IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION and ORDER

Plaintiff,

06-CR-193-C-01

v.

ERIC A. OLSON,

Defendant.

- -

On February 14, 2007, defendant Eric A. Olson pleaded guilty to one count of knowingly using a child to engage in sexually explicit activity for the purpose of making a video in violation of 18 U.S.C. § 2251(a) and one count of possessing visual depictions of a child engaging in sexually explicit conduct in violation of § 2252(a). He reserved the right to challenge the constitutionality of both statutes and the validity of the search that uncovered evidence of the crimes to which he pleaded. (At the same hearing, defendant abandoned his motion challenging the October 6, 2006 search warrant and his motion to dismiss count one for its failure to provide a specific date on which his crimes were allegedly committed. Therefore, I will dismiss those motions as moot.)

Now before the court are defendant's remaining motion to dismiss counts one and

two of the indictment and motion to suppress all evidence recovered from the July 19, 2006 search of his home. Defendant's challenges to the constitutionality of 18 U.S.C. §§ 2251(a) and 2252(a) are foreclosed by the decision of the United States Court of Appeals for the Seventh Circuit in United States v. Angle, 234 F.3d 326 (7th Cir. 2000), cert. denied, 533 U.S. 932 (2001). Consequently, the motion to dismiss must be denied. Defendant's motion to suppress will be denied as well because the affidavit submitted in support of the July 19, 2006 search warrant was sufficient to justify issuance of the warrant.

From the search warrant and the parties' briefs, I draw the following facts.

FACTS

A. Search Warrant

On July 19, 2006, United States Magistrate Judge Theresa Owens issued a search warrant authorizing federal agents to search defendant's home. Her finding of probable cause was based on the affidavit of FBI Special Agent Keith Mammoser, who averred that in April and July 2006, a fugitive named Jerrod Lochmiller provided information to the FBI about a web site he had administered, whose members traded pornographic images of children. The web site contained a feature that allowed members to trade messages privately; however, Lochmiller installed monitoring software that permitted him to view these "private" conversations.

1. Lochmiller website

On November 22, 2005, an FBI Agent in California, Douglas Macfarlane, logged onto the website in an undercover capacity, using a screenname and password provided to him by Lochmiller. The website contained a message board, where users could post messages for others to view. Many of the posted messages contained links to other websites storing pictures and video files of images that appeared to be child pornography.

On several occasions, Macfarlane logged onto the website and downloaded files that contained pornographic images of minors. Often, these files were encrypted and often they were split into smaller pieces. To view the videos and images, Macfarlane used special software that enabled him to decrypt and piece together the fragmented images.

To become a member of the website users were required to register. Registration was free and required only an email address. Registered users could not access all portions of the message board immediately, however. The message board contained several sub-message boards, including the "NN Gallery" (which contained pictures of non-nude, i.e., clothed minor females), the "N Gallery" (which contained links to nude pictures of minor females not engaged in sexual contact with other persons) and a "Private Gallery" (which contained links to pictures and movies of naked minor females engaged in explicit sexual activities with other persons). The main message board contained a post written by Lochmiller titled "Simple Rules—Read This!" The post included the following text:

Please be active and contribute.

Those members who do not will lose their account.
New members your FIRST post should be a file sharing post in the NN Gallery.
Lurkers WILL lose their account in ONE HOUR after logging in unless you do the above.
Members who have not shared in 30 DAYS WILL BE BANNED.
Thank members when you [download] a file they have shared.

Mcfarlane viewed another post by Lochmiller titled :How to access the N Gallery." This post contained the following information:

> If you would like to have access to the N Gallery, PM surfsup or Lovelyday[1] (PICK 1 DO NOT PM BOTH OF US), with a link to the file you will share and a preview picture link.
> Keep in mind those who do not send a preview picture link, or at the very least a very detailed description of the file, will never get it reviewed.
> We do not have time to [download] every file and will rely on preview and description to get you added to the group quickly.
> Do NOT PM a file for review if you have "lurker" status under your screen name (less than 5 posts) wanting access to the N Gallery.
> Do NOT send a site pass as your file for review. A pass is NOT a file share.
> Once you have been given access to the N Gallery, immediately upon entering post the link that you sent to gain access . . .
>
> Keep in mind this access is only good for 30 days, and if you have not made another file sharing post before 30 days has passed you will lose your access.
> Those who only make 1 post every 30 days to just keep access and are not contributing in the other forums and thanking members may lose access permanently at anytime . . . .

Another post from Lochmiller contained in the main message board was titled "NUDE Gallery Forum RULES & POSTING . . . EVERYONE MUST READ" contained the following information:

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[1] "Lovelyday" was Lochmiller's screen name.

READ and FOLLOW these RULES please
NO direct resolving of N images on the forum please
(The following will get you banned immediately)

* * *

-NO posts of girls over 16

2. Defendant's connection to the Lochmiller website

On May 2, 2006, FBI special agent Marc Botello logged onto the website using a screen name and password Lochmiller had provided. In the Private Gallery, Botello found a message titled "short vid & a few pics (different girls)" posted by a user with the screen name djjohn1. The message contained links to two other websites: one containing 16 photographs and the other containing a video. FBI agents recorded the images and the video and sent them to Special Agent Mammoser.

Agent Mammoser reviewed the files. According to Mammoser's affidavit, he

> played the video file from the web page and found that it is approximately 23 seconds long. The video is titled 9Y_COUNTRY_GIRL. The video begins with the text, "The following is rated 'C' for cute." The video then contains the words "A day in the country." The video then depicts a female who appears to be under the age of 18 years old with her blue jeans down around her thighs and a red t-shirt pulled up, exposing her vagina which appears prepubescent. The video is taken from behind the girl as she bends forward. The video contains no sound. The girl is standing on a wood slatted floor which appears to be similar to a pallet. The video ends with the words "the end" appearing on the screen.

The 16 photographs found on the second web site depicted a "white female, well under the age of 18." Eight of the photographs show the girl clothed or in various states of undress,

but are not sexually explicit. The remaining eight photographs show the child totally naked exposing her genitalia, buttocks and chest. Of these eight images, six show the girl in sexually explicit poses, with fingers placed on her vagina, bent over exposing her genitalia and lying on a bed, displaying her vagina.

Agent Mammoser discovered that the IP address for the web site hosting the images was operated by CenturyTel Internet Holdings. From that company, he learned that at the time the images were posted, the web site hosting them was assigned to defendant, who received his internet service through his home telephone line. Agent Mammoser confirmed that defendant resided at the address provided by CenturyTel by checking with the Department of Motor Vehicles, the Superior Police Department and the local postal carrier.

3. Execution of the warrant

After the warrant was signed by the magistrate judge on July 19, 2006, law enforcement officers searched defendant's home and found a videotape of defendant engaging in sexual activity with a child, later identified as his minor daughter.

B. Indictment

On October 11, 2006, the grand jury returned a two-count indictment charging defendant with

knowingly us[ing] a minor to engage in sexually explicit conduct for the purpose

> of producing a visual depiction of such conduct, namely a Maxwell GX Metal 120 8mm MP video tape, using material which had been shipped in interstate and foreign commerce, specifically the . . . videotape.
>
> Defendant was charged also with
>
> knowingly possess[ing] a computer hard drive and DVDs containing visual depictions that were produced using materials which had previously been shipped in interstate and foreign commerce, specifically said hard drives and DVDs, and the production of such visual depictions involved the use of minors engaging in sexually explicit conduct, and the depictions are of such conduct.
>
> On February 14, 2007, defendant pleaded guilty to both counts.

OPINION

A. Motion to Dismiss Counts One and Two of the Indictment

Defendant contends that the court should dismiss both counts of the indictment because the federal statutes on which they rest, 18 U.S.C. § 2251(a) and 18 U.S.C. § 2252(a), are unconstitutional on their face and as applied to him. Defendant contends that both statutes exceed Congress's power to legislate under the commerce clause.

The commerce clause permits Congress to regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995). The parties agree that both §§ 2251(a) and 2252(a) attempt to regulate activities that substantially affect interstate commerce. In analyzing the constitutionality of § 2252(a)(4)(B), courts need not determine whether a defendant's activities

substantially affect interstate commerce, but whether Congress could have a rational basis for concluding that they did. Gonzales v. Raich, 545 U.S. 1, 22 (2005); Angle, 234 F.3d at 337 ("[O]ur task is to determine whether Congress could have had a rational basis for believing that the intrastate possession of child pornography has a substantial effect on interstate commerce; and, further, that the regulatory means chosen were "reasonably adapted to the end permitted by the Constitution.")

The two statutes at issue in this case ban the possession and production of child pornography recorded on media that have traveled at any time in interstate commerce. Specifically, § 2251(a) prohibits any person from using "any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means . . . ." Similarly, § 2252(a)(4)(B) prohibits any person from

> knowingly possess[ing] 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction . . . which was produced using materials which have been mailed or so shipped or transported [in interstate commerce] if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct . . . .

It is undisputed that defendant did not disseminate the sexually explicit videotape he made of himself and his minor daughter. Therefore, the only connection between his possession of the video and interstate commerce is the fact that the blank videotape was produced and

manufactured outside the state of Wisconsin. Defendant contends that the connection is too attenuated to justify the application of either § 2251(a) or § 2252(a) to his behavior.

As an initial matter, defendant concedes that his challenge to § 2252(a)(4)(B) is barred by the court of appeals's decision in Angle, 234 F.3d 326, in which the court considered whether Congress exceeded its power under the commerce clause by criminalizing the intrastate possession of child pornography recorded on blank media that had traveled previously in interstate commerce. Citing United States v. Rodia, 194 F.3d 465, 473 (3rd Cir. 1999), the court of appeals expressed "doubt[] whether § 2252(a)(4)(B)'s jurisdictional element . . . guarantees that the activity regulated (intrastate possession of child pornography) substantially affects interstate commerce." Angle, 234 F.3d at 337. Nevertheless, the court affirmed the statute's constitutionality by finding that it was part of a regulatory scheme reasonably related to diminishing the interstate market for child pornography. The court explained:

> [The] contention that intrastate possession of child pornography has little or no bearing on interstate commerce ignores the interstate demand for child pornography which Congress took into consideration in enacting the statutory scheme under § 2252. For instance, Congress found that "child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale,' and 'that such prostitution and the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce." There can be no debate that interstate trafficking in child pornography has an effect on interstate commerce. However, Congress amended § 2252 in late 1988 to include the clause at issue here, in large part,

> to close a loophole in the original regulatory scheme which was being undercut by the child pornographers who continued to manufacture their own pornography intrastate.

Angle, 234 F.3d at 337 (internal citations omitted). Finding that "Congress could have rationally believed that intrastate possession of child pornography bears a substantial relationship to interstate commerce," the court of appeals upheld the validity of § 2252(a)(4)(B) as applied to intrastate possession of child pornography as "an essential part of a larger regulation of economic activity that arises out of or is connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Id. (citing Lopez, 514 U.S. at 561).

Defendant argues that Angle was wrongly decided, but this court lacks the authority to ignore Seventh Circuit precedent. (Moreover, I note that in upholding the validity of § 2252(a), the Seventh Circuit follows the majority of circuits to have considered this question. See, e.g, United States v. Maxwell, 386 F.3d 1059-1060 (11th Cir. 2006); United States v. Mugan, 441 F.3d 622, 630 (8th Cir. 2006); United States v. Holston, 343 F.3d 83 (2d Cir. 2003); United States v. Kallestad, 236 F.3d 225 (5th Cir. 2000); but see United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003).) Much ink has been spilled on the question whether Congress has power to prohibit through § 2252(a)(4)(B) the intrastate possession of child pornography that has not entered the stream of interstate commerce. Although more could be said, there is little reason to do so when the Seventh Circuit has

clearly stated its position on the subject. Defendant has preserved his argument for appeal; here in the district court, his motion to dismiss count two must be denied.

The Court of Appeals for the Seventh Circuit has never addressed a direct challenge to the constitutionality of § 2251(a); however, there is no reason to believe that the arguments rejected in Angle in the context of a challenge to § 2252(a) would succeed in a challenge to § 2251. Courts that have addressed such challenges have rejected them uniformly, often citing cases addressing § 2252(a). See, e.g., United States v. Smith, 459 F.3d 1276, 1285 (11th Cir. 2006); United States v. Morales-de Jesús, 372 F.3d 6, 17 (1st Cir. 2004); United States v. Galo, 239 F.3d 572 (3d Cir. 2001); United States v. Buculei, 262 F.3d 322 (4th Cir. 2001). If Congress has a rational purpose for regulating the market in child pornography by prohibiting the intrastate possession of such material on media that have traveled in interstate commerce, it has an even more obvious interest in prohibiting the intrastate manufacture of child pornography on media that have traveled in interstate commerce. Because I find that the reasoning of Angle applies with equal force to defendant's commerce clause challenge to the constitutionality of § 2251(a), defendant's motion to dismiss count one of the indictment will be denied.

B. Motion to Suppress Evidence from Search Warrant Executed July 19, 2006

A court that is asked to issue a search warrant must determine whether probable cause

exists by making a practical, common-sense decision: Given all the circumstances, is there a fair probability that contraband or evidence of a crime will be found in a particular place? United States v. Walker, 237 F.3d 845, 850 (7th Cir. 2001) (citing Illinois v. Gates, 462 U.S. 213, 238 (1982)). To uphold a challenged warrant, a reviewing court must find that the affidavit provided the issuing court with a "substantial basis" for determining the existence of probable cause. Reviewing courts "will not invalidate a warrant by interpreting the affidavits in a hypertechnical rather than a common sense manner." Id. Put another way, a court's determination of probable cause should be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the court reasonably could conclude that the items sought to be seized are associated with the crime and located in the place indicated. Doubtful cases should be resolved in favor of upholding the warrant. United States v. Quintanilla, 218 F.3d 674, 677 (7th Cir. 2000).

Probable cause exists when the circumstances, considered in their totality, induce a reasonably prudent person to believe that a search will uncover evidence of a crime. United States v. Mykytiuk, 402 F.3d 773, 776 (7th Cir. 2005). Probable cause is a fluid concept that relies on the judgment of the officers based on all the facts and circumstances known to them. In determining whether suspicious circumstances rise to the level of probable cause, officers are entitled to draw reasonable inferences based on their training and experience.

United States v. Reed, 443 F.3d 600, 603 (7th Cir. 2006). Although the existence of possibly innocent explanations for conduct is part of the totality of circumstances review, it does not by itself negate probable cause. United States v. Funches, 327 F.3d 582, 587 (7th Cir. 2003). "Probable cause requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity." United States v. Roth, 201 F.3d 888, 893 (7th Cir. 2000); see also United States v. Ramirez, 112 F.3d 849, 851-52 (7th Cir. 1997)("all that is required for a lawful search is *probable* cause to believe that the search will turn up evidence or fruits of crime, not certainty that it will") (emphasis in original).

The affidavit upon which the magistrate judge relied in this case is replete with probable cause justifying the issuance of the search warrant. Nevertheless, defendant contends that the affidavit is insufficient for two main reasons: (1) there are no facts establishing that the persons pictured in the allegedly sexually explicit poses are actually minors; and (2) there is no nexus between his residence and the images found on the web sites to which his message board post linked so as to suggest that the materials sought will be found at his home.

Defendant contends that Special Agent Mammoser alleged only that the females in the pictures and video he viewed "appeared to be prepubescent." Because Mammoser did not provide the factual basis for his conclusion, defendant contends, his affidavit was insufficient to establish probable cause to believe that the images depicted children. I

disagree.

In his affidavit, Mammoser describes the video, titled "9Y_COUNTRY_GIRL," as showing a girl's prepubescent vagina. He describes the photographs as depicting a prepubescent girl "well under the age of 18." Although the magistrate judge was not presented with detailed facts explaining why the detective believed the girls shown in the images were prepubescent, it does not take a pediatrician to know the difference between a mature woman and a child. Defendant offers many explanations why a woman might have the appearance of a much younger female (she's model thin, she shaves her pubic hair, etc.); however, the detective was required only to establish probable cause that the person depicted in the images was a minor. Common sense indicates that with or without special training, most people recognize that girls who "appear" prepubescent normally *are* prepubescent. Consequently, the special agent's averment that the females in the photographs and video "appeared" prepubescent provided probable cause for believing they were little girls.

As for a nexus between the contraband images and defendant's residence, contrary to defendant's assertions, Mammoser's affidavit links defendant not only to the message board posting by djjohn1 that contained links to the video and photographs, but to the websites on which the video and photographs were posted. According to the affidavit, Mammoser verified from defendant's internet service provider that IP addresses for the web sites containing the pornography were assigned to defendant, who accessed the internet

through his home telephone line. From these facts, the magistrate was free to conclude that there was a substantial chance that a search of plaintiff's residence and of his home computer would yield evidence of his participation in the distribution of child pornography. Defendant's motion to suppress will be denied.

ORDER

IT IS ORDERED that

1. Defendant's motion to dismiss counts one and two of the indictment, dkt. #22, is DENIED.

2. Defendant's motion to suppress the search warrant issued July 19, 2006, dkt. #23, is DENIED.

3. Defendants' motion to dismiss count one of the indictment, dkt. #21, and motion to suppress search warrant issued October 6, 2006, dkt. #24, are DENIED as moot.

Entered this 30th day of April, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge