 934.

The Supreme Court then held in *Richards v. Wisconsin*, 520 U.S. 390, 393 (1997) A blanket exception to the "knock and announce" rule based on the type of evidence sought is unconstitutional. In *Richards,* the Wisconsin Supreme Court had held that when police have probable cause to search a residence for drugs, they necessarily have reasonable cause to execute a "no-knock" entry. *See id.* at 389. The U.S. Supreme Court reversed, holding

that a state cannot create a categorical exception to the "knock and announce" rule required by *Wilson*. *See id.* at 393. Instead, to justify no-knock entry, "the police must have a reasonable suspicion that knocking and announcing their presence, *under the particular circumstances*, would be dangerous or futile, or that it would inhibit the effective investigation of the crime, by example, allowing the destruction of evidence." *Id.* at 394, emphasis added. The Court concluded that this showing was not high, but was required whenever a no-knock entry was challenged. *See id.* at 394-95.

Brown contends that the no-knock provision of the search warrant for his home was authorized solely because the search involved obtaining evidence of computer child pornography. Special Agent Elizabeth Hanson stated in her affidavit:

> There are currently available commercial encryption products which allow a user to encrypt an entire hard drive by striking a single key. Further, date which is encrypted with some of these commercial encryption software packages can only be decrypted after months, if not years, of forensic analysis. Because computer evidence can be so easily encrypted, and thus, can be so easily placed beyond the reach of law enforcement analysts, I respectfully requested that we law enforcement officers be permitted to enter the subject premises without knocking and announcing ourselves as law enforcement officers.

Affidavit at ¶ 35. (Attached to dkt. 17). Brown points out that these circumstances exist every time officers search a residence for computer child pornography; therefore, this constitutes a blanket exception to the "knock and announce" rule.

The government responds that there was no way for the agents to know whether Brown was using the computer when they executed the search warrant, nor whether Brown would be assisted by others in destroying the evidence. Additionally, the government argues

that, as in *U.S. v. Spry*, 190 F.3d 829 (7th Cir. 1999), the agents in this case did not observe any circumstances at the scene of the search that *negated* the need for a "no-knock" entry. *id.* at 833.

Although it is a closer call than Brown contends, I have decided that he is correct: I erred by authorizing no-knock entry in this case. While the government's fear of quick encryption is legitimate in every case involving the suspected use of computers in a child pornography case, this overarching fear is not enough, without more, to justify no-knock entry in every child pornography case involving computers. *Richards* requires a more particularized showing of exigent circumstances than the government provided here. The government did not demonstrate a reasonable suspicion that *this* suspect possessed encryption software, or that he otherwise reasonably could be expected to destroy evidence upon hearing the police at his door.[2]

No-knock entry is not justified absent some evidence, either presented to the court or learned at the scene, raising a reasonable suspicion that evidence is being or will be destroyed. *See United States v. Bailey*, 136 F.3d 1160, 1165 (7th Cir. 1998)(finding

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[2] Having so decided, I note that the opposite result is defendable: the "particularized showing" in this case would be Brown's use of a computer to disseminate child pornography. The use of a computer might be analogized to the presence of a gun in the home of a drug dealer. It is not the crime itself that is the basis for the no-knock entry, but the "something extra."

Having offered this analogy, I am not convinced by it. Although the presence of a gun always signals danger, the presence of a computer does not always signal encryption capability, even when a suspected child pornographer owns it. It seems that the better course under the Fourth Amendment would be to require the agents, in the absence of particularized evidence of encryption capability, to be more creative in gaining unforced entry so as to minimize the risk of losing evidence.

reasonable suspicion because these defendants were known to conceal drugs in their mouths, and because the police heard suspicious movement in the residence just prior to entry); *United States. v. Mattison*, 153 F.3d 406, 410-11 (7th Cir. 1998) (finding reasonable suspicion where informant told police that the defendant had threatened to kill anyone who interfered with his drug trade); *U.S. v. Gambrell*, 178 F.3d 927, 929 (7th Cir. 1999) (finding reasonable suspicion where defendant commonly answered the door wearing a gun). In contrast, the court in *Jacobs v. City of Chicago*, 215 F.3d 758 (7th Cir. 2000) found no reasonable suspicion that would justify no knock entry where the police merely had information that a person possessed drugs in the apartment. *Id.* at 770, n.5.

The common thread in these cases is that there must be particular circumstances transcending the generalizations that drug dealers are often dangerous or may attempt to destroy evidence if police knock and announce prior to entry.[3] So too with child pornography cases involving computers. Here, as in *Jacobs*, there were no particular circumstances creating a reasonable suspicion. The affidavit provides only a general statement that computer technology allows computer users to encrypt memory with a single key stroke.

Therefore, the "no-knock" provision of the search warrant for Brown's house is invalid because the government did not present sufficient evidence to create a reasonable suspicion

[3] *United States v. Spry*, 190 F.3d 829 (7th Cir. 1999), cited by the government, is no different. The issue in *Spry* was whether police must reevaluate the need for no knock entry upon arriving at the residence. *Id.* at 833. *Spry* does not discuss whether the court properly authorized a "no-knock" warrant prior to the search

that Brown would destroy physical evidence if the officers announced their presence. Unfortunately for Brown, although his argument has resulted in a re-examination of court procedures, it doesn't result in suppression of the evidence seized from his home.

First, the agents acted in good faith by relying on this court's authorization of a no-knock entry into Brown's home. As the government observes, a search warrant invalidated after its execution is not subject to suppression if it was executed in good faith. *See United States v. Sleet*, 54 F.3d 303, 307 (7th Cir. 1995). In *Sleet*, the Seventh Circuit held that evidence recovered during the execution of a facially valid warrant was only subject to suppression if the magistrate judge abandoned his "detached and neutral" role, or if the officers were "dishonest or reckless" in preparing their affidavit or could not have reasonably believed that probable cause existed to execute the search. *Id.*

Brown argues that the rule of *Richards v. Wisconsin* was so obviously on point here that this court could not have been neutral by ignoring it, and the agents must have known that it applied here, notwithstanding the court's erroneous authorization of no-knock entry. I disagree. Although I have determined in this report and recommendation that *Richards* should have controlled, this is not so obvious or indisputable as to call my neutrality into question; as noted above, some other court could reach the opposite conclusion and continue to allow no-knock entry in identical circumstances.

For the same reasons, it could not have been obvious to Agent Hanson that she was not entitled to rely on this court's authorization of no-knock entry. Her fear of encryption

was genuine, she provided a factual basis for it in her affidavit, then she let the court make its decision. It was not her job to double-check this court's authorization against Supreme Court precedent. As the government points out, this court has previously issued "no-knock" warrants in similar cases; in at least one of them, in which Agent Hanson participated on November 10, 1998, the suspect was found at the keyboard of his computer with an open encryption program displayed on his monitor.[4]

The bottom line is that the reasonableness of the "no-knock" warrant was a close call, and the agents relied on my authorization in good faith. Thus, the physical evidence should not be suppressed notwithstanding the warrant's incorrect "no-knock" provision.

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[4] This court found the following facts at an evidentiary hearing in *United States v. Anderson*, 00-CR-61-C:

> As Agent Docken approached Anderson, he saw two "windows" open on the computer monitor screen: the standard "My Computer" window and a window for the "Best Crypt" computer file encryption program. Agent Docken, a computer specialist with Customs, knew that Best Crypt was capable of instantly encrypting all of Anderson's computer files so as to make them permanently indecipherable to Docken and his colleagues. Since a computer user only opens a program if he intends to use it, Agent Docken assumed Anderson was using Best Crypt.
>
> Docken walked behind the chair in which Anderson was seated, reached around Anderson's right side and asked Anderson to remove his hand from his computer's trackball. As he made his request, Agent Docken gently lifted Anderson's hand off of the mouse ball and told him to stop using the computer. . . . Agent Docken did not yet know to what extent Anderson had encrypted his data with the Best Crypt program. Since the window was still open, Agent Docken asked Anderson to disclose his pass phrase for Best Crypt. Anderson responded that he would rather not say.

Report and Recommendation at 5.

Apart from this, the doctrine of inevitable discovery militates against suppression. Here, the agents inevitably would have seized the evidence from Brown's residence even if they had announced their presence prior to entry. Therefore, the fact that they may have–in good faith–entered improperly does not warrant suppression. The exclusionary rule depends on causation. *See United States v. Jones*, 214 F.3d 836, 838 (7th Cir. 2000). In *Jones*, police executed a valid search warrant on the defendant's apartment. When they arrived at the apartment, the police noticed that the door was ajar; even so they battered down the open door with a ram and threw a "flash-bang device"[5] into the apartment.

The Seventh Circuit agreed with the defendant that the police's *method* of entry had been unreasonable. However, the court denied defendant's motion to suppress evidence because the police had acted on a valid warrant; therefore, the evidence inevitably would have been seized. *Id.* at 839. Further, the court held that the defendant could not argue that he would have destroyed the evidence but for the officer's unreasonable manner of entry. *Id.*

Here, the search warrant for Brown's home was valid except for the "no-knock" authorization. Therefore, the agents inevitably would have obtained the physical evidence in Brown's residence even if they had knocked and announced prior to entry. As noted in Section III below, Brown wasn't even in the house at the time the agents forced entry (he was in his driveway on the other side of the house). Therefore, the most likely scenario if

[5] A law enforcement euphemism for a small bomb.

the agents had knocked and announced is that no one would have answered, and the agents would have forced entry anyway.[6]

Taking all of this into account, I find no basis to grant Brown's motion to suppress on the ground that the no-knock entry was unconstitutional.

B. Overbreadth of the Warrant

Brown also challenges the search warrant as overbroad. Brown objects to the warrant authorizing seizure of "child erotica or information pertaining to an interest in child pornography or child erotica," since this material is not, by itself, unlawful.

While Brown's premise is correct as far as it goes, it falls short because the warrant did not designate the questioned materials in isolation. This is the phrase actually used in the search warrant:

> [items] which may be, or are used to visually depict child pornography, child erotica, information pertaining to the sexual interest in child pornography, sexual activity with children or the distribution, possession or receipt of child pornography, child erotica or information pertaining to an interest in child pornography or child erotica.

Search Warrant, Attachment A (attached to dkt. 17). It is clear that the warrant is aimed at child pornography, and that any references to "child erotica" must be interpreted in that context. As the government notes, the Seventh Circuit has upheld the specific language used

[6] There was passing reference at the evidentiary hearing to the presence of a child in the back of the house. It is possible that this child would have answered a knock and allowed the officers in, which would have led to the same outcome: the computer would have been lawfully seized.

in this warrant against an overbreadth challenge because the items listed "were qualified by phrases that emphasized that the items sought were those related to child pornography." *See United States v. Hall*, 142 F.3d 988, 995, 996-97 (7th Cir. 1998).

As the government further notes, Brown has not alleged that any questionable seizure actually occurred. If one had, then *that* evidence would be suppressed, but the rest would not. *See United States v. Buckley*, 4 F.3d 552, 558 (7th Cir. 1993)("The seizure of uncontested evidence remains valid and is severable from any invalid search"); *see also United States v. George*, 975 F.2d 72, 79 (2nd Cir. 1992); *United States v. Ford*, 184 F.3d 566, 578 (6th Cir. 1999). Accordingly, there is no basis to grant Brown's motion to suppress.

III. Motion To Suppress Statements

Brown has moved to suppress statements he made to the agents on the day his home was searched. Brown contends that he was in custody, and therefore should have been advised of his rights under *Miranda* before the agents questioned him. I held an evidentiary hearing on this motion on February 7, 2001. Having heard and seen the witnesses testify, I find the following facts:

A. Facts

On the morning of September 13, 2000, the U.S. Customs Service and the Beloit Police Department executed the search warrant discussed in Section II of this report and

recommendation. At the pre-search briefing Agent Hanson announced that although Brown was an investigative target, he was not to be arrested and he should be allowed to leave if agents encountered him at his residence.

A convoy of vehicles then drove to Brown's residence, located on a corner lot. Some agents (including the entry team) parked in front and headed for the main entrance; others, including Special Agents John Heyer and Paul Manke, turned down the side street toward the house's garage and driveway. Agent Manke parked the unmarked car sloppily, partially blocking Brown's driveway. Even so, there was still room to maneuver into or out of the driveway.

Agents Heyer and Manke noticed an occupied car running in Brown's driveway. They approached on foot and the driver exited his vehicle to meet them. Agents Heyer and Manke were in street clothes wearing windbreakers with a gold badge on the front and "Police" or "Customs" emblazoned on the back. Although both agents were armed, neither displayed his weapon. In response to the agents' inquiry the man identified himself as Frank Brown. From where the three men stood, it was obvious that marked police cars were congregating in front of Brown's house. Although the entry team was around the corner busting down the front door to Brown's house with a ram at approximately the same time, this could not be seen or heard from the driveway.

Brown asked the agents why they were there. Agent Heyer identified himself as a federal agent and stated that they had come to execute a search warrant for Brown's home.

At this point, one of the agents patted down Brown for weapons. The agents did not handcuff Brown or otherwise restrain his movement. Agent Heyer asked Brown if he had any idea why the officers might be executing a search warrant at his house. Brown responded that he thought he knew what they sought. Agent Heyer asked Brown to share his thoughts. Brown did so, making a driveway confession as the men stood around.

Agent Heyer then asked Brown if he wanted to be present during the search of his home. Brown responded that he did. The three men walked into Brown's house, where other agents already had begun searching. (The record does not reflect what happened to the child in the car at this time.)

Brown and the agents entered the dining room whence Agent Hanson directed operations. Agent Hanson told Brown that he was not under arrest. Agent Hanson asked Brown if he would answer some questions and Brown agreed. Brown, Agent Hanson and Agent Heyer sat down and talked. A Beloit police officer may have come and gone from the room at various times.

Brown answered Agent Hanson's questions, then acceded to her request to prepare a written statement. Agent Hanson asked Brown to write the phrase "I was advised I was not under arrest, I was free to leave, and I make this statement voluntarily." Brown did so, bracketing this statement in quotation marks.

B. Analysis

A person being questioned by law enforcement officers is entitled to *Miranda* warnings if the restraints on his freedom of movement are of the degree associated with formal arrest, even if no arrest takes place. *Stansbury v. California*, 511 U.S. 318, 322 (1994); *United States v. Scheets,* 188 F.3d 829, 841 (7th Cir. 1999). The determination is objective: a court looks at all the circumstances to determine how a reasonable person in the suspect's position would have understood his situation. *Scheets,* 188 F.3d at 841.

In *United States v. Burns*, 37 F.3d 276 (7th Cir. 1994), the Seventh Circuit decided that *Miranda* warnings were not necessary when police questioned a suspect during the execution of a search warrant for her hotel room, even where the police denied the suspect's numerous requests to depart while the agents searched. *Id.* at 280-81. Such restraint, the court decided, was not of the degree associated with a formal arrest. *Id.* In *United States v. Saadeh*, 61 F.3d 510 (7th Cir. 1995), the court reached the same conclusion where DEA agents forced their way with a battering ram into a car repair shop, herded the building's occupants into the garage area, patted them down, ordered them to empty their pockets, then questioned the defendant prior to placing him under formal arrest. *Id.* at 515, 519-20.

Here, but for a quick pat down in the driveway, the entire interaction between Brown and the agents could be characterized as a consensual encounter. The agents did not restrain Brown or block his car. They did not order him to change his plans and accompany them back into his house. Instead, they gave him a choice to be present while they searched his

home. Brown chose to stick around, even after Agent Hanson explicitly advised him that he was not under arrest and that he was free to leave. The record does not reflect whether Brown was subsequently arrested, but it is fair to surmise from the lack of evidence on this point that Agent Hanson kept her promise and did not arrest Brown after interviewing him. The totality of circumstances show that Brown was never subjected to restraints on his movement that a reasonable person would equate with formal arrest. Therefore, he was not in custody and was not entitled to *Miranda* warnings. His motion to suppress his statements to the agents must be denied.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny all aspects of defendant Frank Brown's motions to dismiss the indictment and to suppress evidence.

Entered this 16th day of March, 2001.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge