

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**United States of America,**

*Plaintiff,*

v.

Case No. **6:18-cr-10041-JWB-01**

**Charles A. Gann,**

*Defendant.*

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**Defendant Charles A. Gann’s Sentencing Memorandum**

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Charles “Bo” Gann respectfully asks this Court to impose a sentence of 105 months, followed by five years of supervised release. Mr. Gann filed separately his objection to the PSR, including that the Court should calculate the sentencing range to be 151 to 188 months under the guidelines.<sup>1</sup> This sentence is the lowest we can recommend that complies with the terms of the pretrial agreement, which provide that Mr. Gann can request a sentence of 30% below the low end of the sentencing guideline range.<sup>2</sup>

Here, Mr. Gann presents the Court with reasons for a lesser sentence. They include:

- He was abused as a child and exposed to sexual activity at a young age by his parents;
- He has been a steady father to his two autistic sons;

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<sup>1</sup> The PSR calculates a guideline range of 210 to 240 months, with a mandatory minimum of 5 years and a statutory maximum of 20 years. *See* PSR (Doc. 332) at ¶ 110.

<sup>2</sup> Doc. 29 at ¶ 5(d).

- His work history demonstrates he is employable;
- He has no prior offenses and is a low risk for recidivism;
- The sentencing guidelines for this offense do not provide the Court with a meaningful baseline to determine a sentence; and
- Mr. Gann can succeed on supervised release.

## **I. Personal characteristics**

Mr. Gann is 49 years old. He lived a modest life in Great Bend, Kansas, when he wasn't on the road hauling freight as an over-the-road truck driver. He quit school after 8<sup>th</sup> grade<sup>3</sup> and his best employment skill is driving and working on cars and trucks. He is the father of two twin boys, Jacob and Brandon, who both suffer from autism.<sup>4</sup> He has been in a relationship with Shawn Snowden since 2005, who is the mother of his two children.

### **A. Childhood of abuse.**

He experienced a "very bad" childhood.<sup>5</sup> When his mother was not beating him with her fists, she used a small bat.<sup>6</sup> She beat him "all the time."<sup>7</sup> She began abusing him when he was young and continued doing so – physically, mentally, and sexually

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<sup>3</sup> PSR at ¶ 94.

<sup>4</sup> Id. at ¶ 75.

<sup>5</sup> Id. at ¶ 69.

<sup>6</sup> *Id.* at ¶ 67.

<sup>7</sup> Def. Ex. 100 at 2.

– until he cut off all contact with her at the age of 15.<sup>8</sup> His father, Bill Gann, agreed that Mr. Gann’s mother was a “mean and nasty” person.<sup>9</sup> When he was young, his mother was a prostitute. She would often bring strange men into the home and, when Mr. Gann told her that these strange men sometimes propositioned him to engage in sexual acts with them, she responded that he “shouldn’t be so cute.”<sup>10</sup> Mr. Gann has not a single positive memory of his own mother,<sup>11</sup> and he “didn’t even care when she died” in 2009.<sup>12</sup>

Mr. Gann described his father, Bill Gann, as a “liar, thief and manipulator.”<sup>13</sup> His father, in turn, described Mr. Gann as “not a pleasant person” when he lived with him after being charged in this case.<sup>14</sup> In what clearly presents as a strained familial relationship, what is most revealing is that Mr. Gann’s father essentially placed the blame on his young son for quitting school after the 8<sup>th</sup> grade because, in his father’s words, Mr. Gann did not “see eye-to-eye” with the school principal.<sup>15</sup> In contrast, Mr.

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<sup>8</sup> PSR at ¶ 67.

<sup>9</sup> *Id.*

<sup>10</sup> Def. Ex. 100 at 3.

<sup>11</sup> Def. Ex. 100 at 2.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> PSR at ¶ 66.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 95.

Gann reports that his father didn't enroll him in school after he wanted to stop going.<sup>16</sup>

Mr. Gann has four siblings – none of them were ever nice to him.<sup>17</sup> They teased him and played him against his mother.<sup>18</sup> He has had no real contact with them for 25 to 30 years.<sup>19</sup>

As a young man, when Mr. Gann wasn't being beaten, abused, or teased at home, he was being teased at school.<sup>20</sup> That is why he would skip school often.<sup>21</sup> When he did go to school, he found "it was boring."<sup>22</sup> Growing up he "only had two friends" and one of them was his cousin.<sup>23</sup> His father did not enroll him to attend school again after 8th grade.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶ 72.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at ¶ 70.

<sup>20</sup> *Id.* at ¶ 95.

<sup>21</sup> *Id.* at ¶ 94.

<sup>22</sup> Def. Ex. 100 at 3.

<sup>23</sup> *Id.*

**B. Family and Friends – Bo is a good father and a man.**

Mr. Gann has an “up and down” relationship with his long-time partner, Ms. Snowden.<sup>24</sup> Much of that is due to her mental health disorders; some is due to him being on the road as a truck driver.<sup>25</sup>

He has a strong bond with his two boys, Jacob and Brandon. According to Ms. Snowden, he “took to these boys as soon as they were born.”<sup>26</sup> His father described him as being “kind and caring” around his children, and that “he would never hurt or abuse his children.”<sup>27</sup>

The boys traveled with their father when he was on the road<sup>28</sup> until they reached school age. The boys struggled in school due to their autism disorders and they were pulled from public school after 1st grade because they were being bullied.<sup>29</sup> Ms. Snowden took on the role of mom and teacher; Mr. Gann was on the road earning a living.

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<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.*

<sup>26</sup> Def. Ex. 101 at 1.

<sup>27</sup> PSR at ¶ 75.

<sup>28</sup> Def. Ex. 105.

<sup>29</sup> Def. Ex. 101 at 1.

Mr. Gann describes himself as a “loner”<sup>30</sup> and said that he doesn’t, “like being around people very much ... I don’t have any friends and I don’t care to.”<sup>31</sup> Ms. Snowden said he “is awkward socially” and opined he may also suffer from some form of autism.<sup>32</sup>

Despite his self-description as a loner, the few people Mr. Gann did connect with describe him as a “good man”<sup>33</sup> and a “stand up guy.”<sup>34</sup> Doctor Brantley has known him for 15 years – they performed World War II living history re-enactments for veterans together.<sup>35</sup> He calls Mr. Gann a “nice and comfortable person” who is “a good father.” Mr. Taylor has known Mr. Gann since 1983.<sup>36</sup> He called him “an upstanding person, of good character, and has ALWAYS been a good, stand up, straight up friend.”<sup>37</sup>

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<sup>30</sup> Def. Ex. 100 at 3.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> Def. Ex. 101 at 1.

<sup>33</sup> Def. Ex. 104.

<sup>34</sup> Def. Ex. 102.

<sup>35</sup> Mr. Gann confirmed to counsel that during the re-enactments he was always on the Allies side.

<sup>36</sup> Def. Ex. 102.

<sup>37</sup> *Id.*

**C. Employment – Over the road truck driver who was always in the top ten for miles.**

Mr. Gann has been driving trucks since 1987, when he was 18 years old.<sup>38</sup> He has regularly been employed as a truck driver ever since, until he was charged in this case and unable to find work. He has had no formal or informal disciplinary actions at work.<sup>39</sup>

He worked for the Bruenger Trucking Company of Wichita from around 2001 to 2015.<sup>40</sup> The Bruenger family said that as a driver, Mr. Gann “was always in the top 10 for miles and good fuel mileage.”<sup>41</sup> They said that these offenses “were a complete surprise. Completely out of character from the man we knew.”<sup>42</sup>

**D. Criminal history.**

Regarding Mr. Gann’s criminal history, there is very little. This case is his first time before a federal judge to be sentenced. He has no prior history in the federal criminal justice system. He has never been to prison and has no pending cases. He has zero criminal history points. He has no drug addiction or habit.<sup>43</sup>

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<sup>38</sup> PSR at ¶ 104.

<sup>39</sup> Def. Ex. 100 at 4.

<sup>40</sup> Def. Ex. 103; PSR at ¶ 101.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> PSR at ¶¶ 91-92.

His one prior offense was an assault case from Missouri state court in 1997.<sup>44</sup> In that case, he was “seeing a woman” who had a boyfriend “who attacked” him. He defended himself and was charged.

The PSR also includes another “arrest” that occurred in 2013 in Great Bend.<sup>45</sup> In that case, he intervened after a young man assaulted Ms. Snowden’s adult daughter. After Mr. Gann asked him to leave the property, he assaulted Mr. Gann, who defended himself. The PSR indicates he was charged with misdemeanor battery – the charge was dismissed.

## **II. Mr. Gann is a low recidivism risk.**

### **A. A psychological evaluation demonstrates Mr. Gann does not fit the profile of someone likely to recidivate.**

Mr. Gann entered a guilty plea to distributing child pornography.<sup>46</sup> The government will certainly argue to the Court that he is a danger to the community due to his alleged sexual deviancy. But there is strong evidence that is not true.

He was exposed to the sexual activity as a child. As mentioned, his mother worked as a prostitute when he was young, and he was propositioned for sex by strangers his mother brought to the house. He was exposed to pornography by his parents when he was about 12 years old.<sup>47</sup> When they were together, his parents were

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<sup>44</sup> *Id.* at ¶ 56.

<sup>45</sup> *Id.* at ¶ 63.

<sup>46</sup> 18 U.S.C. § 2252a(a)(2).

<sup>47</sup> Def. Ex. 100 at 4.



“swingers” who filmed sexual acts in his presence and the presence of other children.<sup>48</sup> As an adult, he had no physical intimacy with his partner, Ms. Snowden, for several years.<sup>49</sup>

In addition to his clinical interview, Dr. Trevor Patton also performed and completed several tests with Mr. Gann. His conclusory assessment was that Mr. Gann is not an offender who has a sexual attraction to children.<sup>50</sup> Rather, he presents with persistent dysthymia, or “daily depression.” He is socially withdrawn, with limited emotional sophistication, and limited coping skills. Mr. Gann self-identified his two largest problems as “sex life” and “low self-confidence.”<sup>51</sup> He has “mistrust of others” and “low self-worth.”<sup>52</sup> Dr. Patton opined, “[t]he combined effects of his long-standing pattern of abuse, loneliness, deteriorating relationships, and his deep insecurities all seem to converge to perpetuate an ever-present and increasing frustration in a repetitive cycle.”<sup>53</sup> He found that “Mr. Gann withdrew into a fantasy world to provide comfort and relief from his daily existence.”<sup>54</sup>

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<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.*; *see also* Def. Ex. 101 at 1.

<sup>50</sup> *Id.* at 8.

<sup>51</sup> *Id.* at 7.

<sup>52</sup> *Id.* at 8.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Dr. Patton's findings are consistent with the other evidence in this case. Mr. Gann's childhood and family life, confirmed by his father and Ms. Snowden, show how and why he presented to Dr. Patton as dysthymic. But depression and finding a "fantasy world" for escape do not equate to a risk to reoffend.

The Supreme Court recognizes that the likelihood that the defendant "will engage in future criminal conduct [is] a central factor that district courts must assess when imposing sentence."<sup>55</sup> Mr. Gann presents little risk of recidivism.

The U.S. Sentencing Commission engaged in a recidivism study that found that the "sexual recidivism rate" for all sexual offenders was 7.4%; of those, the incidence of contact offense recidivism for non-production offenders was only 3.6%, with another 2.3% of such offenders arrested for or convicted of a subsequent child pornography offense.<sup>56</sup>

There is no crystal ball in criminal law when it comes to recidivism. However, for someone with no the experience of going through the criminal justice system and spending his first time in prison, it will no doubt be a sobering experience. More important, he has not had any counseling or treatment in his past to deal with these issues, and the U.S. Sentencing Commission agrees that, "child pornography offenders with clinical sexual disorders may respond favorably to psycho-sexual

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<sup>55</sup> *Pepper v. United States*, 131 S.Ct. 1229, 1242 (2011).

<sup>56</sup> United States Sentencing Comm'n *2012 Report to the Congress: Federal Child Pornography Offenses* (December 2012) ("USSC Report") at 300, available at <https://www.ussc.gov/research/congressional-reports/2012-report-congress-federal-child-pornography-offenses>.

treatment.”<sup>57</sup> Mr. Gann has also never been prescribed medication to deal with depression. Dr. Patton’s evaluation and empirical data should provide the Court with confidence that Mr. Gann presents a low risk of recidivism.

**B. His age makes him a low risk to reoffend.**

Mr. Gann is 49 years old. With a sentence of 105 months, he would be in his mid-50s by the time he is released to supervision. He has no prior felony convictions.

In December 2017, the U.S. Sentencing Commission published a study that looked at the effects of aging on recidivism.<sup>58</sup> It concluded that age and criminal history make a significant difference concerning the risk a person poses to reoffend when they are released from prison.<sup>59</sup>

The study looked at the cases of 25,431 offenders.<sup>60</sup> It concluded that, “older offenders were substantially less likely than younger offenders to recidivate following release.”<sup>61</sup> For offenders in criminal history category I, like Mr. Gann, “the rearrest rate ranged from 53.0 percent for offenders younger than 30 at the time of release to 11.3 percent for offenders age 60 or older.”<sup>62</sup>

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<sup>57</sup> USSC Report at xiv.

<sup>58</sup> U.S. Sentencing Comm’n, *The Effects of Aging on Recidivism Among Federal Offenders* (Dec. 2017) available at <https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders> (last visited Oct. 26, 2018).

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.* at 2.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.*

Finally, for older persons who do reoffend upon release, the severity of their crimes are less serious. The study found that older offenders who do recidivate do so less frequency and “had less serious recidivism offenses on average.”<sup>63</sup>

**III. A below guideline sentence is warranted because the guidelines do not provide the Court with a meaningful baseline to determine an appropriate sentence.**

The sentencing guidelines relating to child pornography do not provide the Court with any true guidance to determine the appropriate sentence.<sup>64</sup> Indeed, the Sentencing Commission itself agrees with this point. After full study, the Commission issued a report in 2012 that concluded “the current sentencing scheme in § 2G2.2 places a disproportionate emphasis on outdated measures of culpability regarding offenders’ collecting behavior and insufficient emphasis on offenders’ community involvement and sexual dangerousness.”<sup>65</sup> Put differently, “the current non-production guideline warrants revision in view of its outdated and disproportionate enhancements related to offenders’ collecting behavior as well as its failure to account fully for some offenders’ involvement in child pornography communities and sexually dangerous behavior.”<sup>66</sup>

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<sup>63</sup> *Id.* at 30.

<sup>64</sup> *See, e.g., United States v. Dorvee*, 616 F.3d 174, 187 (2d Cir. 2010) (“By concentrating all offenders at or near the statutory maximum, § 2G2.2 eviscerates the fundamental statutory requirement in § 3553(a) that district courts consider ‘the nature and circumstances of the offense and the history and characteristics of the defendant’ and violates the principle, reinforced in *Gall*, that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct.”).

<sup>65</sup> USSC Report at xviii.

<sup>66</sup> *Id.* at xxi.

The § 2G2.2 guidelines are not based on empirical data.<sup>67</sup> In 2012, the Commission asked Congress to enact legislation to provide it with “express authority to amend the current guideline provisions.”<sup>68</sup> But the Commission has still not received that authority to overhaul the guidelines. That is why the Courts “are left without a meaningful baseline from which they can apply sentencing principles.”<sup>69</sup> Even the Department of Justice “has joined in the call for a critical review of the existing sentencing guidelines for non-production child pornography crimes.”<sup>70</sup>

As the prosecutor in this case conceded during the change of plea hearing, the 10-30% below guideline sentencing recommendations in the plea agreement reflect the parties’ non-controversial positions that a guideline sentence for these crimes is not appropriate.

This Court has authority to grant a variance based on a categorical disagreement with the applicable guideline.<sup>71</sup> Because Mr. Gann’s offense involved a

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<sup>67</sup> *Id.* at iii.

<sup>68</sup> *Id.* at xviii.

<sup>69</sup> *United States v. Stern*, 590 F. Supp. 2d 945, 961 (N.D. Ohio 2008).

<sup>70</sup> Def. Ex. 106 at 1. For example, the Department of Justice recognized that “because the vast majority of child pornography offenses now involve the use of a computer, this SOC should be eliminated and replaced with others ... .” *Id.* at 4.

<sup>71</sup> *United States v. Lopez-Macias*, 661 F.3d 485, 489-90 (10th Cir. 2011).

computer<sup>72</sup> and his relevant conduct had certain types<sup>73</sup> and volume<sup>74</sup> of images, he is subject to several enhancements that apply to virtually every offender of these types of crimes.<sup>75</sup> These enhancements “were promulgated in an earlier technological era” and thus “fail to differentiate among offenders in terms of their culpability.”<sup>76</sup>

We ask this Court to recognize the shortcomings of § 2G2.2 and vary from the sentencing range the guidelines produce for this case.<sup>77</sup>

#### IV. Supervised Release

Mr. Gann asks the Court to consider a five-year term of supervised release.<sup>78</sup> There are measures, short of a lengthy prison sentence, that can accomplish the goals of sentencing.<sup>79</sup>

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<sup>72</sup> PSR at ¶ 44.

<sup>73</sup> PSR at ¶¶ 41, 43.

<sup>74</sup> PSR at ¶ 45.

<sup>75</sup> USSC Report at iii (“four of the six sentencing enhancements in §2G2.2 – those relating to computer usage and the type of volume of images possessed by offenders, which together account for 13 levels – now apply to most offenders.”)

<sup>76</sup> *Id.*

<sup>77</sup> *United States v. Nghiem*, 432 Fed. Appx. 753, 757 (10th Cir. 2011) (“To be sure, district courts that disagree with § 2G2.2 may vary from the guidelines to adjust for what they perceive as its shortcomings.”).

<sup>78</sup> 18 U.S.C. 3583(k); USSG § 5D1.2(b)(1).

<sup>79</sup> 18 U.S.C. § 3553(a); *Tapia v. United States*, 564 U.S. 319, 325 (2011) (“These four considerations—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally ...”).

The government's own investigation demonstrates that Mr. Gann can be trusted on supervision. He was stopped by law enforcement on December 9, 2016, and he admitted to his conduct and consented to have his property seized.<sup>80</sup> Four days later, he went to the Kansas Bureau of Investigation office to submit a polygraph and further questioning, where he again was candid about his conduct.<sup>81</sup> He was never arrested and returned home. It was not until April 25, 2018 – 501 days after he confessed to the crimes and consented a seizure of his property – until he was charged. Had he been perceived as a threat to public safety, either the government would have tried to detain him, or would have moved more quickly on the indictment.

The PSR recommends a number of special conditions of supervised release to which Mr. Gann has not lodged an objection.<sup>82</sup> They include: no unsupervised contact with children (preserving an objection to make an exception for his own children); computer and internet monitoring; mental health treatment; submit to search of his person and property at all times; and undergo a psychosexual and/or mental health evaluation and comply with the recommended treatment program. Mr. Gann will also have to register as a sex offender when he is released.<sup>83</sup>

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<sup>80</sup> PSR at ¶ 16.

<sup>81</sup> *Id.* at ¶¶ 24-28.

<sup>82</sup> *Id.* at ¶¶ 124-128.

<sup>83</sup> PSR at ¶ 123.

The Court can have confidence that when Mr. Gann reenters the community, he will do so with both the judicial supervision and resources to succeed.<sup>84</sup> He is capable of succeeding on supervision and being a positive and productive member of his community.

## V. Conclusion

The Court must determine the sentence that is “sufficient, but not greater than necessary” to accomplish the purposes of sentencing set forth by Congress.<sup>85</sup> Mr. Gann presents a compelling case for a lesser sentence. We ask this Court to impose a below guideline sentence of 105 months imprisonment and for 5 years of supervised release.

Respectfully submitted,

s/ Rich Federico  
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<sup>84</sup> *Johnson v. United States*, 529 U.S. 694, 708–09 (2000) (“The congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from the prison to liberty.”).

<sup>85</sup> 18 U.S.C. §3553(a).



**CERTIFICATE OF SERVICE**

I hereby certify that on October 30, 2018, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to all interested parties.

s/ Rich Federico  
Rich Federico, #22111