IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 11-CR-30207-DRH
	)	
CHARLES HICKS,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR VARIANCE AND SENTENCING MEMORANDUM

I. Introduction

Charles Hicks (Chaz) is a product of the "new" generation that rarely hears the word "no," "wins" a trophy at every competition, is never at fault and accustomed to getting whatever they want.

Because the undersigned was not trial counsel, he has a unique view of this case. Sentencing/appellate counsel only sees what's on paper. He has a "black and white" perspective of the case mixed in with getting to know a client scared out of his mind at the prospect of a very long sentence.

Hopefully, it will not be lost on this Honorable Court that it is dealing with someone who at the time the offenses occurred was a teenager, barely old enough to legally purchase cigarettes and not yet old enough to legally drink alcohol. Chaz was on the cusp of his 20th birthday when most of the criminal acts occurred.

Chaz dated the victim in this case for three years. They ultimately planned to get married. The victim had just started driving when she began dating Chaz. Everything which took place between Chaz and the victim was consensual. Law enforcement or parents were never called due to any of Chaz's actions which comprise the criminal conduct contained in the Superseding Indictment.

Unfortunately, the *best* sentence Chaz can hope for is 15 years due to his conviction for production of child pornography. But for this mandatory minimum sentence, the undersigned would argue for a 5 year sentence.

At the outset, the undersigned cannot stress enough that he in no way means to berate, belittle or embarrass the victim in this case. Nor does the undersigned mean to condone Chaz's actions[1]. In all candor, the undersigned who has teenaged children of his own, simply does not understand the allure of "sexting" which is what Count 1 is all about.

II. Case Timeline

Due to the amount of time that has elapsed since Chaz was convicted, the undersigned feels it prudent to give a quick timeline which can be used as a "cheat sheet" at Sentencing.

On November 16, 2011 the grand jury returned an Indictment charging Chaz in Count 1 with receipt of child pornography and in Count 2 with possession of child pornography. (Docket #1) For all intense purposes it was a "run of the mill" child pornography case.

Over the Government's objection, on November 18, 2011 Chaz was released on a $10,000 unsecured bond (Docket #11)

Until March 16, 2012, Chaz was represented by Rob Elovitz who was allowed to withdraw on that date (Docket # 23) and Ethan Skaggs of the Federal Public Defender's Office began his representation of Chaz.

On June 18, 2012 plea documents were exchanged and a Change of Plea Hearing was set for June 21, 2012 (Docket #28) This Hearing was canceled on June 20, 2012 because Defendant did not want to plead "guilty" (Docket #29)

On that same day, apparently because Chaz did not plead "guilty" on or before June 20, 2012, the Government presented a Superseding Indictment to the grand jury (Docket #29) which added Production of Child Pornography as Count 1. Former Counts

[1] Chaz maintains his innocence as to all Counts and intends to appeal the conviction. The jury convicted Chaz of all Counts and as such he will be sentenced as if he committed the crimes charged. Nothing in this Motion is meant to waive Chaz's ability to contest the conviction.

1 & 2 became Counts 2 & 3 respectively in the Superseding Indictment. Count 1 carries a mandatory minimum 15 year sentence. Chaz's case was no longer "run of the mill."

On November 2, 2012 a Change of Plea Hearing set for November 5, 2012 (Docket #41) and on November 5, 2012 the Hearing was canceled (Docket #42)

On November 6, 2012 Mr. Skaggs was allowed to withdraw and pursuant to the Criminal Justice Act a panel attorney was appointed. (Docket #44)

Attorney Justin Kuehn (Docket #45) was appointed to represent Mr. Hicks and on November 6, 2012 he attempted to ascertain whether or not the November 5, 2012 plea offer remained. (Exhibit A) On November 7, 2012, the Government indicated the November 5, 2012 offer had been rescinded. (Exhibit B)

On March 11, 2012 the jury trial began (Docket #89) and on March 14, 2012 (Docket #93) Chaz was convicted on all Counts.

III. "Sexting" Is Not Production of Child Pornography as Charged in Count 1

The jury convicted Chaz of producing child pornography as charged in Count 1. The jury obviously believed the victim. Prior to *Booker* this Honorable Court would have been forced to follow the calculations contained in the Presentence Investigation Report (PSR) and sentence Chaz to at least 30 years.

It is clear that the combination of enhancements and repeatedly increasing base numbers indicates the public disgust toward child pornography and increased attempts at both deterrence and the protection of the public. Over time, the public has become more fearful of child pornography, and the seriousness of the offense has continued to rise.

However, it is doubtful that the legislature or public had in mind a 19 year old boy taking picture of his naked 15 year old girlfriend when they were considering child pornography. Or a 15 year old girl taking a picture of her private parts and sending it to her soon to be fiancée. Or of a couple engaged in consensual intercourse.

Rather, it is likely that the public and the legislature envisioned a morally bankrupt, evil man in a basement forcing children to have sex or pose sexually for erotic or commercial gain. When child pornography is viewed in this light, it is difficult to imagine anyone disagreeing with heightened penalties, given the pain that such crimes

would inflict on their victims. Equally disturbing is the concept of an older man sitting at his computer, gaining erotic benefits from the suffering of victims.

However, what the public likely did not envision was a teenage girl, who was trying to get the attention of her soon to be fiancée, foolishly violating the child pornography laws in an attempt to seduce the teenage boy.

U.S.A. v. Rinehart Cause No. IP06-0129-CR-01-H/Ft

Older men preying on young children is and should be the focus of charging someone with production of child pornography.

The case of *U.S.A. v. Rinehart* is the clearest example of why a 15 year sentence is warranted for Chaz, because in 2006 when his criminal conduct occurred, Rinehart was 34 years old and a police officer in a small town. He was someone of "authority" in Middletown, Indiana.

The "yuck" factor clearly applies to Rinehart insofar as he began consensual sexual relationships with two young women, ages 16 and 17. A 34 year old police officer chasing two teenaged girls. One of the girls had contacted Rinehart through his MySpace page and he had known the other one, the daughter of a man who was involved in training police officers, for most of her life.

When one of the girls told her guidance counselor about her relationship with Rinehart, local authorities were contacted. These local authorities in turn contacted federal authorities.

As part of the investigation, it was learned that one of the girls had posed for sexually provocative photos for a previous boyfriend and offered to do the same for Rinehart. Rinehart lent her his camera, which she returned with the promised photos. Rinehart and both girls then took additional photos and at least one video, which he downloaded to his computer. He was charged in the U.S. District Court for the Southern District of Indiana and in 2007 Rinehart pleaded guilty to two counts of producing child pornography. U.S. District Court Judge David Hamilton, who now serves on the U.S. Court of Appeals for the 7th Circuit, reluctantly sentenced Rinehart to 15 years in prison.

Judge Hamilton wrote a wonderful opinion expressing his dismay at being forced to sentence Rinehart to 15 years, and strongly indicated that Rinehart's actions were not those envisioned by the legislature when 18 U.S.C.A. §2251(a) was enacted. Judge Hamilton wrote his opinion in the hopes it could be used for a clemency petition to be filed by Rinehart.

One would be hard pressed to envision Chaz receiving a sentence in excess of 15 years in light of *U.S.A. v. Rinehart.*

IV. The Guidelines For Counts 2 & 3 Are Overly Draconian Without The Requisite Empirical Data Needed For Enhancements

The reality is that federal prosecutions of child pornographers focuses on the *possible* harm that the Defendant could do to a child. The logical argument goes that someone who looks at child pornography must enjoy it, so they will go to the next level and prey on children. There is no nice way to say the simple truth that there is something "wrong" with someone who looks at child pornography.

The twist here is that the perpetrator, Chaz, was a teenager during the majority of this offense. That is not to excuse a 19 year old from looking at an 11 year old girl. But it is not as "creepy" as a 65 year old man looking at a 5 year old toddler.

Generally speaking, the Guidelines "get it right." Defense lawyers are loathe to make that admission but post-*Booker* in those rare occasions where the Guidelines are needlessly harsh a variance is generally granted.

Bluntly stated, ***all*** child pornography cases are "garden variety." If an individual is charged with a child pornography related crime, certain 2G2.2 enhancements will be automatically applied in ***every*** case. The reason for this is that unlike other Guidelines which are empirically driven, child pornography Guidelines are driven by Congressional dictates. These dictates are not slowed down by the public because unlike Families Against Mandatory Minimums, there is no "child pornography" lobby.

§ 2G2.2 (b)(7) The number of Images enhancement

Chaz has received a 5 level enhancement under §2G2.2(b)(7) because each of the 130 videos (¶39 of PSR) constitute 75 images, thereby crossing the 600 image threshold.

One would think that a great deal of thought, study, and effort went into this *magical* 600 image threshold. Some study must have been relied on to make 600 images worse than say 500 or not a bad as 750. But, the number of images enhancement is based on no study or evidence and has no practical value for sorting offender culpability or danger.

It was not the brainchild of any elected representative but of Jay Apperson, an aide to Representative Sensenbrenner of Wisconsin. The 2G2.2(b)(7) image enhancement was part of the Protect Act of 2003. For whatever reason, rather than having his employer, Representative Sensenbrenner, former Chairman of the House Judiciary Committee and therefore knowledgeable in the Guidelines introduce the bill, Apperson approached freshman Representative Tom Feeney. At that point in his Congressional career, the word "lightweight" would have defined Feeney as witnessed by the fact that at that time he had only one bill to his Congressional record, a resolution to recognize the cheerleaders of the University of Central Florida. See Down With Discretion http://www.legalaffairs.org/printerfriendly.msp?id=547

Representative Feeney undertook no study to ascertain whether or not this provision was necessary before inserting it as a last-minute addition to the large and complicated Amber Alert bill being presented for Congressional vote. See http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf The amendment itself was a small insertion to the overall Amber Alert bill, and "the image enhancements," written by Apperson, "exist as unexplained sentence increases that are not tied to the purpose of the overall amendment in which they appear." See generally, Public Hearing Testimony and Transcript 2009-2010

No empirical basis for the enhancement was ever offered. Nevertheless, this amendment represents the first instance since the inception of the Guidelines where Congress directly amended the Guidelines Manual. *U.S.A. v. Durvee* 616 F. 3d 174, at 185 (2nd Cir. 2010) Had this occurred in a white collar Guideline, a drug Guideline or even a bank robbery Guideline, someone in Congress would have said something to correct this enhancement or at least slow it down. There hasn't been any outcry about how the 2G2.2 (b)(7) enhancement was enacted. Common sense dictates why --- the

"child pornography" lobby is non-existent. The 2G2.2(b)(7) enhancement is simply there and part of the advisory Guidelines.

The undersigned has been unable to locate any study which has been conducted in the past eight years to demonstrate that the 2G2.2(b)(7) enhancement either effectively sorts offenders by moral culpability or that it effectively predicts risk or danger going forward. It was the brainchild of an aide and is now implemented in nearly every child pornography case.

§2G2.2(b)(4) Sadistic or Masochistic Conduct

Under § 2G2.2(b)(4), the PSR has concluded that Chaz should receive a 4-level enhancement because some of the images "portray sadistic or masochistic conduct."(¶36) Even if this Honorable Court is ***absolutely*** certain that Chaz had no intention of receiving, possessing, or distributing this type of material the advisory Guidelines would require the enhancement.

Application Note 1 to 2G2.2 defines many phrases contained in this Guideline, but interestingly "sadistic and masochistic" is not defined. The Merriam-Webster dictionary's definition of sadism is:

> "sexual perversion in which gratification is obtained by the infliction of physical or mental pain on others (as on a love object)," "delight in cruelty," or "excessive cruelty."

Masochism is defined by Merriam-Webster to mean:

> "sexual perversion characterized by pleasure in being subjected to pain or humiliation especially by a love object" or "pleasure in being abused and dominated."

Someone unfamiliar with the federal judicial system might therefore expect this enhancement to apply in the limited circumstances of a child put into traditional bondage or S&M situations, such as being tied, whipped, and so forth. That is not the case because the evolution of this enhancement now applies to almost any image including those that by their creation are likely to have caused physical or emotional pain, even if no evidence

of pain or particular cruelty can be seen in the image. As a result, any picture that depicts a young minor engaged in a sexual act with an adult will normally trigger both the (b)(2) and (b)(4) enhancements even if it contains no overt celebration of pain or humiliation. The reason for this is because there is a presumption that the sexual act depicted would have either hurt or caused emotional distress to the victim. *See* USSG § 2G2.2 cmt n.2; *see also United States v. Richardson*, 238 F.3d 837, 840-41 (7th Cir.), *cert. denied*, 532 U.S. 1057, 121 S.Ct. 2206 (2001).

Strict liability is a particularly severe way to measure culpability given the retributive goals of the Sentencing Guidelines and § 3553's focus on proportionality between an offender's sentence and his blameworthiness. Although Chaz did search the peer-to-peer network for child pornography, he did not deliberately seek out material that contained violence or sexual penetration of particularly young victims. Indeed, the nature of peer-to-peer downloading (i.e. mislabeled, misleading, or vague file names and descriptions) makes it nearly impossible for a user to predict a file's content before he downloads it; thus, a peer-to-peer user could mistakenly download violent or sadistic material without actually specifically intending to possess it.

The unfairness of (b)(4) is demonstrated by a simple example. If a Defendant has one sadistic image amid 10,000 others, the enhancement will apply. If 90% of those same 10,000 images meet the criteria, the enhancement will apply. There seems to be no rhyme or reason as to when the enhancement should be applied.

A Defendant charged with possession of child pornography deserves to be punished for consuming material depicting particularly young and vulnerable victims, "but a Defendant who does not seek out the worst of that material should not receive the same sentence as someone who does." *U.S.A. v. Hanson*, 561 F.Supp.2d at 1009 (E.D. Wis. 2008)

§2G2.2(b)(2) & §2G2.2(b)(6) Prepubescent Minor & Use of Computer

Chaz's base offense level is increased by two levels because "the material involved a pre-pubescent minor or a minor who had not attained the age of twelve years." (¶ 34). Paragraph 38 of the PSR indicates that Chaz's base offense level is increased by

an additional two points because the offense "involved the use of a computer." Chaz respectfully requests that the court reject these guideline enhancements "as lacking a basis in data, experience or expertise." See *United States v. Aguilar-Huerta*, 576 F.3d 365, 367 (7th Cir. 2008) If a truly reasoned, empirical analysis had been conducted when drafting § 2G2.2, Congress and the Sentencing Commission would have realized that these circumstances are inherent in all child pornography offenses. In today's world, it is impossible for someone to be charged with a child pornography offense and ***NOT*** use a computer or look at prepubescent teens.

V. Statistics Show That §2G2.2 Makes Child Pornography Cases Garden Variety

A four level increase for Sections (b)(2) and (b)(6) combined with a five level increase for Section (b)(7) and a four level increase for (b)(4) results in a net increase of 13 levels. If there were no mandatory minimum 180 month sentence Chaz would be able to argue for a 5 year sentence.

The United States Sentencing Commission published a paper recently entitled "Use of Guidelines and Specific Offense Characteristics which can be found online at http://www/ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2010/10_glinexgline.pdf

In http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf, the Sentencing Commission discusses enhancements in cases where § 2G2.2 is the primary sentencing Guideline. Of the 1,711 § 2G2.2 Defendants sentenced nationwide for child pornography offenses in fiscal year 2010, 96.6% received a number of images enhancement, 96.2% received an enhancement for use of a computer, 95.6% received an enhancement for at least one image of a person under 12, and 73.7% involved an enhancement for possession of at least one image of sadistic or masochistic conduct. In other words, almost every case involves certain similar sentencing variables and these variables do not tend to differentiate offenders. Instead, these enhancements skew and concentrate almost all "offenders at the top of the spectrum" in a manner "fundamentally incompatible with § 3553(a)." *U.S.A. v. Durvee* 616 F. 3d 174 (2nd Cir. 2010)

U.S.A v. Grober

The "garden variety" treatment of child pornography cases and the various sentencing enhancements contained in §2G2.2 have been a burr in the saddle of sentencing courts since their inception.

In *U.S.A. v. Grober*, 595 F. Supp. 2d 382 (D.N.J. 2008) the District Court held hearings to determine how these particular enhancements operate in practice. That court found the following:

> As persuasive as Stabenow and Professor Berman were on this point, ultimately the most persuasive evidence came from the government's own witness. SA Chase is the veteran of 100,000 images from 180 collections. In her testimony, SA Chase recognized that *every one* of her 180 investigations involved a possessor with 600 or more images. (SA Chase Test., Dec. 1, 2008, 81:21–25.) SA Chase testified that *every one* of the cases she had worked on—"100 percent"— "involved the use of a computer and of interactive computer service." (SA Chase Test., Dec. 1, 2008, 80:21–25.) Further, according to SA Chase, "all" of the cases she has worked on involved images of pre-pubescent minors under age 12, either posing or engaged in sexual activity. (SA Chase Test., Dec. 1, 2008, 82:16-17.) Even a vast majority—"80 per-cent"—had at least one image and video depicting sadomasochistic content. (SA Chase Test., Dec. 1, 2008, 82:23–24.) SA Chase's experience on the ground punctuates Stabenow's and Berman's view that the purportedly aggravating factors are actually inherent in the possession of child pornography.

While the Third Circuit remanded *Grober* for resentencing, Judge Hayden's analysis is spot on regarding the lack of empirical data when she varied downward from the advisory Guidelines.

Sentencing Data For Variances

The undersigned does not have a great deal of experience before this Honorable Court in handling child pornography cases and is unsure of how many times below Guideline sentences this Honorable Court imposes.

Therefore, the undersigned believes it would be helpful to point out that during fiscal year 2010, 58% of § 2G2.2 Defendants (991 of 1,708, a number that *included* distributors) received sentences *below* the Guideline range. Furthermore, courts gave

"pure" variances to below Guideline sentences in 38.9% of cases (664 of 1,708). Through the first three quarters of 2011, the rate was even higher, with 62.2% of Defendants receiving a below Guideline sentence (859 of 1,380). See U.S. Sentencing Commission, Use of Guidelines and Specific Offense Characteristics at http://www/ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2010/10_glinexgline.pdf

This Sentencing Commission site highlights other types of federal criminal offenses and how § 2G2.2 compares. For example, during FY 2010, Defendants who conspired or attempted to possess drugs (§ 2D2.1) received below guideline sentences in only 5% of cases, with a variance rate of just 1.9% (4 of 213 cases). For drug possession cases more generally, judges downward departed or varied just 3.8% of the time (28 of 746).

The fact that judges are varying so much in one particular type of case is indicative that District Courts see a problem that the Sentencing Commission's and/or Congress' need to correct.

VI. 3553(a) Considerations To Be Considered For a Variance to 15 Years

The goals in any federal sentencing are for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment." Other important goals are for the sentence to "afford adequate deterrence" against the type of conduct in question and to "protect the public from further crimes of the defendant." Finally, the sentence must "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

Just Punishment

Ultimately, the issue with regard to "sexting" as it relates to Count 1is whether it can be considered "just" to punish Chaz, who is the victim's soon to be fiancée in the same way as third-party offenders. As the Supreme Court noted in *New York v. Ferber*, 458 U.S. 747 (1982), the focus of the laws against child pornography is to prevent the victimization of children for erotic or commercial gain. The reasoning behind this is clear: society wants to prevent children from becoming damaged psychologically or

physically by actual sexual abuse. However, this rationale, and therefore the likely basis for extreme punishment in the public's eyes, falls well short in cases of "sexting," which in reality is self-produced child pornography.

The victim in Chaz's case or in other "sexting" type cases are not being subjected involuntarily or voluntarily to sexual abuse by a third party; instead, they are exposing themselves to the camera on their own terms and, therefore, violating the law. This type of self-exposure does not ring consistent with the psychological and physical trauma associated with the production, and subsequent enjoyment, of child pornography.

Because the psychological impact of voluntarily "sexting" between two minors, which involves either no third-party solicitation or solicitation by another minor is likely much less severe than the imposition of sexual acts on minors for the purpose of producing child pornography by a third party, it follows that the "just punishment" for this societal and personal "wrong" should also be less severe.

Regarding Chaz's conviction on Counts 2 & 3, a 15 year sentence is "just." Chaz can be painted out to be the worst child pornographer in the Southern District of Illinois but at the end of the day, he was never old enough to legally buy a beer when these offenses were committed. A 15 year sentence is nearly equal to the amount of time he was on the Earth when he committed the offenses.

Finally, the § 2G2.2 guideline does not take into consideration that drug offenders with no prior criminal history are often eligible for an additional two level reduction pursuant to the safety valve exception of USSG § 2D1.1(b)(7). *See* USSG § 2D1.1(b)(7) (2009).

Deterrence

Deterrence is generally broken down into two separate factors: specific deterrence and general deterrence.

Specific deterrence is a determination as to whether or not the individual who has been charged and sentenced under the sentencing scheme will repeat the offense with which he was originally charged with. Chaz has never been incarcerated. The PSR calls for a sentence nearly 25% longer than the amount of time he has been alive. There can

be little doubt that Chaz has received the "message" and to stop "sexting" and viewing child pornography. Chaz will be on supervised release for the rest of his natural life and will be required to register as a sex offender. When his sentence is finished Chaz will be a pariah. All of this certainly will have a deterrent impact on Chaz if he decides to get involved with "sexting" again.

General deterrence, on the other hand, is trying to ensure that a tough sentence prevents individuals from violating the law to begin with. That's the rub for youngsters like Chaz who simply don't understand how asinine it is to photograph their private parts and send it out for the world to see. Here, it seems unlikely that for "sexting" (Count 1) the message will get across to other youngsters that if they "sext" they are going to receive a 15 year sentence like Chaz.

For purposes of Counts 2 & 3, the message is already getting across that there are long sentences awaiting those who desire to view child pornography. The number of cases filed has increased but it is the undersigned's belief that those who view child pornography do so knowing that if they are caught they will be incarcerated for a very long time.

Finally, it is worth noting that, as a convicted child pornography offender, Chaz is ineligible for a Federal Prison Camp. While Chaz's Bureau of Prisons security classification otherwise qualifies him for a Federal Prison Camp, his child pornography conviction ensures that the *best situation* for which he can hope is serving his sentence in a low security facility. It is the undersigned's experience that a child pornographer will be sent to a medium security prison, where every day of his sentence Chaz will have to look over his shoulder because he will be a *target*. By serving his time in a low security or medium security prison rather than a Federal Prison Camp, Chaz's time in prison will undoubtedly be harsher, thereby increasing the effect of specific deterrence on the Defendant.

Accordingly, Chaz urges the Court to consider the relatively higher severity of a sentence served in a low security facility when it crafts a sentence pursuant to the goals of § 3553(a).

The Sentence Must Protect the Public from Further Crimes of the Defendant

The protection of the public is a key goal of sentencing. At best, Chaz will be locked away for the next 15 years.

Regarding Count 1 ("sexting"), most individuals involved in this type of activity do so for the benefit of one individual, not for the benefit of society as a whole. This is the case here, because Chaz ***NEVER*** intended for other individuals to see the child pornography. Hopefully, this Honorable Court will take this into consideration and sentence Chaz to 15 years.

"Parsimonious" is the rub in child pornography cases. Chaz never harmed a child but it is difficult to not think about what ***might*** happen. The idea is that a child pornographer will cross the line into child molestation. If this hypothesis were correct, then there should be empirical data, but the numbers and facts do not support such a hypothesis.

In 2009, a team of researchers led by Dr. Jerome Endrass published *The Consumption of Child Pornography 7 Violent Sex Offending*, 9 BMC Psychiatry 1-7. The Endrass researchers conducted a six-year follow-up of 231 child pornography Defendants. On page 1 the researchers identified that "[T]he aim of this study was to examine the recidivism rates for hands-on and hands-off sex offenses in a sample of child pornography users." The researchers recommended additional study, but found that after six years,

> [o]nly 3.9% of offenders were investigated for subsequent pornography possession; only 0.8% were investigated for possible child sexual abuse; and [t]hese recidivism rates after a follow-up time of six years indicate that the risk of re-offending for child pornography consumers is quite low. . . . Consumption of child pornography alone does not seem to represent a risk factor for committing hands-on offenses in the present sample—at least in those subjects without prior convictions for hands-on sex offenses. Page 6

Endrass and his colleagues then attempted to determine "whether consumers of child pornography pose a risk for hands-on sex offenses." In choosing a model for their study,

Endrass decided that "research designs following-up on a sample of offenders convicted of child pornography consumption would appear to be the best approach" for assessing risk factors. Ultimately, the researchers concluded:

> The empirical literature does not put forward any evidence that the consumers of child pornography pose a considerably increased risk for perpetrating hands-on sex offenses. Instead, the current research literature supports the assumption that the consumers of child pornography form a distinct group of sex offenders. Though some consumers do commit hands-on sex offenses as well—the majority of child pornography users do not. Previous hands-on sex offenses are a relevant risk factor for future hands-on sex offenses among child pornography users, just as they are among sex offenders in general. The consumption of child pornographic material alone does not seem to predict hands-on sex offenses. PP 2-10

In *U.S.A. v. C.R.*, Senior U.S. District Court Judge Jack Weinstein requested that the Probation Office for the Eastern District of New York prepare a report detailing its experience monitoring a population of child pornography offenders. The resulting seven-page report (Exhibit B) detailed the demographics and history of a body of offenders. In total, probation officers had supervised 280 offenders since 1999, including 108 child pornography offenders, of which 20% reported a prior contact offense. During their time on supervision, 14% had a period of supervision revoked for some reason, but only one offender committed a contact sexual offense while on supervision. Furthermore, in that one instance, the offender self-disclosed the violation during treatment. These findings from the Probation Office tend to validate the amenability of this population to supervision and treatment.

Hopefully, the foregoing assuages any concerns this Honorable Court might have regarding future actions by Chaz against children.

VI. Conclusion

The U.S. Supreme Court has emphasized that Guidelines not supported by empirical data are entitled to less deference than are Guidelines that exhibit the Sentencing Commission's "exercise of its characteristic institutional role" as an expert

agency tasked with promulgating empirically-based Guidelines. *Spears v. U.S.A.*, 129 S. Ct. 840, 842-843 (2009)

U.S.S.G. §2G2.2(b)(2), §2G2.2(b)(4), §2G2.2(6) and §2G2.2(b)(7) have to be applied for Guideline calculation purposes but in determining whether or not to vary downward, less deference can be given to them so that a just sentence can be imposed.

The issue of "sexting" is something that this Honorable Court can take into consideration when determining by how much to vary, and hopefully just as Judge Hamilton did in *Rinehart*, this Honorable Court will realize that a 15 year sentence certainly is just punishment for Chaz.

When everything is considered, Chaz will ask this Honorable Court to vary downward to a 180 month sentence.

CHARLES HICKS

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2014, a copy of the attached *Defendant's Motion to Vary and Sentencing Memorandum* was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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