

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-3158

United States of America

Plaintiff - Appellee

v.

Christopher Scruggs

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Dubuque
(2:17-cr-01048-LTS-1)

JUDGMENT

Before LOKEN, GRUENDER, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 22, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 18-3158

United States of America

Plaintiff - Appellee

v.

Christopher Scruggs

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Dubuque

Submitted: October 10, 2019

Filed: November 22, 2019

Before LOKEN, GRUENDER, and KOBES, Circuit Judges.

PER CURIAM.

Christopher Scruggs pleaded guilty to receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2), (b)(1), and possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), (b)(2), and the district court¹ sentenced him to

¹The Honorable Leonard T. Strand, Chief Judge, United States District Court for the Northern District of Iowa.

concurrent terms of 151 months in prison, at the bottom of the advisory Guidelines range, and five years of supervised release. The district court also ordered Scruggs to pay restitution of \$21,500. On appeal, Scruggs argues in a brief filed pursuant to Anders v. California, 386 U.S. 738 (1967), and in a pro se supplemental brief, that the district court committed plain error in its application of an enhancement for Scruggs's knowing distribution of the material at issue, and abused its discretion by imposing an unreasonable sentence. The Anders brief also raises a challenge to a portion of the restitution order. In addition, the parties have furnished supplemental briefs at this court's request addressing application of the knowing-distribution enhancement under U.S.S.G. § 2G2.2(b)(3)(F), as modified in 2016 by Amendment 801, and relatedly whether the failure to consider an offense-level reduction under U.S.S.G. § 2G2.2(b)(1) constituted plain error.

After careful review of the record, we conclude it was not plain error for the district court to impose the two-level enhancement under section 2G2.2(b)(3)(F) for Scruggs "knowingly engag[ing] in distribution" of child pornography given that Scruggs left dozens of child pornography "depictions" in a shared folder of his file-sharing software that were available on three different days over a seventeen-day span, acknowledged that he understood how his file-sharing software worked, and demonstrated that he generally had a measure of proficiency in using computers and the internet. See United States v. Smith, 910 F.3d 1047, 1056 (8th Cir. 2018) (upholding application of enhancement to sophisticated computer user who knew file-sharing program automatically shared images saved to shared folder, and who had substantial number of child pornography files in shared folder despite use of program designed to shred files); United States v. Kirlin, 859 F.3d 539, 543 (8th Cir. 2017) (reviewing for plain error Guidelines issue raised for first time on appeal).

It was also not plain error for the district court to decline to apply the two-level reduction under section 2G2.2(b)(1) because, regardless of Scruggs's intent, it is undisputed that his conduct was not "limited to the receipt or solicitation" of child

pornography where an investigator was able to download child pornography from Scruggs's computer via file-sharing software. See, e.g., United States v. Abbring, 788 F.3d 565, 568 (6th Cir. 2015) (concluding that "transfer or sharing," "even without regard to knowledge," precludes application of this two-level reduction); see also United States v. Shelabarger, 770 F.3d 714, 718 (8th Cir. 2014) (holding that the defendant was not entitled to this two-level reduction where he had received a distribution enhancement that was supported by "ample evidence").

The district court also did not abuse its discretion in ordering Scruggs to pay one of the victims \$3,000 in restitution, which was reduced from the roughly \$8,200 suggested by the "1/n method," which takes into consideration the number of defendants who have been ordered to pay restitution to the victim. See United States v. Bordman, 895 F.3d 1048, 1056-59 (8th Cir. 2018) (affirming a \$3,000 restitutionary award), cert. denied, 139 S. Ct. 1618 (2019). Finally, Scruggs's sentence was not substantively unreasonable. See, e.g., United States v. Maldonado, 421 F. App'x 667, 668 (8th Cir. 2011) (unpublished) (per curiam) (concluding that a "bottom-of-the-guidelines sentence was not substantively unreasonable" over defendant's assertion that his "scant criminal history" warranted a lower sentence); United States v. Sanchez, 508 F. 3d 456, 459-60 (8th Cir. 2007) (upholding sentence at the bottom of the Guidelines and noting that Guidelines accounted for defendant's lack of criminal history).

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3158

United States of America

Appellee

v.

Christopher Scruggs

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Dubuque
(2:17-cr-01048-LTS-1)

ORDER

The petition for rehearing by the panel is denied.

January 03, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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APPENDIX C

UNITED STATES DISTRICT COURT

Northern District of Iowa

UNITED STATES OF AMERICA

v.

CHRISTOPHER SCRUGGS

JUDGMENT IN A CRIMINAL CASE

)

) Case Number: 0862 2:17CR01048-001

)

) USM Number: 11071-090

)

Jill M. Johnston

Defendant's Attorney

 ORIGINAL JUDGMENT AMENDED JUDGMENT

Date of Most Recent Judgment:

Reason for Amendment:

THE DEFENDANT:

 pleaded guilty to count(s) 1 and 2 of the Indictment filed on October 18, 2017 pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---------------|-------|
| 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1) | Receipt of Child Pornography | January 2014 | 1 |
| 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2) | Possession of Child Pornography Including a Depiction Involving a Prepubescent Minor Who Had Not Attained 12 Years of Age | January 2014 | 2 |

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The defendant has been found not guilty on count(s) _____ Count(s) 3, 4, and 5 of the Indictment is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Leonard T. Strand
Chief United States District Court Judge

Name and Title of Judge

September 20, 2018

Date of Imposition of Judgment

Signature of Judge

9/21/18

Date

DEFENDANT: **CHRISTOPHER SCRUGGS**
CASE NUMBER: **0862 2:17CR01048-001**

PROBATION

The defendant is hereby sentenced to probation for a term of:

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **151 months. This term of imprisonment consists of a 151-month term imposed on Count 1 and a 151-month term imposed on Count 2 of the Indictment, to be served concurrently.**

The court makes the following recommendations to the Federal Bureau of Prisons:
It is recommended that the defendant be designated to FCI Englewood, Colorado.

It is recommended that the defendant participate in the Bureau of Prisons' Residential Sex Offender Management Program.

The defendant is remanded to the custody of the United States Marshal.

The defendant must surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant must surrender for service of sentence at the institution designated by the Federal Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the United States Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **CHRISTOPHER SCRUGGS**
CASE NUMBER: **0862 2:17CR01048-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant will be on supervised release for a term of: 5 years. This term of supervised release consists of a 5-year term imposed on Count 1 and a 5-year term imposed on Count 2 of the Indictment, to be served concurrently.

MANDATORY CONDITIONS OF SUPERVISION

- 1) The defendant must not commit another federal, state, or local crime.
- 2) The defendant must not unlawfully possess a controlled substance.
- 3) The defendant must refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future controlled substance abuse. (*Check, if applicable.*)
- 4) The defendant must cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)
- 5) The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, and/or is a student, and/or was convicted of a qualifying offense. (*Check, if applicable.*)
- 6) The defendant must participate in an approved program for domestic violence. (*Check, if applicable.*)

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **CHRISTOPHER SCRUGGS**
CASE NUMBER: **0862 2:17CR01048-001**

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervision, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition.

- 1) The defendant must report to the probation office in the federal judicial district where the defendant is authorized to reside within 72 hours of the time the defendant was sentenced and/or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed. The defendant must also appear in court as required.
- 3) The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.
- 4) The defendant must answer truthfully the questions asked by the defendant's probation officer.
- 5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) The defendant must allow the probation officer to visit the defendant at any time at the defendant's home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- 7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about the defendant's work (such as the defendant's position or the defendant's job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.
- 10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) As directed by the probation officer, the defendant must notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and must permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: CHRISTOPHER SCRUGGS
CASE NUMBER: 0862 2:17CR01048-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the United States Probation Office:

1. The defendant must not have contact during the defendant's term of supervision with the individual set forth in paragraph 76 of the presentence report, in person or by a third party. This includes no direct or indirect contact by telephone, mail, email, or by any other means. The United States Probation Office may contact the aforementioned individual(s) to ensure the defendant's compliance with this condition.
2. The defendant must submit the defendant's person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office; to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. The United States Probation Office may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
3. The defendant must allow the United States Probation Office to install computer monitoring software on any computer [as defined in 18 U.S.C. § 1030(e)(1)] that is used by the defendant. To ensure compliance with the computer monitoring condition, the defendant must allow the United States Probation Office to conduct initial and periodic monitoring and inspections of any computers [as defined in 18 U.S.C. § 1030(e)(1)] subject to computer monitoring. This monitoring and said inspections will be conducted to determine whether the computer contains any prohibited data prior to the installation of the monitoring software, whether the monitoring software is functioning effectively after its installation, and whether there have been attempts to circumvent the monitoring software after its installation. The defendant must warn any other people who use these computers that the computers may be subject to monitoring and inspections pursuant to this condition.
4. The defendant must not knowingly view, possess, produce, or use any materials that depict sexually explicit conduct as defined in 18 U.S.C. § 2256, or any form of sexually stimulating, sexually oriented, or pornographic materials. Further, the defendant must not knowingly enter any establishment that derives a substantial portion of its income from the distribution or exhibition of these materials.
5. The defendant must not knowingly have contact with children under the age of 18 (including through letters, communication devices, audio or visual devices, visits, electronic mail, the Internet, or any contact through a third party) without the prior written consent of the United States Probation Office. The United States Probation Office may work with the defendant and the defendant's family to set up supervised communications and visits with the defendant's biological and legally adopted children.
6. The defendant must not knowingly be present at places where minor children under the age of 18 are congregated, such as residences, parks, beaches, pools, daycare centers, playgrounds, and schools without the prior consent of the United States Probation Office.

Continued on following page.

DEFENDANT: **CHRISTOPHER SCRUGGS**
CASE NUMBER: **0862 2:17CR01048-001**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the United States Probation Office:

7. The defendant must participate in a mental health evaluation, which may include an evaluation for sex offender treatment. The defendant must complete any recommended treatment program, and follow the rules and regulations of the treatment program. The defendant will be required to submit to periodic polygraph testing at the discretion of the United States Probation Office as a means to ensure that the defendant is in compliance with the requirements of the defendant's supervision or treatment program. The defendant must take all medications prescribed to the defendant by a licensed medical provider.
8. The defendant must pay any fine, restitution, and/or special assessment imposed by this judgment.
9. For as long as the defendant owes any fine, restitution, and/or special assessment imposed by this judgment, the defendant must provide the United States Probation Office with access to any requested financial information.
10. For as long as the defendant owes any fine, restitution, and/or special assessment imposed by this judgment, the defendant must not incur new credit charges or open additional lines of credit without the approval of the United States Probation Office unless the defendant is in compliance with the installment payment schedule.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them. Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

Defendant

Date

United States Probation Officer/Designated Witness

Date

DEFENDANT: **CHRISTOPHER SCRUGGS**
 CASE NUMBER: **0862 2:17CR01048-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| <u>Assessment</u> | <u>JVTA Assessment¹</u> | <u>Fine</u> | <u>Restitution</u> |
|-------------------|------------------------------------|-------------|--------------------|
| TOTALS | \$ 200 | \$ 0 | \$ 21,500 |

The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss²</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|---|-------------------------------|----------------------------|-------------------------------|
| Victim(s), the amount(s) of restitution, and the priority or percentage are listed in an Appendix to this Judgment that has been filed under seal | | | |

TOTALS \$ _____ \$ _____

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

¹Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014.

²Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **CHRISTOPHER SCRUGGS**
 CASE NUMBER: **0862 2:17CR01048-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 200 due immediately; balance due

not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

If any of the defendant's court ordered financial obligations are still owed while the defendant is incarcerated, the defendant must make monthly payments in accordance with the Bureau of Prisons Financial Responsibility Program. The amount of the monthly payments will not exceed 50% of the funds available to the defendant through institution or non-institution (community) resources and will be at least \$25 per quarter. If the defendant still owes any portion of the financial obligation(s) at the time of release from imprisonment, the defendant must pay it as a condition of supervision and the United States Probation Office will pursue collection of the amount due pursuant to a payment schedule approved by the Court. The defendant must notify the United States Attorney for the Northern District of Iowa within 30 days of any change of the defendant's mailing or residence address that occurs while any portion of the financial obligation(s) remains unpaid.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant must pay the cost of prosecution.
 The defendant must pay the following court cost(s):
 The defendant must forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DUBUQUE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
CHRISTOPHER SCRUGGS,
Defendant.

No. CR17-1048-LTS
TRANSCRIPT OF
SENTENCING

The Sentencing held before the Honorable Leonard T. Strand, Chief Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 111 Seventh Avenue Southeast, Cedar Rapids, Iowa, September 20, 2018, commencing at 1:02 p.m.

APPEARANCES

For the Plaintiff: MARK TREMMEL, ESQ.
Assistant United States Attorney
111 Seventh Avenue Southeast
Cedar Rapids, IA 52401

For the Defendant: JILL M. JOHNSTON, ESQ.
Assistant Federal Defender
Suite 290
222 Third Avenue Southeast
Cedar Rapids, IA 52401

Also present: Moria Vaughan, U.S. Probation

Reported via VTC by: Shelly Semmler, RMR, CRR
320 Sixth Street
Sioux City, IA 51101
(712) 233-3846

Contact Shelly Semmler at (712)233-3846 or shelly_semmler@land.uscourts.gov
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1 believe it was Government's Exhibit 1 through 5; is that
2 correct?
3 MR. TREMMEL: Yes, Your Honor.
4 THE COURT: Would you like to offer those?
5 MR. TREMMEL: Government offers Exhibits 1 through 5
6 under seal, Your Honor.

* * * *

8 (Exhibits 1 through 5 were offered.)

* * * *

10 THE COURT: Any objection, Ms. Johnston?

11 MS. JOHNSTON: No, Your Honor.

12 THE COURT: Government Exhibits 1 through 5 are
13 received and will be maintained under seal.

* * * *

15 (Government Exhibits 1 through 5 were admitted.)

* * * *

17 THE COURT: Then the defense exhibits I believe went
18 from A through P. Is that correct, Miss Johnston?

19 MS. JOHNSTON: That is correct, Your Honor.

20 THE COURT: Would you like to offer those?

21 MS. JOHNSTON: I would, Your Honor, and I'd ask that
22 A, C, E, F, and G be under seal.

* * * *

24 (Exhibits A through P were offered.)

* * * *

Contact Shelly Semmler at (712)233-3846 or shelly_semmler@land.uscourts.gov
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1 THE COURT: Please be seated.
2 THE CLERK: In United States of America versus
3 Christopher Scruggs, Case Number 17CR1048, United States
4 Probation is represented by Moria Vaughan. Counsel, please
5 state your appearance.
6 MR. TREMMEL: Mark Tremmel, U.S. Attorney's Office.
7 THE COURT: Good afternoon.
8 MS. JOHNSTON: Jill Johnston on behalf of Mr. Scruggs.
9 THE COURT: Good afternoon to both of you. And for
10 the record, Mr. Scruggs is present. And because our court
11 reporter is participating by video today, I'd ask everybody to
12 remain seated and close to the microphone so she can hear us.
13 We are here for sentencing in this case. Mr. Scruggs
14 has pled guilty to two counts of an indictment. Count 1 charged
15 receipt of child pornography. Count 2 charged possession of
16 child pornography including a depiction involving a prepubescent
17 minor or minor who had not attained 12 years of age.
18 I have reviewed the presentence report and other
19 materials submitted before the hearing.
20 Ms. Johnston, did you have a full and complete
21 opportunity to go through the presentence report with your
22 client?
23 MS. JOHNSTON: Yes, Your Honor.
24 THE COURT: Okay. Thank you. Both sides have
25 submitted exhibits in advance of the hearing. Mr. Tremmel, I

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1 THE COURT: Any objection, Mr. Tremmel?
2 MR. TREMMEL: No, Your Honor.
3 THE COURT: Okay. Defense Exhibits A through P are
4 received, and Exhibits A, C, E, F, and G will be maintained
5 under seal.
6 * * * *
7 (Defendant Exhibits A through P were admitted.)
8 * * * *
9 THE COURT: And I did have a chance to review all of
10 the exhibits including the interviews in Government Exhibits 1
11 and 2 in advance of the hearing. Having said that, if any party
12 wants to play, for example, any portions of the interviews or
13 bring other parts of the exhibits to my attention during the
14 hearing, that's perfectly fine. I just want everybody to know
15 that I have had the chance to review all of those in advance.
16 Does any party intend to present any testimony or
17 other evidence that we haven't discussed yet today?
18 Mr. Tremmel?
19 MR. TREMMEL: No, Your Honor.
20 THE COURT: Ms. Johnston?
21 MS. JOHNSTON: Yes, Your Honor. I do have one
22 witness, but I believe he'll be brief.
23 THE COURT: Okay. We'll get to the witness in a few
24 minutes here.
25 Mr. Tremmel, under the sentencing guidelines, is the

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1 government moving for the additional one-level reduction under
2 3E1.1(b)?

3 MR. TREMMEL: Yes, Your Honor.

4 THE COURT: That is granted. Mr. Scruggs will receive
5 a total of three levels of reduction in the offense level based
6 on acceptance of responsibility. While I know there are various
7 matters in dispute here including I think the issue that
8 Ms. Johnston wants to present a witness on, it's my
9 understanding the basic guideline calculations are not in
10 dispute. Is that correct, Mr. Tremmel?

11 MR. TREMMEL: Yes, Your Honor.

12 THE COURT: Ms. Johnston, do you agree?

13 MS. JOHNSTON: I do agree, Your Honor.

14 THE COURT: Okay. The presentence report finds a
15 total offense level here of 34, a criminal history category of
16 1. That results in an advisory sentencing guideline range of
17 151 to 188. And because there are no objections to those basic
18 guideline findings, I do adopt the presentence report on the
19 issue of the United States Sentencing Guidelines.

20 I'll note by statute on Count 1 the term of
21 imprisonment ranges from 5 to 20 years; Count 2, it's 0 to 20
22 years. And then for both Counts 1 and 2 by statute the term of
23 supervised release is 5 years to life. Do the parties agree
24 with those statutory ranges? Mr. Tremmel?

25 MR. TREMMEL: Yes, Your Honor.

Contact Shelly Semenier at (712)233-3846 or shelly_semenier@cland.uscourts.gov
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1 THE COURT: Ms. Johnston?
2 MS. JOHNSTON: Yes, Your Honor.
3 THE COURT: Okay. So we have a situation here where
4 the government is asking for either an upward departure or
5 variance and the defense is asking for a downward departure or
6 variance from the guideline range.. And let's talk about the
7 government's motion first. Or, Ms. Johnston, let me ask, would
8 it fit better to have your witness testify first before we start
9 arguing about the motions?
10 MS. JOHNSTON: Your Honor, I don't know that it really
11 matters. I guess I'll leave it up to you what you want to do.
12 Yeah, it --
13 THE COURT: Really if you have your witness ready, why
14 don't we just go ahead and get all the evidence in, and then we
15 can argue the motion. So whenever your -- if your witness is
16 ready now, let's go ahead.
17 MS. JOHNSTON: We're ready, Your Honor.
18 THE COURT: All right.
19 MS. JOHNSTON: At this time I'd call Jesse Evilsizer
20 to the stand. Do you want him to go here or --
21 THE COURT: Over there. Yep. Please come on up here
22 in front of me, sir, and I'll swear you in. Would you please
23 raise your right hand.
24 JESSE EVILSIZER, DEFENDANT'S WITNESS, SWORN
25 THE COURT: Okay. Thank you. Please have a seat to

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1 your left there in the witness box. And would you stay close to
2 that microphone and pull it down. Our court reporter's actually
3 by video, so it's really important that we be close to
4 microphones. Sir, would you tell us your full name and spell
5 your last name, please.

6 THE WITNESS: Jesse Eivilsizer, E-v-i-l-s-i-z-e-r.

7 THE COURT: Okay. Thank you.

8 MS. JOHNSTON, you may proceed.

9 MS. JOHNSTON: Thank you.

10 DIRECT EXAMINATION

11 BY MS. JOHNSTON:

12 Q. Jesse, how old are you?

13 A. Eighteen.

14 Q. And what town do you live in?

15 A. Dubuque, Iowa.

16 Q. How long have you lived in Dubuque?

17 A. My whole life.

18 Q. And do you work, Jesse?

19 A. I do. I work at Brazen Open Kitchen and Bar.

20 Q. And what do you do there?

21 A. I make salads and desserts.

22 Q. So essentially you're kind of a prep cook?

23 A. Yep.

24 Q. And how far did you go to school?

25 A. I graduated high school.

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1 Q. And what's your marital status?
2 A. Just currently in a relationship with my girlfriend.
3 Q. Do you have any children?
4 A. I do. I have a three-month-old daughter.
5 Q. Now, Jesse, you know Chris Scruggs; is that right?
6 A. Yes, I do.
7 Q. And how do you know Mr. Scruggs?
8 A. He was my Big Brother.
9 Q. And when you say Big Brother, are you referring to the Big
10 Brothers, Big Sisters program?
11 A. Yep.
12 Q. And how long was he your Big Brother?
13 A. Three to five years.
14 Q. Do you remember approximately what ages you were during the
15 time that Mr. Scruggs was your Big Brother?
16 A. I believe I was 13 up until 16 or 17.
17 Q. And why did the Big Brother relationship end at some point?
18 A. I was just getting older, became a teenager, kind of
19 started doing my own thing.
20 Q. And during the time frame that Chris was your Big Brother,
21 did you spend time with him on the weekends?
22 A. On the weekends, during the week.
23 Q. Would you spend time with him every weekend?
24 A. Just about, yeah.
25 Q. And how many times do you think or how many times a week do

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1 you think you spent time with him during the week?

2 A. Maybe once or twice during the week and then on the

3 weekend.

4 Q. And what types of activities did you and Mr. Scruggs do

5 together?

6 A. We played basketball. We played Civilization on his

7 computer, played with his dog Noah, lots of frisbee, worked on

8 his house, fixed up my bike.

9 Q. During the time that Mr. Scruggs was your Big Brother, did

10 you ever spend the night at his house?

11 A. Not at his house, no.

12 Q. Did you ever travel out of town with him?

13 A. Yeah.

14 Q. On how many occasions do you think you did that?

15 A. We went to Chicago. We went to Colorado. We went to the

16 motorcycle museum. About all I can remember.

17 Q. Let's start with Chicago. You mentioned you traveled there

18 with him. How many times did you go to Chicago with him?

19 A. I think it was just once.

20 Q. And what types of things did you do in Chicago?

21 A. We went to the aquarium. We went to the science museum.

22 Q. And did you stay overnight in Chicago?

23 A. Yeah.

24 Q. Did you and Mr. Scruggs share a room?

25 A. Yep.

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1 Q. Did you share a bed in the room?

2 A. No. There was two beds.

3 Q. You mentioned that you traveled to Colorado with him. How

4 many times did you go to Colorado with him?

5 A. Just once.

6 Q. And where did you stay when you went to Colorado with him?

7 A. His parents' house.

8 Q. And did you stay in the same bedroom with him?

9 A. No.

10 Q. And you mentioned you traveled someplace else. I think you

11 said the motorcycle museum?

12 A. Yeah.

13 Q. Where's that at?

14 A. It's off the highway on the way to Cedar Rapids. I think

15 it might be Marion.

16 Q. Not sure?

17 A. Not quite sure, no.

18 Q. All right. Did you and he stay overnight somewhere on that

19 trip?

20 A. No.

21 Q. Did you ever go to the Wisconsin Dells with Mr. Scruggs?

22 A. Yeah.

23 Q. And did you stay in a hotel when you went there, or did you

24 go camping when you were there?

25 A. We went camping.

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1 Q. Did you share a tent with him?

2 A. Yeah.

3 Q. And what'd you do up in the Dells?

4 A. We went to Devil's Lake State Park, did some hiking, pretty

5 much just sightseeing.

6 Q. During all of the times that you spent with Mr. Scruggs,

7 did he ever touch you sexually or rape you?

8 A. No.

9 Q. Did he ever attempt to touch you sexually?

10 A. No.

11 Q. Did you ever even get a strange feeling when you spent time

12 with Mr. Scruggs that he was sexually attracted to you?

13 A. Not even the littlest bit.

14 Q. Did he ever do or say anything that made you think he was

15 sexually attracted to you?

16 A. Not at all.

17 Q. Did you spend time at Mr. Scruggs' house?

18 A. Yeah.

19 Q. And while you were there, did you ever see any type of

20 pornography at his house?

21 A. Nope.

22 Q. Did you ever see him looking at any type of pornography?

23 A. Nope.

24 Q. Do you remember sending an e-mail to my investigator that

25 was kind of a character reference letter for Mr. Scruggs?

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1 A. Yeah.

2 Q. And in that e-mail you described Mr. Scruggs as one of the

3 only positive male influences in your life.

4 A. Yeah.

5 Q. Is that how you still feel about him today?

6 A. Yeah, absolutely.

7 Q. And that's despite the fact that you know what he's charged

8 with and what's going on here?

9 A. Yeah.

10 Q. And is everything that you said in that character reference

11 e-mail still true today?

12 A. Yeah, absolutely.

13 MS. JOHNSTON: Thank you. I don't have any more

14 questions for you.

15 THE COURT: Cross-examination?

16 MR. TREMEL: No questions, Your Honor.

17 THE COURT: Okay, sir. You are excused. Thank you.

18 THE WITNESS: Thank you.

19 MS. JOHNSTON: Your Honor, the defense has no further

20 witnesses.

21 THE COURT: Okay. Thank you.

22 Mr. Tremmel, any rebuttal evidence?

23 MR. TREMEL: No, Your Honor.

24 THE COURT: Okay. Let's hear argument then. It

25 probably makes sense to do it all together. Obviously the

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1 government is seeking an upward variance or departure. The
 2 defense is seeking downward, and really just I'd like to hear
 3 all of the parties' thoughts generally on what the appropriate
 4 sentence here, whether it's upward, downward, in the range, or
 5 wherever it might be. So, Mr. Tremmel, I'll start with you.

6 MR. TREMMEL: Your Honor, first we would note that
 7 in -- regarding the prior witness, the defendant did say in
 8 paragraph 16 of the presentence report that he did at times find
 9 himself sexually attracted to him but that he had never acted
 10 upon those feelings.

11 Your Honor, the departure is based upon the incident
 12 with J.F. in Illinois. And the Court has had the opportunity to
 13 review the videos and the other exhibits, the exhibits by the
 14 defense.

15 And we understand the arguments that the defendant is
 16 making and Dr. Thompson's criticism. Dr. Thompson did not find
 17 strong evidence of interviewer bias in his words. We would note
 18 that despite some of the inconsistencies there is corroboration
 19 for what J.F. said, and that is as laid out in our sentencing
 20 memo.

21 THE COURT: As far as the hotel and the grocery store?

22 MR. TREMMEL: Yes.

23 THE COURT: In other words, the trip apparently
 24 occurred.

25 MR. TREMMEL: That's correct. There are details that

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1 he gave about the hotel being a Country Inn and it was. He
 2 recalled the room as 110 or something like that. They stayed in
 3 room 112. He said they ended up walking to Piggly Wiggly,
 4 walked to Subway, and it was within walking distance to both of
 5 those. And he stated it had a hot tub in the room and a
 6 jacuzzi. Now, the defendant, you know, has stated that he
 7 doesn't dispute those. But that is some corroboration of
 8 details of that.

9 So the government would argue that the Court should
 10 depart upward based on that. As we noted in our sentencing
 11 memorandum, the departure only applies if an incident qualifies
 12 under the statute. And so the other incidents alleged in
 13 Wisconsin wouldn't qualify for the departure. The Court could
 14 consider everything under 3553(a).

15 And so we would ask for an upward departure as
 16 outlined in our sentencing memo for three levels or,
 17 alternatively, an upward variance based on all the factors under
 18 3553(a). Thank you.

19 THE COURT: Okay. Thank you.

20 MS. JOHNSTON, would you like to argue on behalf of
 21 Mr. Scruggs?

22 MS. JOHNSTON: Yes, Your Honor. Thank you. Your
 23 Honor, in regards to the government's request for an upward
 24 departure, I'll first start with the allegations by J.F. We
 25 respectfully argue that the government has not met its burden of

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1 proving beyond -- or by a preponderance of the evidence that
 2 those allegations are true and that the Court should not depart
 3 upward because of that.

4 The only evidence that the government has presented
 5 are the two videotaped interviews by J.F. And we know from that
 6 first interview that J.F. said nothing happened. And really it
 7 seemed like all he was concerned about during that interview was
 8 getting his property back. And then it wasn't until the second
 9 interview that he made the allegations regarding Mr. Scruggs.

10 We certainly agree with Mr. Tremmel when Mr. Tremmel
 11 said that Dr. Thompson did not find strong evidence of
 12 interviewer bias when J.F. was being interviewed. But
 13 Dr. Thompson did find a number of things that caused him to
 14 question the reliability of the interviews of J.F. and,
 15 therefore, raises questions about whether the allegations are
 16 true.

17 The first is the fact that J.F. wasn't interviewed
 18 right away after he disclosed the alleged abuse. He disclosed
 19 it. He talked to his therapist. His therapist wanted to meet
 20 with him at least one more time before he was interviewed by the
 21 Child Protection Center. And Dr. Thompson said that that's
 22 certainly a red flag. It should not have happened.

23 We also know from Dr. Thompson's report that he has
 24 serious concerns about misattribution errors by J.F. due to his
 25 chaotic upbringing and his family life and also, again, the

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1 actions of his therapist.

2 Secondly, Your Honor, there's just no disputing here
 3 that J.F. is a messed-up kid. It's sad to say, and certainly
 4 nobody's blaming him. But this is a kid who comes from a family
 5 who's had a lot of issues. Apparently his stepfather sexually
 6 assaulted multiple siblings of J.F., and J.F. was aware of that.
 7 There's also allegations that J.F. perpetrated on his younger
 8 brother. So he's somebody who's had a very chaotic upbringing.

9 He also has a lifelong history of developmental
 10 challenges, learning problems, and disruptive and aggressive
 11 behavior which is noted on page 9 of Dr. Thompson's report.
 12 These are also things which call -- or caused Dr. Thompson to
 13 call into question the reliability of the statements made in the
 14 interview with J.F.

15 And I think something that's really important, Your
 16 Honor, is the fact that we know J.F. lied. The government
 17 describes some of the lies as flippant. And I think that's true
 18 in regards to where he said that Mr. Scruggs was a pothead and a
 19 crackhead. But some of the other lies were not flippant where
 20 he said that Mr. Scruggs had a brother who went to the amusement
 21 park with them, when he said that he went to the police station
 22 after Mr. Scruggs abused him. We know that's not true because
 23 the police looked into that and then this whole story about
 24 having some kind of jail-type bars on his windows to keep
 25 Mr. Scruggs away. This is a kid who for whatever reason lies.

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1 And then the final factor we're really asking you to
 2 give weight to in determining if the government has met its
 3 burden on this issue is that even the foster care system and the
 4 people who do training acknowledge that foster kids lie and they
 5 make false allegations of abuse. That was Defense Exhibit D.
 6 And I referenced pages 3 through 5. You know, they themselves
 7 acknowledge that the incidents of false allegations of abuse
 8 occurs at a far higher rate than founded cases of abuse in
 9 foster and adoptive homes. And we just submit that these
 10 allegations by J.F. are simply another example of these
 11 recognized false allegations.

12 So we resist the government's request for an upward
 13 departure or variance based on those grounds.

14 We also resist the government's request for an upward
 15 departure or variance based on the facts and circumstances of
 16 this case. The government refers to the number of images that
 17 were found on Mr. Scruggs' devices, the types of -- the types of
 18 depictions and the images, and then also the length of time that
 19 it appears that Mr. Scruggs had been looking at child
 20 pornography.

21 Your Honor, these are not -- I should say the facts of
 22 this case are not so different than the facts of any other child
 23 pornography case that it takes this case out of the heartland
 24 such that an upward is warranted. It's not uncommon to have
 25 thousands and thousands of images in these cases. As we all

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1 know, the description of what was depicted in the images, that
 2 occurs in all of our cases these days. And the fact that
 3 Mr. Scruggs had been looking at child pornography for a number
 4 of years, that's very common as well.

5 And so we submit that there's nothing about the facts
 6 of this case that would warrant an upward departure because it's
 7 just not significantly different from other child pornography
 8 cases that come before the Court.

9 Your Honor, do you want me to also just go ahead and
 10 make my arguments for a downward as well at this time?

11 THE COURT: Yeah, go ahead. And then I'll have
 12 Mr. Tremmel respond.

13 MS. JOHNSTON: Thank you. Your Honor, I'm not going
 14 to belabor this. I'll pretty much just stand on my brief. To
 15 just sum it up, though, we're asking for a downward departure
 16 due to Mr. Scruggs' essential lack of a criminal history. He's
 17 got no record other than some citations. He's a man who's
 18 always been employed and been a productive part of society. He
 19 comes from a stable family, and he still has the support of his
 20 friends and his family.

21 Further, he cooperated with law enforcement during
 22 their investigation to the point of giving them what he believed
 23 to be the password for his encrypted files. I don't believe law
 24 enforcement was actually able to get into those files. But it
 25 was an extremely long password, and Mr. Scruggs did his best at

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1 telling them what he thought the password was.

2 There's also evidence in this case that Mr. Scruggs
 3 tried not to share any of the files that he had downloaded, and
 4 he did that by deleting them and also by not solely using
 5 peer-to-peer technology when seeking out the child pornography.

6 And then I think perhaps most importantly for our
 7 request for a downward variance is the fact that in Defendant's
 8 Exhibit C which is the report from Elizabeth Griffin, she
 9 determined that he was a low risk for reoffending, both either
 10 hands-on or in just getting involved with child pornography
 11 again.

12 And so we submit, Your Honor, that for all of these
 13 reasons and for the other reasons outlined in the brief that a
 14 downward variance is warranted in this case. We believe that a
 15 shorter time in prison coupled with a lengthy term of
 16 supervision would better serve the goals of sentencing. Thank
 17 you.

18 THE COURT: Okay. Thank you.

19 And, Mr. Tremmel, would you like to respond either on
 20 the upward or downward arguments?

21 MR. TREMMEL: Your Honor, just briefly. The defense
 22 argues that it's about -- it's well recognized about foster
 23 children making false allegations for various reasons.
 24 Defendant chose to participate in foster care. There was an
 25 issue when he was detained in Wisconsin about the understanding

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1 that he wasn't going to do that. He did choose to do that.
 2 When you choose to participate in foster care, you know you're
 3 going to be dealing with troubled kids.

4 I would also say that during the first interview J.F.
 5 expressed the concern about was -- is he going to prison. And
 6 you can understand why there would be some loyalty to
 7 Mr. Scruggs and why kids do change their minds. In regard --
 8 about disclosing, that that's a very, very difficult thing for a
 9 child to do.

10 In regards to the other arguments for a downward
 11 variance, I think the length of time, the nature of the images,
 12 the number of the images are aggravating factors more than in --
 13 more images here than in some other cases.

14 So for all the reasons outlined, we would ask the
 15 Court to depart or vary upwards. If the Court decides not to
 16 depart or vary upwards, then the government would ask for a
 17 sentence at the top of the guideline range. Thank you.

18 THE COURT: Okay. Thank you.

19 Ms. Johnston, anything further on the request for a
 20 downward variance?

21 MS. JOHNSTON: No, Your Honor. Thank you.

22 THE COURT: Okay. I'm going to give the issues more
 23 thought as we go on and cover some other matters here.

24 Let's talk about special conditions. At one point I
 25 know the defense had objected to two of the special conditions

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1 that are proposed. I'm looking at paragraphs 76 through 85 of
 2 the presentence report. I believe the defense waived the
 3 objection to paragraph 81. Is that correct, Ms. Johnston?

4 MS. JOHNSTON: That is correct, Your Honor.

5 THE COURT: Okay. I will consider that objection to
 6 be withdrawn. Paragraph 79 had our then standard language that
 7 we use in our district for the no view or possess of erotica or
 8 pornography. And the defense objected, and I know our probation
 9 office has been in the process of trying to draft a better
 10 version of this. It's my understanding that the parties agreed
 11 to a version that was circulated, I believe, yesterday. Is that
 12 correct, Mr. Tremmel?

13 MR. TREMMEL: Yes, Your Honor.

14 THE COURT: And, Ms. Johnston, do you agree?

15 MS. JOHNSTON: Yes, Your Honor.

16 THE COURT: And with that new language then, will the
 17 defense be withdrawing the objection to paragraph 79?

18 MS. JOHNSTON: Yes, Your Honor.

19 THE COURT: Okay. We will -- I will consider that
 20 objection to be withdrawn with the understanding that we have
 21 amended the language. And I will include in the judgment the
 22 amended version of paragraph 79 that the parties approved
 23 yesterday. I appreciate everybody working with our probation
 24 office on that. We're trying to get this condition into a
 25 little better shape so it's not overly vague or difficult to

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1 5 victims, 3,000 for each victim. Defense has agreed to pay
 2 that for a total of 15,000. So those would be the agreed-to
 3 amounts.

4 Blue Pillow and Marineland, as the government
 5 indicated, there's not enough information to support a
 6 restitution award in our opinion for those victims.

7 For the SpongeB victim, for the reasons outlined in
 8 our brief and the supporting exhibits, we would ask for \$3,000
 9 in restitution. That's less than the amount that the victim
 10 asked for.

11 And then for the J_blonde series, that is a series
 12 where the restitution information was attached to the victim
 13 impact statement. And we believe that information supports a
 14 finding of proximate cause of harm to the victim.

15 However, the specific numbers are from an old
 16 restitution request, and the attorney for the victim has not
 17 submitted an updated restitution request. So we are not relying
 18 on the numbers outlined in that old request. We did submit
 19 Exhibit Number 5 which is a chart of different restitution
 20 awards to that victim across the country. That includes one
 21 award that this Court ordered in a prior case of \$1,500. And we
 22 believe that is an appropriate amount in this case as well.

23 So my understanding is the contested restitution
 24 issues would be regarding SpongeB and J_blonde.

25 THE COURT: Thank you.

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1 understand. Hopefully we're making progress there. -

2 Any other concerns or objections about the proposed
 3 special conditions? Mr. Tremmel, I'll start with you.

4 MR. TREMMEL: No, Your Honor.

5 THE COURT: Ms. Johnston?

6 MS. JOHNSTON: No, Your Honor.

7 THE COURT: Okay. I will -- based on what we've just
 8 discussed, I'll be imposing those special conditions in the
 9 judgment.

10 Obviously restitution is an issue that the parties
 11 have covered pretty thoroughly in their briefs. And I don't
 12 know if there have been any updates.

13 But, Mr. Tremmel, would you walk me through? I tried
 14 to make a chart, and I think I understand the parties'
 15 respective positions. But would you tell me the government's
 16 current position on what restitution should be ordered to which
 17 victims?

18 MR. TREMMEL: Okay, Your Honor. My -- my
 19 understanding is that there's -- regarding J.F., first of all,
 20 the, \$500 was for belongings. And so I don't think that's
 21 contingent on any other finding by the Court, that the defense
 22 is agreeing to that \$500 for the belongings.

23 In terms of the other agreed-to, Tara, the defense
 24 contacted counsel, and that's three thou -- or excuse me. Tara
 25 is pro se. That's \$3,000. And then the 8kids series, there's

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1 And, Miss Johnston, I'll start with J.F. I think in
 2 your brief you indicated that if I find J.F. as a victim there'd
 3 be no objection to the \$500. Is that the case? Or what's the
 4 defense position about the \$500 request?

5 MS. JOHNSTON: Your Honor, given that it's just for
 6 possessions as opposed to some kind of medical treatment or
 7 therapy, we don't have any objection to the restitution request.

8 THE COURT: Okay. Thank you. And then we have the
 9 Tara series and the 8kids series, and I think this was in your
 10 brief as well. But -- and Mr. Tremmel mentioned the defense is
 11 agreeing to 3,000 to the victim in the Tara series, then 3,000
 12 each to the 5 victims in the 8kids series; is that correct?

13 MS. JOHNSTON: Yes, it is, Your Honor.

14 THE COURT: Okay. And then that does leave us then
 15 with the SpongeB or the Sponge Bob -- I've seen it two different
 16 ways -- and J_blonde. What's the defense position with regard
 17 to those two restitution requests?

18 MS. JOHNSTON: Your Honor, I guess our position with
 19 those is that we don't feel the amounts requested by the
 20 government are supported under the Paroline factors. I kind of
 21 argued some things in my brief, but I'd like to elaborate on
 22 that a little bit if the Court is fine with me doing that at
 23 this point.

24 THE COURT: Sure, sure.

25 MS. JOHNSTON: First of all, Your Honor, we know from

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1 Paroline that we have to consider Mr. Scruggs' role. And we
 2 also know that Mr. Scruggs had nothing to do with the production
 3 of the images in both the SpongeB and the J_blonde series. We
 4 don't even know if any of the images were actually distributed
 5 by Mr. Scruggs. Although there is some evidence that one of the
 6 programs he used did do file sharing, we don't know if the
 7 actual images of SpongeB or J_blonde were some of those that
 8 were distributed.

9 As per the discovery, Mr. Scruggs possessed 60 images
 10 of SpongeB and 6 images of J_blonde which is indicated in the
 11 NCMEC reports.

12 We also don't have any info that the victims are even
 13 aware of Mr. Scruggs' actual possession of their images. The
 14 government's calculation for Sponge Bob doesn't take into
 15 account all of the factors set forth in Paroline which the
 16 government does acknowledge in their brief. And the same is
 17 true for J_blonde.

18 And further, as I pointed out in my brief, Your Honor,
 19 SpongeB is seeking money for attorney's fees and costs for a
 20 psych exam and also a report. But we don't have any information
 21 that he actually had to pay for those fees and costs out of his
 22 pocket.

23 And then the other thing I want to point out, Your
 24 Honor, is that especially in regards to the Sponge Bob
 25 restitution request, the government relies on what was referred

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1 to as the 1/n method or 1, slash, n method, and that was
 2 addressed in the Bordman case. And the government relied on
 3 that method in trying to come up with an appropriate restitution
 4 request for SpongeB. And I guess I'm unclear if they relied on
 5 that for J_blonde. We submit that there are flaws regarding
 6 that method which should cause the Court to reject it.

7 First of all, the method makes no sense as a measure
 8 of the harm caused by Mr. Scruggs because his harm is
 9 independent from the number of successful convictions to date.
 10 The fact that somebody has been arrested and convicted doesn't
 11 cause harm to the victims. It's the people who are not arrested
 12 and who continue to look and -- to look at the images and to
 13 trade the images who cause the harm to the victims.

14 And also the 1/n methods results in arbitrary awards.
 15 The first person under that method would be liable for the full
 16 amount of restitution. The second person would be liable for 50
 17 percent of the total amount and so forth. And so the awards
 18 given when utilizing that 1/n method vary considerably depending
 19 on the point in time where restitution is sought. And it could
 20 also amount to awards that are more than the total losses that a
 21 victim is requesting.

22 So for these reasons, Your Honor, we are resisting the
 23 government's restitution requests in those series. I don't have
 24 a specific figure to suggest to you for restitution. But we do
 25 object to the government's requests.

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1 THE COURT: Okay. Thank you.

2 Mr. Tremmel, any response?

3 MR. TREMMEL: If I could just clarify, Your Honor, the
 4 attorney fees that the SpongeB victim is requesting, he's
 5 apparently requesting that amount of attorney fees in each case.
 6 However, we added that to the total and divided that out because
 7 we don't think that should be in each case. Our total we came
 8 up with by doing the 1/n calculation is over \$8,000. And so
 9 we've reduced that down to \$3,000.

10 We agree with the defense that purely using just the
 11 1/n runs into some of those issues of how early along is your
 12 victim as the court in Bordman acknowledged that as well, and
 13 that's why other factors need to be considered as well. Thank
 14 you.

15 THE COURT: Okay. Thank you. I do find the
 16 government -- in looking at the Paroline factors in regard to
 17 the SpongeB or Sponge Bob series, I find the government's
 18 request for \$3,000 has been properly supported. I'm not going
 19 to award restitution with regard to the J_blonde series as I
 20 find there is not sufficient factual support either as to the
 21 amount of the victim's damages or the proximate causation as
 22 required by Paroline.

23 And Ms. Johnston noted, there were -- I hate to say
 24 only, but there were only six images found with regard to the
 25 J_blonde series and suggests a de minimis, if any, impact. And

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1 with the information in front of me, I'm not able to assess
 2 restitution for J_blonde.

3 So I will include in the judgment restitution then as
 4 we discussed with regard to the Tara series, the 8kids series,
 5 the Sponge Bob series, and then \$500 for J.F. And for all of
 6 the victims it'll be \$3,000 other than J.F. who will be \$500.
 7 And, again, in 8kids there were 5 victims, so it will be 3,000
 8 each.

9 Are there other issues we haven't talked about yet
 10 that the parties believe I should take up? Mr. Tremmel, do you
 11 know of any?

12 MR. TREMMEL: No, Your Honor.

13 THE COURT: Ms. Johnston?

14 MS. JOHNSTON: No, Your Honor.

15 THE COURT: Mr. Scruggs, sir, you have the right to
 16 speak here today and to tell me anything you would like me to
 17 know about as I decide what your sentence should be. You also
 18 have the right to remain silent. If you don't say anything,
 19 that's fine. I would not hold that against you at all. Sir, is
 20 there anything you would like to say?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Okay. Are you close to the microphone -- I
 23 can't quite see.

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Okay. Great. Thank you, sir. And one

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1 more thing before you get started. If you're going to read
 2 which is perfectly fine, but can you try to keep a nice slow
 3 pace? It will help our court reporter out.

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Great. Thank you.

6 THE DEFENDANT: Your Honor, there are several things
 7 that I would like the Court to know and understand, things that
 8 have been part of my life and things that I've learned since,
 9 first being interrogated by the police.

10 First I would like to try to explain how after almost
 11 40 years of law-abiding behavior, of being a good son, good
 12 friend, a good employee, how I could do something so wrong.

13 But there's really no excuse that I can offer because
 14 there is no excuse for this behavior. And my decisions were my
 15 own. All I can say is that I first encountered child
 16 pornography at a particularly difficult time in my life. I was
 17 going through a break-up with a girlfriend of six years, and I
 18 was encountering some serious health conditions including severe
 19 fatigue and depression. I was also working in a family business
 20 with my father, and the business was encountering difficulties.
 21 Within about two years we closed the doors on that business.

22 It was during that time that I lost faith and I turned
 23 away from family and friends. I did begin to view pornography
 24 regularly, and I had an account on Usenet. I found pornography
 25 readily available there, and it was there that while searching

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1 I regret that because of what I've done I've lost
 2 relationships. I lost the relationship with Jesse who deserved
 3 a better mentor and somebody to be there for him as he was
 4 taking the last steps to adulthood.

5 And I regret that because of what I've done I'm not
 6 able to be there to support my parents as they are now elderly
 7 and needing more support. They deserve better than to have a
 8 son that they couldn't count on. And I know now that it's
 9 possible that they may pass while I'm in prison.

10 Your Honor, it's been nearly five years since I was
 11 first questioned. I cooperated fully. I was prepared at the
 12 time to face the consequences. For whatever reason I was not
 13 arrested at the time, and during that time I've come a long way.
 14 I've ceased viewing pornography altogether, and I've focused
 15 back on relationships with friends and family.

16 So, Your Honor, I'm prepared to face the judgment that
 17 you want to pass here on me today. I do ask for leniency, that
 18 I may still have some time with my parents, try to help them how
 19 ever I can, and that I can try and rebuild some sort of career
 20 in life when I'm out of prison. But whatever you find to be
 21 just here today, I want you to know that I will embrace my
 22 treatment, and I will endeavor to be a positive force both in
 23 and out of prison. Thank you, Your Honor.

24 THE COURT: Okay. Thank you, sir.

25 I do want to go back to financial issues. I think we

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1 for adult pornography I first encountered child pornography.
 2 When I saw it, I should have deleted it. I never
 3 should have viewed it. And I certainly don't have an excuse for
 4 continuing to download. It was a foolish action. But sin does
 5 set on us when we're weak and when we're afraid. And if we
 6 listen to it, it will lie to us.

7 And so I rationalized. I thought I could control it.
 8 I thought I could contain it. But I could not. And I did not
 9 respect the danger that it represented, that alone at night it
 10 was possible to think that -- it was possible to think that
 11 these images were not real, that if I only downloaded and I
 12 didn't interact with anyone, I didn't share, then there couldn't
 13 be any harm.

14 That was a lie. It was -- it was arrogance to think
 15 that I could walk a tightrope between right and wrong because
 16 what's inherently wrong can't help but cause harm.

17 I'm utterly ashamed of my actions of what I did and
 18 the harm that it caused. And to think that I may have in any
 19 way perpetuated the harm or the pain and trauma of others, I
 20 know if I had been victimized, I know that I would just want the
 21 suffering to end. And I know now that with these images it
 22 never does. And for that I'm very sorry.

23 Now I have to face what I've done. I have caused
 24 harm. And in doing so I've also betrayed the trust of my
 25 friends and my family.

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1 got talking about restitution for a while, and then I didn't ask
 2 about other financial issues. United States Probation has
 3 determined, for example, that Mr. Scruggs has the ability to pay
 4 a fine. I think that's paragraph 65 of the presentence report.
 5 Mr. Tremmel, is the government requesting a fine?

6 MR. TREMEL: Leave that to the Court's discretion,
 7 Your Honor.

8 THE COURT: Ms. Johnston, any thoughts or arguments
 9 about a fine?

10 MS. JOHNSTON: Your Honor, we didn't make an objection
 11 to probation's conclusion in the presentence report, and
 12 obviously I can't sit here and argue that Mr. Scruggs doesn't
 13 have any assets.

14 However, if the Court is inclined to impose a fine,
 15 we'd ask that you would impose a rather nominal sum. Obviously
 16 Mr. Scruggs has a lot of restitution that he's going to be
 17 responsible to make which we believe is probably more important
 18 than the imposition of a fine and also the fact that Mr. Scruggs
 19 is going to be locked up for a number of years and his earnings
 20 are going to be very minimal during that time. So we'll leave
 21 it to the Court's discretion, but if you do impose a fine, we'd
 22 ask that it be a small sum.

23 THE COURT: Okay. Thank you. Are there other issues
 24 that I may have missed or that we haven't talked about yet that
 25 the parties think I should take up? Mr. Tremmel, do you know of

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1 any?

2 MR. TREMMEL: No, Your Honor.

3 THE COURT: Ms. Johnston?

4 MS. JOHNSTON: No, Your Honor.

5 THE COURT: Okay. To recap, the parties were in
6 agreement with the guideline findings in the presentence report.
7 So I have adopted those. The total offense level here is 34,
8 criminal history category is 1. And that means the advisory
9 sentencing guideline range is 151 to 188 months.

10 Both parties have asked me to sentence outside that
11 guideline range. The government, of course, is asking for a
12 sentence above the range. The defense is asking for a sentence
13 below the range. Much of the argument depends on me making a
14 finding concerning the allegations in paragraphs 37 to 40 of the
15 presentence report. And that concerns the alleged assaultive
16 conduct against J.F.

17 As I mentioned at the beginning of the hearing, I have
18 reviewed the video recording of the interviews of J.F. that are
19 on Government Exhibits 1 and 2. I've, of course, reviewed the
20 defense exhibits including the expert report concerning the
21 reliability or lack of reliability of J.F.'s report. It's a
22 difficult position to be in. I obviously have no way to know
23 firsthand what actually happened or didn't happen. None of us
24 do. I guess Mr. Scruggs would be the only other person who
25 would have been present who's here in the courtroom if any of

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1 this happened.

2 In reviewing the video, I'm just not confident enough
3 in J.F.'s reliability as an 11-year-old boy being interviewed on
4 multiple occasions telling different stories. I simply don't
5 find his statements during the interviews to be credible enough
6 for me to make a finding that any hands-on sexual abuse or
7 molestation occurred.

8 And I do not mean to be critical of J.F. at all. He
9 was an 11-year-old boy when he was being interviewed in strange
10 surroundings. He was subject to other interviews and other
11 discussions with his therapist. He's clearly had a lot of
12 difficult issues that he's had to deal with in his life.

13 So I by no means intend to be critical. I simply --
14 after reviewing the interviews and the other information in the
15 record, I'm just not able to make a finding.

16 I did find that the testimony of Mr. Evilsizer -- and
17 I'm sorry if I said your name wrong, but I thought your
18 testimony was very helpful as well as someone who had close
19 contact with Mr. Scruggs, helped to make it even more unsure in
20 my mind about whether or not the allegations by J.F. are
21 reliable and credible enough for me to make a finding.

22 And so I am going to sustain the defense objections
23 with regard particularly to -- I guess it's 37 through -- 37 and
24 38 are the specific factual allegations about any alleged abuse.
25 So I'm going to sustain the defense objections to those and find

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1 that those have not been established by a preponderance of the
2 evidence.

3 As far as other sentencing factors for me to consider,
4 the nature and circumstances of the offense, I know there are
5 some different dates that are thrown around as to when
6 Mr. Scruggs actually started viewing and collecting child
7 pornography. Either way it was a long period of time. And he
8 was ultimately found to be in possession of over 54,000
9 depictions of child pornography.

10 He received upward enhancements in the presentence
11 report because of the nature, the disturbing nature, both with
12 regard to the age and the type of conduct involved with some of
13 the victims in the various depictions. So this is a very
14 egregious and serious offense.

15 I do -- I've heard before from defendants in these
16 cases, and I do think there's probably some truth to it that
17 they don't stop to think about the fact that these are real
18 children being victimized and that they're going to be
19 victimized for the rest of their lives because these depictions
20 get distributed and redistributed. There's no way to ever stop
21 it.

22 And so I do appreciate and tend to think Mr. Scruggs
23 may have acted somewhat differently if he would have realized,
24 if he would have had a chance, frankly, to see some of these
25 victim impact statements and realized what his conduct and the

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1 conduct of other people who are involved in trading and
2 possessing child pornography, the harm that's being caused. But
3 it is an extremely harmful and terrible thing in our society.
4 And it's certainly a serious offense and deserves a very serious
5 punishment.

6 With regard to Mr. Scruggs' history and
7 characteristics, there are certainly a lot of positives
8 including what we heard about through the testimony today. His
9 employment history stands out. He does have both a B.A. and an
10 M.B.A. degree, has a very solid employment record, had no other
11 criminal history prior to the offense in this case. I'm
12 certainly giving him credit and taking that into account.

13 There are some issues with regard to mental health,
14 depression, and other matters that started around 2007 according
15 to the presentence report.

16 Other factors, obviously I have to afford deterrence.
17 I think that's huge in a child pornography case. It becomes
18 known to the public how unacceptable this conduct is and how
19 harshly it will be punished.

20 I need to reflect the seriousness of the offense and
21 provide just punishment. I appreciate all of the work both
22 sides put into this case. It's -- obviously there are important
23 issues here, and I have spent a lot of time getting ready for
24 the hearing today in hopes of making the best possible decision.

25 What I have determined after reviewing the relevant
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1 any?

2 MR. TREMMEL: No, Your Honor.

3 THE COURT: Ms. Johnston?

4 MS. JOHNSTON: No, Your Honor.

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6 agreement with the guideline findings in the presentence report;
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1 sentencing factors is a sentence at the bottom of the advisory
 2 guideline range of 151 months is the right sentence in this
 3 case. It's sufficient to reflect how serious the offense is due
 4 to the nature of the depictions, the number of them, and the
 5 length of time that Mr. Scruggs was involved in collecting child
 6 pornography. But it also is not greater than necessary and in
 7 my mind reflects many of the positive things and the positive
 8 aspects that Mr. Scruggs has accomplished in his life.

9 So it is my sentence, Mr. Scruggs, that you are
 10 committed to the custody of the Bureau of Prisons for 151
 11 months. And that's going to be 151 months each on Count 1 and 2
 12 but to run concurrently all at the same time. So the total
 13 sentence will be 151 months.

14 Ms. Johnston, are there Bureau of Prisons
 15 recommendations you'd like me to make?

16 MS. JOHNSTON: Yes, Your Honor. We'd ask that you
 17 make a recommendation to Englewood, Colorado.

18 THE COURT: And I take it you'd like me to recommend
 19 the Sex Offender Management Program?

20 MS. JOHNSTON: Yes, Your Honor.

21 THE COURT: Okay. I will be happy to include those
 22 recommendations in my judgment.

23 Upon release from imprisonment, I am going to impose a
 24 five-year term of supervised release. That's going to be 5
 25 years on Count 1 and Count 2, again, to be served at the same

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1 time. So the total term of supervised release will be five
 2 years.

3 Sir, while you're on supervised release, there's going
 4 to be various rules and conditions you have to follow. You
 5 can't commit another federal, state, or local crime. You can't
 6 unlawfully use or possess a controlled substance. There will be
 7 other conditions. I do want to say, though, I am suspending the
 8 mandatory drug testing condition because I find that you are a
 9 low risk of future substance abuse.

10 There will be other conditions including all of the
 11 special conditions in the presentence report at 76 through 85,
 12 and we'll use the modified language that we talked about earlier
 13 for -- I believe it was paragraph 79. You're also going to have
 14 to comply with the Sex Offender Notification -- or Registration
 15 and Notification Act. You'll get more information from United
 16 States Probation and the Bureau of Prisons about that. You'll
 17 have to register anywhere where you live, work, are a student,
 18 and/or were convicted of a qualifying offense.

19 You owe a special assessment to the United States of
 20 \$200. That's due immediately. We've talked again about
 21 restitution earlier in the hearing. I will order that you pay
 22 restitution in the amount of \$3,000 each to the victim in the
 23 Tara series, the 5 victims in the 8kids series, and to the
 24 victim in the SpongeB or Sponge Bob series, also restitution in
 25 the amount of \$500 to J.F.

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1 Given the length of the sentence and the amount of
 2 restitution that's being awarded, I -- and in light of the fact
 3 the government hasn't specifically asked for a fine, I'm not
 4 going to order a fine in this case. I'd rather make sure that
 5 Mr. Scruggs' assets and payments are available for the victims
 6 who've been identified in this case.

7 I'll order that restitution be distributed on a pro
 8 rata basis. And, sir, while you're in the custody of the Bureau
 9 of Prisons, as long as you owe any money on the restitution
 10 award, you'll have to make payments through the Bureau of
 11 Prisons' financial responsibility program. You'll get more
 12 information about how that will work.

13 After you're released, if you still owe any money on
 14 the restitution awards, you'll have to enter into a payment
 15 schedule with United States Probation. And you'll have to pay
 16 that as a condition of your supervised release. You'll have to
 17 keep the United States attorney for the Northern District of
 18 Iowa notified once you're released of any change in your mailing
 19 or residential address. And that will last as long as you owe
 20 any money on the judgment in this case.

21 I find that you do not have the ability to pay
 22 interest, so I'll waive the interest requirement.

23 You are remanded to the custody of the United States
 24 marshal.

25 Mr. Tremmel, is the government moving to dismiss

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1 Counts 3, 4, and 5?

2 MR. TREMMEL: Yes, Your Honor. Government moves to
 3 dismiss Counts 3, 4, and 5.

4 THE COURT: That is granted. So Counts 3, 4, and 5
 5 against Mr. Scruggs are dismissed.

6 And, sir, as part of your plea agreement, you have
 7 waived your right to appeal except under some very limited
 8 circumstances. If you want to try to appeal and believe you
 9 might have the right to do so, you'd have to file your written
 10 notice of appeal within 14 -- Mr. Tremmel?

11 MR. TREMMEL: Your Honor, just to clarify, it's a
 12 waiver of specific issues. This is a waiver that says if he was
 13 con -- did over 20 years it'd be double jeopardy issues relating
 14 to that which I don't think apply here. So it's a pretty narrow
 15 waiver, not a general appeal waiver.

16 THE COURT: Okay. Thank you for clarifying that. I
 17 apparently didn't read that closely enough. What I'll do in
 18 light of Mr. Tremmel's clarification for me, I'm just going to
 19 tell you about your general appeal rights. You do -- subject to
 20 any waiver that might be in your plea agreement, you will have
 21 the right to appeal from the sentence and anything else that
 22 happened in this case. You'd have to file your notice of appeal
 23 within 14 days after I file the judgment. If you do appeal and
 24 can't afford an attorney, one would be appointed to represent
 25 you.

Contact Shelly Semmler at (712)233-3846 or shelly.semmler@land.uscourts.gov
 Case 2:17-cr-01048-LTS#e ~~fmchmml@dmpef.uscourts.gov~~ 02/19/18 10:47:50

1 Anything else from the parties? Mr. Tremmel?
2 MR. TREMMELO: No, Your Honor.
3 THE COURT: Ms. Johnston?
4 MS. JOHNSTON: Nothing further, Your Honor.
5 THE COURT: Officer Vaughan, anything from United
6 States Probation?
7 MS. VAUGHAN: No, Your Honor.
8 THE COURT: Okay. Thank you, everyone. We'll be in
9 recess.
10 (The foregoing sentencing was
11 concluded at 1:59 p.m.)
12
13
14
15
16
17
18 CERTIFICATE
19 I certify that the foregoing is a correct transcript
20 to the best of my ability over the VTC from the record of
21 proceedings in the above-entitled matter.
22
23
24 S/Shelly Semmler 10-5-18
25 Shelly Semmler, RMR, CRR Date

Contact Shelly Semmler at (712)233-3846 or shelly.semmler@land.uscourts.gov
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CERTIFICATE

I certify that the foregoing is a correct transcript to the best of my ability over the VTC from the record of proceedings in the above-entitled matter..

S/SheLLy Semmler 10-5-18
SheLLy Semmler, RMR, CRR Date

10-5-18
Date

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| ther - 1/1, 1/1, 2/1, 2/2, 27/29, 28/1, 28/2, 29/1, 29/1, 29/2, 30/1, 31/2, 32/1, 41/2, 42/8, 42/20, 42/3, 42/3, 51/4, 61/3, 61/3, 61/6, 62/1, 62/5, 75/5, 77/12, 12/15, 12/17, 12/18, 12/21, 12/24, 13/21, 13/23, 14/19, 16/11, 16/18, 20/18, 22/1, 22/2, 25/1, 25/4, 21/16, 21/19, 22/5, 22/7, 23/25, 24/6, 25/1, 26/1, 27/1, 27/1, 28/13, 28/15, 28/21, 28/22, 28/24, 28/25, 29/4, 29/5, 29/6, 31/24, 32/9, 32/23, 33/3, 33/5, 37/18, 37/21, 40/4, 40/16, 41/3, 41/5, 41/8 <i>themselves</i> - 1/10, 17/6 <i>thorough</i> - 10/10, 10/11, 24/11 <i>therefore</i> - 2/6 <i>thereof</i> - 24/2 <i>therefore</i> - 15/15 <i>third</i> - 11/7 <i>Thompson</i> - 1/1, 13/16, 15/11, 15/13, 15/21, 16/12 <i>Thompson's</i> - 1/1, 13/16, 15/23, 16/11 <i>thoroughly</i> - 2/2 22/11 <i>thou</i> - 22/24 <i>thought</i> - 13/3, 32/24 <i>thousand</i> - 2/1, 3/1 <i>thousands</i> - 2/1, 17/25 <i>three</i> - 5/5, 6/4, 8/3, 14/16, 22/24 <i>three-month-old</i> - 8/4 <i>thrown</i> - 35/5 <i>hoptrope</i> - 30/15 <i>tonight</i> - 2/11, 4/17, 12/5, 12/11, 26/15, 31/17, 31/21, 36/8, 36/24 <i>together</i> - 9/5, 12/20 <i>top</i> - 20/17 <i>total</i> - 5/5, 5/15, 23/2, 26/17, 28/20 | U.S. - 1/10, 2/6 ultimately - 35/6 unacceptable - 36/19 unclear - 20/4 uncommon - 1/1 17/24 under - 2/19, 3/6 3/13, 22/5, 45/25, 51/1, 14/12, 14/14, 14/17, 24/20, 26/15, 40/7 UNITED - 1/1, 1/3 United - 1/9, 1/14, 2/2, 3/1, 5/18, 32/2, 38/5, 36/19, 37/1, 38/19, 39/23, 41/8 unlawfully - 38/5 unseen - 34/19 up - 6/11, 6/21, 8/16, 9/8, 11/3, 14/3, 16/3, 18/15, 20/12, 27/6, 28/10, 28/17, 32/19, 32/25 upbringing - 2/5, 15/25, 16/1 updated - 1/23 updates - 2/22, 2/24 upward - 1/14 upwards - 1/14, 14/10, 14/15, 14/17, 14/23, 15/3, 17/12, 17/14, 17/24, 18/6, 19/20, 35/10 upwards - 20/15, 20/16 UseNet - 29/24 utilizing - 26/18 utterly - 30/17 | video - 1/2, 7/3, 10/20, 35/18, 35/19 viewing - 22/17, 23/1, 23/8, 24/12, 25/12, 26/11, 26/13, 28/6, 28/7, 35/13, 35/23, 39/5 | view - 1/2, 7/3, 10/20, 35/18, 35/19 viewing - 22/17, 23/1, 23/8, 24/12, 25/12, 26/11, 26/13, 28/6, 28/7, 35/13, 35/23, 39/5 | |
| viewed - 1/2, 7/3, 10/20, 35/18, 35/19 viewing - 22/17, 23/1, 23/8, 24/12, 25/12, 26/11, 26/13, 28/6, 28/7, 35/13, 35/23, 39/5 | Y | year - 27/24 yesterday - 2/17, 5/21, 5/22, 5/23, 6/13, 16/4, 19/11, 28/17, 29/21, 31/10, 32/19, 37/25, 38/2, 40/13 yesterday - 21/1, 21/23 younger - 16/7 | vista - 1/20 visible - 1/21, 2/12, 2/13, 2/19, 2/23, 2/24, 23/20, 24/2, 24/11, 26/21, 26/22, 27/12, 35/24 | 21/17 viewdrawn - 21/5, 21/20 |
| vista - 1/20 visible - 1/21, 2/12, 2/13, 2/19, 2/23, 2/24, 23/20, 24/2, 24/11, 26/21, 26/22, 27/12, 35/24 | W | wave - 39/22 waved - 21/2, 4/27 wavers - 40/12, 40/15, 40/20 wallow - 22/13, 30/15 walked - 1/44 walking - 1/43, 14/4 wants - 4/12, 5/8 warranted - 17/24, 19/14 | wave - 39/22 waved - 21/2, 4/27 wavers - 40/12, 40/15, 40/20 wallow - 22/13, 30/15 walked - 1/44 walking - 1/43, 14/4 wants - 4/12, 5/8 warranted - 17/24, 19/14 | 21/17 viewdrawn - 21/5, 21/20 |
| wave - 39/22 waved - 21/2, 4/27 wavers - 40/12, 40/15, 40/20 wallow - 22/13, 30/15 walked - 1/44 walking - 1/43, 14/4 wants - 4/12, 5/8 warranted - 17/24, 19/14 | V | wave - 31/25 variance - 6/3, 6/5, 13/1, 14/17, 17/13, 17/15, 18/7, 19/14, 20/11, 20/20 various - 5/8, 19/23, 35/13, 38/4 vary - 20/15 20/16, 26/18 VAUGHAN - 41/7 Vaughn - 1/19, 24/4, 41/5 Vauhgn - 21/10, 21/11, 21/22 versus - 2/2 | wave - 31/25 variance - 6/3, 6/5, 13/1, 14/17, 17/13, 17/15, 18/7, 19/14, 20/11, 20/20 various - 5/8, 19/23, 35/13, 38/4 vary - 20/15 20/16, 26/18 VAUGHAN - 41/7 Vaughn - 1/19, 24/4, 41/5 Vauhgn - 21/10, 21/11, 21/22 versus - 2/2 | 21/17 viewdrawn - 21/5, 21/20 |

APPENDIX D

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§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

§2G2.2

(3) (Apply the greatest):

(A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by **5** levels.

(C) If the offense involved distribution to a minor, increase by **5** levels.

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or

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coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.

(E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by **2** levels.

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler, increase by **4** levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by **2** levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

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(D) 600 or more images, increase by **5** levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material);

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Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

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Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)–(b), 2260(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

“*Computer*” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

“*Distribution*” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

“*Distribution for pecuniary gain*” means distribution for profit.

“*The defendant distributed in exchange for any valuable consideration*” means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

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“Distribution to a minor” means the knowing distribution to an individual who is a minor at the time of the offense.

“Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

“Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

§2G2.2

“Pattern of activity involving the sexual abuse or exploitation of a minor” means 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.

“Prohibited sexual conduct” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

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“Sexual abuse or exploitation” means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)–(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). “Sexual abuse or exploitation” does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. **Application of Subsection (b)(3)(F).**—For purposes of subsection (b)(3)(F), the defendant “knowingly engaged in distribution” if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.
3. **Application of Subsection (b)(4)(A).**—Subsection (b)(4)(A) applies 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.
4. **Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).**—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).
5. **Application of Subsection (b)(5).**—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

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6. Application of Subsection (b)(7).—

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The Two and Five Level Distribution Enhancements

Next, the amendment addresses differences among the circuits involving application of the tiered distribution-enhancements in §2G2.2. Section 2G2.2(b)(3) provides for an increase for distribution of child pornographic material ranging from 2 to 7 levels depending on certain factors. See §2G2.2(b)(3)(A)–(F). The circuits have reached different conclusions regarding the mental state required for application of the 2-level enhancement for “generic” distribution as compared to the 5-level enhancement for distribution not for pecuniary gain. The circuit conflicts involving these two enhancements have arisen frequently, although not exclusively, in cases involving the use of peer-to-peer file-sharing programs or networks.

Peer-to-Peer File-Sharing Programs

The Commission’s 2012 report to Congress discussed the use of file-sharing programs, such as Peer-to-Peer (“P2P”), in the context of cases involving distribution of child pornography. See 2012 Report at 33–35, 48–62. Specifically, P2P is a software application that enables computer users to share files easily over the Internet. These applications do not require a central server or use of email. Rather, the file-sharing application allows two or more users to essentially have access each other’s computers and to directly swap files from their computers. Some file-sharing programs require a user to designate files to be shared during the installation process, meaning that at the time of installation the user can “opt in” to share files, and the software will automatically scan the user’s computer and then compile a list of files to share. Other programs employ a default file-sharing setting, meaning the user can “opt out” of automatically sharing files by changing the default setting to limit which, if any, files are available for sharing. Once the user has downloaded and set up the file-sharing software, the user can begin searching for files shared on the connected network using search keywords in the same way one regularly uses a search engine such as Google. Users may choose to “opt in” for a variety of reasons, including, for example, to obtain faster download speeds, to have access to a greater range of material, or because the particular site mandates sharing.

The 2-Level Distribution Enhancement

The circuits have reached different conclusions regarding whether application of the 2-level distribution enhancement at §2G2.2(b)(3)(F) requires a mental state (*mens rea*), particularly in cases involving use of a file-sharing program or network. The Fifth, Tenth, and Eleventh Circuits have held that the 2-level distribution enhancement applies if the defendant used a file-sharing program, regardless of whether the defendant did so purposefully, knowingly, or negligently. See, e.g., United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014); United States v. Ray, 704 F.3d 1307, 1312 (10th Cir. 2013); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015). The Second, Fourth, and Seventh Circuits have held that the 2-level distribution enhancement requires a showing that the defendant knew of the file-sharing properties of the program. See, e.g., United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2015) (requiring knowledge); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard). The Eighth Circuit has held that knowledge is required, but knowledge may be inferred from the fact that a file-sharing program was used, absent “concrete evidence” of ignorance. See United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has held that there is a “presumption” that “users of file-sharing software understand others can access their files.” United States v. Conner, 521 Fed. App’x 493, 499 (6th Cir. 2013); see also United States v. Abbring, 788 F.3d 565, 567 (6th Cir. 2015) (“the whole point of a filesharing program is to share, sharing creates a transfer, and transferring equals distribution”).

The amendment generally adopts the approach of the Second, Fourth, and Seventh Circuits. It amends §2G2.2(b)(3)(F) to provide that the 2-level distribution enhancement applies if “the defendant knowingly engaged in distribution.” Based on testimony, public comment, and data analysis, the Commission determined that the 2-level distribution enhancement is appropriate only in cases in which the defendant knowingly engaged in distribution. An accompanying application note clarifies that: “For purposes of subsection (b)(3)(F), the defendant ‘knowingly engaged in distribution’ if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.” Similar changes are made to the 2-level distribution

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enhancement at §2G2.1(b)(3) and the obscenity guideline, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), which contains a similarly tiered distribution enhancement.

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN (DUBUQUE) DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) Case No.: 17-CR-1048
vs.)
CHRISTOPHER SCRUGGS,) DEFENDANT'S BRIEF IN SUPPORT
Defendant.) OF SENTENCING ISSUES
) (FILED UNDER SEAL)

Christopher Scruggs, through counsel, hereby submits the following brief in support of the sentencing issues in his case.

I. The Court should not Impose a Special Condition of Supervision Prohibiting Mr. Scruggs from Possessing Pornography

The probation office proposes that Mr. Scruggs be subject to a special condition of supervision which provides that he “must not view, possess, produce, or use any form of erotica or pornographic materials” and that he “must not enter any establishment where pornography or erotica can be obtained or viewed.” PSR ¶ 79. Mr. Scruggs objects to the recommendation of this special condition.

Under 18 U.S.C. § 3583(d), the Court may impose special conditions of supervised release only “if the conditions are reasonably related to the sentencing factors set forth in § 3553(a), involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth in § 3553(a), and are consistent with any pertinent policy statements issued by the Sentencing Commission.” *United States v. Morais*, 670 F.3d 889, 895 (8th Cir. 2012).

The proposed special condition at issue fails this test. For one, it is overbroad and vague, and it provides entirely too much discretion to the probation office in deciding what constitutes a violation. "Pornography" and "erotica" are subjective terms, and what might not be considered pornography or erotica by Mr. Scruggs could be determined to be such by the probation office.

See United States v. Loy, 237 F.3d 251, 261, 266 (3rd Cir. 2001)(striking down a condition banning a defendant from possessing all forms of pornography including legal adult pornography, based on vagueness grounds); *but see United States v. Ristine*, 335 F.3d 692, 694-95 (8th Cir. 2003)(upholding conditions which ban owning or possessing any pornographic materials, using any pornography or erotica, and entry into any establishment where pornography or erotica can be obtained or viewed). For example, material which is available at a Barnes & Noble store, such as a book depicting certain works of art, could be considered by some to be erotica or pornography, but to others it would not be considered such. The vagueness of this recommended condition fails to give Mr. Scruggs adequate notice as to when he would be violating the condition. Of further concern is the fact that the condition is overbroad in that it prohibits Mr. Scruggs from accessing lawful materials which are protected by the First Amendment.

Secondly, the proposed special condition is unnecessary and counterproductive. Although Mr. Scruggs pled guilty to child pornography offenses, there is absolutely no evidence that preventing him from looking at legal, adult pornography or erotica, or preventing him from going into any establishment where pornography or erotica can possibly be viewed, will protect children or serve any useful purpose. If the Court adopts the other proposed special conditions of supervised release, he will already be prohibited from "contact with children under the age of 18" without the probation office's consent (PSR ¶ 80), from knowingly being "present at places

where minor children under the age of 18 are congregated" (PSR ¶ 81) and any computer or electronic storage devices will be subject to random monitoring by the probation office (PSR ¶ 78), among other things. These conditions are sufficient to protect children and to promote Mr. Scruggs' rehabilitation. Although Eighth Circuit law suggests that a court would be within its discretion to impose this special condition, *see Ristine*, 335 F.3d at 695, this Court should decline to do so.

II. Restitution

Some of the identified victims have requested restitution from Mr. Scruggs. They are as follows: five victims from the "8 Kids Series"; one from "Sponge Bob"; one from "Blue Pillow"; one from "J_Blonde"; one from "Tara"; and one from "Marineland Sarah". (PSR ¶ 92).¹ Additionally, J.F. has requested restitution for lost property. As set forth in the sentencing memo, Mr. Scruggs has reached agreements regarding restitution for the victims in the "8 Kids Series" and "Tara." The agreements in those series are that he will pay each of the victims \$3,000 in restitution. Further, if this Court determines that J.F. is a victim, Mr. Scruggs is not contesting the \$500 in restitution requested by him. As for the remaining restitution requests—"Sponge Bob," "Blue Pillow," "J_Blonde," and "Marineland Sarah,"--Mr. Scruggs will address each of the requests in turn below.

Restitution for defendants convicted of possessing child pornography is governed by 18 U.S.C. § 2259, which "requires district courts to order defendants "to pay the victim...the full amount of the victim's losses as determined by the court.'" *Paroline v. United States*, 572 U.S. 434, 442 (2014). In *Paroline*, the Supreme Court held that, in setting restitution for such a defendant, district courts "should order restitution in an amount that comports with the

¹ The victim from "Marineland Sarah" is not listed in the PSR as having requested restitution. However, her victim impact statement asks for restitution, therefore, her request will be addressed.

defendant's relative role in the causal process that underlies the victim's general losses." *Id.* at 458. Because the statute "is intended to compensate victims for losses caused by the *offense of conviction*," "the central concern of the causal inquiry must be the *conduct of the particular defendant* from whom restitution is sought." *Id.* at 445 (emphasis added). "[D]efendants should be held to account for the impact of their conduct on those victims, but also...defendants should be made liable for the consequences and gravity of their own conduct, not the conduct of others." *Id.* at 462. *Paroline* set forth some factors for a court to consider in determining a proper amount of restitution. They include "the amount of the victim's losses caused by the continuing traffic in the victim's images," as well as "the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of [the broader number of offenders involved...;] whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role." *Id.* at 460.

A. "Sponge Bob"

The victim in this series goes by the name "Andy." The information provided by Andy's legal team is contradictory. On the one hand, his attorney writes that he has received actual notice of the instant prosecution. *See* docket no. 44-3 at 142. On the other hand, in the very same document, the attorney writes, "On the advice of his psychologist, Andy is not briefed on each and every defendant who distributes, transports, receives or possesses his child sex abuse images. Andy does receive ongoing updates about the number of new cases and efforts to obtain

restitution on his behalf.” *Id.* at 144, n.6. Accordingly, Mr. Scruggs objects to any award of restitution without definitive proof of proximate cause.

Pursuant to statute, Andy’s recovery is limited to “costs incurred by the victim.” 18 U.S.C. § 2259(b)(1). Andy’s attorneys, incredibly, assert greater “losses” for themselves than for their client. They are seeking \$25,000 for Andy’s alleged losses, while making a separate demand of \$33,415 for attorneys’ fees and costs, the latter including \$29,000 for a psychological examination and accompanying expert report. Docket no. 44-3 at 154. Since there is nothing in the record to indicate that Andy is personally liable for the attorneys’ and expert fees, Mr. Scruggs objects to labelling them as “victim’s losses” or “costs incurred by the victim” under § 2259.

B. “Blue Pillow” and “Marineland Sarah”

Although Mr. Scruggs has received general restitution requests from the victims in the “Blue Pillow” and “Marineland Sarah” series (docket no. 44-4 at 34-37; no. 44-6 at 47-48), he still is not aware of the restitution being specifically sought from him. As such, he is not yet able to consider whether proximate causation is established in terms of the requested amount, and is not able to determine whether there is a dispute pertaining to apportionment of restitution.

C. “J_Blonde”

The victim in the “J_Blonde” series is seeking \$150,000 in restitution. Docket no. 44-5 at 9. He has not provided any breakdown as to how he reached that monetary figure, and whether that figure includes attorney fees and/or expert fees. Further, Mr. Scruggs is not aware of the specific amount of restitution being sought by the government on behalf of “J_Blonde.” As such, Mr. Scruggs is not yet able to consider whether proximate causation is established in

terms of the requested amount, and is not able to determine whether there is a dispute pertaining to apportionment of restitution.

III. Upward Departure Based on Allegations that Mr. Scruggs Abused a Child

The presentence report includes allegations by J.F. that Mr. Scruggs sexually abused J.F. PSR ¶¶ 38-39. Due to these allegations, it is suggested that an upward departure may be appropriate. PSR ¶ 95. Mr. Scruggs does not deny that he provided respite foster care for J.F. on several occasions, and that J.F. would stay overnight at Mr. Scruggs' home. He also does not deny that he took J.F. to Illinois to go to the Great America amusement park on one occasion. However, Mr. Scruggs denies that he sexually abused J.F. in any way, and therefore he objects to the suggestion of an upward departure.

Whether or not the government meets its burden of proving up the allegations of abuse at sentencing is a fact-based issue. However, Mr. Scruggs asks this Court to consider several important factors in making this determination.

First, in his report, Dr. Thompson points out many concerns regarding the second Child Advocacy Center (CAC) interview of J.F. and concerns about J.F.'s history, which raise questions about the truth of the allegations. Defendant's Exhibit A. The first is the fact that J.F.'s therapist delayed the scheduling of the CAC interview so she could have a second counseling session with J.F. before the CAC interview. *Id.* at 8; Defendant's Exhibit F, p. 3. In his opinion, this reflects an attempt to influence J.F.'s memory, statements or behavior during the CAC interview. Second, J.F. made a number of statements during the CAC interview which called into question the veracity of his statements. Defendant's Exhibit A, p. 8. These statements caused even the police officer assigned to investigate the case to conclude that J.F. was lying about some things. Defendant's Exhibit F, p. 12. Third is the high potential for source

misattribution errors by J.F. due to his chaotic upbringing and family life, and the actions of his therapist. Defendant's Exhibit A, p. 10.

Second, there is no disputing that J.F. lied during his second CAC interview. One example is when he stated that Mr. Scruggs was a "crackhead" and that Mr. Scruggs smoked marijuana. Defendant's Exhibit E, March 8, 2018, interview, p. 10 of transcript. Another is when he claimed he left Mr. Scruggs' house and went to the police station to report the abuse. *Id.* at 30 of transcript; Defendant's Exhibit F, p. 13. A third example is when J.F. stated that he had metal cages, like "jail bars" that he put on the window of his room at Mr. Scruggs' house. Defendant's Exhibit E, March 8, 2018, interview, p. 36 of transcript. A fourth example is when he stated that Mr. Scruggs' brother went to Illinois with them. *Id.* at 73-74 of transcript. Mr. Scruggs does not have a brother. PSR ¶ 52. This is not an exhaustive list of all of the lies told by J.F. during his second interview, but this highlights some of the fabrications.

Another factor that should be given weight by this Court is that it is well recognized that foster children make false allegations of abuse for various reasons. Defendant's Exhibit D, pp. 3-5. As foster parents in Iowa are instructed during their training, "The possibility of a false allegation of abuse is great for anyone who is a foster and adoptive parent, and increases over time." *Id.* at 3. "The incidence of false allegations of abuse occurs at a far higher rate than founded cases of abuse in foster and adoptive homes." *Id.* Mr. Scruggs respectfully maintains that the allegations of abuse made by J.F. are another example of these recognized false allegations.

IV. A Downward Variance is Warranted

If the Court declines to depart upward, Mr. Scruggs' sentencing guidelines range is 151-188 months in prison. Mr. Scruggs respectfully asserts that such a sentence is far greater than

necessary to achieve the statutory purposes of sentencing as set forth in 18 U.S.C. § 3553(a). Specifically, his advisory guidelines range does not adequately account for his lack of past criminal history, it does not account for the nature and circumstances of the offense, it does not address his personal history and characteristics, and it does not adequately address the need for just punishment. Therefore, Mr. Scruggs moves the Court to vary downward to a lesser sentence than that provided for by the sentencing guidelines.

A. Lack of Criminal History

Mr. Scruggs' essential lack of a prior criminal history mitigates in favor of a downward variance. His only experiences with law enforcement involved two traffic tickets and one dog running at large ticket. PSR ¶ 44. He has been assessed zero criminal history points. This absence of any substantive criminal history is significant for a couple of reasons.

First, absence of prior criminal history speaks a great deal to the issue of deterrence. Mr. Scruggs has never before had an actual criminal conviction or sentence, nor has he ever spent so much as an hour in jail prior to his present incarceration. This absence of past criminal history on his part shows just how substantial *any* punishment for the instant offenses will be. Mr. Scruggs is someone who heretofore has lived a life unfettered by any type of correctional supervision, let alone a long period of incarceration. He is not someone who continues to offend notwithstanding repeated appearances in criminal courts, like so many other defendants who appear before this Court. As a result, the deterrent impacts of his imprisonment to date are, for him, far more marked than they would be for an individual who had already experienced life behind bars but had continued to pursue crime nonetheless. Mr. Scruggs is a true Criminal History Category I defendant, unlike those who are in Criminal History Category I by operation

of the way the sentencing guidelines are applied. Therefore, his guidelines range overstates the need for deterrence in his case.

Second, his lack of criminal history speaks to the protection of society from future wrongs he may commit. Because he has never before been imprisoned, Mr. Scruggs has not been shown to be incorrigible or undeterrible by a shorter sentence than the 151-188 months he is facing in prison under the sentencing guidelines. Without some rational basis upon which to base a conclusion that Mr. Scruggs will commit more crimes after he is sentenced, it is reasonable to presume that a shorter sentence will have a sufficient impact on reducing his likelihood to reoffend in any manner.

B. Nature and Circumstances of the Offenses

There is no question that Mr. Scruggs' offenses were very serious, and while he didn't understand it at the time, he now appreciates that although he did not sexually abuse the children depicted in the images, he helped to re-victimize those children. And, if this Court concludes that Mr. Scruggs did not abuse J.F., then his offenses involved no hands-on contact.

Further, although Mr. Scruggs possessed thousands of depictions of child pornography—some of which included sadistic or masochistic conduct or other depictions of violence—the number of depictions should not be determinative of his sentence. In this day and age it is incredibly easy for child pornography defendants to amass thousands of images in even a short period of time because of the internet. Rare is the recent case in which a defendant does not receive a five-level increase for possession/receipt of 600 or more images. But the increase based on sheer image numbers, as well as the increase for depictions portraying sadistic or masochistic conduct, does not depend on proof that a defendant actually viewed all of the images, and in Mr. Scruggs' case, the record contains no proof that he did so. As such, he may

not have been aware of the total number of depictions that he possessed, or of the content of every single depiction.

Another important consideration is that despite using torrents to obtain some child pornography, Mr. Scruggs did not think that his files were in a shared folder and he took steps to try to prevent the depictions from being available to others. PSR ¶ 14; Defendant's Exhibit G, p. 4. Once he would download a depiction via use of torrents, he would delete the file from the torrent program in an attempt to prevent it from being shared with others. PSR ¶ 14. Mr. Scruggs also did not obtain child pornography solely by using a peer-to-peer type program as the PSR reflects. He also used newsgroups, which are best described as internet discussion groups. Defendant's Exhibit G, pp. 3-4. His use of these newsgroups, rather than only peer-to-peer technology, shows a concern for not wanting to further distribute the images he obtained.

A final consideration about the circumstances of the offenses is that Mr. Scruggs cooperated with law enforcement. He submitted to an interview which lasted for over two hours, and he readily admitted his involvement with child pornography. PSR ¶¶ 14-15; Defendant's Exhibit G. During this interview, he also advised that some of his files were encrypted, and he provided what he believed to be the password for the encrypted files. PSR ¶ 15.

For all of these reasons, the nature and circumstances of the offenses warrant a downward variance.

C. Personal History and Characteristics

Mr. Scruggs' history and characteristics also justify a downward variance. He is a 50-year-old man, who comes from a stable, supportive family. PSR ¶ 51; Defendant's Exhibit C, p. 3. He is an only child, and his parents are elderly. PSR ¶¶ 51-52. He obtained a B.A. in physics from the University of Northern Colorado in 1990, and an M.B.A. through the University of

Colorado in 2003. PSR ¶ 59. He has been a productive member of the workforce, having been employed as a project manager for over 10 years. PSR ¶ 61. He's had healthy, adult relationships with two people, including his ex-wife and a long-time girlfriend, although he is not currently in a relationship. PSR ¶ 53, Defendant's Exhibit C, p. 4. Mr. Scruggs does not have any substance abuse issues, and he has only suffered from situational depression. PSR ¶¶ 57-58; Defendant's Exhibit C, p. 4. When he lived in Dubuque, Mr. Scruggs volunteered with the Big Brothers/Big Sisters program, having a positive, influential relationship with his "little brother," Jesse Evilsizer, who is now 18. Defendant's Exhibit H.

The longer the sentence that Mr. Scruggs receives, the more likely it becomes that he will be released to a world without his parents and without the strong support of his friends which he has now. This argument is not meant to incur pity for Mr. Scruggs; it is meant to point out that having a steady support group upon his release from prison will make it more likely that he will succeed on supervision. A guidelines sentence will also incarcerate him for the remainder of his working years, leave him with few job opportunities commensurate with his education, and decrease his ability to pay any restitution which may still be owed.

D. The Need for Just Punishment

Just punishment is another requirement for this Court to consider in fashioning a sentence which is sufficient, but not greater than necessary. 18 U.S.C. § 3553(a). For a number of reasons, a just punishment in this case is one which is below Mr. Scruggs' advisory sentencing guidelines range. Most of the reasons supporting this assertion are set forth above; namely, Mr. Scruggs' lack of criminal history, the circumstances of the offenses, and his personal history and characteristics. Beyond these factors, however, there are two additional considerations which affect the determination of just punishment.

First is the conclusion in the report by Elizabeth Griffin and Dr. David Delmonico that Mr. Scruggs is a “low risk” for a future contact sexual offense, and a low risk for a future child pornography offense.” Defendant’s Exhibit C, p. 10. He possesses many protective factors, such as constructive social/professional support, goal directed living and sobriety, to name a few, which contribute to a lower risk of recidivism. *Id.* at 9. He is also 50-years-old, he obviously will be older upon his release from prison, and “sex offender research indicates an inverse relationship between age and recidivism.” *Id.* Moreover, they conclude that he is a good candidate for treatment, based on four factors: 1. He admits to wrongdoing and takes full responsibility for his online sexual behaviors; 2. He is willing to attend treatment; 3. He does not have a personality disorder that would interfere with treatment; and 4. He has previously used the counseling process to address personal issues. *Id.* at 10.

Second, the child pornography guidelines do nothing to distinguish the least from the worst offenders. *See United States v. Beiermann*, 599 F.Supp.2d 1087, 1105 (N.D. Iowa 2009). This is because “...the level enhancements, some quite extreme, are based on circumstances that appear in nearly every child pornography case: using the internet, amassing numerous images (made particularly easy by the internet); presence of video clips counted as 75 images each; presence of images of prepubescent minors and violence (broadly defined to include a prepubescent minor engaged in a sex act); and some ‘distributing’ in return for other images.”

Id.

V. Conclusion

For all of the above reasons, Mr. Scruggs moves this Court not to impose the recommended condition of supervision pertaining to pornography; he asks that the Court order either no restitution or restitution in an amount based on the *Paroline* factors; he argues that he

should not receive an upward departure based on allegations that he abused J.F.; and he moves the Court for a downward variance to a sentence below his advisory sentencing guidelines range.

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CERTIFICATE OF SERVICE
I hereby certify that on September 13, 2018, I electronically filed this document with the Clerk of Court using the ECF system which will serve it on the appropriate parties.

By: /s/ K. Jensen

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

18-3158

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTOPHER SCRUGGS,

Appellant.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
HONORABLE LEONARD T. STRAND, CHIEF U.S. DISTRICT COURT JUDGE*

APPELLANT'S SUPPLEMENTAL BRIEF

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**SUPPLEMENTAL SUMMARY OF THE CASE AND
REQUEST FOR ORAL ARGUMENT**

Defendant, Christopher Scruggs (hereinafter "Scruggs"), pled guilty in the Northern District of Iowa to one count of receipt 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. §§ 2252A(a)(5)(B) and (b)(2). Scruggs was sentenced to 151 months imprisonment and five years of supervised release on each count, to be served concurrently. He was also ordered to pay restitution.

On June 3, 2019, Scruggs tendered an appellate brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing that the district court erred in ordering \$3,000 restitution to "Spongebob," erred in applying a two-point distribution enhancement under USSG § 2G2.2(b)(3)(F), and imposed a substantively unreasonable sentence. On July 3, 2019, this Court directed counsel to file a supplemental brief in relation to the distribution enhancement.

Scruggs now submits this supplemental brief, arguing that the district court committed plain error by applying a two-point enhancement under USSG § 2G2.2(b)(3)(F) and, relatedly, by failing to consider a reduction under USSG § 2G2.2(b)(1).

Should the Court find it warranted, Scruggs respectfully requests 10 minutes for oral argument.

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STATEMENT OF THE SUPPLEMENTAL ISSUE
PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT PLAINLY ERRED BY
APPLYING A TWO-POINT ENHANCEMENT UNDER USSG §
2G2.2(b)(3)(F) AND, RELATEDLY, BY FAILING TO CONSIDER A
REDUCTION UNDER USSG § 2G2.2(b)(1).

1. *United States v. Nordin*, 701 F. App'x 545 (8th Cir. 2017)
2. *United States v. Smith*, 910 F.3d 1047 (8th Cir. 2018)
3. *United States v. Cates*, 897 F.3d 349 (1st Cir. 2018)

SUMMARY OF THE SUPPLEMENTAL ARGUMENT

Scruggs argues one supplemental issue on appeal: that the district court committed plain error by applying a two-point enhancement under USSG § 2G2.2(b)(3)(F) and, relatedly, by failing to consider a reduction under USSG § 2G2.2(b)(1).

SUPPLEMENTAL ARGUMENT

I. THE DISTRICT COURT PLAINLY ERRED BY APPLYING A TWO-POINT ENHANCEMENT UNDER USSG § 2G2.2(b)(3)(F) AND, RELATEDLY, BY FAILING TO CONSIDER A REDUCTION UNDER USSG § 2G2.2(b)(1).

Standard of Review: A failure to properly calculate the United States Sentencing Guideline range constitutes a procedural sentencing error. *United States v. Townsend*, 618 F.3d 915, 918 (8th Cir. 2010) (quoting *United States v. Hill*, 552 F.3d 686, 690 (8th Cir. 2009)). Here, Scruggs failed to object to the Guidelines calculation, and therefore review is for plain error. *United States v. Pirani*, 406 F.3d 543, 550 (8th Cir. 2005). Under plain error review, Scruggs must establish an “(1) error, (2) that is plain, and (3) that affects substantial rights.” *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 732–36 (1993)). If all three conditions are met, an appellate court may then exercise its discretion to correct a forfeited error, but only if the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

A. *USSG § 2G2.2(b)(3)(F)*.

Merits: Prior to 2016, § 2G2.2(b)(3)(F) provided for a two-level enhancement “[i]f the offense involved . . . [d]istribution other than distribution in subdivisions (A) through (E).” In cases involving peer-to-peer file sharing programs, a divergence arose amongst the Courts of Appeals as to whether this provision required proof of any particular mens rea, with the Fifth, Tenth, and

Eleventh Circuits holding that mere use of a file-sharing program was sufficient to apply the enhancement (i.e., no mens rea), and the Second, Fourth, and Seventh, Circuits holding that the enhancement was applicable only if the defendant knew of the program's file-sharing properties. *See USSG Am. 801* (detailing the case law from the various circuits). In the Eighth Circuit, knowledge of the program's file-sharing properties was required, but such knowledge could be "inferred from the fact that a file-sharing program was used, absent 'concrete evidence' of ignorance." *Id.* (quoting *United States v. Dodd*, 598 F.3d 449, 452 (8th Cir. 2010)).

To help resolve the circuit split, the Sentencing Commission passed Amendment 801, effective November 1, 2016, "generally adopt[ing] the approach of the Second, Fourth, and Seventh Circuits" and clarifying that the two-level enhancement applies "only in cases in which the defendant knowingly engaged in distribution." *USSG Am. 801*, at p. 136 (emphasis added). Amendment 801 thus modified § 2G2.2(b)(3)(F) to provide that the two-level enhancement applies where the "defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E)." It also added a new application note, providing that a defendant "knowingly engage[s] in distribution" if he: "(A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution or (C) conspired to

distribute.” USSG § 2G2.2, cmt. n.2. The definition of “distribution” remained unchanged, providing that distribution is “any act . . . related to the transfer of material involving the sexual exploitation of a minor.” USSG § 2G2.2, cmt. n.1.

A person acts “knowingly,” when he “is aware of the act and does not act [or fail to act] through ignorance, mistake, or accident.” Eighth Cir. Manual of Model Jury Ins. 7.03 (2018). An evaluation of whether a defendant *knowingly* distributed child pornography is a “fact-intensive” one. *United States v. Nordin*, 701 F. App’x 545, 546 (8th Cir. 2017); *see also United States v. Durham*, 618 F.3d 921, 928 (8th Cir. 2010) (“[T]he enhancement must be decided on a case-by-case basis depending on the facts at hands.” (citation omitted)). The burden of proof is on the government to show that the enhancement is applicable by a preponderance of the evidence. *United States v. Dodd*, 598 F.3d 449, 451 (8th Cir. 2010).

Here, Scruggs does not dispute that he used P2P technology; indeed, the uncontested allegations in the presentence report establish that on three dates in November 2013, an investigator downloaded 44 depictions of child pornography from Scruggs’s computer using MicroTorrent, a P2P application. PSR ¶ 11; *see United States v. Menteer*, 408 F.3d 445, 446 (8th Cir. 2005) (per curiam) (holding that a defendant’s failure to object to facts in the PSR “constitutes an admission of those facts”). As the text and commentary to amended § 2G2.2(b)(3)(F) makes clear, however, the two-point enhancement cannot be applied merely because

Scruggs used a P2P file-sharing program. *See United States v. Durham*, 618 F.3d 921, 928 (8th Cir. 2010) (citing *United States v. Ultsch*, 578 F.3d 827, 830 (8th Cir. 2009)). Likewise, the enhancement is not applicable merely because child pornography was actually distributed from Scruggs's computer, absent evidence that Scruggs "had knowledge that by using a peer-to-peer file-sharing program, his child pornography was made accessible to others." *United States v. Cates*, 897 F.3d 349, 359 (1st Cir. 2018); USSG § 2G2.2(b)(3)(F) & cmt. n.1

The sole evidence in the record that supports Scruggs's knowledge is found in paragraph 14 of the presentence report, which provides as follows:

On [January 23, 2014], the defendant participated in an interview with law enforcement, during which the defendant admitted to using MicroTorrent to download child pornography. . . . He stated that he believed torrents are a "peer-to-peer technology." He explained his understanding that torrents "may reside on multiple computers, and technology will go out there and find the computer that it's on and it may not be the entire file; it may just pull a piece across." He stated that he did not believe his files were in a shared folder. He stated, "Typically, if I have gone out to get a torrent, once I get it, as soon as I get it, I delete it, I delete the, I delete it out of the program. Because I do believe that it goes, once you download it, it then goes back out and uploads it to others."

PSR ¶ 14. For reasons to follow, Scruggs respectfully submits that the information in PSR ¶ 14 is plainly insufficient to demonstrate that he more likely than not "knowingly engaged in distribution" of child pornography, particularly when *all* evidence in the sentencing record is considered. *See United States v.*

Lawrence, 920 F.3d 331, 337 (5th Cir. 2019) (evaluating the applicability of the enhancement “in light of the record as a whole”).

The information in paragraph 14 establishes, at best, that Scruggs had some exceedingly basic knowledge of how P2P applications work in the abstract. He knew that they involved torrents. He knew that torrents could reside on multiple computers and that P2P programs would search for them. He knew that once torrents were downloaded, it might be possible for them to “go[] back out and upload to others.” But Scruggs’s knowledge that P2P technology theoretically *could* make files on a computer available to others does not establish that Scruggs knew the P2P technology he was using either automatically or actually *was* making his files available to others. The distinction is far more than academic – it is central to the question of whether the enhancement is applicable based on the sentencing record in this case. To that end, it is far more notable what the record *does not* establish about Scruggs’s knowledge in this case than what the record does establish.

In passing Amendment 801, the Sentencing Commission explained that there are different variants of P2P software:

Some file-sharing programs require a user to designate files to be shared during the installation process, meaning that at the time of installation the user can “opt in” to share files, and the software will automatically scan the user’s computer and then compile a list of files to share. Other programs employ a default file-sharing setting, meaning the user can

“opt out” of automatically sharing files by changing the default setting to limit which, if any, files are available for sharing.

USSG Am. 801, pp. 135–36. Despite these variations, the sentencing record does not even establish whether MicroTorrent is an opt-in or an opt-out program, let alone that Scruggs had any knowledge as to which type of program it was.

Additionally, it does not establish that Scruggs ever changed the opt-in/opt-out or configuration settings of the P2P program. Def.’s Sent. Ex. G, p. 4 (“Scruggs denied making any configurations to the torrent program he downloaded.”);

compare United States v. Monetti, 705 F. App’x 865, 868–69 (11th Cir. 2017)

(“Monetti changed the default sharing settings in the Ares program, which showed he understood that files in the shared folder could be downloaded by other users.”);

United States v. Vail, 732 F. App’x 326, 327 (5th Cir. 2018) (“[T]here was evidence that the file-sharing service Vail used to download child pornography provides alerts that material will be shared, and Vail did not disable the sharing

capability in his settings.”). There is also no evidence that Scruggs intentionally created a “shared folder,” elected to save files to such a folder, or even knew that one existed. Def.’s Sent. Ex. G, p. 4 (stating that Scruggs told law enforcement he simply read about uTorrent online, downloaded a program, and started using it);

compare United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (“Layton told the FBI agents that . . . ‘he created a shared folder . . . with privileges that allowed other people to download files that he put into the folder.’”). To the contrary, the

record clearly states that Scruggs “did not believe his files were in a shared folder.”

PSR ¶ 14.

Also absent from the record in this case is any evidence supporting a reasonable inference that Scruggs had knowledge that child pornography on his computer was accessible to others. In *Nordin*, for example, this Court found it appropriate to infer knowledge where the defendant admitted “intermediate” computer skills, used four different file sharing programs over the course of five years; and attempted to wipe his hard-drive of incriminating evidence. *Nordin*, 701 F. App’x at 546. Likewise in *Smith*, the Court found § 2G2.2(b)(3)(F) applicable where the defendant admitted to being “a sophisticated user of ARES and other file-sharing computer programs; knew the ARES program automatically shared child pornography images saved to the shared folder, and used programs designed to shred incriminating files.” *United States v. Smith*, 910 F.3d 1047, 1056 (8th Cir. 2018); *see also United States v. Montanez-Quinones*, 911 F.3d 59, 67 (1st Cir. 2018) (“The court below reasonably could infer that the defendant was a sophisticated computer user based on evidence that he had acquired two degrees in computer science and computer networks.”); *United States v. Ryan*, 885 F.3d 449, 454 (7th Cir. 2018) (finding a reasonable inference of knowledge where an expert testified about the file-sharing properties of the software program on the defendant’s computer and “also presented evidence of Ryan’s sophisticated

conduct would be “limited to the receipt” of child pornography. *See United States v. Shelabarger*, 770 F.3d 714, 718 (8th Cir. 2014) (finding that application of an enhancement under § 2G2.2(b)(3) necessarily means that a defendant’s conduct could not have been “limited to the receipt or solicitation of” child pornography, as required by the second prong of § 2G2.2(b)(1)). The district court would, therefore, be obligated to consider whether Scruggs’s efforts to avoid dissemination (*see* PSR ¶ 14; Def.’s Sent. Ex. G) of child pornography proved by the requisite standard that he “did not intend to . . . distribute . . . such material.” Overall, if the § 2G2.2(b)(3)(F) enhancement were removed and the § 2G2.2(b)(1) reduction applied, Scruggs’s sentencing range would be reduced dramatically, from 151–188 months (AOL 34, CH I) to 97–121 months (AOL 30, CH I).

The record in this case was plainly insufficient to prove that Scruggs knowingly engaged in distribution of child pornography. The erroneous application of § 2G2.2(b)(3)(F) substantially increased Scruggs’s advisory guideline sentencing range, both by virtue of the two-point enhancement and because Scruggs was denied the opportunity to be considered for a two-point reduction under § 2G2.2(b)(1). Because the district court did not comment on what sentence would be appropriate had it not erred in calculating Scruggs’s guideline range, Scruggs has shown the necessary effect on his substantial rights.

See United States v. Harris, 908 F.3d 1151, 1156 (8th Cir. 2018) (“We read

Molina-Martinez and *Rosales-Mireles* as strongly cautioning courts of appeals not to [assume that there is no reasonable probability of a lower sentence] when “the record is silent as to what the district court might have done had it considered the correct Guidelines range.” (citing *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016) and *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018)).

CONCLUSION

For the reasons stated herein, Scruggs respectfully requests that the Court of Appeals reverse his sentence and remand the case to the district court for resentencing. In particular, Scruggs requests that the district court be instructed to remove the § 2G2.2(b)(3)(F) enhancement and consider whether Scruggs is entitled to a two-point reduction under § 2G2.2(b)(1).

Respectfully submitted,

/s/ Nova D. Janssen

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 23, 2019, I electronically filed the foregoing supplemental brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users were served by the CM/ECF system. The brief and was scanned for viruses using Symantec Endpoint Protection 12.1.4013.4013. I also certify that on July 29, 2019, after receipt of notice that the brief was filed, I will serve a paper copy of this brief on defendant-appellant by mailing him a copy at FCI Sandstone, P.O. Box 1000, Sandstone, MN 55072. I further certify that on July 29, 2019, after receipt of notice that the brief was filed, I transmitted 10 paper copies of the brief and addendum to the Clerk of Court via Federal Express and 1 paper copy to the appellee via regular mail as noted below.

Respectfully submitted,

/s/ Nova Janssen

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

18-3158

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTOPHER SCRUGGS,

Appellant.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
HONORABLE LEONARD T. STRAND, CHIEF U.S. DISTRICT COURT JUDGE*

APPELLANT'S SUPPLEMENTAL ADDENDUM

Nova Janssen
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ATTORNEY FOR APPELLANT

DUBUQUE SHERIFF'S OFFICE
SUPPLEMENTARY REPORT

Initial Report
Offense: Sexual Exploitation of a Minor

E.A. Wilhelm

Additional Information
Victim: State of Iowa

CASE NO: 13-17446

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DEFENDANT'S EXHIBIT

CASE NO. 17-CR-1048

EXHIBIT NO. G

INTERVIEW/MINUTES OF TESTIMONY

| | |
|---|---|
| NAME: Christopher Wayne Scruggs | EMPLOYMENT: IBM |
| ADDRESS: 960 Davis Street, Dubuque | OCCUPATION: Manager of Project Management |
| SEX: Male | PHONE RES: 563-564-0195 |
| RACE: White | PHONE BUS: |
| DOB: 12/12/1967 | INTERVIEW DATE: 01/23/2014 |
| SSN/DL: | TIME: 12:35 PM |
| LOCATION: DLEC CID Interview Room C | LEAD #: |
| PERSON TYPE: <input type="checkbox"/> VICT <input checked="" type="checkbox"/> SUSP <input type="checkbox"/> IND | WITN <input type="checkbox"/> OTHER: |

On 01/23/2014 at approximately 12:35 PM, I did speak with Christopher W. Scruggs reference the search warrant that was executed at his residence on this date. My conversation with Scruggs was recorded and this report is a synopsis. It should not be used as a substitute for the recording in its entirety.

Before the interview began, Scruggs was advised that he was not under arrest, nor would he be placed under arrest at the end of our conversation. He was also told that if he needed or wanted to leave at any time he was free to do so.

During my conversation with Scruggs, he advised the following:

- His position at IBM is Manager of Project Management
- He was divorced in 1997 and has no children. His ex-wife lives in Washington, DC.
- He was born in the Houston, TX area. He thought it was Pasadena County.
- In 1984 he moved to Colorado and lived there until 2010. He lived in the Denver area and left to take his current position with IBM.
- When he moved to Dubuque, he first stayed at the Mainstay Suites, then rented a room with some other IBM employees on Julian Dubuque Drive, then rented a house on Constance Court in the Barrington Lake neighborhood. He moved again when he purchased his home on Davis Street.
- He has an MBA in Business Administration from Colorado University in Denver.
- Before working with IBM he worked for Advanced Technology Associates which he described as a small aerospace company. When the company went under in 2009, he began looking for new employment with a major corporation.
- He has only traveled internationally when he went on a couple trips when he was married. One trip was to Cancun and the other was to England and France.

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DUBUQUE SHERIFF'S OFFICE
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- He denied that anybody else uses his computer equipment and that the equipment at the house belongs to him.
- He advised that the only password on his computer is the Windows logon. This password is either *bettis01* or *Bettis01*.
- He advised that some of the stuff on his computer is encrypted with True-Crypt. He provided that his password was *78d1@px97#77QT\$84Myy*.
 - Scruggs had some difficulty coming up with this password. He was provided with paper and a keyboard to help jog his memory. There are other possible variations on the paper he was provided which is contained in the case file.
- He advised that he has a wireless router at his house which is password protected. He also advised that he named it *fuzzygate*. He said that he just came up with this and had no explanation for the name.
- He advised that he brings his work laptop home at night per company policy, however he does not use it for non-work purposes.
- He advised that he has "average" computer skills.
- He estimated that in 1998 he took some undergrad courses in networking and programming.
- Scruggs advised that he uses the computer that was hooked up in the upstairs computer room at home. He has two old Dell computers (one laptop and one tower). He thought the passwords on these would be either *bettis01* or *Bettis01*.
- He advised that there was also one computer tower in the computer room which was not working.
- He has a personal thumb drive with an IBM logo on it.
- He said that he is on the computer all day at work and then usually one to two hours during the evening hours at home.
- He advised that he has a smartphone. It has no security features activated and he only has standard apps on it. He requested Scruggs's consent to search his phone. He did sign a consent waiver during the recorded interview.
- Scruggs advised that he has used chats/instant messaging as well as online gaming. He advised that he has not done so in awhile.
- He advised that the broken computer in the upstairs computer room at his residence did have some wiping software.
- His ISP is Mediacom and he has been a customer since he lived on Constance Ct. He estimated he has been a customer with Mediacom for about three years.
- When he lived on Julien Dubuque Drive the landlord provided the internet service.
- He provided the following email addresses:
cwscruggs@gmail.com - this email is used for his friends and family
cwscruggs@yahoo.com - used for registering for things
chris4spam@yahoo.com - used for registering for things

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eseruggs@us.ibm.com - used solely for work purposes, no one outside of work has this email address

- Sometime around 2009 he registered a website but was never assigned a domain name. He never got the website up and running and was just trying to see if he could do it.
- He does not use any cloud storage.
- He has a Facebook page using the name Chris Scruggs. He uses his Gmail account and the password @Peace01.
- He has used AOL and MSN in the past but has not used them since 2009.
- He goes online to look at and search for adult pornography. He uses newsgroups, namely usenet and the newsgroups app.
- He advised that he is looking for gay, straight, adult and underage (he described this as under 18) pornography.
- He advised that he has downloaded videos and pictures of adults, minors and both adults and minors that are modeling as well as engaged in explicit sexual acts.
- He advised that he has not specifically searched for, but has seen, toddlers (3-4 yoa) in some of the pornography.
- He initially denied any use of peer to peer networks because he was unsure of how they worked. Later in our conversation, he spoke about trying torrents and downloading the program µTorrent (aka Micro Torrent).
- He advised that he got both adult and child pornography using this method.
- He advised that he was using the search terms boy, girl and gay.
- He further provided that he did not specifically search out violent acts such as rape, any forced sex act or anything that was vulgar or degrading.
- He advised that there would be child pornography on two of his external hard drives. He advised that they showed up as the J and L Drive on his computer.
- He advised that he did not think he had any child pornography on any CDs or DVDs. He thought that he had destroyed anything that he had in the past by breaking the disk(s).
- Scruggs advised that he traveled to Denver to visit family over Christmas. He advised that he loaded child pornography onto a thumb drive with the purpose to take it with him. Scruggs advised that he went through the work of transferring the images and then forgot to take the drive with him.
- He advised that he does not share or chat about his child pornography.
- He advised that he looks at both adult and child pornography about $\frac{1}{2}$ to 1 hour daily.
- He has not used a pay website since he has lived in Iowa. The only time he did was to a gay adult website.
- He advised there would be some files that were encrypted on one of the thumb drives. He advised there would also be some encrypted files on the external hard drive.

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- He thought there were be 100's of illegal images. He further provided that he had been "collecting them for a number of years." When asked to give a number, he advised more than 10 years.
- He thought it had been 10 years since he first started seeking out images of children.
- He advised that he remembers being sexually attracted to children since his teen years. He denied ever acting on this.
- Scruggs stated that this has been the only illegal activity, to his knowledge, that he has participated in.
- He advised that he has wondered about being with a child and has had fantasies of the same, however, he does not feel it is right.
- He said he is attracted to boys more so than girls and described himself as bisexual.
- He was in a homosexual relationship after his divorce.
- Scruggs stated that he has feared getting caught, but also advised that part of his mind was in denial that it would happen to him.
- He admitted to using the search term preteen. He has searched for images of both boys and girls.
- He advised that Google was his go-to search engine. He has also used Flickr. He also advised that he used Google Image Search. He advised that he had just used this the last couple of nights to look at pictures of kids that were portrait shots. The children would be wearing normal clothing or swimsuits.
- He also talked about using the Pirate Bay. He advised that he would go to this site to use their torrents.
- Scruggs talked about looking at pictures of kids in swimsuits and clothing.
- He advised that there would be pictures of kids from 0-15, but the majority would be of kids aged 10-15. He further provided there would be photos and videos.
- He advised that torrents reside on multiple computers and the technology finds the computers to complete the file.
- His understanding of the newsgroups is that the information is stored on a server and the user downloads from the server.
- He did not think there was a shared folder. He advised that once he would download, he would delete the file so that it would not be uploaded to others.
- Scruggs denied making any configurations to the torrent program he downloaded. He advised that he downloaded it and started using it.
- He advised that he learned about uTorrent and reading about it online as well as in the news. Scruggs advised that he had downloaded this program.
- He advised that no person that he knows, knows about the illegal images on his computer. He provided that he has corresponded with others online about his attraction. He denied that he ever shared images with anyone.

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- Scruggs advised that he masturbates "sometimes" while looking at child pornography and confirmed that he is looking at these images for a sexual purpose.
- He stated that he had children's toys at his house but they were from when he was a child and others were family heirlooms. He denied keeping children's clothes at the house.
- Scruggs talked about "sometimes it is just nice to see an image" without it having explicit sexual content. He advised that sometimes, not always, he has sexual thoughts when he looks at these pictures. He explained that he and other folks who share his attraction appreciate the personality and expressiveness of a child.
- He advised that his pornography was organized by folders entitled: *men, boys, adult and girls*. These folders contain both legal and illegal images.
- He denied changing or altering the files after he gets them.
- He uses VLC Media Player and Windows Image Viewer to look at videos and pictures.
- He denied that there was any protected material on his computer. He advised that he was not a published writer and has not copyrighted anything.
- He denied knowing anybody in the pictures. Then without prompting, Scruggs brought up that he has been involved in the Big Brother program for the last four years and that his "Little Brother" is Jesse Evilsizer. Scruggs advised that Jesse just turned 14 years old. Scruggs advised that he has taken pictures of Jesse during their outings. He talked about spending one on one time with Jesse but denied that he ever inappropriately touched Jesse. Scruggs admitted that at times he had found himself sexually attracted to Jesse but had never acted upon these feelings.
- Besides Jesse there were no other regular pictures of children that he knew.
- He denied ever taking pictures of kids, besides Jesse.
- Scruggs advised that the term *Lolita* was a book to his knowledge and has seen this as a search term for underage girls. He advised that the term *preteen* meant 12 or under. He stated that *young* meant underage and *younger* meant "younger than that" (referencing the word *young*). He also advised that *cyber* meant something on the internet.
- Scruggs advised that he was familiar with NAMBLA but denied being a member because their stance was "far too extreme" for him. He also advised that NAMBLA advocates for legalization of sexual activity with boys.
- He never arranged a meeting with a minor, besides what he did with Jesse, which was through his grandmother.
- He denied chatting with someone who said they were a minor online. He talked about trying to avoid this as it seemed like a "slippery slope" to go down. He also denied online role play. He talked about when AOL was the only way to use the internet, he did do some online role play, chatting and fantasizing. He said this was really creepy and extreme and not a direction that he wanted to go.

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- He denied anyone having sexual contact with him when he was a child. He said there was the "typical you show me yours, I'll show you mine kind of thing." He advised that he did not feel that he was victimized in the past.
- He denied that he has sought treatment for his attraction to children, but has thought about it. He said that beyond looking at the pictures, he felt like he was in control. He also did not think anybody could help him.
- He does not volunteer for any community activities and brought up his interest in foster care, but denied being licensed. He advised that he had gone through part of the process.
- I talked with Scruggs about the adoption and foster care paperwork that was located at his residence. He advised that he felt like he would be able to control his urges if he were to have a child living with him.
- I advised Scruggs that it would be in his best interest to cease his contact with Jesse by contacting the Big Brother program directly and having no further contact with Jesse. I also advised him that it would also be in his best interest to stop looking into foster parenting or any adoption programs.
- Toward the end of the interview, I stepped out of the room. Investigator Grant spoke with Scruggs about neighbor children. He advised that his next door neighbor is retired and a little girl is dropped off for about half an hour. He has noticed this about the time he usually makes his coffee in the morning.
- I did briefly step out of the room to speak with Inv. Pohl. He advised that he had located some files that contained the name Caleb and asked me to see if Scruggs knew who this boy was. When questioned, Scruggs advised that he did not know anybody by the name of Caleb and advised any files that would contain that name would have come from a download. He denied using Skype outside of work and family purposes. He also talked about buying a webcam because his equipment did not come with a camera.
- Scruggs expressed concern about what his charges would be as he stated that we would find illegal images on his equipment. I did my best to answer his questions to the best of my knowledge.

When Scruggs's questions were answered he left the DDEC at approximately 2:45 PM.

On 01/24/2014 at approximately 2:45 PM, I received a voicemail from Scruggs asking about counseling services. I did make a recording of this voicemail and it is contained in the case file. At approximately 3:16 PM I did return Scruggs's call. He asked if I had any knowledge of specialized counseling services that he might be able to seek out. I advised him that I was unaware of any counseling services that were not court ordered. I advised him to check with his insurance company to see what was covered. My conversation with Scruggs lasted less than three minutes.

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