

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA**
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL G. MORRIS,

Defendant.

CASE NO. 3:13-cr-00021

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

Michael G. Morris (“Defendant”) pleaded guilty to two counts of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1), and one count of possession of child pornography, in violation of 18 U.S.C. § (a)(4)(B) and (b)(2). On July 14, 2014, I sentenced Defendant to a term of imprisonment of 106 months on each count, all terms to run concurrently. I also sentenced Defendant to twenty years of supervised release following his incarceration. I varied downward from the United States Sentencing Guidelines (“U.S.S.G.” or “guidelines”) in imposing this sentence, after considering the 18 U.S.C. § 3553(a) factors. The guidelines initially recommended a sentence of between 151 to 188 months, which increased to a range of 210 to 262 months after I applied a sentencing enhancement under U.S.S.G. § 2G2.2(b)(3)(B), for distributing child pornography in expectation of the receipt of a thing of value. See U.S.S.G. § 2G2.2(b)(3)(B); United States Sentencing Commission, *Guidelines Manual*, Ch. 5, Pt. A, Sentencing Table (Nov. 2011).

At the sentencing hearing, I stated that I would issue a memorandum opinion expanding upon my reasons for the variance. Those reasons are set forth herein, and this memorandum will be incorporated into the judgment.

I. BACKGROUND

Defendant pleaded guilty on April 21, 2014, and sentencing occurred on July 14, 2014.

In the interim, the probation office prepared a pre-sentence investigation report (“PSR”), dated July 9, 2014. Both parties filed objections, the probation office responded, and I resolved remaining objections during the sentencing hearing.

The most pertinent of these objections from the government “point[ed] out the absence of two potential additional enhancements that [might] apply to Mr. Morris.” Gov’t Objections 1. First, the government argued that Defendant’s guidelines range could be enhanced by five levels¹ under U.S.S.G. § 2G2.2(b)(3)(B) for “distribution for the receipt, or expectation of receipt, of a thing of value.” Second, the government contended that a five-level enhancement for a pattern of child sexual abuse or exploitation might apply under § 2G2.2(b)(5). The probation office responded to these objections, declining to apply the enhancements and leaving their consideration for sentencing, when more evidence might be presented in support. PSR Addendum 1–2.

One of Defendant’s objections challenged the application of the four-level enhancement under § 2G2.2(b)(4) for “material that portrays sadistic or masochistic conduct or other depictions of violence,” arguing that enhancement overstated Defendant’s culpability and double-counted for certain images already used to apply another enhancement. Def.’s Objections 3–4; PSR Addendum 3–4. In a response to the government’s objections, Defendant also challenged the application of the two enhancements under § 2G2.2(b), arguing the evidence was insufficient to apply these enhancements. Def.’s Obj. 1–2.

Through a motion in limine, Defendant also objected to the admission or consideration of victim impact statements submitted by the government. Defendant argued the writers, whose names had been redacted for their protection, did not qualify as victims under 18 U.S.C.

¹ Effectively, this enhancement would only enhance Defendant’s guideline range by an additional two levels, since the PSR correctly applied a two-level distribution enhancement found in U.S.S.G. § 2G2.2(b)(3)(F). Applying the enhancement in § 2G2.2(b)(3)(B) replaces the enhancement in § 2G2.2(b)(3)(F), as § 2G2.2(b)(3) instructs courts to “[a]pply the greatest” enhancement listed in that subsection. U.S.S.G. § 2G2.2(b)(3).

§ 3771(e), because the harm they suffered could not be sufficiently connected to Defendant by direct or proximate cause. Def.’s Mot. in Limine 1–2. Admitting or considering this information at sentencing would also violate Defendant’s confrontation clause and due process rights, he argued, implying that he had no opportunity to rebut or explain the information and that the letters bore insufficient indicia of reliability. Def.’s Mot. in Limine 5–8. Finally, Defendant objected to the victim impact statements under Federal Rule of Evidence 403 as “neither relevant nor probative to the actual offense elements of his convictions or to the statutory factors the Court must consider for sentencing under 18 USC [sic] § 3553.” Def.’s Mot. in Limine 8–9.

The PSR and sentencing memoranda filed in this case discussed the following undisputed facts underlying this offense. An undercover FBI agent discovered Defendant in January 2012 under the username “Funshooter2006” on a peer-to-peer network called GigaTribe. On this network, users can friend each other and share secured or unsecured files. The PSR states:

‘Funshooter2006’ initiated a chat session with the undercover asking if he shared the password to locked folders. The undercover replied ‘generally . . . usually with an exchange of vids.’ The defendant responded ‘I have a full folder of vids . . . what are you into?’ The undercover stated ‘girls, teen stuff mostly’. Morris then responded ‘cool . . . same here. Let me move you into my other group if you wanna share’. The agent replied ‘ok, cool thx’ and the defendant responded ‘can I check yours out?’.

PSR ¶ 3.

During this interaction, the undercover agent noted that “Funshooter2006” had an ultimate account on GigaTribe, 909 online “friends,” and multiple subfolders contained within a “Shared” folder, each subfolder containing names associated with child pornography. PSR ¶ 4. Other unshared folders contained names associated with child exploitation, including hard core and soft core pre-teen pornography abbreviations. The undercover agent downloaded “6 videos, 5 of which contained young girls between the ages of 10 and 17 years old, doing various sexual acts with adults and . . . considered child pornography by statutory definition.” PSR ¶ 4. The

undercover agent returned to check on Funshooter2006 in March 2013 and found over 4,000 files in shared folders, including hard core pre-teen and child pornography.

The government eventually determined that the IP address and Funshooter account belonged to Defendant. In November 2013, agents seized five Dell laptop computers and several hard drives and thumb drives from Defendant's residence in Crozet, Virginia. On these computers, a forensic examination discovered over a thousand images and hundreds of videos of minors engaged in sexually explicit conduct. PSR ¶ 8.

Morris has no criminal history and described his upbringing to the probation officer as fairly unremarkable. He grew up in what he described as a normal household with a normal childhood. He served in the U.S. Air Force from 1986 to 2001 and held the rank of Captain before leaving with an honorable discharge, then served in the Air Force reserves from 2001 to 2007, holding the rank of Major. Morris has a B.S. from Bowling Green State University, a Master's Degree in Information Resource Management from the Air Force Institute of Technology, and a Ph.D. in Business Administration and Management Information Systems from Indiana University. Morris began working for the University of Virginia in 2001 and served as the Associate Dean for Graduate Programs and Commerce and a Professor of Teaching and Research at the time of his arrest. Morris separated from his first and only wife six years ago and has two female children, ages 14 and 17. Morris turns 51 years old on July 31, 2014.

During the sentencing hearing, I found that those persons writing or referenced in the victim impact statements qualified as "victims" under 18 U.S.C. § 3771, and that the statements were sufficiently reliable and probative of the seriousness of Defendant's offense and other § 3553(a) factors to be admissible at sentencing. I applied the five-level enhancement under § 2G2.2(b)(3)(B) for distributing child pornography with the expectation of receipt of a thing of value, in lieu of the enhancement under § 2G2.2(b)(3)(F) for distribution. *See* U.S.S.G.

§ 2G2.2(b)(3) (instructing courts to “[a]pply the greatest” § 2G2.2(b) subsection). I declined to apply the five-level enhancement under § 2G2.2(b)(5) for a pattern of child sexual abuse or exploitation, finding insufficient trustworthy evidence of the facts necessary to establish that enhancement. *Cf. United States v. Abu Ali*, 528 F.3d 210, 235 (4th Cir. 2008). I overruled Defendant’s objections to the other enhancements, finding the evidence supported application of all other enhancements applied in the PSR. This resulted in a guidelines range of 210–262 months, based on an offense level of 37 and a criminal history category of I.

After considering the parties’ sentencing memoranda, oral argument, the guidelines, and the sentencing factors in 18 U.S.C. § 3553(a), for the reasons expressed at sentencing and more fully below, I sentenced Defendant to 106 months of incarceration on each count, to run concurrently, and to be followed by twenty years of supervised release. Following the probation office’s recommendation,² I found Defendant did not have the financial ability to pay a fine, and that if Defendant was found to owe restitution, any available funds would better serve that purpose. I deferred the determination of restitution for up to 90 days under 18 U.S.C. § 3664(d)(5) and entered a preliminary order of forfeiture that covers the computers and hard drives seized during the search of Morris’ residence.

II. SENTENCING ENHANCEMENTS, VICTIM IMPACT STATEMENTS, AND OTHER FINDINGS

During sentencing, the burden is on the government to prove facts that support guidelines-range enhancements by a preponderance of the evidence. Using that standard, a court must then make findings of fact in making determinations under the Sentencing Guidelines or otherwise. *See United States v. Bastian*, 650 F. Supp. 2d 849, 856–57 (N.D. Iowa 2009) *aff’d*, 603 F.3d 460 (8th Cir. 2010). I ruled on objections to the applicability of several guidelines

² However, I struck language in the special condition barring contact with “the defendant’s own children, without prior permission of the probation officer,” located at paragraph 53(N) of the PSR, to exclude specific reference to Defendant’s children. I found this condition unnecessary, especially since the Defendant will be unable to see his children outside of supervised prison visits until the youngest child, now 14, is no longer a minor.

enhancements during the sentencing hearing, and I explain my reasoning more fully below.

A. Sentencing Enhancements

1. Sadistic or masochistic conduct or depictions of violence: § 2G2.2(b)(4)

During sentencing, I overruled Defendant's objection to applying the enhancement under § 2G2.2(b)(4) for "material that portrays sadistic or masochistic conduct or other depictions of violence." U.S.S.G. § 2G2.2(b)(4). Defendant objected that some images found on his devices that included this conduct also included prepubescent minors, for which he separately received a two-level enhancement under § 2G2.2(b)(2). He also argued about how images came to reside in his folders, suggested Defendant possessed relatively few images of this type, and argued that the government had not shown specific intent to possess these images. Def.'s Objection 3.

I determined that the enhancement under § 2G2.2(b)(4) for material portraying sadistic or masochistic conduct or violence applied, after hearing testimony about the nature of certain images in Defendant's possession. This included a government exhibit depicting a nude minor child bound and gagged in a sexually suggestive position, and testimony from the forensic examiner about other images depicting minors in restraints or with a weapon in the photo frame. Although the forensic examiner said these pictures made up about nine to ten percent of Defendant's cache of images, I found this evidence sufficient, by a preponderance of the evidence, to apply the enhancement.

I reaffirm that finding here, emphasizing that the guidelines commentary instructs courts to apply § 2G2.2(b)(4) "if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials." U.S.S.G. § 2G2.2(b)(4), cmt. n.2. "'Material' includes a visual depiction, as defined in 18 U.S.C. § 2256," which incorporates "data stored on computer disk or by electronic means which is capable of

conversion into a visual image” U.S.S.G. § 2G2.2(b)(4), cmt. n.1; 18 U.S.C. § 2256(5). The evidence clearly showed it was at least more likely than not that Defendant possessed hundreds of images portraying sadistic or masochistic conduct, commonly defined as involving “a sexual perversion characterized by pleasure in being subjected to pain or humiliation esp. by a love object,” for masochism, or as involving “a sexual perversion in which gratification is obtained by the infliction of physical or mental pain on others (as on a love object),” for sadism. *Merriam– Webster's Collegiate Dictionary* 714, 1028 (10th ed. 1994).

2. Distribution with the expectation of receipt of a thing of value: § 2G2.2(b)(3)(B)

Over Defendant’s objection, I also applied an enhancement for distribution with the expectation of the receipt of a thing of value under § 2G2.2(b)(3)(B). The United States Court of Appeals for the Fourth Circuit clearly delineated the test for applying this enhancement in *United States v. McManus*:

[T]o trigger the § 2G2.2(b)(3)(B) five-level enhancement, the Government must show that the defendant: 1) knowingly made child pornography in his possession available to others by some means, and 2) made his pornographic materials available *for the specific purpose of obtaining something of valuable consideration*, such as more pornography, whether or not he actually succeeded in obtaining the desired thing of value.

734 F.3d 315, 319 (4th Cir. 2013) (emphasis added). To show this enhancement should apply, the government therefore needed to present “sufficient individualized evidence of [the defendant’s] intent to distribute his pornographic materials in expectation of receipt of a thing of value.” *Id.* at 322. In *McManus*, where the government only presented evidence that the defendant joined GigaTribe and knew of its file sharing features, the enhancement was improperly applied. *Id.* at 322–23.

Defendant does not dispute that he knowingly made child pornography in his possession available to others by opening a shared folder containing child pornography to be accessed by other GigTribe users. One of these users was the undercover FBI agent.

As I found during the sentencing hearing, evidence sufficiently supports Defendant's specific intent to make child pornography available in order to obtain more pornography. Considering Defendant's GigaTribe folder structure, Defendant's exchange with the undercover agent evinced this specific intent.

'Funshooter2006' initiated a chat session with the undercover asking if he shared the password to locked folders. The undercover replied 'generally . . . usually with an exchange of vids.' The defendant responded 'I have a full folder of vids . . . what are you into?' The undercover stated 'girls, teen stuff mostly'. Morris then responded 'cool . . . same here. Let me move you into my other group if you wanna share'. The agent replied 'ok, cool thx' and the defendant responded 'can I check yours out too?'

PSR ¶ 3.

Defendant did not dispute the contents of this exchange in objections to the PSR or during the sentencing hearing. It shows that Defendant sought out another GigaTribe user, asking for a password to a locked folder. Defendant most likely thought this folder contained child pornography, given the context. The undercover agent stated the terms for his password: an exchange of videos. Defendant changed the undercover agent's status on GigaTribe so that he could view Defendant's shared folder, which the undercover agent found contained child pornography videos and images. Finally, Defendant reiterated his desire to receive child pornography in exchange: "can I check yours out too?" PSR ¶ 3. A preponderance of the evidence supports applying this enhancement to Defendant under the *McManus* test.

3. A pattern of activity involving the sexual abuse or exploitation of a minor: § 2G2.2(b)(5)

The government argued in its sentencing memorandum and at sentencing that a five-point enhancement for abuse and exploitation under § 2G2.2(b)(5) could potentially apply.³

³ For both the enhancement under § 2G2.2(b)(3)(B) and this enhancement, the government formally objected, saying it would be "remiss" if it failed to "point out" two "potential additional enhancements." Gov't's Objection 1. The sentencing memorandum labeled these enhancements again as "Potential Additional Enhancements" and said the defendant's conduct "may justify" each enhancement. Gov't Sent. Mem. 7-9. It was unclear whether the government actually sought application of these enhancements. I inquired about this at sentencing, and the government's answer made clear that it essentially sought to preserve these arguments for any appeal, but would not

According to the government, the defendant admitted after taking a polygraph examination that he had enticed minor females to masturbate during live webcam sessions. During the sentencing hearing, the government submitted a summary of Defendant's polygraph examination, reporting that he discussed this conduct. The government did not call the investigators present during Defendant's interrogation to testify, and the government did not submit the recording of Morris' interrogation to corroborate its assertions about the conduct to which he confessed. *See* FBI Summ. Of Morris Interview, *in* Def.'s Resp. to Gov't Sent. Mem., Ex. 1, at 1 ("The interview with MORRIS was recorded and the original recording is maintained in FBI Richmond Division ELSUR evidence.").

The guidelines define a "[p]attern of activity involving the sexual abuse or exploitation of a minor" to include "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct." U.S.S.G. § 2G2.2(b)(5), cmt. n. 1. Additionally, "sexual abuse or exploitation" includes any conduct, or attempt or conspiracy to commit conduct, described in various statutes, including 18 U.S.C. § 2251.⁴ Section 2251 prohibits using, employing, persuading, inducing, enticing, or coercing any minor to engage in "any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct" in interstate commerce. 18 U.S.C. § 2251; U.S.S.G. § 2G2.2(b)(5), cmt. n. 1. In turn, "sexually explicit conduct" includes "masturbation" under 18 U.S.C. § 2256(1), and "'minor' means any person under the age of eighteen years." 18

challenge any non-application of the enhancements if I sentenced Defendant within the guidelines range, as calculated before application of these enhancements. The only proper way to treat the government's submissions, in my view, is to consider them as arguments that these enhancements should apply in this case. I have done so.

⁴ The government primarily discussed whether the enhancement would apply under 18 U.S.C. § 2251, and I find this would be the most likely candidate of the statutes named for application of the § 2G2.2(b)(5) enhancement.

U.S.C. § 2256(1), (2)(A)(iii).

Defendant argued the evidence the government submitted was insufficient to support the § 2G2.2(b)(5) enhancement, citing the *corpus delicti* rule from Virginia law. Def.’s Resp. to Gov’t Sent. Mem. 3 (citing *Allen v. Virginia*, 752 S.E.2d 856, 859–61 (Va. 2014)). The government observed that finding facts for sentencing hearings is different, and that courts accept drug weights based on defendants’ custodial admissions on a regular basis.⁵ Although the *corpus delicti* rule has been rejected by federal courts, the Fourth Circuit and other federal courts have adopted the “trustworthiness approach.” See *United States v. Abu Ali*, 528 F.3d 210, 235 (4th Cir. 2008) (citing *Opper v. United States*, 348 U.S. 84, 89–90 (1954)). The trustworthiness approach requires the government to “‘introduce substantial independent evidence which would tend to establish the trustworthiness of the [defendant’s] statement.’ But this ‘corroborative evidence need not be sufficient, independent of the [defendant’s incriminatory] statements, to establish the *corpus delicti*.’” *Id.* (citing *Wong Sun v. United States*, 371 U.S. 471, 489 (1963), which noted that “extrinsic proof [i]s sufficient which merely fortifies the truth of the confession, without independently establishing the crime charged”).

Further fleshing out the requirement, the Fourth Circuit held:

Independent evidence adequately corroborates a confession if it ‘supports the essential facts admitted sufficiently to justify a jury inference of their truth;’ the facts admitted ‘plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.’ Thus, ‘corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that [the] defendant is guilty.’ The government must establish each element of an offense but may do so ‘by independent evidence *or* corroborated admissions,’ and one ‘mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense through the statements of the accused.’

⁵ I observe that the drug weight garnered from confessions or admissions of the defendant or co-conspirators is customarily corroborated by other testimony or independent facts.

Id. at 235 (internal citations omitted); *see also United States v. Harding*, No. 7:13-CR-00008, 2013 WL 1832564, at *3 (W.D. Va. May 1, 2013) (discussing a defendant’s *corpus delicti* objection, finding “[t]o the extent he is arguing that any extrajudicial statements he might have made must be corroborated by evidence to establish the trustworthiness of his admissions, he is correct.”).

The trustworthiness approach traditionally applies to jury-trial findings of fact beyond a reasonable doubt. Finding facts by a preponderance of the evidence during a sentencing hearing, for the purpose of applying a sentencing enhancement, presents a different context. Yet, many enhancements have the potential to subject defendants to as much time as a standalone criminal conviction. Likewise, applying these enhancements shares the same need for corroborating evidence to “fortif[y] the truth of the confession” or “establish the trustworthiness of the [defendant’s] statement.” *Abu Ali*, 528 F.3d at 235; *Harding*, 2013 WL 1832564, at *3. I found no such corroborating evidence in this case. Considering that fact, and examining the evidence submitted to support this enhancement, I declined to find that the § 2G2.2(b)(5) enhancement applied to Defendant.

I reiterate that finding here, noting that the government says Defendant confessed to these acts during the course of a four-hour interrogation conducted shortly after his house was searched and he was taken into custody. He apparently did so after taking a polygraph exam and during transport to Roanoke, Virginia thereafter for his initial appearance. *See Gov’t Sent. Mem.* 5–6 (noting search warrant executed on Defendant’s house on November 6, 2013); FBI Summary (noting interrogation took place on November 6, 2013). Although he had been given *Miranda* warnings, no attorney was present to represent Defendant during this questioning. Nothing else in the record corroborates Defendant’s involvement in this kind of direct contact activity, and the government did not make clear the context in which these admissions were

made. The government did not submit available recordings of the interrogation, for example, and did not have the investigator testify about them, subject to cross examination. The information the government provided this Court does not show it is more likely than not that Defendant engaged in a pattern of abuse or exploitation. Therefore, I will not apply the § 2G2.2(b)(5) enhancement to Defendant.

B. Victim Impact Statements

Defendant objected to the consideration or use of the victim impact statements at sentencing, contending that insufficient proximate cause linked the victims' harm to Defendant's acts, and that introducing the statements would violate his confrontation clause and due process rights. I found the statements could be considered, and I allowed their use at sentencing.

Defendant's arguments are misplaced. The United States Supreme Court in *Paroline v. United States* clarified that victims like those in this case are sufficiently causally linked to child pornography possession and distribution defendants to grant restitution awards. *See Paroline v. United States*, 134 S. Ct. 1710 (2014). The standard for determining the proximate cause connecting a child pornography defendant and a restitution victim is essentially the same as that for determining whether a person qualifies as a "crime victim" under 18 U.S.C. § 3771. *See United States v. Hunter*, No. 2:07CR307DAK, 2008 WL 53125, at *3–4 (D. Utah Jan. 3, 2008); *United States v. Sharp*, 463 F. Supp. 2d 556, 561–62 (E.D. Va. 2006). Namely, a court must find that a victim was directly and proximately harmed by conduct underlying an element of the offense or offenses for which the defendant was convicted, employing "the traditional 'but for' and proximate cause analyses." *United States v. Tonawanda Coke Corp.*, --- F. Supp. 2d ---, No. 10-CR-219S, 2014 WL 1053769, at *2 (W.D.N.Y. Mar. 14, 2014); *United States v. Warwick*, No. CRIM. WDQ-11-0167, 2011 WL 4527285, at *2 (D. Md. Sept. 26, 2011); *cf United States v. Davenport*, 445 F.3d 366, 374 (4th Cir. 2006) ("A person is directly harmed, for purposes of the

MVRA, when the harm results ‘from conduct underlying an element of the offense of conviction.’”).

In *Paroline v. United States*, 134 S. Ct. 1710 (2014), the United States Supreme Court affirmed that proximate cause is the correct standard to apply when analyzing whether to award restitution under the MVRA, 18 U.S.C. § 2259. The Court defined proximate cause as “often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct,” noting that “[a] requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.” *Id.* at 1719, 1722. General victim losses could be attributed to one defendant through a looser form of causation to respect congressional intent, the Court found, observing that “the victim's costs of treatment and lost income resulting from the trauma of knowing that images of her abuse are being viewed over and over are direct and foreseeable results of child-pornography crimes, including possession.” *Id.* at 1722.

During a sentencing hearing, a court must make findings of fact by a preponderance of the evidence in making determinations under the Sentencing Guidelines or otherwise. *See Bastian*, 650 F. Supp. 2d at 856–57. The court may consider a wide variety of evidence in sentencing a defendant, including hearsay where it is “relevant and ‘accompanied by sufficient indicia of reliability to support the conclusion that it [was] probably accurate.’” *Id.* Additionally, the defendant must have an opportunity to respond to or rebut the evidence. *See United States v. Faxon*, 689 F. Supp. 2d 1344, 1354 (S.D. Fla. 2010) (“Hearsay may be admitted at a sentencing if there are sufficient indicia of reliability, the court makes explicit findings of fact as to credibility, and the defendant has an opportunity to rebut the evidence.”).

Yet, a court may admit victim impact statements at a sentencing hearing, over a defendant’s objection that his confrontation clause rights have been violated. *See United States*

v. Hubbard, 227 F. App'x 224, 227 & n.2 (4th Cir. 2007).⁶ In *Hubbard*, the Fourth Circuit found a court did not abuse its discretion in admitting two videotaped statements by victims, which described the defendant's molestation of them. *Id.* at 227. *Hubbard* involved a sentencing hearing on a conviction or receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A), but two victims also alleged the defendant had molested them. *Id.* at 225–27. The Fourth Circuit observed in a footnote that the defendant could not rely on *Crawford v. Washington*, 541 U.S. 36 (2004), to show the court abused its discretion in admitting the videotaped hearsay statements:

Appellant's reliance on *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), is misplaced. *Crawford* dealt with hearsay statements that had been admitted at trial. *Id.* at 38–41, 124 S.Ct. 1354. Every circuit court to consider the issue of *Crawford's* application to sentencing proceedings has concluded that the decision does not limit a sentencing court's broad discretion to consider hearsay evidence. *See United States v. Katzopoulos*, 437 F.3d 569, 575 (6th Cir.2006); *United States v. Brown*, 430 F.3d 942, 944 (8th Cir.2005); *United States v. Cantellano*, 430 F.3d 1142, 1146 (11th Cir.2005), *cert. denied*, 547 U.S. 1034, 126 S.Ct. 1604, 164 L.Ed.2d 325 (2006); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir.2005); *United States v. Martinez*, 413 F.3d 239, 243 (2d Cir.2005), *cert. denied*, 546 U.S. 1117, 126 S.Ct. 1086, 163 L.Ed.2d 902 (2006); *United States v. Monteiro*, 417 F.3d 208, 215 (1st Cir.2005), *cert. denied* 546 U.S. 1202, 126 S.Ct. 1405, 164 L.Ed.2d 105 (2006); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir.2005), *cert. denied* 546 U.S. 1024, 126 S.Ct. 671, 163 L.Ed.2d 541 (2005).

Id. at 227 n.2.

Recently, the District Court for the District of Columbia held that “considering evidence such as victim statements and expert reports without live testimony and cross-examination” during sentencing or restitution proceedings does not violate a defendant’s Confrontation Clause rights. *United States v. Loreng*, 956 F. Supp. 2d 213, 222 n.4 (D.D.C. 2013). In *Loreng*, the

⁶ Although the Fourth Circuit has since ruled that courts must make certain findings to admit hearsay during revocation proceedings, it explicitly based its holding on Federal Rule of Criminal Procedure 32.1, rather than on the United States Constitution. *See, e.g., United States v. Doswell*, 670 F.3d 526, 529 (4th Cir. 2012) (citing the principle of constitutional avoidance and noting the court only addressed a district court’s obligations in considering hearsay during revocation proceedings under Federal Rule of Criminal Procedure 32.1(b)(2)(C)); Fed. R. Civ. P. 32.1 (titled “Revoking or Modifying Probation or Supervised Release”).

court held that once guilt has been properly established, a sentencing judge “is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and characteristics.” *Id.* (internal quotation marks and citations omitted). During a restitution proceeding in *Loreng*, since “[r]estitution is part of sentencing,” the court found that the defendant had “no confrontation right” to exclude the victim statements and expert reports. *Id.*

Employing *Paroline*'s analysis, the government submitted sufficient evidence to admit these victim impact statements for consideration at sentencing. The government noted that it was able to submit specific victim impact statements corresponding to the images on Defendant's computers because many videos and images in his possession depicted known victims, as identified by the National Center for Missing and Exploited Children. *Paroline* confirmed that the harm these child victims have suffered sufficiently causally connects them to child pornography defendants to make them victims for the purposes of the MVRA. Since the MVRA and § 3371 contain essentially identical standards for determining who qualifies as a victim, the proposed victims in this case indeed qualify as “crime victims” with the right to be heard at Defendant's sentencing hearing under § 3371. *See* 18 U.S.C. § 3371; *Hunter*, 2008 WL 53125, at *3–4; *Sharp*, 463 F. Supp. 2d at 561–62.

The Defendant's objections on due process grounds and under Federal Rule of Evidence 403 likewise fail. I find that the victim impact statements are relevant and highly probative in showing the seriousness of Defendant's offense, the nature and circumstances of that offense, and the just punishment any sentence must provide to Defendant. *See* 18 U.S.C. § 3553(a)(1)–(2). I find that the statements are reliable and credible, and that Defendant had a sufficient

opportunity to rebut these statements: he received the statements well in advance of the sentencing hearing on July 14, 2014, and in fact filed a motion in limine contesting them on June 30, 2014. *See generally Loreng*, 956 F. Supp. 2d at 222 n.4; *Bastian*, 650 F. Supp. 2d at 856–57; *Faxon*, 689 F. Supp. at 1354; Mot. in Limine (docket no. 43). Although Defendant was not able to cross examine the child victims in open court, § 3771 provides that these victims or their lawful representatives can present testimony through alternate means at the court’s discretion. *See, e.g.*, 18 U.S.C. § 3771(d)(2). The probative value of these statements regarding the purposes of sentencing is not substantially outweighed by any unfair prejudice they might cause Defendant. *Cf. Fed. R. Ev. 403; United States v. Finley*, 726 F.3d 483, 493–94 (3d Cir. 2013) (finding no abuse of discretion in district court’s Rule 403 determination to allow jury to view thirteen child pornography video segments and two images, because no unfair prejudice outweighed probative value regarding defendant’s knowledge of receiving, distributing, and possessing child pornography).

For the reasons stated, I admitted and considered the victim impact statements submitted by the government in sentencing Defendant.

C. Dr. Fracher’s Psychological Evaluation

As part of the record at sentencing, Defendant submitted a psychological evaluation conducted by Jeffrey C. Fracher, Ph.D. As part of that evaluation, Dr. Fracher conducted an Abel Assessment and a Static-99R test to shed light on Defendant’s sexual preferences and likelihood of reoffending. *See Fracher Evaluation, in Def.’s Sent. Mem., Ex. 4.* The government did not directly object to the use of Dr. Fracher’s evaluation of Defendant. Rather, it challenged the evaluation’s reliability for predicting the likelihood that an offender committed or will commit acts of sexual abuse against children. *See Gov’t Sent. Mem. 16–18.* At least two federal district courts have held that the results of the Abel Assessment were not admissible in child

pornography trials, because these courts found the assessment insufficiently reliable to meet *Daubert's* standards. *See, e.g., United States v. Birdsbill*, 243 F. Supp. 2d 1128, 1131 (D. Mont. 2003), *aff'd*, 97 F. App'x 721 (9th Cir. 2004); *United States v. White Horse*, 177 F. Supp. 2d 973 (D.S.D. 2001), *aff'd*, 316 F.3d 769 (8th cir. 2003). Additionally, the government notes that the evaluation makes no mention of Defendant's alleged video chat sessions with minors; therefore, it may not be based on all the information available and may not prove reliable.

During the sentencing hearing, I observed that Dr. Fracher's evaluation used the November 18, 2013 FBI summary as one source of information about Defendant. *See* Fracher Evaluation at 1. The FBI summary states that on the way to his preliminary hearing in Roanoke, Defendant admitted to masturbating over webcam and enticing minor females with whom he chatted to masturbate for him on the webcam. FBI Summary, *in* Def.'s Resp. to Gov't Sent. Mem., Ex. 1 at 4–5. Therefore, I can infer Dr. Fracher at least reviewed this source of information in coming to his conclusions.

Nevertheless, I place little or no weight on Dr. Fracher's conclusions regarding Defendant's sexual predispositions. The Fourth Circuit has not decided whether *Daubert* applies to sentencing hearings. *United States v. Caro*, No. 106-CR-00001, 2007 WL 419525, at *1 n.1 (W.D. Va. Jan. 3, 2007). District courts have broad discretion to consider a wide range of information during sentencing hearings, and psychological evaluations are often submitted for consideration. Yet in this case, Dr. Fracher's evaluation is undermined by doubts about the reliability of the tests he performed to reach his conclusions. *See, e.g., Birdsbill*, 243 F. Supp. 2d at 1131; *White Horse*, 177 F. Supp. 2d at 975–76. It is further undermined by the fact that the report does not mention Defendant's purported admissions to having minors masturbate for him on live video chat sessions. The evaluation denies that Defendant ever acted on his voyeuristic desires and finds he has no predisposition to act on his sexual fantasies involving underage

females.⁷ Accordingly, in determining defendant's sentence, I placed little or no weight on the results of the Abel Assessment, the Static-99R, and Dr. Fracher's conclusions concerning Defendant's sexual predispositions.

III. REASONS FOR DOWNWARD VARIANCE

The guidelines in this case ultimately recommended a sentence between 210 and 262 months of incarceration. I varied downward from that recommendation and imposed 106 months of incarceration, to be followed by 20 years of supervised release. Defendant pleaded guilty to serious offenses, for which he deserves to be punished. Nonetheless, I must account for Defendant's individual characteristics and carefully determine what sentence would be "sufficient but not greater than necessary" to meet the purposes of sentencing outlined in § 3553(a). 18 U.S.C. § 3553(a); *Gall v. United States*, 552 U.S. 38, 50 (2007). After considering the parties' arguments, listening to testimony at the sentencing hearing, and carefully reviewing the extensive submissions in this case, I find the sentence of 106 months, followed by 20 years of supervised release, is sufficient to serve the purposes of sentencing. *See* 18 U.S.C. § 3553(a).

The nature and circumstances of these offenses, and the history and characteristics of Defendant, warrant a downward variance. *See* 18 U.S.C. § 3553(a)(1). Defendant, like many other child pornography offenders, has no criminal record. But Defendant also served in the military for over a decade, gaining a fairly high rank, commendations, and an honorable discharge. These characteristics, as well as his immediate and full cooperation with authorities, show me that he has some respect for authority and the ability to adhere to discipline.⁸ These

⁷ Although I found that there was insufficient evidence to apply the pattern of abuse or exploitation enhancement under § 2G2.2(b)(5), the government's claims undermine Dr. Fracher's conclusions. Even without corroboration, the psychological evaluation should have mentioned and dealt with these claims in forming opinions about Defendant's predisposition to act on his fantasies involving minor females.

⁸ I understand the government's argument that a military veteran should not receive a reward for serving in the military at sentencing, because that person has dishonored the principles the military holds dear in committing a crime. As I explained at sentencing, I do not give Defendant a reward for that service in considering it, but find it a

qualities set Defendant apart from other similarly-situated Defendants, and in my view make him less likely to reoffend or to commit more egregious conduct upon his release. On release from incarceration, Defendant will be under close supervision with extensive computer monitoring, registration requirements, numerous other restrictions, and a requirement that he receive psychiatric care. Defendant's history and characteristics evinced by his long and distinguished military service lead me to conclude he poses a low risk of recidivism under these circumstances. The policy statement of the United States Sentencing Commission further supports a downward variance due to Defendant's military service. *See* 18 U.S.C. § 3553(a)(5); U.S.S.G. § 5H1.11.

I also observed at sentencing that Defendant seems to be truly remorseful, and that his history includes probable suffering from some form of depression that likely contributed to his offenses. These characteristics make Defendant more susceptible to reform through psychiatric care, which he will be required to receive upon his release.

A guidelines sentence is not necessary to reflect the seriousness of these offenses, to justly punish defendant, or to promote respect for the law. *See* 18 U.S.C. § 3553(a)(2)(A). The sentence I imposed is sufficient to do so. At almost 51 years old, Defendant is older than many of those similarly situated. His age is not entitled to very much consideration, but I have lightly considered it as one more reason why Defendant is less likely to reoffend than others. Defendant will be released from prison at about the age of 60 and remain on supervised release until he is about 80 years old. At those ages, under the intense scrutiny of sex offender registration requirements and his probation officer, a term of incarceration greater than 106 months is unnecessary to protect the public or provide deterrence to Defendant. In considering just punishment, I also account for the fact that Defendant, like other child pornography defendants,

persuasive factor in showing Defendant can adhere to discipline, is less likely to reoffend than other offenders, and is likely to adhere to the conditions of supervised release after his imprisonment.

will face weighty collateral consequences upon his release. Registering as a sex offender and complying with the strict requirements of post-release supervision for twenty years will punish Defendant well beyond his term of incarceration.

The sentence imposed must also afford adequate deterrence to criminal conduct and protect the public from further crimes of Defendant. *See* 18 U.S.C. § 3553(a)(2)(B)–(C). In my view, Defendant is less likely to commit this offense again than others because of his general maturity, remorsefulness, and the fact that he would likely adhere very strongly to the requirements of probation.⁹ I find the sentence I have imposed will be sufficient to deter Defendant from reoffending, and the lengthy term should also provide general deterrence to potential future offenders. Of course, incarceration is one way to protect the public from further crimes. Here, the strict requirements of supervised release and sex offender registration, coupled with the close supervision of a probation officer, prove sufficient.

I must account for the need for the sentence imposed to provide Defendant with needed medical care or other correctional treatment in the most effective manner. *See* 18 U.S.C. § 3553(a)(2)(D). There is nothing to suggest that Defendant will not be able to obtain adequate medical care and the psychological treatment he needs to overcome his behavior, both inside and outside of prison. Indeed, this will be required of him by the probation officer.

I took account of the kinds of sentences and sentencing range established by the guidelines for Defendant's category of offense. *See* 18 U.S.C. § 3553(a)(3)–(4). Defendant objected that the guidelines double-count for certain conduct or overstate the seriousness of his offense. While I do not find that there is double counting, the enhancements under the child

⁹ Additionally, a 2010 study by the United States Sentencing Commission found that offenders who are in Criminal History Category I (as is Defendant) are very likely to successfully complete a term of supervised release, and that, in 2008, 81.3 percent of such Category I offenders successfully completed their term of supervision. *See* United States Sentencing Commission, *Federal Offenders Sentenced to Supervised Release*, at 66 (July 2010) (available at www.ussc.gov).

pornography possession and distribution guidelines do increase the guidelines range by a considerable amount of time. Not all of these enhancements should necessarily apply in their full force to every defendant; still, that seems to be the usual result. Testimony and submissions before me at sentencing established that Defendant did not necessarily seek out sadistic or masochistic content, for example. The enhancement still properly applies. Nevertheless, I find that the enhancements I applied to Defendant result in a guidelines range that overstates the type of conduct in which Defendant primarily engaged. I varied downward, in part, to arrive at a sentence more reflective of this individual defendant's conduct.

The sentence I imposed on Defendant also satisfies the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. *See* 18 U.S.C. § 3553(a)(6). Suffice it to say that my reasoning for the sentence imposed in this case is consistent with the reasoning for sentences imposed below the advisory guideline ranges in other child pornography cases before this court and across the country.³

Finally, I have deferred a determination on the need to provide restitution to any victims

³ *See, e.g., United States v. McVey*, 752 F.3d 606, 608–09 (4th Cir. 2014) (affirming downward variance to 78-month sentence on guidelines range of 87 to 108 months for man who solicited child porn videos from father of young girls, asked about the price to have sex with those girls, but possessed few videos); *United States v. Robertson*, 464 F. App'x 186, 187 (4th Cir. 2012) (affirming downward variance to 42-month sentence and lifetime of supervised release from guidelines range of 87 to 108 months, where defendant asked for noncustodial sentence); *United States v. Cicalese*, 396 F. App'x 10, 11 (4th Cir. 2010) (affirming downward variance sentence of 60 months from 78-to-108-month guideline range).

See also United States Sentencing Commission, *2013 Sourcebook of Federal Sentencing Statistics*, Table 27A, *Sentences Relative to the Guideline Range By Each Primary Offense Category, Fiscal Year 2013*, (available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table27a.pdf>) [hereinafter “Table 27A”]; United States Sentencing Commission, *2013 Sourcebook of Federal Sentencing Statistics*, Table 28, *Sentences Relative to the Guideline Range By Each Primary Sentencing Guideline* (available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table28.pdf>) [hereinafter “Table 28”]. In 2013, district courts around the county sentenced below the advisory guideline range in approximately 68% of cases sentenced under U.S.S.G. § 2G2.2 and in 64.6% of cases grouped into the “Child Pornography” Primary Offense Category. *See* Tables 27A & 28. Below-range sentences not based on either downward departures or government-sponsored motions accounted for about 66% of these below-guidelines sentences under § 2G2.2, or 45% of all § 2G2.2 sentences. *See* Table 28. Of 1,626 cases sentenced under § 2G2.2, only 499 defendants (30.7%) received a sentence within the guideline range. *See id.* Of defendants receiving below-guideline sentences, approximately 73% were not based on government sponsored motions, but occurred as a result of consideration of the 18 U.S.C. § 3553(a) factors, as a result of a downward departure, or for some other reason. *See id.* About 65% of all below-guidelines sentences resulted from downward variances due to consideration of the 18 U.S.C. § 3553(a) factors. *See id.*

of these offenses to a date no later than 90 days after sentencing. *See* 18 U.S.C. § 3664(d)(5). On July 22, 2014, I set a briefing schedule. *See* July 22, 2014 Order. I will examine the restitution issue when it is fully briefed and issue my determination thereafter.

IV. CONCLUSION

This memorandum opinion is hereby incorporated into the judgment order in this case, entered this same day. The Clerk of the Court will forward a certified copy of this memorandum opinion and the accompanying judgment order to all counsel of record.

Entered this _____ day of July, 2014.



NORMAN K. MOON
UNITED STATES DISTRICT JUDGE