UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case No. 3:05-00185**
	)	**Judge Trauger**
TIMOTHY RYAN RICHARDS	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE CONVICTIONS SUBJECT TO STATUTORY 15-YEAR MINIMUM MANDATORY SENTENCING AS VIOLATIVE OF EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Defendant, **Timothy Ryan Richards**, by and through his undersigned counsel, respectfully submits this Memorandum of Law in support of his Motion to Vacate Convictions as Violative of the Eighth Amendment's Prohibition against Cruel and Unusual Punishment.

Background

On October 10, 2006, Defendant Richards began a jury trial on Counts 1 through 26 of the Third Superseding Indictment. (Docket Entry 180). On October 26, 2006, the jury reached a verdict finding Defendant Richards guilty of Counts 1, 2, 3, 11,16, 19, 20, 21, 22, 23, and 24, and acquitting him of Counts 4, 5, 6, 7, 9, 12, 15, 18, 25, and 26.[1] (Docket Entry 203). Counts 11 and 22 charged Defendant Richards with violations of 18 U.S.C. § 2257 (records keeping requirements).

The government's evolving theory of prosecution in this case arises out of three separate courses of conduct clearly outside the heartland of typical child pornography cases. The facts and circumstances present here represent the rare case in which a threshold comparison of the crime committed and the sentence to be imposed leads to an inference of gross disproportionality. Far

[1]At various stages of the trial and upon motion either by government or the defendant, the Court dismissed Counts 8, 10, 13, 14, and 17. (Docket Entries 176, 189 & 196).

from the "Internet - kid - exploitation" paradigm associated with the typical child pornography case, Mr. Richards' offensive conduct included the filming of himself and his then-boyfriend, Patrick Lombardi, engaging in consensual sex and related images[2]; the appearance of the Defendant's childhood friend, Chris Billings, a/k/a "Tory," in a sexually explicit video made by and at Billings' request on or immediately before Billings' eighteenth birthday[3]; and, Richards' alleged involvement in a website created by Justin Berry and the dubious circumstances surrounding Berry's recruitment of a 14-year old performer prior to Richards' involvement with the site.

Defendant Richards was arrested on September 22, 2005 and charged by Criminal Complaint with child pornography offenses relating to JustinsFriends.com - a website featuring Justin Berry. (Docket Entries 3 & 5). From September 22, 2005 to September 13, 2006 (less than 1 month prior to trial), Defendant Richards was charged exclusively with conduct relating to a single website, JustinFriends.com (Docket Entry 115, Second Superseding Indictment). Specifically, during that year, Defendant Richards faced charges rooted in his involvement with the site and the production of JustinsPreview2 - a video advertisement montage containing partial footage from a child pornographic video (the "Taylor video") produced by Justin Berry on June 9, 2005. The return of the Third Superseding Indictment on September 27, 2006 represented the government's attempt to salvage a prosecution that had been severely compromised by the duplicity of its once star immunized witness, Justin Berry. (Docket Entry 157). With the return of this indictment, the

[2] Born in 1981 and 1986, respectively, Mr. Richards and Mr. Lombardi engaged in a legal, consensual relationship from 2000 to 2004. A relationship that was known to and approved by both sets of parents. At all points in time that Patrick Lombardi was under the age of 18, Mr. Richards was under the age of 21.

[3] The jury rejected the video as "child pornography."

government's focus shifted to vindicating conduct involving a boyfriend (Lombardi) and a classmate ("Tory") that, frankly, standing alone would not have survived an "indictment review committee" and would probably have been declined for prosecution.

As the trial proof clearly demonstrated, Justin Berry was an adult at the time that he recruited a minor (Taylor) to star in a mutual masturbation video with him. The video was filmed by Berry at Greg Mitchel's home in Roanoke, Virginia using a webcam operated by Berry. Justin Berry was the perpetrator of that particular crime.[4] It is clear from the plain language of the Third Superseding Indictment (Docket Entry 157), as illuminated by the government's trial theory, that Justin Berry was a conspirator in the crimes relating to the JustinFriends website.

Because Justin Berry did not testify, the jury was not given the context or history of the JustinFriends website - other than through Defendant Richards' testimony. The untold back-story included information about Berry's longstanding involvement with the site dating back to the Summer of 2004 and the site's sudden dormancy in early 2005. Then, in May and June of 2005, Justin Berry began producing new material for the site and began redesigning the site himself. Berry did not recruit Defendant Richards to assist him (initially as contract labor) until June 17, 2005, when he requested Defendant Richards' assistance with the HTML code for the site.

Argument

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. A punishment is cruel and unusual if it is "'excessive' in relation to the crime committed." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). A punishment is unconstitutionally

[4] It was uncontested at trial that Defendant Richards had nothing to do with the making of the original "Taylor video."

excessive if it either "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592.

What constitutes cruel and unusual punishment changes in recognition of the "evolving standards of decency that mark the progress of a maturing society." *Penry v. Lynagh*, 492 U.S. 302, 331-332 (1989). In determining whether a sentence set by the legislature is cruel and unusual, Justice Kennedy's concurrence in *Harmelin v. Michigan*, 501 U.S. 957, 996-1009 (111 SC 2680, 115 LE2d 836) (1991) (Kennedy , J., concurring), is instructive**.** Under Justice Kennedy's concurrence in *Harmelin*, as further developed in *Ewing v. California*, 538 U.S. 11, 29-30 (123 SC 1179, 155 LE2d 108) (2003) (O'Conner, J., joined by Rehnquist, C.J., and Kennedy, J. (Plurality opinion)), in order to determine if a sentence is grossly disproportionate, a court must first examine the "gravity of the offense compared to the harshness of the penalty" and determine whether a threshold inference of gross disproportionality is raised. *Ewing*, 538 U.S. at 28; *Harmelin*, 501 U.S. at 1004-1005. In making the determination, courts must bear in mind the primacy of the legislature in setting punishment and seek to determine whether the sentence furthers a "legislative penological goal" considering the offense and the offender in question. *Ewing*, 538 U.S. at 29. If a sentence does not further a legislative penological goal, it does not "reflect[] a rational legislative judgment, entitled to deference," and a threshold showing of disproportionality has been made. If this threshold analysis reveals an inference of gross disproportionality, a court must proceed to the second step and determine whether the initial judgment of disproportionality is confirmed by a comparison of the defendant's sentence to sentences imposed for other crimes within the jurisdiction and for the same crime in other jurisdictions. *Harmelin*, 501 U.S. at 1004-1005 (Kennedy, J., concurring).

Turning to the threshold inquiry of disproportionality as developed in *Harmelin* and *Ewing*, considering the nature of Richards' offense, a 15-year minimum mandatory sentence does not further a legitimate penological goal. Surely, society's views regarding sexual activity between a willing teenage participant and a slightly older partner in a parentally sanctioned relationship (in the case of Messrs. Lombardi and Richards) have 'evolved' thereby rendering the spectre of 15-year minimum mandatory punishment cruel and unusual. Stated in the language of *Ewing* and *Harmelin*, a 15-year minimum sentence for young couples (within four years of age of each other) who film themselves in sexual situations is grossly disproportionate for that crime.

Interestingly, the *Model Penal Code* has adopted a provision de-criminalizing oral or vaginal sex with a person under the age of sixteen years old where that person willingly engaged in the acts with the other person who is not more than four years older.[5] The commentary to the *Model Penal Code* explains that the criminal law should not target "[sexual experimentation among social contemporaries"; that "[i]t will be rare that the comparably aged actor who obtains the consent of an underage person to sexual conduct . . . will be an experienced exploiter of immaturity"; and that the "more likely case is that both parties will be willing participants and that the assignment of culpability only to one will be perceived as unfair."[6]

A comparison of Richards' proposed minimum mandatory sentence with sentences for other crimes in this State buttresses the threshold inference of gross disproportionality. For example, a defendant who gets in a heated argument and shoving match with someone, walks away to retrieve a weapon, returns minutes later with a gun, and intentionally shoots and kills the person may be

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[5] *Model Penal Code* § 213.3(1)(a) (Official Draft Revised Comments 1980).

[6] *Id.* at 385.

convicted of voluntary manslaughter and sentenced to as little as three years in prison with parole eligibility after the service of 10 months. [7] A person who plays Russian Roulette with a loaded handgun and causes the death of another person by shooting him or her with the loaded weapon may be convicted of reckless homicide and receive a sentence of as little as two years in prison with parole eligibility after the service of 7 months.[8] A person who intentionally shoots someone with the intent to kill, but fails in his aim such that the victim survives, may be convicted of aggravated assault and receive as little as three years in prison with parole eligibility after the service of 10 months.[9] Finally, at the time Richards committed his offense, a fifty-year old man who fondled a fourteen-year-old girl for his own sexual gratification could receive as little as one year in prison,[10] and a person who forcibly raped a woman against her will could be sentenced to eight years in prison.[11] There can be no legitimate dispute that the foregoing crimes are far more serious and disruptive of the social order than a young couple filming consensual sex acts.

Conclusion

Based on the foregoing, Defendant Richards respectfully requests that his convictions on Counts 2, 3, 19 and 23 of the Third Superseding Indictment be vacated as unconstitutional. All of the foregoing considerations compel the conclusion that Richards' proposed 15- year minimum mandatory sentence would be grossly disproportionate to his crime and constitutes cruel and unusual

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[7] T.C.A. § 39-13-21 (*Voluntary Manslaughter*)

[8] T.C.A. § 39-13-215 (*Reckless Homicide*)

[9] T.C.A. § 39-13-102 (*Aggravated Assault*)

[10] T.C.A. § 39-13-505 (*Sexual Battery*)

[11] T.C.A. § 39-13-503 (*Rape*)

punishment under the United States Constitution. Such a ruling would affect only a small number of individuals whose crimes and circumstances are similar to Mr. Richards'.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion was sent, if registered, via the Court's electronic filing system or, if not registered, sent via telefax and deposited in the United States Mail, postage prepaid, to the following:

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This 22nd day of October, 2008.

S/ Peter J. Strianse
PETER J. STRIANSE