UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	)	
V.	)	No. 15-Cr.-00074-LM
JAMES BEDNARCYK	)	

DEFENDANT'S MOTION ON SENTENCING

Defendant James Bednarcyk respectfully moves through counsel that the Court impose a non-guideline sentence of twelve months and one day in the custody of the Bureau of Prisons (BOP) and five years of supervised release, with special conditions including timely registering and updating his status as a sex offender, appropriate sex offender treatment, submission to polygraph examinations as reasonably directed by his supervising probation officer – who shall advise Bednarcyk that he retains the right to assert his right against self-incrimination as to questions about any criminal conduct which post-dates sentencing in this case, no possession or control of any depictions of sexually explicit conduct of adults or children, and no use of the internet or of media devices with interactive computer service as defined in 47 U.S.C. § 230(f) without the prior approval of his supervising probation officer, which approval shall not be unreasonably withheld.

Bednarcyk is scheduled to be sentenced on April 18, 2016 for possession of child pornography on or about September 29, 2014. He has been released on conditions since his arraignment on May 14, 2015. The presentence investigation report concludes that he falls in Criminal History Category I, that the total offense level is 28, and that the advisory guideline sentencing range (GSR) is 78 to 97 months. *Revised Presentence Investigation Report of April 4,*

2016 ("*PSR*"), ¶ ¶ *32,36 & 59.*

Both parties agree that a sentence within the GSR of 78 to 97 months would be greater than necessary to implement the sentencing criteria in 18 U.S.C. § 3553(a). The government seeks a sentence which includes 48 months in BOP custody. United States Sentencing Memorandum and Motion for a Downward Variance, *Document 18.* For the following reasons the Court should impose a sentence which includes one year and one day in BOP custody.

A. Guidelines Issues

U.S.S.G. § 5K2.0(b) substantially restricts the Court's ability to depart downward in cases involving child crimes and sexual offenses. Application Note 4 to § 5K2.0 extends that restriction to all offenses in Chapter 110 of Title 18, which covers conduct ranging from the buying and selling of children to production of child pornography to possession of depictions of child pornography.

On January 21, 2016 Senior Judge Jack B. Weinstein in the United States District Court for the Eastern District of New York issued a lengthy opinion in a child pornography sentencing, *United States v. R.V.*, 2016 U.S. Dist. LEXIS 7717 (ED NY 2016). To implement fair and just sentences for child pornography offenses, ones which differentiate among offenders with varying degrees of culpability, he cogently categorizes child pornography offenders as follows:

"• Possession-only child pornography users: This category includes those viewers and consumers of child pornography who download images of child pornography. It frequently includes individuals with the lowest degree of culpability. Often, defendants in this category do not have the mens rea threatening actual contact with a minor.

"• Possession and involuntary distribution: This category comprises those individuals who possess child pornography they downloaded and are deemed to have engaged in distribution due to the nature of the technology used for downloading the images. The individuals in this category may not intend to distribute child pornography. For example, this category would include child pornography users who download images via peer-to-peer file sharing sites which may render files automatically accessible to others.

"• Possession with intentional distribution: This category comprises those individuals who possess and intentionally distribute child pornography to other users, but not for commercial gain. Offenders in this category display a higher degree of culpability; the trade and exchange of such images significantly contributes to the child pornography market, perpetuating the severe harm suffered by children in production.

"• Possession with intentional distribution for commercial gain: This category encompasses individuals who profit from the trade in child pornography. This conduct is extremely serious. It not only contributes to the existence of the market, but defendants in this category tend to be driven by unchecked pecuniary concerns rather than a mental illness amenable to curative medical treatment.

"• Online communications with minors without intent to engage in contact: This category includes those child pornography users who view child pornography while concurrently engaging in online communications with minors, without the intention, or with little or no likelihood, to engage in any physical contact with them. The adverse effect on the child of such inappropriate conduct may be serious.

"• Online communications with minors intending to engage in contact: This category represents individuals with a high degree of culpability. They possess the mens rea that is likely to lead to actual contact with minors. Individuals falling within this category represent a serious risk to the public. The contact ranges from talk to coitus.

"• Production of child pornography: Defendants in this category engaged in, and are most likely to engage in the future, in the sexual exploitation of a minor. This group potentially constitutes a most serious and dangerous category of child pornography offenders. Defendants in this category can be further differentiated based on factors such as the type of images produced, the quantity, and their role in the production. Some involve photographing rapes of young children by a parent and other relatives or friends of the family. Such incestuous relationships are particularly hard to ferret out."

2016 Lexis 7717, *6-10. Judge Weinstein notes that, although the current guidelines appear to recognize these broad categories, the Sentencing Commission itself concedes that several of the "enhancements tend to apply indiscriminately to all child pornography offenders, greatly increasing the recommended punishment range without necessarily reflecting an individual's heightened level of culpability." 2016 Lexis 7717, *9. He quotes a Sentencing Commission

publication which states that:

> "[T]he current sentencing scheme . . . places a disproportionate emphasis on outmoded measures of culpability regarding offenders' collections," and recommends that the Guidelines be revised to "more fully account" for: the content of an offender's child pornography collection and nature of his collecting behavior; the degree of the offender's involvement with child pornography communities; and an offender's history of "sexually dangerous behavior."

2016 Lexis 7717, *9-10, quoting *Federal Child Pornography Offenses* (Dec. 2012), at 320-21.

Both the PSR, ¶ *69*, and the government's motion for a variance, *Pp.2-3*, agree that two guideline enhancements overstate Bednarcyk's culpability. The first is the two level increase for use of a computer. To the best of counsel's knowledge, it has been years since this district has seen a prosecution for possession of pornography which did not involve use of a computer or other digital device. The second enhancement is the four level increase for possession of a single video containing sadistic and masochistic (S&M) content. As the government notes, possession of a single S&M video is notably less egregious than other collections in which that four level increase has been applied. In this case reducing the offense level by two for use of a computer and an further two to reflect the lesser seriousness of possessing a single S&M video level would result in an applicable offense level of 24 and a GSR of 51 to 63 months.

Bednarcyk is accountable for 71 images and 20 videos of child pornography. *PSR* ¶ *12*. Application Note 4(b)(B)(ii) to U.S.S.G. § 2G2.2 directs that each video "shall be considered to have 75 images." Twenty multiplied by 75 generates1500 images, which per § 2G2.2(b)(7) results in the same five level maximum increase in the offense level, the same increase that would be imposed for the much larger video collections which can now be stored in the cloud or elsewhere in the ever expanding digital universe. A two level increase would better reflect the relatively modest size of Bednarcyk's video collection.

Applying these suggested adjustments would result in a total offense level of 21 and a GSR of 37 to 46 months. Although the current sentencing guidelines do not give the Court the discretion to grant a downward departure in this case, they are no longer mandatory. The Court can and should consider how the applicable guidelines generate an excessive sentence in this case.

B. Legal Authority for a Non-Guideline Sentence

United States v. Booker, 543 U. S. 220, 125 S. Ct 738 (2005), Gall v. United States, 128 S. Ct. 586 (2007), Kimbrough v. United States, 128 S. Ct. 558 (2007), and 18 U.S.C. § 3253(a) require the Court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" and to impose a sentence which is "sufficient but not greater than necessary" to comply with the enumerated purposes of sentencing. Upholding a non-guideline sentence well below the GSR, Judge Selya wrote for the First Circuit Court of Appeals that post-Gall, "[A] sentencing court "should not consider itself constrained by the guidelines to the extent that there are sound, case-specific reasons for deviating from them. Nor should a sentencing court operate in the belief that substantial variances from the guidelines are always beyond the pale." United States v. Martin, 520 F.3rd 87 (1st Cir. 2008). Moreover, the Court may deviate from the GSR if it determines the applicable guideline does not fit the circumstances of the case before it or indeed if the Court disagrees with the Sentencing Commission policies reflected in that guideline. Kimbrough, 128 S. Ct. at 573-74. As Judge Weinstein observed, this rationale is most compelling when the offense guideline at issue is not the product of the Commission's empirical analysis and technical expertise, which is the case with respect to the Guidelines for child pornography offenses, which were amended at the direction of Congress rather than through the Sentencing Commission's empirical approach. *United States v. R.V.*, 2016 U.S. Dist. LEXIS * 106-106, citing *United States v. Dorvee*, 616 F.3d 174, 184-86. The

Commission opposed some changes to the Guidelines directed by Congress and has sought authority from Congress to amend the current child pornography provisions. *Id.*, citing *Dorvee,* 616 F.3d at 18, and *Federal Child Pornography Offenses*, at 322 ("[T]he Commission believes that Congress should enact legislation providing the Commission with express authority to amend the current guideline provisions that were promulgated pursuant to specific congressional directives or legislation directly amending the guidelines."). The Kimbrough mandate that the Court consider whether the applicable guideline fits the circumstances of the case before it, as well as the weight owed to that guideline, "applies with full force to § 2G2.2," the guideline which governs this case. *United States v. Dorvee*, 604 F.3d at 98.

According to § 3553(b)(2) (ii)(II) & (III), sentencing courts may downwardly depart from the Guidelines, in addition to declining to follow them, if the court finds that there exists a mitigating circumstance of a kind or to a degree, that has not been taken into consideration by the Sentencing Commission in formulating the guidelines, and that should result in a sentence different from that described. Significant mitigating circumstances support the sentence sought herein.

C. The Offense Conduct

The offense conduct in this case falls in the less culpable of Judge Weinstein's categories for child pornography offenses. It is described in Paragraphs 7 through 13 of the PSR. The material allegations are undisputed. In April of 2011 law enforcement determined that an electronic device linked to Bednarcyk's IP address shared on a peer to peer network a file which contained child pornography. In May of 2014 a Vermont investigator reported that child pornography was being shared by a device at another IP address assigned to Bednarcyk. On September 29, 2014 law enforcement executed a warrant at Bednarcyk's apartment in Claremont,

New Hampshire and seized his desktop computer and several related media devices. They contained the sexually explicit images that Bednarcyk has pled guilty to possessing.

While the apartment was being searched, two Homeland Security agents and two Claremont police officers went to the local Staples, where Bednarcyk was employed. He was cooperative and agreed to speak with them. They searched his vehicle and cell phone and found nothing out of the ordinary. Bednarcyk went voluntarily to the Claremont police station, waived his rights against self-incrimination, and gave a recorded statement, to which his counsel has listened attentively. It is cogent and candid. Bednarcyk answers the detective's questions respectfully, without evasion, and with no minimizing or excuses. Salient points include the following:

i. Bednarcyk started looking at child pornography (CP) when he was 10 or 11 years old.

ii. He probably collected it for 6 years, although he did not "actively save it."

iii. He was "trying very hard to get away from everything" and had recently deleted every CP file and only kept adult images, "But [he] went back to it, unfortunately, " and retrieved some of the CP files.

iv. He has 10 or more CP videos on his computer.

v. He has between 100 and 300 CP photos on his computer.

vi. All the CP is in on one custom built computer.

vii. There is no CP on any other computer, cell phone or other electronic device including at work. [Investigators corroborated this before returning his cell phone.]

viii. He has never had any CP-related interactions with anyone else.

ix. He has never knowingly shared CP with anybody.

x. He knew that the CP images on his computer were illegal.

xi. He would go to web sites, download peer to peer software, and type in the age group he was interested in: mostly 6 to 12 year olds.

xii. He never tried to hide his identity.

xiii. He never used anyone else's device for internet access.

xiv. Prior to his arrest nobody was aware of his interest in CP.

xv. His parents are shocked and disappointed, but still very supportive.

xvi. He was never sexually abused.

xvii. He has never thought about touching, or acting out, or preying on a child.

xviii. He would pass a polygraph question on never touching a child inappropriately.

xxiv. He is not aware of anyone else with an interest in CP.

xxv. "This is the final push I need to go to counseling."

xxvi. "This needs to stop."

There is no evidence that Bednarcyk's recorded statement was anything other than fully truthful. As will be discussed below, his actions since September 29, 2014 show that he meant what he said.

D. Bednarcyk's history and characteristics.

Bednarcyk is a 28 year old graduate of Newport (NH) High School and earned 21 credits at River Valley Community College in Claremont. *PSR ¶ 49.* He has maintained a stable residence in Sullivan County and currently lives in Lempster with his two parents, who remain supportive. He had a solid history of full-time employment until January 7, 2016, when he was terminated due to his pleading guilty in this case. *PSR ¶ 50.* He currently works part-time in the family machine shop. *Id.* Prior to September 29, 2014 he had no contacts whatsoever with law enforcement. *PSR ¶ ¶ 34-39.* He has no history of alcohol or substance abuse other than minimal use of marijuana, most recently about two years ago. *PSR ¶ 48.* He has been diagnosed with severe depression without psychotic features, likely due to the instant prosecution, and has no other

emotional or cognitive impairments. *PSR ¶ ¶ 45-46.*

Bednarcyk was allowed to leave the Claremont police station after he gave his statement on September 29, 2014. He was not arrested until May 14, 2015, when he turned himself in to be arraigned on the instant indictment and was released on conditions. *PSR ¶ 2.* During those seven and a half months, when he did not know whether or not he was going to be charged, Bednarcyk sought counseling on his own. No local counseling entity was able or willing to address his child pornography problem. Ultimately, he was directed to RTT Associates in Concord.

The conditions of release imposed on May 14 included gaining and maintaining employment, no unsupervised contact with minor children, and no access to a computer or any other internet accessing device other than at work. Bednarcyk has complied with all conditions, including maintaining employment. *PSR ¶ 4.* On March 21, 2016 software monitoring was installed on his computer. *Id*

Although it was not a condition of Bednarcyk's release that he seek counseling, since June 24, 2015 he has participated at his own expense in a psychosexual treatment program at RTT Associates in Concord. Counsel submitted to the probation office treatment summaries from therapist Kris L. Geno. They show that Bednarcyk had individual sessions in July and that since July 8 he has attended and participated in weekly group sessions. They note that he has attended all sessions, that he is making progress, that he reported no recent deviant thoughts or behaviors and that if he experiences such thoughts he can intervene and redirect them, and that he has positive supports in his life. *PSR ¶ 45.* He is participating in a two to five year aftercare program, with a goal to further reduce what Geno describes as his already low to moderate risk of re-offending. *Id.*

Viewing and collecting child pornography can be an addiction, like drug and alcohol use or gambling; it has physiological effects that can be just as disabling. See The Porn Trap, Maltz & Maltz, New York, NY (2008), pp. 17-24, 91-94. It can also be treated. On page 158 Maltz and Maltz list six steps to quitting pornography:

1. Tell someone about your porn problem.
2. Get involved in a treatment program.
3. Create a porn-free environment.
4. Establish twenty-hour support and accountability.
5. Take care of your physical and emotional heath.
6. Start healing your sexuality.

Bednarcyk is taking these steps. Beginning with his September 29 admissions to law enforcement, he has been candid with his parents, supervisors, and close friends about his problems with child pornography. He got himself into a treatment program, continues to participate at his own expense, and is making progress. He avoids any access to child pornography. He holds himself accountable for avoiding it.

The defense retained Leo Keating to conduct a psychological and sexual evaluation of Bednarcyk and anticipates calling him as a witness at the sentencing hearing. Keating has over 18 years of experience in the diagnosis, assessment, and treatment of sexual offenders. Copies of his September 13, 2015 report have been given to the prosecutor and the probation officer and will be made available to the Court. It makes important points. Bednarcyk has never had a sexual relationship. He is himself a victim of on-line pornography, to which he was exposed before the onset of puberty. At age 13 he began masturbating to sexually explicit images, which progressed to child pornography. On page five of his report Keating states:

> "Over the course of his pornography usage, Mr. Bednarcyk admits to viewing pornography that involved violence, and very young prepubescent children. He says that he knew what he was looking at was wrong, but over the progression of his pornography use, he felt compelled to seek out

> more novel and bizarre images. During the interview he acknowledged that he viewed very young prepubescent children engaged in sex acts. Mr. Bednarcyk acknowledged that these images were extremely disturbing, but said that he was unable to stop the behavior by himself."

On pages 7 and 8 Keating reports:

"In reviewing Mr. Bednarcyk's history, we see an individual who has had significant disruption in his ability to develop relationships with female peers during the period of his early sexual development. Although he had a desire to date, he had no ability to connect with young wom[e]n. During the same time frame, he began viewing pornography via the Internet. It seems that his inability to connect with females was exacerbated by his pornography use. His only intimate connection was with images that he viewed on the Internet. He never dated or had a sexual relationship with another person. I believe that had Mr. Bednarcyk not been exposed to pornography during early adolescence, his social development would have been far more normal. The current criminal charges are the direct progression of behavior that began in adolescence. It is important to consider that, in many ways, Mr. Bednarcyk has significantly harmed his own development through the use of pornography."

Keating opines that Bednarcyk is neither a pedophile nor antisocial in nature, that he is at a very low risk to reoffend, and that he could be safely managed in the community. He notes that Bednarcyk has done well in treatment.

E. The sentence sought herein would be sufficient but not greater than necessary to implement the sentencing criteria in 18 U.S.C. § 3553(a).

There is a sound argument that substantial mitigating circumstances in this case support a non-incarcerative sentence. They include the absence of a prior criminal history, Bednarcyk not participating in internet chats or similar intentional efforts to include anyone else in inappropriate let alone illegal misconduct, **Fn.1**, his candor to law enforcement, his recognition that he suffers from what amounts to an addiction to child pornography that began in early adolescence, his voluntarily seeking sex offender treatment on his own, his conscientiously continuing that treatment since June 24, 2015, his commitment to a two to five year aftercare program, and credible expert opinions that Bednarcyk poses a very low risk to re-offend, that imprisoning him

1 He did not knowingly share with anyone the files on the peer to peer networks which he accessed.

would do little to enhance public safety, and that incarcerating him would interrupt his ongoing treatment. However, the defendant understands that possession of child pornography is a serious crime that inflicts ongoing harm to its innocent victims, one that calls for specific and general deterrence.

In support of a sentence which includes 48 months in BOP custody, the United States Sentencing Memorandum and Motion for a Downward Variance cites two pornography cases in this district, United States v. Rathe, D NH 14 Cr. 102-JL, in which the defendant was sentenced to 36 months in custody, and United States v. Lebanc, D NH 15 Cr. 0001-LM, in which this Court imposed a sentence of 32 months. The circumstances in those cases differ from those in this case. Rejecting the two level computer enhancement and a two level increase for distribution, Chief Judge Laplante ruled that the GSR in Rathe was 57 to 71 months. In that case both the government and the defense sought a variant sentence of 24 months. There is no indication in either the government's or the defendant's sentencing motions that, unlike Bednarcyk, Rathe had voluntarily sought and obtained at his own expense sex offender counseling, nor that he had become compulsively drawn to child pornography when he himself was a child. *United States v. Rathe*, D NH 14 CR 102-JL, *Docket Entries 13* & *14.* The GSR in Leblanc was 78 to 97 months. The defense sought a sentence of 24 months; the government sought 63 months. Again, unlike in this case, there is no indication in either the government's or the defendant's sentencing motions that LeBlanc had voluntarily sought and obtained at his own expense sex offender counseling, nor that he had become compulsively drawn to child pornography when he himself was a child. *United States v. Lebanc*, D NH 15 Cr. 0001-LM, *Docket Entries 19 & 20.*

There are circumstances in this case which are less egregious than some in United States v St. Peter, D NH 09 Cr. 149-SM-01, in which the defendant was sentenced to 18 months in BOP

custody and 20 years of supervised release. Unlike in this case, the defendant in that case accessed child pornography at his workplace and communicated with others about sexual involvement with minors. Again, unlike that defendant, Bednarcyk engaged in post-arrest sex offender treatment at his own initiative and at his own expense.

The totality of circumstances presented by this case warrant the sentence sought herein. It would comport with the parsimony principle in 18 U.S.C. § 3553(a) to impose sentence of a year and a day in the custody of the BOP, followed by five years of supervised release with appropriate special conditions, including that Bednarcyk timely register and update his status as a sex offender, that he participate in appropriate sex offender treatment, that he submit to polygraph examinations as reasonably directed by his supervising probation officer – who shall advise Bednarcyk that he retains the right to assert his right against self-incrimination as to questions about any criminal conduct which post-dates sentencing in this case, **Fn.2**, that he not possess or control any depictions of sexually explicit conduct of adults or children, and that he not use the internet or any media devices with interactive computer service as defined in 47 U.S.C. § 230(f) without the prior approval of his supervising probation officer, which approval shall not unreasonably be withheld. **Fn.3** The proposed sentence would be sufficient but not greater than necessary to implement the statutory purposes of sentencing. It would reflect the seriousness of the instant offense, promote respect for the law, provide just punishment, afford adequate deterrence to criminal conduct, protect the public from further crimes by the defendant, and provide him with needed supervision and treatment in the most effective manner.

The government opposes this motion.

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2 See *United States v. York*, 357 F.3d 14, 24 (1st Cir.2004)

3 The proposed condition that the defendant participate in drug or alcohol treatment is not warranted in this case. See *PSR ¶ 48.*

No memorandum of law has been submitted with this motion because it contains supporting authority.

WHEREFORE, it is respectfully moved that the Court grant said relief and such other and further relief as may be just.

Respectfully submitted,
JAMES BEDNARCYK
By His Attorney,

Date: April 8, 2016

/s/ Bjorn Lange
Bjorn Lange (NHBA # 1426)
Assistant Federal Public Defender
22 Bridge Street
Concord, NH 03301
Tel. (603) 226-7360
Bjorn_Lange@fd.org

CERTIFICATE OF SERVICE

I, Bjorn Lange, hereby certify that on April 8, 2016 this motion was served via ECF on AUSA Nick Abramson and that copies will be e-mailed to USPO Sean P. Buckley and to James Bednarcyk.

/s/ Bjorn Lange
Bjorn Lange