

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

UNITED STATES OF AMERICA	:	
	:	NO. 1:06-CR-113
vs.	:	
	:	JUDGE COLLIER/LEE
EARL McELHENEY	:	
	:	

DEFENDANT’S RESPONSE TO COURT’S ORDER OF APRIL 1, 2009

Comes the defendant, Earl McElheney, by and through counsel and addresses the issue that the Court directed the parties to brief in its Order entered April 1, 2009. (Doc. 88). The Government filed its Response and an Addendum to that Response. (Doc. 89 & 91). The defendant’s reply to the Government’s Response is in a separate filing and will not be specifically addressed in this brief.

The Order by the District Court states that there has been considerable litigation in the courts regarding the “deference that should be accorded the federal sentencing guidelines applicable to child pornography cases.” The Court directed both parties to file briefs regarding “whether the applicable sentencing guidelines are indicative of the sentences actually being imposed in these cases.” (Doc. 88). The defendant submits that due to changes in the caselaw, district courts are now departing from the Guidelines in child pornography cases because they find that the child pornography Guidelines are not worthy of the credence typically given to them.

What this Court sees other district courts doing around the country over the last two years in challenging the child pornography Guidelines, is based in what the defendant has argued since the beginning of this case. The defendant has argued that the Guidelines overstate the

offense and dictate a sentence that is greater than necessary. District courts are now finding that the Guidelines are not worthy of the reliability that they have given them in the past. Since Kimbrough and Gall, which were decided after this Court's original sentencing decision, it is clear that district courts do not have to follow the Guidelines when they find that the Guidelines result in ridiculously long sentences and result in guideline ranges that are less reliable than those that are based on an empirical approach. See Kimbrough v. United States, 128 S. Ct. 558, 169 L.Ed. 481 (2007), Gall v. United States, 128 S.Ct. 586, 169 L.Ed. 445 (2007). "The Guidelines for child exploitation offenses were not developed under the empirical approach, but were promulgated, for the most part, in response to statutory directives." United States v. Thomas Gellatly, No. 8:08-cr-50, 2009 WL 35166 at *4 (D. Neb. Jan. 5, 2009). The Guideline ranges of imprisonment that are not tied to empirical evidence are a less reliable appraisal of a fair sentence and may not achieve the 3553(a) objectives. See Kimbrough, 128 S.Ct. at 574-75.

District courts across this country are now discounting §2G2.2 of the Guidelines because of its lack of empirical support. United States v. Michael Phinney, No. 08-CR-260, 2009 WL 425816, at *3 (E.D. Wis. 2009) (explaining why 2G2.2 is "just as flawed as the crack guideline"). "[T]he guideline for child pornography offenses is seriously flawed and is accordingly entitled to little respect." Id. at *4.

History

Before Congress got involved in doing the job of the Sentencing Commission, the Guidelines and enhancements for child pornography offenses were much lower when based on the Sentencing Commission's research and empirical evidence. However, due to Congress's desire to "get tough" on these types of offenses, Congress directed the Sentencing Commission to increase the penalties for these offenses in the 1990s.

[O]ver the objection of the Sentencing Commission, Congress reacting to the erroneous perception that the Sentencing Commission had lessened the penalties for child pornography crimes, again directed the Commission to alter the Guidelines. See 137 Cong. Rec. H6736, H6737 (1991). In doing so, Congress rejected the Sentencing Commission's advice and abandoned the studied empirical approach to child pornography sentencing. See id. at H6738.

United States v. Grinbergs, No. 8:05-cr-232, 2008 WL 4191145, at *6 (D. Neb. Sept. 8, 2008) (outlining the history of the §2G2.2 Guidelines and Congress's influence on the Guidelines as they exist today). Congress directed the Sentencing Commission to increase the base level offense and to add enhancements. Id. The enhancements and greater penalties Congress was wanting imposed were not directed at individuals, like McElheney, who download images from the internet and possessed the images without ever trying to contact any children or distribute the images further. The "amendments to the Guidelines reflect Congressional concerns that 'pedophiles, including those who use the Internet, are using child pornographic and obscene materials to desensitize children to sexual activity, to convince children that sexual activity involving children is normal, and to entice children to engage in sexual activity.'" Id. at *8 (quoting U.S.S.G. App. C., Vol. 2, amend. 592 (Nov. 1, 2000)). "[L]ess than 5% of the defendants affected by the changes [in 2G2.2] fall within the classes of mass producers, repeat abusers, and mass distributors that Congress intended to target for the lengthiest sentences."

United States v. Jose Ontiveros, No. 07-CR-333, 2008 WL 2937539, at *8 (E.D. Wis. July 24, 2008). "[F]or policy reasons and because statutory mandatory minima dictated many terms of

the Guidelines, the Commission departed from past practices in setting offense levels for such crimes as fraud, drug trafficking, and child crimes and sexual offenses. . . . Consequently, the Guideline ranges of imprisonment for those crimes are a less reliable appraisal of a fair sentence.” United States v. Baird, 580 F. Supp.2d 889, 894 (D. Neb. 2008) (citations omitted)(citing Kimrough, 128 S.Ct. 567 & 574)).

Attached to this Brief is the article by Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines, available at http://www.fd.org/pdf_lib/Deconstructing%20the%20Child%20Pornography%20Guidelines%206.10.08.pdf. (Attachment 1). This article gives a thorough history of the child pornography Sentencing Guidelines from 1987 until 2008, and shows the dramatic increases in sentences over the last twenty years. It discusses the changes made by Congress to the Guidelines over the objections of the Sentencing Commission. Where no careful study or review has been allowed, “the assumption of careful study becomes unfounded, and the resulting Guideline is worthy of little respect.” (Attachment 1, p. 26).

Since 1991, the punishment for these offenses has been dramatically and irrationally increased, to the point where today rapists, murderers, and molesters receive lesser sentences than would a man who swaps a few, thirty-year old, pictures of child pornography that were produced before the defendant was even born. Recent changes to the sentencing system, and an increased familiarity with the underlying presumptions of §2G2.2 should persuade and embolden the courts to conclude that unless a defendant was a repeat offender, or a mass distributor, the

Guidelines yield a sentence ‘greater than necessary’ to achieve §3553(a)’s purposes.

(Attachment 1, p. 31-32).

In Phinney, the district court looked at the history of the Guidelines and what the Guidelines sentence for the defendant would have been when the Guidelines were based on empirical evidence and before Congress got involved. Phinney, 2009 WL 425816, *5. We have attempted to do the same. The earliest version of the Sentencing Guidelines that counsel had available was 1990, which is when it appears that Congress began to interfere with the child pornography Guidelines. Under U.S.S.G. §2G2.2 in 1990, McElheney’s base offense level would have been 13 instead of 22, and there would have been two points added to the offense level, rather than 11 points. See U.S.S.G. §2G2.2 (1990) (Attachment 2). Therefore, under the sentencing commission’s empirically based Guidelines the defendant’s total offense level (with 2 points added under §3C1.1 and 2 points subtracted for acceptance of responsibility) would have been a level 15, as opposed to the level 33 under today’s Guidelines. The difference in the Guideline range is that it would have been a range of 18 to 24 months, rather than 135 to 168 months. The district court in Phinney found that an appropriate sentence was one based on the Commission’s initial approach, not on the version molded by Congress’s influence, and sentenced the defendant to 6 months imprisonment followed by 10 years supervised release. Phinney, 2009 WL 425816 at *6.

The enhancements applied in the PSR in McElheney’s case more than triple the Guideline sentence, increasing the low end of the recommended range from 41 months (Level 22) to 135 months (Level 33). Because the internet is the most common means for obtaining child pornography today, virtually every case involves the use of a computer, and thus a two-level

enhancement. Grinbergs, 2008 WL 4191145 at *10. Also, the number of images does not distinguish between a large-scale and small-scale child pornography viewer, which was Congress' purpose of imposing this enhancement. Id. The defendant will address each of the enhancements applied in McElhenny's case in more detail below.

The cases available to defendant on Westlaw from the last two years on child pornography tend to show that downward variances, due to the unreliability of the Guidelines for these offenses, are the common approach now being taken by the district courts. In United States v. Baird, the district court imposed a sentence of 24 months in a child pornography possession case wherein guideline range was 63 to 78 months. Baird, 580 F. Supp.2d at 890. After reviewing the §3553(a) factors and recognizing that it could take into account its own criticism of the fact that §2G2.2 was not developed under an empirical approach, the district court varied downward from the guideline range. Id. at *6-8; see also United States v. McClelland, No.07-40010-01-RDR, 2008 WL 1808364 (D. Kan. Apr. 21, 2008) (imposing sentence of 85 months wherein guideline range was 108 to 135 months for possession of child pornography because, although defendant's criminal history category of III overstated his background, the court believed that there was reason for a downward variance, relying in part on United States v. Baird, 580 F. Supp.2d 889 (D. Neb. 2008)).

In United States v. Matthew William Doktor, the district court imposed a sentence of 36 months in the child pornography possession case wherein the Guideline range was 57-71 months. Doktor, No. 6:08-cr-46-Orl-31DAB, 2008 WL 5334121, at *1 (M.D. Fla. Dec. 19, 2008). The district court gave little explanation for the downward variance other than that it had the discretion to do so after evaluating the §3553(a) factors and that it had the discretion to consider its policy-related criticism of the particular Guidelines. Id.

In United States v. Thomas Gellatly, the district court imposed a sentence of 60 months in a receiving child pornography case wherein the Guideline range was 97 to 121 months. Gellatly, No. 8:08-cr-50, ,2009 WL 35166 at *1 & 11 (D. Neb. Jan. 5, 2009). The defendant had possessed 1,637 images and six videos. Id. at *1. The district court relied on its finding that the child pornography Guidelines do not reflect the Sentencing Commission’s unique institutional strengths and gave them less deference than it would empirically based Guidelines. Id. at 9. The district court even felt that in this case, a case similar to McElheney’s, that a sentence of 60 months was too great. Id. at 10. It stated that if it was not constrained by the “government’s charging decision” by indicting the defendant on receipt of child pornography which carried a mandatory minimum sentence of 5 years, then the court “would be inclined to sentence this defendant to a shorter term of imprisonment that would be more in line with the sentences impose[d] on similar defendants convicted of possession.” Id.

In United States v. Luis Misael Castro-Valenzuela, the Third Circuit affirmed the district court’s imposition of a Guideline sentence, but that case involved a defendant who raped a child, the type of defendant that was actually the type of the defendant who was to be the target of such harsh Guidelines by Congress. No. 07-4818, 2008 WL 5422707 (3rd Cir. Dec. 31, 2008). The district court sentenced the defendant to 220 months imprisonment wherein the Guidelines range was 210 to 240 months for transporting and shipping child pornography in interstate and foreign commerce. Id. at *1. The defendant had recorded himself forcing a seven-year old little girl to engage in violent, sexually explicit conduct and then brought the tape from Chile to the United States. Id. The Guideline range was based on a cross-reference that triggered a base offense level of 32 for an offense that involved forcing a minor to engage in sexually explicit conduct. Id. The Third Circuit noted the defendant’s challenge to the sentence based on Kimbrough but stated that

the “question of whether the Kimbrough reasoning should apply to the child pornography Guidelines applied in this case is not really at issue here.” Id. at 4. This was a case involving the type of conduct that Congress intended to target when it pressed the Sentencing Commission for harsher Guidelines.

Judge Hayden of the District Court of New Jersey relied on and cited many of the other decisions that we cite today in reaching her decision to depart below the Guidelines. She stated that “[t]he foregoing decisions are practical, courageous, and use the research of Troy Stabenow’s article.” United States v. Grober, 595 F. Supp.2d 382, 394 (D. N. J. 2008). She also notes that in the case before her, the Government (Department of Justice) and the Sentencing Commission were asked to give testimony at the sentencing hearing about the Guidelines for child pornography cases but they declined to do so. Id. at 390-91. In Grober, the district court looked at several cases in which defendants that actually molested children received lower sentences than the guideline range that Grober was facing. Id. at 395-96.

In Grober, the district court imposed a sentence of 60 months for a receipt of child pornography offense wherein the Guidelines range was 235 to 292 months. Id. at 384 & 412 The court began its analysis of §3553(a) factors by stating that it “arrives at this point in the sentencing analysis convinced that the typical downloading case, which this one assuredly is, the applicable guideline, §2G.2.2, cannot be given deference and produces an unreasonable sentencing range even before considering the sentencing factors in §3553(a).” Id. at 402. The court stated that Grober fell squarely within the heartland of downloading cases and that it was the designated Guidelines for the typical downloading case that fell outside of the heartland. Id. at 403. After thoughtful and thorough review of the history of §2G.2.2, the district court joined the “thoughtful district court judges whose work has convinced them that the present guideline,

§2G2.2, must be given less deference than the Guidelines traditionally command. The Court's scrutiny of the guideline has led it to conclude that the guideline does not guide." Id. at 412.

After reviewing the §3553(a) factors the district court in Grober concluded that a sentence of 60 months and three years of supervised release was a sufficient sentence, stating that "[f]ive years is not a slap on the wrist: it is 260 weeks, 1825 days." Id. at 412. Grober possessed 1500 images and 200 videos, had no criminal history, and there was no evidence that the defendant harmed any children by any means beyond his voyeuristic behavior. Id. at 404. The district court rejected the Government's argument that there is no need to distinguish from abusers and producers on one hand and consumers on the other. Id. at 404. McElheney's offense and history is comparable to Grober, and thus a comparable sentence should be imposed.

In United States v. Steven Sudyka, the district court sentenced the defendant to 24 months in a possession of child pornography case wherein the guideline range was 135 to 168 months, the statutory maximum was 120 months, and the plea agreement called for a 63 to 78 month sentence. Sudyka, No 8:07-Cr-383, 2008 WL 1766765, at *2 & 10 (D. Neb. Apr. 14, 2008). The court's reasoning for varying downward was based on the fact that the child pornography offenses, like the drug-trafficking Guidelines, were not developed under an empirical approach but were based on statutory directives. Id. at *5. The sentence the court imposed of 24 months was closer to the sentences that were in effect before Congress influenced and changed the Guidelines. Id. at *9.

In United States v. Hanson, the district court imposed a sentence of 72 months in a transportation of child pornography case wherein the guideline range was 210-262 months. 561 F.Supp.2d 1004, 1005 (E.D. Wis. 2008). The district court found that the Guideline sentence was greater than necessary and that the Sentencing Commission's typical empirical approach was

not found in §2G2.2 and granted a downward variance, imposing a sentence that was approximately one third of the guideline range. Id. at 1008; see also United States v. Shipley, 560 F. Supp.2d 739 (S.D. Iowa 2008) (imposing a sentence of 90 months and five years of supervised release in a trading of child pornography case wherein the guideline range was 210 to 240 months because the advice of the Guidelines was “less reliable than in other cases where the guidelines are based on study and empirical data”).

In United States v. Jose Ontiveros, the district court imposed the mandatory minimum sentence of 60 months and lifetime supervision in a receipt of child pornography case wherein the guideline range was 97 to 121 months. Ontiveros, No. 07-CR-333, 2008 WL 2937539, at *1 (E.D. Wis. July 24, 2008). The court found that “the guideline provisions relating to child pornography offenses of this nature do not reflect the kind of empirical data, national experience, and independent expertise that are characteristic of the Commission’s institutional role.” Id. at 8.

In United States v. Harold Stults, the district court imposed a 144 month sentence for possession of child pornography wherein the guideline range was 188 to 235 months and the defendant had a prior conviction for attempted sexual assault of a child. Stults, No. 8:07-CR-199, 2008 WL 4277676 at *1 (D. Neb. Sept. 12, 2008). The court found that the enhancements were repetitive and extreme and the sentence imposed “more closely approximates the sentencing range that was in effect before the Sentencing Commission merged the child pornography possession guideline into the trafficking guideline.” Id. at 10-11.

In United States v. Noxon, the district court imposed a 144 month sentence for distributing and possessing child pornography wherein the Guideline range was 262 to 327 months (statutory maximum was 240 months). Noxon, No. 07-40152-01-RDR, 2008 WL 4758583, at *1-3 (D. Kan. Oct. 28, 2008). The court believed that the sentence would be greater

than necessary and noted that other courts had found that the Guidelines diverted from the empirical approach used by the Sentencing Commission. Id. at *2. The court also considered the fact that the guideline range of a defendant found guilty of assaulting a person with a gun and causing a permanent or life-threatening injury would begin at 78 months, a sentencing range much lower than what Noxon faced. Id. at *3.

In United States v. Paul Stabell, the district court imposed the mandatory minimum sentence of 60 months wherein the Guideline range was 78-87 months for attempted distribution of child pornography. Stabell, No. 08-CR-244, 2009 WL 775100, at *1 & 4 (E.D. Wis. Mar. 19, 2009). The court recognized “as district judges across the country have recognized, the guideline for child pornography offenses is seriously flawed, does not reflect the Sentencing Commission’s exercise of its characteristic institutional role, and is accordingly entitled to little respect.” Id. at *3.

In United States v. Johnson, the district court imposed an 84 months sentence and 10 years of supervised release for a receipt of child pornography conviction wherein the Guideline range was 121 to 151 months, because the court afforded the Guidelines less deference than it would empirically grounded Guidelines. Johnson, No. 4:07-CR-00127, 588 F. Supp.2d 997, 1004 (S.D. Iowa Dec. 4, 2008). The defendant in Johnson used a peer-to-peer, file sharing program and downloaded images on approximately 300 different occasions. Id. at 999. This is different than McElheney who did not share or distribute images and who accessed images over a shorter period of time. The district court found issue with Congress’s actions and stated that “[i]f Congress does not want the courts to sentence individual defendants throughout that range [5 to 20 years] based on the facts and circumstances of each case, then Congress should amend the sentencing statute, rather than manipulate the advisory Guidelines, thereby blunting the

effectiveness and reliability of the work of the Sentencing Commission.” Id. at 1004.

In United States v. Grinbergs, the district court imposed a sentence of 12 months and 1 day wherein the defendant’s Guidelines range was 46 to 57 months for possession of child pornography. Grinbergs, No. 8:05-cr-232, 2008 WL 4191145, at *1 & 11 (D. Neb. Sept. 8, 2008). The district court found that the “child pornography Guidelines are statutorily-driven, as opposed to empirically grounded,” making the Guideline ranges an unreliable appraisal of a fair sentence for that type of child pornography offense. Id. at 10. The district court based this determination on the §3553(a) factors and on the fact that the offense did not involve a pedophile trying to use the materials to desensitize or entice victims or trying to contact any minors for sexual exploitation, which were the concerns that led to criminalizing possession of child pornography. Id. Similarly to Grinbergs, McElheney never tried to contact any children and never tried to distribute the materials further and “does not fall within the class of the most dangerous child pornography offenders.” Id.

Although, most of the Circuits have not addressed this issue on appeal yet, we can find some direction from the Sixth Circuit case of United States v. Grossman, 513 F.3d 592 (6th Cir. 2008).¹ The Sixth Circuit affirmed the sentence in which the district court imposed a below the Guidelines sentence based on the fact that the multiple enhancements created a sentence greater than necessary. The Sixth Circuit affirmed a sentence of 66 months wherein the guideline range was 135-168 months and the statutory maximum was 120 months. Grossman, 513 F.3d at 593-

¹The Government did cite one case decided by the Seventh Circuit on April 6, 2009, in which the Seventh Circuit mentioned the lack of empirical evidence behind §2G2.2. See United States v. Mark C. Huffstatler, No. 3:07-cr-30167-JPG-DGW-1 (7th Cir. Apr. 6, 2009). It appears to be the first Circuit to mention what the district courts appear to have been dealing with for the last year. However, the defendant submits that the issue in Huffstatler differs from the district court cases. These differences are discussed in the defendant’s Reply to Government’s Response to Court’s Order of April 1, 2009.

94. The sentencing judge in that case “noted that he was ‘troubled’ and ‘shocked’ by the enhancements . . . the guidelines produced a calculation that was ‘not fair’ and ‘not reflective of what [the defendant] did.’” Id. at 594. The Sixth Circuit pointed out that the court’s statement that the enhancements “almost repeat one another” spoke “not to a problem of double counting but a perception that the Guidelines sentence is higher than this conduct deserves - a concern that Booker aptly allows a court to consider in applying advisory guidelines.” Id. at 597.

The district court is in a similar position as the district court was in United States v. Jeremy Goldberg, No. 05-CR-0922, 2008 WL 4542957 (N.D. Ill. Apr. 30, 2008). The district court in Goldberg and this court have the cases before them for resentencing. In Goldberg, the district court had the case before it on resentencing after the Seventh Circuit held that the court’s prior sentence of no imprisonment was unreasonable in a child pornography possession case. Goldberg, 2008 WL 4542957 at *1. This Court has McElheney’s case before it again, due to a change in the law under Gall that arose after the defendant was sentenced, providing that district courts do have discretion to vary from the Guidelines even absent extraordinary circumstances. United States v. Earl McElheney, No. 07-6245, 2009 WL 361396 (6th Cir. Feb. 13, 2009). On remand in Goldberg, the district court imposed a 48 month sentence (out of a guideline range of 97-121 months) after reviewing the §3553(a) factors and recognizing that “there is reason to be skeptical concerning whether the current guidelines for the specific offense with which Goldberg is charged reflect, as originally intended, an empirical analysis by the U.S. Sentencing Commission of judicial sentencing practices.” Id. at *6. Things have changed since this Court reviewed McElheney’s case the first time, and it is appropriate and necessary that the Court consider what many district courts are now considering: the fact that §2G2.2 is not based on empirical analysis by the U.S. Sentencing Commission, and it should call into question any

deference that the Court has been given to §2G2.2 in the past.

The district courts, who decided the cases referred to in this brief, recognize the seriousness of the offense of child pornography and the need to deter and to stop the production, trade, and possession of such material. However, even in considering the seriousness of the offense, the district courts in these cases have found that the sentences that result when the Guidelines are strictly applied and followed lead to sentences that are “greater than necessary.” A sentence that is “disproportionately long in relation to an offense is unjust and fails to promote respect for the law.” Ontiveros, 2008 WL 2937539 at *3.

Instead of lengthy sentences, these district courts have looked at other restrictions that are more likely to curb any future offense, to rehabilitate the offender, and to protect the public. Phinney, 2009 WL 425816 at *8 (imposing ten years of supervised release, computer restrictions, required mental health treatment, prohibited possession of all sexually explicit material, required registration as a sex offender, and required 100 hours of community service); Hanson, 561 F.Supp.2d at 1012 (imposing supervised release for life, alcohol and sex treatment, limitations on computer usage and contact with minors, and required to register as a sex offender).

ENHANCEMENTS

The defendant will briefly address the enhancements under §2G2.2 that the PSR has applied to McElheney. The defendant made several objections to these in past documents and will again file objections to these enhancements, as well as asking the Court to give a downward variance based on the fact that the enhancements lead to too great of sentences, act as a form of almost double counting, and are not a reliable means for assessing culpability.

[T]he guideline impermissibly and illogically skews sentences for even “average” defendants to the upper end of the statutory range,

regardless of the particular defendant's acceptance of responsibility, criminal history, specific conduct, or degree of culpability. . . . This is so, largely because the level enhancements, some quite extreme, are based on circumstances that appear in nearly every child pornography case: using the internet, amassing numerous images (made particularly easy by the internet); presence of video clips counted as 75 images each; presence of images of prepubescent minors and violence

United States v. Brandon J. Beiermann, No. CR 07-4018-MWB, 2009 WL 467628 at *15 (N.D. Iowa Feb. 24, 2009) (citations omitted). The effect of these enhancements is that a defendant can receive a higher sentence for trading child pornography than a defendant would receive for repeatedly raping a child. Id. at 16.

One court discusses how each of the enhancements under §2G2.2(b) apply in almost every case and describes how an “individual who swapped a single picture, and who has only engaged in viewing and receiving child pornography for a few hours, can quickly obtain an offense level of 40.” Grober, 595 F.Supp.2d at 392. The district court in Grober discussed the testimony of Special Agent Chase, who had viewed over 100,000 images from over 180 child pornography collections in her investigations of these offenses. The court found it important to point out that

SA Chase recognized that every one of her 180 investigations involved a possessor with 600 or more images. . . SA Chase testified that every one of the cases she had worked on -“100 percent”-“involved the use of a computer and of interactive

computer service.” . . . Further, according to SA Chase, “all” of the cases she has worked on involved images of prepubescent minors under age 12, either posing or engaged in sexual activity. . . . Even a vast majority - “80 percent” - had at least one image and video depicting sadomasochistic content.

Grober, 595 F. Supp.2d 382.

The defendant will address how McElheney’s enhancements have been viewed by other district courts since the new caselaw has emerged. The enhancements applied in McElheney’s case included under §2G2.2(b) were as follows: (1) two level enhancement because several of the images recovered from defendant’s computer involved prepubescent minors or under the age of 12 under (b)(2); (2) four level enhancement for one video that depicted sadistic behavior under (b)(4); (3) two level enhancement for use of a computer under (b)(6); and (4) five level enhancement for the number of images under (b)(7)(D). The defendant did have two levels subtracted under §2G2.2(a)(2), because he did not intend to traffic or distribute the material. Therefore, under §2G2.2, the defendant’s sentence was enhanced by 11 levels, bringing it from a level 22 to a level 33. The difference between the Guideline ranges was 41 to 51 months for a level 22 and 135 to 168 months for a level 33.

The first enhancement under §2G2.2(b)(2) was because some of the images involved children under the age of 12. Images containing children under the age of 12 is typical for this type of offense. Hanson, 561 F Supp.2d at 1009.

The second enhancement under §2G2.2(b)(4) was because one video portrayed a sadistic image. This one video increased the defendant’s guideline range by 4 levels, or by 48 months. The defendant’s sentence was increased by 4 years, because one video portrayed a sadistic image.

This enhancement applies “whether or not the person specifically intended to possess such material . . . which seems an odd way of measuring culpability.” Hanson, 561 F.Supp.2d at 1099; see also Stults, 2008 WL 4277676 at *10 (stating that the enhancement of four levels for sadistic conduct is inadequate to measure culpability because it applies whether or not a defendant intended to possess such material). The PSR states that one video contained a sadistic image. The fact that only one video falls into this category tends to negate any contention that could be made that the defendant was interested in sadistic pornography or that he intended to possess that kind of pornography. He possessed 22 videos and 178 images that did not fall under this enhancement, and therefore, it tends to show that these were not the type of images that he had sought. See Gellatly, 2009 WL 35166 at *9 (“The application of a four-level enhancement for portrayal of sadistic conduct is especially out of proportion in this case, where the evidence shows only one images that fits the broad definition of such conduct.”).

The third enhancement under §2G2.2(b)(6) was for the use of the computer. Almost all cases today involve the use of a computer. See Grober, 595 F. Supp.2d at 397 (providing that a Special Agent who investigated 180 cases of child pornography testified that every case involved the use of a computer); Grinbergs, 2008 WL 4191145 at *10 (stating that because “the internet has become the typical means of obtaining child pornography, virtually every offender will get a two-level enhancement for use of a computer”). The Sentencing Commission itself has noted that this enhancement does not make much sense “because online pornography comes from the same pool of images found in specialty magazines or adult bookstores.” Beiermann, 2009 WL 467628 at *16; see also Hanson, 561 F. Supp.2d at 1009-10. The purpose of the enhancement was to penalize those who “use the computer to widely disseminate the images, use them to entice a child, or show them to a child,” and if the defendant simply used the internet to

download images or emailed images to another person, the purpose of the enhancement was not served. Id.; see also Grinbergs, 2008 WL 4191145 at *10 (stating that the Congressional concerns over using the computer dealt with luring or enticing children into sex acts); United States v. Jose Ontiveros, No. 07-CR-333, 2008 WL 2937539, at *8 (E.D. Wis. July 24, 2008) (stating that “less than 5% of the defendants affected by the changes [in 2G2.2] fall within the classes of mass producers, repeat abusers, and mass distributors that Congress intended to target for the lengthiest sentences”).

The fourth enhancement under §2G2.2(b)(7)(D) was for possession of the number of images (more than 600) wherein each of the 23 videos counted as 75 images. Because of the “increased ability to easily and inexpensively capture and store images with computers, the number of images does not reliably provide the distinction between large-scale and small scale child pornography purveyors that Congress and the Sentencing Commission envisioned when promulgating the enhancement.” Grinbergs, 2008 WL 4191145 at *10; see also Hanson, 561 F.Supp.2d at 1009 (noting that because of the computer age, compiling a collection of hundreds of images is “all too easy, yet carries a 5 level enhancement, which in this case nearly doubled the range”). This enhancement was applied at its highest level in many of the cases cited in this brief, in which the district courts varied downward in order to impose sentences that were sufficient but not greater than necessary. See Beiermann, 2009 WL 467628 at *3 (defendant possessed 2600 images and 25 videos); Gellatly, 2009 WL 35166 at *1 (defendant possessed 1637 images and 6 videos); Grober, 595 F.Supp.2d at 386 (defendant possessed 1500 images and 200 videos); Grinbergs, 2008 WL 4191145 at *1 (defendant possessed 348 images); Sudyka, 2008 WL 1766765 at *1 (defendant possessed 3000 images); Baird, 580 F. Supp.2d at 889 (defendant possessed 800 images and 1 video). McElheney possessed 178 images and 23 videos

(accounting for a total of 1903 images) for which his Guidelines sentencing level increased 5 levels or 57 months. He received almost 5 years added onto his sentence for a relatively small or average number of images for these types of cases.

CONCLUSION

The defendant submits that it is clear that this Court has the discretion to vary downward from the Guidelines based on the same reason that district courts across the country are departing downward: the child pornography Guidelines are not based on empirical studies of the Sentencing Commission and applying the Guidelines, as written in child pornography cases such as this, leads to sentences that are much “greater than necessary.” The defendant urges this Court to follow the direction that other district courts have been taking with respect to child pornography cases since Kimbrough and Gall were decided.

The defendant will submit a new sentencing memorandum and other documents to address the defendant’s continuing objections to the presentence report and motion for downward variance that will build on the arguments already made and asserted in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2009, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

s/Jerry H. Summers
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