IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**Criminal Action**
	)	
v.	)	**Case No.18-10041-01-JWB**
	)	
CHARLES A. GANN,	)	
Defendant.	)	
	)	

UNITED STATES' SENTENCING MEMORANDUM

The United States requests this Court impose a sentence of 189 months, which is 10% less than the bottom-end of the 210-240 month guideline range reflected in the Presentence Investigation Report, followed by 10 years supervised release. In light of specific features relating to this defendant's offense conduct, history, and characteristics, that sentence reflects the dangerousness posed by the defendant, the seriousness of his conduct, and is otherwise sufficient but not greater than necessary to achieve the goals of 18 U.S.C. 3553.

I. Features specific to defendant that favor a sentence of 189 months

There are several features that place this defendant outside the typical realm of offenders. Most alarming, this defendant has cultivated relationships with other like-minded offenders.[1] This is reflected in his admissions that reveal the defendant actively seeking other individuals who desire sex with children. See PSR ¶16, 25, 26, and 28. Those admissions of engagement (which

[1] This feature of the defendant's conduct (involving himself in a community of offenders) has been identified as an aggravating factor by the United States Sentencing Commission in its 2012 Report to Congress. However, this feature does not appear as a guideline adjustment. The Court should consider this feature of the defendant's conduct pursuant to 18 U.S.C. §3553.

were post-polygraph) show the defendant agreeing to have sex with multiple children – while he disclaims his interest in the children, his collection demonstrates he actually has an interest in sex with children. While the defendant disclaims himself as a mere passive participant to these encounters, this Court need not accept the defendant's role in the encounters. It remains that the defendant affirmatively sought out individuals who, like himself, desired to sexually abuse children.

Equally alarming is the defendant's "first in line" status to child pornography production. As the defendant described (post-polygraph), in terms of "sexual photos," he received images of one woman's daughter in the course of his communication with that woman. PSR ¶25. According to the defendant (post-polygraph), another woman asked him to sexually torture and kill her 11 year old daughter. PSR ¶26. The remarkable thing about these disclosures is that they only came after the polygraph – meaning, the defendant was trying to remediate his responses, not help the children. Indeed, despite his protestations, his derogatory interest in the children seems plainly apparent from his deviant activities.

Along those lines, in his initial (pre-polygraph) interview with investigators, the defendant disclaimed having sex with minors. However, post-polygraph, the defendant changed his story to say he engaged in sex acts with two teens whom he "later found out they were 16 and 17 years old." PSR ¶25. Whether this is accurate or not, it remains that the defendant's response was in direct relation to the question about participating in sex acts with an underage person. The defendant was deceptive initially, and may or may not be telling the truth as to sex with a 16 and 17 year old.

It should also be noted the defendant also patronized prostitutes[2] while on his truck route. PSR ¶24. That conduct does not weigh in the defendant's favor, as it reveals the defendant's involvement in other criminal and exploitative sexual activity. Put simply, the defendant lacks significant sexual inhibitors that the rest of the population recognizes and deploys, making him a greater risk to whatever community with which he may come in contact.

Similarly, by his own admission, the defendant's favorite type of pornography is "bondage," that is, the sexual humiliation and torture of another for sexual pleasure. PSR ¶16. Lest the defendant claim that this only pertains to adults, this Court should note his communication with at least one other offender involved torture of a child, and his collection of child sexual exploitation media revealed similar content.

Regarding his technological profile, the defendant used multiple mediums to access, obtain, and distribute depictions of child rape, bondage, and sexual exploitation. Aside from using the BitTorrent file-sharing network), the defendant also used dating websites to meet people offering children for sex. PSR ¶16, 26. After meeting like-minded offenders, the defendant admitted he would engage them via instant messaging, which included sending depictions of child sexual exploitation. PSR ¶26, 28. The defendant also used email to send depictions of child sexual exploitation to his cohorts. PSR ¶30, 31. While "use of computer" is a guideline adjustment, the guidelines do not take into account the types, or variability, of the types of programs or mediums used by an offender. In this case, the defendant employed multiple vectors of access, revealing him to be more aggressive in his pursuit of his criminal activity.

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[2] These may have been "trafficked persons."

It should also be noted that this defendant was observed by his girlfriend to be looking at children. PSR ¶15. The defendant's response was not to stop, but to password-protect his activity. Likewise, though ordered by the court to desist from accessing sexual media, the defendant was found in possession of a new phone which contained precisely that. PSR ¶12. Even while on bond, the defendant cannot control himself.

For his part, the defendant diverts the Court from paying attention to his criminal conduct. Instead, the defendant claims he should receive a reduction because he was abused as a child, he's a father, and he's employable. The latter two are unremarkable for child pornography offenders, while the former does not serve to explain nor mitigate his conduct of exploiting children. The defense also relies on Dr. Patton's report, which suggests the defendant does not have a "sexual attraction to children." That seems to miss the parts where the defendant "reported he has become sexually aroused by watching underage persons involved in sex acts," albeit with a self-reported cut-off of 10 years old. PSR ¶ 25. Dr. Patton also appears to minimize the fact that the defendant collected child pornography over a period of years and sought out other offenders for discussions about torturing and sexually exploiting children. These features do not counsel for a reduction to 105 months, as requested by the defendant.

II. Discussion of the 2G2.2 Guideline

The 2G2.2 Guideline is the starting point for sentencing. The Guidelines were primarily designed to aid the courts in avoiding unwarranted sentencing disparities. "[T]he purpose of the Guidelines is to eliminate unwarranted disparities in sentencing nationwide, not to eliminate disparity between co-defendants." *United States v. Gallegos*, 129 F.3d 1140, 1143 (10th Cir.1997); *see also United States v. Smith*, 540 F. App'x 854, 860 (10th Cir. 2013). Put more simply, to

enhance the courts' credibility within civil society, the sentences imposed by judges should reflect more about a given defendant's offense conduct and history rather than a given judge's political or personal interest. For this reason, the Guidelines (generally) attempt to place defendants with similar offense conduct and backgrounds in similar positions.

For the last several years (since 2010), the 2G2.2 guideline has been under attack. The United States does not concede, as the defendant suggests, that the 2G2.2 guideline is not appropriate, but merely concedes the point that disparity in child pornography sentencing exists. Indeed, the United States contends that such disparity arises from a cadre of judges that sentence defendants at or near the bottom of the statutory ranges - this Court need look no further than the historical outcomes within the Wichita courthouse. Against this backdrop, the United States seeks a sentence that avoids that disparity while reflecting the seriousness of the defendant's conduct and his apparent dangerousness.

This Court may find some historical context useful in considering the origins of the arguments presently before it.

A. The Stabenow Opinion piece

On June 10, 2008, Troy Stabenow, an Assistant Federal Public Defender from the Western District of Missouri, posted *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, on the Office of Defender Services website. Essentially, Stabenow opined that §2G2.2 was based on emotional fears rather than "empirical study,"[3] and thus resulted in every offender receiving the statutory maximum sentence. Central to his thesis was the notion that child pornography offenders are not as dangerous as Congress thinks.

[3] Since Stabenow's opinion piece, a considerable amount of "empirical study" has been done (discussed herein) to show that Stabenow's opinion piece was misguided.

Shortly thereafter, a district court in Wisconsin picked up the opinion piece, lifting whole sections in support of a variance. *See United States v. Hanson*, 561 F. Supp. 2d 1004, 1005 (E.D. Wis. 2008).[4] Very quickly, additional courts used the opinion piece to support their "policy disagreements" with the §2G2.2 guideline.[5] Other courts, however, have since scrutinized the Stabenow opinion piece, and found it failing in many respects.

For example, one court, recognizing that there is no dispute that certain enhancements apply in nearly every child pornography case, still rejected the *a priori* assertion that "frequency of application" equates to "lack of utility." *See United States v. Cunningham*, 680 F.Supp.2d 844, 851–853 (N.D. Ohio 2010). Indeed, the Court observed that "the frequency of the enhancements was expressly acknowledged by the Commission when it set the base offense levels for these offenses." *Id*. at 851-852. Moreover, the court expressly rejected the "frequency of application" as a negation of the §2G2.2 guideline by noting that an opposite conclusion should be drawn instead: "[T]he fact that more than fifty percent of offenders have over 300 images and that over sixty-percent have sadistic and masochistic images supports a conclusion that even more harsh sentences are required for deterrence." *Id*. At 852-853. The court handily exposed another central flaw in the Stabenow argument:

> The assertion that sentences should be reduced because it is easy to accumulate a large number of pictures quickly also rings hollow. The Court does not dispute that it is very likely that a defendant could acquire more than 600 images with just a few mouse clicks and several emails. But that number of images is not collected by accident. Instead, those images are sought out by a troubled mind, from like-minded individuals. Thus, a defendant makes a cognitive choice to seek out that level of

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[4] Interestingly, Hanson engaged in conduct that the United States Sentencing Commission has since determined should be considered as aggravating (discussed below), such as active communication with other offenders.

[5] *See United States v. Grober*, 595 F. Supp. 2d 382, 394 (D.N.J. 2008) aff'd, 624 F.3d 592 (3d Cir. 2010) (listing decisions that used the research in Stabenow's post).

> images. Moreover, the Court has never before seen an argument that because a crime is easy to commit, it should be punished less severely. Robbery is certainly simplified from the criminal's perspective by the use of a firearm and the choice of a feeble, elderly victim. The Guidelines, however, do not lessen punishment because the crime was easier to commit. In fact, seeking out a vulnerable victim leads to a 2–level enhancement under the Guidelines. U.S.S.G. § 3A1.1(b)(1). This Court, therefore, will not alter its sentence simply because accessing and growing a database of child pornography has become easier as technology has advanced.

Id. at 851-853. *See also* U*nited States v. Johnson*, 765 F. Supp. 2d 779, 782 (E.D. Tex. 2010) ("Gratuitous attacks on the Guidelines or Congress by a defendant for 'policy reasons' add nothing to the analysis of a particular case, or to the law in general. Claiming that there is a disparity between the Guidelines sentence for a first-time offender who has visually raped numerous children and one who has possessed illegal drugs ignores congressional intent to 'avoid unwarranted sentence disparities among defendants ... guilty of similar conduct.'").

After opinions as above, reference to the Stabenow opinion piece has been largely replaced by citations to *United States v. Dorvee*, 616 F.3d 174 (2d. Cir. 2010), and the United States Sentencing Commission's 2012 "Report to Congress: Federal Child Pornography Offenses" (hereinafter, The Report).[6] The argument remains largely the same: the §2G2.2 guideline should be abandoned because it was not developed like other guidelines, and §2G2.2 fails to meaningfully distinguish between dissimilar offenders with every offender receiving a sentence that is too harsh. However, that argument fails to take into account more recent research and essentially advocates for no guideline at all.

B. Dorvee

For his part, the defense points to the Second Circuit's opinion in *Dorvee* for the

[6]The Report is available online at: http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses

proposition that the 2G2.2 guideline does not provide this Court with "any true guidance." *See* Doc. 35, p. 12, FN 64. Other circuits had addressed, and rejected, the same argument. *See, e.g., United States v. Wayerski*, 624 F.3d 1342, 1354–55 (11th Cir.2010); *United States v. Pugh*, 515 F.3d 1179, 1201 n. 15 (11th Cir.2008). While the Second Circuit did discuss the §2G2.2 guideline, its primary reason for reversal was because the district court committed procedural error by improperly calculating the guideline. *Dorvee*, 616 F.3d at 181 ("[T]he district court plainly erred in its Guidelines calculation: the Guidelines sentence was not 262 to 327 months, it was the statutory maximum."). The Second Circuit went on to conduct a gratuitous analysis of §2G2.2, because "we have found and identify here certain serious flaws in U.S.S.G. § 2G2.2—issues which are squarely presented on *this* appeal and which must be dealt with by the district court at resentencing." *Id*. at 182. The *Dorvee* court took exception to the district court's assumption that its sentence would likely be upheld:

> "Finally, we are also troubled that the district court seems to have considered it a foregone conclusion that the statutory maximum sentence 'probably [would] be upheld' on appeal, apparently because it concluded that its sentence was 'relatively far below' the initial Guidelines calculation of 262 to 327 months."

Id. It was at this point in the decision that the Second Circuit took the district court to task for its hubris.

As above, the *Dorvee* court cited to the Stabenow opinion piece in support of its analysis. *Id*. at 185. The Second Circuit opined, without citation to any source, that "[t]he §2G2.2 sentencing enhancements cobbled together through this process routinely result in Guidelines projections near or exceeding the statutory maximum, even in run-of-the-mill cases." *Id*. at 186. Contrary to this claim by the *Dorvee* court, this Court's (albeit limited) experience and the catalogue of cases presented later in this brief show that run-of-the-mill distribution cases typically end up in the

middle of the statutory maximum (between 121 and 188 months), and the very few possession cases have failed to achieve the statutory maximum.[7] Simply put, empirical facts and rational analysis do not bear out Stabenow nor the criticisms levied in *Dorvee*. Those facts should counsel this Court from relying on the Stabenow/*Dorvee* analysis.

It should be noted, the Tenth Circuit has not adopted the Second Circuit's position, even though they have repeatedly given the opportunity over seven years. *See United States v. Nghiem*, 432 Fed. Appx. 753 (10th Cir. 2011); *United States v. Grigsby*, 749 F.3d 908, 911 (10th Cir. 2014) ("But neither *Dorvee* nor the Commission Report stand for the proposition that *any* application of § 2G2.2 will yield an unreasonable sentence."). Aside from the Tenth Circuit's obvious reticence, two other circuits have expressly disagreed with the *Dorvee* analysis. In *United States v. Miller*, 665 F.3d 114, 120 (5th Cir. 2011), the Fifth Circuit responded to the *Dorvee* argument in the following way:

> "With great respect, we do not agree with our sister court's reasoning. Our circuit has not followed the course that the Second Circuit has charted with respect to sentencing Guidelines that are not based on empirical data. Empirically based or not, the Guidelines remain the Guidelines. It is for the Commission to alter or amend them. The Supreme Court made clear in *Kimbrough v. United States* that '[a] district judge must include the Guidelines range in the array of factors warranting consideration,' even if the Commission did not use an empirical approach in developing sentences for the particular offense. Accordingly, we will not reject a Guidelines provision as 'unreasonable' or 'irrational' simply because it is not based on empirical data and even if it leads to some disparities in sentencing."

United States v. Miller, 665 F.3d 114, 120–21 (5th Cir. 2011) (internal citations omitted). Likewise,

[7] For example, in *United States v. Gates*, 11-CR-10011-MLB, the conviction for possession resulted in a guideline of only 51-63 months. In *United States v. Mitchell*, 11-CR-10157-JTM, and *United States v. Cheatum*, 11-CR-10122-MLB, and *United States v. Alter*, 11-CR-10225-MLB, each of those convictions for possession resulted in a guideline of only 78-97 months. In *United States v. Roach*, 11-10086-MLB, the conviction for possession yielded a guideline of 108-120 months, but that was because the defendant proceeded to jury trial. Had he accepted responsibility, his guideline would have been 78-97 months. These are real applications of the 2G2.2 guideline, not the hyberbole spouted by Stabenow.

the Eleventh Circuit rejected the *Dorvee* argument, observing:

> "We have previously rejected the argument that U.S.S.G. § 2G2.2 is inherently flawed. *United States v. Wayerski*, 624 F.3d 1342, 1354–55 (11th Cir.2010); *United States v. Pugh*, 515 F.3d 1179, 1201 n. 15 (11th Cir.2008). Scott's reliance on a Second Circuit case criticizing § 2G2.2, *United States v. Dorvee*, 616 F.3d 174 (2d Cir.2010), is therefore misplaced."

United States v. Scott, 476 F. App'x 845, 846 (11th Cir. 2012). If the Court looks to *Dorvee* as a favorable circuit-opinion, the Court would be wise to look unto *Miller* and *Scott* for the circuit counter-point. *See also United States v. Crisman*, 39 F.Supp.3d 1189 (D.N.M. 2014) (discussing the 2G2.2 guideline and rejecting the *Dorvee* arguments).

C. The 2012 Report

To be certain, the 2012 Report does not counsel that courts abandon the §2G2.2 guideline in its entirety, or even to disregard certain SOCs within in the guideline. Nor does the Report identify so-called "empirical defects" within the guideline. The Report does confirm, however, that there is widespread and growing sentencing disparity in §2G2.2 cases. *See The Report*, Chapter 12, p. 317. Indeed, one need look no further than to the courtrooms within the Wichita courthouse to find significant differences (disparity) in historical child pornography sentencing outcomes (see catalogue of cases, below).

The Report observed that "no offender or offense characteristics (e.g., an offender's military service record, history of CSDB, or distribution of child pornography) appeared to account for these practices in most cases." *Id*. at 318. Put another way, **district courts have failed to explain why they vary downward and what factors distinguished one offender from another**, leaving the USSC to simply guess at ways to improve the guideline. Even so, the Report recommended the following amendments to §2G2.2:

The Commission believes that the following three categories of offender behavior

encompass the primary factors that should be considered in imposing sentences in §2G2.2 cases:

1) the content of an offender's child pornography collection and the nature of an offender's collecting behavior (in terms of volume, the types of sexual conduct depicted in the images, the ages of the victims depicted, and the extent to which an offender has organized, maintained, and protected his collection over time, including through the use of sophisticated technology);

2) the degree of an offender's engagement with other offenders — in particular, in an Internet "community" devoted to child pornography and child sexual exploitation; and

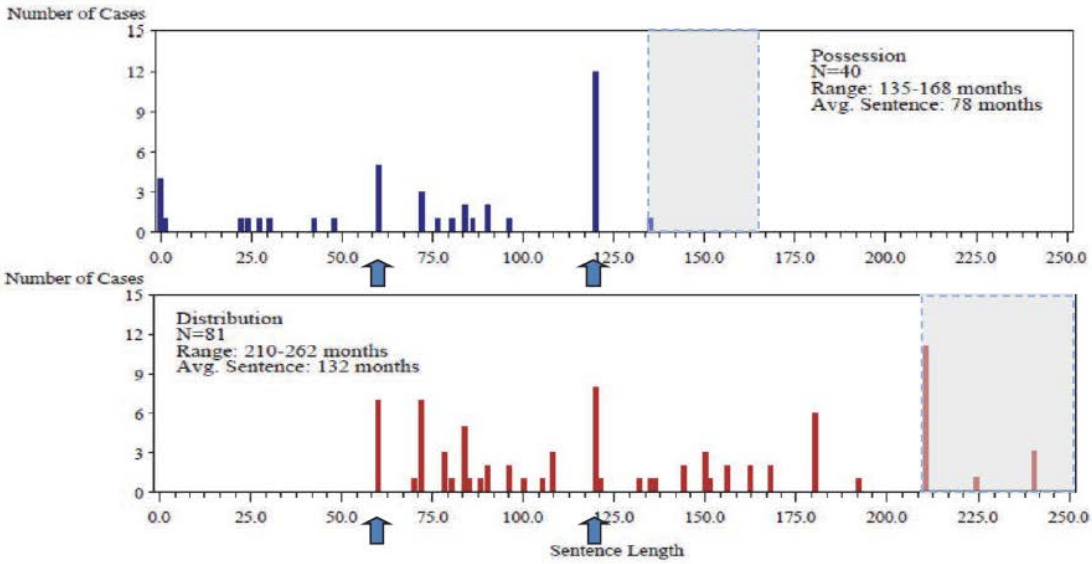
3) whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense.

Id. at 320. To be clear, the Commission still found value in many of the current SOCs (the primary point of the defendant's critique), as reflected in the first category. The Commission observed "the current scheme places insufficient emphases on other relevant aspects of collecting behavior as well as on offenders' involvement in child pornography communities and their sexual dangerousness." Id. at 321. The Commission specifically referenced the current SOC for number of images as outdated, but still maintained the volume of images was an important factor (and, as one can see, listed volume in the first category above). Importantly, the Commission observed "[a]t the same time, [the guideline] results in *unduly lenient* ranges for other offenders who engaged in aggravated collecting behaviors not currently addressed in the guideline, who were involved in child pornography communities…" *Id*. Put another way, the Commission observed that **district courts fail to adequately account for aggravating factors**. Thus, to the extent that the Report addresses limitations of the §2G2.2 guideline, it also speaks to the district courts' failures to adequately identify and consider aggravating conduct that are not captured in the guideline and to specifically note the same on the Statement of Reasons.

In this case, the defendant epitomizes the Report's first proposed amendment – among other things, he used multiple technological avenues for his offending. The defendant also nails the second proposed amendment: he is an offender that engaged with other offenders. Moreover, it was not simply engagement, but discussing of torture and killing of a child. To a lesser degree, the defendant also rings the bell for predatory conduct in the third proposed amendment, by virtue of his paying-for-sex and first-in-line-for-production behaviors. The fact that the defendant hits any one of these factors (that the Commission has identified as salient and aggravating) would suggest that the defendant would achieve a higher, rather than lower, guideline range even under a reconstructed guideline.

It should also be noted, the defendant's requested sentence of 105 months conflicts with the average outcome reported in the 2012 Report:

Figure 8-7
Variation of Sentence Length for Case Type Three Offenders
Convicted of Possession and Distribution Offenses



As Figure 8-7 from the 2012 Report indicates, the average sentence for offenders in the defendant's guideline range was 132 months, well above the 105 requested by the defense. That average is pulled down by the number of cases (a mere 7 or 8) where the district court imposed the mandatory

minimum sentence of 60 months. It is difficult to conceive how an individual that distributes child pornography (much less one that distributes for the reasons achieving the 5 point or greater SOCs) can justly receive a minimum sentence. However, the number is what it is, and the average of 132 shows the defense requests a reduction that actually promotes sentencing disparity.

D. Investigative strategies based on limited resources

To the extent the defense suggests that certain SOCs are inherent to the crime and appear in every case, the defense misses the mark. SOCs are not inherent to the crime, but instead track more closely to *investigative strategies*. Given the limitations or resources (stretched ever thinner by the increasingly routine appearance of exceedingly large computer storage for analysis), investigations have tended to focus on certain types of offenders, i.e., the worst of the worst.[8] The reason for that focus is simple: it tends to reveal the most dangerous offenders, allowing law enforcement to interrupt or prevent the ongoing abuse of children. In this case, the investigative strategy targeted a user of BitTorrent, a file-sharing network that allows users to transfer large amounts of images and videos in batches. The investigation struck an offender who was using file-sharing who was also engaged with other offenders, discussing sexual torture of children, who was receiving purported "production" depictions of children from other users.

E. The Guideline is higher because we better understand the danger of these sex offenders

While it is absolutely true that the § 2G2.2 guideline is higher than it was in the 1990s, that proposition should come as little surprise. Both Congress and the courts have access to more and

[8] To highlight the limitations of these resources, consider that in 2017, child pornography cases accounted for **only 2.7% of all federal offenders**, compared to 30.5% Immigration, 30.8% Drugs, 12.1% Firearms, and 9% Fraud. See United States Sentencing Commission, 2017 Datafile, Figure A. Available here: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/FigureA.pdf

better information about child pornography offenders. In fact, research published in the *Journal of Sexual Aggression* demonstrates that Congress's so-called "meddling" in §2G2.2 was justified:

> Crimes involving the possession, distribution, or manufacture of child pornography constitute violations of specific laws pertaining to the receipt and transmission of child abuse/exploitation images, and as a result *there is a tendency for some individuals to assume these offenders are somehow distinct from child molesters* (i.e., 'hands-on' abusers). This assumption, in fact, is a key reason why recent years have seen an increase in judicial sentences that fall below sentencing guidelines (United States Sentencing Commission, 2012), a trend that may be attributable to an impression that the rate of 'crossover' between child pornography collection and hands-on abuse is low (Eke & Seto, 2011; Endrass et al., 2009; Seto, Hanson, & Babchishin, 2011).
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> *The logic of this conceptual view is somewhat befuddling. It ignores the observation that individuals who molest children and those who download and masturbate to child pornographic images share a primary motivational pathway* - both are sexually aroused by minors (Seto et al., 2006). It therefore should come as no surprise that offenders whose sexual fantasies and urges involve children are able to derive pleasure and gratify their deviant impulses through a variety of means, and it suggests that significant 'crossover' may exist between these crimes.
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> Although some research (Elliott, Beech, Mandeville-Norden, & Hayes, 2009; Howitt & Sheldon, 2007; Webb, Craissati, & Keen, 2007) has shown differences between groups of 'online' and 'offline' offenders, most is limited by an important assumption; that is, an individual is a hands-off offender simply because official records do not reflect contact sexual offending. This assumption appears unwise, given the base rates for detecting sexual abuse are extraordinarily low, the finding that most victims of abuse never report their victimization to law enforcement, and the low percentage of arrests leading to convictions (Centres for Disease Control and Prevention, 2010; National Centre for Policy Analysis, 1999; US Department of Justice, 2010, 2012). *Researchers should never assume an offender has not committed a hands-on crime merely because his or her criminal record does not reflect such a charge or conviction.*

M.L. Bourke, et. al., "The use of tactical polygraph with sex offenders," *Journal of Sexual Aggression* (2014), p. 5-6 (emphasis added). This study goes on to describe its own processes as

well as results. The study was comprised of 127 persons under investigation for the possession, receipt, or distribution of child pornography who agreed to take a polygraph examination regarding their hands-on activity. *Id*. at 8. These individuals had no known history of hands-on offending. *Id*. Six individuals (4.7%) admitted to sexually abusing at least one child *prior* to the polygraph. *Id*. However, during the polygraph procedures, an additional 67 individuals (52.8%) of the study sample provided disclosures about hands-on abuse they had perpetrated. That means a total of 57.7% of the sample admitted to *previously undetected hands-on sexual offenses*. *Id*. For children (and judges), that percentage gives worse odds than a coin-toss. Even more shocking is the total number of hands-on victims for these 73 individuals: 282 children, **nearly four per offender**. *Id*. at 9, Table I. To reiterate, those results are from persons under investigation for possession, receipt, or distribution of child pornography.

This study is important because it supports the results of prior studies, i.e., that child pornographers have high rates (as high as 85%) of previously unreported sexual offenses against children. *See* Michael L. Bourke & Andres E. Hernandez, "The 'Butner Study' Redux: A Report on the Incidence of Hands-On Child Victimization by Child Pornography Offenders," 24 *Journal of Family Violence* 183 (2009) (study of 155 federal child pornography offenders in the United States who participated in the residential sex offender treatment program at FCI Butner from 2002–05; finding that official records, including the offenders' presentence reports in their child pornography cases, revealed that 26% had previously committed a contact sex offense, yet finding that "self reports" of the offenders in therapy revealed that *85% had committed prior "hands on" sex offenses*)(emphasis added); *see also* The Report, Ch. 7, p. 173 ("The six self-report studies taken together reported a rate of *55 percent*."). This should come as little surprise, as other studies that relied solely upon prior *official* reports (arrests or convictions) showed a 20-28% association

between child pornography offenses and contact sex offenses. *See* Janis Wolak et al., "Child Pornography Possessors: Trends in Offender and Case Characteristics," 23 *Sexual Abuse: A Journal of Research & Treatment* 22, 33–34 (2011) (finding, based on 2006 data from surveys of approximately 5,000 law enforcement officials throughout the United States, that 21% of cases that began with investigations of child pornography possession "detected offenders who had either committed concurrent sexual abuse [offenses] or been arrested in the past for such crimes"); Richard Wollert et al., "Federal Internet Child Pornography Offenders — Limited Offense Histories and Low Recidivism Rates," in *The Sex Offender: Current Trends in Policy & Treatment Practice* Vol. VII (Barbara K. Schwartz ed., 2011) (based on a study of 72 federal child pornography offenders in the United States who were treated by the authors during the past decade, the authors found that 20, or 28%, had prior convictions for a contact or non-contact sexual offense, including a prior child pornography offense).

Despite these peer-reviewed studies that support lengthy sentences, some (not all) courts continue to view these offenders as simple voyeurs of relatively low risk, cowing to the hyperbolic and distinctly un-empirical criticisms of the § 2G2.2 guideline, using those criticisms as the sole basis for variance.[9]

The United States does not ask the Court to use the Bourke study, or any of the studies discussed, as proof of uncharged crimes. The United States does ask the Court to consider that these studies highlight the seriousness of the offense, *as well as the rightness of Congress's intervention*. These studies support the guideline, and indicate that lengthy and substantial sentences for child pornography offenders are appropriate. As the *Crisman* court observed,

[9] It should not go unnoticed that both *Dorvee* and *Grober* were decided in 2010, before most (all but one) of the above studies were published.

regarding one of the predecessors to the Bourke study:

> The Butner Study Redux has some purpose, however. When defendants come to Court and ask the Court to make some *Kimbrough v. United States* variance, and argue that the guideline range is too harsh, the Court is inclined to reject such arguments, based in part on the Butner Study Redux and other standards. *At the present time, the studies indicate a strong correlation between looking and touching in the past for many defendants, regardless whether the correlation is eighty-five percent or fifty-five percent*. This correlation is disturbing. *As long as the strong correlation remains unrefuted, there is no reason to have a substantive disagreement with the guideline range*.

United States v. Crisman, 39 F.Supp.3d 1189, 1255-1256 (D.N.M. July 22, 2014) (emphasis added). The *Crisman* court went on to observe:

> Congress, as the democratic branch, and the Commission, trying to express Congressional intent, has expressed this intuition with harsh sentences, in part to protect the public. The federal courts should be hesitant to disagree with this democratic expression by varying because of its own view of what sentences are needed to protect the public. If the Butner Study Redux turns out to be accurate, or even close to accurate, then lay people's intuition that people who engage in the socially deviant behavior of child pornography may engage in other socially deviant behavior *may be right all along*.

Id. at 1256. The *Crisman* court did not have the benefit of the 2014 Bourke study. The *Crisman* court also did not have the benefit of yet another more recent study by DeLisi, *et al*, involving federal sex offenders. *See* Matt DeLisi, et al., (2016), "The dark figure of sexual offending: new evidence from federal sex offenders," *Journal of Criminal Psychology*, Vol. 6, Iss. 1, pp. 3 – 15.

The 2016 DeLisi study revealed that non-contact sex offenders, such as those convicted of possession of child pornography, are very likely to have a history of contact sexual offending. *Id*. at 11. This study involved 119 federal sex offenders from 2010-2015, for which 69% reported a contact sex offense during polygraph examination, divulging 397 victims. *Id*. at 5, 7. Of the 119 participants, 57 had been convicted of only possession or receipt of child pornography. *Id*. at 6.

More than half of the offenders in the highest number-of-victims category (10 or more) had been convicted of possessing or receiving child pornography. *Id*. at 7, 11. The two most prolific offenders – with 22 and 24 victims – were child pornography offenders. *Id*. at 11. The study concluded that "the current analyses indicate that child pornography offenders are significantly more severe than their instant conviction offense indicates. More often than not, they are contact sexual abusers." *Id*.

These studies show that "lay people's intuition" and Congress has been right all along. These studies show that Congressional "meddling" in the §2G2.2 guideline was justified. These studies demonstrate that earlier judicial reliance upon the Stabenow mythology was unfortunately misplaced. Judicial variances downward, based solely upon a "policy disagreement" with the formulation of the §2G2.2 guideline, are unsupportable if not irresponsible. These studies demonstrate that continued entertainment of the mythology propounded by the Stabenow op-ed piece only inures benefit to a uniquely homogenous offender group (white and male), which does not promote respect for the law.[10]

On this last point, it is important to note the defendant's arguments against the §2G2.2 guideline have been co-opted from *Kimbrough v. United States*, 522 U.S. 85 (2007). In *Kimbrough*, the Supreme Court expressly contemplated the *racially disparate* treatment of African-American defendants in the "crack/powder cocaine 100/1 ratio" context. *Id*. at 98. As the Supreme Court observed, because 85% of crack offenses in federal court were African-American, there was a widely held perception that it promotes unwarranted disparity *based on race*. *Id*. The Supreme Court relied upon research showing the dangers of crack were overstated. *Id*. at 97-98.

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[10]The United States Sentencing Commission's 2017 Sourcebook of Federal Sentencing Statistics showed 79.3% of child pornography offenders are white (Table 4) and 97.7% are male (Table 5). The 2016 Sourcebook showed 79.9% were white (Table 4) and 98.3% male (Table 5). The 2015 showed 81.2% were white (Table 4) and 97.8% male (Table 5). The Sourcebooks are available online at: https://www.ussc.gov/research/sourcebook/archive

In the child pornography context, the *Kimbrough* argument has been turned on its head. Despite empirical, peer-reviewed studies showing that child pornography offenders are *more dangerous* than perceived, some district courts continue to understate that danger by varying at an unusually high rate to the benefit of an offender group that is more than 80% white and male.[11] The United States cautions this Court from viewing the defendant's arguments as having any merit or force. In light of newer research, this Court should find that the defendant's Stabenow-type arguments are simply incorrect, unjustifiable, and that further reliance upon them would seriously affects the fairness, integrity, or public reputation of judicial proceedings in a negative manner. With the benefit of more recent, empirical, peer-reviewed studies referenced above, this Court should affirmatively disapprove of the defendant's argument.

To the extent the Court wishes to consider the defendant's 2G2.2 criticism, the Court should be mindful that the intellectual irony of the defendant's position - it seeks to tether the Court's sentencing decision more closely to the §2G2.2 guideline. This is made clear when the defendant comments on the types and volume of images (a tacit reference to the 11 points added for prepubescents, sadistic/violent, and number of images). In essence, the defendant implies that if the Court recalculated the guideline *without* certain SOCs, the Court would end up at a much lower guideline... which should be his sentence. In this way, the defendant asks the Court to sentence the defendant under a judicially-reconstructed guideline. That would be procedural error.

Notably, the defendant does not identify any adjustments that the 2G2.2 guideline should be added that would more meaningfully distinguish offense conduct. Given that the defense has

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[11]The Report, Chapter 12, p. 317 (noting that, for FY 2011, "within range" sentences occurred in only 32.7% of cases under §2G2.2, meaning two-thirds received a below-range sentence.); see also United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table 28 (only 442 of 1557 (28%) of offenders with a primary §2G2.2 guideline received a "within range" sentence in FY 2015).

put its eggs in this basket, the Court should inquire of the defense what SOCs would provide meaningful distinction among offenders. It may be that the defense agrees that certain SOCs should be applied, and that they are present in this case. Making this inquiry would aid the Tenth Circuit in evaluating the resulting sentence, as well as aiding the Sentencing Commission in identifying salient SOCs. "A more detailed sentencing explanation can often prove beneficial, even if it is not mandatory, helping to reduce confusion among the parties, facilitate and expedite judicial review, and provide guidance to practitioners and other defendants, enabling them to better predict the type of sentence that will be imposed in their cases." *United States v. Wireman*, 849 F.3d 956, 965 (10th Cir. 2017) (quotations omitted).

To be clear, this Court should not rewrite the guideline, as that would be procedural error. Even if the Court disagrees with certain SOCs of the 2G2.2 guideline, or the guideline in its entirety, upon policy grounds, that does not leave the Court free to ignore the other required 18 U.S.C. 3553(a) factors discussed above.

III. CATALOGUE OF CONTESTED CASES

The following catalogue of cases show the results of contested sentencings (where the parties did not present an 11c1C plea agreement or a joint recommendation and the court was required to determine the appropriate sentence) in cases involving the 2G2.2 Child Pornography guideline, since March 2010.

United States v. David Ellis, 10-10068-JTM, Receipt and Possession
(Variance from 97-121 to 60 months);

United States v. Andy Nghiem, 10-CR-10069-MLB, Distribution
(Guideline sentence of 121 months from range of 121-151);

United States v. Donald Schmidt, 10-10102-MLB, Distribution and Possession
(Guideline sentence of 120 months from modified range of 97-121);

United States v. Armando Ramos, 10-10112-MLB, Receipt
(Guideline sentence of 87 months from modified range of 70-87);

United States v. Kenneth Wilhelm, 10-10126-MLB, Distribution
(Variance from 210-240 to 120 months);

United States v. Kevin Chapin, 10-10188-WEB, Distribution
(Variance from 151-188 to 75 months);

United States v. Gary West, 11-10012-EFM, Distribution
(Variance from 78-97 to 60 months);

United States v. Austin Ray, 11-10029-EFM, Receipt
(Variance from 151-188 to 102 months);

United States v. John Roach, 11-10086-MLB, Possession
(Variance from 108-120 to 60 months);

United States v. Kenneth Cheatum, 11-CR-10122-MLB, Possession
(Range of 78-97, sentenced to 78 months);

United States v. Matthew Alter, 11-10225-MLB, Possession
(Variance from 78-97 to 72 months);

United States v. William Dearnley, 12-10061-EFM, Distribution
(Variance from 210-240 to 160 months);

United States v. Jacob Grigsby, 12-10062-JTM, Distribution and Possession
(Variance from 121-155 to 72 months);

United States v. Brian Welch, 12-10127-JTM, Distribution and Possession
(Variance from 151-188 to 72 months);

United States v. Deric Davin, 12-CR-10141-01-EFM, Distribution
(Range of 121-151, sentenced to 121 months);

United States v Barry Thompson, 12-10227-JTM, Distribution
(Variance from 151-188 to 60 months);

United States v. Amel Loop, 13-10007-JTM, Distribution
(Variance from 210-240 to 60 months);

United States v. Justin Tatum, 13-10015-MLB, Distribution (3 counts)
(Variance from 210-240 to 180 months);

United States v. Mark Phillips, 13-10147-EFM, Receipt
(Variance from 97-121 to 87 months);

United States v. Walter Ackerman, 13-10176-EFM, Distribution and Possession
(Variance from 235-240 to 170 months);

United States v. Jaime Menchaca, 14-10012-MLB, Distribution
(Variance from 210-240 to 110 months);

United States v. Daniel Hosier, 14-10060-JTM, Distribution and Possession[12]
(Variance from 210-262 to 84 months);

United States v. Steven Meisel, 14-10106-JTM, Distribution and Possession[13]
(Variance from 210-262 to 100 months);

United States v. Alfredo Franco, 14-10205-EFM, Distribution
(Variance from 151-188 to 110 months);

United States v. Mark Wireman, 15-CR-10012-JTM, Distribution (5 counts) and Possession [14]
(Guideline sentence of 240 months from 210-262);

United States v. Delmas Rich, 15-CR-10025-JTM, Distribution[15]
(Guideline sentence of 151 months from 151-188);

United States v. Paul Jordan, 15-10056-JTM, Distribution (2 counts) and Possession
(Variance from 151-188 to 72 months);

United States v. John Gariglietti, 15-10057-JTM, Distribution
(Variance from 151-188 to 96 months);

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[12] No acceptance of responsibility reduction due to jury trial - otherwise guideline would have been 151-188.

[13] No acceptance of responsibility reduction due to jury trial - otherwise guideline would have been 151-188.

[14] Previously convicted of various sex offenses involving minors in five prior cases, and thus faced a 15 year (180 month) mandatory minimum.

[15] Prior military conviction for Indecent Acts with a Minor did *not* activate the 15 year mandatory minimum due to statutory construction.

United States v. Daren Coen, 15-10097-JTM, Distribution (2 counts) and Possession[16]
(Modified guideline sentence of 60 months);

United States v. Brandon Pyle, 15-CR-10151-JTM, Distribution
(Variance from 151-188 to 72 months);

United States v. Joshua Haskins, 15-CR-10158-JTM
(Variance from 188-235 to 60 months);

United States v. Jeremy Schmidt, 15-CR-10159-EFM, Distribution[17]
(Variance from 210-262 to 195 months);

United States v. Mark David Busby, 16-CR-10092-JTM, Distribution
(Variance from 151-188 to 60 months);

United States v. Jonathan McClain, 16-CR-10098-EFM, Distribution[18]
(Variance from 360-480 to 264 months);

United States v. David Newcomer, 16-CR-10124-JTM, Distribution
(Variance from 151-188 to 60 months);

United States v. Theodore Clous, 17-CR-10011-JTM, Distribution
(Variance from 210-140 to 60 months);

United States v. Austin Evans, 17-CR-10012-JTM, Distribution
(Variance from 135-168 to 108 months[19]);

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[16] Though the PSR calculated the Coen's guideline at a level 34, with a range of 151-188 months, the district court eliminated certain SOCs, resulting in a modified guideline of 21, which would have been a range of 37-46 but for the statutory mandatory minimum of 60 months. The district court stated "The Court finds these Specific Offense Characteristics are an inherent part of determining the defendant's Base Offense Level under 2G2.2; arbitrary in their definition, specifically as it relates to the quantity of the images involved; broad in nature; and vague in definition." That same district court later applied these SOCs against other defendants in later cases.

[17] Previously convicted of possession of child pornography in Florida, and thus faced a 15 year (180 month) mandatory minimum.

[18] Previously convicted of a sex offense involving a minor, thus activating the 15 year (180 month) mandatory minimum.

[19] Shockingly, this defendant admitted he sexually molested at least one child as part of his history.

United States v. Michael Martin, 17-CR-10040-JTM, Distribution
(Variance from 151-188 to 72 months);

United States v. Paul Butler, 17-CR-10068-EFM, Receipt
(Variance from 121-151 months to 102 months);

United States v. Daniel Cookson, 17-CR-10087-JTM, Possession
(Variance from 97-121 months to 5 years probation).[20]

IV. CONCLUSION

The United States requests this Court impose a sentence of 189 months, which is 10% less than the bottom-end of the 210-240 month guideline range reflected in the Presentence Investigation Report, followed by 10 years supervised release. While the requested sentence reflects a variance from the 2G2.2 guideline, that variance aligns with the sentencing practice of Judge Melgren[21] and does not promote sentencing disparity. Further, features of the defendant's conduct, history, and characteristic support the sentence of 189 months, followed by 10 years supervised release.

Respectfully submitted,

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[20] This is on appeal by the United States.

[21] The catalogue of cases shows that, while Judge Marten nearly uniformly varied to or near the mandatory minimum, Judge Melgren has typically sentenced within 10-30% of the bottom of the applicable Guideline range.

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CERTIFICATE OF SERVICE

I certify that on November 26, 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 Rich Federico, attorney for defendant.

s/Jason W. Hart
JASON W. HART
Assistant United States Attorney