IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	) No. 1:15-CR-0165-TWP-DKL
	)
v.	) Honorable Judge Tonya Walton Pratt
	)
RUSSELL TAYLOR,	)
	)
Defendant.	)

DEFENDANT'S SENTENCING MEMORANDUM AND REQUEST FOR DOWNWARD VARIANCE

Defendant, RUSSELL TAYLOR, by and through his attorneys, BRAD BANKS, ADAM BROWER, and ERIC MASSEY, respectfully submits his Memorandum for this Court's consideration in determining a sentence that, while sufficient, is not more than necessary to meet the goals of sentencing as outlined by 18 U.S.C. §3553 (a)(2).

I. Introductory Remarks

Mr. Taylor submits to this Court as a man who is deeply remorseful and demonstratively affected by the pain, suffering, and humiliation he has caused the victims in this case. Mr. Taylor has had significant time to reflect on his actions and criminal conduct in this matter and is distraught over the anguish it has caused both to the victims, their families and his own family. Mr. Taylor's psychological evaluation highlights numerous areas of concern which Mr. Taylor is committed to addressing during his lengthy time of incarceration.

Mr. Taylor is prepared to accept the sentence the Court finds appropriate pursuant to the plea agreement filed in this cause. Mr. Taylor has been incarcerated since his arrest by federal authorities and is accepting that his incarceration in federal custody is going to continue for quite

some time. As outlined below, the Defendant will show that a sentence in the range of 180 to 274 months is what is sufficient to meet the purposes of 18 U.S.C. §3553(a)(2).

II. Presentence Investigation Report and §5K1.1

Mr. Taylor does not contest the calculations of the pre-sentence investigation report which calculates his offense at a level 43. The plea agreement contemplates a §5k1.1 motion reducing the advisory level to a level 42, and it is this level that Mr. Taylor's memorandum will be working from in reference to what is an appropriate sentence. Based on the factors outlined below, the advisory level as applied to Mr. Taylor should be given little weight and an appropriate sentence should be found to be between 180 and 274 months.

III. Application of the Sentencing Guidelines

The reasonableness of any sentence is determined by a district court's individualized application of the statutory sentencing factors. Unfortunately, in this case the Court is working with a guideline that is fundamentally different from most in that, unless applied with great care, can lead to an unreasonably excessive sentence that is inconsistent with §3553.

Sentencing guidelines are typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. *United Sates v. Ritta*, 551 U.S. 338, 349 (2007). However, the Commission was prevented from using the empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under §2G2.1 and 2.2 several times since their introduction in 1987, recommending increasingly harsher penalties each time.[1]

[1] United States Sentencing Commission, *The History of Child Pornography Guidelines,* Oct. 2009, available at http://www.ussc.gov/general.20091030_History_Child_Pornography_Guidelines.pdf.

The sentencing guideline for production of child pornography based offenses is §2G2.1, which was part of the original 1987 guidelines.[2] §2G2.1 initially provided for a base offense level of 25 and had a single specific enhancement for the age of the child being under 12 years appearing in the production.[3] Over the years to follow, the Sentencing Commission substantially increased the penalty for "production" offenses based primarily on congressional directives instead of any empirical data.[4] For example, in 1996 the commission increased the base level to 27 and added the often criticized 2 level enhancement for the use of a computer.[5] In another example of a congressionally directed increase, the Commission was directed under the PROTECT Act to increase the base level from 27 to 32, also adding a number of additional separate enhancements.[6]

The statistics offered by the Sentencing Commission clearly show a substantial disapproval by the district courts of the guidelines in many instances. In fiscal year 2004, 84% of the production cases were sentenced within the guidelines.[7] By 2010 the number of cases sentenced within the guidelines dropped to 56.8%.[8] By 2011 (most recent data available), the rate of offenders convicted of production charges that were sentenced within the guidelines

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[2] United States Sentencing Commission, *Federal Child Pornography, Full Report to Congress,* December 2012, at 249, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf

[3] USSC §2G2.1 (1987)

[4] United States Sentencing Commission, *Federal Child Pornography, Full Report to Congress,* December 2012, at 249, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf

[5] *Id.*

[6] *Id.*

[7] *Id* at 254.

[8] *Id.*

dropped to 50.4%.[9] Of the offenders convicted of production offenses, 38.1% received below range sentences, which *did not include those receiving departure for substantial assistance*.[10]

The child pornography guidelines have been the subject of intense scrutiny leading to a criticism of their application by district courts. Much of the criticism surrounds distribution cases as they are more prevalent. However, the implications apply to production charges as well. Judges across the country have been critical of the guidelines in child pornography cases, especially the fact that the increase in the guidelines are based on congressional directives as opposed to empirical evidence.[11]

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[9] *Id.*

[10] *Id.* Emphasis added.

[11] See also United States v. Grober, 624 F.3d 592, 600-01 (3d Cir. 2010) (applying abuse of discretion review to a district court's policy-based downward variance from § 2G2.2 because "the Commission did not do what 'an exercise of its characteristic institutional role' required—develop §2G2.2 based on research and study rather than reacting to changes adopted or directed by Congress"); id. at 608-09 ("Congress, of course. . . may enact directives to the Commission which the Commission is obliged to implement," but "Kimbrough permits district courts to vary even where a guideline provision is a direct reflection of a congressional directive"); United States v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010) (Kimbrough's holding that "it was not an abuse of discretion" for a district court to disagree with the crack guidelines "because those particular Guidelines 'do not exemplify the Commission's exercise of its characteristic institutional role' . . . applies with full force to § 2G2.2."); United States v. Henderson, 649 F.3d 955, 959-60 (9th Cir. 2011) ("[T]he child pornography Guidelines were not developed in a manner 'exemplify[ing] the [Sentencing] Commission's exercise of its characteristic institutional role,' . . . so district judges must enjoy the same liberty to depart from them based on reasonable policy disagreement as they do from the crack-cocaine Guidelines discussed in Kimbrough."); id. 963 n.3 ("That Congress has the authority to issue sentencing directives to the Commission" and "that the Guidelines conform to Congressional directives does not insulate them from a Kimbrough challenge."); United States v. Stone, 575 F.3d 83, 89-90 (1st Cir. 2009) ("[O]ur precedent has interpreted Kimbrough as supplying this power even where a guideline provision is a direct reflection of a congressional directive," including the career offender, fast-track, and child pornography guidelines); id. at 93-94, 97 (district court may choose to agree with Congress's policy decisions as long as it recognizes its authority not to, but the "guidelines at issue are in our judgment harsher than necessary" and "we would have used our Kimbrough power to impose a somewhat lower sentence"); United States v. Halliday, 672 F.3d 462, 474 (7th Cir. 2012) (district courts are "at liberty to reject any Guideline on policy grounds," but defendant did "not argue that the district court was unaware of its discretion to disagree with the [child pornography] Guidelines"); United States v. Regan, 627 F.3d 1348, 1353-54 (10th Cir. 2010) (defendant's argument for a policy-based variance from § 2G2.2 was "quite forceful" but he "did not raise the argument that the Guidelines are entitled to less deference because they are not the result of empirical study by the Commission").

In fiscal year 2011 in production of child pornography cases the average guideline minimum was 291 months, despite the fact that the average sentence imposed was 274 months.[12] The fact that courts are increasingly sentencing below the minimum applicable guideline range was stated very well by the sentencing commission, "Thus, the growing gap in the difference between the average guideline minimums and average sentences imposed in fiscal years 2010 and 2011 is explained by the increased *rate* of below range sentences rather than by an increased *extent* of departures and variances.[13]

The Sentencing Commission is an agency like any other agency. The Commission's guidelines lack the force of law, as the Supreme Court held in *Booker* that courts are no longer bound to rigidly follow the Guidelines. But, in light of the Commission's relative expertise, courts must take the Guidelines into account when sentencing. This deference to the Guidelines is not absolute or even controlling; rather, like judicial review of any agency determination, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors to which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see Kimbrough v. United States*, 552 U.S. 85 at 109, 128 S.Ct. 558 (citing the crack cocaine Guidelines as an example of Guidelines that "do not exemplify the Commission's exercise of its characteristic institutional role"). On a case-by-case basis, courts are to consider the "specialized experience and broader investigations and information available to the agency" as it compares to their own technical or other expertise at sentencing and, on that basis, determine the weight owed to the Commission's

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[12] United States Sentencing Commission, *Federal Child Pornography, Full Report to Congress,* December 2012, at 257, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf

[13] *Id.*

Guidelines. *United States v. Mead Corp.*, 533 U.S. 218, 234, (2001)(citing *Skidmore*, 323 U.S. at 139, 65 S. Ct. 161).

In keeping with the principles in *Kimbrough*, the Supreme Court held that it was not an abuse of discretion for a district court to conclude that the Guideline's treatment of crack cocaine convictions typically yields a sentence greater than necessary to achieve the goals of §3553(a), because those Guidelines "do not exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109-110, 128 S. Ct. 558. Much like *Kimbrough*, the guidelines and enhancements found in §2G2.1 and 2G2.2 do not reflect the empirical data and findings of the Sentencing Commission, but instead reflect the history of congressional mandates. It has been clearly established by the Sentencing Commission's report to Congress that on average district courts across the United States are sentencing below the minimum recommended guidelines in child pornography production cases. Therefore, the guidelines should be given minimal consideration in determining the appropriate sentence in this case.

IV. Application of the § 3553 Sentencing Factors

A. Nature and Circumstances of the Offense

Mr. Taylor recognizes the seriousness of the offenses to which he is pleading guilty to. In referencing the nature and circumstances of the offense, Mr. Taylor in no way is minimizing the impact his conduct has had on the victims of this case. Nor is Mr. Taylor disputing the fact that he placed the cameras, setup the recording that captured the images in question, or that he distributed commercial child pornography to Mr. Fogle. However, it is important for the Court to understand what his conduct comprised.

Mr. Taylor originally placed hidden cameras in his home in an effort to avoid his property being stolen during the numerous periods of travel with Mr. Fogle. In reviewing the

videos, he noted a video that captured sexual activity and told Mr. Fogle of this video. This led to the cameras being placed by Mr. Taylor in the home in places that would capture minors without clothing. Mr. Taylor's production of child pornography, with the exception of one text/video, is limited to capturing minors that were visiting his home on video in various states of undress. These videos were recorded on cameras that appeared to be radio alarm clocks and were placed in a bedroom and bathroom where minors would be when either changing clothes or undressing to shower or bathe. The cameras automatically recorded any time movement was detected and the video was then saved on a computer. The videos did capture what would meet the definition of sexually explicit conduct in that they displayed lascivious exhibition of the genitals or pubic area of any person.

Mr. Taylor did not engage in any sexual activity or video any sexual activity with himself and any of the victims depicted in the production charges. Further, Mr. Taylor did not have any contact or in any way direct the victims' actions. Mr. Taylor placed cameras in places where he was likely to capture the victims without clothing but he was not contacting or directing the victims in the production of the videos in any way.

Mr. Taylor did not distribute or show the videos he created to individuals other than Mr. Fogle. It is important to note that punishment for production of child pornography is higher in part due to the videos becoming what is commonly known as "commercial child pornography." By design, Mr. Taylor and Mr. Fogle maintained these videos, with the exception of one text message, on a single laptop computer that was accessed by Mr. Fogle and then returned to Mr. Taylor. Additionally, there is no evidence to show that Mr. Taylor ever engaged in any of this type of inappropriate conduct prior to establishing a relationship with Mr. Fogle.

As for the commercial child pornography count, this was placed on a single jump drive file and distributed to Mr. Fogle at Mr. Fogle's request. Mr. Taylor also maintained a copy of this file on one of his computers located in his home and never distributed it to anyone other than Mr. Fogle.

As will be shown in further discussion, Mr. Taylor and Mr. Fogle maintained a psychologically abusive relationship. Despite contentions made by Mr. Fogle, Mr. Fogle regularly requested additional videos of the minor children be made and even offered to provide Mr. Taylor with more sophisticated equipment to do so. Mr. Fogle maintained control over Mr. Taylor's job, owned the home Mr. Taylor was living in, and provided a lavish number of experiences to Mr. Taylor. Mr. Fogle had the perfect person to carry out his sexually deviant pursuits, all the while attempting to insulate himself from the risks of the conduct.

B. History and Characteristics of Defendant

Prior to the charges brought in this case, Mr. Taylor was by all accounts a good father and husband. Mr. Taylor has a history of working in leadership positions for non-profit organizations. Mr. Taylor is also a military veteran.

Mr. Taylor underwent a psychological/psychosexual risk assessment performed by Dr. Robin Kohli at the Grayson County Detention Center on November 9, 2015[14]. Dr. Kohli is a graduate of Ohio University and has her masters and doctorate degrees in Psychology from Pepperdine University. Dr. Kohli is a full member of the American Psychological Association and maintains a private practice in Indianapolis. A copy of Dr. Kohli's report is filed contemporaneously with this memorandum and will be referenced herein as the "Kohli report."(Exhibit B attached).

[14] See Exhibit A a copy of Dr. Kohli's Curriculm Vitae attached as reference for sentencing.

Mr. Taylor had a very strained and abusive childhood. Mr. Taylor was born on July 5, 1971, and is currently 44 years of age. Mr. Taylor has reported throughout the investigation of this matter that he was sexually assaulted by a neighbor and the neighbor's son on a regular basis between the ages of 5 and 8 years old. (*See Kohli report pg. 4*). The abuse by the neighbors included both oral and anal sexual assault. (*See Kohli report pg. 4).* The perpetrators of Mr. Taylor's abuse threatened to physically harm Mr. Taylor and his family if he revealed the sexual assaults to anyone. (*See Kohli report pg. 4).* These threats of violence were accompanied on at least one occasion with actual violence when the neighbor shot Mr. Taylor in the back with a pellet gun. (*See Kohli report pg. 4).* Additionally, Mr. Taylor indicates he went along with the abuse as the neighbor child was his only friend. (*See Kohli report pg. 5).*

Mr. Taylor's parents were divorced at the time he was 8 years old and he spent time after that first living with his mother for the next 5 or 6 years until she remarried a preacher in 1984. (*See Kohli report pg. 3).* Mr. Taylor's relationship with his mother at this time was abusive, as she would discipline him by hitting him with objects including switches, shoes, or paneling, whatever was around. (*See Kohli report pg. 4).* Mr. Taylor did maintain a positive relationship with his step-father. During the time with his mother and step-father he was moved around frequently due to his step-father's work as a preacher. (*See Kohli report pg. 3).* Mr. Taylor attended 10 different schools in a 12 year period. (*See Kohli report pg. 3).* At the age of 15, Mr. Taylor moved back in with his father. Once living at his father's home and prior to the age of 18, Mr. Taylor reports having had sexual contact with 5 or 6 older women. (*See Kohli report pg. 5).*

As a young adult Mr. Taylor was with the Air Force for 6 months and the Reserves for another year before being honorably discharged. (*See Kohli report pg. 5 and Presentence Report*

generally). Mr. Taylor held jobs with non-profit organizations until meeting and going to work for Mr. Fogle and his non-profit foundation.

Mr. Taylor and Mr. Fogle were in the position of employee and employer, and in that context, their relationship can only be described as complicated and inappropriate. Mr. Taylor was aware of Mr. Fogle's interest in young girls early on in their relationship. (*See Kohli report pg. 9).* Mr. Fogle quickly treated Mr. Taylor to the benefits of Mr. Fogle's celebrity status, including Colts games, trips to Los Angeles for filming of commercials, and introducing Mr. Taylor to women. (*See Kohli report pg. 8-9).* Mr. Taylor eventually went to go work for Mr. Fogle and the Jared Foundation. (*See Kohli report pg. 9).*

Over the course of their relationship, Mr. Taylor and Mr. Fogle grew very close, often being referred to by others as an old married couple. Mr. Taylor shared with Mr. Fogle that he had installed a camera for security purposes in his home office and that unbeknownst to him it captured a sexual encounter involving an intern and her boyfriend. (*See Kohli report pg. 9).* The two then began to engage in conversation about catching minors on camera in the bedrooms and bathroom so as to see them in states of nudity. (*See Kohli report pg. 10).* Mr. Fogle had a specific interest in a couple of the minor victims and would request additional video in relation to those specific victims. (*See Kohli report pg. 10).* These events led to Mr. Taylor capturing more videos with the hidden cameras. These motion activated cameras would be set up by Mr. Taylor in the bathroom or bedroom of his home, then whatever was happening would be recorded to a hard drive on a computer. Mr. Taylor would view the video and then present the videos of interest to Mr. Fogle by delivering the laptop for him to watch, thus insulating Mr. Fogle from directly maintaining the videos. (*See Kohli report pg. 10).* Mr. Taylor captured other minor victims that were not shared with Mr. Fogle through this process and has taken responsibility for

every victim that was captured on video, even those that were not shared or distributed to anyone, including Mr. Fogle. Mr. Taylor and Mr. Fogle would engage in extensive, inappropriate text messaging regarding sexual fantasies involving some of the victims. (*See Kohli report pg. 10).*

Throughout this entire time, Mr. Fogle maintained a controlling influence over Mr. Taylor, remind him frequently that he controlled his employment and his home. Mr. Fogle would refer to himself as Mr. Taylor's "daddy" and there would be discussions of how much Mr. Taylor loved "daddy" and reminding him that "daddy" was paying for his things. (*See Kohli report pg. 10).* Mr. Fogle would even go as far as making Mr. Taylor eat things that were inconsistent with his gluten intolerance. (*See Kohli report pg. 10).*

Mr. Taylor acknowledges that the facts as he has presented them are different than what was presented to the Court by Mr. Fogle and his Counsel. However, there are acts that are consistent with the facts as presented by Mr. Taylor. For example, shortly after the arrest of Mr. Taylor, Mr. Fogle made contact with Mr. Taylor's wife to assure her that she didn't need to worry about the house because he knew that Mr. Taylor was in custody and she did not need to worry about that. However, after Mr. Fogle's house was raided on July 7, 2015, in what can only be described as retribution, Mr. Fogle filed a lien via land contract on Mr. Taylor's home on or about July 9, 2015[15], and subsequently filed suit to foreclose on that lien on August 26, 2015[16]. It should be noted that Mr. Fogle was maintaining innocence through a spokesperson at the time of the lien filing.

Additionally, Mr. Taylor was in counseling well before any investigation into the criminal conduct involved in this case. Mr. Taylor entered counseling in November, 2012, and

[15] *See* exhibit C land contract filed with Marion County Recorder July 9, 2015
[16] *See* exhibit D Chronological Case Summary of foreclosure action

completed it in March, 2014. Shane Seabourn, Licensed Clinical Social Worker, reports that he counseled Mr. Taylor from November 6, 2012 to March 11, 2014. According to Mr. Seabourn Mr. Taylor's counseling included addressing "significant problems with being assertive in a healthy manner with his boss." (*See Seabourn* exhibit E). At that time Mr. Taylor was diagnosed as suffering from major depressive disorder with melancholic features and generalized anxiety disorder. (*See Seabourn* Exhibit E*).*

As referenced above and from his counseling with Mr. Seabourn, Mr. Taylor suffers from a history of mental illness that likely dates back to the trauma he suffered as a child. Mr. Taylor continues to suffer from substantial mental illness, which most recently manifested itself in his near fatal suicide attempt shortly after his arrest for the charges he faces in this case. During Dr. Kohli's psychological assessment of Mr. Taylor, she confirmed the presence of dependent and passive personality structures, as well as significant emotional distress related to anxiety and depression. (*See Kohli report pg. 15).* Further, Dr. Kohli noted that at the time of the evaluation, Mr. Taylor continued to use significant cognitive distortions related to his relationship with Mr. Fogle, which suggests that he continues to rationalize that Mr. Fogle had his best interests in mind and was "taking care" of him. (*See Kohli report pg. 10).* Further, Dr. Kohli states that Mr. Taylor's desperation for friendship has demonstrated a recurrent pattern over the years, whereby he has allowed himself to be exploited in return for friendship and dependency. (*See Kohli report pg. 10).* Dr. Kohli reached the conclusion that, "Mr. Taylor's continued rationalization and confusion regarding his history of abuse and willingness to allow himself to be exploited by others will likely require years of therapy, which he appears to desire." (*See Kohli report pg. 15).*

As part of her evaluation of Mr. Taylor, Dr. Kohli administered the Sex Offender Risk Appraisal Guide (SORAG). Mr. Taylor scored in the low risk range with a finding of 15%

chance of sexual recidivism in 7 years and a 12% chance of sexual recidivism in 10 years. (*See Kohli report pg. 14).* Additionally, Dr. Kohli administered the widely recognized Static-2002 test to Mr. Taylor. In the Static-2002 test, Mr. Taylor received a score of 4 which placed him in the low-moderate risk level. (*See Kohli report pg. 14).* The score of 4 on this test equates to a probability of sexual re-offense at 4.6% within the next 5 years and 5.1% in the next 10 years. (*See Kohli report pg. 15).*

Dr. Kohli noted three areas for the Court's consideration. First, Mr. Taylor has a significant history of trauma. More specifically, Dr. Kohli found that, rather than seek solutions for his problems or give up his by-proxy celebrity status he enjoyed through his employment with Mr. Fogle, "Mr. Taylor chose to stay in his situation due to his unhealthy dependency on Mr. Fogle, his fear that all he had [house, lifestyle, etc.] would be stripped away from him, and also because his history of trauma led to Mr. Taylor's underlying belief that Mr. Fogle was controlling his decisions." (*See Kohli report pg. 15).*

The second point of emphasis noted by Dr. Kohli was her finding of Mr. Taylor's lack of criminal history and low-moderate risk of reoffending. (*See Kohli report pg. 15).* Dr. Kohli cited the lack of criminal history and the findings of low risk and low-moderate risk for reoffending as a mitigating consideration. (*See Kohli report pg. 15).* Further, her evaluation found that there was a lack of evidence to suggest Mr. Taylor engaged in the video recordings based on his own sexual interest. (*See Kohli report pg. 15).*

The last point of emphasis made by Dr. Kohli is that the studies regarding sex abuse offenders of this nature can be divided into motivations associated with subtypes of pedophilia or the commercial exploitation for financial gain. (*See Kohli report pg. 15).* It is noted that Mr.

Taylor's motivations for generating the child pornography in this case fall outside of the standard subtypes and may put him at even a lower risk of re-offending. (*See Kohli report pg. 15).*

Dr. Kohli made several diagnoses of mental illness as it relates to Mr. Taylor. Mr. Taylor has been diagnosed with Child Sexual abuse, Confirmed (non-contact exploitation); Adjustment Disorder with Mixed Anxiety and Depressed Mood; Posttraumatic Stress Disorder; Personal History of Sexual Abuse in Childhood, and Adult Psychological Abuse by Non-spouse/non-partner, Confirmed; Narcissistic Personality Traits; and R/0 Somatic Symptom Disorder.

The nature and circumstances of the offense as well as the history and characteristics of Mr. Taylor heavily weigh toward the Court deviating below the minimum guideline of 360 months. The production offenses involved in this case used a hidden camera activated by motion. The camera required no direct involvement by Mr. Taylor in the actual filming of the minors and the minors were unaware it was even occurring. Mr. Taylor did not have contact with the victims or direct them in the production of the videos in anyway. Additionally, Mr. Taylor's extensive mental health issues made him especially susceptible to the suggestions and requests of Mr. Fogle. Taking into account the foregoing factors, a sentence between 180 and 274 months is appropriate.

C. Sentence Imposed Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment

Mr. Taylor understands the production and distribution of child pornography is a very serious offense. He further understands that he is facing a significant sentence regardless of what determination the Court makes. The plea agreement anticipates a range of 180 to 420 months. Any sentence the Court could fashion within that range will reflect that these charges are serious, promote respect for the law, and provide just punishment. Given the circumstances of this case

and the other sentencing factors for the Court to consider, a sentence that is between 180 and 274 months will achieve all of the prongs associated with this part of §3553. If the Court were to sentence Mr. Taylor to the statutory minimum, he would be approximately 57 years old at the time of his release.

D. Afford Adequate Deterrence to Criminal Conduct

There is no denying the attention this matter has garnered in the media. The coverage of this case has been extensive by both local and national media due to the celebrity status of co-defendant Mr. Fogle. Anyone that has paid attention to this case has seen the labels, descriptions, and adjectives used to describe both Mr. Fogle and Mr. Taylor.

Taking into account the public ridicule in this case, it is hard to imagine that such ridicule along with a sentence that is at least 180 months would not be adequate to serve as a deterrent to future criminal conduct. Regardless of the sentence, Mr. Taylor is going to spend a significant part of his life because he is behind bars. Mr. Taylor will miss most if not all major events in his twin sons' lives, he will likely be imprisoned longer than his parents will live, and he will lose significant portion of his income producing years. If the minimum sentence in this case and the collateral consequences suffered are not a deterrent to a member of the general public, then there is probably not a sentence high enough to deter that particular person.

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

As noted by Dr. Kohli, Mr. Taylor is in need of years of significant treatment for him to correct and deal with the issues that got him to the point he finds himself today. Dr. Kohli and the Presentence Report both found Mr. Taylor very interested in and open to receiving treatment.

The most important factor for consideration of this prong is that Mr. Taylor is very low risk to re-offend. At the 10 year point the risk of recidivism was very low, ranging between 5.1% and 12%. A sentence fashioned between 180 and 274 months is more than enough to achieve the goals of this prong.

F. Provide Defendant with Needed Education/Vocational Training, Medical Care and Correctional Treatment

Mr. Taylor is aware that he has substantial work to do to address his mental health needs. Additionally, Mr. Taylor has not completed his college education and has indicated in the Presentence Report a desire to do so. The Statutory minimum would provide more than ample time for Mr. Taylor to acquire the treatment and education he needs and desires. Mr. Taylor does request placement in the FCI Marianna facility in Marianna, Florida due to its offering sex offender treatment programs and its close proximity to his father who resides in Florida.

G. Avoiding Unwarranted Disparities among Defendants with Similar Records who Have Been Found Guilty of Similar Conduct

This factor weighs heavily in Mr. Taylor's favor for being sentenced below the guidelines. In fiscal year 2011 (the most recent data available), of the Defendants sentenced for production of child pornography, the average sentence imposed was 274 months.[17] Further, compared to other Defendants given an average sentence of 274 months, Mr. Taylor falls into a small category of less dangerous offenders. The commission found in 2010 that the average sentence handed down nationally to defendants convicted of child production charges was 267.1

[17] United States Sentencing Commission, *Federal Child Pornography, Full Report to Congress,* December 2012, at 256, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf

months.[18] Of those offenders sentenced in 2010, 74% had present or remote offense level sexual contact with the victims, 15.5% were present for the production of the pornography but did not have sexual contact offenses or assist others with sexual contact offenses, and a mere 10.5% were not physically present and did not have sexual contact with the victims.[19] It is important to note the average sentence in the United States for production offenses in 2010 was 267.1 months. Of those sentenced in 2010, 74% of the offenders had sexual contact with the victims as part of their production of the child pornography. This data suggests heavily that a sentence of 420 months as promulgated by the United States would result in a gross and unwarranted disparity when compared to Defendants found guilty of the same type of charges.

To the contrary, Mr. Taylor's creation of the videos of child pornography in this case were non-contact, and none of the videos involved sexual contact of any nature with the victims. If 74% of the defendants had sexual contact with the victims as part of their production of child pornography and received an average sentence of 267.1 months, clearly and offender who falls into the minority of defendants who had no sexual contact does not deserve a sentence harsher than that average. Surely any aggravator that there were multiple victims that did not know they were being filmed is outweighed by offenders who filmed the sexual assault of their victim as part of the pornography and whose victims were being sexually assaulted during the filming. Since the average sentence for production offenders was 274 months in 2011, and because Mr. Taylor is in the small minority that did not engage in sexual contact with any of the victims as part of the production of child pornography, a range of 180 to 274 months for Mr. Taylor's sentence would be appropriate and avoid a disparate result that the United States is seeking 420 months.

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[18] *Id.*
[19] *Id* at 263.

It is also warranted to consider the sentence Mr. Fogle received in this case. Mr. Fogle was intimately tied to the creation of the child pornography. Despite his declarations to the contrary, it is inconceivable to think that a man who admittedly and regularly sought out sex with minors under the age of 16 did not request the commercial pornography or the home produced videos form Mr. Taylor, as Mr. Fogle claimed. To the contrary, Mr. Fogle requested more videos of specific minors and pressured Mr. Taylor to do so, even after Mr. Taylor stopped the videotaping altogether in early 2015. Mr. Fogle even offered to buy more sophisticated and better quality camera equipment. Mr. Fogle was smart in that he made sure all of these items were produced and maintained by Mr. Taylor, making it difficult if not impossible for the United States to prove a production charge against Mr. Fogle. Despite the differences in the charges that the co-defendants pled to, Mr. Fogle's intimate involvement in this case should give some point of reference for an appropriate sentence that is not too disparate from Mr. Fogle's sentence. A sentence of 420 months for Mr. Taylor would be almost 2.5 times more than the sentence received by Mr. Fogle. Mr. Taylor recognizes it is he who produced the videos and understands that is clearly a crime punishable by a harsher sentence. However, given Mr. Fogle's direct involvement in this crime, a punishment that is 2.5 times harsher is not warranted and would create an unreasonable disparity. A sentence in the range of 180 to 274 months is appropriate under all circumstances and would avoid a gross disparity between Mr. Taylor and others sentenced for the same type of offenses.

V. Conclusion

Per the level 42 guideline, the minimum recommended sentence for Mr. Taylor is 360 months. Given the nature and the circumstances, Mr. Taylor's history and characteristics, the clearly disproportionate sentence that would result by a sentence to the guideline minimum of

360 months, Mr. Taylor respectfully submits that a downward deviation is warranted in this case. Mr. Taylor, as a non-contact offender, should not receive a greater sentence than the national average where 74% of the defendants perpetrated sexual offenses on their victims as part of the child pornography production. An appropriate sentence in this matter would be between 180 and 274 months.

Respectfully submitted,

/s/ Bradley L. Banks
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CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system this ____ day of December, 2015.

By: /s/ Bradley L. Banks
Bradley L. Banks