UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
XXXXX YYYYY,	)	
	)	
Defendant.	)	
	)	

SENTENCING MEMORANDUM

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APPENDIX

As this Court is aware, its sentencing obligation since the decision in *United States v. Booker,* 125 S.Ct. 738 (2005) is to impose "a sentence sufficient, *but not greater than necessary*" to comply with the factors set forth in 18 U.S.C. § 3553. As one Court has explained:

> Sentencing will be harder now than it was [prior to *Booker*]. District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual. *Booker* is not an invitation to do business as usual.

United States v. Ranum, 353 F. Supp.2d 984, 987 (E.D. Mich. 2005).

Defendant, XXXXX YYYYY, submits this Sentencing Memorandum for the purposes of assisting the Court in fashioning a sentence under 18 U.S.C. § 3553(a) that is, in fact, "sufficient but not greater than necessary to comply with the purposes" of § 3553.

I. XXXXXYYYYY

XXXXXYYYYY is a thirty-three year old man whose prior offenses are speeding and failing to display a driver's license**.** He has been married to his wife, Megan, for approximately eight years. *See* PSR at ¶ 37. They have three children: Roman (8), Lucian (5) and Tallen (1). *Id*. He also has a child from a previous relationship, Zachary (10), for whom he makes child support payments. *Id*. at ¶ 36.

It was first suggested that XXXXXsuffered from Asperger's Syndrome in 2006 when XXXXXand his wife went for marriage counseling in Indiana, where they lived at the time. Regrettably, no follow up treatment was sought from an Asperger's specialist.

The Asperger's diagnosis was confirmed by Dr. Perry Marchioni who evaluated XXXXXat the behest of this Court. *See* Attachment A. There are several observations made by Dr. Marchioni,

based upon objective testing performed by Dr. Marchioni, that are relevant for sentencing purposes.

> •First, that XXXXXsuffers from Asperger's Disorder and from depression. *Id*. at p. 6.
>
> •Second, "there appear[ed] to be no significant evidence that XXXXXhas engaged in any sexually abusive behavior toward children." *Id*. at p. 5.
>
> •Third, XXXXXshould **not** be considered a pedofile." *Id*.
>
> •Fourth, Adam's obsessive traits, a feature of Asperger's Syndrome, could have "translate[d] into overuse of pornography." *Id*. at p. 6.

Importantly, Dr. Marchioni's key conclusions were later confirmed with polygraph testing.[1] The test confirms that XXXXXhas never sought out underage children using the internet. *See* Attachment B. In short, Adam's computer activities were limited to viewing child pornography during downtime while working in the oil fields.

Finally, Dr. Silverman, a board certified forensic psychiatrist, was retained by the defense to examine Adam. Dr. Silverman concurs with Dr. Marchioni's diagnosis of XXXXXas having Asperger's Disorder and a Depressive Disorder. *See* Attachment C at p. 7. Significantly, he also concurs with Dr. Marchioni that there is absolutely no indication that XXXXXhas ever physically abused a child and, most importantly, that **"the chances that he would recidivate are extremely unlikely**." *Id*. at p. 9. Moreover, as discussed in more detail below, Dr. Silverman also discusses the dangers of imprisoning a defendant with Asperger's Syndrome who could be easily exploited and victimized in prison compared to the average defendant. *Id*. at p. 8.

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[1]The polygraph testing was done by, Rick Holden, the most respected polygrapher in the Dallas area. Counsel can represent to the Court that, over the past decade, it has been rare for counsel to have a client "pass" a Holden polygraph.

II. ASPERGER'S SYNDROME[2]

Asperger's Syndrome is a neurobiological "brain-based" disorder,[3] characterized by social isolation, odd and pedantic speech, poor nonverbal communication, and preoccupation with certain idiosyncratic interests.[4] It is on the less severe end of the Autism continuum, but it still causes severe difficulties in social perception and interaction and should be considered a "serious and debilitating developmental syndrome...and not a transient or mild condition."[5] The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV (DSM IV) defines Asperger's Syndrome as follows:

> The essential features of Asperger's Disorder are severe and sustained impairment in social interaction (Criterion A) and the development of restricted, repetitive patterns of behavior, interests, and activities (Criterion B). In contrast to Autistic Disorder, there are no clinically significant delays or deviance in language acquisition . . . although more subtle aspects of social communication (e.g., typical give-and-take in conversation) may be affected. . . . In contrast to Autistic Disorder, Mental Retardation is not usually observed in Asperger's Disorder.

American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders. Fourth Ed. Washington, D.C., A.P.A. (1994) 299.80 at 75-77.

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[2]Also referred to as Asperger's Disorder.

[3]Tantam, D. "The Challenge of Adolescents and Adults with Asperger's Syndrome." 12 Child Adolescent Psychiatry Clinic of North America 143 (2003) at 147

[4]Klin, Ami, James McPartland, and Fred R. Volkmar, "Asperger's Syndrome." Handbook of Autism & Pervasive Development Disorders," 3rd Edition. Vol. 1: Diagnosis, Development, Neurobiology, & Behavior. Ed. Fred R. Volkmar, Rhea Paul, Ami Klin, and Donald Cohen. New York: Wiley, John & Sons, Inc. (2005) at 89.

[5]*T.H. v. Division Developmental Disabilities*, 189 N.J. 478, 485-86 (2007), *quoting*, Ami Klin & Fred R. Volkmar, Asperger's Syndrome: Guidelines for Assessment and Diagnosis (Learning Disabilities Association of America 1995).

Individuals with Asperger's Syndrome may react inappropriately to, or fail to interpret the valence of the context of the affective interaction, often conveying a sense of insensitivity, formality, or disregard for the other person's emotional expressions. They may be able to describe correctly, in a cognitive and often formalistic fashion, other people's emotions, expected intentions, and social conventions; yet, they are unable to act on this knowledge in an intuitive and spontaneous fashion, thus losing the tempo of the interaction. Their poor intuition and lack of spontaneous adaptation are accompanied by marked reliance on formalistic rules of behavior and rigid social conventions. This representation is largely responsible for the impression of social naiveté and behavioral rigidity that is so forcefully conveyed by these individuals.[6]

According to one commentator, individuals with Asperger's Syndrome who wander into child pornography do not present the danger that inspires the harsh laws and treatment of those who ordinarily produce, traffic in, or purchase child pornography. Mark Mahoney, *Asperger's Syndrome and the Criminal Law: The Special Case of Child Pornography* at 2. (2009) (attached hereto as Attachment D) "If prosecuted and almost unavoidably convicted, these individuals face a life of insurmountable civil disabilities superimposed on a very challenging developmental disability. In the event of a prosecution and conviction, courts, corrections, and probation/parole supervising authorities must be cognizant of the very significant impact the Asperger's Syndrome disability has on analyzing legal and moral blameworthiness, future dangerousness, appropriate conditions of confinement, if any, and therapy." *Id.*

[6] Klin, McPartland, and Volkmar, *supra* note 7, at 89.

III. U.S.S.G. § 2G2.2

The Presentence Report in this case recommends a sentencing guideline range of 97-120 months imprisonment for Mr. YYYYY's offense of possession of child pornography.

A. Perspective

First consider the hypothetical of a man living in Texas who makes contact with a twelve year-old girl living in Maine over the Internet. Using his age and experience, he convinces her to meet and he travels to Maine on *multiple* occasions and the two engage in *repeated* sexual encounters in violation of 18 U.S.C. § 2423(b). U.S.S.G. § 2G1.3(a)(4) establishes a base offense level of 24 for the offense. After a two-level enhancement for unduly influencing the child under U.S.S.G. §2G1.3(b)(2), a two-level enhancement for use of the computer (b)(3), and a two-level enhancement for commission of a sex act (b)(4), the final offense level would be 30. After Acceptance, the guideline range for this Category I offender would be 70-87 months imprisonment-almost two years less than Mr. YYYYY's guideline range.

Consider next a mother convicted in federal court of the aggravated assault of her infant child resulting in serious bodily injury include a cerebral hemorrhage and multiple fractures or a step-mother convicted in federal court of abusing her two minor children through beatings and starvation. According to the testimony of Chief United States District Judge M. Casey Rodgers before the United States Sentencing Commission, the guideline ranges for those cases were 46-57 months and 57-71 months, respectively. *See* Attachment E hereto.

Next consider a person charged with using interstate commerce facilities in the commission of a murder for hire. Under U.S.S.G. § 2E1.4, his guideline imprisonment range with acceptance of responsibility would be 87-108 months.

Even consider the aggravated case of Joe Champion, as discussed at *United States v. Kane*, 470 F.3d 1277 (8th Cir. 2006). Mr. Champion paid $20 to have a mother hold down her nine year-old child while Mr. Champion raped the young girl twice a week for two years. During these rapes, the child experienced such trauma she passed out. These assaults happened over 200 times! The damage to the child physically and emotionally is unimaginable. Using the Guidelines, applying all enhancements, and granting only Acceptance of Responsibility, the court determined the guideline range was 151-188 months- a mere five years more than Mr. YYYYY's guideline range. *Id.* at 1282.

B. Progression of the Child Pornography Guidelines

1. Background

Many pages have been written regarding the progression of the child pornography guidelines over the years. Indeed, there is an extensive study now in wide circulation entitled *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guideline* that discusses this flawed progression at great length. Still, the following four paragraphs provide an accurate description of the progression and are quoted verbatim from the discussion in *United States v. Phinney,* 599 F.Supp.2d 1037, 1041-43 (E.D. Wisc. 2010)

When the Commission completed the original guidelines in 1987, simple possession of child pornography-the offense in this case-was not a federal crime. Thus, the child pornography guideline, U.S.S.G. § 2G2.2, was limited to transporting, receiving and trafficking offenses. In 1990, Congress criminalized possession, and in response the Commission decided to create a separate guideline, § 2G2.4, with a base offense level of 10, to cover possession cases. That guideline also contained a 2-level enhancement for images of prepubescent children or minors under the age of 12. Under the

Commission's original plan, trafficking continued to be covered by § 2G2.2, with a base offense level of 13 and possible enhancements based on the age of the children depicted and distribution for value. *Gellatly*, 2009 WL 35166, at *5; Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guideline*, at 3-6 (July 3, 2008), http://www.fd.org. The Commission explained its decision to create a new, lower base level for possession based on empirical data and study. Stabenow, *supra*, at 5.

However, in 1991, based on the erroneous perception that the Commission had lessened penalties for child pornography crimes, and over the explicit objection of the Commission, Congress required alteration of these guidelines. In doing so, Congress rejected the Sentencing Commission's advice and it's studied empirical approach to child pornography sentencing....Congress directed the Commission to increase the base level for simple possession from 10 to 13 and to add enhancements for the number of items possessed and for a pattern of activity involving the sexual abuse or exploitation of a minor. *Gellatly*, 2009 WL 35166, at *5; Stabenow, *supra*, at 6-9.

In 1995, Congress again directed the Commission to increase penalties for child pornography and sex crimes against children. *Gellatly*, 2009 WL 35166, at *5. According to a key Senate sponsor, the changes were needed to properly punish those who sexually exploited children and profited from it. Stabenow, *supra*, at 10-11. In response, the Commission made various changes to the guidelines including, in pertinent part, a 2-level increase in the base level for simple possession and a 2-level enhancement for use of a computer, neither of which particularly target the serious offenders about whom Congress seemed most concerned. *See Gellatly*, 2009 WL 35166, at *5; Stabenow, *supra*, at 11-12. Indeed, in a 1996 report, the Sentencing Commission questioned the computer enhancement, noting that on-line pornography comes from the same pool of images found

in print pornography, and that different types of computer use have different effects on the two primary harms caused by the crime-(1) the degree to which the computer facilitated widespread distribution, and (2) the degree to which it increased the likelihood that children would be exposed. Stabenow, *supra*, at 14-15. In other words, some computer uses are more harmful than others, yet the enhancement provided no distinction. Further, data show that the enhancements for use of a computer and number of images are applicable in almost every case. *Id*. at 15; Federal Prosecution of Child Sex Exploitation Offenders, 2006, http://www.ojp. usdoj. gov/ bjs/ abstract/ fpcseo 06. htm. Likewise, over 96% of cases involve an image of a child under 12. Stabenow, *supra*, at 24.

Finally, in 2003, with little debate and no advanced notice to or consultation with the Commission, Congress made further changes in this area, including an increase in the statutory maximum for simple possession from 5 years to 10, a 5-year mandatory minimum sentence for trafficking/receipt offenses, and more amendments to the guidelines. In response, the Commission merged the guideline dealing with possession, § 2G2.4, into the guideline dealing with trafficking, § 2G2.2, and in order to conform to the new mandatory minimum sentences and increased statutory maxima, raised the base level for trafficking/receipt offenses from 18 to 22 and for possession from 15 to 18. The Commission also added significant enhancements for the number of images possessed, received or distributed. *Gellatly*, 2009 WL 35166, at 6; Stabenow, *supra*, at 18-23.

2. Enhancements

As mentioned above, the effect of the guidelines progression was to add enhancements that apply in almost every child pornography case resulting in a guideline range for almost every first time offender very near or at the statutory maximum. Indeed, most enhancements are inherent to the crime of conviction and, therefore, render them meaningless in helping sentencing judges

distinguish between offenders; an approach fundamentally inconsistent with 18 U.S.C. § 3553(a). For example, in fiscal year 2010, 96% of U.S.S.G. § 2G2.2 cases involve children under 12 years of age, 73% involve "violent" images;[7] 96% involve the use of the computer and 67% involve 600 or more images.[8]

As one federal judge noted, "As widespread as computer use is now, enhancing for use of the computer is a little like penalizing speeding, but then adding an extra penalty if a car was involved." Statement of Judge Robin J. Cauthron (W.D. Okla) before the United States Sentencing Commission, Austin, Texas, at 6 (Nov. 19, 2009). And, as another court noted, '"the number of images doesn't reflect intent any longer, because the click of the mouse can result in many more images than anybody ever really perhaps wanted.'". *United States v. Maguire*, 436 Fed. Appx. 74, 78 (3rd Cir. 2011) (quoting district judge). This is especially true when the images, such as in this case, are captured using peer-to-peer software.

3. Example of Progression

To give a stark example of the guideline progression discussed above, the following illustrates how Mr. YYYYY's guidelines would have changed over the years:.

Year	Offense Level	Sentencing Rage
Prior to 1990	Not a federal crime	

[7]The frequent application of this enhancement is likely because it is construed broadly to include all acts of minors engaged in sexual acts with adults. *See, e.g., United States v. Lyckman*, 235 F.3d 234, 237-39 (5th Cir. 2000).

[8]http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2010/10_glinexgline.pdf at 37-38.

11/90-11/1991	10	6-12 months (Zone B)
11/1991-11/1996	14	15-21 months
11/1996-4/2003	18	27-33 months
4/2003-11/2004	25	57-71 months
11/2004-pres.	30	97-121 months

4. The Future

In light of the widespread concerns over the child pornography guidelines, the United States Sentencing Commission held a full day of hearings on these guidelines on February 8, 2012. The Commission heard testimony from judges, representatives from the Department of Justice, representatives from the defense bar, law enforcement officials, victims and professors. It seems likely that the Sentencing Commission is poised to suggest amendments to these guidelines during the next amendment cycle to, at the very least, better differentiate among offenders.

As one commentator noted who attended the hearing: " There was a rough consensus from the written testimony submitted on the first hearing day concerning penalties for child pornography offenses that, as a matter of policy and practice, federal sentencing law in this area is functioning quite poorly."[9] Even the comments of representatives from the Department of Justice recognized the problems with the current guidelines:

> We believe the sentencing guideline, U.S.S.G. § 2G2.2, poses some challenges to the successful handling and sentencing of child pornography cases. This guideline has existed in its current version more or less since 2003. Whether or not in 2003 it accurately calibrated the seriousness of the offenders, our experience today tells us two things: first, the guideline has not kept pace with technological advancements in

[9]Douglas Berman, *Brief Reflections on Federal Sentencing Policy, Practice and Politics after USSC Hearings* at http://sentencing.typepad.com/sentencing_law_and_policy.

> both computer media and internet and software technologies; and second, there is a range of aggravating conduct that we see today that is not captured in the current guideline. As a result, prosecutors, probation officers, and judges are often assessing these cases using a guideline that does not account for the full range of the defendant's conduct and also does not adequately differentiate among offenders given the severity of their conduct.

Statement for the Record of James M. Fottrell, Steve Debrota, and Francey Hakes, Department of Justice, before the United States Sentencing Commission (February 16, 2012) at 7-8. DOJ representatives also noted, "As for the enhancement for the quantity of images, the image table might be revised to reflect the plain reality that offenders today can amass collections, not of hundreds of images, but tens, or even hundreds, of thousands of images." *Id*. at 17.

Of course, a change in the child pornography guidelines made at some point in the future will be little solace for Mr. YYYYY. Therefore, although the Sentencing Commission seems poised to suggest amendments to these guidelines in the near future, Mr. YYYYY urges this Court to recognize the problems inherent in the guidelines when applying the 18 U.S.C. § 3553(a) factors to *this* case.

C. Application of the Guidelines by Federal Judges

The draconian progression of the child pornography guidelines to a level where defendants who actually have sex with minors and defendants who severely abuse minors have lower guideline ranges than defendants who possess child pornography has produced telling statistics.

First, in the fiscal year October 2010-September 2011, there were 1,620 cases sentenced using U.S.S.G. § 2G2.2 and there were downward departures/variances in **sixty-six percent** (1062) of the cases. In **sixty-three percent** (1013) of the 1,620 cases, the departure/variances had no

relation to U.S.S.G. § 5K1.1[10]

Second, when the Sentencing Commission recently surveyed federal judges, **seventy percent** of the 576 federal judges responding believed the sentencing guidelines were too harsh for defendants possessing child pornography.[11]

These statistics were reflected in the statement by Judge Casey who addressed the Sentencing Commission last month on behalf fo the Judicial Conference of the United States Committee on Criminal Law:

> In the vast majority of cases on the federal courts' criminal dockets, the work of the Commission has enabled judges to proceed with confidence that their sentencing judgment is informed not only by the law and facts before them in a particular case, but also by the experience, thorough study and expertise underlying each of the Commission's guideline decisions. As stated in the Commission's introduction to the Guidelines Manual, "[t]he Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." The Commission's introduction further reflects the understanding that courts will not often depart because the guidelines seek to take into account "those factors that the Commission's data" show to be "empirically important" at sentencing "in relation to the particular offense." This has proven true in my own district, where the judges by and large can be characterized as within-guidelines sentencers. We are hesitant to disregard an advisory guidelines range precisely because of the confidence we place in the role of the Commission in developing guideline calculations through its proven studied, reasoned, and incremental approach. Most often, our independent consideration of the section 3553(a) factors confirms the reasonableness of the recommended guidelines sentencing range. Unfortunately, however, this is not the case in the area of child pornography offenses
>
> ....*There is a common sentiment among many trial judges that these sentencing*

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[10]http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2011_4th_Quarter_Report.pdf (Table 5)

[11]http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf (Question 6)

> *guidelines fail to provide an appropriate baseline or starting point for child pornography offenses which, combined with numerous offense characteristics, restrictions on departures, and congressionally mandated provisions not fully supported by the Commissions's empirical study, produce guideline ranges that are too high compared to the statutory range, particularly in the area of possession and receipt. We seek guidelines that more accurately reflect the severity of the offense and meet the goals of sentencing reform.*

See Attachment E at 3-4 (emphasis added).

Judge Rodgers also quoted from his brethren:

> A review of testimony by district judges before the Sentencing Commission in a series of public hearings commemorating the twenty fifth anniversary of the Sentencing Reform Act illustrates the view that the child pornography guidelines often do not reflect the seriousness of the offense. Chief District Judge Susan Oki Mollway (District of Hawaii), for instance, testified: *"I have been troubled by Guideline 2G2.2, as applied in certain child pornography cases. More than once, I have viewed the guidelines as suggesting a sentence that is disproportionately high for the offense conduct."* District Judge Richard J. Arcara (Western District of New York) stated: *"It also seems to be the case that numerous enhancements apply to every child pornography offender...Once all of these enhancements are applied, a first time offender is often facing the statutory maximum."* Finally, Chief District Judge Audrey B. Collin (Central District of California) asserted: *"We see so many of these cases lately, and while we do not necessarily all agree on how [child pornography cases] should be handled, everyone does agree that the Guidelines applicable to these cases are not welldesigned. This is especially true for those defendants accused only of owning child pornography, and not of its creation or distribution. There is no question that these defendants deserve punishment, but how much? Almost all child pornography offenses involve these same enhancements, rendering them meaningless. But the cumulative effect of these enhancements is the imposition of extremely long sentences in almost every case, often at or near the maximum even for first-time offenders."*

Id. at 10, n. 31 (emphasis added).

D. Fifth Circuit

The United States Court of Appeals for the Fifth Circuit has left this all completely in the hands of the district judges. On the one hand, it has routinely approved probationary sentences in

child pornography cases despite appeals by the government. *See, e.g., United States v. Duhon*, 541 F.3d 391 (5th Cir. 2008) (affirming grant of probation for defendant charged with possession of child pornography as reasonable); *United States v. Rowan*, 530 F.3d 379 (5th Cir. 2008) (same); *United States v. Politio*, 215 Fed. Appx. 354 (5th Cir. 2007) (affirming grant of probation with one year home confinement for defendant charged with possession of child pornography as reasonable).

On the other hand, Mr. YYYYY acknowledges that the Fifth Circuit will not reverse a sentence within the guideline range in child pornography cases simply because the child pornography guidelines lack an empirical basis. *See United States v. Miller*, 665 F.3d 114 (5th Cir. 2011). It is important to note, however, that *Miller* in no way forbids a downward variance based upon the myriad of problems with the development and progression of the child pornography guidelines when these problems are analyzed in connection with the § 3553 factors. It simply holds that a sentencing judge is not required to vary downward on the basis of these problems. Indeed, while a court of appeals may apply a presumption of reasonableness when conducting a substantive review of a sentence within the advisory range, "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Rita v. United States*, 551 U.S. 338, (2007).

IV. DISCUSSION OF 3553 FACTORS

As noted above, this Court must impose "a sentence sufficient, *but not greater than necessary*" to comply with the factors set forth in 18 U.S.C. § 3553. Of course, in making this determination, a court may not presume that a guideline sentence is a correct one. *Nelson v. United States*, 555 U.S. 350, 352 (2009) ("Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable.").

1. Nature and Circumstances of the Offense and the History and Characteristics of the Defendant.

a. Nature and Circumstances of the Offense

Mr. YYYYY acknowledges that even the mere possession of child pornography is a serious offense that perpetuates the victimization and exploitation of persons already victimized and exploited. Of course, Mr. YYYYY had absolutely nothing to do with production of child pornography. Moreover, unlike many defendants charged with child pornography offenses, Mr. YYYYY was never a member of any online "clubs" or "chat rooms" related to child pornography. Most of the time, Mr. YYYYY downloaded the child pornography using peer-to-peer software during downtime working in the oil fields.

The peer-to-peer software used by Mr. YYYYY was called "Shareaza." While this software allowed others to "access" Mr. YYYYY's computer and download pornography, unlike many defendants, there is no evidence that Mr. YYYYY actively traded images. Moreover, the default settings for Shareaza allows others to access a user's computer unless the user knows enough to change the default settings to not allow access. *See United States v. Spriggs*, 666 F.3d 1284, 1286-87 (11th Cir. 2012); *Wengler v. Thaler*, 2010 WL 5050991, *1 (N.D. Tex. Dec. 3, 2010).

b. History and Characteristics of the Defendant.

As noted above, Mr. YYYYY has never been in trouble before. As also noted above, he suffers from Asperger's Syndrome which generally causes severe difficulties in social perception and interaction. Both Drs. Marchioni and Silverman opine that this contributed to the offense in this case.

Significantly, there is no indication the Mr. YYYYY has ever abused a child (in fact every indication, including a polygraph, is to the contrary); no prior history of sexual offenses, let alone ones involving children; and no prior offenses such as voyeurism or loitering that might be seen as precursors to more serious sexual offenses.

2. Need for the Sentence Imposed-

a. To Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense

b. To Afford Adequate Deterrence

As noted above, Mr. YYYYY notes that the offense for which he was convicted is a serious offense perpetuating the victimization of previously victimized children.

With regard for promoting respect for the law and providing just punishment, it must be remembered that "[r]espect for the law is promoted by punishments that are *fair*...not those that simply punish for punishment's sake. There is no reason to believe that respect for the law will increase if a defendant who deserves leniency is sentenced harshly any more than there is reason to believe that respect for the law will increase if a defendant who deserves a harsh punishment receives a slap on the wrist." *United States. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio) (Defendant convicted of possessing child pornography sentenced to twelve months and one day imprisonment.). Indeed, the Supreme Court has agreed that "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall v. United States*, 552 U.S. 38, 54 (2007) (quoting district court).

Even if the Court elects not to incarcerate Mr. YYYYY, he would be subject to a significant

term of strict supervision with severe restrictions. Moreover, he will be required to register as a sex offender which will severely affect his job prospects, activities and living arrangements for the remainder of his life.

c. To Protect the Public from Further Crimes of the Defendant

In many respects this is truly where the proverbial rubber meets the road. As Chief Judge Casey recently explained to the Sentencing Commission, "[a] common concern among many district judges is that the sentencing guidelines for child pornography offenses do not assist them in identifying which offenders pose a danger of child sexual abuse." *See* Attachment E at 17.

The Sentencing Commission also heard testimony from Dr. Michael Seto, a noted scholar in the field of sex offenders, who attempted to summarize the research conducted in the past five years about the risk posed by online child pornography offenders. *See* Michael Seto, *Child Pornography Offender Characteristics and Risk to Reoffend*, Presented in Connection with Testimony to United States Sentencing Commission (Feb. 6, 2012) (attached hereto as Attachment F). Dr. Seto concluded that, recent research has concluded that, "[i]n particular, first time child pornography possession only offenders appear to be very low risk of sexual recidivism...." *Id*. at 4.

Dr. Richard Wollert, a professor at Washington State University, was also invited to testify before the Sentencing Commission. Dr. Wollert concluded based upon the scientific research as well as his clinical experience that he agreed with the conclusion that online child pornography offenders pose a "relatively low risk of committing contact sexual offenses in the future." *See* Richard Wollert, *The Implications of Recidivism and Clinical Experience for Assessing and Treating Federal Child Pornography Offenders*, Presented in Connection with Testimony to United States Sentencing

Commission (Feb. 15, 2012) (attached hereto as Attachment G).[12]

Moreover, with regard to Mr. YYYYY in particular, Dr. Marchioni, who evaluated Mr. YYYYY for the Court, concluded that "there appear[ed] to be no significant evidence that XXXXXhas engaged in any sexually abusive behavior toward children" and that he should not be considered a pedofile. *See* Attachment A at 5. Likewise, Dr. Silverman, concluded that "the chances that [Mr. YYYYY] would recidivate are extremely unlikely." *See* Attachment C at 9. For added assurance, Mr. YYYYY passed a related polygraph. *See* Attachment B.

d. To Provide the Defendant with Needed Educational or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner[13]

This factor weighs strongly in favor of a sentence other than imprisonment. As discussed above and as discussed in Dr. Silverman's report, a prison sentence would be extremely detrimental in this case. In prison a person with Asperger's Syndrome would be easily abused, manipulated, exploited and controlled. *See* Attachment C at p. 8. Moreover, such a person could be "at a higher risk to be blackmailed or abused sexually or physically." *Id*.

As discussed in *Asperger's Syndrome and the Criminal Law: The Special Case of Child Pornography:*

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[12]*See also* Endrass, J., Urbaniok, F., Hammermeister, L. C., Benz, C., Elbert, T., Laubacher, A., & Rossegger, A. (2009). *The Consumption of Internet Child Pornography and Violent and Sex Offending*. BMC Psychiatry, 9, 43 (Concluding that "[c]onsuming child pornography alone is not a risk factor for committing hands-on sex offenses....").

[13]"For a defendant who faces more onerous conditions of confinement than the typical defendant, the court can impose a shorter prison sentence and obtain the same punitive effect." *United States v. Redemann,* 295 F.Supp.2d 887, 896 (E.D. Wisc. 2003).

> Though imprisonment may be an appropriate form of punishment for neurotypical individuals, "sentences based on confinement with many others, such as jail sentences, are simply not appropriate for a person with Asperger's." Incarceration can be especially cruel and dangerous for AS individuals, particularly for those convicted of "child pornography." There are no special prisons for people with AS and they would not be eligible for housing in a psychiatric facility based on AS alone. Furthermore, because their offense involves child pornography, they would be ineligible for placement in a camp or minimum security prison. The aforementioned peculiar manifestation of AS symptoms make incarceration with other offenders problematic....

Id. at 50 (Attachment D)

As also explained in detail in *Asperger's Syndrome and the Criminal Law: The Special Case of Child Pornography:*

> [A] traditional sex offender treatment program is not effective for individuals with AS because individuals with AS learn information differently than do neurotypical individuals. In a traditional sex offender treatment program, an individual with AS, who likely has no sexual interest in children, would be grouped with actual pedophiles—individuals who have a sexual interest in children, and who, in some cases, have sexually abused children. The common modality of treatment in traditional sex offender treatment programs involves challenges to the distorted thoughts and justifications individuals put forth for their sexually deviant behavior. It is about relearning appropriate sexual behaviors and rehabilitation of deviant thoughts, which involves group treatment and often group pressure. There is also a requirement for group participation, which requires speaking in front of fellow group members and challenging the statements made by group members—things that individuals with AS are very uncomfortable doing or incapable of doing.
>
> In contrast, an individual with AS requires an individualized assessment of how he sees the world and an assessment of what he needs to avoid the dangers that are ever present for an individual with Asperger's, rather than group treatment. For an individual with Asperger's there was no learning at all, so there is nothing to relearn or rehabilitate. Materials must be presented in a concrete fashion and learned by rote. Explicit directions must be given. The lessons taught must be tailored to the individual's life situation because Asperger's individuals are not good at applying abstract rules to unfamiliar situations. Furthermore, because individuals with AS are not inherently able to empathize with others, aspects of traditional sex offender treatment programs that are meant to teach participants to empathize with victims and

to recognize cognitive distortions are unlikely to work, specifically because the lessons are not being taught in a manner that individuals with AS can comprehend.

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Individuals with AS who are not pedophiles or sexual predators should not be placed in a traditional sex offender treatment program with pedophiles and sexual predators....[A] traditional sex offender treatment program is likely to do is horrify, confuse, and frustrate individuals with AS. A traditional sex offender treatment program could actually be damaging for Asperger's individuals.

Instead, individuals with AS need habilitative treatment, using active learning and education that is very explicit and concrete. Treatment must include individualized education that recognizes the individual's special needs and the unique ways in which the individual's brain functions, rather than seeking to return the individual's sexuality to a state of normalcy, as these individuals often have no sexual experiences to normalize. Asperger's individuals, who are very rule bound and reason in black-and-white, need concrete rules and explicit instructions because once they knows the rules, they will abide by them; but because they cannot generalize across unfamiliar situations, it is very important that any treatment program for an individual with AS is tailored to the individual's needs and life situation.[14]

In sum, while one can debate the effectiveness of the Bureau of Prisons' sex offender therapy, there is no debate that they do *not* offer Asperger's counseling, let alone Asperger's counseling vis-a-vis collecting child pornography. In contrast, this type of counseling would be available to Mr. YYYYY in the community while under court supervision. Simply put, imprisonment would impede any treatment of Mr. YYYYY and certainly not promote it.

3-6. The Kind of Sentences Available; The Advisory Guideline Range; Any Pertinent Policy Statements Issued by the Sentencing Commission; and The Need to Avoid Unwarranted Sentence Disparities

The Court, of course, has the full range of punishment from probation to ten years imprisonment available.

[14]Emphasis added

As discussed above, while the Court must consider the advisory guideline range, it cannot be presumed that such a range provides reasonable and just punishment. *Nelson*, 555 U.S. at 352. Moreover, as also discussed above, there are strong indications that the advisory guideline range does *not* provide a reasonable and just punishment in child pornography cases in general. It certainly does not provide reasonable and just punishment in this case given the nature of the offense, the background of Mr. YYYYY, and the extremely small likelihood that he would reoffend.

There are no Sentencing Commission "policy statements" applicable in this case although it again must be noted that the Sentencing Commission did not endorse much of the current guideline structure which sets punishments close to or at the statutory maximums and the Sentence Commission appears poised to recommend major corrections to the guidelines.

In many cases, courts must be careful to ensure that a downward departure of variance does not result in an unwarranted sentence disparity. Paradoxically, in child pornography cases, it would be a guideline sentence that should cause worries about unwarranted sentence disparities. Indeed, as noted above, in the fiscal year October 2010-September 2011, there were 1,620 cases sentenced using U.S.S.G. § 2G2.2 and there were downward departures/variances in **almost two-thirds** (66 percent) of the cases. There are a myriad of cases from courts around the nation imposing below guideline sentences in child pornography cases.[15] Moreover, as noted above, there are several **Fifth**

[15]*See, e.g., United States v. Tews*, No. 09-CR-309, 2010 WL 1608951, at *3 (E.D.Wis. Apr. 20, 2010) (citing *United States v. Howard*, No. 8:08CR387, 2010 WL 749782 (D.Neb. Mar. 1, 2010); *United States v. Manke*, No. 09-CR-172, 2010 WL 307937 (E.D.Wis. Jan. 19, 2010); *United States v. Raby*, No. 2:05-cr-00003, 2009 WL 5173964 (S.D.W.Va. Dec. 30, 2009); *United States v. Burns*, No. 07 CR 556, 2009 WL 3617448 (N.D.Ill. Oct. 27, 2009); *United States v. McElheney*, 630 F.Supp.2d 886 (E.D.Tenn.2009); *United States v. Phinney*, 599 F.Supp.2d 1037 (E.D.Wis.2009); *United States v. Grober*, 595 F.Supp.2d 382 (D.N.J.2008); *United States v. Stern*, 590 F.Supp.2d 945 (N.D.Ohio 2008); *United States v. Doktor*, No. 6:08-cr-46, 2008 WL 5334121 (M.D.Fla. Dec. 19, 2008); *United States v. Johnson*, 588 F.Supp.2d 997 (S.D.Iowa

Circuit cases in which defendants were sentenced to probation. *See United States v. Duhon*, 541 F.3d 391 (5th Cir. 2008); *United States v. Rowan*, 530 F.3d 379 (5th Cir. 2008); *United States v. Politio*, 215 Fed. Appx. 354 (5th Cir. 2007).

V. CONCLUSION

Undersigned counsel respectfully suggests a sentence of one day of imprisonment and ten years supervised release with conditions related to counseling for Mr. YYYYY in connection with Asperger's Syndrome is "a sentence sufficient, *but not greater than necessary*" to comply with the factors set forth in 18 U.S.C. § 3553.

Counsel fully understands that, even though this type of sentence is not out of the ordinary in these type of cases and that federal judges gave below guideline sentences in two-thirds of child pornography cases last fiscal year, it still requires *this* Court and *this* Judge to take a great chance on Mr. YYYYY. Nevertheless, as Judge Sorkin recognized in *United States v. Dyce*, 975 F.Supp. 17, 22-23 (D.C. Cir. 1997):

> All in society from time to time make mistakes. Society must be willing to take a chance on a one-time wrongdoer who has demonstrated that she has reformed. There is no down side to the Court's decision in this case. Defendant will be monitored closely on probation for two more years....Society will benefit from the addition of a productive member, and through the savings of approximately $30,000 per year, the cost of incarcerating a law violator. Even more important, a downward departure from the Guidelines in this case is simply the right thing to do.

2008); *United States v. Noxon*, No. 07-40152, 2008 WL 4758583 (D.Kan. Oct. 28, 2008); *United States v. Ontiveros*, No. 07-CR-333, 2008 WL 2937539 (E.D.Wis. July 24, 2008) (Griesbach, J.); *United States v. Hanson*, 561 F.Supp.2d 1004 (E.D.Wis.2008); *United States v. Shipley*, 560 F.Supp.2d 739 (S.D.Iowa 2008); *United States v. Baird*, 580 F.Supp.2d 889 (D.Neb.2008)).

Counsel prays that after weighing the § 3553 factors in this case, the Court will conclude that a sentence allowing close monitoring in the community and the type of counseling not available in the Bureau of Prisons is, in this case, "simply the right thing to do."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on March 5, 2012, I caused the foregoing document to be served by electronic filing on:

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