

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

UNITED STATES OF AMERICA,)	CRIMINAL ACTION NO.
)	
Plaintiff,)	4:08-CR-005-A
v.)	
)	
AAAA XXXX,)	
)	
Defendant.)	
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SENTENCING MEMORANDUM

I. HAVE WE GONE MAD?

The Presentence Report in this case recommends – albeit contrary to established law – a sentencing guideline range of 151-188 months imprisonment.

First consider the hypothetical of a man who, in 2006, contacted a twelve year-old girl over the Internet. Using his age and experience, he convinced her to meet, and the two engaged in repeated sex. U.S.S.G. § 2G1.3(a) (since amended to be made consistent with congressionally initiated changes of the Adam Walsh Act) established a base offense level of 24 for the offense. After a two-level enhancement for unduly influencing the child under U.S.S.G. §2G1.3(b)(2), a two-level enhancement for use of the computer (b)(3), and a two-level enhancement for commission of a sex act (b)(4), the final offense level would have been 30. After Acceptance, the Guideline range for this Category I offender would have been 70-87 months imprisonment.

Consider next the aggravated case of Joe Champion, as discussed at *United States v. Kane*, 470 F.3d 1277 (8th Cir. 2006). Mr. Champion paid \$20 to have a mother hold down her nine year-old child while Mr. Champion raped the young girl twice a week for two years. During these rapes, the child experienced such trauma she passed out. These assaults happened

over 200 times! The damage to the child physically and emotionally is unimaginable. Using the Guidelines, applying all enhancements, and granting only Acceptance of Responsibility, the court determined the Guideline range was 151-188 months. *Id.* at 1282.

Next consider a person charged with using interstate commerce facilities in the commission of a murder for hire. Under U.S.S.G. § 2E1.4, his guideline imprisonment range with acceptance of responsibility would be 87-108 months.

If Mr. XXXX had possessed over 1,000 lbs of explosives with the intent to blow up a building, his guideline range would be **27-33 months** imprisonment. *See* U.S.S.G. § 2K1.3.

To even dream up a system in which Mr. XXXX could face the same amount of imprisonment time as Joe Champion and a system in which he faces more than five times the imprisonment range that he would face had he possessed 1,000 lbs of explosives intending to blow up a building. is almost unfathomable. Perhaps this is why fully one-third of those sentenced in FY 2007 for child pornography offenses received sentences below their applicable guidelines.¹

II. FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES

Several judges have recently noted that the insanely high guidelines for child pornography offenses are purely the result of politics and are *not* based upon an empirical approach by the United States Sentencing Commission:

The guidelines for child exploitation offenses were not developed using an empirical approach by the Sentencing Commission, but rather were mainly promulgated in response to statutory directives. Specifically, the Protect Act directly amended guideline 2G2.2 by amending the guideline enhancements for specific offense characteristics. These modifications do not appear to be based on any sort of empirical data, and the Court has been unable to locate any particular rationale for them beyond the general revulsion that is associated with child exploitation-related offenses.

¹ *See* 2007 Sourcebook, <http://www.ussc.gov/annrpt/2007/sbtoc07.htm> at Table 28

United States v. Shipley, No. 4:07-CR-00081 (S.D. Iowa **June 19, 2008**) (attached hereto as Attachment A). The political phenomenon is discussed at length in a June 10, 2008 article entitled *Deconstructing the Myth of Careful Study: A Primer of the Flawed Progression of the Child Pornography Guidelines*. See Attachment B hereto (pages 1-30 of study).

As noted **just last week** by one Judge:

Congress established the Sentencing Commission “to formulate and constantly refine national sentencing standards,” in fulfillment of its important institutional role. *Kimbrough*, 552 U.S. at ----, 128 S.Ct. at 574 (noting key role preserved for the Sentencing Commission); *Rita v. United States*, 551 U.S. at ----, 127 S.Ct. at 2464. In that institutional role, the Sentencing Commission “has the capacity courts lack to ‘base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.’” *Kimbrough*, 552 U.S. at ----, 128 S.Ct. at 574 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir.2007) (McConnell, J., concurring)); see also *Gall*, 552 U.S. at ----, 128 S.Ct. at 594 (noting that “even though the Guidelines are advisory rather than mandatory, they are ... the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions”).

However, when Guidelines are not the result of “the Commission's exercise of its characteristic institutional role,” such as when they are not based on an empirical approach, but are instead keyed to or guided by statutory directives, a court is not presented with the “ordinary case,” in which “the Commission's recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.’” See, e.g., *Kimbrough*, 552 U.S. at ----, 128 S.Ct. at 574 (quoting *Rita*, 551 U.S. at ----, 127 S.Ct. at 2465); see also *Gall*, 552 U.S. at ----, 128 S.Ct. at 594 n. 2 (noting that not all Guidelines are tied to empirical evidence, most notably, those for drug offenses). In cases involving application of Guidelines that “do not exemplify the Commission's exercise of its characteristic institutional role,” it is “not an abuse of discretion for a district court to conclude when sentencing a particular defendant” that application of the guideline “yields a sentence ‘greater than necessary’ to achieve § 3553(a)'s purposes even in a mine-run case.” *Kimbrough*, 552 U.S. at ----, 128 S.Ct. at 575.

United States v. Baird, 2008 WL 151258 (D. Neb. Jan 11, 2008). And, as noted by yet another judge:

In a recent paper published on Professor Douglas Berman’s sentencing website, an Assistant Federal Defender traced the history of this guideline and pointed out its serious flaws, which were clearly evident in this case. See Troy Sabenow,

Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines, available at <http://sentencing.typepad.com> (June 10, 2008). As Stabenow explains, much like the crack guideline criticized by the Supreme Court in *Kimbrough*, guideline 2G2.2 is not representative of the Commission's typical role or of empirical study. The guideline has been steadily increased despite evidence and recommendations by the Commission to the contrary. Congress has repeatedly amended it directly, ostensibly to target mass producers of child pornography and/or repeat abusers of children, a class of offenders that make up less than 5% of those affected by the changes. The most recent changes from 2003 apparently came from two lawyers in the Justice Department who persuaded a novice Congressman to add them to the popular Amber Alert bill. *Id.* at 27. To the extent that the advisory guidelines deserve continued respect from courts, that respect will be greatest where the Commission has satisfied its institutional role of relying on evidence and study to develop sound sentencing practices. This guideline simply does not represent that role, as the Commission itself has acknowledged.

Between 1994 and 2007, the mean sentence in child pornography cases increased from 36 months to 110 months. *Id.* at 1. As Stabenow notes, this increase was not the result of the empirical approach often used by the Commission, designed to be an expert body on sentencing. Rather, it was the result of arbitrary increases by Congress slipped into other bills, often with little or no debate, resulting in direct amendments to the guidelines. *Id.* at 2. These amendments destroyed some of the careful distinctions the Commission had drawn between true peddlers of child pornography and more simple possessors or transporters. To its credit, and as in the crack cocaine context, the Commission sought to persuade Congress not [sic.] make such changes, but to no avail. *Id.* at 3-7 (quoting letter from Chair of the Commission). Specifically, the Commission has noted that the enhancement for use of a computer does not make much sense because online pornography comes from the same pool of images found in specialty magazines or adult bookstores. Further, to the extent that use of a computer may aggravate an offense, it does not do so in every case. For example, someone who e-mails images to another (like the instant defendant) is not as culpable as someone who sets up a website to distribute child pornography to a large number of subscribers. If the defendant did not use the computer to widely disseminate the images, use them to entice a child, or show them to a child, the purpose for the enhancement is not served. *Id.* at 14-15. Yet it applies in virtually all cases.

The Commission itself sought to increase penalties for those offenders who also had a history of sexually exploiting or abusing minors, and posed a greater risk of recidivism, certainly a valid concern. However, Stabenow notes that it did so based on a study of offenders in 1994 and 1995, while most offenders prosecuted in federal court today, such as defendant Hanson, have no such histories. The typical child pornography defendant today has no prior felonies of any kind, let alone prior abuse of children, and is not involved in production. *Id.* at 13.

Finally, in 2003, as part of the Feeney Amendment to the PROTECT Act, Congress added the 5 level enhancement for number of images. No research, study or rationale was provided for this huge increase. At the same time, Congress established the 5 year mandatory minimum applicable in this case, as a result of which the Commission also increased the base offense level to 22 to keep pace. Again, this had nothing to do with the Commission's statutory mission of satisfying the purposes of sentencing. *Id.* at 18-19.

United States v. Hanson, No. 07-CR-330 (D. Wisc. June 20, 008) (attached hereto as Attachment C).

To put all of this in perspective and using the flawed application of the sentencing guidelines as recommended by the Probation Department in this case, the following would be Mr. XXXX's offense level and imprisonment range over the years:

1987-11/1990	13	12-18 months
11/1990-11/1996	18	21-27 months
11/1996-11/2000	22	41-51 months
11/2000-4/2003	27	70-87 months
4/2003-11/2004	29	87-108 months
11/2004-pres.	34	151-188 months ²

III. CASE LAW

Of course, a district judge may no longer “presume that the Guidelines range is reasonable.” *Gall v. United States*, 128 S.Ct. 586, 597 (2007). This is particularly the case where particular guidelines are less reliable because they are not empirically grounded.

Kimbrough v. United States, 128 S.Ct. 558, 574 (2007); Baird, 2008 WL at * 7; Shipley

² Part of the dramatic increase stems from specific offense characteristics that are present in almost all cases. For example, there is a two level increase for use of a computer, but such use is present in 97 percent of all cases. *See*, Bureau of Justice Statistics Bulletin: “*Federal Prosecution of Child Sex Exploitation Offenses, 2006* (available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fpcseo06.pdf>). Likewise, there is a two level adjustment for an offense involving a minor less than 12 years of age, yet that specific offense characteristic is present in 95 percent of all cases. *Id.*

(Attachment A at 7-8). Again, perhaps this is why one-third of those sentenced in 2007 for child pornography offenses received sentences below their applicable guidelines.

A. Fifth Circuit

The madness of the sentencing guidelines in child pornography cases appears to be resonating with courts in the Fifth Circuit. For example, just this month, the Fifth Circuit found a district court's sentence of **probation** to be reasonable for a defendant convicted of possessing child pornography despite the fact that the sentencing guidelines called for 46-57 months imprisonment. *United States v. Rowan*, 2008 WL 2332527 (5th Cir. June 9, 2008).

Also this month, the Fifth Circuit found that a sentence to the mandatory minimum sentence of **60 months** imprisonment was reasonable for a defendant accused of distributing child pornography rather than his guideline sentence of 210-262 months. *United States v. Nazerzadeh*, 2008 WL 2325646 (5th Cir. June 6, 2008).

One week before *Nazerzadeh*, the Fifth Circuit upheld a **60 month** sentence in a child pornography case, where the defendant was originally charged with actually *producing* child pornography, despite the fact that the Sentencing Guidelines called for a 120 month sentence. *United States v. Taylor*, 2008 WL 2329191 (5th Cir. June 4, 2008).

In January, the Fifth Circuit upheld a **probation** sentence (with one year house arrest) as reasonable for a defendant convicted of possessing child pornography. *United States v. Polito*, 215 Fed. Appx. 354 (5th Cir. 2007). One of the reasons for the variance was to allow Polito to continue his mental health treatment.

B. Other Cases

Many of the cases discussed in Section II – two of which were decided this past week – are instructive.

In *Baird*, the defendant was charged with possession of child pornography and faced 63-78 months imprisonment. He was sentenced to two years imprisonment. *Baird*, 2008 WL 151258.

In *Shipley*, the defendant was charged with using a file-sharing program to distribute child pornography and faced 210-240 months imprisonment. He was sentenced to 90 months imprisonment and five years supervised released. *See* Attachment A.

In *Hanson*, the defendant was also charged with using a file-sharing program to distribute child pornography and faced 21-240 months imprisonment. He was sentenced to 72 months imprisonment and a life term of supervised release. *See* Attachment C.

An excellent discussion is also contained in *United States v. Cherry*, 487 F.3d 366 decided by the United States Court of Appeals for the Sixth Circuit in which it approved as reasonable a 43% downward variance for a defendant charged with distributing child pornography. One reason for the variance was because Cherry would get little mental health treatment in prison. *Id.* at 370. Likewise, in *United States v. Beach*, 2008 WL 1896766 (6th Cir. April 29, 2008) the Sixth Circuit upheld a downward variance to 96 months imprisonment from a 210-240 month guideline range for a defendant convicted of distributing child pornography. Again in *United States v. Grossman*, 513 F.3d 592 (6th Cir. 2008) the Sixth Circuit upheld a 66 months imprisonment sentence in a child pornography case despite the fact that the defendant was facing 135-168 months imprisonment.

In *United States v. White*, 506 F.3d 635 (8th Cir. 2007), the United States Court of Appeals for the Eighth Circuit approved a downward variance from 135 months imprisonment to 72 months imprisonment in a child pornography case. In particular, the Court noted that a downward variance does *not* have to be “supported by extraordinary circumstances.” *Id.* at 647.

In *United States v. Gray*, 453 F.3d 1323 (11th Cir. 2006), the United States Court of Appeals for the Eleventh Circuit upheld a 72-month imprisonment sentence where the defendant was charged with distributing child pornography and faced a guideline sentence of 151 months imprisonment.

In *United States v. Smith*, 2008 WL 1816564 (4th Cir. April 23, 2008), the Court of Appeals for the Fourth Circuit upheld a sentence of 24 months imprisonment for a defendant charged with possessing over 600 images of child pornography and facing a guideline imprisonment sentence of 78-97 months. *See also United States v. Pauley*, 511 F.3d 468 (4th Cir. 2007) (Approving 36 month downward variance for defendant charged with possession of child pornography and facing a guideline imprisonment sentence of 78-97 months).

IV. 18 U.S.C. § 3553

As this Court is, of course, well aware, section 3553(a) requires courts to “impose a sentence sufficient, but not greater than necessary,” to comply with the purposes set forth in the sentencing statute. Section 3553 states that such purposes are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed-
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;

- (4) the advisory guideline range;
- (5) any pertinent policy statements issued by the Sentencing Commission;
- (6) the need to avoid unwarranted sentence disparities; and
- (7) the need to provide restitution to any victims of the offense.

A. Nature of Offense

Almost every court that has granted a downward variance or upheld a downward variance in child pornography cases has noted that child pornography cases are serious offenses. Perhaps the best discussion is contained in *United States v. Wachowiak*, 412 F. Supp. 2d 958 (E.D. Wis. 2006) where a defendant was convicted of receiving child pornography using a file share program and the District Court sentenced the defendant to 70 months imprisonment rather than the 121-151 months recommended by the sentencing guidelines.

There can be no doubt that possessing child pornography is a very serious crime, and defendant's offense involved a large number of images, some of which depicted pre-pubescent children and sadistic conduct. These were aggravating factors.

However, there was no evidence that defendant possessed the material in order to entice a child, that he produced any of the images, or that he purposely distributed them (though he did make them available to others through the file sharing program). Nor was there any indication of improper contact with an actual child. The PSR identified several of the victims depicted in the images, and I received a statement from the mother of one of them, which detailed the severe harm caused her daughter.

As noted, defendant came to the attention of law enforcement when the FBI accessed his computer through a file sharing program. Defendant was extremely cooperative, voluntarily accompanied the FBI agents to their offices and provided a detailed confession.

Id. at 960.

As in *Wachowiak*, the defense acknowledges this is a serious crime. Nevertheless, it should be pointed out that, not only did Mr. XXXX fully cooperate with the FBI in this case, but

he also he deleted the file-sharing program *prior* to learning that he was under investigation. *See* Government’s Response to Defendant’s Objections to the Presentence Report at 3 (“The preliminary examination did confirm that XXXX was no longer running [the file-sharing] software on his computer.”). Moreover, XXXX himself acknowledged in therapy sessions that what he as doing was “deviant.” *See* PSR at ¶ 48.

Moreover, although not meant to minimize Mr. XXXX’s offense, it should be noted that, unlike in *Wachowiak*, this case involves a small number of images, only one of which involved violence. *See Cherry*, 487 F.3d at 369 (“[T]he district court stated that the number of images Cherry downloaded was “relatively small compared to [other defendants], and the guidelines have sort of a skewed measurement of those numbers’”).

Finally, the Probation Department recommends a five level distribution enhancement in this case based upon the use of the file share program. Nevertheless, this is the same type of enhancement that would be imposed “on a commercial peddler” of child pornography. This case “in no way involved commercial activity or profit from these types of images.” *See Hanson*, at 7 (Attachment C). Indeed, this case is qualitatively different from business distribution.

B. Character of the Defendant

Mr. XXXX is blessed with a supportive family. *See* Letters (attached hereto as Attachments D-F). In addition, prior to the indictment in this case, he has taken positive steps to deal with his problems by enrolling in psychotherapy and by seeking treatment for his alcohol problems. *See* PSR at ¶¶ 48-49.

Moreover, as much as society must hold Mr. XXXX responsible for his actions in this case, it should not be lost that our society owes Mr. XXXX its gratitude for his service to the country. As noted in the PSR, Mr. XXXX served on active duty as a “top gun” fighter pilot in

the United States Marine Corp. for nine years with over 200 aircraft landings. *See* PSR at ¶¶ 44, 57. Even after active duty, Mr. XXXX continued with the Marines as a reservist. *Id.* at ¶ 57. In determining whether a downward variance is appropriate in this case, this Court should certainly consider the debt this country owes Mr. XXXX for his accomplished military service. *See Kimbrough*, 128 S.Ct. at 575 (Upholding downward variance based, in part, on the defendant’s exemplary military service). *See also, Shipley* at 8 (Attachment A) (Noting that variance was based in part on the defendant’s “service to his country.”); *Baird*, 2008 WL 151258 at *6 (Variance based in part on defendant’s service to the country, having been a captain in the Air Force).

C. Just Punishment/Respect for the Law/Deterrence

A sentence of 60 months imprisonment in this case would certainly be “just” punishment. In addition, Mr. XXXX will have the stigma of being a registered sex offender for the rest of his life. Such a sentence would “reflect[] the seriousness of the offense and the associated impact the crime has on children, while also reflecting the fact that the Defendant has lived an admirable life until the commission of this crime. *Shipley* at 10 (Attachment A).

In addition, to the extent that other offenders will pay attention to this sentence, if a sentence of 5 years imprisonment and being a registered sex offender does not deter those offenders, it is safe to say that nothing will. *Shipley* at 9 (Attachment A). Indeed, “[t]he mere fact of [Mr. XXXX’s] prosecution deters others from engaging in this sort of conduct, and a sentence of incarceration will act as a further deterrent to others contemplating such activity. The value of any longer sentence as a deterrent...would be marginal.” *Baird*, 2008 WL 151258 at *7.

It can also be said that a sentence so out of proportion to the conduct does *not* promote respect for the law, but actually promotes *disrespect* for the law. *See United States v. Williams*, 435 F.3d 1350, 1352-53 (11th Cir. 2006).

D. Protect the Public/Provide Treatment

Counsel has grouped these two factors together because it would seem self-evident that it is in the public's best interest that Mr. XXXX gets effective treatment since he is ordinarily a contributing member of our society. With the proper treatment, the public can be protected from Mr. XXXX's use of child pornography while having the benefit of his contributions.

Unfortunately, the Bureau of Prisons has **one** Sex Offender Treatment Program ("SOTP"), and it is at FMC Butner, North Carolina. The program only has 112 beds and turns away many inmates who seek treatment. As a result, only **one percent of sex offenders** in federal prison receive sex offender treatment before they are released. Moreover, a person incarcerated with the Bureau of Prisons is not even eligible to receive treatment until they have **twenty-four months** or less remaining on their sentence. *See* BOP Policy Statement 5310.12 § 5.2(A). *See also Wachowiak*, 412 F. Supp. at 963 ("It was also my understanding that space in the Butner program is limited, and many inmates never get in. Thus, defendant could be denied treatment for the entire prison sentence.").

This was exactly the analysis approved by the Sixth Circuit in *Cherry* where it observed:

Noting that Cherry would get little treatment in prison, the district court counted this factor in favor of a low sentence, especially in light of Cherry's demonstrated desire for treatment.

Cherry, 487 F.3d at 369.

In sum, recognizing that there is a mandatory minimum sentence that the Court must impose in this case, it must also be recognized that, the longer the sentence imposed in this case,

the longer it will take for Mr. XXXX to get the treatment he needs. Indeed, significant treatment conditions as part of supervised release will offer better treatment opportunities and protect the public as much or more than a draconian sentence.

E. Guidelines and Policy Statements

As discussed above, the Court can no longer “presume that the Guidelines range is reasonable.” *Gall* 128 S.Ct. at 597. This is particularly true in this case where, as explained in *Shipley, Baird and Hanson*, “the Guidelines do not reflect the Commission’s unique institutional strengths.” *Baird*, 2008 WL 151258 at *7.

F. Disparity

As discussed, courts vary downward in approximately one-third of child pornography cases. Therefore, a downward variance in this case would hardly result in a “disparity.” Moreover, the case offers some unique factors that would justify a disparity in any event. The first factor, as noted above, is Mr. XXXX’s long service to his country – a characteristic possessed by relatively few defendants. Second is the fact that Mr. XXXX is being sentenced based on 10-150 images, but the number (20) is much closer to the bottom than the top. Third is the confirmed fact that Mr. XXXX stopped the use of the file-share programs prior to learning that he was under investigation. Fourth, to the extent the Court finds that a four-level enhancement is applicable under U.S.S.G. § 2G2.2(b)(4), a disparity would be warranted where a defendant, such as this one, had only one qualifying image. Fifth, to the extent the Court finds that a five-level enhancement is applicable under U.S.S.G. § 2G2.2(b)(2)(B), a disparity would be justified in order to distinguish between Mr. XXXX and a commercial distributor who would otherwise receive the same enhancement.

V. CONCLUSION

“Although the sentencing judge is obliged to consider all of the sentencing factors outlined in section 3553(a), the judge is not prohibited from including in that consideration the judge's own sense of what is a fair and just sentence under all the circumstances. That is the historic role of sentencing judges, and it may continue to be exercised, subject to the reviewing court's ultimate authority to reject any sentence that exceeds the bounds of reasonableness.”

United States v. Jones, 460 F.3d 191, 195 (2d Cir. 2006)

Counsel submits that a sentence of 60 months is more than adequate to serve as a sentence that is “sufficient, but not greater than necessary.” Moreover, it helps overcome the madness described in Sections I and II, given that as little as eight years ago Mr. XXXX’s guideline imprisonment sentence would have been a maximum of 51 months imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on June 23, 2008, I caused the foregoing document to be served by U.S. Mail, first class, on:

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