**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **UNITED STATES OF AMERICA,** | : | **CRIMINAL NO. 08-CR-00215-CKK** |
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| **v.** | : | |
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| | : | |
| **EMERSON VINCENT BRIGGS** | : | |
| **Defendant.** | : | |

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR RELEASE PENDING SENTENCING**

The United States, by and through the undersigned Trial Attorney for the Criminal Division, United States Department of Justice, hereby opposes Defendant Emerson V. Briggs' Motion for Release Pending Sentencing.

**BACKGROUND**

On September 8, 2008, defendant pled guilty to one count of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and 2256, pursuant to a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). This Court detained defendant under the mandatory detention provisions of 18 U.S.C. § 3143(a)(2) , which provide that: "the judicial officer shall order that a person who has been guilty of an offense described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained." Subparagraph 3142(f)(1)(A) refers to crimes of violence, which Congress has categorically defined in the detention context to include the receipt of child pornography and other offenses under Chapter 110. 18 U.S.C. § 3156(a)(4).

18 U.S.C. § 3145(c), governing appeal from a release or detention order, provides that a

"judicial officer" may release a defendant subject to Section 3143(a)(2) where it is "clearly shown that there are exceptional reasons why such person's detention would not be appropriate" and where the court is able to find, by clear and convincing evidence, that the defendant is not likely to flee or pose a danger to the safety of any other person or the community. 18 U.S.C. § 3145(c); 18 U.S.C. § 3143(a)(1).

**ARGUMENT**

Defendant claims that, notwithstanding the mandatory provisions of Section 3143(a)(2), Section 3145(c) authorizes this Court to release defendant pending sentencing, and that defendant has clearly shown that there are exceptional reasons why his detention would not be appropriate. Defendant further asserts that the evidence in this case supports a finding, by clear and convincing evidence, that he is not likely to flee or pose a danger to the community if released. Even assuming that Section 3145(c) allows the Court to go beyond the mandatory provisions of Section 3143(a)(2) in some cases, defendant cannot demonstrate that there is anything "exceptional" setting him apart from the bulk of defendants convicted of receipt of child pornography and similar offenses.

As recognized by this Court in United States v. Sharp, 517 F.Supp.2d 462, 464 (D.D.C. 2007), the term "exceptional reasons" in Section 3145(c) is generally construed as requiring "circumstances that are 'clearly out of the ordinary, uncommon, or rare.'" (quoting United States v. Koon, 6 F.3d 561, 563 (9th Cir. 1993) (Rymer, J., concurring in denial of rehearing en banc)); See also United States v. DiSomma, 951 F.2d 494, 497 (2nd Cir. 1991) (statute requires a "unique combination of circumstances giving rise to situations that are out of the ordinary"). There is nothing unique about the circumstances of this case, either separately in combination.

Defendant's argument regarding exceptional reasons is devoted primarily to the purportedly

non-violent nature of receipt under Section 2252A(a)(2). Motion ("Mot.") at 8-12. Defendant does not even attempt to differentiate himself from the ordinary defendant convicted of receipt of child pornography, instead asserting that the wholesale categorization of non-contact child pornography offenses as crimes of violence is, itself, "uncommon" and "extraordinary." Mot. at 12. This argument defeats itself. Section 3145(c) requires a defendant seeking pre-sentencing release to demonstrate that the circumstances in his particular case are uncommon or unique, not that Congress's classification decision was somehow flawed or "uncommon." The Court should decline defendant's invitation to second-guess Congress's deliberate determination that all child pornography felonies are crimes of violence subject to mandatory detention under Section 3143(a)(2).

Although defendant attempts to classify receipt and possession offenses as somehow "exceptional," the child pornography offenses contained in Chapter 110 are predominantly non-contact offenses, including the possession, receipt, transportation, advertising, and distribution of child pornography. Only the child pornography production offenses contained in this Chapter require direct contact with minor victims. Despite this, Congress explicitly defined all felonies under Chapter 110 as crimes of violence for detention purposes. See 18 U.S.C. § 3156(a)(4). That the receipt of child pornography was not accidentally "swept" within the definition of crimes of violence, as suggested by defendant, is also shown by the provisions of 18 U.S.C. § 3142(c), under which Section 2252A(a)(2) is separately listed as an offense triggering a presumption in favor of *pretrial* detention.

There is nothing "arbitrary" about Congress's decision to include non-contact child pornography offenses within the definition of crimes of violence. Congressional findings

accompanying each major piece of child pornography legislation in the past fifteen years have recognized that all child pornography offenses, including possession and receipt, contribute to the victimization of the children whose sexual abuse is captured in those images. For example, in the Adam Walsh Act of 2006 (Public Law 109-248), Congress stated:

> (2) "(C)The Government has a compelling state interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain."
> "(D) Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."

The Adam Walsh Act, Title V. - Child Pornography Prevention, Sec. 501. Findings.

As the Supreme Court has explained, "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." New York v. Ferber, 458 U.S. 747, 759 (1982); see also United States v. Norris, 159 F.3d 926, 929 (5th Cir. 1998) ("The simple fact that the [pornographic] images have been disseminated perpetuates the abuse initiated by the producer of the materials"). Persons such as defendant, who deliberately seek out and collect images of child sexual abuse, contribute to the harm inflicted on children by creating a demand for these images and by re-violating the privacy of the victims. These viewers are in part responsible for the psychological and physical harm to the children whose abuse is shown in the images. See, e.g., United States v. Yeaple, 605 F. Supp. 85, 86 (Pa. D. 1985); Ferber, 458 U.S. at 759.

Congress has considered evidence demonstrating the threat posed to children and the community by the entire range of child pornography offenders, including those charged with non-contact offenses such as possession and receipt of child pornography. Against this backdrop, Congress has deliberately included possession and receipt with other child exploitation offenses for

purposes of detention. The express statutory provisions of Sections 3143(a)(2), 3156(c)(4) and 3145(c) leave no room for the defendant's argument, Mot. at 11, that the entire class of defendants of which he is a part should be treated differently from those convicted of "direct-harm offenses under Chapters 109, 110 and 117 for purposes of mandatory detention."

As noted by defendant, the court in United States v. Reboux, 2007 WL 4409801, *2 (N.D.N.Y.), considered the lack of direct contact with any child as one of several "exceptional reasons" under Section 3145(c), and ordered the defendant's release pending sentencing. Several courts have rejected this approach, which contravenes clear statutory provisions and conflates the danger assessment contained in Section 3143(a) with the "exceptional reasons" assessment mandated by Section 3145(c). For example, in United States v. Mellies, the court refused to find exceptional reasons supporting the release of a defendant convicted of possession of child pornography, noting that "[b]ecause Congress has determined that possession of child pornography is a crime of violence for purposes of the detention statute, it is immaterial that possession of child pornography is not considered to be a 'crime of violence' in other legal contexts." 496 F.Supp.2d 930, 936 (M.D. Tenn. 2007) (also refusing to find that extreme dental procedures, medical ailments suffered by family members, and strong family support, either separately or in combination, show exceptional circumstances under Section 3145(c)); See also Sharp, 517 F.Supp.2d at 464 (recognizing that defendant must show something more than low likelihood of flight or danger to others) (citation omitted); United States v. Peel, 2007 WL 1021974, *3 (S.D. Ill. 2007) (no exceptional circumstances under Section 3145(c) even if defendant convicted of possession of child pornography was unlikely to engage in recidivist behavior and where there was no evidence of any contact offenses with minors); United States v. Brown, 368 F.3d 992, 993 (8th Cir. 2004) (per curiam) (reversing the

district court's ruling that defendant convicted of receipt of child pornography could self-surrender and holding that defendant's participation in treatment program and possible abuse in prison did not set him apart from "every other defendant convicted of offenses involving the sexual exploitation of children."); United States v. Wages, 271 Fed.Appx. 726, *1-2 (10th Cir. 2008) (unpublished) (no exceptional reasons under Section 3145(c) where defendant convicted of possession of child pornography relied on his lack of a prior criminal record, use of a wheelchair, limited ability to hear, and need to take care of elderly mother). That the defendant was convicted of a non-contact child pornography offense does nothing to set him apart from every other defendant convicted of the receipt or possession of child pornography.

The other circumstances relied on by defendant similarly do not constitute "exceptional reasons" permitting his release pending sentencing. Defendant's discussion of the fact that this is a plea under Fed.R.Crim.P. 11(c)(1)(C) proceeds directly to the determination of the risk of flight and danger to the community under the standards governing pretrial detention. Mot. at 8. The standards governing pretrial detention will apply in this case only if the Court rejects the plea agreement and the defendant decides to withdraw his plea of guilty. It should be noted that, even under these standards, there is a presumption in favor of detention for defendants charged with receipt of child pornography. See 18 U.S.C. § 3142(c). Regardless, there is nothing about the mere fact that the parties have entered into a plea under Rule 11(c)(1)(C) that makes this case unique or uncommon within the meaning of Section 3145(c).

Similarly, defendant suggests that the more than two-year delay between the discovery of defendant's offense and the arraignment and plea in this case constitutes an exceptional reason why he should not be detained. There is nothing exceptional about a two-year delay in a case such as this.

Although defense counsel contacted law enforcement shortly after the law firm discovered the child pornography, it was nonetheless necessary to conduct a full investigation before being in a position to determine the proper resolution of this case. Like most child pornography cases, this case required detailed forensic analysis of computer media. It also required the analysis of certain records that the law firm in question needed to review for privilege prior to providing them to law enforcement. This case differs significantly from Reboux, in which the defendant himself made incriminating statements to law enforcement and which involved a three-year and seven-month delay between defendant's statements to law enforcement and the court's order for pretrial detention. See 2007 WL at *1.[1]

Furthermore, defendant's claim that he committed no additional wrongdoing during the period in which this case was investigated is based entirely on self-reporting.[2] In contrast, the period for which we have objective evidence of defendant's conduct, through analysis of his computer, shows a consistent pattern of seeking out and viewing extreme images of child pornography. Where, as here, defendant bears the burden of showing exceptional reasons why he should not be detained pending sentencing, his self-report that he has not committed any child pornography offenses carries little weight. Even if, as all parties hope, defendant has committed no additional offenses since his discovery in April 2006, this circumstance should not be deemed "exceptional." See, e.g., Brown, 368 F.3d at 993 (citing with approval district court's recognition that year long pretrial release with

[1] Although defendant suggests otherwise, Mot. at 12, there is a vast difference between an attorney making representations about what a defendant might say and a defendant himself making admissible admissions about an offense, as happened in Reboux.

[2] Before defendant was charged, the government had no means of subjecting defendant to any kind of monitoring or restrictions.

no violations was not an exceptional circumstance).

Defendant falls far short of a showing that his situation is in any way exceptional compared to defendants convicted of similar offenses. Indeed, defendant fares poorly when compared to many others convicted of receipt or possession of child pornography. Defendant was a fairly sophisticated collector of child pornography, using peer-to-peer software to find and download child pornography videos. See Statement of Offense ¶ 3. He deliberately sought and found extreme images of child pornography, using search terms such as "childlover pedo rape 11yo nude." Id. While child pornography may encompass a still image depicting a 17 year old posing lasciviously and showing no sexual acts or contact, defendant sought and received graphic videos showing prepubescent children being sexually penetrated by adults. Id. at ¶ 5.[3] The admitted facts in this case demonstrate that defendant's offense conduct was by no means exceptionally "mild" when compared with other defendants convicted of possession, receipt, and other non-contact child pornography offenses.

**CONCLUSION**

Because the defendant has utterly failed to demonstrate that there are exceptional reasons why his detention would not be appropriate, the Court need not determine whether Section 3145(c) endows district courts with the power to release defendants subject to the mandatory detention provisions of Section 3143(a)(2), or whether the defendant has met his burden of showing, by clear and convincing evidence, that he would not pose a risk of flight or danger to the community if

[3] The video "Best_(Hussyfan) (pthc) (r@ygold)(babyshivid) 11yo Hana anal.mpg," which is listed in the Information, shows a young girl being anally sexually assaulted. The video "(Pthc) 5Yo Kelly - Trying Fuck.mpg," also listed in the Information, contains graphic images of a girl between 4-6 years of age being penetrated by an adult male. For the Court's information, "pthc" stands for preteen hard core.

released.[4] There is nothing rare or unique about the defendant's circumstances and he remains subject to the statutory mandate for detention pending sentencing.

Respectfully submitted,

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Dated: September 11, 2008

[4] The government does not concede these issues.