IN THE UNITED STATES OF AMERICA
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs. **CASE NO. 4:10cr12-SPM**

THEODORE MITCHELL,

Defendant.
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CORRECTED SENTENCING MEMORANDUM

Theodore Mitchell is fifty-two years old. He has never been arrested or charged with a criminal offense. Prior to his arrest, he had worked four years at the Winn-Dixie Grocery Store in Live Oak, Florida. He will be sentenced by the Court for the offense of possession of child pornography. The circumstances of his case do not differ from many of the other such cases that have come before this Court and other courts across the United States.

Mr. Mitchell's advisory guideline range is determined by USSG §2 G2.2 and is 51 to 63 months. Had he been sentenced in 1991 before the enactment of a series of provisions that have dramatically increased the penalty for possession of child pornography, his total offense level would have been 10, and with no criminal history points, his guideline range would have been 6 to 12 months.[1] Because the increases in the guideline range since 1991 do not reflect the kind of empirical

[1]In 1991, the applicable guideline provision for "Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct" was USSG §2G2.4. The base offense level under that provision was 10. The only enhancement applicable would have been a two-level increase based upon the images involving a prepubescent minor. With a two-level decrease for acceptance of responsibility, the total offense level would have been 10. That offense level when coupled with Criminal History Category I produces the Guideline range of 6 to 12 months. *See* United States Sentencing Commission Guidelines Manual (Incorporating guideline amendments effective November 1, 1991) at 134. For the history of §2G2.4 and how the crime of possession of child pornography came to be merged with trafficking as part of §2G2.2, *see* United States v. Phinney, 599

data, national experience, and independent expertise that are characteristic of the Sentencing Commission's institutional role and because application of the guideline in Mr. Mitchell's case would lead to a sentence that is inconsistent with what is required by 18 U.S.C. § 3553, a sentence significantly below the advisory guideline rage would be "sufficient, but not greater than necessary," to comply with the goals of sentencing established by Congress. 18 U.S.C. § 3553(a).

Mr. Mitchell recognizes the harm associated with child pornography. As one court explained, "the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials." United States v. Goff, 501 F. 3d 250, 259 (3rd Cir. 2007). Mr. Mitchell, too, is now clearly aware that those who collect child pornography also create a market for the images. *Id.* at 501 F. 3d at 260.

Nonetheless, as one court has recognized, the guideline applicable to Mr. Mitchell's case "is fundamentally different from most in that, unless applied with great care, [it] can lead to unreasonable sentences that are inconsistent with what section 3553 requires." United States v. Dorvee, 604 F. 3d 84, 95 (2nd Cir. 2010).

The heart of the problem with the guideline is that the increases over the years have been arbitrary and because of them the guideline does not distinguish between run-of-the-mill offenders like Mr. Mitchell and those whose conduct is deserving of greater punishment. *See* Dorvee, 604 F.3d at 96 ("Consequently, adherence to the Guidelines results in virtually no distinction between the sentences for defendants like Dorvee, and the sentences for the most dangerous offenders who, for example, distribute pornography for pecuniary gain and who fall in higher criminal history

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F.Supp.2d 1037, 1042-1043 (E.D. Wisc. 2009).

categories.")[2] In Mr. Mitchell's case, he received a two level increase in his offense level because the images involved prepubescent minors, two levels because he used a computer, and five levels because of the number of images. As recognized in Dorvee, these particular enhancements would apply in the vast majority of cases:

> On top of that, many of the § 2G2.2 enhancements apply in nearly all cases. Of all sentences under § 2G2.2 in 2009, 94.8% involved an image of a prepubescent minor (qualifying for a two-level increase pursuant to § 2G2.2(b)(2)), 97.2% involved a computer (qualifying for a two-level increase pursuant to § 2G2.2(b)(6)), 73.4% involved an image depicting sadistic or masochistic conduct or other forms of violence (qualifying for a four-level enhancement pursuant to § 2G2.2(b)(4)), and 63.1% involved 600 or more images (qualifying for a five-level enhancement pursuant to § 2G2.2(b)(7)(D)). n8 See United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics for Fiscal Year 2009, available at http://www.ussc.gov/gl_freq/09_glinexgline.pdf (last visited April 19, 2010).

Id. at 96. Enhancements, of course, come on top of what was an increase of the base offense level from 10 to 18, which was, not the result of any research or empirical evidence, but the result of the Sentencing Commission's attempt "to square the guidelines with Congress's various directives." *Id*. *See also* United States v. Phinney, 599 F.Supp.2d 1037, 1042-1043 (E.D. Wisc. 2009).

As the court recognized in Dorvee, many of the changes directed by Congress were openly opposed by the Sentencing Commission:

> The Commission has often openly opposed these Congressionally directed changes. For instance, the Commission criticized the two-level computer enhancement (which is currently set forth at § 2G2.2(b)(6) and was adopted pursuant to statutory direction) on the ground that it fails to distinguish serious commercial distributors of online pornography from more run-of-the-mill users. See United States Sentencing Commission, Report to Congress: Sex Offenses Against Children Findings and

[2]Mr. Mitchell, unlike the defendant in Dorvee, is not facing a sentence near the statutory maximum. Nonetheless, the point is that enhancements that increase the guideline range for such things as use of a computer and possession of images of prepubescent minors, and even the number of images, rather than providing harsher consequences for those defendants whose conduct sets them apart from the typical case, provide for harsher penalties for nearly all defendants.

> Recommendations Regarding Federal Penalties, June 1996, at 25-30, available at http://www.ussc.gov/r_congress/SCAC.PDF (last visited [*29] April 15, 2010). n7 Speaking broadly, the Commission has also noted that "specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress." See United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, 2004, at 73, available at http://www.ussc.gov/15_year/chap2.pdf (last visited April 15, 2010).

Id. at 95-96.[3]

In the final analysis, the court in Dorvee concluded that the within-guideline sentence was substantively unreasonable. It reached that conclusion, finding that the analysis used by the Supreme Court with regard to the crack cocaine guideline was equally applicable to § 2G2.2:

> In keeping with these principles, in Kimbrough, the Supreme Court held that it was not an abuse of discretion for a district court to conclude that the Guidelines' treatment of crack cocaine convictions typically yields a sentence "greater than necessary" to achieve the goals of § 3553(a), because those particular Guidelines "do not exemplify the Commission's exercise of its characteristic institutional role." Kimbrough, 552 U.S. at 109-10. As we have explained here, the same is true for the child pornography enhancements found at § 2G2.2. Following Kimbrough, we held that "a district court may vary from the Guidelines range based solely on a policy

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[3] *See also*, United States v. Stern, 590 F. Supp. 2d 945, 960 (N.D. Ohio 2008) where the court similarly recognized some of the shortcomings in the promulgation of § 2G2.2:

> The Court is particularly troubled that the Guidelines for sentencing those who possess child pornography "have been repeatedly raised despite evidence and recommendations by the [United State Sentencing] Commission to the contrary." Hanson, 561 F. Supp. 2d at 1009 (citation omitted); Grinbergs, 2008 U.S. Dist. LEXIS 91712, at *19-20. Indeed, "[t]he most recent changes [to the Guidelines] apparently came from two lawyers in the Justice Department who persuaded a novice Congressman to add them to the popular Amber Alert bill." Hanson, 561 F. Supp. 2d at 1009 (citation omitted). For the above reasons, and for the reasons fully set forth in Hanson and Baird, this Court concludes 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." Ontiveros, 2008 U.S. Dist. LEXIS 58774, at *20.

> disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses." Cavera, 550 F.3d at 191. That analysis applies with full force to § 2G2.2.

Id. at 604 F. 3d 97.

The actual sentences imposed by judges across the nation implicitly recognize the shortcomings of § 2G2.2. In fiscal year 2009, there were more sentences imposed below the advisory guideline range than were within it. To be precise, 53% of all sentences imposed pursuant to § 2G2.2 fell below the advisory guideline range.[4]

In United States v. Stern, 590 F.Supp. 2d 945 (N.D. Ohio 2008), the defendant entered a guilty plea to possession of child pornography and faced a guideline range of 46 to 57 months. The defendant, unlike Mr. Mitchell, received a two-level adjustment for distribution and, like Mr. Mitchell, received a two-level increase for the use of a computer. He received a four-level increase for possessing more than 300 images but fewer than 600 images. The court recognized that "possession of child pornography is an exceedingly serious offense, among the most serious class of offenses that do not involve the direct use of violence or coercion on the part of the perpetrator." *Id.* at 951. Unlike Mr. Mitchell, the defendant in Stern, was twenty-two years of age and had developed his interests in child pornography when he was a young teenager. *Id.* at 953. There were, as well, mitigating circumstances: Stern graduated from college a year after his arrest, he sought therapy, he was a talented computer game designer, and he maintained "normal and productive

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[4]United States Sentencing Commission, *2009 Sourcebook of Federal Sentencing Statistics*, Table 28, available at www.ussc.gov/ANNRPT/2009/Table28.pdf. Specifically, the report shows that 1,606 individuals were sentenced pursuant to § 2G2.2. Of those, 29 of the sentences were above the guideline range, 169 were described as "government sponsored" below guideline-sentences including 34 that were the product of substantial assistance, 82 were below-guideline departures, and 609 were below-guideline variances.

relationships with his family." Significantly, for purposes of Mr. Mitchell's sentencing, the court in Stern concluded that a sentence of "twelve months and one day" was the appropriate sentence. *Id.* at 963.

In reaching that decision, the court relied upon its view that when it came to imposing sentences in child pornography cases, "the national sentencing landscape presents a picture of injustice":

> The Court has carefully considered an extremely wide variety of opinions from across the country as well as the National Guideline Statistics. n14 *See* United States v. Newell, 35 Fed. Appx. 144, 145 (6th Cir. 2002) ("[The Guidelines are intended] to eliminate unwarranted sentence disparities nationwide.") (emphasis added). The Court is deeply troubled by its findings: "anyone seriously concerned about federal sentencing disparities [must begin by] taking a very close look at federal child porn cases." Professor Douglas A. Berman, Is There an Ivy-Leaguer Exception to Federal Child Porn Charges? (October 22, 2008), on-line at http://sentencing.typepad.com. Based on the Court's review of the case law, it is clear that "one would be hard pressed to find a consistent set of principles to explain exactly why some federal child porn defendants face decades in federal prison, some face many years in federal prison, while others only end up facing months." *Id.* This Court is "struck by the inconsistency in the way apparently similar cases are charged and sentenced." [**44] Goldberg, 2008 U.S. Dist. LEXIS 35723, at *5-6 (considering nearly two-dozen cases).
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> In short, the national sentencing landscape presents a picture of injustice. In the absence of coherent and defensible Guidelines, district courts are left without a meaningful baseline from which they can apply sentencing principles. The resulting vacuum has created a sentencing procedure that sometimes can appear to reflect the policy views of a given court rather than the application of a coherent set of principles to an individual situation. Individual criminal sentences are not the proper forum for an expansive dialogue about the principles of criminal justice. Such conversation, though vital, should not take place here -- lives are altered each and every time a district court issues a sentence: this is not a theoretical exercise. Yet, this Court is mindful of the appropriate scope of its authority -- it must take the law as it finds it.

Id. at 961.

There is, then, little reason to believe that the guideline range in Mr. Mitchell's case, as a product of § 2G2.2, reflects the goals of sentencing established by Congress in 18 U.S.C. § 3553(a). In that it fails to distinguish between more serious offenders and those such as Mr. Mitchell, a sentence well below the advisory guideline range of 51 to 63 months would be sufficient, but not greater than necessary to achieve those goals. Because Mr. Mitchell's personal history and the circumstances of his case suggest only that his case is indistinguishable from the typical case that comes before the courts, Mr. Mitchell, therefore, respectfully requests this Court to impose such a sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert Davis, Smith, Assistant United States Attorney, 111 N. Adams Street, 4th Floor, Tallahassee, FL 32301, by electronic delivery this 15th day of June, 2010.

Respectfully Submitted,

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Names and places have been changed for reasons of privacy.