948 F.3d 722
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Andrew DEMMA, Defendant-Appellee.

No. 18-4143
|
Argued: December 12, 2019
|
Decided and Filed: January 24, 2020.

Appeal from the United States District Court for the Southern District of Ohio at Dayton. No. 3:17-cr-00062-1—Walter H. Rice, District Judge.

Attorneys and Law Firms

ARGUED: Mary B. Young, UNITED STATES ATTORNEY'S OFFICE, Columbus, Ohio, for Appellant. Richard E. Mayhall, RICHARD E. MAYHALL, Springfield, Ohio, for Appellee. ON BRIEF: Mary B. Young, UNITED STATES ATTORNEY'S OFFICE, Columbus, Ohio, for Appellant. Richard E. Mayhall, RICHARD E. MAYHALL, Springfield, Ohio, for Appellee.

Before: GILMAN, KETHLEDGE, and READLER, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge.

This is yet another case raising the issue of whether a one-day sentence for a defendant convicted

of possessing child pornography is reasonable. For the reasons set forth below, we determine that it is not. We therefore VACATE the sentence imposed by the district court and REMAND the case for resentencing.

I. BACKGROUND

In February 2015, FBI agents seized a computer server used to host a child-pornography website. The website operated through "Tor," a network designed for anonymous internet use. Users of Tor must download special software onto their computers, followed by the entry of an obscure web address not found on publicly available search engines, in order to access particular websites. The users' IP addresses and locations are then shielded by Tor from the websites they visit.

Shortly after seizing the server, the FBI began monitoring the activity of a particular user, "domine21." Agents observed domine21 accessing 107 "threads" containing child pornography over a five-day period. The FBI traced the IP address associated with domine21 to Andrew Demma's residence in Dayton, Ohio. In August 2015, the FBI executed a search warrant and seized several electronic devices from the residence, finding more than 3,600 images and 230 videos in Demma's possession. Hundreds of the images depicted adult men raping and otherwise sexually abusing prepubescent girls.

Demma pleaded guilty to possessing child pornography, such possession being in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). Under United States

Sentencing Guidelines (U.S.S.G.) § 2G2.2, the base-offense level for violating the statute is 18. The probation officer's Presentence Report called for enhancements of the base-offense level due to Demma's possession of images displaying prepubescent children (a two-level increase); his possession of images involving sadomasochistic conduct, including images of insertion or intercourse with prepubescent children (a four-level increase); his use of a computer (a two-level increase); and the fact that the offense involved 600 or more images (a five-level increase). Demma's acceptance of responsibility (a two-level decrease) and his assistance to authorities (a one-level decrease) were listed as mitigating factors. Based on the above calculations, the probation officer computed an adjusted offense level of 28. This offense level, together with Demma's criminal history category of I, corresponds to a term of imprisonment between 78 and 97 months under U.S.S.G. § 2G2.2. The officer recommended a sentence of 78 months' imprisonment.

Contrary to the probation officer's recommendation, Demma submitted a sentencing memorandum asking the district court to impose a noncustodial sentence. The memorandum described Demma's supportive upbringing, educational background, and lack of criminal history. It also described Demma's experience in the Army, where Demma served honorably for over five years between 2005 and 2010. Demma, who admits to having been long addicted to adult pornography, said that he was introduced to child pornography

during his second deployment to Iraq. He acknowledged that he continued to view child pornography up until the FBI searched his home in 2015.

The memorandum also offers an account of Demma's experience with post-traumatic stress disorder (PTSD) as a result of his military service. Demma began seeing Dr. Frederick Peterson, a psychologist at a nearby Veterans Affairs Hospital, after the FBI searched Demma's home. Dr. Peterson diagnosed Demma with PTSD, and the doctor's records describe a range of violent and traumatic episodes during Demma's tours of duty in Iraq. At the sentencing hearing, Dr. Peterson expressed his opinion that Demma's use of child pornography stemmed from his "objectification" of children as a result of combat trauma.

The memorandum further cites Dr. David Tennenbaum, a forensic psychologist who submitted a report asserting that Demma's use of child pornography "is directly resultant from experiencing the ravages of war as this impacts children, viewing the deaths of children." Dr. Tennenbaum, at Demma's sentencing hearing, expressed his belief that Demma sought child pornography in order to "bring pain to himself, to redo within his mind the pain he experienced in Iraq."

Finally, Demma offered the testimony of psychologist Dr. David Roush, who runs a sex-offender treatment program in which Demma enrolled following his arrest. Dr. Roush, contrary to the opinions of Dr. Peterson and Dr. Tennenbaum, did not believe that Demma's use of child pornography was directly caused

by Demma's service in Iraq. He was instead of the opinion that Demma was already attracted to minors and simply happened to be in Iraq when he became exposed to child pornography.

The government submitted its own sentencing memorandum, arguing that the factors outlined in 18 U.S.C. § 3553(a) supported the imposition of a custodial sentence on Demma. Highlighting the sophistication of Demma's access to the pornography, as well as the large number of images of "prepubescent children being anally and vaginally penetrated by adult males," the government emphasized the need for just punishment and the sentencing goal of providing deterrence. The government also contended that Demma could successfully continue his treatment in the Bureau of Prisons Residential Sex Offender Treatment Program and the Sex Offender Management Program during incarceration.

After hearing from Demma, his parents, and his treating psychologists, as well as considering several victim statements read into evidence, the district court rejected the sentence recommended by the Sentencing Guidelines. It instead sentenced Demma to only one day for time already served. The court also required Demma to undergo 10 years of supervised release and pay $45,000 in total restitution to nine identified victims.

In declining to impose a custodial sentence, the district court articulated its disagreement with the Sentencing Guidelines on policy grounds, explaining

that "the guidelines, while certainly they're a starting point and they do achieve a certain amount of consistency," are "artificially high because everyone secures most of the enhancements." It further explained that the Guidelines made it difficult to distinguish between offenders.

The district court also cited the need to impose a sentence reflecting Demma's individualized characteristics, noting that "Mr. Demma, because of his experiences, is to be treated differently than someone who simply allowed his curiosity to get the better of him." In particular, the court focused on Demma's PTSD diagnosis. The court, pointing to the reports of the three psychologists, commented that "very few people come home from a combat situation without suffering lasting damage." It relied most heavily on Dr. Tennenbaum's testimony that Demma's experience in Iraq was "the direct cause of his involvement with child pornography." In light of the doctors' opinions, the court determined that Demma "wound up in criminal court as an unintended consequence" of his voluntary service in the Army.

The district court nevertheless noted the impact of Demma's crime on his victims, explaining that the possession of child pornography is "an offense that has no finite ending." It also discussed the role of such possession in creating a market for the production and distribution of child pornography, and it described the number of images possessed by Demma as "if not the highest the Court has ever seen in a possession of child pornography [case], certainly not the lowest either."

Other considerations, however, carried greater weight in the court's analysis.

The district court specifically discussed Demma's decision to voluntarily seek out treatment after he was arrested, his low risk of reoffending, and the potentially detrimental effect of a prison sentence on Demma's treatment, as articulated by Dr. Peterson and Dr. Roush. It also considered Demma's low risk for committing a "contact offense," an inquiry that the court called the "overarching question" to be answered prior to sentencing. Discussing general deterrence, the court noted that, while it "recognize[d] the need to consider general deterrence, there are certain types of crimes, this being one of them, for which general deterrence is . . . more myth than reality."

The government timely appealed, arguing that the one-day sentence was substantively unreasonable under 18 U.S.C. § 3553(a). We now turn to the merits of the government's argument.

II. ANALYSIS

A. Standard of review

The federal Sentencing Guidelines are no longer mandatory after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2 621 (2005). "[T]hey still," however, " 'should be the starting point and the initial benchmark' for choosing a defendant's sentence." *United States v. Bistline*, 665 F.3d 758, 761 (6th Cir. 2012) (*Bistline I*)

(quoting *Gall v. United States*, 552 U.S. 38, 49, 128 S.Ct. 586, 569 L.Ed.2 445 (2007)). The district court must calculate the range prescribed by the Guidelines before varying from them. *Gall*, 552 U.S. at 49, 128 S.Ct. 586. And, after allowing the parties to argue for a particular sentence, the district court must weigh and apply the range of factors outlined in 18 U.S.C. § 3553(a). *Id.* at 49–50, 128 S.Ct. 586.

A sentence may be vacated on appeal if it is substantively unreasonable—that is, where the "sentence is too long . . . or too short." *United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir. 2019), *cert. denied*, ___ U.S. ___, 140 S. Ct. 44, 205 L.Ed.2d 150 (2019) (quoting *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018)). This inquiry requires us to determine whether "the court placed too much weight on some of the § 3553(a) factors and too little on others." *Rayyan*, 885 F.3d at 442. We thus "take into account the totality of the circumstances," *Gall*, 552 U.S. at 51, 128 S.Ct. 586, in applying this "deferential abuse-of-discretion standard," *United States v. Reilly*, 662 F.3d 754, 761 (6th Cir. 2011). We may also "consider the extent of the deviation" in deciding whether the district court abused its discretion. *Gall*, 552 U.S. at 51, 128 S.Ct. 586.

True enough, the Supreme Court has acknowledged that "courts may vary [from federal Guidelines ranges] based solely on policy considerations, including disagreements with the [Guidelines]." *Kimbrough v. United States*, 552 U.S. 85, 101, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) (citation and internal quotation marks omitted). But district courts in this circuit

seeking to reject U.S.S.G. § 2G2.2 on policy grounds face "close scrutiny." *Bistline I*, 665 F.3d at 763. As this court has explained regarding § 2G2.2: "[W]hen a guideline comes bristling with Congress's own empirical and value judgments—or even just value judgments—the district court that seeks to disagree with the guideline on policy grounds faces a considerably more formidable task than the district court did in *Kimbrough* [which dealt with crack-cocaine guidelines that, unlike § 2G2.2, were not implicitly attributed to Congress]." *Id.* at 763–64.

B. Disagreement with the Guidelines

Demma, however, argues that the district court adequately explained its disagreement with the Guidelines on policy grounds and that its variance is justified on this basis. We respectfully disagree. This court has explained that, to reject U.S.S.G. § 2G2.2 on policy grounds, a district court must consider the values of punishment and retribution. *Bistline I*, 665 F.3d at 764.

In relevant part, U.S.S.G. § 2G2.2 provides as follows:

> **(a)** Base Offense Level:
>
> > **(1)** 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).
> >
> > . . . .

(b) Specific Offense Characteristics

. . . .

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.

. . . .

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler, increase by 4 levels.

. . . .

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.

(7) If the offense involved –

. . . .

(D) 600 or more images, increase by 5 levels.

In *United States v. Bistline*, 720 F.3d 631 (6th Cir. 2013) (*Bistline II*), the district court had rejected U.S.S.G. § 2G2.2 for reasons similar to those stated by the district court in the present case. The district court in *Bistline II* had expressed "a continued disagreement with the range of sentences that result under these guidelines in the average case," pointing out that "every case" involved computer use and "almost every case" involved a large number of images. *Id.* at 633.

The district court below likewise noted that "everyone" who is brought into federal court for possessing child pornography receives the same enhancements, which, the court claimed, makes it impossible to distinguish between individual defendants.

This court in *Bistline II* concluded that such reasoning does not withstand close scrutiny. *Id.* It explained that the policy underpinnings of § 2G2.2 "were not only empirical, but retributive—that they included not only deterrence, but punishment." *Id.* at 633 (quoting *Bistline I*, 665 F.3d at 764). Because the district court in *Bistline II* "did not acknowledge, much less refute, those bases for [the defendant's] guidelines range," its out-of-hand rejection of § 2G2.2 on policy grounds was not adequately explained. *Id.* The district court here, like the court in *Bistline II*, did not discuss the retributive purposes of § 2G2.2 in rejecting the offense-level increases recommended under the Guidelines, and its disagreement with the Guidelines cannot justify its decision to ignore the delineated enhancements.

Moreover, as in *Bistline II*, the district court's disagreement with the Guideline enhancements on policy grounds cannot justify its failure to impose what is essentially no custodial sentence at all. Demma would have scored an offense level of 15 even with none of the enhancements that the district court said made it "impossible" to distinguish between defendants (his base offense level of 18 less the 3-level recommended decrease). Such a stripped-down offense level (which is clearly inapplicable based on the facts of this case)

would still have produced a Guidelines range of 18 to 24 months of imprisonment. U.S.S.G. ch. 5, pt. A. So any policy disagreement with the Guidelines based on the alleged similarity of the enhancements does not justify the extent of the downward variance in the present case.

C. Substantive reasonableness

We now turn to the issue of substantive reasonableness. The substantive-reasonableness standard recognizes that district-court judges can vary from the Guidelines range. But the discretion to vary from the Guidelines requires the district court to justify the variance. In particular, the reduced sentence must reflect, expressly or impliedly, a proper consideration of the factors set forth in 18 U.S.C. § 3553(a). *See United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018) ("The point is not that the district court failed to consider a factor or considered an inappropriate factor. . . . It's a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual."); *see also United States v. Boucher*, 937 F.3d 702, 707 (6th Cir. 2019) ("A substantive reasonableness challenge is not defeated by a showing of procedural reasonableness—for example, by confirming that the district court addressed each relevant factor under 18 U.S.C. § 3553(a), or even that it discussed those factors at length."). Here, the district court did not comply with its obligations under 18 U.S.C. § 3553(a).

The relevant § 3553(a) factors are the following:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

> **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> **(B)** to afford adequate deterrence to criminal conduct;
>
> **(C)** to protect the public from further crimes of the defendant; and
>
> **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

> **(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> **(i)** issued by the Sentencing Commission. . . .

(5) any pertinent policy statement—

> **(A)** issued by the Sentencing Commission. . . .

> **(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> **(7)** the need to provide restitution to any victims of the offense.

1. Factors given excess weight

At the sentencing hearing, the district court focused almost entirely on Demma's individual characteristics in deciding not to impose a term of incarceration. It relied, in particular, on the testimony of Dr. Peterson and Dr. Tennenbaum, both of whom opined that Demma's use of child pornography was directly caused by his service in the military and his resulting PTSD.

To be sure, the district court did not err by recognizing Demma's military service and PTSD diagnosis under § 3553(a)(1) as considerations relevant to his sentence. *See United States v. Reilly*, 662 F.3d 754, 760 (6th Cir. 2011) (explaining that the defendant's military service and lack of criminal history were "permissible considerations in the 'variance' determination under 18 U.S.C. § 3553(a)"). But the court in the present case gave these considerations unreasonable weight in deciding to vary downwards to an essentially noncustodial sentence.

Indeed, by focusing on Demma's PTSD diagnosis to the exclusion of other considerations, the district court failed to acknowledge analogous cases within this circuit. In *Reilly*, for example, the defendant

pleaded guilty to the distribution of child pornography and then challenged a within-the-Guidelines sentence of 151 months as substantively unreasonable. *Id.* at 757. Reilly, like Demma, argued that his violent experiences in combat led to his interest in child pornography. *Id.* But this court affirmed Reilly's sentence as substantively reasonable despite the claimed direct relationship between the defendant's military service and his crime. *Id.* at 761.

In other analogous cases, this court has upheld custodial sentences for possessors and distributors of child pornography who have served in the military and experienced PTSD. *See*, *e.g.*, *United States v. Myers*, 442 F. App'x 220, 223–24 (6th Cir. 2011) (affirming a 60-month sentence for possessing child pornography by a 20-year military veteran); *United States v. Tanner*, 382 F. App'x 421, 424 (6th Cir. 2010) (affirming a 210-month sentence for possessing and distributing child pornography by a defendant who was a "decorated combat veteran who suffered from post-traumatic stress disorder related to his military service"). Demma's military service and PTSD diagnosis, in light of the outcomes in *Reilly, Myers*, and *Tanner*, are not sufficient to justify what amounts to a noncustodial sentence here.

Moreover, in focusing on the role of Demma's military service as purportedly causing his crimes, the district court cast Demma more as the victim than the perpetrator, stating that Demma's crimes were "the result of his voluntary service to his community and his country" and "an unintended consequence" of his

decision to serve in the Army. This court has explained, however, that "[k]nowing possession of child pornography . . . is not a crime that happens to a defendant." *Bistline I*, 665 F.3d 758, 765 (6th Cir. 2012).

As with any criminal defendant, Demma's history and personal experiences have informed his actions. But he is still a volitional actor, and Demma, as the government points out, is "not the victim[] of the crime." *See United States v. Christman*, 607 F.3d 1110, 1123 (6th Cir. 2010). We specifically note that there is no evidence in the record to support the proposition that military veterans suffering from PTSD typically become addicted to child pornography. Under the totality of the circumstances, we therefore conclude that the district court gave an unreasonable amount of weight to Demma's PTSD diagnosis in considering the § 3553(a) factors.

Nor was § 3553(a)(1) the only factor given excess weight in the district court's analysis. The court also assigned undue weight to § 3553(a)(2)(D), which requires the court to consider the need to provide "correctional treatment in the most effective manner." In particular, the court relied on the opinions of Dr. Peterson and Dr. Roush, both of whom believed that incarceration would be detrimental to Demma's treatment, in determining that a custodial sentence "would be more destructive than helpful." We find this reliance unwarranted in light of Dr. Roush's opinion that Demma could successfully continue treatment after a term of incarceration, and in light of the government's

point that the prison system itself provides sex-offender treatment. *See United States v. Camiscione*, 591 F.3d 823, 833 (6th Cir. 2010) (holding that a sentence was substantively unreasonable even where the district court reasonably considered a defendant's "determination and effort to treat his condition and change his behaviors, consistent attendance and compliance with all treatment programs, [and] participation in '[b]ehavioral programs focusing on sexual disorder' ").

2. Factors given insufficient weight

Even if the district court gave reasonable weight to some of the factors under 18 U.S.C. § 3553(a), this court has made clear that "the sentence imposed must do more." *Id.* at 833. The district court, for example, gave sparse attention to the seriousness of Demma's offense, as required of it under § 3553(a)(2)(A). The Supreme Court has explained that simple possession of child pornography, in itself, causes serious and continuing harm to victims as a result of the "trauma of knowing that images of [their] abuse are being viewed over and over." *Paroline v. United States*, 572 U.S. 434, 449, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014). This harm, in turn, may "haunt[ ] the children in years to come." *Osborne v. Ohio*, 495 U.S. 103, 111, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). The enhancements delineated in U.S.S.G. § 2G2.2 take into account the ways in which this harm is magnified.

Noting that Demma's offense was one without any "finite ending," and after describing the effect of child-pornography possession on the market for such images, the district court discussed the seriousness of child-pornography possession in general. It also described how Demma's offense was particularly harmful, stating that the number of images was, "if not the highest the Court has ever seen in a possession of child pornography [case], certainly not the lowest either." But the court did not properly account for other features that made Demma's crimes particularly serious.

Section 3553(a)(2)(A) requires a more thorough consideration. *See United States v. Robinson*, 778 F.3d 515, 519 (6th Cir. 2015) (*Robinson II*) (vacating a one-day sentence as substantively unreasonable where the district court did not discuss what made the defendant's actions "particularly egregious"). Demma's Guidelines range was significantly enhanced because the images in his possession depicted extreme, sadomasochistic content, including images of insertion or intercourse with prepubescent children. But the district court made no mention of this fact. *See United States v. Groenendal*, 557 F.3d 419, 426 (6th Cir. 2009) (holding that "penetration of a prepubescent child by an adult male constitutes inherently sadistic conduct"). We also note that Demma's collection of child pornography, which amounted to more than 3,600 images and 230 videos, far exceeded the amount at issue in *Bistline*, where the defendant possessed 305 images and 56 videos. *See Bistline I*, 665 F.3d at 760. Yet the district court in the present case did not explain why a

defendant whose collection was many times larger than Bistline's should receive only a one-day sentence.

The district court also unreasonably concluded that Demma's sophisticated and extensive access to child pornography somehow made him less culpable than "someone who simply allowed his curiosity to get the better of him." We draw the opposite conclusion; i.e., that an infrequent viewer simply overcome by curiosity should be deemed *less culpable* than someone like Demma who accessed child pornography on a daily basis by the use of complex software.

Another factor that the district court failed to properly analyze is § 3553(a)(2)(B)'s requirement that the sentencing court consider the need to provide general deterrence through sentencing. The district court mentioned this factor only to the extent that it determined that "there are certain types of crimes, this being one of them, for which general deterrence is . . . more myth than reality." Because child-pornography possession is driven by addictive behavior, the court explained, imposing a custodial sentence on Demma would not affect the behavior of others.

But the district court's determination that general deterrence has no particular role in the child-pornography context is contrary to this circuit's caselaw. As squarely stated in *Camiscione*, "[g]eneral deterrence is crucial in the child pornography context." 591 F.3d at 834. The court elaborated that "[s]entences influence behavior, or so at least Congress thought when in 18 U.S.C. § 3553(a) it made deterrence a statutory

sentencing factor." *Id.* (quoting *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir. 2007)). Similarly, in *Bistline I*, this court rejected the district court's determination that general deterrence would have "little [if] anything to do" with the defendant's sentence. *Bistline I*, 665 F.3d at 767 (alteration in original). Our court has thus made clear that general deterrence in the child-pornography context is not a "myth." The district court's decision to give this factor little weight was therefore unreasonable.

Along with § 3553(a)(2)(B)'s imperative to "afford adequate deterrence to criminal conduct" in general, this factor also requires the sentencing court to consider the need for the sentence to provide specific deterrence to the individual defendant. The district court discussed the role of specific deterrence in Demma's case to a point, noting that "specific deterrence can be guaranteed in a number of ways, some of which are overlapping, [including] a custodial sentence as advocated by the government, intensive treatment, or a combination of the two." But in opining that Demma was unlikely to reoffend "as a user of child pornography," the court improperly focused its inquiry on whether Demma was likely to physically molest a child in the future. The court noted that it needed to answer "one overarching question prior to sentencing to the extent humanly possible": "whether the Defendant who comes before it . . . is a latent predator, someone who is likely or at least a significant risk of acting out by way of a contact offense with minors." It also noted

that "there is no indication of any contact offenses on the part of Mr. Demma."

In *United States v. Robinson*, 669 F.3d 767 (6th Cir. 2012) (*Robinson I*), however, this court explained that "[t]he emphasis should be upon deterring the production, distribution, receipt, or possession of child pornography, and not a prediction of future sexual contact with children." *Id.* at 777; *see also Camiscione*, 591 F.3d at 834 ("[I]t is not logical to justify a more lenient sentence on the basis that [the defendant] did not make or distribute child pornography or molest a child."). The crime in this case, as in *Robinson*, was the *possession* of child pornography, not a contact offense with a minor. In making the likelihood of Demma perpetrating a contact offense the "overarching question" prior to sentencing, the district court failed to properly weigh the specific-deterrence factor.

3. The relevant precedents

Demma attempts to counter the above points by arguing that several of the cases in which this court has vacated a short sentence as substantively unreasonable in fact stand for the opposite proposition. He specifically cites *Bistline I*, 665 F.3d 758; *Bistline II*, 720 F.3d 631; *United States v. Christman*, 607 F.3d 1110 (6th Cir. 2010); *Camiscione*, 591 F.3d 823; *Robinson I*, 669 F.3d 767; *Robinson II*, 778 F.3d 515; and *United States v. Shrank*, 768 Fed.Appx. 512, 515 (6th Cir. 2019). He argues that "the sentences ultimately imposed by the district court [in these cases], following

remand, and which were not appealed by the United States, are not significantly different from the one day sentence imposed [in the present case]."

Those sentences make up no part of the law of this circuit, however, precisely because we had no ability to review them. The unreviewed sentences therefore have little relevance to the question before us here. Nor is our unpublished opinion in *United States v. Prisel*, 316 F. App'x 377 (6th Cir. 2008), of much importance in the present case given that we reviewed the sentence in *Prisel* for plain error. *See*, *e.g.*, *Robinson I*, 669 F.3d at 779.

Our overall conclusion is that, based on the totality of the circumstances, the district court weighed some factors under § 3553(a) too heavily and gave insufficient weight to others in determining Demma's sentence. This is not to say that some other defendant possessing far fewer and less offensive images over a much shorter period of time might justify such an extreme downward variance, but that is not Demma's case. As this court noted in *United States v. Elmore*, 743 F.3d 1068 (6th Cir. 2014), a United States Sentencing Commission report states that "fully *96.6 percent* of first-time child-pornography-possession convictions led to at least some prison time." *Id.* at 1076 (emphasis in original). We find no basis in the record for Demma to not become part of this overwhelming statistic.

III. CONCLUSION

For all of the reasons set forth above, we VACATE Demma's sentence and REMAND the case for resentencing consistent with this opinion.

Br. of Appellee, United States v. Demma, No. 18-4143 (6th Cir. July 31, 2019)

* * *

Military HX: Vet signed up with Army after finishing undergrad degree in psych (2005 @ WSU) and did basic infantry training at Ft. Benning; followed by combat training at Ft. Sam Houston; followed by assignment to 4th Brigade of 1st CAV. Vet reported he was first deployed in Nov. 2006 to Baghdad Iraq where he was assigned for 9 months to a unit immersed in a Bagdad neighborhood. There he experienced 368 IEDs over 9 months including 14 days straight of either IED or small arms attacks.

* * *

Transcript of the Continuation of Sentencing Proceedings, United States v. Demma, No. 3:17 cr 62 (S.D. Ohio Dec. 21, 2017)

* * *

[8] Q. Did he tell you why he joined the Army after getting his college degree?

A. Yeah. I think – after 911 I think he was really committed. He told us both that he had a real desire to help out. He wanted to serve his country. Plus he said he felt bad for those individuals who had families who had to go in and serve and would be put in harm's way. He really didn't feel, he felt maybe that if he went in and took one of their spots, maybe one person wouldn't have to go to Iraq or wouldn't be in a situation where they would be in harm's way.

* * *

[12] Q. Do you recall phone calls with Andrew where he talked about friends or comrades being killed or injured?

A. Yes. During the period of time when I was the assistant superintendent, I worked at the Board office. One early afternoon, I got a call and it was Andy. He started crying. He cried for several minutes. When he finally [13] composed himself, he told me that they, his part of his patrol had been under ambush and a sniper got his, one of his friend's Taylor, didn't kill him, but shot him up through under his armor and Andy was called to work on him. When he was working on him,

he asked about another friend. I believe his name was Thrasher. They pointed to him over in the corner and he's dead. Andy said – I said, What did you do? He said, well, your adrenalin. You have a job to do. Your adrenalin was to get his friend Taylor taken care of. Then he broke down a few more times.

And I said, well, what's going on now?

He said well, we're back at our main camp. They lived pretty much out in the city at these joint security stations that they had to maintain. He said, we got back and we were told that we had one hour to grieve. Then we had to get back out on patrol in the city. He said, how can you grieve in one hour? We talked.

I got so emotional I had to go out in the parking lot and finish my call. But I couldn't do anything for him.

Q. I know this is difficult. Did you receive a call from Andy where he talked about a young girl blowing herself up?

A. Yes. He called again. He was kind of in dispare. They had been on patrol. They were in a – they had a little small convoy. Part of that convoy was a tank. When they – I don't know if it was the officer in control said, [14] we need to stop. There was a young lady up ahead of them; a young girl. Probably in the neighborhood of ten or 12 years old. They could tell she had a dress on or a gash on that was hiding explosives. That's what they thought. She kept on waving them on. The lieutenant says, no, we can't. So they would back up a

little bit. They ordered Andy and the other soldiers into the tank or into the armored vehicles. And he – they could view him from the tank. He said they knew they did not want that girl, the enemy or the Iraqi who was controlling that girl did not want her to get too far out of radio control because the bomb was radio controlled. They kept on backing up to the point where they knew that the people who were controlling the device knew that they had to do it then. They detonated her. Obviously they weren't close enough to – they felt the explosion, but it wasn't enough to injure any of them. But I remember him talking about – being able to see parts of her on their vehicles.

And he said, Why, dad? Why do they do this to their people, their own people?

I didn't have an answer. I said, That's what war is all about, I guess. That wasn't a good answer but that was the answer I had.

* * *

Transcript of Proceedings,
United States v. Demma, No. 3:17-cr-62
(S.D. Ohio Jan. 25, 2018)

* * *

[10] Q. What was your physical situation when you arrived at Baghdad, where did you stay, where did you go, issues like that?

A. For the first couple of months, we remained on the large, very large base complex surrounding Bagdad International Airport, and we were staging daily missions from there to our neighborhood that was about 7 or 8 minutes [11] away. After those 2 months, we occupied an outpost in our neighborhood in Bagdad as part of the surge plan.

Q. Let me talk a little bit about or ask you a little bit about the initial deployment. When you would go out on – did you use the word "mission"?

A. Yes.

Q. How long would those missions last?

A. Anywhere from an hour to 12 or 14 hours.

Q. After the mission was over, did you go back to the base?

A. We would go back to our outpost, yes.

Q. Was the outpost secure from most of the attacks?

A. From some attacks.

Q. How frequent were the attacks on the base those first 2 months?

A. Daily.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

UNITED STATES OF AMERICA,

Plaintiff,

Vs. CASE NO. 3:17-cr-62

ANDREW DEMMA,

Defendant.

TRANSCRIPT OF SENTENCING PROCEEDINGS

PRESIDING: THE HONORABLE WALTER H. RICE

DATE: Wednesday, October 3, 2018

APPEARANCES:

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Also Present:
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Patrick Kennedy, U.S. Pretrial Services Officer

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Proceedings recorded by mechanical stenography, transcript produced by computer

[26] THE COURT: These cases are always difficult because the Court needs to answer one overarching question prior to sentencing to the extent humanly possible. And that is whether the Defendant who comes before it, before the Court, is a latent predator, someone who is likely or at least a significant risk of acting out by way of a contact offense with minors or whether the person for whatever reason is a viewer, a possessor of child pornography, for whatever reason who is not likely to, graduate is the wrong word but accelerate his conduct into a contact offense.

This case has been extremely well presented by the attorneys for both sides. Mr. Mayhall has done an excellent job. Ms. Clemmens has done her typical thorough job representing very well the people of the community, not as a prosecutor trying to extract the last pound of flesh, but as one trying to achieve a just result for all parties, victims, defendant, and the community. In addition to her professional skills – I could say the same of Mr. Mayhall – she brings to any case in which

she's involved an ample dose of reality and compassion which is always appreciated by the Court.

[27] We've had 3 psychologists testify in this case, each and every one of which the Court has dealt with in other cases and each and every one of which the Court has the greatest of respect for.

Let me go through some basic sentencing comments before I get into some more specific comments. The charge is possession of child pornography, visual depictions involving prepubescent minors. This was a plea of guilty to the sole count in a Bill of Information.

I overruled Mr. Mayhall's objection pursuant to 2G2.2(a) for a two-level decrease from the Base Offense Level. Given that Mr. Demma had been charged under Section 2252(a)(4) which according to subsection B disqualifies him from the two-level decrease that would otherwise apply in Section 2G2.2(b)(1).

Defendant has spent one day in custody. He's been compliant.

The Offense Conduct paragraphs are set forth in paragraph 17 through 28. The Court, though, has had a long-standing policy of determining the Base Offense Level, the Gross such and finally the Net or Adjusted Offense Level not by the Offense Conduct paragraphs but rather on the Statement of Facts agreed to by and between the government and the Defendant and admitted by the Defendant to be true while under oath at the time of the taking of the plea.

[28] Of course, anything not objected to in the 12 Offense Conduct paragraphs may be considered by the Court in its Section 3553(a) analysis.

The Base Offense Level is 18 pursuant to Section 2G2.2.

Plus 2 pursuant to guideline Section 2G2.2(b)(2) for material involving a prepubescent minor or a minor who had not attained the age of 12.

Plus 4 pursuant to guideline Section 2G2.2(b)(4) for visual depictions of sadistic or masochistic conduct.

Plus 2 pursuant to guideline Section 2G2.2(b)(6) for the use of a computer to access child pornography.

Plus 5 pursuant to guideline Section 2G2.2(b)(7)(D) for 600 or more images.

The Gross Offense Level is 31.

Minus 2 for acceptance of responsibility.

Minus 1 more for timely notification of intent to plead guilty and full disclosure of role in the offense. For a Net Offense Level of 28.

Mr. Demma has no prior record, either juvenile or adult. His Criminal History is I which calls for a no longer binding now advisory sentencing guideline range of 6 years, 6 months to 8 years, 1 month.

Putting that aside and examining the other factors of sentencing set forth in subsection 3553(a), we have a defendant almost 40, served two tours in Iraq

as a combat [29] medic. He spent a total of 5 years I think plus in the military. His two tours totalled some 2-1/2 years. He did suffer some injuries from a mortar blast. He has suffered severe depression since age 20. He's been addicted to adult pornography since before his military experience, probably from his late teenage years. He became interested in child pornography while in Iraq. There's no evidence that he involved himself in viewing child pornography prior to his military service. By the time he returned home in May of 2010, he was viewing child pornography on a daily basis.

Post traumatic stress was diagnosed first by Nova House in August – not first diagnosed. Was diagnosed by Nova House and certainly Dr. Peterson seconds that by ranking, if I can use that expression, Mr. Demma's PTSD anywhere from moderate to severe.

Mr. Demma describes himself as a moderate drinker, previously utilized cocaine on an occasional basis. Does have a Bachelor's degree and several years of medical school. He is an EMT. He's working presently and has for quite a while with Home Depot. He worked previously as a mental health technician with mental health services of Clark and Madison County. He has worked in the past at Oesterlen Home working with young children. He is unable now or even on an installment plan in the future to defray either the costs of a fine in addition to the $100 special [30] assessment or the $5,000 assessment to the Victims of Trafficking Act. That's not only because of his inability to satisfy

such, but because he will have some $45,000 in restitution.

Everything Ms. Clemmens said about the seriousness of this offense the Court agrees with. I don't sense any disagreement by Mr. Mayhall or Mr. Demma either. This is an exploitive offense. It allows people who produce and distribute this to find a market of viewers and to that extent, the viewer, perhaps unintentionally, is aiding and abetting the production and distribution of this material.

It's a never-ending offense. It's not like a house burglary or a car theft which is invasive enough, but it's an offense that has no finite ending because the victim of the crime never knows when her pictures will be circulated on the Internet by people who are, quite frankly, if I may use a layman's mental health diagnosis, sick people.

In this case, Mr. Demma possessed images that were certainly if not the highest the Court has ever seen in a possession of child pornography, certainly not the lowest either.

The Court has considered, and I'll expand upon this, the issue of the safety of the community. It's considered the issue of fair punishment, punishment that both promotes respect for the law while at the same time not minimizing or [31] trivializing the offense.

The Court has considered the need for specific and general deterrence. The Court has considered whether there's anything this Court can do to help the

Defendant get his life back on the right track. The Court has considered the necessity of the forfeiture of five items spelled out in the Plea Agreement. The Court has considered the need for Mr. Demma to pay the sum of $5,000 for each of the nine victims in this case.

And finally, as a wrap-up to these very general and self-serving statements, the Court has considered the need to avoid unreasonable disparities between the sentence to be imposed on Mr. Demma and others similarly situated who have committed similar crimes in the past.

Now, I'm going to expand on each of these items. But let me make two comments first. More than two comments. All sentences are different because all sentences are required to take into account the differences between different cases. Mr. Demma, because of his experiences, is to be treated differently than someone who simply allowed his curiosity to get the better of him and President Trump's 400-pound man sitting on the edge of his bed who was surfing the Internet one night and allowed his curiosity to get the better of him.

Secondly – and Mr. Demma will be treated differently. [32] Whether that means a higher sentence or a lower sentence I'll get to shortly but he's a different person than others who have committed similar crimes. And indeed if we were not to take into account the individual characteristics of a given defendant when creating a sentence that is sufficient but no more than needed to carry out the purposes of sentencing,

then we simply are abrogating or nullifying Title 18, United States Code, Section 3553(a).

The Court is fully aware of the need to consider general and specific deterrence. Deterrence, specific deterrence can be guaranteed in a number of ways, some of which are overlapping, a custodial sentence as advocated by the government, intensive treatment, or a combination of the two, and by other means that simply do not come immediately to the Court's mind.

As far as general deterrence is concerned, people who commit these type of offenses have mental health issues. Doesn't mean they're psychotic. Doesn't mean they're not capable of facing and defending a criminal indictment or Bill of Information, but they have issues that have to be dealt with. While I guess it is possible – I don't guess. I'm certain it's possible to will one's self to never watch pornography, adult or child pornography, again much as it is possible to put down your last drink and never drink again or throw away that pack of cigarettes with maybe five to ten [33] cigarettes left inside and vow never to smoke again, it's a lot easier said than done.

So what I'm trying to say is while the Court recognizes the need to consider general deterrence, there are certain types of crimes, this being one of them, for which general deterrence is, I believe, more myth than reality.

The last general statement I would like to make is this. The only point of disagreement that I find I have, and it's a very respectful disagreement with

government's counsel, is her statement that there are no circumstances, real, hypothetical or barely conceivable, that might exist that would justify the type of variance advocated by defense counsel. I'm not saying at this point that this is one of those cases but I think you have to assume that Congress acts in its infinite wisdom and if there were no set of circumstances, real, hypothetical or barely conceivable that would justify a noncustodial sentence, then Congress would have required either a minimum mandatory sentence or some period of custody beyond a one-day or a time-served sentence.

Now, having made those very general statements, let's go into some detail. We had 3 psychologists in this case: Dr. David Tennenbaum, a Ph.D. We had Dr. David Roush and Dr. I believe Frederick Peterson, Psy.D.s. Dr. Peterson and Dr. Roush conferred with each other and are in effect [34] jointly treating Mr. Demma and have promised to confer on perhaps a quarterly basis to make certain that all that should be done for Mr. Demma, whether now or after a custodial sentence, is being done.

Ms. Clemmens' comment about if Dr. Tennenbaum's cause and effect were accurate, then we would have persons coming home from combat zones committing similar types of offenses. I see her argument. I think it's not an invalid argument.

Yet, number 1, a person's, I personally believe that there's a cause for every mental health diagnosis, whether it's a chemical imbalance or a finite event or

serious events. While I don't know the quantity, the numbers, the percentage of persons coming home from Iraq having seen combat who have become addicted to pornography, no way to know that, what I am certain of is that very few people come home from a combat situation without suffering lasting damage. Some of it causes people to wind up in a criminal court. There's no question about that. Some of it people are at least superficially seen as having gone on with their lives and not suffered any results. Yet, any reading of any kind of literature involving PTSD I believe would tell us that even those who have no outward sequelae of having been in a combat zone, even those who have not wound up in a criminal court, have suffered a lot of the symptoms of PTSD, whether it's isolation, whether it's an apathy toward life, [35] whether it's depression or not.

This Court has fortunately never been in combat and I quite frankly can't imagine how I would react to being in that type of situation. But I simply don't believe – I'm not taking judicial notice of this; I'm sharing my personal opinion. I simply don't believe one can go through a protracted combat experience and not suffer some consequences unless that person goes into combat detached, introverted and apathic to begin with.

I don't want to spend a lot of time going through the opinions of the psychologists. Suffice it to say that Dr. Tennenbaum finds a direct correlation between Mr. Demma's experiences and his addiction to child pornography.

Dr. Peterson doesn't agree in so many words but there's very little difference between Dr. Peterson and Dr. Tennenbaum. They certainly see a cause and effect relationship between his combat service and his interest in child pornography.

Dr. Roush disagrees. Dr. Roush would tell us, as he has, that the combat experience, while it certainly has increased the stress which increases the strength of the addiction at certain times to child pornography, while it certainly has exacerbated the interest in child pornography, that that experience in combat was not a direct causative factor in the interest in child pornography.

Dr. Roush blames the interest in child pornography, [36] quite frankly, on Mr. Demma's interest in child pornography having graduated from an interest in adult pornography that had existed for many years. Dr. Roush's beliefs that he's testified to many times in this Court is that one who views adult pornography gradually becomes not immune but jaded or satiated with it. The person no longer gets the sexual rush that he or she previously did and therefore graduates to different forms of pornography of which child pornography is one of those subsets.

Without going into a lot of detail because I don't think I need to revisit that here, Mr. Demma had a number of experiences in combat, some of which were not unusual for people in combat situations. His first tour of Iraq I think lasted a year and a half. He was constantly in harm's way. He was subject to IEDs on a

frequent basis, if not their detonation then at least the possibility of such but he was also exposed to situations involving young children that hopefully are unusual for people in combat. Situations that made, as they would anyone, made him have memories that, try as he might, he simply could not simply slough off and get on with his life.

He had experiences with young children, children, teenagers or less in terms of age, and his involvement with those children and with the deaths of those children that, quite frankly, have made an indelible impression on him, [40] experiences that the stereotypical 400-pound man sitting on, the edge of his bed might not have had.

Dr. Roush uses a molester and a Rapist Comparison Test which he candidly admits is not predictive. It's simply used to corroborate other evidence. On the Molester Comparison Test he ranks Mr. Demma as having thinking and behavioral attributes moderately similar to other adult male sexual offenders who use manipulation with their victims.

As far as the Rapist Comparison Test, Mr. Demma's attributes are not similar to other adult male sexual offenders who use force with their victims. He feels at the time of the initial evaluation of Mr. Demma, that he, Mr. Demma, lacked the acknowledgment of the excitement that he derived from child pornography and/or the planning and the strategy to view same.

It's important to note that unlike many who appear in this Court and are ordered by the Court to

receive a mental health evaluation, this man sought out Dr. Roush. I could be off by a few months but by 15 months prior to charges being filed. Admittedly, after his arrest but some 15 months before charges being filed, to try to get to the bottom of this; why he was attracted to child pornography.

And he was, prior to the charge, involved with sex offender counseling with Dr. Roush as I recall. Dr. Roush at one point said: Why don't you wait until your legal [38] situation is resolved before you get involved in group?

Mr. Demma insisted that he wanted to begin group as quickly as is possible in order that he might get to the bottom of his particular situation. So while Mr. Demma may well not have had the insight to admit in Dr. Roush's viewpoint the stimulation he got from child pornography and the strategies leading up to his viewing of child pornography, he did have enough insight to know that he had problems that had to be dealt with.

Dr. Roush said that Iraq didn't cause his interest in child pornography. As I've said, he was addicted to the adult version pre-Iraq but stress in Iraq perpetuated and escalated the interest in child pornography that he first viewed while in Iraq. He rates Mr. Demma's participation as above satisfactory. He doesn't, Dr. Roush, make prognoses but there's nothing in his report or his testimony that would indicate any concern about Mr. Demma's propensity to re-offend either viewing child pornography or acting out against children.

Dr. Tennenbaum examined on five occasions Mr. Demma post charge but prior to sentencing. He quoted Dr. Peterson in the agreement on the PTSD diagnosis. He felt, Dr. Tennenbaum did, that the initiation of viewing child pornography was a direct result of experiencing the ravages of war on children and on children being killed.

[39] He felt, Dr. Tennenbaum did, that pornography was a coping mechanism to try to deflect the pain from what he saw in Iraq by the lesser harm, if I can use that expression, of seeing children victimized by being the subject of child pornography.

From a psychological perspective he, Dr. Tennenbaum, felt there was a direct link between his military experience and his introduction to child pornography and his escalating addiction. I agree with Ms. Clemmens that this is not the typical cause and effect that we hear in court. Yet, Dr. Peterson who deals with treating veterans who have come back from war and who are suffering from PTSD was at the time of his testimony co-authoring a book about six similar cases that he and his co-author have become aware of. So while it's an unusual cause and effect, I don't feel, respectfully, that it is a stretch that it is an inconceivable cause and effect.

Dr. Tennenbaum says that Mr. Demma needs intensive outpatient or residential PTSD care for his unremitting post traumatic thoughts and behaviors. He's been a severely depressed adult with a multitude of emotional disabilities. He is undergoing a severe level

of depression which I believe the doctor has testified is easing a bit. He ruminates unproductively. He's an emotionally damaged adult based on what he has seen. He feels his decision was [40] exacerbated by his tours in Iraq. The PTSD interfaces with that experience. The depression interferes with his, Mr. Demma's ability to understand his experiences and he used child pornography to bring to mind the pain, the victimizing of children that he witnessed in Iraq. He simply is incapable, as of the time Dr. Tennenbaum examined him, of coping with his own experience and trauma.

Dr. Tennenbaum feels that the use of child pornography was not for sexual gratification but to see and to experience again the pain he experienced regarding children in Iraq. The experience was the direct cause of his involvement with child pornography. He simply is incapable of moving on.

Dr. Tennenbaum said that he had – not Dr. Tennenbaum but Mr. Demma, a very low risk for recidivism of looking at child pornography. He felt that the literature revealed that 96 percent of child pornography viewers were not at risk for contact offenses. Again, he used the child pornography to punish himself into reexperiencing the suffering he had.

Dr. Tennenbaum was asked the effect that prison would have on Mr. Demma. He said that Mr. Demma would use the prison experience to further punish himself for matters that he observed and participated in while in combat.

Dr. Roush and Dr. Peterson at the Court's request [41] consulted with each other and jointly testified on May 1st of this year. Dr. Roush is treating Mr. Demma for sex offender treatment. His prognosis is good in Dr. Roush's opinion with regard to repeating the offense of viewing child pornography. Dr. Roush indicated on May 1st that he needed about a year and a half more of treatment.

Dr. Peterson indicated that the PTSD involved a recapitulation of some trauma through dysfunctional coping which the dysfunctional coping being the using of child pornography. He's fully participating in therapy. He's getting better. The goal is not to cause Mr. Demma to forget his experiences which regrettably will never happen but the goal is not to allow the PTSD to direct or control Mr. Demma's life but rather to put control of Mr. Demma's life back with Mr. Demma where it belongs.

Dr. Peterson said that the wartime experiences contributed to the continuation of his addiction to child pornography. Very low probability, in Dr. Peterson's view, of viewing or acting out. Both he and Dr. Roush believe that while interruption of treatment would not destroy the treatment, interruption of treatment by prison would not destroy the benefits of treatment already rendered. It would simply slow down the process.

The Defendant apparently was a contributing member of the military, earned many decorations, medals, badges, [42] citations, campaign ribbons and the like.

Having computed the Sentencing Guidelines and having found that they are 78 to 97 months gives me the opportunity to express my strong disagreement with the guidelines particularly with regard to possessors of child pornography.

First of all, federal court is the place where, I'm going to use the word serious child pornographers are brought. Serious in the terms of the kinds of images possessed and the amount of images possessed. Just about every person who comes to federal court for possession of child pornography almost automatically earns all of the enhancements to the Base Offense Level. While there's nothing wrong with that, the problem is, it becomes extremely difficult – and again I have no ax to grind with 400-pound men who sit on the edge of a bed, but it makes it impossible to distinguish between that type of person and an unusual person, unusual because of the experiences that have either caused the addiction to child pornography or where those experiences have accelerated it, escalated it, and made it more difficult to recover from.

So the guidelines, while certainly they're a starting point and they do achieve a certain amount of consistency, in my opinion are artificially high because everyone secures most of the enhancements and secondly makes it difficult to distinguish between offender A and offender B.

[43] Secondly, while the crime is very, very, very serious, this gentleman, if the psychologists are to be believed, is almost no danger to the public now or in

the future if he continues his therapy, is almost no danger to the community to re-offend as a user of child pornography or as someone who acts out against children.

This Defendant having sought out treatment on his own months before a charge was filed and having in effect told the therapist that he wanted to participate in group therapy even though the doctor himself said "you ought to wait till your case is over," this Defendant having – I don't want to underemphasize this, on the other hand I don't want to drown this record in clichés. This is a man who voluntarily joined the service as a combat medic where he could be guaranteed to see the worst of combat and who has wound up in criminal court as an unintended consequence of that I think deserves some consideration that the average possessor of child pornography hasn't earned.

His rehabilitation is well on its way. He's going to continue with Dr. Roush for another year. He'll then pick up with Dr. Peterson. I'm going to order that the VA PTSD inpatient program be seriously considered and if not followed, that the Court be advised as to why. There's no danger to the safety of the community. I believe frankly based on what the psychologists have told me, that a prison [44] term – which this kind of offense warrants; I don't disagree with that – would be more destructive than helpful.

I firmly believe that, let me put it this way. I can fully understand the need for a custodial sentence in this type of offense generally. I can fully understand the fact that a noncustodial sentence may send the

wrong message out to others, although quite frankly whether there's a custodial sentence or not is not going to impact upon others' addiction in this area. But, quite frankly, in this Court's opinion the interest of safety, having considered that and considered the public at no danger to its safety from this Defendant, having considered the fact that prevention is already being aggressively pursued by this Defendant, the fact that he is working as hard as he can or at least as I can conceive on his rehabilitation, and quite frankly the fact that his being in federal court is the result of his voluntary service to his community and his country, in this unique case outweighs the need for a custodial sentence which I believe would be contraindicated based on the testimony certainly of Dr. Tennenbaum.

Mayhall, if you and your client would be good enough to come forward.

The following is a sentence that the Court believes to be sufficient but no more than needed to carry out the [45] purposes of sentencing.

The Defendant is remanded to the custody of the Attorney General of the United States, the Bureau of Prisons, for a period of one day. He is to pay on an immediate basis the $100 special assessment to the victims' compensation fund. No additional fine is required for reasons that the Court has already given.

Restitution will be made to each of the nine victims in the amount of $5,000 for a total of $45,000. One additional reason for not imposing a fine beyond the special assessment, in addition to restitution, is the

fact that community service will play a part of the Defendant's supervision. Needless to say, the $5,000 special assessment based on the Victims of Trafficking Act will not be imposed on this Defendant due to his inability, the need to make restitution, and the like.

There are five items to be forfeit. They're spelled out in the Plea Agreement.

1. Netgear Wireless-N USB Adapter, serial number 1WB29CB 0731. These are all capital letters. Why don't I simply do it this way. Rather than read an endless series of numbers into the record, I simply will put in the judgment entry the five items stated in the Plea Agreement that must be forfeit.

Supervised release will be ordered for a ten-year [46] period subject to conditions that I will mention.

If after the 5-year mark, Mr. Steed, in the opinion of the department, probation department and the mental health providers, if the opinion is that this Defendant no longer needs the service of further supervision, then my successor should be contacted with a motion to terminate supervised release early.

The following are the conditions of supervision and some of what I'm about to say is duplicative.

First. He is to follow all of the rules and regulations of the probation department to which he is to report not later than 24 hours after final disposition today or tomorrow.

He is to commit no further crimes, local, state or federal.

He is neither to own, possess, use or traffic in any controlled substances, firearms, or other dangerous weapons.

He is to maintain his employment or seek other employment, not to leave his present employment without a new position involved.

Normally I give as an alternative for seeking and maintaining employment that the Defendant avail himself of job training. This Defendant has too many talents based on education and accomplishments that he doesn't have to be ordered to participate in job training if in fact he feels [47] the need.

He is to contribute 100 hours of community service on a schedule and with an agency to be determined by and between himself and the probation department within the first two years of supervision if a suitable placement can be found.

He is to subject himself to drug testing and treatment. With regard to testing at least during the first, once during the first 15 days of supervision and no fewer than twice thereafter.

If treatment is necessary, inpatient or outpatient, at the recommendation of the probation officer.

He is liable for a $25 a month co-payment for treatment if financially able to defray that cost.

I don't think there is a significant probability of drug treatment so I would in addition to the test during the first 15 days of supervision, the Court would have no objection to further tests being spaced out as far as the probation officer determines is proper.

The Defendant is to receive a mental health assessment and if needed treatment. Now, he's already being treated for PTSD and for a major depressive order. I'm talking about other issues for which he may not be presently treated for. I would recommend to the probation department that the reports of Dr. Roush and the testimony of Dr. Peterson and the report of Dr. Tennenbaum be given the mental health [48] assessor to see if there's any additional mental health treatment necessary. My feeling is that there may be unnecessary redundancy or duplication. I simply don't want there to be any issue that falls untreated between the cracks. To the extent he receives treatment from an additional mental health provider, he is liable for the $25 a month co-pay if financially feasible.

He is to cooperate with all of the requirements of the Sex Offender Rehabilitation and Notification Act in whatever state he works, lives, or attends schooling.

He is, without question, to complete his sex offender treatment with Dr. Roush. He is to continue and step up his interaction with Dr. Peterson as soon as he and Dr. Roush in concert believes that the time is proper. And he is to seriously consider, once his treatment with Dr. Roush has been completed, inpatient at

the Fort Thomas veterans administration clinic or hospital specializing in PTSD.

He is to cooperate in the search of his person, property, home and the like by any law enforcement officer or probation officer.

He is to cooperate in the collection of DNA.

He is to cooperate in the taking of various polygraph examinations which is a standard requirement and he is to comply with all five conditions set forth in pages 3 and 4 of the attached supplement to the Presentence Report which, [49] Mr. Mayhall, I would be delighted to read into the record absent a stipulation from you that that is not necessary given that you've reviewed these with him prior to today.

MR. MAYHALL: I have reviewed them, your Honor, so reading them in the record is not necessary.

THE COURT: All right. Ms. Clemmens, would you agree?

MS. CLEMMENS: Yes, your Honor.

THE COURT: All right. Mr. Mayhall, are there any procedural or substantive objections to this Court's disposition?

MR. MAYHAL: No, your Honor, thank you.

THE COURT: All right. Ms. Clemmens, if the government wishes, I certainly would not be offended if you feel the Court's disposition is either procedurally or substantively unreasonable?

MS. CLEMMENS: Your Honor, respectfully, for the record, we would lodge an objection to the sentence on the grounds of substantive reasonableness.

THE COURT: Thank you.

The Court will make the following recommendation: That the one day of confinement be satisfied by the day on which Mr. Demma was processed by the United States Marshals.

Mr. Demma, I need to explain to you what we call your right of appeal. Anytime within 14 days from the day the [50] final paperwork is filed which, because of some personnel issues, may be a week or two weeks from now, you have the right to appeal any action of this Court with which you disagree to a higher court known as the Court of Appeals. You're entitled to the services of an attorney to make this appeal. If you don't have an attorney and would like to have one but feel you can't afford the price of an attorney, the Court will appoint one for you at no cost. This attorney will see to it both that your appeal is filed, that all of the necessary court papers are prepared for you and that your appeal is fully argued. Do you understand, sir, what I've said?

THE DEFENDANT: Yes, your Honor.

THE COURT: Let the record show in this case, CR-3-17-62, *United States of America versus Demme*, that sentence has been imposed, the Defendant orally explained his right of appeal, and he has indicated an understanding of it.

Mr. Mayhall, I don't know whom else to look to for this last request other than yourself but I would very much appreciate on about an every four-month basis, to get a report from Dr. Roush and Dr. Peterson – I'll write them this as well – with of course a copy to me, to you, and to Ms. Clemmens setting forth Mr. Demma's progress and further treatment considerations. If I could ask you to simply put [51] that up on your followup calendar, I would appreciate it.

MR. MAYHALL: Yes, sir.

THE COURT: All right. Ms. Clemmens, is there anything further?

MS. CLEMMENS: Just an administrative matter, your Honor. I believe the agreed orders of restitution, the originals were given to the Court some time ago. I just want to confirm that the Court will be filing those or let us know if we need to do anything.

THE COURT: I've signed them but haven't filed them. Just a moment. Rather than watch me shuffle through paper, I believe they have been filed. If they haven't, they will be by close of business tomorrow.

MS. CLEMMENS: Thank you, your Honor. Then nothing further.

THE COURT: Thank you. Mr. Mayhall, anything further?

MR. MAYHALL: No, sir, thank you.

THE COURT: You're welcome. Mr. Demma, any questions?

THE DEFENDANT: No, sir.

THE COURT: I wish you well, sir. We are in recess.

(Proceedings concluded 4:13 p.m.)

CERTIFICATE

I, Debra Lynn Futrell, Federal Official Court Reporter, in and for the United States District Court for the Southern District of Ohio, Western Division at Dayton, do hereby certify that the foregoing pages constitute a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter, on the date indicated, to the best of my ability and knowledge, transcribed by me.

s/Debra Lynn Futrell,
Debra Lynn Futrell
Federal Official Court Reporter

18 U.S. Code § 3553. Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *