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Via email to pubaffairs@ussc.gov.

United States Sentencing Commission

1 Columbus Circle, N.E.

Suite 2-500, South Lobby

Washington, D.C. 20002-8002

ATTN: Public Affairs, Priority Comments

Re: Sentencing guidelines for first time offenders convicted of the possession or receipt of child pornography with no history of abusing or exploiting children.

Dear Sir or Madame:

My name is Andy Dunham, and I am an attorney licensed by the State of Texas. Though I primarily practice civil litigation, I have committed to staying abreast of developments in all areas of the law, particularly those that have Constitutional implications. I also have a particular interest in how laws are changing in response to advances in technology. In light of this, I am writing regarding the sentencing guidelines for offenses for the possession and receipt of child pornography for first time offenders with no history of abusing or exploiting children

The Current Sentencing Guidelines Are Unjustly Severe.

The current sentencing guidelines for first time offenders convicted of the possession or receipt of child pornography with no history of abusing or exploiting children are unjustly severe. Though no one would dispute that child pornography is a heinous practice, and that the possession and receipt of child pornography should be punished, the current guidelines are disproportionately severe when applied to first-time offenders who possess child pornography only through online distribution and who have no history of physical abuse or molestation of children. Such persons do not represent the same threat to society, and particularly to children, as those who have a history of criminal behavior or of abusing or molesting children. Because of the undue severity of the current

guidelines, they do not conform to Congress' desire for proportionality of punishments administered under the guidelines.

Penalties Have Become More Severe Over the Last Decade.

As the Commission has recognized, the penalties for child pornography offenders have become more severe over the last several years, while Congress has at the same time broadened the scope of behavior which is punishable under child pornography statutes.¹ When the first guidelines were promulgated in 1987, possession of child pornography was not a federal offense, regardless of the means through which the pornography was obtained.² Congress made possession a federal offense in 1990.³ The 1991 guidelines provided that possession was a level 10 offense, which is punishable by a sentence of 6 to 12 months for first-time offenders.⁴ After Congress reacted strongly against this recommendation by the Committee, new guidelines were promulgated raising the offense level for possession of child pornography to 13, which is punishable by a sentence of 6 to 12 months for first-time offenders.⁵ In 1996, pursuant to Congress's instructions to increase penalties for possession of child pornography, including enhancements for possession resulting from the use of a computer, the Commission promulgated guidelines raising the offense level for possession of child pornography to 15, with an enhancement of 2 if the possession involved a computer.⁶ The resulting level 17 offense is punishable by a sentence of 24-30 months for first time offenders.⁷

¹See p. 1 of article, "The History of Child Pornography Sentencing Guidelines," issued by the Commission in 2009, available at http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf

²See *id.* at 10.

³See *id.* at 17.

⁴See *id.* at 19; <http://www.crimdefend.com/files/federal-guidelines.pdf>

⁵See "History of Child Pornography Sentencing Guidelines" at 18-25; <http://www.crimdefend.com/files/federal-guidelines.pdf>

⁶See *id.* at 32.

⁷See <http://www.crimdefend.com/files/federal-guidelines.pdf>

In 2003, the PROTECT Act was passed, which raised the maximum sentence for possession of child pornography to 10 years.⁸ The Act also included an “image table,” which increased the punishment for child pornography offenses based on the number of images involved.⁹ Such an amendment has a disproportionate affect on child pornography obtained or transported through computer use due to the ability to easily transport many images over the internet. The regulations promulgated pursuant to the Act provided that possession of child pornography obtained by a computer was a level 17 offense, and it was increased by between 2 and 5 levels depending on the number of images involved.¹⁰ Thus, a first-time offender who obtained 600 or more images over the internet would be punished for a level 22 offense, which carries a sentences of 41 to 51 months.¹¹ This is the same sentence as is typically imposed on an offender convicted of conspiracy to commit murder or kidnapping.¹²

Punishments have historically been more severe for those convicted of “trafficking and receipt” of child pornography. Moreover, the alignment of “receipt” with trafficking rather than possession has proven confusing and difficult for courts to implement, resulting in elongated sentencing hearings.¹³ Thus, under the PROTECT Act, the 2003 regulations provided that “receipt” of child pornography obtained by a computer was a level 19 offense (as opposed to level 17 for possession), which similar enhancements based on the number of images. In the 2004 regulations, the minimum level for possession involving a computer was raised to level 18, and for trafficking and receipt it was raised to level 22.¹⁴

⁸See “History of Child Pornography Sentencing Guidelines,” 38.

⁹See *id.* at 39.

¹⁰See *id.* at 41.

¹¹See <http://www.crimdefend.com/files/federal-guidelines.pdf>

¹²See “History of Child Pornography Sentencing Guidelines,” at 48.

¹³See *id.* at 43.

¹⁴See *id.* at 49.

The Guidelines' Goal Is to Impose Proportional Sentences.

As mentioned above, a key goal of the sentencing guidelines is that the sentences they impose be proportional to the offenses that are being punished.¹⁵ To achieve this goal, the guidelines take into account the following factors:

- the nature and degree of the harm caused by the offense;
- the community view of the gravity of the offense;
- the public concern generated by the offense;
- the deterrent effect a particular sentence may have on the commission of the offense by others; and
- the current incidence of the offense in the community and in the Nation as a whole.¹⁶

Judges imposing sentences under the guidelines are to consider retribution, deterrence, incapacitation, and rehabilitation.¹⁷

Other factors inform the Commission's analysis. In the 1990 guidelines, the Commission noted that whether the offender had a history of abusing children was an important factor in considering what sentence to impose on the offender.¹⁸ The 1996 guidelines focused on identifying offenders who were at risk for victimizing children in the future so that they could "be provided treatment or [be] incapacitated through extended imprisonment."¹⁹ To this end, the Committee recommended longer sentences for offenders with history of abusing children due to their propensity to recidivate.²⁰

The Current Sentencing Guidelines Are Not Proportional.

The current sentencing guidelines for first time offenders convicted of the possession or receipt of child pornography with no history of abusing or exploiting children do not satisfy the goal of the sentencing guidelines because they are disproportionately severe. The punishment is disproportionately severe, among other reasons, because:

- It punishes overly broadly, including non-violent first time offenders who have no criminal history or history of abusing children;

¹⁵*See id* at 3.

¹⁶*See id* at 2.

¹⁷*See Tapia v. U.S.*, 131 S.Ct. 2382, 2384 (2011); *citing* 18 U.S.C. 3553(a)(2).

¹⁸*See id.* at 13-14.

¹⁹*See id.* at 30.

²⁰*See id.* at 30-31.

- It punishes computer child pornography offenders at the same level as violent criminals such as those who kidnap and conspire to commit murder;
- It enhances punishment for computer use, when computer use, in fact, indicates the possibility of a lesser intent than those obtaining child pornography through traditional means;
- It does not support the purposes of rehabilitation for first-time offenders who are likely candidates for rehabilitation, choosing merely to warehouse them with violent felons, increasing the likelihood that they will become career criminals themselves.

Because the current sentencing guidelines are disproportionately severe, they should be retroactively amended to properly and proportionately punish first time computer child pornography offenders.

The Current Guidelines Do Not Sufficiently Account for a Lack of Criminal or Abusive History.

As discussed above, whether or not an offender has a history of abusing children is an important factor in determining an appropriate sentence for that offender. Yet, the current guidelines do not properly distinguish between offenders who have a history of abusive behavior and first-time offenders. As such, they cast too wide a net. As the Commission has noted, a key reason those with abusive histories merit stronger punishment is that they are likely to recidivate. In contrast, first time offenders who obtain their materials through computer use are not likely candidates to become career criminals, as studies have shown that computer consumption of child pornography does not, by itself, indicate a likelihood of “hands-on” abusive behavior of children.²¹ Courts should be given more discretion to take into account the very real difference between first-time computer offenders and those with histories of abusing children and to impose sentences better reflecting those differences.

The Current Guidelines Improperly Lump First-Time Computer Offenders Together With Violent Criminals.

The current guidelines are also disproportionately severe in that they punish first-time computer offenders at the same level as violent criminals. As discussed above, the offense level for a first-time computer offender is the same sentence as is typically imposed on an offender convicted of conspiracy to commit murder or kidnapping. This is disproportionate on its face. It is simply unjust for the sentencing guidelines to mandate judges to punish first-time computer offenders with no history of criminal behavior or of abusing children at the same level as those who commit violent, intentional acts such as conspiracy to commit murder and kidnapping. Reprehensible as child pornography is, there is simply no equivalence between receiving images over the internet to view privately on one’s computer and intentionally seeking to kidnap or murder someone. Yet, the sentencing guidelines mandate that courts sentence these two classes of offenders as though they

²¹See “The Consumption of Internet Pornography and violent and sex offending
BMC Psychiatry,” July 14, 2009, www.biomedcentral.com/1471

were the same. This is unjust on its face, and the sentencing guidelines must be revised to correct this injustice.

The Current Guidelines Improperly Impose an Enhanced Sentence for Computer Use, Although Computer Use Indicates a Lesser Intent Than Traditional Use.

Under the current guidelines, there is a two-level enhancement for obtaining child pornography through computer use. Additional enhancements up to five levels apply depending on the number of images the offender receives or has possession of. But, this is counterintuitive, since obtaining such images through the use of a computer actually demonstrates a lower level of intent than obtaining the images through traditional means.

Computers and the internet have revolutionized nearly every aspect of modern life. For both good and bad, we can now access in an instant what used to take weeks or longer. Sadly, this is true for the transmission and receipt of child pornography. In the past, someone who wanted to view such images would (presumably) have to take deliberate steps to find a source for such images, and make arrangements to obtain the images from that source, including delivery via mail or other means, all of which demonstrate intent and purpose on the part of the offender. Now, in contrast, such images may (again, presumably) be obtained simply through typing some terms into a search engine and pressing the submit button. In fact, it's possible that such images may be obtained unintentionally when seeking legal adult pornography. Whereas, before, obtaining such images was the final result of a long chain of decisions, it may now be the fruit of momentary weakness, ill judgment, or the mistake of others. The degree of culpability of at least some computer offenders is clearly less than that of traditional offenders.

Yet, the sentencing guidelines not only do not reflect this reality, they are in direct contradiction to them. An automatic two-level enhancement is applied to computer offenders, and additional enhancements are applied, up to a five-level enhancement, based on the number of images. When it's possible to download or access hundreds of images in moments, such guidelines can result in a level 29 offense for the receipt of 600 or more images over the internet. This means a mandatory sentence of 87 to 108 months for a first-time offender who is possibly being punished for a momentary lapse in judgment or for someone else's wrongful actions (if he did not know the images depicted children). That's more than 7 years of someone's life thrown away, at taxpayer expense, despite no history of violence, criminal behavior, or abuse to children. Such a disproportionately severe sentence does justice neither to the offender or to society at large.

The Current Sentencing Guidelines Waste an Opportunity to Rehabilitate First-Time Offenders, and, Instead, Increases the Likelihood of Making them Career Criminals.

There are precious few opportunities for the criminal justice system to truly rehabilitate criminal offenders. Perhaps the most egregious problem with the current sentencing guidelines is that it squanders such an opportunity and, instead, warehouses first-time computer offenders along

with violent felons where they are likely to develop into career criminals. In 2006, 80% of child pornography defendants had no prior felonies of any kind let alone a history of sexually abusing or exploiting a child.²² These offenders are not hardened criminals or career criminals, and they are likely candidates to be rehabilitated with proper treatment. Such offenders are often men entering the prime years in which they should be building their careers and contributing to society. If given treatment and counseling in closely monitored situations, they can learn the broader effects of their offense and be steered toward a productive life.

Instead, such offenders are given long sentences with little or no treatment or counseling. Instead of advancing in their careers and becoming productive citizens, they become criminalized by association with violent felons. The skills they learn are those of a career criminal. Upon release, they are unlikely to find employment and are ostracized from society due to being registered sex offenders. One of the few paths open to such an offender is that of the criminal lifestyle, and, eventually, a return to a lifetime of imprisonment.

The Guidelines Need to Be Retroactively Reformed in the Interest of Justice.

Prospectively reforming the guidelines to deal more justly with future first-time computer offenders is insufficient, because it leaves hundreds of such first-time offenders trapped in long prison sentences at taxpayer expense instead of contributing to society. The only solution which will achieve justice is a retroactive reformation of the guidelines to correct the unjustly disproportionate sentence imposed on those already sentenced under the guidelines.

²²See "A Reluctant Rebellion," by Mark Hansen, *ABA Journal*, June, 2009, http://www.abajournal.com/magazine/article/a_reluctant_rebellion/

Conclusion

It is not a popular decision to shorten sentences for child pornography offenders, regardless of whether or not they have a history of criminal or abusive behavior and whether or not they are good candidates for rehabilitation. Child pornography is a heinous and reprehensible practice, and it universally evokes a strong, instinctive cry for punishment in the name of protecting children. There is a reason that even criminals themselves, who tolerate a broad range of reprehensible behavior, are themselves intolerant of those who commit offenses against children.

But the goal of the sentencing guidelines is not to be popular; it is to be just. Just guidelines are proportional guidelines. Just and proportional guidelines are those that take into account all the realities of the offender's situation, and that make meaningful distinctions between different classes of offenders. Just guidelines also provide opportunity for rehabilitation where it is indicated. Unfortunately, the current guidelines fall woefully short of this standard. Instead of just punishment, they impose draconian punishment. Instead of offering rehabilitation, they offer long sentences without hope. Instead of providing justice, they sacrifice young men to society's cry for vengeance because it is expedient.

For these reasons, I support a retroactive change to the sentencing guidelines for first time offenders convicted of the possession or receipt of child pornography with no history of abusing or exploiting children.

Very truly,

/L. Andrew Dunham/

L. Andrew "Andy" Dunham