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Federal Corner: Beware of the 'Butner Study' Redux - By F. R. Buck Files Jr.

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On the front page of the *New York Times* on September 2, 2014, was an article by Adam Liptak entitled 'Seeking Facts, Justices Settle for What Briefs Tell Them.' From this article we learned that:

The Supreme Court received more than 80 friend-of-the-court briefs in the Hobby Lobby case. Most of these filings, also called amicus briefs, were dull and repetitive recitations of familiar legal arguments.

Others stood out. They presented fresh, factual information that put the case in a broader context.

The justices are hungry for such data. Their opinions are increasingly studded with citations of facts they learned from amicus briefs.

But this is a perilous trend, said Allison Orr Larsen, a law professor at the College of William and Mary.

'The court is inundated with 11th-hour, untested, advocacy-motivated claims of factual expertise,' she wrote in an article to be published in *The Virginia Law Review*.

Some of the factual assertions in recent amicus briefs would not pass muster in a high school research paper. But that has not stopped the Supreme Court from relying on them. Recent opinions have cited 'facts' from amicus briefs that were backed up by blog posts, emails, or nothing at all.

Some amicus briefs are careful and valuable, of course, citing peer-reviewed studies and noting contrary evidence. Others cite more questionable materials.

Some 'studies' presented in amicus briefs were paid for or conducted by the group that submitted the brief and published only on the Internet. Some studies seem to have been created for the purpose of influencing the Supreme Court.

Yet the justices are quite receptive to this dodgy data. Over the five terms from 2008 to 2013, the court's opinions cited factual assertions from amicus briefs 124 times, Professor Larsen found.

I was reminded of this article when I read the opinion of United States District Judge James O. Browning of the United States District Court of New Mexico in *United States v. Crisman*, ___ F.3d. ___, 2014 WL

4104415 (D. New Mexico).

Richard D. Crisman had entered a plea of guilty to possessing child pornography. The problem for Judge Browning was what the appropriate punishment should be and the Government had an answer. They had a study that indicated that only 15 percent of child pornography offenders had not committed any hands-on offense, and they argued to Judge Browning that Crisman should be sentenced to 97 months confinement and a lifetime of supervised release.

Judge Browning's opinion contains the following:

[The Issue before the Court]

The primary issue is whether, and how, the Court should consider the findings in Michael L. Bourke & Andres E. Hernandez, *The "Butner Study" Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. Fam. Violence 183 (2009) (*"Butner Study Redux"*), in determining an appropriate sentence for Defendant Richard D. Crisman.

[It Would Have Been Difficult for Any Judge to Be Sympathetic to the Defendant]

According to the NCMEC, Crisman had 1,884 known child pornography images from approximately 100 different series and nine known child pornography videos from five different series. *See* PSR ¶34, at 15.

He indicated he would masturbate two to three times a day while viewing the pictures and at times would masturbate five to six times daily. PSR ¶26, at 9. Crisman also told officers about a specific fantasy that he had about a five-year-old boy who lived next door to him: he wanted to kiss [] and lick [] everything, including the penis. PSR ¶27, at 10 (quotation unattributed). Further, Crisman admitted to stealing approximately 50 pairs of soiled underwear from various children in his neighborhood and from the children of his friends, which he would place on his face while masturbating. PSR ¶32, at 14.

[The Government's Position]

The United States argues that significant empirical data provides support for concluding that those who distribute, receive, and possess child pornography pose a significant danger to our community, pointing specifically to the *Butner Study Redux* as demonstrating that offenders involved in child pornography-related conduct are often unknown hands-on offenders.

[The *Butner Study Redux*]

One study in particular, published in 2009, the *Butner Study Redux*, offers scientific justification for a claim that convicted child pornography offenders are likely guilty of additional crimes against children. Michael Bourke and Andres Hernandez conducted research on 155 child pornography offenders treated at the Federal Correctional Institution (FCI) in Butner, North Carolina. Bourke and Hernandez concluded that the vast majority of convicted child pornography offenders, eighty-five percent in their study, had committed at least one hands-on sexual offense. *Butner Study Redux* at 187-88.

[A History of the First Butner Study]

In 2000, Hernandez, the director of the Sex Offender Treatment Program (SOTP) at FCI Butner, presented preliminary findings before the annual conference for the Association for the Treatment of Sexual Abusers (ATSA) in San Diego, California. Andres E. Hernandez, *Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders* (Nov.2000)(unpublished manuscript), available at [http://www.ovsom.texas.gov/docs/Self?Reported?Contact?Sexual?Offenses Hernandez?etal?2000.pdf](http://www.ovsom.texas.gov/docs/Self?Reported?Contact?Sexual?Offenses%20Hernandez?etal?2000.pdf) (First Butner Study). The preliminary findings suggested a significantly higher rate of hands-on offenses amongst the population of child pornography offenders than had been known at the time of sentencing. First Butner Study at 6. The study involved . . . sixty-two people in the 'Child Pornographer/Traveler' group, whose crimes of conviction 'involve[d] the production, distribution, receipt, and possession of child pornography,' or 'involve[d] luring a child and traveling across state lines to sexually abuse a child . . .'

[The Study's Conclusions]

Hernandez found that prisoners in the Child Porn/Traveler group identified fifty-five contact sex crimes in their PSRs, but, following their treatment, 'these offenders admitted to an additional 1,379 contact sexual crimes for which they were never detected by or reported to the criminal justice system.' This difference represents a significant increase in the number of crimes that known child molesters and those with no previous history of hands-on offending committed.

[The Beginning of the *Butner Study Redux*]

Given the striking nature of these initial findings, Hernandez continued recording the incidents of hands-on offenses in the Butner SOTP. See Hernandez Statement at 4. He enlisted the assistance of Michael Bourke, the Chief Psychologist for the United States Marshals Service. See *Butner Study Redux* at 183. Together, Hernandez and Bourke interviewed 155 offenders undergoing treatment at Butner between 2002 and 2005. See *Butner Study Redux* at 185.

[Judge Browning's Criticism of the First Butner Study]

The distinction between the First Butner Study and the *Butner Study Redux* is important, as Hernandez's initial research lacks the specificity, clarity, and reliability of the later research. The remainder of this Memorandum Opinion and Order will consider only the published article 'the *But-ner Study Redux*' and the findings contained therein.

[The *Butner Study Redux*]

Bourke and Hernandez conducted their research by interviewing child pornography offenders that chose to participate in an optional treatment program, SOTP, between 2002 and 2005. See *Butner Study Redux* at 186. Each SOTP participant worked with his clinician over the course of eighteen months. See *Butner Study Redux* at 185. They attended group and individual therapy sessions as well as unstructured 'therapeutic activities' for fifteen hours a week. *Butner Study Redux* at 185. In addition, offenders spent sixty weeks attending a psychoeducational series in which they learn about coping mechanisms and managing their criminality after release. See *Butner Study Redux* at 185. They were also subjected to

psychological testing.

The remaining 155 participants comprise the entire research sample relied upon in the published article. See *Butner Study Redux* at 186. Researchers studied two separate issues??Contact Sexual Criminality? and ?Crossover Behavior.?

[The *Butner Study Redux*'s Conclusion]

Bourke and Hernandez used the above procedure to determine how many of the 155 child pornography offenders had also molested a child. In doing so, they recorded the number of hands-on victims disclosed on the PHQ and compared that number to what was in the PSR. See *Butner Study Redux* at 186. At sentencing, twenty-six percent were known to have committed a hands-on offense. See *Butner Study Redux* at 187. At the end of treatment, eighty-five percent admitted to molesting at least one child. See *Butner Study Redux* at 187. The study indicated that only fifteen percent of child pornography offenders had not committed any hands-on offense.

[Judge Browning's Conclusions]

Although the *Butner Study Redux* indicates that many child pornography ?lookers? are also ?touchers,? the Court does not think it is appropriate to enhance Crisman's sentence when there is no evidence that Crisman has molested children. The Court also will not use the *Butner Study Redux*'s findings to conclude that Crisman poses a risk to the community, because the Court thinks it should base its finding of Crisman's future risk of harm on evidence in his case and not on a study in which he was not involved. The Court finds that the *Butner Study Redux*'s findings are, however, persuasive for the following purpose: the Court will not vary from the sentencing guidelines calculation based on a *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), disagreement with the guidelines, because, although the guidelines may punish child pornographers harshly, the *Butner Study Redux*'s findings that many ?lookers? are also ?touchers? are disturbing and, in part, justify the United States Sentencing Commission's, and ultimately Congress's, decision to set harsh punishments for child pornographers. The *Butner Study Redux* may support what most parents, and the public at large, intuitively think: men who frequently view child pornography might touch children inappropriately, and such men should not be around their children. Congress and the Commission's sentences reflect these fears, and the Court should be reluctant to set aside these harsh sentences on *Kimbrough v. United States* grounds. The Court will not do so here. The Court will sentence Crisman to ninety-seven months of imprisonment and twenty-five years of supervised release.

My Thoughts

- If you are confronted with a *Butner Study Redux* issue, you have to read Judge Browning's entire opinion. Downloaded, it is 66 printed pages and contains the following:
 - A History of the Child Pornography Guidelines;
 - Research Regarding the *Butner Study Redux* (Including an Overview of the Research);
 - A Judicial History of the Cases in which the *Butner Study Redux* was Cited;
 - Criticisms of the *Butner Study Redux* (Including Methodology, Author Bias, Sample Size and Representativeness, Verifying the Results and Generalizing the *Butner Study Redux*'s Findings);
 - The Sentencing Commission's 2012 Report to Congress; and,
 - An Analysis of the Case before the Court.
- What the Government has done in *Crisman* is precisely what the defense bar has been doing in seeking below the Guideline sentences in child pornography cases by citing *United States v. Grober*,

595 F.Supp.2d 382 (D.N.J.2008), and Troy Stabenow's *Deconstructing the Myth of the Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*.

- If you are defending child pornography cases, you *must* be familiar with *Crisman* and *Grober* and Stabenow's article.

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