

[On Behalf Of WMurphyLaw@aol.com – This is a long decision - I pasted the important parts - much good data in here re recidivism of sex offenders, child porn, harm to victims - and correlations - wendy]

UNITED STATES OF AMERICA, Plaintiff, v. THOMAS CUNNINGHAM, Defendant.

CASE NO. 1:09CR154

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

2010 U.S. Dist. LEXIS 6097

January 26, 2010, Decided

January 26, 2010, Filed

In arguing for a variance, Cunningham asserts that he has a very low risk of recidivism. In so arguing, Cunningham relies upon the Commission's publications regarding recidivism. Based on his lack of a criminal history, Cunningham asserts that his risk of reoffending is only 6.2%. The Court finds that this generalized data does not warrant reliance when examining the risk of recidivism of a particular individual. For that matter, Congress has repeatedly reiterated that recidivism rates are particularly high for child sex offenders. See Blaisdell, Krista, Note, Protecting the Playgrounds of the Twenty-First Century: Analyzing Computer and Internet Restrictions for Internet Sex Offenders, 43 Val. U. L. Rev. 1155, 1192, n. 150 (2009) (compiling Congressional statements regarding the high risk of recidivism among child sex offenders). Similarly, the Eleventh Circuit has recently noted that "child sex offenders have appalling rates of recidivism [*31] and their crimes are under-reported." *United States v. Pugh*, 515 F.3d 1179, 1201 (11th Cir. 2008). In addition, one study of sex offenders found an overall recidivism rate of 31.7%. Kingston, Drew, et al., Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders, *Aggressive Behavior*, Volume 34 (2008) (also available at www.courseweb.uottawa.ca/PSY3171/personal/wp/p33%20Pornography%20Paper%202007a%20%20July%202007.pdf). The predicted odds of recidivism increased by 177% among the offenders that viewed deviant pornography, such as child pornography. Moreover, the predicted odds of violent recidivism, including sexually violent recidivism, increased by 185% for this group. The predicted odds of any type of sexual recidivism increased by 233% for the group that admitted to viewing deviant pornography. This increased risk of recidivism among sexually deviant offenders has also been found in earlier studies, including a meta-study from 1996. See Hanson, R. Karl, and Monique Bussiere, Predictors of Sexual Recidivism: A Meta-Analysis, available at home.wanadoo.nl/ipce/library_two/han/hanson_96_txt/pdf. The Court finds [*32] that these category-specific rates of recidivism are more appropriate when considering the need for adequate deterrence.

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VI. Child Pornography, Generally

"There can be no keener revelation of a society's soul than the way in which it treats its children."

2 Given the current statistics surrounding child pornography, we are living in a country that is losing its soul.

2 Quote commonly attributed to Nelson Mandela.

Child pornography is a vile, heinous crime. Mention the term to your average American and he responds with immediate disgust and a sense of unease. However, once it enters the legal system, child pornography undergoes sterilization. The sterilization goes far beyond properly removing emotion from sentencing decisions. Images are described in the most clinical sense. Victims all too often remain nameless. The only emotions on display are those of defendants,

sorry that their actions were discovered by law enforcement.

Congress began its regulation of child pornography in the 1970s. In so doing, Congress noted that its "legislation [was] designed to eliminate the exploitation [*6] of children in pornographic materials" and "to increase the deterrent effect" of then-existing statutes. S.Rep. 95-438, reprinted in 1978 U.S.C.C.A.N. 40, 41 and 55.

In this regard the committee feels that by greatly increasing the penalties for the sale and distribution of obscene materials -- if those materials involve the depiction of sexually explicit conduct by children -- the Congress is clearly expressing its abhorrence of child pornography. ... The committee feels that such [increased] penalties will provide adequate deterrence especially since the maximum penalty could be assessed for each violation and the most offensive cases would normally involve multiple violations.

Id. at 52. Sadly, Congress' efforts at deterrence were unsuccessful. In 2007, Congress heard testimony from Ernie Allen, the then-President of the National Center for Missing and Exploited Children. During his testimony, Allen stated that "today commercial child pornography is a multi-billion dollar industry worldwide, fueled by the internet." Even those that argue that the current sentencing scheme is too severe admit that the increase in the number of child pornography prosecutions has far outpaced any increase [*7] in the sentencing Guidelines. In 1994 and 1995, a total of 423 cases were prosecuted for all sex offenses against children, including but not limited to violations of the child pornography statutes. See U.S.S.C. Report to the Congress, Sex Offenses Against Children (June 1996). In 2008, 1,391 defendants were sentenced utilizing U.S.S.G. § 2G2.2, and another 175 were sentenced using U.S.S.G. § 2G2.1. See 2008 Sourcebook, available at <http://www.usc.gov/ANNRPT/2008/SBTOC08.htm>. This increase occurred despite the fact that the mean sentence for such offenders in 1995 was 36 months and the mean sentence for those offenders in 2008 increased to nearly 120 months. Id.; see also Stabenow, Troy, "Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines" (hereinafter "Stabenow") (January 1, 2009), available at http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf. One district court has described the growth of child pornography as follows:

The exploitation of children is pandemic. The most vulnerable members of our society have been exploited and discarded. Those who traffic in or consume child pornography must be punished severely. [*8] Indeed, the Supreme Court has recognized that punishing child pornography consumers is a compelling state interest. See *Osborne v. Ohio*, 495 U.S. 103, 110, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) ("[I]t is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution."). Yet a spectrum of criminal culpability is involved in this crime. Those who produce and distribute these images are at one end of the spectrum. They deserve the harshest punishment. At the other end of the spectrum are men like [this defendant] who view these disgusting images. Rather than physically harming a child, their criminal act is complete by entering a market with a few clicks of a mouse. From my experience, most of these men, like [this defendant], have no prior criminal history. They usually have healthy family lives and productive careers. While these men bear responsibility for the horrors created by child pornography, any system of justice must attempt to emotionally remove itself from natural instincts of revenge and retribution. See *United States v. Baird*, 580 F.Supp.2d 889, 895 (D.Neb. 2008) ("It is clear that one possessing child pornography has far less culpability than one [*9] distributing pornography, who, in turn, has far less culpability than one who produces child pornography."). These pathetic men make easy targets. There is nothing redeeming or even understandable about this crime. But judges must objectively consider whether the sentences imposed further the goals of punishment. To do so, we must differentiate between those who create child pornography and those who consume it.

United States v. Cruikshank, 2009 U.S. Dist. LEXIS 103279, 2009 WL 3673096, at *4 (S.D.W.Va. Nov. 6, 2009).

a. The Stabenow Argument

In his sentencing memorandum, Cunningham essentially presents the same argument espoused in Stabenow's article, namely that the child pornography Guidelines are not entitled to deference. Prior to addressing the substance of this argument, the Court acknowledges its discretion to disagree with the Guidelines.

However, even if it were true that district courts, based on the reasoning of Kimbrough, may impose below-guideline sentences for child pornography offenses solely based upon policy disagreements with those Guidelines, such does not entail that they must do so.

United States v. Mikowski, 332 Fed. Appx. 250, 256 (6th Cir. 2009) (footnote omitted); see also United States v. Huffstatler, 561 F.3d 694, 697-98 (7th Cir. 2009) [*10] ("while district courts perhaps have the freedom to sentence below the child-pornography Guidelines based on disagreement with the Guidelines, they are certainly not required to do so."). Moreover, the Court acknowledges that the Stabenow argument has been accepted by numerous district judges, including a judge within this district. See United States v. Hanson, 561 F.Supp.2d 1004 (E.D.Wis. 2008); United States v. Stern, 590 F.Supp.2d 945 (N.D. Ohio 2008). In so finding, those courts have held 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 960 (quoting United States v. Ontiveros, 2008 U.S. Dist. LEXIS 58774, 2008 WL 2937359, at *8 (E.D.Wis. July 24, 2008)). Cunningham primarily presents two arguments surrounding the validity of the child pornography Guidelines. Cunningham first points to the fact that Congress has routinely required the Commission to increase the penalties for child pornography, effectively negating the Commission's ability to independently determine the appropriate sanctions based on empirical evidence. [*11] Cunningham also argues that many of the child pornography enhancements apply in nearly every case, resulting in unduly harsh sentences for "average" offenders. The Court finds no merit in either argument.

1. Congressional Influence

There can be no dispute that Congress has repeatedly instructed the Commission to modify the child pornography Guidelines. Moreover, there is no dispute that one of the changes, the Feeney amendment, was made with little to no input from the Commission. While Congress' actions give rise to some concern, they are also easily explained. Crimes involving the exploitation of children provide fertile ground for grandstanding politicians. Public outcry is always at its loudest following media coverage of a crime involving a child victim. As such, it comes as little surprise that Senator Jesse Helms used inflammatory language in 1991, calling on tougher penalties for "smut peddlers and pedophiles," when Congress sought to have the Commission amend the Guidelines. Based on that language, it is simple to conclude that the Guidelines were modified for no other reason than to serve as campaign fodder for public officials. However, while the Commission made changes to [*12] the Guidelines on October 28, 1991, the Helms-Thurmond Amendment changes were foreshadowed. A 1990 State Report generated by the Commission recommended two of the same changes included in the Congressional act: "increasing the base offense level for § 2G2.2 from 13 to 15, and including a specific offense characteristic at § 2G2.2 for pattern of abuse." The History of the Child Pornography Guidelines, at 24-25, available at www.ussc.gov/general/20091030_History_Child_Pornography_Guidelines.pdf. After the 1991 amendment, Congress continued to pass acts that affected the Guidelines. In December of 1995, Congress passed the Sex Crimes Against Children Prevention Act. In 1998, it passed the Protection of Children from Sexual Predators Act. In 2003, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act was passed. The PROTECT Act was the first and only time Congress has directly amended the child pornography Guidelines. The Act added the image table to the Guidelines and also added the enhancement for possessing sadistic or masochistic images. Following the passage of the PROTECT Act, the Commission conducted a number of studies regarding the Guidelines, [*13] including the

following:

. A prison impact analysis that used 2002 data to report how the 2004 amendments to §§ 2G2.2 and 2G2.4 directly mandated by Congress would likely impact sentences. This analysis revealed that average sentences for § 2G2.2 would likely more than double from 42.8 months to 88.8 months. Those previously sentenced under § 2G2.4 were predicted to see a similarly large average increase in sentence from 28 months to 54 months.

. An examination of state sentencing practices for child pornography offenses in Florida, Oklahoma, Massachusetts, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, and Washington. The results were ultimately ambiguous due to differing data collection models in each state, but such information was considered during the policy development process.

. A project examining offenders sentenced under §§ 2G2.2 and 2G2.4 to determine the statute of conviction; the offender's most serious behavior; any inappropriate contact with a minor by offender; travel by victim or offender; arrest due to a sting operation; age of victim; number of victims; use of a computer by offender; pattern of activity by offender; offender's criminal history [*14] (particularly, the existence of prior offenses against persons); existence of plea agreement; history of substance abuse by offender; psychological evaluation of offender; and offender's marital status. The project also examined departure rates in child pornography cases. The results informed the drafting of proposed amendments and identified issues for comment. It also permitted the Commission to understand the likely rates at which new enhancements would apply.

History at 41-42. Moreover, despite Congress directly amending the Guidelines, the Commission was still required to implement those Guidelines. For example, "the Commission had to define the term 'images,' quantify video images, and implement the directive." *Id.* at 43. "Given that the image table enacted by Congress assigned a 2-level increase for between ten images and 150 images, and a 3-level increase for 150 to 300 images, the Commission adopted a definition of video that considered each video to contain 75 images, squarely in the middle of the 2-level increase range." *Id.* at 43-44.

The [*15] Commission was also tasked with implementing appropriate base offense levels that took into account the five-year statutory mandatory minimum.

After engaging in extensive analysis of its data, including a review of typical trafficking and receipt offenders, offense characteristics, and rates of below guideline sentences for these offenses, the Commission adopted the third, most lenient option of those typically used by the Commission, and selected base offense level 18 for possession offenders and base offense level 22 for trafficking and distribution offenders.

The Commission's analysis revealed that a majority of offenders sentenced under § 2G2.2 were subject to specific offense characteristics that increased their offense level. Specifically, the overwhelming majority of these offenders received a 2-level enhancement for use of a computer (89.4%) and a 2-level enhancement for material involving a child under 12 (91.4%).

Id. at 46. The Federal Defender's office agreed that setting the base offense levels below the mandatory minimum was appropriate. *Id.* at 47.

The Commission's research and review of comments indicated that if it placed the base offense level at 26, or even 24, after applying [*16] the typical enhancements, most first-time offenders' Guidelines calculations would be far in excess of the mandatory minimum. However, setting the base offense level at level 22 would permit the Guidelines and enhancements to operate in conjunction with the statutory mandatory minimum.

Id.

Finally, the Commission undertook a proportionality review of the Guidelines prior to finalizing its base offense level analysis. "This review demonstrated that if the base offense level were set any higher than 22, the typical offender sentenced under § 2G2.2 for receipt of child pornography would face a higher guideline than a typical offender convicted of conspiracy to commit murder

and kidnapping. Thus by setting the base offense level at 22 for trafficking, the Commission sought to preserve proportionality, avoid double counting, and provide a wider sentencing range for defendants than would be otherwise available." *Id.* at 48.

Having reviewed the actions taken by the Commission, the Court finds that giving deference to the Guidelines is appropriate. We are often told that when life gives you lemons, make lemonade. In this instance, the Commission was given grandstanding politicians, but still crafted [*17] proper Guidelines. Rather than cede its responsibility, the Commission instead appears to have gone above and beyond to justify its amendments. Far from failing to rely on empirical data and its own expertise, the Commission has conducted formal studies whenever possible and has conducted extensive analyses to fulfill its statutory obligations. Have politicians unduly hampered the Commission's ability to perform its duties? There can be no question that they have interfered. However, at the same time, Congress' actions could be viewed as a necessary response to a crime that was spiraling out of control. As internet access grew across this country, so did the online community of pedophiles that supports the market for child pornography. Rather than remain silent, Congress acted. In turn, the Commission used empirical data and its own expertise to craft the appropriate Guideline amendments. This Court, therefore, declines to join those district judges that have found otherwise.

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The Court made its request to view the images shortly before the first sentencing hearing in this matter. At that time, Agent Hagan expressed surprise that the Court wished to review the images in their entirety. Agent Hagan indicated to the Court that she had been the affiant in more than 100 child pornography investigations and, absent a matter going forward to trial, a judge had never requested to view the photographs at issue. While only a minor sampling, this revelation was shocking to the Court. ³ As detailed above, the agents handling these matters are able to aptly describe the contents of each image. Those descriptions, however, are little more than words on paper. Absent examining the images, one cannot [*27] get a true sense of the depravity that they depict. Thus, the Court implores any reviewing Court to personally examine the images at issue and not simply rely on a written description of their contents. The Court acknowledges that the review of such images is, to say the least, uncomfortable. There are some images that are haunting, and they cannot be unseen. However, any uneasiness felt by the individual reviewing the image pales in comparison to the harm caused by the image being created in the first place.

³ At least one other district court has recognized that judges rarely view the images at issue in child pornography matters. See *United States v. Fiorella*, 602 F.Supp.2d 1057, 1075 n.8 (N.D.Iowa 2009) ("It is easier to overlook the horrors of child pornography when, as is often the case, the material at issue is not presented to the sentencing judge. For purposes of efficiency and minimization of re-victimization of the children depicted, the government and the defendant will often (and rightly so) enter into stipulations about the number and nature of the photographs at issue. But the horrors of child pornography are real even if those who sit in judgment do not have occasion to [*28] view them.").

The image "004.jpg" does in fact depict a prepubescent female engaged in sex with an adult male. That written description cannot convey the true nature of the image. The image depicts a little girl, likely no more than eight years old. She has a vacant look to her eyes, as if even at her tender age, she understands the cruelty of the event taking place and the impact it will have on her for the rest of her life. Moreover, viewing such a young girl being violated by adult, male genitalia gives the viewer an understanding of how heinous the crime truly is. One cannot describe in writing that image. Rather, one has to see the dull, often vacant expressions of the victims to get an ounce of the proper emotions expressed in those images.

2. Seriousness of the Offense

In examining the seriousness of the offense, the Court must review the harm to the victims. While courts and scholars have tried to explain the effects on victims, the Court in this matter has the benefit of victim impact statements. In reviewing Cunningham's images, the Government was able to identify two of the victims in those images. The two victims describe in detail the lingering

effects of their abuse. One, [*29] now seventeen years old, describes her life as follows:

I block my room at night from anyone seeing me when I sleep. I will never answer the door even my mom is home. I trust nobody! ... I have had night mares, migraines and I have lot's of problems sleeping. I don't trust anyone but my mom and I will never trust a photographer again.... I have had stomach ulcers and weight loss and just the thought of what they are doing makes me want to throw up. (Sic throughout.)

Another identified victim, now eighteen years old, offers a similar description:

I tried to kill myself and didn't want to live. ... I will never forget what these people have done to us. I don't take any photo's with photographers.... I will not answer my phone unless I know who it is. I do not open my window or my blinds in my room. I still like to sleep with my mom. I don't stay home alone. I received many scholarships to colleges away from home and I did not take any of them. ... I just don't know if I will ever get over some of these things. Once you have been affected by a predator they never really leave you. I have night mares, dreams and anxiety thinking they are going to get us[.] (Sic throughout.)

While heart-wrenching to read, [*30] the letters lack the emotion that could be conveyed in court and that would perhaps finally begin to impact defendants like Cunningham. Nevertheless, they amply demonstrate the seriousness of the general offense of child pornography.

3. Adequate Deterrence

In arguing for a variance, Cunningham asserts that he has a very low risk of recidivism. In so arguing, Cunningham relies upon the Commission's publications regarding recidivism. Based on his lack of a criminal history, Cunningham asserts that his risk of reoffending is only 6.2%. The Court finds that this generalized data does not warrant reliance when examining the risk of recidivism of a particular individual. For that matter, Congress has repeatedly reiterated that recidivism rates are particularly high for child sex offenders. See Blaisdell, Krista, Note, Protecting the Playgrounds of the Twenty-First Century: Analyzing Computer and Internet Restrictions for Internet Sex Offenders, 43 Val. U. L. Rev. 1155, 1192, n. 150 (2009) (compiling Congressional statements regarding the high risk of recidivism among child sex offenders). Similarly, the Eleventh Circuit has recently noted that "child sex offenders have appalling rates of recidivism [*31] and their crimes are under-reported." *United States v. Pugh*, 515 F.3d 1179, 1201 (11th Cir. 2008). In addition, one study of sex offenders found an overall recidivism rate of 31.7%. Kingston, Drew, et al., Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders, Aggressive Behavior, Volume 34 (2008) (also available at www.courseweb.uottawa.ca/PSY3171/personal/wp/p33%20Pornography%20Paper%202007a%20%20July%202007.pdf). The predicted odds of recidivism increased by 177% among the offenders that viewed deviant pornography, such as child pornography. Moreover, the predicted odds of violent recidivism, including sexually violent recidivism, increased by 185% for this group. The predicted odds of any type of sexual recidivism increased by 233% for the group that admitted to viewing deviant pornography. This increased risk of recidivism among sexually deviant offenders has also been found in earlier studies, including a meta-study from 1996. See Hanson, R. Karl, and Monique Bussiere, Predictors of Sexual Recidivism: A Meta-Analysis, available at home.wanadoo.nl/ipce/library_two/han/hanson_96_txt/pdf. The Court finds [*32] that these category-specific rates of recidivism are more appropriate when considering the need for adequate deterrence. Moreover, even if the Court were to start with the lower rates contained in the Commission's data, the Court would find that Cunningham's likelihood of recidivism is greater than those published rates. Cunningham has over and over again indicated that he used child pornography as a coping mechanism during a period of time when his life was in shambles. From that perspective, Cunningham fails to recognize the significance of his own actions. Many individuals go through periods of severe depression with little to no support from family and friends. A vast majority of those individuals do not resort to online communities of child pornography to address their

loneliness. It is clear to the Court that there is some underlying issue that has caused Cunningham to seek out child pornography. Until Cunningham receives some treatment, discovers that issue, and confronts it, the Court believes he is at a significant risk of reoffending. In response, Cunningham asserts that he now has a more stable life and has no need for that type of material going forward. While that may be [*33] true in the short term, it does little to address the likelihood of Cunningham's returning to child pornography during the next downturn in his personal life. As such, the Court finds that a significant sentence is necessary to deter Cunningham from reoffending.

In addition to deterring Cunningham, the Court is also mindful of the need to deter other offenders. As has been highlighted throughout, end users are the cogs in the wheel that drive the demand for child pornography. As technology progresses, the recipients of these images are becoming more and more difficult to find and prosecute. Millions of dollars are spent each year in the hopes of finding those consuming these images. As such, the Court finds it important to impose an appropriate sentence to alert end users to the fact that receipt and distribution in and of itself is a heinous crime deserving of a severe punishment.