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7 UNITED STATES DISTRICT COURT
8
9 CENTRAL DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)

11 Plaintiff,)

12 vs.)

13 IRA ISAACS,)

14 Defendant.)

CR-07-732-GHK

GOVERNMENT'S RESPONSE TO COURT
ORDER REGARDING VULNERABLE
VICTIM SENTENCING ADJUSTMENT

15
16 The United States of America, through the undersigned
17 counsel, submits the following response to the Court's (in
18 Chambers) Order of September 27, 2012 (Dkt. 254) in which the
19 Court set forth its tentative view that the vulnerable victim
20 sentencing adjustment does not apply in this case.

21 While the government's position remains that Ms. Tibbetts
22 and Ms. Gray are simultaneously both "participants" and
23 "victims" for purposes of U.S.S.G. §§ 3B1.1(c) and 3A1.1(b)(1),
24 respectively, the government has concluded for the reasons set
25 forth below that it is unable to meet its evidentiary burden of

1 establishing that either Ms. Tibbetts or Ms. Gray qualifies as a
2 "vulnerable victim" under § 3A1.1(b)(1). Accordingly, the
3 government agrees that the two-level vulnerable victim
4 sentencing adjustment does not apply in this case.

5
6 **I. MS. TIBBETTS AND MS. GRAY ARE SIMULTANEOUSLY BOTH**
7 **PARTICIPANTS AND VICTIMS UNDER THE SENTENCING**
8 **GUIDELINES.**

9 Ms. Tibbetts and Ms. Gray are "participants" under U.S.S.G.
10 § 3B1.1(c). A participant in an offense is "a person who is
11 criminally responsible for the commission of the offense, but
12 need not have been convicted." U.S.S.G. § 3B1.1(c) cmt. n.1.
13 Ms. Tibbetts and Ms. Gray, as well as other employees of
14 Defendant Isaacs, were criminally responsible with respect to
15 Count 1 of the Superseding Indictment. Until their prosecution
16 became time barred, Ms. Tibbetts and Ms. Gray could have been
17 prosecuted by the United States as aiders and abettors for their
18 2004 participation in "Hollywood Scat Amateur No. 7," and
19 "Hollywood Scat Amateur No. 10," with respect to the defendant's
20 crime of engaging in the business of producing and selling
21 obscene matter in violation of 18 U.S.C. § 1466(a). *See United*
22 *States v. Ott*, 982 F.2d 530 (10th Cir. 1992) (unpublished
23 disposition) (by virtue of their participation in obscenity
24 films, defendant's common law wife and "a woman named Judy"
25 could have been charged with aiding and abetting the defendant
in his possession of obscene material with intent to distribute

1 under 18 U.S.C. § and § 1466, thus they were participants under
2 U.S.S.G. § 3B1.1(c)).

3 However, in addition to being participants under U.S.S.G. §
4 3B1.1(c), Ms. Tibbetts and Ms. Gray are also "victims" under
5 U.S.S.G. § 3A1.1. The term "victim" is defined by U.S.S.G. §
6 3A1.1 as any individual who suffers actual or intended harm from
7 either (1) the offense of conviction, or (2) any "relevant
8 conduct" for which the defendant is accountable. U.S.S.G. §
9 3A1.1 cmt. n.2; *see United States v. Haggard*, 41 F.3d 1320, 1326
10 (9th Cir. 1994) (no nexus is required between the identity of
11 the victim and the elements of the crime charged; family members
12 who suffered psychological harm as a result of defendant's lying
13 to them were vulnerable victims even though lying was not an
14 element of any of the crimes defendant was convicted of); *United*
15 *States v. Zats*, 298 F.3d 182, 187 (3rd Cir. 2002) ("the drafters
16 [of Application Note 2 to U.S.S.G. § 3A1.1] obviously intended
17 to define 'victim' to mean anyone hurt by conduct for which the
18 defendant is accountable under § 1B1.3,"); and *United States v.*
19 *Yount*, 960 F.2d 955, 956-58 (11th Cir. 1992) ("the 'vulnerable
20 victim' provision does not require a vulnerable victim who is a
21 victim of the offense of conviction"). "Relevant Conduct" is
22 defined by U.S.S.G. § 1B1.3(a)(1) and (3) as "all acts and
23 omissions conducted, aided, abetted, counseled, commanded,
24 induced, procured, or willfully caused by the
25 defendant . . . that occurred during the commission of the

1 offense of conviction, in preparation of that offense, or in the
2 course of attempting to avoid detection or responsibility for
3 that offense . . . and all harm that resulted from the acts and
4 omissions specified [above] that were part of the same course of
5 conduct or common scheme or plan as the offense of conviction."

6 An individual's willing decision to participate in an
7 offense does not preclude her from being a victim of the offense
8 under the United States Sentencing Guidelines. *See United*
9 *States v. Badaracco*, 954 F.2d 928, 934 (3d Cir. 1992) ("nothing
10 in the Guidelines or in the case law interpreting them precludes
11 a finding that an individual or entity was both a victim and a
12 participant" of an offense under U.S.S.G. § 3B1.1(c)); *see also*
13 *United States v. Angeles-Mendoza*, 407 F.3d 742, 747-48 (5th Cir.
14 2005) (aliens who voluntarily contracted with defendant to be
15 smuggled by him "were 'victims' for purposes of U.S.S.G. §
16 3A1.1(b)(1)"); *United States v. Madden*, 403 F.3d 347, 352 (6th
17 Cir. 2005) (Boggs, C.J., concurring in part and dissenting in
18 part) ("even seemingly willing decisions can leave individuals
19 harmed and, thus, make them vulnerable victims.") (citations
20 omitted); and *United States v. Amedeo*, 370 F.3d 1305, 1317-18
21 (11th Cir. 2004) (drug addict who accepted drugs from defendant
22 was a "vulnerable victim" pursuant to U.S.S.G. § 3A1.1(b)(1)
23 with respect to defendant's conviction for drug distribution).

24 Ms. Tibbetts and Ms. Gray are thus "victims" under U.S.S.G.
25 § 3A1.1(b)(1). Ms. Tibbetts and Ms. Gray suffered harm as a

1 result of acts the defendant engaged in during his commission of
2 the offenses of conviction. The harms suffered by Ms. Tibbetts
3 and Ms. Gray include the ingestion of feces and use of
4 methamphetamine, both of which were supplied by the defendant.
5 *See Jennings v. Bradley*, 2:06-CV-154, 2007 WL 2683530 (W.D.
6 Mich. Sept. 7, 2007) ("Attempting to have [an individual] eat
7 feces presents obvious health risks that cannot be ignored or
8 swept away as de minimus acts."), *aff'd*, 419 F. App'x 594 (6th
9 Cir. 2011); and *United States v. Swafford*, 1:04-CR-138-1, 2008
10 WL 5204064 (E.D. Tenn. Dec. 11, 2008) ("Methamphetamine is a
11 drug which has. . . several long-term health effects for users,
12 including addiction, violent behavior, anxiety, confusion, and
13 insomnia."), *aff'd*, 639 F.3d 265 (6th Cir. 2011). Additionally,
14 Ms. Tibbetts suffered significant psychological harm as a result
15 of the defendant's conduct related to his offenses of
16 conviction. Specifically, Ms. Tibbetts experienced mental
17 anguish for years, feared going out in public, and sought and
18 received professional counseling for her shame, anguish, and
19 fear.

20 Ms. Tibbetts and Ms. Gray are simultaneously both
21 "participants" and "victims" for purposes of U.S.S.G. §§
22 3B1.1(c) and 3A1.1(b)(1), respectively.

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1 **II. THE GOVERNMENT IS UNABLE TO ESTABLISH THAT MS.**
2 **TIBBETTS AND MS. GRAY ARE "VULNERABLE VICTIMS" UNDER**
3 **U.S.S.G. § 3A1.1(b)(1).**

4 Pursuant to the Federal Sentencing Guidelines Manual
5 (November 1, 2011), a "vulnerable victim" is defined as "a
6 person (A) who is a victim of the offense of conviction and any
7 conduct for which the defendant is accountable under § 1.B1.3
8 (Relevant Conduct); and (B) who is unusually vulnerable due to
9 age, physical or mental condition, or who is otherwise
10 particularly susceptible to the criminal conduct." U.S.S.G. §
11 3A1.1, Application Note 2.

12 Ms. Tibbetts and Ms. Gray qualify as victims of conduct for
13 which the defendant is accountable under § 1.B1.3 (Relevant
14 Conduct) for the reasons previously set forth. The sole
15 remaining question is whether the government has met or can meet
16 its evidentiary burden of establishing that Ms. Tibbetts and/or
17 Ms. Gray were unusually vulnerable due to age, physical or
18 mental condition, or who is otherwise particularly susceptible
19 to the criminal conduct.

20 Ms. Tibbetts and Ms. Gray were both severely addicted to
21 methamphetamine at the time the defendant recruited, enticed,
22 induced, instructed, and filmed them, and the defendant not only
23 knew that they were methamphetamine addicts, but exploited this
24 mental and physical vulnerability by promising and providing the
25 women with methamphetamine in an effort to recruit, entice, and
26 induce them to participate in the filming. Yet the government

1 is unable to provide evidence to establish that Ms. Tibbetts'
2 and Ms. Gray's methamphetamine addiction, and the defendant's
3 knowledge and exploitation of their addiction, qualify Ms.
4 Tibbetts and Ms. Gray as "vulnerable victims" for the purposes
5 of U.S.S.G. § 3A1.1.

6 "[I]t is not enough to support a finding of particular
7 susceptibility under § 3A1.1 that the victims are more likely
8 than other members of the general population to become a victim
9 to the particular crime at issue." *United States v. Castellanos*,
10 81 F.3d 108, 110 (9th Cir. 1996). "If the factor that makes the
11 victim vulnerable is not 'unusual for victims of the offense,
12 the § 3A1.1(b) enhancement is not permitted." *United States v.*
13 *Castaneda*, 239 F.3d 978, 981 (9th Cir. 2001); *see also United*
14 *States v. Nielsen*, 694 F.3d 1032 (9th Cir. 2012) (district court
15 applied erroneous legal standard in finding that § 3A1.1
16 enhancement applied when it found that victim was vulnerable in
17 comparison to the general population instead of vulnerable in
18 comparison with typical victims of the offense of conviction).

19 Ms. Tibbetts and Ms. Gray qualify as vulnerable victims
20 only if the government can establish that their addiction to
21 methamphetamine (or perhaps substance abuse generally) was a
22 factor that was unusual for individuals who participate in the
23 making of obscene films. This is something that the government
24 is unable to establish. Whereas the government can establish
25 that methamphetamine addiction was and is unusual for members of

1 the general population, the government is unable to establish
2 that methamphetamine addiction, or any other substance
3 addiction, was or is unusual for individuals who participate in
4 the making of obscene films.

5 Accordingly, because the government is unable to meet its
6 evidentiary burden to establish that Ms. Tibbetts' and Ms. Gray'
7 addiction to methamphetamine was a factor that was unusual for
8 individuals who participate in the making of obscene films, the
9 § 3A1.1(b)(1) enhancement does not apply in the case at bar.

10
11 Respectfully Submitted,

12 /s/

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CERTIFICATE OF SERVICE

I, Michael W. Grant, Trial Attorney with the United States Department of Justice, Criminal Division, hereby certify that the foregoing Government's Response to Court Order Regarding Vulnerable Victim Sentencing Adjustment was filed on November 16, 2012 by CM/ECF which will send electronic copies to counsel for the defendant, Roger Jon Diamond, 2115 Main Street, Santa Monica, California 90405. Also, on November 16, 2012, the Government mailed a paper copy, including all attachments, to the counsel of defendant, Roger Jon Diamond, at 2115 Main Street, Santa Monica, California 90405.

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