"THE FEDERAL CORNER"

Neither Congress Nor the Courts are Interested in the United States Sentencing Commission's Comments On U.S.S.G. § 2G2.2

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In the mid-1980s, we began to hear about the proposed United States Sentencing Guidelines. There were going to be studies done and the United States Sentencing Commission would take into account thousands of cases and the sentences imposed in these cases as they put together a Guidelines table.

As the introduction to the Guidelines notes,

> In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an *empirical approach* that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. (emphasis added)

For each offense, an *empirical approach* was supposed to be the basis for arriving at a Guideline level and the specific offense characteristics which could increase the Guideline level and the sentencing range for the offense.

The latest amendments to § 2G2.2 were clearly based on emotion rather than on empirical data. That section's specific offense characteristics – *many of which are found in almost every child pornography prosecution* – effectively increase the sentence in almost every case.

Even though the United States Sentencing Commission continues to be critical of § 2G2.2, neither Congress nor the courts are impressed. The latest federal case to discuss the tension between the Sentencing Commission and the courts is *United States v. Lynde*, ___F.3d___, 2019 WL 2402924 (6th Cir. June 7, 2019) [Panel: Circuit Judges Cook, Nalbandian and Murphy. (Opinion by Judge Murphy] The Court held that [1] the sentence was substantively reasonable, even though enhancements under Guidelines did not arise from Sentencing Commission's empirical study of courts' past sentencing practices; [2] the enhancements under Guidelines are valid no matter how often they apply; and, [3] the report from Sentencing Commission, adding its expert voice to criticism of the enhancements, could not compel the judicial branch to depart from its legal judgment that the enhancements were valid.

[The Court's Attitude Toward the Sentencing

Commission's Criticism of § 2G2.2]

Section 2G2.2 of the Sentencing Guidelines increases the recommended sentence in child-pornography cases if the offense involves a minor under the age of 12, the use of a computer, or other aggravating factors. This Guideline has repeatedly been subject to the criticism that its enhancements apply in most child-pornography cases and generate unduly harsh sentences. Our court has just as repeatedly rebuffed claims that courts must decline to follow § 2G2.2 because it arose from too much democratic tinkering by Congress and not enough empirical research by the Sentencing Commission. *United States v. Cunningham*, 669 F.3d 723, 733 (6th Cir. 2012). Lawrence Lynde, who pleaded guilty to a child-pornography offense, asks us to depart from our cases and reject § 2G2.2 because the Commission added its expert voice to the criticism in a 2012 report to Congress. But just as this report cannot compel the legislative branch to depart from its policy choices about § 2G2.2's content, *cf. United States v. Bistline*, 665 F.3d 758, 761–64 (6th Cir. 2012), so too it cannot compel the judicial branch to depart from its legal judgment about § 2G2.2's validity. We thus affirm Lynde's sentence.

[The Facts]

Before detailing our reasoning, we start with the facts. In October 2015, federal officials received a tip from Canadian authorities that Lynde had been trading child pornography online. An investigation uncovered that he had exchanged 62 images with another individual on the online application 'Kik' between October and December 2014. Executing a search warrant at Lynde's home in December 2015, federal agents recovered 322 images and five videos of child pornography. The images showed, among other things, prepubescent minors, including toddlers, engaged in genital-to-genital intercourse with adult males. Lynde ultimately pleaded guilty to receiving and distributing child pornography, in violation of 18 U.S.C. § 2252(a)(2).

[The Offense]

The knowing receipt and distribution of child pornography carries a statutory minimum of five years' imprisonment and a statutory maximum of twenty years.

[The Guidelines Range]

18 U.S.C. § 2252(b)(1). The Sentencing Guidelines assigned Lynde's crime a base offense level of 22. U.S.S.G. § 2G2.2(a)(2) (2016). His presentence report applied five § 2G2.2 enhancements: (1) Lynde's offense involved children under 12, *id.* § 2G2.2(b)(2); (2) Lynde knowingly distributed child pornography, *id.* § 2G2.2(b)(3)(F); (3) the child pornography presented sadistic or masochistic conduct and the sexual abuse of a toddler, *id.* § 2G2.2(b)(4); (4) Lynde had used a computer, *id.* § 2G2.2(b)(6); and (5) Lynde possessed over 600 images, *id.* §

2G2.2(b)(7)(D). (Under the Guidelines commentary, every video is 'considered to have 75 images.' *Id.* § 2G2.2, cmt. n.6(B)(ii).) After reductions for acceptance of responsibility, Lynde's total offense level was 34. With no criminal history, he faced a Guidelines range between 151 and 188 months.

[Lynde's Counsel's Argument at Sentencing]

At sentencing, Lynde's counsel objected to the § 2G2.2 enhancements. Counsel conceded that they applied. But he described § 2G2.2 as 'broken' because it produced harsh sentences through enhancements that enlarge the punishment in most cases. Counsel also highlighted Lynde's otherwise productive life and strong family support. A married father of three who provided care to his sick wife, Lynde served in the military and then began a career servicing x-ray equipment, which occasionally took him overseas on charitable work. Lynde's counsel thus requested the statutory minimum—a five-year sentence.

[The Court's 18 U.S.C. § 3553(a) Analysis
and the Sentence Imposed]

The district court agreed that the presentence report correctly calculated the Guidelines range, but decided that a Guidelines sentence would be 'longer than necessary' under 18 U.S.C. § 3553(a). It rejected the use-of-a-computer enhancement because the court had never presided over a child-pornography case that did not involve a computer. It also decreased the offense level because of Lynde's family circumstances. All in all, its reductions reduced the Guidelines range to between 97 and 121 months. Because of Lynde's 'particularly exemplary life,' the court settled on a 97-month sentence.

[The Standard of Review]

We review this sentence 'under a deferential abuse-of-discretion standard.' *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). While a sentence must be both procedurally and substantively reasonable, *id.* at 51–52, 128 S.Ct. 586…

[The Defendant's Position]

Lynde does not identify any procedural problems with his sentence. He simply disputes the bottom-line number, arguing that his 97-month sentence is 'too long.' *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). Lynde presents wholesale and retail challenges in support of this substantive argument: He broadly asserts that the district court should have rejected the § 2G2.2 enhancements on policy grounds that would apply to most defendants, and he narrowly asserts that the district court wrongly balanced the § 3553(a) factors in his case.

[The Appellate Presumption of Reasonableness]

We typically start with an appellate presumption of reasonableness if the district court imposes a sentence within the Guidelines range (or a sentence below that range where, as here, the defendant is the one appealing). *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008). This 'presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case.' *Rita v. United States*, 551 U.S. 338, 347, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007).

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[The Defendant's Arguments]

…Lynde argues that we should treat as *unreasonable* even a below-Guidelines sentence that relies on § 2G2.2's enhancements. That is so, Lynde claims, because those enhancements neither (1) arise from the Commission's careful study into the courts' past sentencing practices nor (2) adequately distinguish among child-pornography offenders.

[The Court Rejects the Defendant's Two Arguments]

We have not taken kindly to Lynde's claim that § 2G2.2 deserves to be cast aside because of its 'purported lack of empirical grounding.' *Cunningham*, 669 F.3d at 733. His premise is correct. Congress has actively policed § 2G2.2, so the Commission's usual statistical methods have taken a backseat to Congress's 'desire to cast a wider criminal net[ ] and impose harsher punishments.' *United States v. McNerney*, 636 F.3d 772, 775–76 (6th Cir. 2011). But Lynde's conclusion does not follow. To the contrary, Congress's direct involvement is a 'virtue, rather than [a] vice,' in a republic like ours because '[t]he Constitution is fundamentally a democratic document, not a technocratic one.' *Bistline*, 665 F.3d at 762. If the representatives who are accountable to the People reach 'a retributive judgment that certain crimes are reprehensible and warrant serious punishment as a result,' the Commission cannot stand in their way. *Id.* at 764.

We have also rejected Lynde's claim that § 2G2.2's enhancements must be disregarded because they apply in most cases and do not adequately distinguish among offenders. *See United States v. Walters*, 775 F.3d 778, 786–87 (6th Cir. 2015). If 'the harm [an enhancement] addresses is real,' we have reasoned, 'the enhancement is valid, no matter how often it applies.' *United States v. Lester*, 688 F. App'x 351, 352 (6th Cir. 2017) (alteration in original) (citation omitted). Here, Lynde does not dispute that real harms undergird two of the enhancements that he attacks—those for pornography involving children under 12, and for pornography that includes sadistic or masochistic conduct or the abuse of toddlers. U.S.S.G. § 2G2.2(b)(2), (b)(4). (The phrase 'res ipsa loquitur' comes to mind.) Rather, Lynde makes only the legally insufficient point that these enhancements arise frequently.

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[The Guidelines are Advisory]

To be sure, the Guidelines have been advisory since *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Thus, a *district court* may disagree with § 2G2.2's enhancements 'for policy reasons, and *may* reject the Guidelines range based on that disagreement.' *United States v. Brooks*, 628 F.3d 791, 799–800 (6th Cir. 2011). But a district court faces a 'formidable task' when it seeks to *reject* the policies underlying a Guideline, like § 2G2.2, that 'comes bristling with Congress's own empirical and value judgments.' *Bistline*, 665 F.3d at 764.

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[The Defendant's New Attack on § 2G2.2]

Our existing precedent would fully rebut Lynde's attack on § 2G2.2 but for a new turn that he takes. Lynde says that the Sentencing Commission *itself* 'offered significant criticism of [§ 2G2.2's] enhancements' in a December 2012 report to Congress recommending changes. *See* U.S. Sentencing Comm'n, *Federal Child Pornography Offenses* 322–25 (Dec. 2012).

[The Court Rejects This Attack]

Does this report require us to reassess our cases upholding § 2G2.2's general validity? No. That's analogous to suggesting that Congress can compel the Supreme Court to depart from its authoritative interpretation of the law—not by amending the law through Article I's bicameralism and presentment process—but by issuing a congressional report critical of the decision. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–25, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995); *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962). Since Congress cannot supersede judicial interpretations in this way, it should go without saying that the Commission—which has been described as 'a sort of junior-varsity Congress,' *Mistretta v. United States*, 488 U.S. 361, 427, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (Scalia, J., dissenting)—cannot either. *See also Bistline*, 665 F.3d at 761–62. And while the Commission may follow the prescribed process for amending the Guideline (or convince Congress to do so for subsections out of its control), *see* 28 U.S.C. § 994(p), Lynde concedes that neither Congress nor the Commission has amended § 2G2.2 in response to this report.

We are not alone in taking this view. Other circuits have held that the Commission's 'report does not render the non-production child pornography guidelines in § 2G2.2 invalid or illegitimate.'

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[The Court's Conclusion]

> In sum, notwithstanding the Commission's report, a sentence does not become unreasonable 'because U.S.S.G. § 2G2.2 [is] involved.' *Brooks*, 628 F.3d at 799. Instead, a sentence following this Guideline receives the same appellate presumption of reasonableness that applies to a sentence following any other Guideline. *See United States v. Wroten*, 744 F. App'x 245, 249 (6th Cir. 2018).
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> [The District Court Did it Right]
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> Anyone who has reviewed the sentencing materials in this case—both the materials detailing the severe and lasting harm that child pornography causes its victims and those showing the effects of this conviction on Lynde and his family—would recognize that the district court faced a difficult decision. Our task as appellate judges is not to pick the sentence that we would prefer (whether higher or lower), but only to ensure that the sentence chosen by the district court fell within its broad range of reasoned discretion. On that, we are confident in the answer.

[My Thoughts]

- Congress is simply ignoring any input from the United States Sentencing Commission on § 2G2.2. Although I did not find any cases from the United States Court of Appeals for the Fifth Circuit on point, I would bet the farm that they would come to the same conclusion as the judges of the Sixth Circuit reached in *Lynde*.
- I was reminded this morning of how repugnant child pornography cases are in the Texas courts. We have a 76 year old client who was found to be in possession of twelve pictures or videos of child pornography. We declined to accept the State's offer of 120 years' confinement in the Texas Department of Criminal Justice and are now awaiting trial.
- State or federal, it doesn't make any difference. Child pornography cases are a huge challenge for any defense lawyer.

Buck Files is a member of TDCLA's Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA's Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 232nd column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett and Harrison, P.C., and can be reached at bfiles@bainfiles.com.