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8
 9 UNITED STATES OF AMERICA
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 OAKLAND DIVISION

12

13 UNITED STATES OF AMERICA, No.: CR 10-0745 DLJ

14

15 Plaintiff,

**DEFENDANT'S SENTENCING
MEMORANDUM**

16

vs.

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18 MICHAEL HOWARD VAWTER,

Date: February 25, 2022
 Time: 11:00 a.m.
 Dept: Courtroom #1

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Defendant.

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I. INTRODUCTION

Michael Vawter entered a plea of guilty to a violation of Title 18 USC 2252(a)(4)(B), Possession of Child Pornography, pursuant to a Plea Agreement entered under Federal Rule of Criminal Procedure 11(c)(1)(C). The Plea Agreement provides for a sentencing range of from 51 months to 78 months imprisonment, incorporating a United States Sentencing Guideline (USSG) Total Offense Level 28 and allowing for a downward variance of four levels, to Total Offense Level 24, should the Court find a sufficient basis. The United States Probation Office has prepared a Presentence Report (PSR) and concluded that the advisory Guideline is Total Offense Level 28, Criminal History Category I, consistent with the agreement of the parties. Mr. Vawter has no objection to the PSR.

1 Mr. Vawter comes now before the Court requesting that the Court find that there is
2 sufficient basis, pursuant to Title 18 USC 3553(a), for a four level downward variance
3 from the advisory Guideline and that a sentence of 51 months imprisonment, to be
4 followed by a term of supervised release, is “sufficient, but not greater than necessary” to
5 meet the ends of justice.

II. BACKGROUND

7 Michael Vawter was born in San Leandro, California. Now 41 years old, he is the
8 second of three children born to the marriage of Henry Michael and Cheryl Diane
9 Vawter. At the time of Michael's birth in 1969, his father established an insurance
10 brokerage firm, California Coastal Insurance. Michael's seven year older brother James
11 joined the firm after he completed college. Michael's mother has been an elementary
12 school teacher.

13 Michael attended public schools in Castro Valley, California, where he was raised.
14 He graduated from Castro Valley High School in 1987. In addition to doing well
15 academically, he was a varsity athlete. He went on to San Diego State University, from
16 which he graduated in 1992 with a degree in Organizational Psychology. Immediately
17 upon graduation from college, Michael joined his father's insurance brokerage firm.
18 Michael has held a California Fire and Casualty Broker-Agent's license since 1992. He
19 remained with the firm until his arrest in the instant case.

20 While a college student, Michael met Tina, his wife to be. They were married in
21 1994 and have two children, 11 year old Sarah and 8 year old Daniel. Tina is a
22 pharmaceutical sales representative Michael, Tina, and the children resided in their
23 family home in Danville for 13 years before his arrest. Michael was initially arrested on
24 state charges in March 2010, was released on bail, and taken into federal custody on
25 October 14, 2010, where he remains. During the 7 month period from March until
26 October 2010, Michael resided with his mother. During that time he regularly visited his
27 children and his wife.

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1 Michael's parents separated and divorced approximately five years ago. Michael's
 2 father left his mother, who suffers from Multiple Sclerosis, and began a relationship with
 3 a woman Michael's age, who also worked at California Coastal Insurance. A rift
 4 occurred in the family as a result of Michael's father's actions and his father was
 5 eventually bought out of the company. Since his parents' separation, Michael has played
 6 a critical role in the care of his severely ill mother, who now uses a wheel chair and is
 7 disabled.

8 Michael has provided the U.S. Probation Office with a complete statement
 9 regarding his offense. He indicated that since college he has looked at adult femal nude
 10 photography, primarily in magazines such as Playboy. Several years ago, Michael's
 11 company hired a new information technology manager who became aware of Michael's
 12 interest in accessing pornography. On Michael's company laptop computer, the IT
 13 manager set up automatic links to various pornography sites and installed file sharing
 14 software. Michael has stated that he possesses limited computer skills and simply
 15 utilized the links and software the manager established for him. He began to receive
 16 adult pornography and, as he has admitted, spent more and more time, compulsively,
 17 viewing the material. Over time, one link led to another link.

18 When Michael first received unsolicited child pornography (his initial interests
 19 were in adult pornography), he simply deleted the images. As he received more of them,
 20 however, he began to view them and eventually proceeded to "collect" them, in his
 21 characteristic compulsive fashion, organizing them. Michael's compulsive downloading
 22 of pornography, primarily adult, but also child, became disruptive at his company, as it
 23 was affecting other's ability to access computer resources. The disruption led to an
 24 inquiry, which led to the discovery of the child pornography images.

25 Michael immediately admitted his conduct and began therapy at Crossroads
 26 Psychotherapy Institute, both individual and sex offender specific group therapy, under
 27 the direction of Dr. Sue Scoff. Michael was in treatment for almost seven months before
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1 he was taken into federal custody. According to Dr. Scoff, Michael was cooperative,
 2 engaged, and committed to his treatment (PSR Paragraph 60).

3 Counsel referred Michael to Dr. Charles Flinton of the San Francisco Forensic
 4 Institute for a Sex Offender Specific Psychological Evaluation. Dr. Flinton is the former
 5 director of Sharper Future, the agency that provides contract sex offender evaluation and
 6 treatment services for the Northern District of California United States Probation Office.
 7 Dr. Flinton is also a Sexually Violent Predator evaluator for the State of California. Dr.
 8 Flinton's report has been provided to the Court through the U.S. Probation Office.

9 Dr. Flinton provisionally diagnosed Michael with "Pedophilia, sexually attracted
 10 to females, non-exclusive" and "Features of Sexual Compulsivity." (Flinton Report, p.
 11 14). He also concluded that based on actuarial assessment data, Michael presents with an
 12 approximate 2.1% likelihood within 5 years of re-offending. That is a low risk for re-
 13 offending. (Flinton Report, pp. 17, 21) Dr. Flinton noted that Michael was developing
 14 benefit from the therapy in which he was engaged, that he has never had any sexual
 15 contact with a child, that he has a stable social support network, and that he is developing
 16 insight into his behavior. Dr. Flinton concluded, "Mr. Vawter's overall risk level (low),
 17 his response to the current situation, including his cooperation and his interests in making
 18 significant changes in his life, suggest that he can be adequately managed in the
 19 community."

20 Michael was also evaluated by Douglas Tucker, M.D., who reached essentially the
 21 same conclusion as Dr. Flinton, but noted that Michael was also diagnosed as
 22 "polysubstance dependence (marijuana, alcohol, chewing tobacco)." Dr. Tucker noted
 23 that Michael takes responsibility for his actions, has been effectively engaged in
 24 treatment, and presents with low risk of re-offending. (Tucker Report, pp. 3-4)

25 The findings of the treatment professionals are consistent with many people in
 26 Michael's life who have expressed their opinions and observations of Michael over the
 27 years. Some 57 letters in support of Michael have been submitted to the United States
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1 Probation Office as well as the United States Attorney's Office. (Attachment "1" is a list
 2 of letters submitted to the Court by the Probation Office)

3 His older brother James offered the following:

4 "But regardless of this, one thing is certain. I can state with utmost
 5 confidence – my brother is not a threat to children or society or himself.
 6 He's a lover of kids – his own and others, he loves his wife and family and
 7 community, and has the potential to turn this tragedy in his life into good.
 8 As odd as that sounds I firmly believe that once he confronts the demons
 9 that possessed him to engage in the crime he is accused of, he can turn this
 10 event into good. He has always been a giver – whether as a kid through his
 11 Eagle project as a Boy Scout, as a worker in building houses for the poor,
 12 as a church leader organizing philanthropic efforts for the underprivileged
 13 here and abroad, or simply as a friend to those around him. He's not
 14 perfect for none of us are, but if you needed somebody for moral or
 15 physical support, he's always been there. And never, ever, under any
 16 circumstances has Michael been associated with or been linked to, or been
 17 in a position of taking advantage of children."

18 Michael has been active in the Parish Council of the Greek Orthodox Church in
 19 Oakland. A fellow parishioner who has known Michael for over ten years, Geoffrey
 20 Gowan, wrote:

21 Michael has done many good deeds over the years. For example, last year
 22 he organized and lead a special collection of supplies from our community
 23 to benefit Project Mexico and the St. Innocent Orphanage in Tijuana. He
 24 also served on the Parish Council for three years and lead our Philanthropy
 25 Ministry, and served in many other ways such as helping put on the Greek
 26 Festival in Oakland each year."

27 This positive impression of Michael was echoed by Metropolitan Nikitas, Director
 28 of the Patriarch Athenagoras Orthodox Institute at the Graduate Theological Union at
 Berkeley:

29 "As a clergyman and hierarch of the Greek Orthodox Church, I not only
 30 visit various parishes but in certain rare cases assume the administrative
 31 and liturgical responsibilities of a community. This was so in the case of
 32 the Oakland Ascension Cathedral. It was there that I came to know Michael
 33 and develop my opinion and thoughts about him, since he served on the
 34 Parish Council and various committees. I found him to be thoughtful,
 35 trustworthy, respectful and dedicated. He seemed to be well-rounded and
 36 to be a person who was respected by colleagues and members of the parish
 37 community. . . . The fact that he was elected to and served on the Parish
 38 Council is a statement about his character. For our community, this means
 39 that we trust the person, respect his decisions, and see him/her as leader and
 40 role model. All of these qualities, I saw in Michael."

1 Emanuel Sakkis has known Michael for 35 years. He wrote:

2 "In our adult lives I have served with Mike on our church's Parish Council
 3 and have seen how Mike is a man of action and not just words. He has
 4 been an inspiration to many in our community. Mike's main focus on our
 5 Parish council was philanthropy and giving back to the community from
 6 food drives to Project Mexico where he led a group of parishioners and
 7 built a home for a needy family in Mexico. . . . When I see Mike he is with
 8 his wife and children and they are the picture of a happy family. I can't
 9 imagine what this event has done to my friend's poor kids and wife.
 10 Michael is also a loving son who brings his disabled mother to church
 11 every week selflessly taking care of her every need. He has a brother and
 12 sister yet Mike is the only one in the family that I ever see helping his mom
 13 and people have seen this and it supports the kind of man Mike has always
 14 proved to be in our community."

15 Michael's wife Tina's letter is particularly compelling, as she describes life with
 16 Michael that is characterized by his devotion to family, work in his church, efforts to aid
 17 teachers in his children's schools, leadership as a Cub Scout den leader, and his kindness
 18 and generosity toward his disabled mother. With regard to his efforts as a Den leader,
 19 she wrote:

20 "Michael's leadership as our den leader was impeccable. With his efforts
 21 he was able to recruit other parents to volunteer their time. Many of our
 22 den meetings were standing room only with the large turnout of children
 23 and parents. My daughter and I also participated in the meetings and
 24 outings as everything is welcoming to families at boy scouts. To organize
 25 and communicate on the whole year of calendar events, Michael met with
 26 the parents at our home, while his co-leaders/den moms met with the boys
 27 in the backyard, Michael was always very organized with the learning
 28 tasks at boy scouts and received compliments from all the parents. He is
 29 very missed at the meeting by the kids and parents."

30 The many letters received on Michael's behalf declare that the offense with which
 31 Michael is charged does not reflect the totality of Michael Vawter. Each person who has
 32 written has described characteristics consistent with the above excerpts. He is positively
 33 regarded for his work in the community, his devotion to family including his disabled
 34 mother, his commitment to his family company, and his unfailing friendship to many.

35 **III. APPLICABLE SENTENCING LAW**

36 The landmark decision in ***United States v. Booker***, 160 L. Ed. 2d 621, 125 S.Ct.
 37 738 (2005), changed sentencing in the Federal Courts. ***Booker*** renders the Guidelines as
 38 advisory only, and instructs the sentencing courts to consider the Guidelines in context of

1 all of those factors enumerated in Title 18 USC 3553(a). The Court found that the
 2 mandatory application of the Guidelines was unconstitutional and that a sentencing
 3 court's decision will be reviewed for whether it is "reasonable." *Booker*, at 660-661.

4 The Supreme Court addressed the issue of the "presumption of reasonableness" of
 5 a within Guidelines sentence in *Rita v. United States*, 551 S.Ct. 338, 127 U.S. 2456, 168
 6 L.Ed. 2d 203 (2007) and instructed that a within Guideline sentence is presumed
 7 reasonable only upon **appellate review**. The Court stated:

8 "We repeat that the presumption before us is an *appellate* court
 9 presumption. Given our explanation in *Booker* that appellate
 10 "reasonableness" review merely asks whether the trial court abused its
 11 discretion, the presumption applies only on appellate review. The
 12 sentencing judge, as a matter of process, will normally begin by
 13 considering the presentence report and its interpretation of the Guidelines.
 14 *18 U.S.C. § 3552(a); Fed. Rule Crim. Proc. 32*. He may hear arguments by
 15 prosecution or defense that the Guidelines sentence should not apply,
 16 perhaps because (as the Guidelines themselves foresee) the case at hand
 17 falls outside the "heartland" to which the Commission intends individual
 18 Guidelines, to apply, *USSG § 5K2.0*, perhaps because the Guidelines
 19 sentence itself fails properly to reflect § 3553(a) considerations, or perhaps
 20 because the case warrants a different sentence regardless. See *Rule 32(f)*.
 21 Thus, the sentencing court subjects the defendant's sentence to the
 22 thorough adversarial testing contemplated by federal sentencing procedure.
 23 See *Rules 32(f), (h), (i)(1)(C) and (i)(1)(D)*, see also *Burns v. United States*,
 24 *501 U.S. 129, 136, 111 S. Ct. 2182, 115 L.Ed. 2d 123 (1991)* (recognizing
 25 importance of notice and meaningful opportunity to be heard at
 26 sentencing). In determining the merits of these arguments, the sentencing
 27 court does not enjoy the benefit of a legal presumption that the Guidelines
 28 sentence should apply. *Booker*, *543 U.S. at 259-260, 125 S.Ct. 738, 160 L.*
Ed. 2d 621." at 351.

Further, the Court instructed:

"The fact that we permit courts of appeals to adopt a presumption of
 21 reasonableness does not mean that courts may adopt a presumption of
 22 unreasonableness. Even the Government concedes that the appellate courts
 23 may not presume that every variance from the advisory Guidelines is
 24 unreasonable." at 354.

In *Nelson v. United States*, 129 S. Ct. 890, 892, 172 L.Ed. 2d 719 (2009), perhaps
 as a reminder and definitely for emphasis, the court stated:

"Our cases do not allow a sentencing court to presume that a sentence
 26 within the applicable Guidelines range is reasonable."

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1 The Ninth Circuit reiterated this premise in ***United States v. Edwards***, 595 F.3d
 2 1004, 1015 (9th Cir. 2010) ([Court] cannot presume a sentence is substantively
 3 unreasonable only because it falls outside the range recommended by the Sentencing
 4 Commission).

5 The Ninth Circuit was heard on the presumption of reasonableness and directed
 6 that even on appeal the presumption of a Guideline sentence may not be reasonable. It
 7 stated:

8 “... A court of appeals may *not* presume that a non-Guidelines sentence is
 9 unreasonable. Although a court may presume on appeal that a sentence
 10 within the Guidelines range is reasonable, *id.*, we decline to adopt such a
 presumption in this circuit.” ***United States v. Carty***, 520 F.3d 984, 993 (9th
 Cir. 2008).

11 The Guideline range is simply the beginning of the analysis for sentencing, not the
 12 end. The Ninth Circuit stated:

13 “‘The Guideline’s factor may not be given more or less weight than any
 14 other.’ So while the Guidelines are the ‘starting point and initial
 15 benchmark’ and must ‘be kept in mind throughout the sentencing process,’
 16 the Guideline’s range constitutes only a touch-stone in the district court’s
 sentencing consideration.” ***United States v. Autery***, 555 F.3d 864, 8172 (9th
 Cir. 2009)

17 The Court must now consider 18 USC 3553(a) in its entirety and impose a
 18 sentence “sufficient, but not greater than necessary, to comply with the purposes set forth
 19 in paragraph (2) of this subsection.” The court, in determining the particular sentence to
 20 be imposed, shall consider –

21 (1) The nature and circumstances of the offense and the history and
 22 characteristics of the defendant;

23 (2) The need for the sentence imposed --

24 (a) to reflect the seriousness of the offense, promote respect for the law
 25 and provide just punishment for the offense;

26 (b) to afford adequate deterrence to criminal conduct;

27 (c) to protect the public from further crimes of the defendant; and

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1 (d) to provide the defendant with needed education or vocational
2 training, medical care or other correctional treatment in the most effective manner;

3 The sentencing court is now required to consider factors that the Guidelines
4 effectively prohibited from consideration (ie: Age, USSG 5H1.1; Education and
5 Vocational Skills, USSG 5H1.2; Mental and Emotional Condition, USSG 5H1.3;
6 Physical Condition Including Drug or Alcohol Dependence, USSG 5H1.4; Employment,
7 USSG 5H1.5; Family Ties and Responsibilities, USSG 5H1.6; Socio-economic Status,
8 USSG 5H1.10; Civic and Military Contributions, USSG 5H1.11; and Lack of Youthful
9 Guidance, USSG 5H1.12.). ***United States v. Ameline***, 409 F.3d 1073, 1093 (9th Cir.
10 2005) (*en banc*). To consider the “history and characteristics of the defendant,” the Court
11 must now consider factors the Guidelines previously eschewed.

Finally, the Supreme Court has cautioned that respect for the law is promoted in many ways, not always measured by the strictness of sentences or the nature of harsh sanctions. The Court stated:

15 “... Moreover, the unique facts of Gall’s situation provide support for the
16 District Judge’s conclusion that, in Gall’s case, “a sentence of
17 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*, *id.*, at 599.

19 In order to meet the mandate of the *Booker* remedy, then, this court must calculate
20 the appropriate guidelines range and may consider appropriate departures. It must also
21 apply the 3553(a) factors and address any other specific characteristics of the defendant
22 or his offense that might impact the determination of a “reasonable” sentence under the
23 particular circumstances of this case. The court must then consider the statutory
24 parsimony provision and impose a sentence “sufficient, but not greater than necessary to
25 comply with the purposes set forth in [§3553(a)(2).]” The district court’s sentencing
26 decision will then be subject to an abuse-of-discretion review by the circuit. See, *United*
27 *States v. Treadwell*, 593 F.3d 990, 999 (9th Cir. 2010) (reversal is appropriate only if

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1 district court's sentence is "illogical, implausible, or without support in inferences that
 2 may be drawn from facts in the record."

3 IV. A REASONABLE SENTENCE

4 This Rule 11(c)(1)(C) Plea Agreement presumes that a reasonable sentence lies
 5 within the range of 51 to 78 months of imprisonment, the low end of Level 24 to the low
 6 end of the established Guideline of Level 28. Michael Vawter requests that the Court
 7 consider "Title 18 USC 3553(a) factors" aside from the Guideline range and conclude
 8 that a sentence of 51 months is "sufficient, but not greater than necessary," to achieve the
 9 goals of sentencing.

10 With respect to "3553(a) factors," Mr. Vawter requests that the Court find, under
 11 "history and characteristics of the defendant" that prior to Mr. Vawter's arrest in the
 12 instant case, he led a blemish free life that included 1) participation on the Parish Council
 13 of Oakland Ascension Cathedral, 2) participation in Project Mexico during which he
 14 traveled to Mexico to construct housing for low income families, 3) coordinated
 15 contributions and collections for St. Innocent Orphanage in Tijuana, Mexico, 4) the
 16 extraordinary care of his mother who is afflicted with Multiple Sclerosis, 5) his blemish
 17 free history as Scout Leader, and 6) history of the development and management of a
 18 successful insurance agency. The 57 letters submitted on Mr. Vawter's behalf
 19 corroborate this information. See, in particular, letters of Jack McKee, Metropolitan
 20 Nikitas, Cathy Soria, Emanuel Sakkis, Mr. and Mrs. Kolokotrones, Michael Woods,
 21 James Vawter, Geoffrey Gowan, and Mr. Vawter's mother, Cheryl Vawter. These factors
 22 warrant a variance below the established Guideline range.

23 Perhaps more importantly, however, is the manner in which Michael Vawter has
 24 responded to his arrest. He immediately took responsibility for his conduct and initiated
 25 therapy at Crossroads Psychotherapy Institute. He has been committed to his treatment
 26 and has impressed treatment professionals with his work and insight. He has also been
 27 evaluated by several experienced forensic evaluators, who have vast expertise assessing
 28 sex offenders, and has been deemed a low risk for re-offending. The evaluators have also

1 noted Michael's commitment to treatment and his growing insight. Dr. Flinton
2 concluded that his case could be safely managed in the community.

3 A sentence of 51 months imprisonment is substantial and “sufficient” under these
4 circumstances. It is a length of time, over four years, that reflects the seriousness of the
5 offense. It is a significant deterrent that also promotes respect for the law. As this is
6 Michael Vawter’s first and only involvement in the criminal justice system, it is a
7 sentence that provides just punishment. Given Michael’s very positive response to
8 treatment, it is also a significant time for him to be away from the progress he is making
9 in treatment, without completely undermining his progress.

10 Therefore, it is respectfully requested that the Court sentence Michael Vawter to
11 51 months imprisonment to be followed by a term of supervised release. The parties
12 have also agreed that Michael's sentence will include a \$12,500 fine and \$1,700 in
13 restitution, both recommended by the U.S. Probation Office.

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15 | Dated: February 14, 2011 Respectfully submitted,

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By· /s/

William E. Gagen, Jr.
Attorneys for Defendant
Michael Howard Vawter

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