IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
PAUL MOTTO	:	NO. 99-297

PAUL MOTTO	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA	:	NO. 01-2676

MEMORANDUM

Dalzell, J. May 17, 2002

Paul Motto pleaded guilty to distributing visual depictions of minors engaged in sexually explicit conduct, and receiving visual depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. §§ 2252(a)(1) and (a)(2). We sentenced Motto to seventy months in prison and two years of supervised release. He began serving his sentence on January 7, 2000.

Before us now is Motto's pro se petition to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Motto primarily argues that his counsel was ineffective for failing to pursue a downward departure for extraordinary post-offense efforts at rehabilitation under United States v. Sally, 116 F.3d 76 (3d Cir. 1997). We will grant the petition in part.

Introduction

A prisoner in federal custody may move to vacate, set aside, or correct his sentence on the ground that it "was imposed in violation of the Constitution or laws of the United States, or

that the Court was without jurisdiction to impose such sentence, or [] the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." See 28 U.S.C. § 2255. To prevail, the prisoner must establish a constitutional error of such magnitude that it had a "substantial and injurious effect or influence" on the criminal proceeding. Brecht v. Abramson, 507 U.S. 619, 637-38 (1993); United States v. Khalil, Crim. No. 95-577-01, 1999 U.S. Dist. LEXIS 10017, at *5-6 (E.D. Pa. June 30, 1999).

The Sixth Amendment right to assistance of counsel necessarily entails "the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show two elements, cause and prejudice. First, the defendant must persuade the court that the performance of counsel was deficient, that is, it was unreasonable "under prevailing professional standards." Gov't of Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989); Strickland, 466 U.S. at 687-88. Second, the defendant must demonstrate prejudice, or "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; Forte, 865 F.2d at 62. We must assess counsel's conduct under all the circumstances. Strickland, 466 U.S. at 688-90. So as not to hamper "the constitutionally protected independence of counsel"

and "restrict the wide latitude counsel must have in making tactical decisions", we must regard counsel's performance with deference. Id. at 689.

"[F]amiliarity with the structure and basic content of the Guidelines...has become a necessity for counsel who seek to give effective representation." United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). "[D]epartures are an important part of the sentencing process because they offer the opportunity to ameliorate, at least in some aspects, the rigidity of the Guidelines themselves." United States v. Gaskill, 991 F.2d 82, 86 (3d Cir. 1993). Indeed, "because a sentencing outcome is the ultimate conclusion to the vast majority of criminal cases, the quality of most defendants' representation will likely be reflected -- and have its greatest bottom-line impact -- at sentencing." Douglas A. Berman, Legal Issues and Socioeconomic Consequences of the Federal Sentencing Guidelines: From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel under Guidelines Sentencing, 87 Iowa L. Rev. 435, 437 (2002).

Accordingly, our Court of Appeals has held that the failure to argue an appropriate downward departure constitutes ineffective assistance of counsel. United States v. Headley, 923 F.2d 1079, 1083-84 (3d Cir. 1991); see also United States v. Soto, 132 F.3d 56, 58-59 (D.C. Cir. 1997); United States v. Harfst, 168 F.3d 398, 402-05 (10th Cir. 1999); Stinson v. United States, 102 F. Supp. 2d 912, 918-19 (M. D. Tenn. 2000).

Motto here claims that his retained counsel was ineffective for failing to pursue a Sally departure. In United States v. Sally, 116 F.3d 76, 80 (3d Cir. 1997), filed fifteen months before Motto's sentencing, our Court of Appeals held that a defendant may receive a downward departure for extraordinary efforts at post-offense rehabilitation. To qualify for such a departure, the defendant's efforts at rehabilitation must be "so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply." Id. Sally noted that since post-offense rehabilitation efforts are already factored into the United States Sentencing Guidelines -- "post-offense rehabilitative efforts (e.g., counseling or drug treatment)" are a listed factor for the "acceptance of responsibility" departure under § 3E1.1(g) -- a separate downward departure is only "warranted where [post-offense rehabilitation] is 'present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted.'" Id. (citing United States v. Brock, 108 F.3d 31, 35 (4th Cir. 1997)). The defendant's efforts at post-offense rehabilitation must be remarkable, "indicate real, positive behavioral change," and demonstrate a "commitment to repair and rebuild" his or her life. Id. at 81; see also United States v. Yeamen, 248 F.3d 223, 228 (3d Cir. 2001). As Sally put it,

> [A]t a minimum, there must be evidence demonstrating that a defendant has made concrete gains toward 'turning his life

> around' before a sentencing court may properly rely on extraordinary post-conviction rehabilitation efforts as a basis for a downward departure. Unlike the usual adjustment for acceptance of responsibility where defendants may all-too-often be tempted to feign remorse for their crimes and be rewarded for it, we view the opportunity for downward departures based on extraordinary or exceptional post-conviction rehabilitation efforts as a chance for truly repentant defendants to earn reductions in their sentences based on a demonstrated commitment to repair and to rebuild their lives.

Sally, 116 F.3d at 81.

Is There a Reasonable Probability that the Outcome of the Sentencing Hearing Would Have Been Different?

A court may analyze the Strickland factors in either order. Strickland, 466 U.S. at 697. To frame Motto's efforts at rehabilitation, we will begin by discussing prejudice.

We set out Motto's criminal conduct in our prior decision, United States v. Motto, 70 F. Supp. 2d 570 (E.D. Pa. 1999):

> Motto, using the cybername FOXFOX99, in the summer of 1997 sent graphics files containing child pornography to the New York State Attorney General's undercover e-mail address. Based on the information received from the New York Attorney General's Office, the United States Postal Inspector in Philadelphia, also acting undercover, contacted Motto through AOL under the undercover cybername, BABYFACES54. Through an AOL chatroom, Motto and the Postal Inspector arranged that Motto would send a computer disk containing child pornography in exchange for a video containing the same sexually explicit material. Motto directed that the videotape be mailed to a post office box in Bensalem, Pennsylvania, to the

> attention of one "Bill Tate", Motto's pseudonym.
>
> In September of 1997, Motto sent another e-mail in which he confirmed that he had sent a small package through the mails, that he could not wait for the video, and that he had "tons more stuff" when he got his materials. Motto on September 3, 1997 sent another e-mail to the undercover officer, and stated that he had sent a 3.5" disk, as well as eight to twenty-nine files as a show of good faith. A later review of the computer disk showed that it contained thirty graphics files, twenty-six of which containing child pornography involving children as young as six years old.
>
> In late October of 1997, Motto arrived at the Bensalem Post Office and picked up an express mail package allegedly containing the video he had long sought. He was then followed to his residence in Bensalem, whereupon a federal search warrant was executed on the residence. Motto's computer system, computer disks and videos were seized.

Id. at 572 (citation omitted).

In his habeas petition, Motto claims that he sought mental health treatment the day after he completed the subject offenses -- the day after he received the pornographic video and law enforcement officers followed him home confronting him about his indecent behavior. He called his health services provider and immediately made an appointment with Bucks County Mental Health Center. Motto alleges that he attended psychiatric therapy voluntarily and continuously for the two years until his sentencing. Between sentencing and incarceration, he persisted with treatment. He engages in counselling in prison.

The crimes in issue, receiving and distributing graphic sexually explicit images of children, are the defendant's only

known offenses. Motto maintains that through extraordinary commitment to therapy and never becoming complacent about his treatment he came to understand the causes at root of his criminal behavior and is unlikely to succumb to crime again. Through his therapy he says he has restored bonds with his family. Motto provides an affidavit that furnishes a capsule summary of what his testimony and his therapists' would reveal about his efforts at rehabilitation:

> 1. The Defendant had self-recognized his disorder upon his arrest for what it truly represented. Without any prompting, he contacted his health insurer for a referral to therapy on the very next day.
>
> 2. The Defendant came to identify and understand the most likely cause of his predilection and addressed it in detail extensively in his therapy sessions. He has shown how he could put his adolescent wish fulfillments behind him and used multiple appointments for this purpose. He put intensive effort into making this change, objectively evidenced by nearly 80 sessions sustained for over two years.
>
> 3. It was his therapists['] professional opinions that he has successfully put behind him that phase of his life, which belonged in adolescence, whose repression had resulted in the recent behavior.
>
> 4. The chance for a repeat occurrence was extremely unlikely because Mr. Motto understood the causes and the betrayal of his family's trust that he felt produced deep remorse and commitment not to re-offend.

Pet. for Habeas Corpus at 10.

Motto attaches letters by his treating psychiatrists:

> This letter is on behalf of Paul Motto. He started his treatment at this agency

> (Warminster Hospital) on October 27, 1997. Mr. Motto had demonstrated a sincere commitment of his treatment for his problem. He had fully acknowledged his problem and the needed therapy to help him. He had also shown a strong desire to rehabilitate himself, as well as a tremendous willingness to prevent it from occurring again. Mr. Motto has made substantial gains to changing his behavior and was dedicated to rebuilding his life with his wife and his children.

Id., Ex. B (Letter of Virginia M. Keane, M.D. to the Court); and

> This letter is in reference to Paul Motto[.] He was a patient of mine in 1998 & 1999. At the time he was awaiting charges of receiving child pornography. I had a strong impression when I was seeing him that he did not want to continue the pursuit of child pornography. And that he was committed to do anything in his power to rehabilitate his life and minimize the damage that he caused to his wife and children.

Id., Ex. A (letter of Theodore J. Wilf, M.D., to the Court).

To remove any doubt that Dr. Timothy P. Foley testified at Motto's sentencing hearing about Motto's argument of diminished capacity at the time of the offense under U.S.S.G. § 5K2.13 and McBroom[1], and not about Motto's psychological rehabilitation, Motto attaches a letter from Dr. Foley which says that "[m]y referral question was to determine if you met the criteria outlined in McBroom. I cannot offer an opinion as to

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[1] United States v. McBroom, 124 F.3d 533 (3d Cir. 1997). Dr. Foley's expert testimony is in the transcript of the sentencing hearing at Tr. at 49-100 (Oct. 21, 1999) and Tr. at 109-128 (Nov. 9, 1999). We addressed Motto's argument for a downward departure based on diminished capacity at some length in our earlier opinion, United States v. Motto, 70 F. Supp. 2d 570 (E.D. Pa. 1999) (denying departure under U.S.S.G. § 5K2.13), aff'd, 225 F.3d 651 (3d Cir. 2000).

why your attorney did not ask for an assessment of your rehabilitative efforts. Your therapist at the time of our evaluation may have been in a better position to answer that question." Id., Ex. D (letter of Timothy P. Foley, Ph.D. to Paul Motto (Feb. 27, 2001).

As we will explore more fully in the next section, Motto's counsel at sentencing did not raise a Sally departure for extraordinary efforts at post-offense rehabilitation (although the Government did), did not offer arguments in favor of the departure, and did not present evidence (except in a summary fashion) about Motto's post-offense rehabilitation.

Motto has shown prejudice because there exists reasonable probability that, had we heard the proffered evidence of his post-offense rehabilitation, the outcome of sentencing might well have been different. Strickland, 466 U.S. at 694; Headley, 923 F.2d at 1084. Of course, the mere fact that one engages in counselling does not entitle one to a Sally departure. A Sally departure is available "for truly repentant defendants to earn reductions in their sentences based on a demonstrated commitment to repair and to rebuild their lives," and is the exception, not the rule. Sally, 116 F.3d at 81. "[S]tanding alone, [counselling] is not 'extraordinary' unless there is some evidence that it was somehow present to an extraordinary degree in this case." United States v. Yeamen, 248 F.3d 223, 228 (3d Cir. 2001). In the right circumstances, however, a defendant's participation in counselling can by itself warrant a Sally

departure. See, e.g., United States v. Kane, 88 F. Supp. 2d 408, 409-13 (E.D. Pa. 2000).

Whether particular behavior amounts to extraordinary criminal rehabilitation depends on the facts and the circumstances of each case. Sally, 116 F.3d at 81; United States v. Bockius, 177 F. Supp. 2d 353, 356 (E.D. Pa. 2001). In this case, Motto did not have criminal cohorts to renounce. There were no known victims to restore. He did not lose his job as the result of his complicity in illegal activity. But there is a "reasonable probability" that the record may show that Motto had a propensity to indulge in child pornography that he made an exceptional effort to overcome. Thus, "it is reasonable to believe that the outcome of the proceeding may have been different had counsel argued for adjustment." Headley, 923 F.2d at 1084.

Was Counsel's Performance Unreasonable
Under Prevailing Professional Standards?

Headley held that the failure of counsel to argue for an appropriate downward departure is professionally unreasonable. 923 F.2d at 1081-84. In Motto's case, as distinct from Headley, the downward departure was raised and the Court considered the downward departure. However, it was the Government, and not the defense, who raised the Sally issue, late in the sentencing hearing. While defense counsel thereafter nominally moved for a Sally departure -- merely by adopting it after the Government raised it -- defense counsel made no argument and presented no

evidence to give any content to the Court's inquiry on this twelfth-hour issue.

There is no principled way to distinguish counsel's performance in this case from the defense lawyer's deficient performance in Headley. As the Court of Appeals for the District of Columbia Circuit has observed, counsel's embrace of a downward departure can be so superficial as to be the functional equivalent of not advocating it. Soto, 132 F.3d at 58-59 (finding counsel ineffective under the Sixth Amendment for nominally advancing a downward departure). If our consideration of a Sally departure suggested anything, it is that we were receptive to a downward sentencing adjustment if we could grant one without violence to the record and the law.

We turn to Motto's sentencing record.

In defendant's sentencing memorandum, Motto's lawyer made no mention of a Sally departure. Defense counsel was aware of Motto's efforts at criminal rehabilitation, however, and thus should have known that pursuing a Sally departure "might have been fruitful," Headley, 923 F.2d at 1084; Stinson, 102 F. Supp. 2d at 918-19. The sentencing memorandum urged that "Mr. Motto has not engaged in the usual denials and self deception associated with criminal conduct. Mr. Motto and his wife met with the Assistant United States Attorney to explain Paul's conduct and to express his true remorse for his actions. Through therapeutic intervention, hard work and the commitment of a

devoted, loving wife and family Paul continues his rehabilitation." Def.'s Sentencing Mem. at 7.

At the sentencing hearing, Motto's lawyer did not make a motion for a Sally departure. The record confirms that the lawyer did not intend to add anything to what he had written in his memorandum:

> DEFENSE COUNSEL: May I make an Opening Statement, your Honor?
>
> THE COURT: Is it something you haven't said in your papers?
>
> DEFENSE COUNSEL: No, sir.

Tr. at 11 (Oct. 21, 1999). At the hearing's close, still not having asserted a Sally departure, the lawyer pleaded, "The only thing I can think of, with my limited imagination, is that the Court downward depart and figure out a way to put him in some sort of Halfway Program." Tr. at 205 (Nov. 9, 1999). "Our plea to you, your Honor, is to see if there is something creative that can be done to punish him, but not punish them and not punish the children.... [S]ee if there is some way that the Court can fashion a Sentence and accomplish that." Id. at 205-06.

As rehearsed earlier, "familiarity with the structure and basic content of the Guidelines...has become a necessity for counsel who seek to give effective representation." Day, 969 F.2d at 43; Khan v. United States, 77 F. Supp. 2d 651, 652 (E.D. Pa. 1999). Where "counsel ignores a relevant Guideline provision altogether" he cannot give effective assistance. Soto, 132 F.3d at 59. Counsel appeared unaware that Sally provided a possible

basis for downward departure. Stinson, 102 F. Supp. 2d at 918 ("Counsel's failure to present this issue was not a matter of strategy; the transcript of the sentencing hearing reveals that counsel was unaware that Petitioner may have been eligible for a downward departure.").

As counsel did not raise a Sally departure, he necessarily marshalled no evidence in support of one. Counsel did not once characterize Motto's rehabilitative efforts as "exceptional" or "extraordinary" in the sentencing memorandum or during the two-day sentencing hearing. He did not call Motto's psychiatrists as witnesses. He did not elicit testimony from Motto about his rehabilitation.[2]

Unusually enough, the Government raised the Sally issue in its closing argument:

> GOVERNMENT: ...The last issue that was, I'd like to address is post-rehabilitation. There's been no testimony at all from either expert to say that Mr. Motto has had--
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> THE COURT: Has made extraordinary rehabilitation under Sally.
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> GOVERNMENT: Yes. And, your Honor, even if you read the letter from Warminster, where this defendant has seen two psychologists. Neither of the people mentioned in the letter have made any statement at all regarding his rehabilitation....[M]y heart extends out to the family for the loss that they may incur as a result of incarceration. I just can't

[2] Counsel called Motto to the stand briefly to testify about the reason he obtained his home computer and post office box, both used to exchange sexually explicit images of children, and the circumstances of his obtaining the sexually explicit video tape. Tr. at 129-33 (Nov. 9, 1999).

> see a legal basis by which the Court can depart, based on the record we have before us.

Id. at 210-11.

At this juncture, the evidentiary portion of the hearing was over and both counsel had given closing arguments. We began a colloquy with defense counsel:

> THE COURT: [The Government] properly makes reference to the Sally issue. I didn't hear anything about that from you. I take it that you're not seriously pressing that-- or are you pressing that, because there wasn't any testimony that I heard on extraordinary rehabilitation efforts.
>
> DEFENSE COUNSEL: I think the Court can make that finding, or at least make that assessment, after you hear from Mr. Motto.
>
> THE COURT: O.K.

Id. at 212. After Motto addressed the Court, his lawyer requested and was granted leave to ask him questions. He still did not ask about rehabilitation. Id. at 218-21.

When Motto stepped away from the lectern, we asked defense counsel:

> THE COURT: Now, do you still press the Sally issue?
>
> DEFENSE COUNSEL: I would like the Court to consider it based on Mr. Motto's testimony.

Id. at 221-22.

Not surprisingly, we concluded in our decision,

> Without the vigor with which he pressed the "enabler" argument, Motto's counsel at the hearing today proffered, as another basis for a downward departure, Motto's "extraordinary post-conviction rehabilitation efforts" under

> United States v. Sally, 116 F.3d 76, 79-82 (3d Cir. 1997). There is nothing in this record that would warrant such a downward departure under Sally, and so we decline to do so.

Motto, 70 F. Supp. 2d at 579-80 n.17. Our discussion of Sally occupied this one footnote.

There was some reference to post-offense rehabilitation in the record. The sentencing memorandum, noting that "[s]entencing is traditionally believed to be based on rehabilitation, restitution and retribution," volunteered that "[r]ehabilitation has been accomplished through immediate recognition and acceptance of responsibility for the deviant behavior" and reported that "Motto has been in counselling since October 1997." Def.'s Sentencing Mem. at 7. The sentencing memorandum also attached a letter from Warminster Hospital to Pretrial Services advising that Motto was in counselling. Id., Ex. C.[3] The letter contrasts with the letters from Doctors Keane and Wilf that Motto now attaches to his pro se habeas petition. See supra. As the Government has noted, the letter contained no

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[3] The letter provides:

> Mr. Motto has been in treatment at this agency since 10/27/97 and continues currently. His last appointment for therapy having been this day, he will continue to be seen as long as possible.
>
> He is seen by Dr. Ted Wilf for medication and continues in his care. I will continue to work with Paul on his issues.

Id. (letter from Virginia M. Keane, M.D., to Terrence Dudley of Pretrial Services (Sept. 30, 1999)).

statement at all regarding [Motto's] rehabilitation. The presentence investigation report recommended, and we granted, a three-level downward adjustment for acceptance of responsibility, which includes efforts at post-offense rehabilitation. When Motto addressed the Court, he discussed his efforts at self-transformation and rehabilitation. He stated that "he bared [his] soul...from the very beginning" to his doctors, family, and friends. He said he sought psychological intervention immediately. He also revealed: "I've worked harder at this than anything I ever have before, to get myself mentally where I need to be in my life." Tr. at 215-16 (Nov. 9, 1999). These heartfelt disclosures were not, as far as we could tell, due to counsel's efforts; indeed, since the Government was the first to mention "Sally", all evidence points to Motto himself, and not his lawyer, as the author of these references in his allocution.

Had the Government not raised the Sally departure, the record in this case would be identical to Headley's. It may be that in certain cases the Government raising a downward departure, and the Court taking cognizance of it, may neutralize defense counsel's deficiency -- distinguishing such cases from Headley. That is not so here. Defense counsel did not argue extraordinary post-offense rehabilitation and did not present testimony about rehabilitation by Motto, Dr. Wilf, or Dr. Keane. We were therefore deprived of the ability we might otherwise have had to "make factual findings demonstrating that the defendant has achieved real gains in rehabilitating himself and changing

his behavior" under Sally, id. at 82. The Government's invoking Sally does not get defense counsel off the professional hook. Soto, 132 F.3d at 58 ("[T]he government argues that counsel raised the minimum participation issue and was therefore not ineffective. We disagree. To 'raise' the issue properly, counsel had to do more than simply mention the provision....").[4]

"There is no rational basis to believe that [defendant's] trial counsel's failure to argue adjustment was a strategic choice. Clearly it falls outside the prevailing professional norms." Headley, 923 F.2d at 1084. A Sally departure could be pursued concurrently with a § 5K2.13 departure, which counsel did here pursue.[5] There is no strategic explanation, nor we can imagine any, for counsel's failure to raise a Sally departure and then embracing it only perfunctorily after the Government mentioned it.

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[4] The Court went on to observe:

> Describing Soto's role as minimal or minor is insufficient to raise the section 3B1.2 issue.... This is particularly true, where, as here, the guideline requires the district court to make empirical judgments and where factual subtleties can make a real difference.... Developing these issues requires more than just reciting the words "minimal participant."

Id. at 58-59.

[5] He also vigorously pursued an America-Online-as-enabler departure under U.S.S.G. § 5K2.0, see Motto, supra, 70 F.Supp. at 578-79.

Since defense counsel's failure to press for a Sally departure was unreasonable under prevailing professional norms, and there is a real probability that but for this deficiency the sentencing outcome would have been different, we must grant Motto's habeas petition insofar as it claims ineffective assistance of counsel with respect to a Sally departure.[6]

Thus, we will proceed to resentencing, which we will open for the limited purpose of receiving evidence and rendering a decision on a Sally departure.

Motto's Other Ineffective Assistance of Counsel Claim

Motto also contends that his lawyer was constitutionally ineffective for failing to object to the increase of Motto's base offense level by four points, under U.S.S.G. § 2G2.2(b)(3), for committing the subject offenses using "material that portrays sadistic or masochistic conduct or other depictions of violence."[7] The sentence enhancement was owing to

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[6] It is unnecessary to conduct an evidentiary hearing on this point. "When a motion is made under 28 U.S.C. § 2255 the question of whether to order a hearing is committed to the sound discretion of the district court." Day, 969 F.2d at 41. While "the court must hold an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that the movant is not entitled to relief," id. (see also 28 U.S.C. § 2255), there are no factual matters to determine. The Government has not opposed the habeas petition on the basis of fact, but only on the basis of law. By and large counsel's ineffectiveness "is plain from the record" as it was in Headley, 923 F.2d at 1085. The factual proffers on which we rely, such as that Motto attended psychiatric counseling with Dr. Wilf and Dr. Keane, are not in dispute.

[7] Section 2G2.2(b)(3) provides that the base offense (continued...)

Motto's having sent the undercover postal inspector an image of a minor in bondage.

Motto maintains that he told defense counsel during sentencing that he did not remember having any photographs involving sadistic, masochistic, or violent images. He asserts that, under United States v. Canada, Nos. 96-30319, 96-30320, 1997 U.S. App. LEXIS 12789, *10-13 (5th Cir. Apr. 7, 1997), and United States v. Tucker, 136 F.3d 763, 764 (11th Cir. 1998), a defendant must specifically intend to traffic violent, sadistic or masochistic material to be subject to the adjustment. Motto argues that, since counsel was on notice that Motto may not have had such intent, his lawyer was ineffective for not opposing the upward adjustment.

Defense counsel's representation in this regard was not ineffective. The record shows that Motto sent the postal inspector the image of the minor in bondage in question using the filename "10tied.jpg." In view of these highly incriminating facts alone, defense counsel's failure to argue that Motto did not intend to send the violent image, and therefore did not merit the adjustment under persuasive appellate authority, was not professionally unreasonable as it would have been a hopeless contention. The failure to generate this weak (and possibly

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[7](...continued)
level for offenses under, inter alia, 18 U.S.C. § 2252(a)(1)-(3), must be increased by 4 levels if "the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence."

counterproductive) argument did not fall "outside the wide range of professionally competent assistance" the Sixth Amendment demands. Strickland, 466 U.S. at 690; Headley, 923 F.2d at 1083. Since this claim is lacking on the face of the petition and the record, we will not have a hearing on it.