APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMOND J. LIDDY, Defendant-Appellant.	No. 20-50238 D.C. No. 3:19-cr-01685-CAB-1 MEMORANDUM* (Filed Sep. 28, 2022)

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted November 9, 2021
Pasadena, California

Before: COLLINS and LEE, Circuit Judges, and BAKER,** Judge.

Memorandum joined by Judge COLLINS and Judge LEE; Partial Concurrence by Judge BAKER

Raymond J. Liddy appeals his conviction, following a bench trial, on a single count of knowingly possessing child pornography in violation of 18 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable M. Miller Baker, Judge of the United States Court of International Trade, sitting by designation.

§ 2252(a)(4)(B). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. To secure Liddy's conviction under 18 U.S.C. § 2252(a)(4)(B), the Government was required to prove that (a) Liddy possessed one or more "matters"—here, disks or drives—containing child pornography; and (b) Liddy knew those matters contained such "unlawful visual depiction[s]." *United States v. Lacy*, 119 F.3d 742, 747–48 (9th Cir. 1997) (citing 18 U.S.C. § 2252(a)(4)(B)). Liddy does not contest the first element; indeed, he signed a formal stipulation, for purposes of trial, that 10 specific files found on certain devices seized from his home by the FBI contained child pornography. Liddy contends, however, that the evidence was insufficient to prove the second element—*viz*., that he knew that those devices contained child pornography. Where, as here, we review "a district court's judgment in a bench trial," we review evidentiary sufficiency under the familiar standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979), which requires us to determine whether, "'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Temkin*, 797 F.3d 682, 688 (9th Cir. 2015) (quoting *Jackson*, 443 U.S. at 319). Applying this standard, we conclude that the evidence of Liddy's knowledge was sufficient.

The 10 files at issue were found on three different devices: an external hard drive containing two images; a 16GB thumb drive containing three images; and a

1GB thumb drive containing five images. Nine of the 10 images, at the time of the FBI's search, had been deleted and were located in "unallocated space" on the devices.[1] The tenth file was found on the external hard drive, saved in allocated space in a folder labeled, in relevant part, <USMC/Bios/Newfolder/JTFPanama>. (Liddy had served in the Marine Corps.) Although that file was a "JPEG" image, it was mislabeled with a "PDF" file extension. Due to the incorrect file extension, that file could not be opened simply by double-clicking on it, but the file could still be opened by other means.

In articulating the basis for its finding of guilt, the district court "particularly focus[ed]" on the five images on the 1GB thumb drive, because there was "undisputed evidence as to the dates they were created on the thumb drives." Specifically, those images had been saved to that thumb drive on separate occasions over a period of time—namely, on May 24, June 14, and June 17, 2017. The court concluded that this evidence supported an inference that Liddy had "moved" or "transferred over" files from his "desktop or some other source to these thumb drives" before later deleting them. Accordingly, considering Liddy's "statements" to law enforcement agents and the "circumstantial evidence" in the record, the court found "beyond a

[1] "Unallocated space is space on a hard drive that contains deleted data, usually emptied from the operating system's trash or recycle bin folder, that cannot be seen or accessed by the user without the use of forensic software." *United States v. Flyer*, 633 F.3d 911, 918 (9th Cir. 2011).

reasonable doubt that [Liddy] knew what he was saving, that he saved them to the drives, and he subsequently deleted them."

Liddy acknowledges that the posited sorting or moving of files could support an inference of knowledge, but he argues that (a) there was no evidence to support the district court's transfer theory, and (b) the trial evidence could not exclude the alternative theory that Liddy had downloaded what he thought was adult pornography *directly* onto the external devices, where he then "deleted them either without opening them or as soon as he recognized they were contraband." Considering several items of evidence together, we conclude that the district court could rationally find Liddy knowingly accessed, transferred, and stored the files on the drives.

First, the Government's expert noted that several of the files had date stamps showing that the files had been "modified" on dates that were earlier than their "created" dates, and he explained that this discrepancy supports an inference that "the image was modified on a different device before it was placed on th[e] particular device" on which it was found. Liddy's own expert similarly acknowledged that such a disparity in modified/created dates is a "common artifact when something is transferred from one local file system to another local file system" and is "an example of a transfer that can take place from a computer to a hard drive or a thumb drive." As noted, Liddy argues that the Government's evidence failed to exclude the reasonable alternative inference that the same discrepancy

could have occurred without Liddy having reviewed the files before they were saved onto his devices, *e.g.*, if Liddy had downloaded compiled ZIP files directly from the internet to the external drives. Liddy further contends that the Government's failure of proof in this regard is underscored by the lack of metadata showing that the files had ever been on Liddy's desktop computer or been viewed there. While these arguments have some force, we cannot say that, in light of the record as a whole, the district court could not reasonably draw the inference it did and find Liddy's knowledge to be established beyond a reasonable doubt.

Second, as the district court noted, Liddy made several statements to law enforcement that can reasonably be viewed as inculpatory. When agents asked Liddy whether he had ever sent images of "girls under the age of 18," Liddy initially replied, "[Y]eah, I've resent them," before changing his answer to, "I—I don't believe—I don't think I have." He subsequently volunteered that, "[y] ou know, um, if I looked at anything, it was strictly just curiosity and screwing around." When asked later whether he had saved any "child pornography-type stuff" to his computer, Liddy responded that "[u]m, if I had, it's gone." Liddy also stated, when asked whether a forensic search of his computer would uncover "a ton" of deleted child images, that "[y]ou probably would find some, but not a ton."

Third, an undeleted image on the external hard drive was saved under a file path and name—"USMC/Bios/New folder/JTF Panama.pdf"—that could reasonably be construed as referencing Liddy's time in

the United States Marine Corps. The saving of a child pornography image with such a distinctive file name supports an inference that the possession of the image was not unintentional or unknowing. Indeed the "Panama" file—the only file that was found in "allocated space"—had been saved to the external drive less than nine hours before agents arrived at Liddy's home. Liddy argues that, because the Panama file had an incorrect file extension—".pdf" rather than " jpg"—that file must be deemed "inaccessible" to Liddy and should be disregarded. But given the evidence of Liddy's computer use, including the presence of child pornography on multiple external devices, the district court was not required to conclude that Liddy was a digital naïf who could not access the Panama file or that he was unaware of its contents. Liddy also argues that we must disregard the Panama file because the district court did not reference it when announcing the court's verdict. But even assuming *arguendo* that the district court's findings did not include the Panama file in describing the *actus reus* and instead relied only on the other files (or a subset of those files), the Panama file remained circumstantial evidence that the district court could evaluate in determining what inferences to draw with respect to those other files, and such evidence is properly considered on appeal in assessing the sufficiency of the evidence in the trial record.

Considering the record evidence as a whole, we conclude that the district court could rationally find, beyond a reasonable doubt, that Liddy knew the contents of the files in question. *See United States v.*

Richter, 782 F.3d 498, 501 (9th Cir. 2015) (citing *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010)). In contrast to *United States v. Flyer*, 633 F.3d 911 (9th Cir. 2011), there was sufficient evidence in the trial record in this case to show that the files in unallocated space were knowingly possessed by Liddy, before their deletion, during the time frame charged in the indictment.

2. Reviewing de novo, *see United States v. I.M.M.*, 747 F.3d 754, 766 (9th Cir. 2014) (citing *United States v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009)), we hold that the district court correctly concluded Liddy was not in custody when he was interviewed at home by law enforcement and that the failure to give *Miranda* warnings therefore did not require suppression of his statements to the agents. Liddy relies on *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008), but the circumstances of this case are very different. Unlike in *Craighead*, Liddy did not live on a military base; the questioning at issue occurred before Liddy knew that the officers had a warrant to search his home; he chose the room (the kitchen) in which the interview took place; there was no display of "unholstered" firearms; and his exit from the room was not physically blocked. *Id*. at 1078–79, 1085–89. Considering the totality of the circumstances, we conclude that a reasonable person would have felt free to terminate the interview and that Liddy was therefore not in custody. *Howes v. Fields*, 565 U.S. 499, 508–09 (2012).

3. The district court did not err in denying Liddy's motion for a new trial, which challenged the validity of his waiver of jury trial. Liddy, himself a

lawyer, executed a written waiver of his right to a jury trial and orally affirmed his waiver in open court. He nonetheless contends that his waiver was unintelligent because, had he known ahead of time that the testimony of a Government witness would ultimately be proved incorrect and retracted, he would have used the opportunity to impeach the unreliable witness before a jury. Reviewing the adequacy of his waiver de novo, *see United States v. Tamman*, 782 F.3d 543, 551 (9th Cir. 2015) (citing *United States v. Shorty*, 741 F.3d 961, 965 (9th Cir. 2013)), we reject this contention. "[W]ritten waivers are presumptively knowing and intelligent," *id*., and the record amply confirms that Liddy knew and understood the rights that he was giving up when he "request[ed] that the court alone decide if he is guilty or not guilty." The fact that Liddy could not have foreseen that a Government witness would later have his credibility damaged at trial does not vitiate the voluntary and intelligent nature of his jury waiver.

4. Liddy argues that, under *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the district court should have suppressed the subscriber information that the Government obtained by subpoena, rather than with a warrant, from Liddy's internet service provider. This argument is foreclosed by *United States v. Rosenow*, 33 F.4th 529 (9th Cir. 2022), in which we held that "a defendant 'ha[s] no expectation of privacy in . . . IP addresses' or basic subscriber information because internet users 'should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of

information.'" *Id*. at 547 (alterations in original) (quoting *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008)).

AFFIRMED.

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BAKER, International Trade Judge, concurring:

I part company with my colleagues on two issues. I don't think we should rely on the "JTP Panama" file, not only because the district court didn't rely on it, but because the record is inconclusive as to whether Liddy would have known how to access it. In the absence of any evidence on this point—regarding the *relative* accessibility of this file to an ordinary computer user, if there is such a thing—I don't think we should speculate that it was accessible to Liddy. Given the government's burden of proof, ties go to Liddy.

I also can't rely on the district court's file transfer theory based on the "created date" and the "modified date." In my view, Liddy's counsel thoroughly debunked that theory at argument. There is no digital evidence on the PC to support the notion that Liddy transferred these images from his PC to the external drives. Counsel also pointed to expert testimony that files downloaded from an online zip file would contain the exact same sort of artifact—the "last modified date" would be the date the file was added to the zip

file, and the "created date" would be when it was saved to the external drive.

Considering Liddy's incriminating statements outlined in the memorandum disposition, in my view the district court could rationally find Liddy knowingly stored and accessed the five files on the 1 GB thumb drive before deleting them. In contrast to *United States v. Flyer*, his incriminating statements can be viewed as "admission[s] that he had viewed [these] charged images on or near the time alleged in the indictment." 633 F.3d 911, 919 (9th Cir. 2011).

Except as to the issues discussed above, I join the memorandum disposition.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA **V.** RAYMOND LIDDY (1)	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987) Case Number: 19CR1685-CAB KNUT JOHNSON, DEVIN BURSTEIN AND JOHN ELLIS, JR. Defendant's Attorney

USM Number 63272298

☐ –

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☒ was found guilty on count(s) ONE (1) OF THE ONE-COUNT INDICTMENT after a plea of not guilty.

Accordingly, the defendant is adjudicated guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 USC 2252(a)(4)(B)	POSSESSION OF IMAGES OF MINOR ENGAGED IN SEX-UALLY EXPLICIT CONDUCT.	1

The defendant is sentenced as provided in pages 2 through 7 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) _____ is dismissed on the motion of the United States.

Assessment: $100.00

☒ –

☒ JVTA Assessment*: $5,000.00

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

☒ See fine page ☒ Forfeiture pursuant to order filed 9/1/2020, included herein.

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 any material change in the defendant's economic circumstances.

September 2, 2020
Date of Imposition of Sentence

/s/ Cathy Ann Bencivengo
HON. Cathy Ann Bencivengo
UNITED STATES DISTRICT JUDGE

PROBATION

Upon release from imprisonment, the defendant will be on supervised probation for a term of: FIVE (5) YEARS.

MANDATORY CONDITIONS

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 not illegally possess a controlled substance. 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. Testing requirements will not exceed submission of more than 4 drug tests per month during the term of supervision, unless otherwise ordered 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 substance abuse. (check if applicable)

4. ☐ The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☒ The defendant must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)

6. ☒ 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, is a student, or was convicted of a qualifying offense. (check if applicable)
7. ☐ 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.

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervised release, 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 they are authorized to reside within 72 hours of their release 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.

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 their probation officer.

5. The defendant must live at a place approved by the probation officer. If the defendant plans to change where they live or anything about their living arrangements (such as the people living with the defendant), 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 them at any time at their home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of their 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 their work (such as their position or their 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 they know is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, they 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. If the probation officer.determines the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant notified the person about the risk.

13. The defendant must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS OF SUPERVISION

1. Submit your person, property, residence, abode, vehicle, papers, computer, social media accounts, and any other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation/supervised release or unlawful conduct, and otherwise in the lawful discharge of the officer's duties. 18 U.S.C. Sections 3563(b)(23); 3583(d)(3). Failure to submit to a search may be grounds for revocation; you must warn any other residents that the premises may be subject to searches pursuant to this condition.

2. Consent to third party disclosure to any employer, potential employer, concerning any restrictions that are imposed by the court.

3. Not use or possess any devices (computers, laptops and cell phones) which can communicate date via

modem, dedicated connection and may not have access to the Internet without prior approval from the court or the probation officer, all of which are subject to search and seizure. The offender must consent to the installation of monitoring software and/or hardware on any computer or computer-related devices owner or controlled by the offender that will enable the probation officer to monitor all computer use and cellular data. The offender must pay for the cost of installation of the computer software.

4. Not associate with or have any contact with any known sex offenders unless in an approved treatment and/or counseling setting.

5. Not have any contact, direct or indirect, either telephonically, visually, verbally or through written material, or through any third-party communication, with any victims, or the victims' family, without prior approval of the probation officer.

6. Not accept or commence employment or volunteer activity without prior approval of the probation officer, and employment should be subject to continuous review and assessment by the probation officer.

7. Not possess or view any materials such as videos, magazines, photographs, computer images or other matter that depicts "sexually explicit conduct" involving children as defined by 18 U.S.C. § 2256(2) and/or "actual sexually explicit conduct" involving adults as defined by 18 U.S.C. § 2257(h)(1), and not patronize any place where such materials or entertainment are the primary material or entertainment available.

8. Complete a sex offender evaluation, which may include periodic psychological, physiological testing, and completion of a visual reaction time (VRT) assessment, at the direction of the court or probation officer. If deemed necessary by the treatment provider, the offender shall participate and successfully complete an approved state-certified sex offender treatment program, including compliance with treatment requirements of the program. The Court authorizes the release of the presentence report, and available psychological evaluations to the treatment provider, as approved by the probation officer. The offender will allow reciprocal release of information between the probation officer and the treatment provider. The offender may also be required to contribute to the costs of services rendered in an amount to be determined by the probation officer, based on ability to pay. Polygraph examinations may be used following completion of the formal treatment program as directed by the probation officer in order to monitor adherence to the goals and objectives of treatment and as a part of the containment model.

9. Reside in a residence approved in advance by the probation officer, and any changes in residence shall be pre-approved by the probation officer.

RESTITUTION

The defendant shall pay restitution in the amount of **$6,000.00** unto the United States of America.

Schedule and specific amounts for payment of restitution outlined in the Order of Restitution to follow.

FINE

The defendant shall pay a fine in the amount of $10,000.00 unto the United States of America.

This sum shall be paid _X_ Forthwith.
___ as follows:

The Court has determined that the defendant does have the ability to pay interest. It is ordered that:

_X_ The interest requirement is waived.
____ The interest is modified as follows:
