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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DONALD XXXXXXXXX,	)	******To Be Filed Under Seal******
	)	
Defendant.	)	

DEFENDANT'S SENTENCING MEMORANDUM

Comes now Defendant, by his attorney, John D. Stobbs II, and for his Sentencing Memorandum states:

I. Introduction

The federal criminal justice system has a myriad of tentacles to punish various types of offenders. White collar Defendants have generally already been punished once they are charged because of the stigmatism that comes with being labeled a "crook." What looks like a "light" sentence really isn't. Drug Defendants generally have a long history of dealing drugs and know they are going to be caught, so harsh punishment by the federal criminal justice system is not entirely unexpected. Bank robbers always get caught and they get what's coming to them. In the past decade with the advent of widespread internet use, child pornography prosecutions have soared. A first time child pornographer generally receives a sentence which is much, much harsher than a white collar Defendant, a drug Defendant or a bank robber.

It has been the undersigned's experience that most child pornographers are middle aged white males with no criminal records. The undersigned has yet to represent a child pornographer who has "crossed the line" into harming a child. 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.

Donald XXXXXXXXXX is a middle aged white man without any criminal record. Up until three or four years ago he lived a non-descript life working as a laborer for Muriel Realty (¶ 59) where he lived in properties which he also took care of.

II. Ultimate Sentence That Will Be Requested

The well-prepared Presentence Investigation Report, to which there are no objections concludes, just as did the Plea Agreement, that Donald will have a Total Offense Level of 31 which when combined with a criminal history category of I calls for an advisory Guideline Sentence beginning at 108 months.

Donald will request a variance to 60 months which is the statutory minimum. This request will be based on the sexual abuse Donald faced as a youngster at the hands of his parish priest as well as a reduction for specific offense characteristics contained in paragraphs 20, 22, 23, and 24 of the PSR.

III. Fr. Joneser

Fr. Joneser is a *monster*. He died several years ago, so he is presently rotting in Hell. He stole Donald's childhood. Fr. Joneser raped Donald and his brother John while they were pre-teen altar boys. John went from being a nice, normal young man into a drug addict whose life spiraled out of control because of what this monster did to him. John ultimately placed a gun against his head, pulled the trigger and blew his brains out. Donald walked in after hearing the gunshot to find his dead brother. There was blood and skull fragments all over the room. Donald cleaned up the room where John killed himself. (¶ 50)

As John drifted into drug addiction, he attempted suicide and was placed in a hospital for evaluation. Donald's mother Lolita couldn't understand what was happening to her son. Donald's father is 100% Polish and his mother 100% Irish. They are traditional Catholics. Lolita was understandably scared by what was happening to John and did what any traditional, devout Catholic parent raised in the 1940's, 50's or 60's would do. She called

their parish priest, Fr. Joneser to see if he could talk to John. Fr. Joneser went to talk to John and after doing so John told Lolita, "why did you send that son of a bitch to talk to me? Don't you know what he did to me?" Shortly thereafter John killed himself.

The undersigned, reflexively, asked Lolita the same question that the probation officer reflexively asked Donald, "why didn't you report the abuse?" In today's world it is easy to wonder why sexual abuse isn't reported. When Donald was abused, unfortunately monsters like Fr. Joneser were protected by their position. It was the word of a boy against that of a revered "holy man."

IV. Dr. Cuneo's Report

The undersigned is not trying to create a "wedge" for Sentencing. He had no idea that Donald had been abused by Fr. Joneser until Lolita mentioned it in an offhanded way. He thought this would be a "normal" child pornography case until Lolita, while sitting in the undersigned's office with her daughter Dawn, mentioned that she blamed herself for not getting Donald help. She blamed herself for what happened to John. She blames herself for Donald's situation.

Dr. Daniel Cuneo examined Donald extensively and prepared a detailed report, (Exhibit A) which shows that Donald suffers from Posttraumatic Stress Disorder, Chronic Dysthymic Disorder, Polysubstance Dependence in a Controlled Environment and Rule Out Pedophilia. Dr. Cuneo's reason for this diagnosis is:

> "[I]n summary, Donald XXXXXX is a 49-year-old, Caucasian, single male who is presently charged with Production of Child Pornography and Possession of Child Pornography. He has had periods of depression since childhood and many symptoms consistent with Posttraumatic Stress Disorder. The roots for his depression date back to his being sexually molested by a Catholic priest when he was in sixth grade and his finding his brother's body after he committed suicide after his brother was unable to cope with his being sexually abused by the same priest. Mr. XXXXX older brother introduced him to alcohol and drugs and this became the major way that Mr. XXXXX attempted to deal with his own sexual abuse.
>
> Mr. XXXXXX sexual abuse by Father Joneser robbed him of his childhood and severely impaired his ability to trust. It led to his depression, shame,

> anxiety, loss of self esteem, and difficulties in sexual identity. He has repeated difficulties forming long term relationships as he felt he was not good enough. Repeatedly he spoke of how girls would break up with him because they would "find someone better than he." His sexual abuse led to his distorted sense of sexuality. It played a role in his later viewing of child pornography."

Donald had a distorted sense of sexuality as a result of being raped while a boy by his parish priest. He couldn't say anything because it was "little Donald" against the powerful Fr. Joneser. One can only imagine the horrible nightmares Donald must have experienced as he grew from a child to a man.

Because of this abuse, Donald's beloved brother John changed. John and Donald had a bond that only brothers can understand. They endured the abuse together and were strong for each other. John ultimately capitulated, first trying to douse his depression, anger and guilt with alcohol and drugs. When that couldn't quash the demons he felt, John killed himself.

With that act, Donald was alone. Like John, he also began using and abusing alcohol and drugs. Donald limped through life with this incredibly massive albatross hanging over his neck. He could never get close to a woman or have a "normal" relationship. The event causing the posttraumatic stress was being raped by Fr. Joneser and the suicide of his brother John. The posttraumatic stress was released when Donald lost his job, placed his Dad in a nursing home, surfed the internet for jobs and came across child pornography.

As stated above, the fear is that someone who views child pornography could possibly be a future pedophile. Dr. Cuneo had that same concern and for that reason utilized the Mn-SOST-R and HCR-20 to assess his risk of sexual re-offending and Donald's potential for future acting out.

> "The HCR-20 is a tool to predict future violent behavior. The Mn-Sost-R was utilized as a guided assessment to assess his risk of future acting out as there are no specific instruments that would assess those who view child pornography. The Mn-SOST-R was originally developed as a screening tool in predicting recidivism of sex offenders and had not originally been normed for those convicted of child pornography. His overall scores on both the

> HCR-20 and Mn-SOST-R would place him in the low risk category of re-offending. Mr. XXXXXXXX denied ever sexually abusing a child. There are no documented incidents of Mr. XXXXX ever sexually abusing a child."

Dr. Cuneo's report ruled out pedophilia. While nothing is 100% in life, hopefully this Honorable Court will recognize that a variance is in order because a respected psychologist has ruled out the fear that exists in child pornography cases, combined with the posttraumatic stress disorder diagnosis.

V. Section 2G2.2

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.

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

Donald has received a 5 level enhancement under §2G2.2(b)(7) because each of the 11 videos (¶11) 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 the brainchild not 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 at http://www.ussc.gov/hearings.htm

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. It's 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 Donald should receive a 4-level enhancement because some of the images "portray sadistic or masochistic conduct."(¶22) Even if this Honorable Court is ***absolutely*** certain that Donald 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 Donald 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

Donald'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." (¶ 20). Paragraph 23 of the PSR indicates that Donald's base offense level is increased by an additional two points because the offense "involved the use of a computer." Donald 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.

VI. 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 60 month sentence Donald would have a Total Offense Level of 19 which when combined with a Criminal History Category I would result in an advisory Guideline range sentencing range of 27-33 months. *See* U.S.S.G. Sentencing Table

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 it 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.

VII. 3553(a) Considerations

Because there are no objections to the Presentence Investigation Report this Honorable Court can apply enhancements or downward variances where it finds such adjustments appropriate based on the Defendant's relevant individual characteristics or other § 3553(a) factors. The §3553(a) sentencing considerations include:

> (1) The nature and circumstances of the offense and the history and characteristics of the Defendant:
> (2) the need for the sentence imposed-
>> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>> (B) to afford adequate deterrence to criminal conduct;
>> (C) to protect the public from further crimes of the Defendant; and
>> (D) to provide the Defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the advisory guideline range;
> (5) any pertinent policy statements issued by the Sentencing Commission;
> (6) the need to avoid any unwarranted sentencing disparities; and
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2) also mandates the court to punish parsimoniously, that is, to impose a punishment "sufficient, but not greater than necessary" to accomplish the goals of sentencing.

Recidivism/Future Harm Against Children

"Parsimonious" is the rub in child pornography cases. Donald never harmed a child but *even with* Dr. Cuneo's report 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 combined with Dr. Cuneo's report assuages any concerns this Honorable Court might have regarding future actions by Donald against children.

Just Punishment

There is no doubt that Donald's behavior was abhorrent; young children are victimized to create this material, and crimes like Donald's may perpetuate the market for child pornography.

Once Donald is sentenced he will be sent to the Bureau of Prisons, where he will ***not*** be eligible for sentence reduction programs and post-conviction motions available to many federal offenders. Thus, the typical child pornography Defendant like Donald must serve almost his entire sentence. In practical terms, this means that a variance to a sixty month sentence for child pornography is actually more severe than a sixty month sentence for a similarly-situated drug offender. For example a typical drug conspiracy offender, sentenced to sixty months in prison, will often be able to provide assistance in investigating or prosecuting another person and, hence, will be eligible for a Rule 35 motion to reduce his sentence from sixty to forty months. Fed. R. Crim. P. 35(b). In addition, treatment programs are generally available to federal drug offenders, allowing them to further reduce their sentences by an additional twelve months – resulting in a twenty-eight month sentence. Thus, by serving 85% of the twenty-eight month sentence, the typical drug offender sentenced to sixty months would actually serve just under twenty-four months.

Because Donald does not affiliate with other child pornographers he therefore, will not receive the benefit of a Rule 35 Motion. *See* Fed. R. Crim. P. 35(b). Similarly, his sentence will not be reduced based on the completion of any treatment programs. If Donald is fortunate enough to receive a variance sentence of sixty months, he will likely serve fifty-one months, approximately twice the amount of time served by a drug offender with an original sentence of sixty months.

Moreover, 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).

Specific Deterrence

Finally, it is worth noting that, as a convicted child pornography offender, Donald is ineligible for a Federal Prison Camp. While Donald'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 Donald 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, Donald's time in prison will undoubtedly be harsher, thereby increasing the effect of specific deterrence on the Defendant.

Accordingly, Donald 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).

VIII. History and Characteristics of Donald

It is a mystery why bad things happen to good people. The XXXXXXXXXX children were raised in a loving devout family. They weren't rich, but they weren't poor. They were loved. They were taught to respect authority. Up until Fr. Joneser raped him and his brother

Donald had an idyllic childhood. He played catch with his Dad and brother. He'd go hiking and camping. He enjoyed everything a little boy is supposed to enjoy.

And Fr. Joneser took all of that from the XXXXXXXXXX family.

Donald lost his brother. Donald's Dad is in a nursing home in deteriorating health. Donald's 85 year old Mom just got out of the hospital and is not doing well health-wise. This whole situation has understandably taken a toll on her.

Donald is facing ***at best*** an advisory Guideline Sentence of 9 years. Donald was always there to help his parents. A 9 year sentence will certainly ensure that he will never hug his parents in freedom. He won't be able to help them in their dotage. Wherever he is sent by the Bureau of Prisons, it is folly to think that his parents will ever be able to visit him, so in reality, if his Mom is healthy enough to attend his Sentencing it will be the last time she sees him.

The only hope Donald has of being released so that he can spend time with his parents is for this Honorable Court to vary downward to 60 months. Any concerns about future conduct can be addressed through his supervised release.

Not a lot of good has happened to the XXXXXXXXXX family. A downward variance to five years will give them hope for the first time in a long time. A five years sentence for Donald addresses and satisfies all of the 3553(a) elements.

IX. 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.

Donald's past sexual abuse at the hands of Fr. Joneser, and post traumatic stress disorder diagnosis by Dr. Cuneo also is something that this Honorable Court can take into consideration when determining by how much to vary.

When everything is considered, Donald will ask this Honorable Court to vary downward to a 60 month sentence.

DONALD XXXXXXXXXX

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached *Defendant's 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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