

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	
THE ACCUSED,	)	<b>***TO BE FILED UNDER SEAL***</b>
	)	
Defendant.	)	

**DEFENDANT'S SENTENCING MEMORANDUM**

***I. Introduction***

Child pornographers get very little sympathy from anyone. Clergy, such as The Accused who become involved in child pornography are viewed with disdain. So, it is understandable the reluctance this Honorable Court, or any sentencing court for that matter, would initially have in granting The Accused requests for downward departure to a total offense level 10, and a sentence of 12 months home confinement.

The knee jerk reaction is that because The Accused looked at child pornography he is automatically a pedophile, and as such should be punished by being incarcerated for several years. Downward departures for diminished capacity and/or aberrant behavior are viewed as “clever outs” whereby a convicted child pornographer uses his mental and/or emotional *defects* as a subterfuge to incarceration.

The Accused is *not* the typical child pornographer who appears before this Honorable Court to be sentenced. The reality of The Accused’s case is that at the time the offense was committed he was a very sick man. As was shown in his Motion to be Released on Bond Pending Sentencing, The Accused was suffering from depression at the time he was viewing child pornography. This is not something the undersigned has invented as a way to claim The Accused’s mental state is a reason for a downward departure. It is a *fact* which has been documented by *every* mental health expert who has treated The Accused.

## *II. Downward Departures*

### *A. General Principles*

18 U.S.C. § 3553(b) states in part that a district court may impose a sentence outside of the applicable Guidelines range when "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the sentencing court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Guidelines." In other words, a district court must determine whether the defendant's circumstances are sufficiently distinguished from the "heartland" of typical cases to which the Commission intended the Guidelines to apply. See *Koon v. United States*, 518 U.S. 81, 94, 116 S. Ct. 2035 (1996).

Here, both 5K2.13 and 5K2.20 take into consideration defendants like The Accused. Like The Accused, the Defendant in *U.S.A. v. McBroom* 124 F.3d 533(3rd Cir. 1997) was convicted of possession of child pornography. Like the Defendant in *McBroom*, there is no doubt whatsoever that The Accused knew that viewing child pornography was wrong. Similarly, like the Defendant in *McBroom*, at the time of the offense, The Accused was suffering from diminished capacity. The Accused has been a contributing member of society his entire life, and this one horrible period when he viewed child pornography is nothing more than an aberration.

### *B. Diminished Capacity*

The question though, is whether or not The Accused mental condition constitutes *diminished capacity* under United States Sentencing Guideline Section 5K2.13. As will be shown below, it clearly does and as such a downward departure is warranted.

As this Honorable Court is aware, Section 5K2.13 underwent massive changes in November of 1998 by way of Amendment 583 to the Guidelines (Exhibit A) which expanded Section 5K2.13 to comply with *McBroom* (Exhibit B).

Section 5K2.13 was changed to deal with individuals like The Accused, who while

knowing what they were doing was in violation of the law were unable to stop their criminal activity because of their diminished capacity. Section 5K2.13 defines significantly reduced mental capacity to mean a defendant who “*although convicted, has a significantly impaired ability to . . . (B) control behavior that the defendant knows is wrongful.*”

If this Honorable Court determines that The Accused’s condition constitutes diminished capacity pursuant to Section 5K2.13, it must then determine whether or not subparagraphs 1, 2 or 3 preclude a departure. They do not, since The Accused’s diminished capacity was not caused by voluntary drug use and the crime for which he has been convicted is not a crime of actual violence. Finally, since The Accused has no criminal history, there is no need to be concerned about protecting the public.

This *volitional impairment*, which allows this Honorable Court to find that The Accused committed the underlying offense while suffering from a significantly reduced mental capacity is addressed by Dr. Daniel Cuneo (Exhibit C) who states on page 8 of his report:

“The question remained as to what factors operated to reinforce his continuing to view child pornography in the absence of sexual arousal. As presented above, it appears likely that this behavior functioned, on the one hand, to punish himself for his perceived role in his stepmother’s death and for his extremely negative feelings towards her that he did not entirely acknowledge at the time, and on the other, to unconsciously express his hostility and anger towards her by using one of her possessions to convey such evil subject matter. While The Accused does know that possession of child pornography is wrong, his reasoning, insight, judgment, and capacity to control his behavior were impaired. He knew what he was doing and that it was wrong, but due to his guilt, obsessive behavior, and depression he could not control his behavior or conform his actions to the requirements of the law.”

Just like the Defendant in *McBroom* was “able to reason and absorb information in the usual way,” (at 533), The Accused was able to go about his life in a way which seemed outwardly “normal” to a casual observer. The demons The Accused has lived with virtually his entire life were dormant until his stepmother died. His first symptoms of depression

exhibited themselves the year his stepmother died. (Cuneo page 5) Even though his stepmother was not a good mother, and showed The Accused little, if any true love, he nevertheless feels a horrible amount of guilt for not having taken her to the hospital on the day she died.

At page 5 of his report, Dr. Cuneo mentions that the “central feature seen in history was his relationship with his stepmother.” The Accused’s mother committed suicide when he was a young child, and his father remarried shortly thereafter to a woman who rejected her stepson throughout the rest of her life. His stepmother never told The Accused she loved him. She rejected his wife and children. She refused to attend The Accused’s ordination as an Episcopalian priest. The Accused was able to keep all of this inside of himself and he simply never dealt with his inner feelings about his stepmother or his mother’s suicide until after his stepmother died.

His stepmother was diagnosed with diabetes in 1996 and died in 1999. The Accused “doted on her trying to make her love him. He stated that he had stayed with her at her home the night she went into a diabetic coma and later died. He damns himself for not having taken her to the hospital that night instead of waiting for her appointment with her doctor the next day.” The Accused felt guilty for not having arranged for medical attention for his stepmother the day she died. (Cuneo page 6) He stated to Dr. Cuneo (page 7) “I did not want her dead. I didn’t let her die.” Nevertheless, all of these emotions regarding his stepmother led Dr. Cuneo to diagnose The Accused with chronic depressive mood disorder (page 7) which “has been exacerbated the past three years due to the death of his stepmother for which he feels guilty; and marital discord resulting from his impotence.”

The last sentence in Section 5K2.13 is crucial. It states: “*If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.*” Quite simply, but for The Accused’s diminished capacity, he never would have entered child pornography sites, and as such his criminal conduct can be almost entirely attributed to his diminished capacity.

### *C. Aberrant Behavior*

Common sense mandates that The Accused offense conduct be classified as aberrant behavior. Until he began entering child pornography websites, The Accused lived an exemplary life which was filled with doing good deeds for others. He has maintained gainful employment throughout his adult life, and has no prior convictions as evidenced by the PSR's assessment of zero criminal history points. This reflects the lowest likelihood of recidivism.

The recent policy statement at § 5K2.20 sets forth the parameters of conduct and criminal history which the Sentencing Commission believes appropriately may warrant a downward departure on the basis of "aberrant behavior."<sup>1</sup> It provides:

A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if 1) the offense involved serious bodily injury or death; 2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; 3) the instant offense of conviction is a serious drug trafficking offense; 4) the defendant has more than one criminal history point...; or 5) the defendant has a prior federal, or state, felony conviction...

#### § 5K2.20

Due to the recency of this policy statement, the case law from the Seventh Circuit construing new § 5K2.20 is scant. Two courts have denied § 5K2.20 departures based on the defendants' criminal history, degree of planning involved in the offense and victim impact. *See United States v. Bailey*, 2001 WL 459098, 2001 U.S. Dist. LEXIS 15927 (W.D.V.A. 2001) (denying the departure to defendant who pled guilty to possession of a firearm having previously been convicted of a misdemeanor crime of domestic violence and who had "a history of convictions for illegal, albeit not felonious, conduct."); *United States v. Kelly*, 169 F. Supp. 2d 171 (2001 S.D.N.Y.) (declining to apply § 5K2.20 where the offense took a great deal of planning and conspiring and had a lasting adverse effect on numerous victims). An

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<sup>1</sup>U.S.S.G., Amendment 603, Appendix C (November 1, 2000).

example of pre-Amendment 603 decisions comes from the Eighth Circuit which had previously allowed departure for aberrant behavior only where the offense involved a single act that was spontaneous and seemingly thoughtless. The Court, in *United States v. Garlich*, 951 F.2d 161 (8<sup>th</sup> Circ. 1991), interpreting existing guideline language, held that a fraud spanning one year and several transactions was not a “single act of aberrant behavior.”<sup>2</sup>

Prior to Amendment 603, the argument against a downward departure for aberrant behavior would have been “The Accused’s behavior can’t be considered aberrant because it occurred over a period of several months.” However, in adopting § 5K2.20 the Commission resolved a circuit split regarding whether a “single act of aberrant behavior” includes multiple acts that occurred over a period of time. The Commission concluded that the former language in Chapter One was “overly restrictive and may preclude departures for aberrant behavior in circumstances in which such a departure might be warranted.”<sup>3</sup>

Applying new Section 5K2.20 to the instant case, The Accused is the quintessential candidate for departure. It should be recognized that the Commission has placed restrictions on the type of offense that can be considered for this departure. Because The Accused did not possess a dangerous weapon or discharge a firearm he does not fall within the policy statement’s restriction precluding departure. See comment., (n.1).

Application note 1 defines “aberrant behavior” as a single criminal occurrence or single criminal transaction that A) was committed without significant planning; B) was of limited duration; and C) represents a marked deviation by the defendant from an otherwise law-abiding life. There is no evidence that The Accused engaged in any planning, let alone significant planning, prior to committing the offense. While The Accused criminal conduct was not a single occurrence, it was of limited duration and was the first serious criminal act in which he has engaged. He is a responsible person and well thought of by his parishioners

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<sup>2</sup>The prior, original language was contained in the Introduction to the Guidelines Manual as follows, “The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.” U.S.S.G. Chap. One, Part A, Subpart 4(d) (1987).

<sup>3</sup>Amendment 603, Reason for Amendment, at 1218-1219.

and other members of the church. His conduct clearly meets the characteristics the Commission has identified as aberrant and as such [The Accused]’s sentence should be reduced.

The Court may consider a number of other factors, as reflected in application note 2, in the departure determination under § 5K2.20. These include [The Accused]’s (i) mental and emotional conditions; (ii) employment record; (iii) motivation for committing the offense; and (iv) efforts to mitigate the effects of the offense.

[The Accused]’s mental condition prior to and at the time of the offense has already been discussed in detail above, and based on this, his mental condition is a factor which this Honorable Court should take into consideration when determining whether or not this offense constitutes aberrant behavior.

Similarly, Dr. Cuneo addressed [The Accused]’s motivation for committing the offense, which again relates to [The Accused]’s mental condition.

Finally, [The Accused] is attempting to mitigate the effects that this offense has had by undergoing weekly therapy sessions where he is confronting his demons so that this kind of conduct will not reoccur.

The support [The Accused] enjoys from his community is staggering. He has done an enormous amount of good deeds throughout his life. His “bad” deed is isolated to his short involvement in internet child pornography. There is no mention of any other criminal wrongdoing. Members of his former parish—many of whom are parents of small children—have written this Honorable Court on behalf of the “[The Accused]” they have come to know over the last three decades. They know the charges against [The Accused] and rather than saying nothing, or saying something negative, have come forward to support him as best they can.

Section 5K2.20 stands for the proposition that inherently good people like [The Accused] who for a short period in their otherwise law-abiding, stellar lives make mistakes are allowed a “break” so that the sentencing court can take into account the Defendant’s entire life before rendering a sentence.

### *III. Statutory Analysis*

is requesting a departure from a total offense level 18 to a total offense level 10. The sentence [The Accused] will request is 12 months home confinement. Admittedly, this is a *shock the conscience* request, but Sections 5K2.13 and 5K2.20 **allow** this Honorable Court to treat [The Accused] differently, and within the law, than other child pornographers. As such a sentence of 12 months home confinement meets all of the requirements set out by Congress when the Guidelines were enacted.

Obviously, 28 U.S.C. 994 (k) and 18 U.S.C. 3553 (a) are the two statutes this Honorable Court must rely upon in imposing sentence on a particular Defendant, and this section will discuss the elements of these statutes to show why a departure to 12 months home confinement satisfies the statutory requirements of sentencing.

#### *a. 28 U.S.C. 994 (k)*

Simply stated, 28 U.S.C. 994 (k) removes the sympathy factor from sentencing, and was implemented to ensure that no defendant was incarcerated in order to put him in a place where it was hoped that rehabilitation would occur.

The aspect of *rehabilitation* is intriguing in [The Accused] case, because on the one hand the argument would go that doing “hard time” in a prison would rehabilitate [The Accused] , even though the reality from mental health experts such as Debra Letarte is that the best chance of rehabilitation would be by continuing therapy sessions on the “outside.” (Exhibit D)

994 (k) specifies specific traditional penological purposes for incarceration such as “rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” The only reason for purposes of [The Accused]’s case that this is important, is to point out to this Honorable Court that while the Bureau of Prisons has a facility in Pennsylvania dedicated to sex offenders, [The Accused] is not requesting that he be sent there to serve his sentence. While [The Accused]’s crime involved possession of child pornography, he is **NOT** a pedophile and as such does not require sex offender counseling.

*b. 18 U.S.C. § 3553*

If 994 (k) is the proverbial *stick* then for purposes of 18 U.S.C. § 3553, U.S.S.G. Sections 5K2.13 and 5K2.20 are the *carrots* because those sections of the Guidelines allow this Honorable Court to view [The Accused] as a whole before rendering a sentence.

Section 3553 states in pertinent part:

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

Starting with the preamble of 3553 which states “the court shall impose a sentence sufficient, but not greater than necessary,” it is [The Accused]’s hope that after granting his Motions for Downward Departure this Honorable Court will concur that a sentence of 12 months home confinement is a sufficient sentence, and that under the circumstances it would not appear to be “greater than necessary.”

Regarding 3553 (a)(1), the undersigned has already devoted a great deal of time discussing the nature and circumstances of [The Accused]’s offense as well as his history and characteristics. [The Accused] should be punished for his offense because he broke the law, even though at the time he committed the offense his reasoning, insight, and judgement were greatly impaired due to his diminished capacity. This is a child pornography case where the

Defendant viewed the images of child pornography for a limited period of time and stopped his criminal action nearly one full year before law enforcement intervened.

The whole problem is that a sentence of *home confinement* appears to a casual outside observer as a light sentence. It will look like [The Accused] is not being punished for being a child pornographer, which is probably one of the most serious offenses an individual could commit. As such it would be argued that a sentence of home confinement would not reflect the seriousness of [The Accused]'s offense. If this were a typical child pornography case, then perhaps this would be true. But, because [The Accused] was suffering from diminished capacity, this Honorable Court *must* give meaning to the last sentence of Section 5K2.13 which states "if a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense." A departure to a total offense level 10, with a sentence of 12 months home confinement would give meaning to this portion of Section 5K2.13 *and* show that this Honorable Court takes these offenses seriously.

Subsection (a)(2)(A) of 3553 urges the sentencing court to mete out *just punishment* for the criminal activity. Does a 61 year old, depressed, first time offender deserve to go to jail? The undersigned will *NOT* make the easy and obvious argument to tug on this Honorable Court's sentimentality. Certainly [The Accused]'s actions have already punished him and his family. His once sterling reputation is in shambles. He can no longer actively serve his priestly functions. His life is in shatters. But, that is something which comes to any Defendant who breaks the law.

At the same time though, it is wholly unfair to take the position that the *only* just punishment is imprisonment so as to act as a deterrence to other child pornographers. At first blush the Guidelines with regard to this case appear to be extraordinarily straightforward, and for purposes of subsection 2(B) to Section 3553 a *just sentence* for [The Accused] would require incarceration. To follow this approach would violate the legislative history to Section 3553 (a) where a sentencing court should not show a preference for one purpose of sentencing over another.

The undersigned could discuss ad infinitum the various aspects of sentencing, but in reality, if this Honorable Court grants Defendant's Motions for Downward Departure it is *free* to sentence to whatever sentence it feels would satisfy the requirements of 28 U.S.C. 994 (k) and 18 U.S.C. 3553 (a), and hopefully this Honorable Court will sentence to a sentence of 12 months home confinement.

***IV. Conclusion***

Wherefore, [The Accused] requests that this Honorable Court grant his Motions for Downward Departure and determine that his conduct was aberrant behavior and that at the time the offense was committed [The Accused] suffered from a diminished capacity. As such, [The Accused] requests that this Honorable Court depart to a total offense level of 10 and sentence him to 12 months home confinement.

[THE ACCUSED]

STOBBS LAW OFFICES

BY:

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John D. Stobbs II, NO. 06206358  
Attorney for Defendant  
346 West St. Louis Avenue  
East Alton, Illinois 62024  
Telephone: (618)259-7789  
FAX: (618)259-4145

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 15<sup>th</sup> day of October, 2002, a copy of the attached *Defendant's Sentencing Memorandum* was served on the following persons by depositing a copy of same in an envelope with postage prepaid in the United States Mails in the Post Office in East Alton, Illinois addressed as set out, namely:

Mr. George Norwood  
Assistant U.S. Attorney  
402 West Main, Suite 2A  
Benton, Illinois 62812

STOBBS LAW OFFICES

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346 W. St. Louis Ave.  
East Alton, IL 62024