

APPENDIX

Appendix A

Opinion below

United States v. McElderry, No. 16-3618 (8th Cir.)
(slip op.) (also reported at 875 F.3d 863)

United States Court of Appeals
For the Eighth Circuit

No. 16-3618

United States of America

Plaintiff - Appellee

v.

Kennett James McElderry

Defendant - Appellant

Appeal from United States District Court
for the District of Minnesota - St. Paul

Submitted: October 16, 2017

Filed: November 16, 2017

[Published]

Before LOKEN, MURPHY, and COLLOTON, Circuit Judges.

PER CURIAM.

Kennett McElderry pleaded guilty to one count of distribution of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1). The district

court¹ determined that his advisory guideline range was 235 to 240 months in prison. Varying downward, the court imposed a 130-month sentence. McElderry appeals, arguing that his sentence is substantively unreasonable because the district court abused its discretion in failing to consider the sentences of other similarly situated defendants in the District of Minnesota who were less cooperative and more culpable, and had more extensive criminal histories than McElderry. We affirm.

Prior to sentencing, McElderry's attorney submitted a lengthy Sentencing Memorandum that urged the court to impose a 60-month sentence, the statutory mandatory minimum, based primarily on his extensive cooperation with law enforcement, the nature of his crime, his behavior while on pre-trial release, his expression of remorse, and his overstated criminal history. Near the end, the Memorandum compared the sentences imposed by six District of Minnesota judges on thirteen defendants convicted of prior, unrelated child pornography offenses. At sentencing, the district court stated that it had considered the 18 U.S.C. § 3553(a) sentencing factors "and finds that the [130-month] sentence imposed is sufficient and not greater than necessary to afford adequate deterrence to future criminal conduct." Defense counsel urged the court to reconsider because in other cases "there's been prior hands-on offenses or prior viewing where people have gotten less time." The court noted that it had read that portion of the Sentencing Memorandum and declined to reconsider the sentence.

On appeal, McElderry argues that his sentence is greater than necessary because the district court failed to consider a mandatory sentencing factor: "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Comparing his

¹ The Honorable David S. Doty, United States District Judge for the District of Minnesota.

sentence “to other defendants convicted of similar crimes,” McElderry argues, “it is clear his sentence is unreasonable.”

Although sentencing-disparity arguments are properly raised to the district court, “we decline to impose a procedural requirement that a district judge . . . must compare and contrast the defendant under consideration with a similar offender who has been sentenced by another federal judge.” United States v. Barron, 557 F.3d 866, 869 (8th Cir. 2009). As we said in United States v. Soliz, 857 F.3d 781, 783 (8th Cir. 2017) (citations omitted):

The sentencing practices of one district court are not a reference point for other courts. An argument that non-conspirator defendants received shorter sentences for comparable offenses is at base a disagreement with the weighing of the § 3553(a) factors. This disagreement does not demonstrate an abuse of discretion.

McElderry correctly notes that we did remand for resentencing two similarly situated co-conspirators who were given extremely disparate sentences by different district judges in United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006). But we have limited that decision to the “unusual circumstances” there presented, which included “a consolidated appeal involving both conspirators that permitted a remand for resentencing of both parties.” United States v. Fry, 792 F.3d 884, 892-93 (8th Cir. 2015). When the argument is, as in this case, that the district court’s sentence created unwarranted disparities with the sentences imposed on thirteen unrelated offenders by six different judges, “there is no principled basis for an appellate court to say which defendant[s] received the ‘appropriate’ sentence.” Id. at 893 (citation omitted). Thus, McElderry’s reliance on § 3553(a)(6) on appeal is misplaced.

Reviewing the substantive reasonableness of McElderry’s sentence under our deferential standard, we conclude that the district court did not abuse its discretion

by imposing a substantively unreasonable sentence. See United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009) (*en banc*) (standard of review).

The judgment of the district court is affirmed.

Appendix B

Order denying rehearing
United States v. McElderry, No. 16-3618 (8th Cir.)
(order) (filed December 28, 2017)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-3618

United States of America

Appellee

v.

Kennett James McElderry

Appellant

Appeal from U.S. District Court for the District of Minnesota - St. Paul
(0:15-cr-00215-DSD-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 28, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix C

Petitioner's principal sentencing paper
United States v. McElderry, Crim. No. 15-CR-215 (D. Minn.)
(filed August 10, 2016)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 15-215 (DSD/LIB)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	DEFENDANT'S SENTENCING
v	)	MEMORANDUM
	)	
	)	
KENNETT JAMES McELDERRY,	)	
	)	
Defendant.	)	

Thirty-six year old Kennett James McElderry has never served more than a 120 days in jail. Today, he faces an advisory guideline range of 235 to 240 months for using a Google Plus to view child pornography and upload child pornography. The range is much higher than was contemplated in the plea agreement because of his higher criminal history category. A mandatory minimum term of 60 months' imprisonment and a 20 year maximum applies.

Mr. McElderry has led much of his life without violence or any behavior that would cause concern. For much of his life he has been a drug addict and an alcoholic. Today, he is facing an extremely long sentence because of sentencing enhancements that are applied in many child pornography case. The reality is that Mr. McElderry is the prototypical person who viewed child pornography for whom the sentencing guidelines far exceeds any notion of justice or proportionality. Respectfully, Mr. McElderry requests

that the Court grant a significant variance from the advisory guidelines and sentence him to a term of five years in prison, the statutory minimum, followed by five years of supervision.

DEPARTURE

I. Over Stated Criminal History

It is important to remember that the offense conduct occurred in July 2014. (See Plea agreement and Indictment.) The PSR concludes that Mr. McElderry has 8 criminal history points. The points are awarded because during one of two interviews during the investigation of this case, in which Mr. McElderry was beyond cooperative, he admitted that he may have looked a child pornography in 2006. As such, he is awarded criminal history points as far back as 2000, when he was twenty years old and drinking and driving. He is given two points for that offense. Five additional points are awarded for two additional DUIs in 2007 and 2009. Two of the points come from being on probation during the year 2006. Because of his cooperative nature, he is being punished with four extra criminal history points. (§ 46 and 56.) He is also awarded one point for a **petty** misdemeanor offense of possessing marijuana. It is not a crime punishable by jail, but rather by a fine. (§ 54.) But for the five points, Mr. McElderry would correctly have three points, placing him in criminal history category II, lower than the category III the parties had anticipated. His advisory guideline range would be 168-210 months. There is nothing in Mr. McElderry's record that suggests that he should be in criminal history

category V. It is clear he has a chemical dependency problem. He has three DUIs and his burglary offense occurred when he was drunk. This was verified by the victim, the mother of his daughter, Kristen. Mr. McElderry has completed intensive treatment that he paid for with his insurance and continues with a support group. His treatment is discussed in more detail below. Respectfully, Mr. McElderry requests that the Court grant a downward departure for overstated criminal history pursuant to § 4A1.3(b). The departure is justified and warranted in this case.

Legal Analysis

I. Advisory Guideline Range.

As stated above, the advisory guideline range is 235 to 240 months. This is because the offense level is 34 and the criminal history category is V. The total offense level is so high because of specific offense characteristics. They are as follows:

Base Offense Level 2G2.2	22	
Images of minors under the age of 12	+2	
Images are sadistic or masochistic	+4	15 levels added
Images viewed on a computer	+2	
More than 600 images	+5	
Distribution	+2	
Acceptance of Responsibility	-3	
TOTAL Adjusted Offense Level	34	

II. The Application of the U.S.S.G. § 2G2.2 Fails to Make Meaningful Distinctions in Culpability and Results in an Unduly Harsh Guideline In Mr. McElderry's Case.

Mr. McElderry's advisory guide range is the normal sentencing range for an individual sentenced for distribution of child pornography. Over the past year, this Court has heard argument from Mr. McElderry's counsel in regards to the "exaggerated" guidelines for child pornography and that the guidelines do not distinguish from an offender who emails images from an offender who file shares for the purpose of viewing images. As applied to the case at hand, Mr. McElderry's offense conduct mirrors that of virtually all offenders sentenced on this type of offense. In FY 2010, the use of computer enhancement was applied in **ninety-six percent** of sentencing proceedings; the images table was applied in **ninety-eight percent** (with the five level maximum enhancement applied in seventy percent of sentences); images of prepubescent minors or minors under twelve, **ninety-seven percent**; and images of sadistic, masochistic or violent acts, **eighty percent**. *United States Sentencing Commission*. Report to Congress: Federal Child Pornography Guidelines. p. 209. (December 2012).

Sixty-nine percent of district court judges believe that the § 2G2.2 sentencing guideline is too severe, according to a Commission survey.¹ The Criminal Law

¹United 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/projects.cfm

Committee of the Judicial Conference has also recommended the elimination of the five year mandatory minimum sentence for receipt offenses, finding there to be no substantive difference between receipt and possession. Commission at 326-327. This perspective is reflected in the increased use of variances at sentencing. In 2010, courts imposed within range sentences in only forty percent of § 2G2.2 cases (which include all non-production child pornography cases, of which receipt is one). *Commission. Report to Congress*. p. 224. The trend continued in 2012 when only thirty-two percent of § 2G2.2 sentences were within the recommended sentencing range: 754 were below range sentences that were not government sponsored (forty-three percent) while 232 were government sponsored downward variances, other than § 5K1.1 or § 5K3.1 departures (or thirteen percent).²

In *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010), the Third Circuit Court of Appeals affirmed the imposed sentence of the mandatory minimum (sixty months in prison) when the § 2G2.2 recommended a sentencing range of 235 - 293 months in prison. *Id.* at 596. Grober's base offense level was 22 (as is Mr. McElderry's) and with each enhancement faced by Mr. McElderry is also being applied. *Id.* Grober had one additional five level enhancement for "distributing material to receive a thing of value,

² U.S. Sentencing Commission, Sourcebook for Federal Sentencing Statistics 80 (2012) (Table 28), available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table28.pdf

but not for pecuniary gain.” *Id.* The district court gave three key reasons for its downward variance: (1) “the enhancements are essentially inherent in the crime and, thus, apply in nearly every case”, *id.*; (2) “the enhancements promote sentencing disparities”, *id.*, and (3) “given the nature of child pornography, it can be very difficult for the defense to rebut the government’s characterization of the egregious of a defendant’s conduct or dispute the government’s evaluation of the defendant’s collection compared to the collections of others, both of which may bear on the applicability of § 2G2.2’s enhancements.” *Id.* Each of these factors are equally applicable in considering a downward variance for Mr. McElderry.

District courts within the Eighth Circuit have also grappled with the dimensions and applicability of § 2G2.2 when granting variances to the guideline. In *United States v. Baird*, 580 F.Supp.2d 889, 894 (D. Ne. 2008), Chief Judge Battalion surveys the intervention of Congress and concludes that § 2G2.2 guidelines “...were not developed under the empirical approach, but were promulgated, for the most part, in response to statutory directives” and that “[b]ecause the Guidelines do not reflect the Commission’s unique institutional strengths, the court affords them less deference than it would to empirically-grounded guidelines.” Chief Judge Pratt reached the same conclusion in *United States v. Shipley*, 560 F.Supp.2d 739, 744 (S.D. Iowa 2008). District courts throughout the country have found § 2G2.2 to be flawed. *See United States v. Kelly*, 868 F.Supp.2d 1202 (D.N.M. 2012); *United States v. Diaz*, 720 F.Supp.2d 1039 (E.D.Wis.

2010)(collecting cases); *United States v. Riley*, 655 F.Supp.2d 1298 (S.D.Fla. 2009); *United States v. McElheny*, 630 F.Supp.2d 886 (E.D.Tenn. 2009); *United States v. Beiermann*, 599 F.Supp.2d 1087 (N.D.Iowa 2009); *United States v. Phinney*, 599 F.Supp.2d 1037 (E.D.Wis. 2009).

In granting a variance to Mr. McElderry, this Court will not stand alone in its manner of applying § 2G2.2 in a child pornography non-production case. Rather, it will join with the increasing number of judges and district courts who have found troubling the manner in which § 2G2.2 was crafted by Congress and who have found the recommended sentencing range to result in unduly harsh sentences that exceed the mandate to be “sufficient, but not greater than necessary” to achieve the purposes of 18 U.S.C. § 3553(a).

Many other courts have questioned the reasonableness of the child pornography guidelines over the years. Judge Bennett described the disagreement many district court judges have with these guidelines and their rejection of them:

[N]umerous district courts had read *Kimbrough* to permit a sentencing court to give little deference to the guideline for child pornography cases on the ground that the guideline did not exemplify the Sentencing Commission’s exercise of its characteristic institutional role and empirical analysis, but was the result of congressional mandates, often passed by Congress with little debate or analysis. *See, e.g., United States v. Baird*, 580 F.Supp.2d 889,892 (D.Neb. 2008); *United States v. Goldberg*, 2008 WL 4542957, *6 (N.D.Ill. April 30, 2008); *United States v. Shipley*, 560 F.Supp.2d 739,744 (S.D. Iowa 2008); *United States v. Hanson*, 561 F.Supp.2d 1004, 1009-1011 (E.D. Wis.2008); *United States v. Ontiveros*, 2008 WL 2937539, ** (E.D. Wis. July 24, 2008); *United States v.*

Grinsbergs, 2008 WL 4191145, *5-*8 (D.Neb. Sept. 8, 2008); *United States v. Stults*, 2008 WL 4277676, *4-*7 (D.Neb. Sept. 12, 2008); *United States v. Noxon*, 2008 WL 4758583, *2 (D.Kan. Oct. 28, 2008); *United States v. Johnson*, 588 F. Supp.2d 997, 1003-05 (S.D. Iowa 2008); *United States v. Stern*, 590 F.Supp.2d 945, 960-61 (N.D. Ohio 2008); *United States v. Gellatyls*, 2009 WL 35166, *5-*7 (D.Neb. Jan. 5, 2009); *see generally*, Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progressions of the Child Pornography Guidelines* (hereinafter, Stabenow, *Deconstructing the Myth*) (July 3, 2008)[available at www.fd.org] [. . .] I must consider whether to join these courts in finding that U.S.S.G § 2G2.2 is entitled to little deference. . . .[and]. . . I join my brethren who find that the child pornography guideline, U.S.S.G. § 2G2.2, which is the result of congressional mandates, is entitled to considerably less deference than other guidelines that *are* based on the commission’s exercise of its institutional expertise and empirical analysis. . . .

United States v. Beiermann, 599 F.Supp.2d 1087, 1100-1103. (N.D. Iowa, Feb. 24, 2009).

Again, Mr. McElderry is the prototypical offender for § 2G2.2 sentencing purposes. He has no prior similar or violent criminal history and he engaged in behavior that characterizes the behavior of the vast majority of similarly situated individuals. § 2G2.2, if rigidly applied, essentially results in a new mandatory minimum sentence of ten years for the prototypical offender—double that imposed by Congress. Logically, this does not make sense and the Commission has recognized this lack of logic by calling for reform of § 2G2.2.

III. Restitution.

Counsel for Mr. McElderry has sent a letter to the attorney representing the “Marineland series.” No response has been received as of today’s date. As such, counsel

requests the restitution matter be left open for 90-days. Counsel for Mr. McElderry is hoping there can be a settlement between Mr. McElderry and the victims.

IV. The Court Should Vary Downward Based on the § 3553(a) Factors.

A. Offense Conduct & Behavior After the Offense.

On December 18, 2014, investigators executed a search warrant at Mr. McElderry's home. In July 2014, law enforcement had been contacted by Google in regards to Child Pornography that had been downloaded under the account "kenconll@gmail.com" which was associated with "kenmcelerry@gmail.com." Mr. McElderry had not attempted to disguise his name. As officers entered his home, he told them the locations of his computers and handed over the passwords. He further sat down with the case agent and admitted to possessing and down loading child pornography. When he was arrested on this offense in early August 2015, he was again interviewed and again admitted to his illegal conduct.

On August 3, 2015, Mr. McElderry was released on bond. He has been residing at the Bethel halfway house. On his right ankle he wears a small device that tracks his every movement. He has been doing extremely well at the halfway house. He has been supervised by Matt Whiting. Counsel had the opportunity to meet with USPO Whiting who verified, with the exception of Mr. McElderry using alcohol soon after he got to the halfway house, there have been no other violations. All of his drug tests have been negative.

Within a month of being at the halfway house, he began working at KFC. Mr. McElderry has been employed at KFC for a year, he was offered a job as a supervisor, but turned it down since he knows he will be going to prison.

Aside from remaining law abiding, his biggest achievement has been his sobriety. He began a treatment soon after arriving at Bethel. His goal was to stop using marijuana (used since age 12), methamphetamine (used since age 23), and alcohol (used since age 13/14). Because his addiction was so strong, he was prescribed Naltrexone. The drug helps with alcohol cravings. He continues to take the medication. His intensive outpatient treatment began at Genesis. He completed the program successfully. This treatment was the first treatment that Mr. McElderry took seriously. He invested more because he shared more with his therapist. His treatment included one on one sessions and three group sessions a week. The one on one therapy was the first he had received and really addressed his "use triggers." Since being a teen, this time period has been the longest period of sobriety for Mr. McElderry. He has surprised himself by his success. After completing treatment, he continued with aftercare and completed the program in May 2016. He continues to attend AA meetings to maintain his sobriety.

Although he was receiving therapy at this treatment center, Mr. McElderry felt he needed more one on one therapy. He completed a mental health assessment at Nystroms and Associates. As a result of the assessment, he began therapy. During his therapy sessions, he has been able to discuss this case. He is learning to deal with his shame and

the responsibility of his actions. He was prescribed Sertile (anti-depression), Hydrozen (anti-anxiety), and Trazadone. Both treatment and therapy sessions have addressed his offense conduct.

B. Mr. McElderry's History and Characteristics.

The PSR in Section C outlines Mr. McElderry's background in detail. He was raised in Ely, Minnesota along with his sister. His parents are divorced, but both are involved in his life and have addressed the Court through letters. Every family member knows about his guilty plea and they remain supportive of Mr. McElderry. He has one child with his ex-girlfriend Kristen. She continues to support Mr. McElderry. His family has expressed concern over Mr. McElderry's addiction to alcohol and drugs. His addictions have led to his criminal history. During this offense, many times when he viewed the images he was high on methamphetamine. His addiction was further complicated when he found his best friend with a gunshot wound to his head. Mr. McElderry realized through a text message his best friend was about to commit suicide and ran to the scene, but was only minutes too late to save his friend. The trauma from that event led to more alcohol and drugs.

This offense has led to much shame. It is hard for his family and friends to believe that Mr. McElderry committed this offense. Mr. McElderry understands the seriousness of his offense: the possession of images and video clips of child pornography. He understands that the viewing of this material played a role in the sexual exploitation and

abuse of children. He accepts responsibility for his acts for which he is being sentenced. His actions should be balanced with all the good he has done in his life. Additionally, this Court should consider the following factors in arriving at its sentencing decision.

1. Mr. McElderry Acted as an Individual and Did Not Join a Community Engaged in Child Pornography.

In imposing a sentence, the Court should account for Mr. McElderry's acceptance of responsibility and place his acts within the totality of the circumstances of his life. Mr. McElderry was not in a good place emotionally when he viewed child pornography. It was not a calculated act, but rather one resulting from following a slippery path from mainstream legal adult pornography to non-mainstream adult pornography to child pornography. All of this occurred while he was abusing alcohol and later methamphetamine. During this downward spiral, Mr. McElderry did not join a community of those trading in child pornography but rather descended on his own personal journey.

The Commission urges that § 2G2.2 be modified to account for particular levels of culpability between offenders. Commission at 322-333. It urges that those who engage in a community of offenders are more culpable and sentencing should reflect this culpability. *Id.* Mr. McElderry did not join such a community. After some time, he moved from adult pornography and then to child pornography. He never was involved in a chat room or viewing child pornography through other programs. After the search

warrant and seven months before he was charged, he did not go back to viewing pornography.

2. Mr. McElderry's behavior in downloading child pornography.

Mr. McElderry he did not "categorize" the material. The images were from downloaded series of pornography found on Google Plus. While not excusable, it does not reflect the level of culpability of an individual who possesses 150,000 carefully catalogued images. Yet the current § 2G2.2 treats both the same at sentencing. This court should factor in the Commission's recommendations and vary downward in imposing sentence.

3. Mr. McElderry Has No History of Abusing Children or Others.

The Commission recommends that a rewritten sentencing guideline distinguish between offenders with a history of sexual abuse of children and those who do not have such a history. Mr. McElderry has no such history. His daughter was interviewed by social workers soon after the search warrant. No abuse was suspected, but the interview was conducted as a safety precaution. No abuse was found. Mr. McElderry is a good father to his daughter. His daughter will be entering the eighth grade this fall. She has spent lots of time with her father over the past year. She along with her mother have come from Ely to Duluth to allow the bonding. His young daughter is fully aware of her father's crime and continues to support her father as does the daughter's mother. Kristin,

the mother, has indicated she was never concerned about leaving her young children with Mr. McElderry and continues to support Ken.

4. Low Recidivism Rate

What is clear is that online offenders recidivate at very low rates with regard to all types of offenses. Seto, Hanson and Babchishin (2011) conducted a meta-analysis of studies with follow-up data on online offenders. In these studies, online offenders were followed for 1.5 to 6 years after their offenses came to light. Overall, 4.6% of this group reoffended in any manner. Two percent had new offline offenses and 3.4% had new online offenses. Stated another way, 98% had no new offline offenses and 96.6% had no new online offenses. A 2015 study by Seto and Eke noted that 91% of their sample of 166 men had no new online offenses in a five year follow-up period.

5. Mr. McElderry Recognizes and is Interested in Continuing to Receive Therapy to Address His Prior Viewing of Child Pornography.

Mr. McElderry wants to continue to receive therapy, and will do so. Mr. McElderry recognizes that what he did is not acceptable, and wants to seek treatment to better himself. As discussed above, he sought out mental health treatment so he could discuss his behavior in this case and address his issues.

C. Criminal History.

Mr. McElderry's criminal history is limited to his use of chemicals. In 2000, 2007, and 2009 he drank and drove. For these offenses, he receives five points and an

additional two points for being on probation during the commission of this offense in 2006. In 2004, twelve years ago, he went to his ex-girlfriend's house and fought with the new boyfriend. At time he was drunk. This is the only felony on his record and the only hint of violence. The ex-girlfriend is the mother of his child, and she is very supportive of Mr. McElderry. Counsel has had the opportunity to speak to Kristin many times and she is not fearful of Mr. McElderry. She is very supportive of her daughter spending time with Mr. McElderry. As stated numerous times, his convictions were related to his addiction to drinking. He has addressed his addiction by completing and attending treatment.

D. A Five Year Term of Imprisonment Is Sufficient to Provide Just Punishment for the Offense.

Mr. McElderry acknowledges the seriousness of his offense. At the time of the offense conduct, he did not understand how serious the offense was or how the children depicted in the images were being hurt. He recognizes the serious harm he caused to children forced into child pornography. He cannot imagine how he would react if his own child was a victim of such behavior. As stated above, because of his behavior, his own child was interviewed by social services. The process of not seeing his daughter, putting his daughter through uncomfortable questioning and then telling his child what he had done, was and is a punishment. A five year prison term will accomplish the same exacting punishment upon Mr. McElderry as would a guideline sentence, while being "sufficient, but not greater than necessary."

E. A Five Year Prison Term Will Serve as a Deterrence to Future Wrongful Acts by Mr. McElderry.

Deprivation of liberty, regardless of length, serves as a deterrent to wrongful behavior. This is especially true for individuals like Mr. McElderry who experience the deprivation for the first time in his life. He will encounter a prison system which is especially not friendly towards those who commit offenses against children. Every aspect of his daily life will be controlled by others. This experience will deter him from future wrongful conduct. Quite frankly, as long as he continues with his sobriety, it is clear he will remain law abiding. All of his offenses are related to chemical dependency, including this offense.

It seems at any given time, there is someone arrested for viewing, receiving or distributing child pornography. Regardless of the Federal sentences, it appears, people are still committing these types of offenses. A five year prison sentence is a long sentence, particularly for some like Mr. McElderry who has never served more than a 120-days in a local jail. A sentence above five years is simply not warranted in this case.

F. A Five Year Term of Imprisonment Will Adequately Protect the Public.

Mr. McElderry does not pose an on-going threat to the public. Over two years have passed from the time the warrant was executed to now. The warrant itself was executed on December 18, 2014. Mr. McElderry admitted to what he had done and

handed over his laptop, along with his password. **Seven** months later, Mr. McElderry was indicted. There is no evidence that the public was not safe during those seven months and there is no evidence that Mr. McElderry returned to viewing child pornography.

On August 3, 2015 he was placed on pretrial release. He again, has remained law abiding and has handled his problems by attending treatment and therapy. His behavior shows he will be a success on supervised release and that he is not a danger to the public.

G. Other Defendants.

Every defendant that appears before the Court is different. Mr. McElderry should be treated as an individual. That being said, the cases below are some examples of various sentencings related to the same offense conduct.

In *United States v. Binner*, 14-256 PJS, the defendant admitted that, along with the co-defendant, she viewed and possessed child pornography. The guideline range was 78-97 months. She received 27 months. In *United States v. Davenport*, 12-271 DSD, this Court sentenced Davenport to 60-months. His advisory range was 121 to 151 months. In *United States v. Hamlin*, 13-279 DWF, the defendant faced 210 to 260 months. He had over 500 images and 558 videos. He was sentenced to 90 months. In *United States v. Slaughter*, 15-12 DSD, this Court sentenced Slaughter to 72 months. Slaughter violated his pretrial release conditions. Mr. McElderry has not violated. In *United States v. Braun*, 10-261 DWF, the defendant admitted to sexual touching another boy. He had a guideline range of 235-292, and was sentenced to 84 months. In *United States v. Olson*,

11-62 JRT, the defendant was sentenced to 72 months. His range was 210 to 240 months. He actively traded pictures with others in a chat room. Mr. McElderry distributed by using a filing sharing program, he did not actively distribute. In *United States v. Williams*, 12-310, DWF, Williams was sentenced to 66 months. Williams paid to become a subscriber of child pornography. About 15, 000 images and 800 videos were seized. Mr. McElderry did not actively join a child pornography community. In *United States v. Stewart*, 12-18 DSD, Stewart was sentenced to 85 months. Stewart continued to view child pornography after law enforcement found 5,700 images and 370 videos of child pornography. Further, children's underwear were found inside his home. There is no indication that Mr. McElderry viewed child pornography from the time of the search warrant to his arrest a year later.

Some defendants have had prior Child Pornography cases. In *United States v. David Goodsell*, 14-48 JRT, Goodsell was sentenced to 210 months. He was on supervision at the time of the new offense. In *United States v. Schnapp*, Schnapp was sentenced to mandatory minimum of 180 months. In *United States v. Defoe*, 15-13 (MJD), Defoe was sentenced to the mandatory minimum of 120 months for possessing child pornography. He too was on supervision for the same offense conduct at the time of his new offense. Mr. McElderry who does not have prior possession of child pornography should not be sentenced even close to these defendants.

Other defendants have had prior touching offense. *United States v. Klepperich*, 12-210 PJS, and Klepperich had a prior hands on offense. Later he was found with child pornography and charged in state court. While on supervision, he was found with child pornography again and charged in federal court. He pled guilty to possession of child pornography. He was sentenced to 160 months. In *United States v. Trester*, 09-13 RHK, Trester, had a prior possession of child pornography and a prior failure to register conviction. Trester was caught again with child pornography along with children's clothing and a homemade doll with children's clothing. He was sentenced to the mandatory minimum of 120 months. Finally, *United States v. Brad Cornelius*, 10-334 JRT, and Cornelius was sentenced to the mandatory minimum of 10 years. Cornelius had a prior hands-on offense involving a 3-year old relative. After he sent money to website to receive child pornography, law enforcement searched his home. He was charged with a mandatory minimum charge of possession of child pornography and received the mandatory minimum of 10 years.

CONCLUSION

Mr. McElderry should be sentenced to know more than five years because of the following:

1. Exaggerated guidelines.
2. His overstated criminal history.
3. His remorse he expressed twice when he investigated by confessing and handing over evidence.
4. His law abiding behavior during the time period of the search warrant to being charged.

5. His excellent behavior on pretrial release, including remaining law abiding and obtaining his job.
6. His completion of chemical dependency treatment.
7. His individual therapy to address his behavior in this case.
8. His family support which includes his confession to family members.
9. His lack of a prior prison sentence.
10. The low likelihood of reoffending.
11. His lack of prior criminal history involving children.
12. His lack of sophistication in this crime (used his own email address.)
13. His lack of participation in chat rooms or active distribution.
14. His guilt over social workers involvement in his daughter is punishment.
15. His time at the halfway house and ankle bracelet will not be credited in any way by the Bureau of Prison.

In considering these factors, this Court should impose no more than a 60-month term of imprisonment upon Mr. McElderry followed by a term of supervision. A sentence of such is not only reasonable, but it is warranted given the facts and circumstances of this case.

Dated: August 9, 2016

Respectfully submitted,

s/ Manny K. Atwal

MANNY K. ATWAL
Attorney ID No. 282029
Attorney for Defendant
107 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Appendix D

Petitioner's supplemental sentencing paper
United States v. McElderry, Crim. No. 15-CR-215 (D. Minn.)
(filed August 15, 2016)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 15-215 (DSD/LIB)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v	)	DEFENDANT'S
	)	MEMORANDUM IN SUPPPORT
	)	OF MOTION TO RECONSIDER
	)	
KENNETT JAMES MCELDERRY,	)	
	)	
Defendant.	)	

This Court has found that Mr. McElderry's advisory guideline range with an offense level of 34, criminal history category III, is 188-235 months. Further the Court has imposed a sentence of 130-months and has allowed counsel to file a motion to reconsider. Respectfully, counsel for Mr. McElderry respectfully requests that the Court reconsider term of imprisonment.

The intent of this memorandum is not to restate what has already been said in Court and Mr. McElderry's previous filing. Rather, the intent is to focus on one factor found in 3553(a).

Title 18 United States Code 3553(a)(6) tells the Court to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar crimes. In this case, a sentence of 130-months for distribution of child pornography is creating a disparity. Acknowledging that every case and every defendant is different, counsel has researched a few cases over the past four years. From reviewing reports from

the Commission and informally investigating distribution cases, it appears the average sentence is 60-80 months for a first time offender¹. Below are some cases for the Court to review. Information was gathered from counsel's own notes and ECF Filings.

DISTRITBUTION CASES: The Same as McElderry

- *United States v. Olson*, 11-062 (JRT), Chief Judge Tunheim imposed a sentence of **72 months** in a distribution case where the guidelines were 210-240 months. Olson traded child pornography in via email and chatrooms.
- *United States v. Caya*, 15-107 (DSD), the Court imposed a sentence of **70 months** in a downloading file sharing case and where the defendant renamed the files. Mr. McElderry did not rename any files.
- *United States v. Slaughter*, 15-12 (DSD), this Court imposed a sentence of **72 months**. Slaughter violated his pretrial release terms. Mr. McElderry was successful for a year while on pretrial release.
- *United States v. Brian Gene Montgomery*, 11-257(MJD), Judge Davis imposed sentence of **180-months** with a guideline range of 210-240 months for distribution of Child pornography. Montgomery had sent pornographic images via chat room to a 15-year-old boy. He then engaged the victim in a sexual conversation. Later, another victim, aged 14, reported sexual hands on abuse by the defendant. Mr. McElderry was never involved in a chat room and never shared images through a chat room or email.
- *United States v. Nathan Paul Severson*, 12-127 (DSD), this Court imposed a sentence of **180-months** with a guideline range of 210 to 240 months. Severson was on a network of "friends." Once the friend request was accepted, another user could access and download the other's shared digital content. Severson chatted on the network, posted his passwords, and posted sexual messages. Computer analysis revealed Severson researched information about child molesters and why children get molested. Severson also served as a mentor to young boys and admitted to having thoughts that were not appropriate after having a victim sit on his lap. The defendant also had folder of the victim on his desktop that included

¹ Mr. McElderry does not have prior sex offense or child pornography conviction. He has 3 DUIs and a 2002 burglary conviction.

many pictures of the victim including a picture of a naked child. Mr. McElderry did not share any passwords so others could view or share his pornography, rather he used a file share program. He did not post sexually explicit messages.

- *United States v. John Kasten*, 15-286 (PJS), Judge Schiltz imposed a sentence of **90 months** with a guideline range of 151 to 188. Kasten, used a file share program named GigaTribe. Unlike, McElderry, he attempted to avoid detection by using open wireless networks and used a screen name not connected to his name. McElderry used his own email address that contained his name. Kasten was active with teen boys in a chat room.
- *United States v. Matthew Tentis*, 13-185 (DWF), Judge Frank imposed **60 months**, with a range of 210 to 240 months. Tentis used Gigatribe to share child pornography images and supplied his password to others. He also was active in chat rooms. Again, McElderry did neither.
- *United States v. Hamlin*, 13-279 (DWF), Judge Frank imposed **90 months** when the defendant faced 210 to 260 months. Hamlin had over 500 videos along with over 5000 images.
- *United States v. Olson*, 11-62 JRT, the defendant was sentenced to **72 months**. His range was 210 to 240 months. He actively traded pictures with others in a chat room. Mr. McElderry distributed by using a filing sharing program, he did not actively distribute.

RECEIPT

- *United States v. Williams*, 12-310 (DWF), Williams was sentenced to **66 months**. Williams paid to become a subscriber of child pornography. About 15,000 images and 800 videos were seized. Mr. McElderry did not actively join a child pornography community.
- *United States v. Shawn Ederhoff*, 14-21(DWF), Judge Frank imposed a sentence of **82 months**. Ederhoff had previously been charged with Criminal Sexual conduct when he was 36 years old and the victim was a teen he had met online. He is the father of the victim's child. The charges were later dismissed. It was discovered that Ederhoff was active on Danish website that offered child pornography videos for sale. He further admitted

to masturbating in the presence of a child. McElderry has no prior investigations or convictions of abusing children.

- *United States v. Davenport*, 12-271 (DSD), this Court imposed a sentence of **60 months** in a receipt case where the guidelines were 121-151 months and similar to Mr. McElderry, Davenport attended and completed therapy.
- In *United States v. Stewart*, 12-18 DSD, Stewart was sentenced to **85 months**. Stewart continued to view child pornography after law enforcement found 5,700 images and 370 videos of child pornography. Further, children's underwear were found inside his home and he admitted to touching a teenager. There is no indication that Mr. McElderry viewed child pornography from the time of the search warrant to his arrest a year later.

PRIOR CP or Sex Offense Convictions

- *United States v. Douglas Meister*, 16-56 (JRT). In 2005, this Court sentenced Meister to 78 months for possession of child pornography. While on supervision, he was caught with pornography more than one time. In 2015, he was charged with his second federal case and received **120-months**.
- *United States v. Alex Smith*, 14-107 (JNE). Judge Ericksen imposed a sentence of **192-months** for distribution of child pornography. The guideline range was 262 to 327 months and the mandatory minimum was 15 years. Smith was engaged in viewing and trading child pornography since he was teen. He had a prior conviction for distribution of child pornography. While he was on probation, he again began trading child pornography images.
- *United States v. Braun*, 10-261 DWF, Judge Frank imposed **84-months** in a possession case. The defendant admitted to sexual touching young boys and was convicted of a criminal sexual abuse. He had been researching how to adopt a child prior to being investigated.

- *United States v. David Goodsell*, 14-48 (JRT), Goodsell was sentenced to **210 months**. He was on supervision for child pornography at the time of the new offense.
- *United States v. Schnapp*, Schnapp was sentenced to mandatory minimum of **180 months**. He had a prior child pornography conviction.
- *United States v. Defoe*, 15-13 (MJD), Defoe was sentenced to the mandatory minimum of **120 months** for possessing child pornography. He too was on supervision for the same offense conduct at the time of his new offense. Mr. McElderry who does not have prior possession of child pornography should not be sentenced even close to these defendants.
- *United States v. Klepperich*, 12-210 (PJS), Klepperich had a prior hands on offense. Later he was found with child pornography and charged in state court. While on supervision, he was found with child pornography again and charged in federal court. He pled guilty to possession of child pornography. He was sentenced to **160 months**.
- *United States v. Trester*, 09-13 (RHK), Trester, had a prior possession of child pornography and a prior failure to register conviction. Trester was caught again with child pornography along with children's clothing and a homemade doll with children's clothing. He was sentenced to the mandatory minimum of **120 months**.
- *United States v. Brad Cornelius*, 10-334 (JRT), and Cornelius was sentenced to the mandatory minimum of **120-months**. Cornelius had a prior hands-on offense involving a 3-year old relative. After he sent money to website to receive child pornography, law enforcement searched his home. He was charged with a mandatory minimum charge of possession of child pornography and received the mandatory minimum of 10 years.

CONCLUSION

With respect, Mr. McElderry strongly urges this Court to reconsider the sentence of 130-months in light of the above cases that counsel did not share with the Court at the time of sentencing. Further, counsel was re-emphasize the factors previously discussed:

1. His overstated criminal history.
2. His remorse; he expressed twice when he investigated by confessing and handing over evidence.
3. His law abiding behavior during the time period of the search warrant to being charged.
4. His excellent behavior on pretrial release, including remaining law abiding and obtaining his job.
5. His completion of chemical dependency treatment.
6. His individual therapy to address his behavior in this case.
7. His family support which includes his confession to family members.
8. His lack of a prior prison sentence.
9. The low likelihood of reoffending.
10. His lack of prior criminal history involving children.
11. His lack of sophistication in this crime (used his own email address.)
12. His lack of participation in chat rooms or active distribution.
13. His guilt over social workers involvement in his daughter is punishment.
14. His time at the halfway house and ankle bracelet will not be credited in any way by the Bureau of Prison.

Mr. McElderry understands this motion is extraordinary, but in a case such as this, the motion is justified.

Dated: August 15, 2016

Respectfully submitted,

s/ Manny K. Atwal

MANNY K. ATWAL
Attorney ID No. 282029
Attorney for Defendant
107 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Appendix E

Transcript of sentencing hearing
United States v. McElderry, Crim. No. 15-CR-215 (D. Minn.)
(filed August 10, 2016)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,	)	File No. 15-cr-215(1)
	)	(DSD/LIB)
Plaintiff,	)	Appellate No. 16-3618
	)	
v.	)	
	)	Courtroom 14W
Kennett James McElderry,	)	Minneapolis, Minnesota
	)	Monday, August 15, 2016
Defendant.	)	10:00 a.m.
	)	

BEFORE THE HONORABLE DAVID S. DOTY
UNITED STATES DISTRICT COURT SENIOR JUDGE
(SENTENCING HEARING)

APPEARANCES:

For the Plaintiff: **UNITED STATES ATTORNEY'S OFFICE**
BY: LAURA M. PROVINZINO
600 United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

For the Defendant: **OFFICE OF THE FEDERAL DEFENDER**
BY: MANNY K. ATWAL
107 United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

Court Reporter: **RENEE A. ROGGE, RMR-CRR**
1005 United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

Proceedings recorded by mechanical stenography;
transcript produced by computer.

P R O C E E D I N G S

IN OPEN COURT

THE COURT: Good morning. Do you want to take your seats, except for those who are going to take part, if they would come up to the podium, please.

The next matter on our calendar is that of the United States versus Kennett James McElderry.

And may I have appearances, please?

MS. PROVINZINO: Good morning. Laura Provinzino on behalf of the United States.

THE COURT: Good morning.

MS. ATWAL: Good morning, Your Honor. Manny Atwal on behalf of Mr. McElderry, who is standing next to me.

THE COURT: And the court notes Mr. McElderry's presence.

Ms. Atwal, I note you have had a chance to look at the presentence report. Have you gone over that report with Mr. McElderry?

MR. ATWAL: I have, Your Honor.

THE COURT: Any issues with the report itself?

MS. ATWAL: I originally did have some objections, Your Honor, and I withdraw those objections and have no other issues.

THE COURT: Which -- I was going to deal with those. Which objections are you withdrawing? The ones

1 about prior sentencing?

2 MS. ATWAL: It was related to the Criminal History
3 Category.

4 THE COURT: All right.

5 MS. ATWAL: I do agree that it is Criminal History
6 Category V and will be asking for a downward departure based
7 on that analysis.

8 THE COURT: So it would be both the prior
9 sentences that you are really withdrawing the objection to
10 that would create that?

11 MS. ATWAL: Correct.

12 THE COURT: Okay. I have to do a little -- real
13 quick editing in my mind as we go along, but that will be
14 okay.

15 As you know, I tend to write out things or have
16 written out things, so that I don't get it wrong; and we
17 have written out all our reactions to your objections, so we
18 will get to that.

19 Is there anything you would like to say on behalf
20 of Mr. McElderry?

21 MS. ATWAL: Yes, Your Honor.

22 THE COURT: Go ahead.

23 MS. ATWAL: Your Honor, there was a reason that I
24 wrote a very lengthy position pleading in this case, and I
25 don't normally do that with a lot of my cases, but in this

1 case I felt it was very important, because I really wanted
2 the court to understand why I think 60 months is more than
3 enough for the man that is standing next to me.

4 I'm going to skip over what I think are the
5 exaggerated guidelines. I know this court has had me make
6 that argument many, many times. And so I will rest on my
7 position pleading as it relates to that, but I gave the
8 court fifteen other reasons as to why the court should
9 depart from the advisory guideline range, and I don't make
10 those lightly.

11 First, I want to start off with -- before I go to
12 the variances for traditional departure, and that's under
13 4A1.3 for overstated criminal history. Again, but for Mr.
14 McElderry himself saying that he perhaps had viewed child
15 pornography back in 2006 -- it wasn't because it was
16 evidence of that; it's because those are the words that came
17 out of his mouth -- we would be 5 points less on the
18 criminal history grid and he would be placed in Criminal
19 History Category III, as the parties had anticipated.
20 Instead, we find him in Criminal History Category V because
21 of what he had said with his cooperation and what he felt
22 was the right thing to do when he spoke to the agent.

23 The 60 months is more than reasonable enough and
24 it is warranted in this case because, again, I'll go back to
25 the two confessions he gave, one at the time of the search

1 warrant and the next when he was confronted again by the
2 agent, and each time not once did he minimize his behavior.
3 Instead, he embraced what he had done, told the agent
4 passwords, told the agent where to find laptops, hard
5 drives, all of it. To me that shows somebody that not only
6 is confessing to what they had done, but also shows a great
7 deal of remorse.

8 At the back of the courtroom to my right -- or to
9 my left sits his two parents, and those two individuals have
10 been very supportive of their son. In the letters they
11 wrote to the court I think it is very obvious. They've
12 talked about his addiction to drugs and his spiral out of
13 control and that perhaps maybe this case is a saving grace,
14 because what we see is this young man decided not only to
15 get his life together, but he did it with the help of other
16 people, the support of his parents, and then he went to
17 chemical dependency.

18 And during the whole time he's been out for this
19 one year we had one bump in the road where he used alcohol.
20 And what did he do? He went right to his treatment
21 counselor and said I am an addict, I need help, and they
22 gave him medication to stop those cravings.

23 After he started his chemical dependency
24 treatment, he came to me and said I don't think I am getting
25 enough therapy for what I did in this case and I want to be

1 able to talk about what I did related to this case to get
2 the help that I need. He sought out mental health
3 treatment, separate from his chemical dependency.

4 So we have a person who for the past year is
5 getting help for his addiction and for his behavior related
6 to this case. We don't always see that. Maybe it's because
7 usually the people are locked up, but otherwise it's the
8 people don't even want to take the effort or they don't want
9 to admit that they have got a problem. Mr. McElderry didn't
10 do that. He's sought two different types of treatment, has
11 been on medication and has done really well in both
12 treatment programs, and we know he's graduated from the
13 chemical dependency program and he continues to see his
14 therapist individually.

15 The other part that I was impressed with is his
16 relationship with his daughter. His daughter, as the court
17 knows, was interviewed after the search warrant was done in
18 this case. Instead of telling his daughter that everything
19 is fine and daddy didn't do anything wrong, Mr. McElderry
20 sat down his child and said this is what I did and this is
21 why I need help and this is why people think I'm a danger to
22 you. That is huge. I think somebody that has enough guts
23 to get up and do that with their own child, that's very
24 telling in how much -- how serious Mr. McElderry is that he
25 wants to get better and do better in life. Today he has a

1 very good relationship with his daughter. He's allowed
2 visitation with his daughter, and they've been able to make
3 a really good bond over the last year.

4 THE COURT: You are speeding up your speech.

5 MR. ATWAL: Sorry, Your Honor.

6 THE COURT: And I know -- but I know you want to
7 get it all out, but we do have a court reporter who is
8 trying desperately to keep up with you, but if you can just
9 slow down a tiny bit.

10 MS. ATWAL: I will, Your Honor.

11 THE COURT: Go ahead.

12 MS. ATWAL: Finally, I want to talk about the time
13 that he has been at the halfway house. Again, he's been on
14 an ankle bracelet the entire time. He's never had any
15 violations on that ankle bracelet. I talked to his
16 probation officer just last Friday, who again verified that
17 he's had no issues with Mr. McElderry. The probation
18 officer told me he's shown up at Mr. McElderry's work at
19 KFC, which he's been there for one year, and he's -- again,
20 there's been no problems whatsoever. And we know the BOP is
21 not going to give him custody for that one year where he was
22 on ankle monitoring, on a curfew and not allowed to leave
23 the house as he wanted it. He's not going to get credit for
24 that. So I am asking the court to take that into
25 consideration as well.

1 I look to other clients, other defendants that
2 have been sentenced by this court and by the court's
3 colleagues on the bench. And so what I am asking for is not
4 an outrageous sentence. It goes and complies with what
5 other people have received with similar backgrounds.

6 As far as deterrence, I think Mr. McElderry has
7 shown this court that this is not something he wants to do.
8 This is -- he sought help for his addiction and has done all
9 the right things. And this is an individual that's never
10 stepped foot in a prison, so this is going to be huge, even
11 at five years.

12 Looking at the public safety issue, again, he's
13 been out for a year. There's been no violations. Even more
14 telling is -- and December 2014 is when the search warrant
15 was executed. It wasn't until August that he came in to
16 federal court. During that eight-month period there was no
17 allegations that he downloaded or viewed any type of child
18 pornography or was involved in any type of criminal
19 behavior. That's telling that the public is safe.

20 It's also very -- what compelled me to ask for
21 this sentence was that he's taken this so serious that when
22 the United States Probation Office put on a program for
23 prison for people that are looking at a prison sentence, he
24 came down to the cities with his parents and took that
25 class. It's a three-hour class to learn how life is going

1 to be on the inside. And that shows me, again, how serious
2 he is taking this.

3 It is for all those reasons, Your Honor, that I
4 think a sentence of 60 months is not only justified in this
5 case, but is completely warranted, and I would ask the court
6 to take my recommendation very seriously and to consider it.

7 THE COURT: All right. Thank you.

8 Mr. McElderry, you also get a chance to address
9 the court this morning, if you wish. Anything you'd like to
10 say is fine. We usually orient people to talking about the
11 underlying offense or mitigation, as we call it, but
12 whatever you would like to have on your mind and get off
13 this morning and talk about now is the time.

14 THE DEFENDANT: I would like to take the
15 opportunity to thank my family for coming here on numerous
16 occasions and providing me with transportation and with
17 moral support and Ms. Atwal as well for putting forth a
18 solid effort on my behalf. I appreciate that. And I'm
19 looking forward to getting on with the rest of my life. I
20 am hoping anything beyond won't be too much beyond the
21 60-month sentence. I still feel I've got 20 years of some
22 type of career left in me, if given the opportunity. That's
23 it. I'm a bit nervous. I'm sorry. Thank you.

24 THE COURT: All right. That's just fine.

25 Ms. Provinzino, on behalf of the government.

1 MS. PROVINZINO: Thank you, Your Honor. And I
2 know this court has read the government's sentencing
3 position.

4 THE COURT: I have.

5 MS. PROVINZINO: So I don't need to go into
6 extensive detail, but this was an appropriate crime to be
7 prosecuted federally. Law enforcement identified the crime
8 based on a tip made from Google. They appropriately
9 executed a search warrant and charged this very quickly. In
10 this case, unlike some of the cases cited by the defense
11 counsel, there's no doubt this was distribution. It was
12 distribution of child pornography to Google Plus for others
13 to see. And this court has read the many victim impact
14 statements and appreciates and understands that every time
15 those images are sent back into circulation that's causing
16 harm to that victim. And that's the offense that Mr.
17 McElderry is here to be sentenced for today.

18 This was not just a one-time aberration. I think
19 contrary to some of the letters of support provided for the
20 defendant, he did tell the special agent truthfully that
21 this has been something he's struggled with since 2006 and
22 it's something that's been commingled with the abuse of
23 alcohol and methamphetamines. And he, you know, among the
24 range of various images, he identified that he was looking
25 at hard core images, images of violence, images depicting

1 bondage, and that's what the special agent saw in reviewing
2 the defendant's collection of child pornography, and that
3 was over 10,000 images and over 100 videos.

4 In addition to that, and what was I think
5 troubling to the agent initially, we have no evidence to
6 indicate he's harmed any child, but there were newspaper
7 articles for local children in his home. There was a
8 collage of various child pornography images, and there were
9 dolls that appeared to be in bondage. So all of that I
10 think are unique factors for this court to consider.

11 In addition to that, this court can recognize
12 there is some criminal history. There was a prior felony, a
13 burglary conviction, a misdemeanor assault, and much of the
14 criminal history appears to be related to substance abuse.

15 One thing that's very favorable is the defendant
16 has taken advantage of and done everything we could ask for
17 somebody to do on bond. And I think that's a measure of
18 character and that's something that will help. One thing
19 the government is always looking for is ways we can mitigate
20 and protect children into the future. So all of the things
21 that the defendant has done while on bond are positive.

22 I am hoping with defense counsel that we can work
23 out restitution in a timely manner, and we'll come back to
24 the court on that, but based on -- you know, the government
25 is asking this court to look at a totality of the

1 circumstances in coming to the appropriate sentence.

2 THE COURT: All right.

3 MS. ATWAL: Your Honor, if I may.

4 THE COURT: Ms. Atwal, you go ahead.

5 MR. ATWAL: In regards to the restitution, I did
6 contact the attorney that was requesting the restitution. I
7 just have not heard back from her. I am asking for 60 days,
8 and hopefully we should have a response by then --

9 THE COURT: All right.

10 MR. ATWAL: -- as to how much the restitution will
11 be.

12 THE COURT: Or maybe none.

13 MS. ATWAL: Correct.

14 THE COURT: If possible. Okay.

15 All right. Thank you. Thank you both.

16 Well, as you know, as counsel knows, the court
17 must make some findings of fact, but there were no
18 objections to the factual statements contained in the
19 presentence investigation report, and, therefore, the court
20 will adopt those statements as its findings of fact.

21 As far as the application of the guidelines to the
22 facts, there were questions concerning the defendant's
23 criminal history score, but, as I understand it, those
24 objections have been now removed and have been abandoned,
25 and so the court is not even going to discuss what it would

1 have done concerning the criminal history score.

2 The government does agree, and apparently with the
3 probation officer, that the PSR accurately calculates the
4 defendant's criminal history score, but also agrees to stand
5 by the plea agreement, which contemplated certain -- a
6 Criminal History Category of Roman numeral III rather than
7 Roman numeral V. Because the PSR correctly calculated
8 defendant's criminal history score, the court will adopt
9 that part of the PSR, but will apply the -- the plea
10 agreement.

11 Under the PSR the guidelines were as follows: A
12 total offense level of 34 with a Criminal History Category
13 of V would have allowed an imprisonment range of 235 to
14 240 months, with supervised release of five years to life,
15 with a fine range of 17,500 to \$175,000 and a special
16 assessment of \$100.

17 If the court follows the plea agreement, the total
18 offense level remains the same at 34, the Criminal History
19 Category goes to III, with the imprisonment range of 188 to
20 235 months, supervised release --

21 And is that -- what is it now, madam probation
22 officer? Is it five years still to life?

23 PROBATION OFFICER: Yes, Your Honor.

24 THE COURT: It would still be to life. That's
25 what I thought. With a special assessment of \$100.

1 Now, the statute under which defendant has been
2 convicted sets a minimum term of imprisonment of five years,
3 a maximum term of imprisonment of 20 years, a maximum term
4 of supervised release of life and a maximum fine of
5 \$250,000.

6 The plea agreement, however, in this case that Mr.
7 McElderry entered into with the government contemplated the
8 guideline range that I have read off and that is as
9 comparable to a Criminal History Category -- Criminal
10 History Category of III, that is, 188 to 235 months.

11 Mr. McElderry, you have been charged in Count 1 of
12 the indictment with distribution of child pornography, in
13 violation of 18 United States Code Sections 2252(a)(2) and
14 (b)(1). That is a Class C felony. And based upon your plea
15 of guilty to that charge, it is considered and adjudged that
16 you are guilty of that offense. And, therefore, it is
17 adjudged that you are committed to the custody of the United
18 States Bureau of Prisons for imprisonment for a term of
19 130 months.

20 Is there a placement request?

21 MS. ATWAL: Your Honor, as close to Minnesota as
22 possible.

23 THE COURT: And I will make that recommendation.

24 As you know, and Ms. Atwal can talk to you about
25 this, the judge will make a recommendation. Oftentimes, the

1 Bureau of Prisons does not follow that. They don't have to.
2 And they will follow whatever they believe to be the
3 appropriate and/or what they can do. They sometimes are
4 restricted. But I'll make a recommendation that you be
5 placed here in Minnesota or as close to Minnesota as
6 possible.

7 It is further ordered that pursuant to 18 United
8 States Code Section 3583 you are to serve a term of
9 supervised release of 15 years under the following
10 conditions:

11 First, you shall report to the U.S. Probation and
12 Pretrial Services Office in the district in which you are
13 released within 72 hours of release from the custody of the
14 Bureau of Prisons.

15 Second, you shall not commit any crimes, federal,
16 state or local.

17 Third, you shall not illegally possess a
18 controlled substance and shall refrain from any unlawful use
19 of a controlled substance. You shall submit to one drug
20 test within 15 days of release from imprisonment and at
21 least two periodic drug tests thereafter as determined by
22 the court.

23 Fourth, you shall not possess a firearm,
24 ammunition, destructive device or any other dangerous
25 weapon.

1 Fifth, you shall cooperate in the collection of
2 the DNA as directed by the probation officer.

3 Sixth, you shall comply with the requirements of
4 the Sex Offender Registration and Notification Act -- that
5 is 42 United States Code Section 16901 -- as directed by the
6 probation officer, the Bureau of Prisons or any state sex
7 offender registration agency in which you reside, work or
8 are a student or were convicted of a qualifying offense.

9 Seven, you shall pay restitution in accordance
10 with the schedule of payments sheet of the judgment.

11 You shall also abide by the standard conditions of
12 supervised release that have been adopted by this court,
13 including the following special conditions:

14 One, you shall not associate with persons under
15 the age of 18, except in the presence of a responsible adult
16 who is aware of the nature of your background and current
17 offense and who has been approved by the probation officer.

18 Number two, you shall participate in sex offender
19 and/or mental health treatment as approved by the probation
20 officer and shall submit to risk assessment, which may
21 include, but is not limited to, physiological testing and
22 polygraph or truth verification testing. Polygraph testing
23 may be used following a completion of primary treatment as
24 directed by the probation officer to monitor adherence to
25 the goals and objectives of treatment. Sex offender

1 assessments and treatment are to be conducted by a therapist
2 approved in advance by the probation office. Further, you
3 shall contribute to the costs of such treatment as
4 determined by the Probation Office Copayment Program, not to
5 include -- or not to exceed, I should say, the total cost of
6 treatment.

7 Number three, you shall not possess, view,
8 assess -- access or otherwise use child pornography or any
9 other material that is sexually stimulating or sexually
10 oriented deemed to be inappropriate by the probation officer
11 in consultation with a treatment provider.

12 Fourth, you shall be prohibited from incurring new
13 credit charges or opening additional lines of credit without
14 approval of the probation officer.

15 Fifth, you shall provide the probation officer
16 access to any requested financial information, including
17 credit reports, credit card bills, bank statements and
18 telephone bills.

19 Sixth, if you are not employed at a regular lawful
20 occupation, as deemed appropriate by the probation officer,
21 you may be required to perform up to 20 hours of community
22 service per week until employed, and you may also
23 participate in training, counseling, daily job search or
24 other employment-related activities as directed by the
25 probation officer.

1 Seven, you shall not possess or use a computer or
2 have access to any online service without prior approval of
3 the U.S. Probation and Pretrial Services Office. Your
4 cooperation shall include, but not be limited to, allowing
5 installation of a computer and internet-monitoring program
6 and/or identifying computer systems, internet-capable
7 devices and similar memory and electronic devices to which
8 you have access. Monitoring may include random examinations
9 of computer systems, along with internet, electronic and
10 media storage devices under your control. The computer
11 system or devices may be removed for a more thorough
12 examination, if necessary. You shall contribute to the cost
13 of such monitoring services, based on your ability to pay,
14 as deemed appropriate by the U.S. Probation and Pretrial
15 Services Office.

16 Number eight, you shall submit your person,
17 residence, office, vehicle or an area under your control to
18 a search conducted by a probation officer or a supervised
19 designee, at a reasonable time and in a reasonable manner,
20 based on a reasonable suspicion of contraband or evidence of
21 a probation violation. You shall warn any other residents
22 or third parties that the premises and areas under your
23 control may be subject to search under this condition.

24 Nine, you shall participate in a program for
25 substance abuse as approved by the probation officer. That

1 program may include testing and inpatient or outpatient
2 treatment, counseling or a support group. And, further, the
3 defendant shall contribute to the cost of such treatment as
4 determined by the Probation Office Copayment Program, not to
5 exceed the total cost of treatment.

6 Further, it is hereby ordered that mandatory
7 restitution is due to the victims in this case. The
8 appropriate amount has not yet been determined. The
9 remittance address will be submitted to the clerk's office
10 under seal.

11 Over the period of incarceration you shall make
12 payments of either quarterly installments of a minimum of
13 \$25, if working non-UNICOR, or a minimum of 50 percent of
14 monthly earnings if working UNICOR. You shall participate
15 in the Inmate Financial Responsibility Program while
16 incarcerated. Payments are to be made payable to the Clerk
17 of the United States District Court for disbursement to the
18 victims.

19 Payments of not less than \$25 per month are to be
20 made over a period of 15 years commencing 30 days after
21 release from confinement. Payments are to be made payable
22 to the Clerk of the United States District Court for
23 disbursement to the victim. The interest requirements will
24 be waived, in accordance with 18 United States Code Section
25 3612(f)(3).

1 Further, pursuant to 18 United States Code Section
2 3013, you must pay to the United States a special assessment
3 of \$100, which is due immediately.

4 Now, the court believes that this sentence imposed
5 is appropriate and reasonable, in light of the
6 considerations set forth in 18 United States Code Section
7 3553(a). The court has taken into account the nature and
8 circumstances of the instant offense, as well as the history
9 and characteristics of the defendant, and finds that the
10 sentence imposed is sufficient and not greater than
11 necessary to afford adequate deterrence to future criminal
12 conduct.

13 No fine will be imposed because of defendant's
14 inability to pay a fine, due to his lack of assets and
15 impending incarceration.

16 And the court now accepts the plea agreement in
17 this case, because it is satisfied that the agreement
18 adequately reflects the seriousness of the defendant's
19 offense behavior and that accepting the plea agreement will
20 not undermine the statutory purposes of sentencing.

21 Mr. McElderry -- Mr. McElderry, you do have a
22 right to appeal, and you have 14 days from today to file a
23 notice of appeal. You talk with your counsel, decide
24 whether you wish to appeal this sentence. If you decide to
25 appeal, make sure that a notice is filed within 14 days of

1 today. Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: If you cannot afford a lawyer and/or
4 to pay the costs of the appeal, the government will provide
5 a lawyer or provide funds for you to hire a lawyer and will
6 also pay the costs of those -- of the expenses and costs of
7 the appeal. Do you understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Those are your rights. Okay.

10 We still have some counts outstanding, at least
11 Count 2 is still out there.

12 MS. PROVINZINO: At this point the government
13 moves to dismiss Count 2, Your Honor.

14 THE COURT: And without objection, that motion
15 will be granted.

16 There was some forfeiture -- there was a
17 preliminary order issued. Is the government going to follow
18 up on that?

19 MS. PROVINZINO: Yes, we will, Your Honor.

20 THE COURT: All right.

21 MS. PROVINZINO: I don't believe it is contested.

22 THE COURT: All right. Is that true?

23 MR. ATWAL: That's true, Your Honor.

24 THE COURT: So I will wait the order from the
25 government on that.

1 This is a Mandatory Detention Act case.

2 MS. ATWAL: Your Honor, I am sorry to interrupt.

3 In regards to the sentence, there are some things I would
4 like to put on the record, but may I have a side bar before
5 I do that?

6 THE COURT: Sure. Come up.

7 (Side-bar conference at the bench.)

8 THE COURT: Go ahead.

9 MS. ATWAL: Okay. I'm a little taken aback by the
10 sentence, given what other defendants with hands-on offenses
11 have had. Can I do a motion to reconsider, allow me just
12 even 24 hours to file something additional for him? I
13 mean --

14 THE COURT: Well, you are making a motion to
15 reconsider right now, in a sense.

16 MS. ATWAL: But I want to pull every single case I
17 can think of, where there's been prior hands-on offenses or
18 prior viewing where people have gotten less time.

19 THE COURT: I read that and the problem I have is
20 the -- the mixture of things involved, especially with the
21 sentencing guideline. And I don't know what --

22 What's the government's view? I know you asked
23 for a sentencing guideline sentence. Now, I am even varying
24 -- I am varying from that, even with the application of the
25 plea agreement's sentencing guidelines, which, of course,

1 were a huge variation from what the probation officer found.

2 MS. PROVINZINO: The government has no objection
3 to the sentence. I mean, it was roughly a 50 percent
4 reduction --

5 THE COURT: Right.

6 MS. PROVINZINO: -- from the guideline range,
7 which is substantively reasonable.

8 MS. ATWAL: I'm just looking at this guy, because
9 he did do the treatment program and --

10 THE COURT: I understand what you are saying.

11 MR. ATWAL: Not many people come in and do that.
12 And then -- sorry.

13 THE COURT: Well, go ahead.

14 MS. ATWAL: And then I'm looking at --

15 THE COURT: You are a great advocate and I love --
16 you know, as I told the probation officer, you are a great
17 advocate. I respect you for that. Don't ever back down
18 from that. That's your job.

19 MS. ATWAL: Thank you. Thank you, Your Honor.
20 But I do look at all my prior guys that have had prior
21 hands-on offenses or prior viewing, and this guy has had
22 none of that, and they walked away with 120. I am literally
23 stunned by the sentence, because he did everything that I
24 wanted him to do.

25 THE COURT: I understand why you think so, but you

1 shouldn't have been stunned. It could have been 288.

2 MS. ATWAL: I am, Your Honor. Just with the way
3 the guidelines and, you know, that I have seen this district
4 sentence people, I just have not seen a sentence as high as
5 this, unless the guy has had a prior touching case and
6 they've gotten 15 or it's a mandatory 15, and so -- I would
7 get it if this guy had more of a history, but he just
8 doesn't have any of that.

9 THE COURT: I understand. I understand all that.

10 MS. ATWAL: Zero. Zero. And he doesn't --

11 THE COURT: And the probation officer, you know,
12 she's very sensitive, good probation officer, that did the
13 report, and we had a nice chat this morning about it, and
14 she has the same view that you do, that he's unusual.
15 That's why she recommended a big variance. And so -- and
16 I'm taking her recommendation pretty much. And, you know,
17 it's a -- well, I'll let you argue. But if you want to file
18 -- I'm not going to change this morning. If you want to
19 file a motion to reconsider, you can. You can do anything
20 you want to, obviously. But I am going to tell you that
21 right now at least I don't think there's a reason, because I
22 have gone over all your material. You did a great job, you
23 know. And I'm sorry you are stunned, but, you know, if it
24 had been a 250-month sentence, I would have imagined you
25 would have been stunned and I probably would have understood

1 it more than I do now, but I understand --

2 MS. ATWAL: Again, I guess I am just comparing
3 with other defendants. I mean, it seems --

4 THE COURT: I understand what you are saying.

5 MS. ATWAL: -- different from somebody that
6 produced or --

7 THE COURT: Well, he's done everything he could --

8 MS. ATWAL: Yeah.

9 THE COURT: -- to kind of ameliorate and mitigate,
10 and so I understand that too.

11 But now if the government says, well, judge, you
12 know, the judges back off and maybe vary even more, I would
13 probably listen to her, but she's shaking her head in a very
14 negative way, so I'm not sure -- so I'm going to stick with
15 what I have done. You can do what you want to do and have
16 to do.

17 MS. ATWAL: Will the court give me 24 hours to
18 just submit something in writing? I just want to --

19 THE COURT: Of course.

20 MS. ATWAL: Okay.

21 THE COURT: Of course. All right?

22 MS. ATWAL: Okay.

23 THE COURT: All right.

24 MS. ATWAL: And do you want me to put that on the
25 record then right now?

1 THE COURT: Say again.

2 MS. ATWAL: Can I put this on the record to
3 allow --

4 THE COURT: You have just been putting it on the
5 record.

6 MS. ATWAL: Oh, okay. Okay.

7 THE COURT: That's what this is, a microphone, and
8 I think the court reporter is taking it all done as best she
9 can.

10 MS. ATWAL: All right.

11 THE COURT: Is she nodding? Yes, she is.

12 MS. ATWAL: Okay.

13 THE COURT: All right. Anything else?

14 MS. ATWAL: No.

15 THE COURT: Well, you know --

16 MS. ATWAL: Judge, it really --

17 THE COURT: No. You don't have to explain. I
18 understand.

19 (Side-bar conference concluded.)

20 THE COURT: If you hadn't believed it before, Mr.
21 McElderry, you should know that you have a very good counsel
22 that's a strong advocate. She's always been a strong
23 advocate. In this case she's a strong advocate for you.
24 And so you should know that you are getting good
25 representation. I just want you to know that.

1 We still have to deal with custody, and we didn't
2 even talk about that up at side bar. We were talking about
3 other matters.

4 But what's the government's view?

5 MS. PROVINZINO: The government has in front of it
6 a release status report to the court, and it's my
7 understanding that the -- well, the defendant has met
8 conditions of release. There are no continued treatment or
9 other obligations that are necessary. And so under the
10 Mandatory Detention Act, it would be appropriate to take the
11 defendant into custody.

12 THE COURT: Okay. Ms. Atwal, I will let you talk,
13 but you know what the problem is here. The problem the
14 court has is that unless the government believes that there
15 is some reason, some unusual reason to allow Mr. McElderry
16 to turn himself in, that the Mandatory Detention Act law
17 requires the court to take him into custody. So you can say
18 anything you would like this morning, but you know where I
19 am coming from at this point.

20 MS. ATWAL: Yes, Your Honor. I do want to put on
21 the record that Mr. McElderry was aware that the government
22 was going to ask that he be taken into custody. The
23 exceptional reason I have to put before the court is that,
24 as the court is aware, he is doing individual therapy and he
25 is receiving medication. He ran out of his medication, and

1 his next appointment where he will get his medication upped
2 is not for another two weeks, and I want him to have that
3 ability. Aside from that, it also is important that he does
4 get the voluntary surrender to lower his BOP points, so
5 hopefully he can get into a prison closer to Minnesota. So
6 I would ask the court to allow him another 15 to 21 days to
7 turn himself in.

8 THE COURT: Well, you know, I understand all of
9 that too. I tell you what I would do. We have a marshal
10 with us this morning right now. I would allow him to turn
11 himself in within -- you know, it's now 10:35 -- turn
12 himself in by 11 o'clock this morning, so that we get the
13 advantage of having him turn himself in. In other words,
14 what I am saying is I don't want him to leave the
15 courthouse. I don't even want him to leave the marshal's
16 view, but he can turn himself in at the marshal's office in
17 a half an hour, which I think gives, as I understand the
18 technicalities of the Bureau of Prisons, that would give him
19 the advantage of having turned himself in. I'll go that
20 far, but I'm not going to do anything more than that.

21 MS. ATWAL: Your Honor, would the court be okay if
22 I took him down to my office to talk about the case, bring
23 him up to probation to get the ankle bracelet removed and
24 then bring him in to the marshals?

25 THE COURT: That would be fine.

1 MR. ATWAL: Okay. Thank you.

2 THE COURT: Government agree with that?

3 MS. PROVINZINO: No objection, Your Honor.

4 THE COURT: All right. So that's what we'll do
5 this morning. So, in effect, I'm allowing himself to turn
6 himself in, but, in effect, not far away.

7 MS. ATWAL: Yes, Your Honor.

8 THE COURT: All right. Anything else that should
9 come before the court?

10 MS. PROVINZINO: Nothing further from the
11 government, Your Honor.

12 MS. ATWAL: Not at this time, Your Honor.

13 THE COURT: All right. I understand where you are
14 going.

15 Court is going to stand in recess until 1:30 this
16 afternoon.

17 THE CLERK: All rise.

18 (Court adjourned at 10:36 a.m., 8-15-16.)

19 * * *

20 I, Renee A. Rogge, certify that the foregoing is a
21 correct transcript from the record of proceedings in the
22 above-entitled matter.

23 Certified by: /s/Renee A. Rogge
24 Renee A. Rogge, RMR-CRR

25