A Policy Of Variance: Downward Departures from Child Pornography Sentencing Guidelines

By Emily Bakeman and Sarah Riley Howard[1]

I. Introduction

Child pornography offenses are serious crimes. Accordingly, the Federal Sentencing Guidelines for these offenses[2] impose severe punishments – but maybe too Draconian, according to many judges. A 2010 survey by the United States Sentencing Commission revealed that 70% of district judges believe that the child pornography Guideline range for possession is too high, 69% believe the range is too high for receipt, and 30% believe it is too high for distribution.[3]

Courts' disagreement with the current guidelines is more than just talk. In 2011, child pornography offenses had the highest rate of below-Guideline sentences,[4] with 44.9% of sentences for child pornography trafficking and possession below the Guideline range, as compared to 17.4% of sentences for all offenses.[5] While judges are permitted to deviate from any Guideline if they have compelling reasons for doing so,[6] basic policy disagreements are consistently invoked to deviate from the Guidelines for child pornography sentences.

II. Recent Sixth Circuit Development in Policy-Disagreement Jurisprudence

As discussed further in this article, a number of courts have permitted categorical, policy-based departure from child pornography Guidelines because Congress has been directly involved in instructing the Commission about offense levels as to these particular crimes, reflecting an apparently widely-held belief that these Guidelines are less empirically sound.[7] However, the Sixth Circuit recently became the first circuit in *United States v. Bistline*[8] to hold that Congressional involvement in setting a child pornography Guideline's development alone was an inadequate basis on which to deviate from the Guideline.[9]

In that case, the district judge departed downward from a Guideline range of 63 to 78 months in prison when sentencing an individual for possession of child pornography, sentencing him instead only to one night in the courthouse lockup and ten years of supervised release.[10] The Supreme Court denied a petition for certiorari in the case, and the district court is in the middle of a continuing hearing regarding re-sentencing. Mr. Bistline is expected to be re-sentenced on January 4, 2013.

Judge Kethledge, who authored *Bistline,* called a categorical criticism of a Guideline based only on the fact of its mandate from Congress "misguided."[11] While acknowledging the ability of a district judge to depart based on a policy disagreement with a Guideline, the Sixth Circuit's holding requires that the trial court articulate substantive reasons for the policy disagreement, and not just procedural objection to the policymaker at issue:

> For our purposes, however, the relevant point is one of constitutional context: namely, that the Constitution merely tolerates, rather than compels, Congress's limited delegation of power to the [Sentencing] Commission. And that context, we think, puts in a different light the various complaints, both within and without the judiciary, that Congress has encroached too much on the Commission's authority with respect to sentencing policy. That is like saying a Senator has en-croached upon the authority of her chief of staff, or a federal judge upon that of his law clerk. And thus we disagree with the complaint—to the extent it is one—that Congress's amendments to § 2G2.2 "evince a 'blatant' disregard for the Commission and are 'the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress[.]' " Congress can marginalize the Commission all it wants: Congress created it.[12]

The Court there also wrote that there is nothing requiring the reasoning behind a Guideline to be entirely empirically-based, and even solely value-based judgments

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that a crime is so reprehensible that a message needs to be sent via the offense level cannot be categorically rejected.[13] (According to *Bistline*, Congress's directives as to child pornography Guidelines were based on both its specific empirical and value judgments calculated to achieve retribution and punishment.[14])

Accordingly, the Sixth Circuit instructed in *Bistline* that a district court that has a *Kimbrough* policy-based disagreement with a Guideline and departs on that basis "must contend with" all of the grounds behind the reasoning of the Guideline – whether those of the Commission or of Congress – to justify the departure.[15] When the reasoning is that of Congress, the Sixth Circuit called the district court's job to explain its own justification to depart downward from the Guideline offense level a "formidable task."[16] In *Bistline,* the district court judge made no specific effort to explain why downward departure was appropriate based on a policy disagreement, and so remand for re-sentencing was ordered. In any event, it seems evident from the opinion that there is no possible reasoning that will survive on appeal to justify a departure of the magnitude in Bistline's original sentence. Thus far, this holding has been recognized only within the Sixth Circuit, and courts in other circuits continue to cite Congress's involvement alone as a basis for deviation.[17]

III. History of the Child Pornography Sentencing Guidelines

The involvement of Congress in the child pornography Guidelines makes them "fundamentally different than most."[18] While Guidelines are usually developed by the Sentencing Commission "using an empirical approach based on data about past sentencing practices," the current child pornography Guidelines, as noted above, are the result of recurrent Congressional involvement.[19] Since the child pornography Guidelines' introduction in 1987, Congress has directed the Sentencing Commission on multiple occasions to amend the Guidelines and has amended the Guidelines directly through legislation in order to impose increasingly harsher penalties for child pornography offenses, despite the Commission's open opposition to those changes.[20]

In 1995, prior to the majority of the Congressionally-directed amendments, the average sentence for child pornography offenses was under 30 months and only 23% of sentences were below-guideline sentences.[21] By 2011, the average sentence for these offenses was 119 months, despite the fact that 44.9% of sentences fell below the Guideline range.[22] Currently, child pornography offenses have the fourth-highest sentence length, surpassed only by murder, kidnapping, and sexual abuse.[23]

IV. Policy-Based Deviation from Child Pornography Sentencing Guidelines

In *Kimbrough v. United States,*[24] the United States Supreme Court held that courts could vary from the crack cocaine Guidelines based on the belief that those Guidelines did not appropriately serve the purposes of sentencing.[25] Later, in *Spears v. United States,*[26] the Supreme Court clarified that its previous holding was a "recognition of district courts' authority to vary from the crack cocaine Guidelines based on policy disagreement with them," thus permitting categorical rejection of those guidelines. This was based on the belief that the Guidelines did not "exemplify the Commission's exercise of its characteristic institutional role," considering Congress's involvement.[27]

While *Spears* specifically addressed only a specific provision of the crack cocaine Guidelines, courts have since extended its reasoning to the child pornography Guidelines.[28] Thus, courts are permitted to deviate downward from the child pornography Guidelines based on policy disagreements.[29] While this provides judges with significant discretion, the court may not simply state its dissatisfaction with the Guidelines; the court must instead provide sound reasoning for its disagreement and "adopt some other well-reasoned basis for sentencing."[30]

Spears, by its terms, would permit courts to "reject and vary categorically" from the child pornography Guidelines, rather than determine whether to deviate on an individual basis.[31] Thus, courts may reject the

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Guidelines as a whole rather than merely as they apply to a particular defendant. For example, in *United States v. Beiermann,*[32] the district court rejected the child pornography Guidelines generally and in their entirety, without any reference to the defendant in that case.[33] However, some courts have declined to take a categorical stance or have argued that categorical rejection is inappropriate.[34] Those courts conduct an individual evaluation in light of the specific facts of the case, but give the child pornography Guideless less deference than the deference given to Guidelines for other offenses.[35]

V. Other Justifications for Policy-Based Deviations Besides Congressional Mandate

Unreasonable Sentences

Courts also have held that the Guidelines result in "unreasonable sentences"[36] because they fail to differentiate between the worst offenders and those with less culpability.[37] This is largely because many of the sentencing enhancements for child pornography offenses are "all but inherent to the crime of conviction."[38] In 2011, 97% of cases involved use of a computer, 95% involved a victim under age 12, 79% involved violent images, and 70% involved at least 600 images.[39] A defendant who qualifies for three of those four enhancements, as many do, will receive a scoring increase of at least eleven levels.[40]

In *United States v. Dorvee,*[41] the Second Circuit held that a Guideline range of 262 to 327 months was unreasonable for a defendant convicted of possessing numerous videos depicting minors engaging in sexually explicit conduct and for trading these videos on the Internet with approximately 20 other individuals.[42] The court observed that the defendant's Guideline range in this case could have been considerably lower if he had actually engaged in sexual conduct with a minor rather than merely possessed and distributed images.[43] "[A]dherence to the Guidelines results in virtually no distinction between [the defendant] and the sentences for the most dangerous offenders" and therefore the court rejected the Guideline range.[44]

Similarly, in *United States v. Munoz,*[45] the court rejected the Guideline range after noting the irony that, if the defendant had committed the charged pornography offense while engaging in a "pattern of activity involving sexual abuse or exploitation of a minor," or had distributed child pornography for pecuniary gain, he would have received the same sentence recommendation under the Guidelines as he received for the charged offense alone.[46]

Sentencing Disparities

The increasing rate of downward deviations from the child pornography Guidelines has in fact given courts yet another reason to deviate: avoidance of sentencing disparities.[47] The Guidelines are intended to reduce sentencing disparities by providing a national sentencing standard. However, because of the prevalence of below-Guideline sentences, within-Guideline sentences are quickly becoming the exception rather than the rule. In *United States v. Munoz,*[48] the court noted "[t]he sentencing practices of other courts in similar cases demonstrate that a Guidelines sentence in this case would create disparities."[49] In *United States v. McElheney,*[50] the court found that applying the child pornography Guidelines created sentencing disparities in two ways. First, as in *Munoz,* the court noted that the significant number of sentences below the Guidelines create a situation in which a within-Guideline sentence treats a defendant differently than similarly-situated defendants.[51] Additionally, because the Guidelines fail to differentiate between particularly egregious conduct and less serious conduct, adherence to the Guidelines treats differently situated defendants similarly, which also contributes to impermissible sentencing disparities.[52]

VI. Policy-Based Deviations Permitted But Not Required

A sentencing court commits "*Kimbrough* error" when it fails to recognize its discretion to vary from a Guideline range based on policy disagreements.[53] While it is error for a court to fail to recognize the discretion, it is not error for a court to refuse to exercise it.[54] Now, *Bistline* requires more of district court judges who do choose to exercise that discretion, at least in this circuit,

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all while it appears that courts nationwide who refuse to exercise this discretion as to child pornography sentences are becoming more and more rare.

Endnotes

1 Sarah Riley Howard heads the White Collar Criminal Defense practice group at Warner Norcross & Judd LLP, which represents clients in a range of matters involving corporate legal compliance, federal litigation counseling, and criminal defense. Emily Bakeman is a junior associate in Warner's Grand Rapids office.

2 The Guidelines for trafficking and possession of child pornography are found in found in section 2G2.2 of the 2012 Guidelines Manual. United States Sentencing Commission, *Guidelines Manual, § 2G2.2 (Nov. 2012)* ("Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor").

3 United States Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010* (June 2010), *available* at http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf .

4 For the purposes of this article, "below-Guideline sentences" and "downward deviations" refer specifically to below-Guideline sentences that are non-government sponsored.

5 United States Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics,* Table 27A, *available* at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table27a.pdf ; United States Sentencing Commission, 2011 Annual Report, Ch. 5, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/2011_Annual_Report_Chap5.pdf .

6 *See United States v. Booker,* 543 U.S. 220, 246-58 (2005) (holding that sentencing guidelines are advisory rather than mandatory).

7 *E.g., United States v. Zauner,* 688 F.3d 426, 431 (8th Cir. 2012); *United States v. Dorvee,* 616 F.3d 174 (3d Cir. 2010) (holding that the deference given to the Guidelines will depend on the thoroughness evident in the Commission's consideration of those Guidelines, which was lacking in light of Congress's involvement); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (finding grounds to deviate from the child pornography Guidelines based on the fact those Guidelines are unlikely to "reflect a rough approximation of [appropriate] sentences" due to Congress's involvement).

8 665 F.3d 758 (6th Cir. 2012), cert. den., 133 S. Ct. 423 (Oct. 9, 2012).

9 *See Id.*

10 *Id. at 760.*

11 *Id.* at 761.

12 *Id.* at 762 (internal citations omitted).

13 *Id.* at 764.

14 *Id.*

15 *Id.*

16 *Id.*

17 *See United States v. Rothwell,* 847 F. Supp. 2d 1048, 1054 (E.D. Tenn. 2012) (citing *Bistline* with approval for the proposition that Congress's role is not a grounds for rejecting the Guidelines); compare with *Zauner*, 688 F.3d at 431; Dorvee, 616 F.3d at 184.

18 *United States v. Dorvee,* 616 F.3d 174, 184 (2nd Cir. 2010).

19 *Id.* at 184.

20 *See Dorvee,* 616 F.3d at 185-86; United States Sentencing Commission, *The History of the Child Pornography Guidelines* (Oct. 2009), *available at* http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf .

21 *See* Sentencing Commission, *History of Child Pornography Guidelines.*

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22 *See* United States Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics,* Table 13, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table13.pdf .

23 *See Sentencing Commission, 2011 Annual Report, Ch. 5*

24 552 U.S. 85 (2007).

25 *Id.* at 575.

26 555 U.S. 261 (2009).

27 *Id.* at 268 (citing *Kimbrough,* 552 U.S. 85).

28 *See United States v. Beiermann,* 599 F. Supp. 2d 1087, 1096 (N.D. Iowa 2009) ("[T]he powerful implication of Spears is that, in other "mine-run" situations, the sentencing court may also reject guidelines provisions on categorical policy grounds[.]").

29 *See Id.; Dorvee,* 616 F.3d at 188.

30 *Beiermann*, 599 F. Supp. 2d at 1096.

31 *Spears,* 555 U.S. at 266.

32 599 F. Supp. 2d 1087.

33 *Id.* at 1104-06.

34 *See, e.g., United States v. McElheney,* 630 F. Supp. 2d 886, 895 (E.D. Tenn. 2009) (" The Court agrees with those courts that have concluded the child pornography Guidelines are due less weight than empirically based Guidelines. However, the Court parts company with those courts that categorically reject the child pornography Guidelines."); *United States v. Cruikshank,* 667 F. Supp. 2d 697, 702 (S.D. W.Va. 2009).

35 *See McElheney,* 630 F. Supp. 2d at 895 ("The Court agrees with those courts that have concluded the child pornography Guidelines are due less weight than empirically based Guidelines.").

36 *Dorvee,* 616 F.3d at 184.

37 *See, e.g., Zauner,* 688 F.3d at 431 (holding that the defendant's offense conduct alone did not place him among the worst offenders and therefore it would have been unreasonable to sentence him within the Guidelines).

38 *See Id.* at 186.

39 *See* United States Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics, Fiscal Year 2011,* 41-42, *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2011/Use_of_Guidelines_and_Specific_Offense_Characteristics.pdf .

40 Sentencing Commission, *Guidelines Manual, § 2G2.2(b).*

41 616 F.3d 174.

42 *Id.* at 186-87.

43 *Id.* at 187.

44 *Id.*

45 2012 WL 5351750

46 *Id.* at *4.

47 *See Munoz,* 2012 WL 5351750 (citing numerous cases in which district courts have imposed sentences far below the child pornography Guideline range as evidence that a harsh sentence would create sentencing disparities); Rothwell, 847 F. Supp. 2d at 1054 ("The reality, however, that so many courts are imposing sentences of defendants convicted of child pornography offenses outside of USSG § 2G2.2, coupled with the multiple criticisms of it must give any court pause when sentencing a defendant under USSG § 2G2.2.").

48 2012 WL 5351750.

49 *Id. at *5.*

50 630 F. Supp. 2d 886

51 *Id. at 895.*

52 *Id.*

53 *See United States v. Stone, 575 F.3d 83, 89 (1st Cir. 2009); United States v. Henderson, 649 F.3d 955 (9th Cir. 2009); United States v. Boykin, 2012 WL 5625853, *2 (11th Cir. Nov. 15, 2012). See also United States v. Clogston, 662 F.3d 588 (1st Cir. 2011).*

54 *See Stone, 575 F.3d at 92-93.*

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