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11  
12 UNITED STATES OF AMERICA  
13  
14 NORTHERN DISTRICT OF CALIFORNIA  
15  
16 OAKLAND DIVISION  
17

18 UNITED STATES OF AMERICA,

No.: CR 10-0745 DLJ

19 Plaintiff,

**DEFENDANT'S SENTENCING  
MEMORANDUM**

20 vs.

21 MICHAEL HOWARD VAWTER,

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

22 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.

## 6 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.

### 25 III. APPLICABLE SENTENCING LAW

26 The landmark decision in *United States v. Booker*, 160 L. Ed. 2d 621, 125 S.Ct.  
27 738 (2005), changed sentencing in the Federal Courts. *Booker* renders the Guidelines as  
28 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  
 reasonableness does not mean that courts may adopt a presumption of  
 unreasonableness. Even the Government concedes that the appellate courts  
 may not presume that every variance from the advisory Guidelines is  
 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  
 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 (9<sup>th</sup> 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  
 11 presumption in this circuit.” *United States v. Carty*, 520 F.3d 984, 993 (9<sup>th</sup>  
 12 Cir. 2008).

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

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

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

25 (1) The nature and circumstances of the offense and the history and  
 26 characteristics of the defendant;

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

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

(b) to afford adequate deterrence to criminal conduct;

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

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

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

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

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

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

Respectfully submitted,

By: /s/  
William E. Gagen, Jr.  
Attorneys for Defendant  
Michael Howard Vawter