No. _____

IN THE
Supreme Court of the United States

DOUGLAS JAMES SCHNEIDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding the failure to object to the violation of Rule 11(c)(1) provides dispositive evidence that the violation did not affect a defendant's substantial rights under the plain error standard.

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. Schneider, No. 1:19-CR-00124-DMT-1, United States District Court for the District of North Dakota. Judgment signed and entered January 10, 2022.

United States v. Schneider, No. 22-1112, United States Court of Appeals for the Eighth Circuit. Judgment entered July 20, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Douglas James Schneider respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 40 F.4th 849.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2022. A petition for rehearing was denied on September 22, 2022 (App. 1a-12a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Fed. R. Crim. P. Rule 11(b)(1)

> Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> . . .
>
> (G) the nature of each charge to which the defendant is pleading;
>
> (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
>
> (I) any mandatory minimum penalty;
>
> . . .
>
> (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a)[.]

Fed. R. Crim. P. Rule 11(c)(1)

> An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.

Fed. R. Crim. P. Rule 11(h)

> A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Fed. R. Crim. P. Rule 52(b)

> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

The district judge plainly violated the prohibition against judicial participation in plea discussions, explicitly delineating the minimum sentencing terms he would accept in any future plea agreement negotiated between the parties. Petitioner did not object to the violation. Instead, petitioner and the government negotiated a plea agreement incorporating the specific terms set forth by the district judge. When the district judge later sentenced petitioner to a higher sentence, he appealed, arguing the district court's plain violation of Rule 11(c)(1) of the Federal Rules of Criminal Procedure affected his substantial rights. The court of appeals denied petitioner relief, holding that while the district judge plainly violated the prohibition against judicial participation in plea discussions, petitioner's failure to object to the violation, or to move to withdraw his guilty plea, established that the violation did not affect petitioner's substantial rights. App., *infra*, 1a-12a. This case concerns whether the failure to object to a district court's violation of Rule 11(c)(1) of the Federal Rules of Criminal Procedure, and subsequent guilty plea, forecloses a defendant from obtaining relief under the plain-error standard despite clear evidence the district judge's violation affected a defendant's decision to plead guilty.

In August of 2019, a federal grand jury in the District of North Dakota indicted petitioner on one count of transportation of a minor, in violation of 18 U.S.C. § 2423(a). Docket entry No. 1 (Aug. 7, 2019). The district court appointed counsel to represent him. Docket entry No. 14 (Feb. 5, 2020).

Through his appointed counsel, petitioner negotiated a plea agreement with the government. On February 16, 2021, petitioner and his counsel signed a plea agreement, under which petitioner would plead guilty to an unamended charge in exchange for the parties jointly recommending a binding sentence of 150 months imprisonment. Docket entry No. 24, at 5-6 (Feb. 16, 2021).

On March 2, 2021, petitioner appeared before the district judge for a change of plea hearing. Docket entry No. 34 (filed Oct. 20, 2021) (First Plea Hearing Tr.). At the outset, the district judge indicated—based on his calculation—that the United States Sentencing Guidelines called for a sentencing range exceeding the plea agreement's binding sentence recommendation, and inquired why he should accept the agreement. *Id.* at 4. After the petitioner and the government explained their rationale, the district judge rejected the plea agreement. *Id.* at 4-10. The district judge then volunteered, sua sponte:

> [Y]our client can either have the three points [for acceptance of responsibility and timely notification when pleading guilty,] or he can take it to trial. And I will tell you this, I'll sentence him within the guideline range, but he's not going to get a 15-year sentence for this type of conduct, particularly involving someone in his care.

Id. at 10. Following some brief scheduling discussions regarding resetting the case, the government questioned whether the parties could informally submit future plea agreements to the district court prior to a change of plea hearing. *Id.* at 12. The district judge expressed an openness to informally approving a future plea agreement, and then reiterated: "And as I indicated, I'll sentence him within the

guidelines under a 37—so we're looking at 210 to 262 months—but he's not going to get 15 years. He's going to get more than that." *Id.* at 12-13.

Petitioner and the government then resumed plea discussions. On July 15, 2021, petitioner and his counsel signed a second plea agreement, under which petitioner would again plead guilty to an unamended charge, this time in exchange for the government recommending a sentence at the low end of the precise sentencing guideline range previously calculated by the district judge. Docket entry No. 29, at 5-6 (July 15, 2021) (Second Plea Agreement).

On October 20, 2021, petitioner again appeared before the district court judge for a change of plea hearing. Docket entry No. 48 (filed Jan. 18, 2022) (Second Plea Hearing Tr.). Petitioner represented that he understood the plea agreement, *id.* at 6, and that it was "nonbinding," *id.* at 6-7, and that the district court could conceivably sentence him up to life. *Id.* at 7; *see also id.* at 9 (again testifying that he understood the sentence of imprisonment could be up to life imprisonment). Following the plea colloquy required by Rule 11, the district judge accepted the second plea agreement, and petitioner's guilty plea. *Id.* at 17-18.

The United States Probation and Pretrial Services later completed a pre-sentence report calculating petitioner's guideline sentence higher than as calculated by the district judge, and as used by petitioner and the government in the second plea agreement. Docket entry No. 38 (Jan. 3, 2022). In response, petitioner requested that the district judge employ the guideline calculation used by him and the government—the same guideline calculation the district judge previously identified

as acceptable during the first change of plea hearing. Docket entry No. 40 (Jan. 3, 2022).

Petitioner appeared for sentencing on January 10, 2022. Docket entry No. 48 (filed Jan. 18, 2022) (Sentencing Tr.). When outlining his requested sentence, counsel for petitioner explicitly identified that petitioner relied on the district judge's comments during the first plea hearing when deciding to enter into the second plea agreement. *Id.* at 39. Nevertheless, the district court rejected the recommendations of petitioner and the government, and sentenced petitioner to life in prison without the possibility of parole. *Id.* at 44-52.

On appeal, petitioner requested that his guilty plea be set aside, arguing the district judge's comments warranted relief under the plain-error standard. Pet. C.A. Br. 8-21. In response, the government argued the district judge's comments did not violate Rule 11(c)(1), and that even if they did, the comments did not affect petitioner's substantial rights. Gov't C.A. Br. 12-31. In particular, the government contended that petitioner could not show "a reasonable probability that but for the error, he would not have entered a guilty plea." *Id.* at 29 (citation and internal quotation omitted). In support, the government identified the four-month gap between the comments and the plea, and petitioner's answers during the Rule 11 plea colloquy at the second change of plea hearing. *Id.* at 29-30.

The court of appeals denied petitioner's appeal. App., *infra*, 1a-12a. The court recognized the district judge committed a plain error by "commit[ing] the court to a sentence of at least a certain level of severity and within a particular range." *Id.* at

7a. The court also acknowledged counsel for petitioner had identified petitioner's reliance on the district judge's comments. *Id.* at 10a. Nevertheless, the court found this evidence did not prove the error affected petitioner's substantial rights because petitioner acknowledged during the second plea colloquy that the second plea agreement was not binding, and petitioner did not otherwise move to withdraw his plea prior to sentencing. *Id.* at 11a-12a.

The court of appeals later denied petitioner's petition for rehearing en banc. App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

The approach adopted by the court of appeals effectively abolishes plain error review for violations of Rule 11(c)(1). That approach cannot be squared with this Court's cases interpreting Rule 11, which make clear a defendant may challenge his sentence under the plain-error standard even when no objection is made to the district court. *See also* Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). It also conflicts with the decisions of the other circuits that have addressed the issue. This recurring and important issue of federal criminal procedure warrants this Court's review, with this case providing an ideal vehicle for addressing the issue.

I. The Court Of Appeals Erred In Denying Relief Under The Plain Error Standard Based On Facts Necessitating Plain Error Review.

An unobjected-to violation of the prohibition against judicial participation in plea discussions does not warrant relief unless a defendant can satisfy the plain-error

standard. *United States v. Davila*, 569 U.S. 597, 612 (2013). Amongst other requirements, relief under the plain error standard requires proof that the error affected a defendant's substantial rights—proof of "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles v. United States*, 585 U.S. ——, —— - ——, 138 S.Ct. 1897, 1904-1905 (2018) (internal quotation marks omitted). This inquiry requires review of the "particular facts and circumstances matter[,]" *Davila*, 569 U.S. at 612, based on the "entire record[.]" *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). A defendant meets this requirement by showing "that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Ibid.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). While relief may be "rare," the "rule does not . . . foreclose relief altogether." *Id.* at 83 n.9. And a preponderance of the evidence is unnecessary to warrant relief. *Ibid.*

Despite the relatively low burden of proof, the court of appeals' approach would render the plain-error standard impossible to satisfy. The court of appeals concluded the district judge plainly violated Rule 11(c)(1) by prospectively telling the parties what terms he was willing to accept in a future plea agreement. *See* App., *infra*, 7a. The court also found petitioner explicitly identified the district judge's comments as causing him to plead guilty. *Id.* at 10a ("Schneider . . . mentioned his reliance on the district court's improper comments at sentencing."). Indeed, the record confirms the district judge's comments acted as the but-for cause, with the parties' negotiating the second plea agreement to specifically incorporate the exact terms the district judge

advised were acceptable to him. *Compare* First Plea Hearing Tr., at 12-13 ("And as I indicated, I'll sentence him within the guidelines under a 37 -- so we're looking at 210 to 262 months -- but he's not going to get 15 years. He's going to get more than that."), *with* Second Plea Agreement, at 5-6 (agreeing to an offense level of 37, with the government recommending a sentence at the low end of the guideline range).

Nevertheless, the court of appeals explained this clear evidence that the district judge's comments affected petitioner did not provide even a reasonable probability that the comments affected petitioner's substantial rights because, when the district judge accepted petitioner's guilty plea under the second plea agreement, he "confirmed that [petitioner] was aware that the agreement's recommendations were not binding, that the district court could impose a sentence above the range it calculated at the first change-of-plea hearing, and that the maximum sentence was life." App., *infra*, 10a; *see also ibid.* ("Because Schneider repeatedly acknowledged that the district court could impose a life sentence despite its comments at the first change-of-plea hearing, he has failed to show a reasonable probability that he would not have pled guilty but for those comments."). Additionally, the court found dispositive that petitioner "did not move to withdraw his guilty plea after the PSR calculated a higher guideline range." *Id.* at 11a.

But this reasoning renders relief under plain error review for Rule 11(c)(1) errors merely hypothetical because these facts will be present in most—if not all—Rule 11(c)(1) plain-error review scenarios. First, a Rule 11(c)(1) violation cannot be subject to plain error review unless a defendant fails to object—a violation cannot be

subject to plain error review if a defendant moves to withdraw a guilty plea based on the error. Second, Rule 11 requires a district court to engage in the plea colloquy before accepting a guilty plea. *See* Fed. R. Crim. P. 11(b)(1). Accordingly, whenever a defendant ultimately pleads guilty, the facts identified as critical to the court of appeals' decision will necessarily be present. If these facts suffice to disprove a reasonable probability of a different result, then plain-error relief for a Rule 11(c)(1) error—while possible in theory—becomes impossible in fact. This contravenes this Court's precedent allowing for relief due to a Rule 11(c)(1) violation, even when a defendant ultimately pleads guilty. *Cf. Davila*, 569 U.S. at 612 (despite the defendant's guilty plea, remanding for plain-error review). The court of appeals' impossible Rule 11(c)(1) review standard conflicts with this Court's plain-error review precedent.

II. The Court Of Appeals' Approach Conflicts With The Decisions Of Other Circuits.

As the decision in this case recognized, other jurisdictions weigh the factors identified by the court when determining whether a district court's plain violation of Rule 11(c)(1) affected a defendant's substantial rights. App., *infra*, 8a-9a. Indeed, decisions from the Fourth, Fifth, and Ninth Circuits have all found a district court's plain violation of Rule 11(c)(1) affected a defendant's substantial rights on weaker records than this case. *See United States v. Sanya*, 774 F.3d 812 (4th Cir. 2014); *United States v. Miles*, 10 F.3d 1135 (5th Cir. 1993); *United States v. Kyle*, 734 F.3d 956 (9th Cir. 2013).

The Fourth Circuit's decision in *United States v. Sanya* puts the circuit conflict in particularly stark relief. Heralding the reasoning employed by the court of appeals in this case, the government argued in *Sanya* that the defendant failed to prove the district court's Rule 11(c)(1) violation affected his substantial rights "because he did not object to the court's involvement either at the proper Rule 11 colloquy, or at sentencing, or by otherwise moving to withdraw his plea before th[e] appeal." *Sanya*, 774 F.3d at 818 (citation omitted). But the Fourth Circuit expressly rejected this argument, explaining those facts merely "provide[d] the reason why [the defendant] must meet the rigorous plain error standard[,]" and were not, "in and of itself, . . . a basis for concluding that [the defendant] failed to demonstrate a 'reasonable probability' that his substantial rights were affected." *Ibid.*

The Fifth and Ninth Circuits have likewise granted appellate relief for violations of Rule 11(c)(1) even when a defendant did not object to the district court's participation, and subsequently entered a plea agreement. *See Miles*, 10 F.3d at 1141 (holding defendant's substantial rights were affected, despite second plea agreement, when the second plea agreement "corresponded exactly to the court's suggestion [of what] would be necessary before it would accept an agreement[]"); *Kyle*, 734 F.3d at 966 (holding defendant's substantial rights were affected, despite second plea agreement, when "it is unlikely [the defendant] would have so quickly agreed to a significant extension of his custodial sentence in exchange for no additional benefit[]" but-for the district judge's comments). While those circuits did not expressly reject the reasoning employed by the court of appeals in this case, by granting relief after

the respective defendants pleaded guilty—thereby partaking in the same plea colloquy as petitioner in this case—the Fifth and Ninth Circuits have implicitly rejected the court of appeals' reasoning.

Indeed, while the court of appeals ignored the decision from the Fourth Circuit, it seemingly recognized the incompatibility of its decisions with those of the Fifth and Ninth Circuits. *See* App., *infra*, 8a-9a. Accordingly, the court of appeals stated those decisions were unpersuasive because they were decided incorrectly through the application of an automatic vacatur standard expressly rejected by this Court in *United States v. Davila*. *See* App., *infra*, 8a. This is incorrect. Though the Fifth Circuit's decision preceded this Court's decision in *United States v. Davila*, it expressly rejected an automatic vacatur standard, and instead granted relief under the totality of the circumstances standard required by this Court's decision in *Davila*. *See Miles*, 10 F.3d at 1140-41 ("Previously, we identified judicial participation in plea negotiations as an error implicating a core concern of Rule 11. As such, we might have found that a guilty plea entered after judicial participation was reversible error *per se*. However, Rule 11(h) and our recent decision in *United Sates v. Johnson*, 1 F.3d 296 (5th Cir. 1993) (*en banc*), compel harmless error review." (emphasis added) (citation omitted)). The Ninth Circuit's decision is also indistinguishable on this basis because it explicitly applied the totality of circumstances standard mandated by this

Court in *United States v. Davila*. *See Kyle*, 734 F.3d at 966.[1] The court of appeals failed to—and cannot—meaningfully distinguish its decision to employ reasoning rejected by the Fourth, Fifth, and Ninth circuits.

The circuit conflict created by the court of appeals' decision will persist unless this Court intervenes. The court of appeals' decision holds the facts needed to employ plain-error review are dispositive evidence that relief cannot be issued under the plain error standard. App., *infra*, 10a-12a. The court has denied petitioner's petition for en banc review. App., *infra*, 13a. The court has thus cemented its impossible plain-error standard. Review by this Court is necessary to correct that error, and to bring the court in line with its sister circuits.

III. The Question Presented Is Recurring And Important.

Without this Court's intervention, the circuit conflict will continue to affect a substantial number of cases. Guilty pleas account for 97% of federal criminal convictions. *Missouri v. Frye*, 566 U.S. 134, 143 (2012). District courts presiding over such cases will not always refrain from participating in plea discussions, thereby violating Rule 11(c)(1).

That is precisely what happened in this case. Petitioner did not ask the district judge to interject himself into plea discussions. Nevertheless, the district judge volunteered—unprompted—the minimum terms that he would accept. And once the

[1] *United States v. Sanya* is also not distinguishable on the ground identified by the court of appeal because it also followed this Court's decision in *United States v. Davila*, and expressly applied the standard announced therein. *See Sanya*, 774 F.3d at 818-19.

district judge delineated his desires to the parties, predictably, those desires dominated the course of the future plea discussions. *Cf.* Second Plea Agreement, at 5-6 (adopting the exact plea terms the district court advised were acceptable to it). This is unsurprising because, once a district judge has delineated what terms are and are not acceptable, those terms will necessarily dominate any future negotiations between a defendant and the government. *See United States v. Adams*, 634 F.2d 830, 835 (5th Cir. 1981) ("Statements and suggestions by the judge are not just one more source of information to plea negotiators; they are indications of what the judge will accept, and one can only assume that they will quickly become 'the focal point of further discussions.'" (quoting *United States v. Werker*, 535 F.2d 198, 203 (2d Cir. 1976))). Despite this inevitability, in the opinion of the court of appeals, such infection of the plea discussion process does not afford a defendant relief so long as he does not object to the violation, and later pleads guilty. This Court should grant certiorari to reaffirm that Rule 11(h) allows a defendant to seek relief even if no immediate objection occurs.

IV. This Case Is An Ideal Vehicle For The Question Presented.

This case squarely presents the issue of whether the failure to object to a violation, or otherwise move to set aside a subsequent guilty plea, denies a defendant relief under the plain-error standard despite the defendant's actual reliance on the district judge's plain violation of Rule 11(c)(1). Petitioner did not object to the district judge's plain violation of Rule 11(c)(1). *See* First Plea Hearing Tr., at 10 & 13. And when petitioner subsequently entered a plea agreement adopting the specific

sentencing parameters dictated by the district judge, understanding the sentencing recommendation was not binding. *See* Second Plea Hearing Tr., at 6-7. Nevertheless, petitioner explicitly identified—before imposition of a sentence—that the district judge's comments affected his decision to enter his guilty plea. *See* Sentencing Tr., at 39. This case presents an ideal vehicle for answering the question of whether the lack of an objection to a Rule 11(c)(1) violation—the prerequisite for plain-error review—is dispositive evidence that a defendant cannot obtain relief under the plain error standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 16 day of December, 2022.

Respectfully submitted,

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United States Court of Appeals
For the Eighth Circuit

No. 22-1112

United States of America

Plaintiff - Appellee

v.

Douglas James Schneider

Defendant - Appellant

Appeal from United States District Court
for the District of North Dakota - Western

Submitted: June 14, 2022
Filed: July 20, 2022

Before GRUENDER, BENTON, and GRASZ, Circuit Judges.

BENTON, Circuit Judge.

According to the government, in 2018, Douglas J. Schneider drove his stepdaughter from their home in North Dakota to Montana with the specific intent of engaging in sexual acts with her—one of many instances of Schneider's sexual abuse of her from age 7 to 11.

In February 2021, Schneider and the government reached a binding plea agreement: Schneider would plead guilty to transportation of a minor in violation

of 18 U.S.C. § 2423(a) and receive a below-guideline sentence of 150 months. At a change-of-plea hearing in March, the district court rejected the plea agreement:

> Well, I'm not going to accept this binding plea agreement. Mr. Heck, your client can either have the three points or he can take it to trial. And I will tell you this, I'll sentence him within the guideline range, but he's not going to get a 15-year sentence for this type of conduct, particularly involving somebody in his care.

The government asked if the parties could submit a future plea agreement informally. The district court answered, "I'm okay with that. And as I indicated, I'll sentence him within the guidelines under a 37—so we're looking at 210 to 262 months—but he's not going to get 15 years. He's going to get more than that."

In July, the parties reached a second plea agreement. It was nonbinding: in exchange for Schneider's guilty plea, the government would recommend a sentence of 210 months—the lower limit of the guideline range as calculated by the district court during the first hearing. In September, the district court held a second change-of-plea hearing to evaluate Schneider's understanding of the agreement:

> THE COURT: I see that the Plea Agreement is nonbinding. Do you know what that means?
>
> THE DEFENDANT: Yes. That you can accept it and that you don't have to accept it as written.
>
> THE COURT: Well, what it means is that you and your attorney and the government are going to give me some recommendations as far as the amount of time that you want—will—should receive for this criminal violation for prison time, and I can do what I want; what they suggest is not binding on me in any way. Do you understand that?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: So what you and your attorney have talked about, I can throw that out the window and sentence you to the max, maximum amount of time, that the law will allow. And if that occurs, you're stuck

> with your change of plea. So this is a do-or-die moment; if you change your plea today, you can't go back. Do you understand that?
>
> THE DEFENDANT: Yes, Your Honor.

The district court also confirmed that Schneider was aware of the maximum sentence:

> THE COURT: Paragraph 7 sets out the maximum penalty for a plea of guilt or a finding of guilt by a judge or jury with regard to Count One of the Indictment. Do you understand, sir, with regard to a plea of guilty, if you enter that here, that I can imprison you for any amount of years up to the rest of your life?
>
> THE DEFENDANT: Yes, Your Honor.

At the end of the second hearing, the district court accepted Schneider's guilty plea.

In December, a pre-sentence report was prepared. The PSR calculated a guideline range of life, due to a 2-level enhancement for undue influence and a 5-level enhancement for pattern of activity involving prohibited sexual conduct with minors. *See* **U.S.S.G. § 2G1.3(b)(2)(B)**, **U.S.S.G. § 4B1.5**. Schneider objected to the PSR but did not move to withdraw his guilty plea.

In January 2022, at the sentencing hearing, Schneider's counsel urged the court to impose a sentence within the range discussed at the first change-of-plea hearing:

> . . . the guideline range, based on what it came back at, as [the prosecutor] indicated, wasn't contemplated at the time that it would end up at life. I think that just—I'm not trying to throw any quotes back from the Court either from the first plea hearing, but I don't think any party involved at that time anticipated that guideline range; and the Court at paragraph 12 of the initial plea hearing noted that, and I think Mr. Schneider was in part relying on that he'd be sentenced under a 37 looking at 210 to 262 months . . . . And in light of that, we would request that the Court proceed with a range consistent with the Plea Agreement

> and consistent with the Sentencing Guideline range discussed at the end of the initial plea hearing with a 210 to 262 months understanding what the guidelines came back at.

The district court imposed a sentence of life without the possibility of parole: "As per the Court's recitation of the sentencing expectation, the Court is not bound by the sentencing expectation that was presented to the Court at the time. The Court indicated it would give Mr. Schneider a guideline sentence and that's what I will do today."

Schneider appeals, arguing that the district court participated in plea negotiations in violation of Rule 11(c)(1) of the Federal Rules of Criminal Procedure, requiring vacatur of his conviction and sentence. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

The government argues that Schneider waived his right to appeal. "Whether a valid waiver of appellate rights occurred is a question of law that we will review de novo." ***United States v. Haubrich***, 744 F.3d 554, 556 (8th Cir. 2014).

A defendant's right to appeal is statutory, not constitutional, and may be waived. ***United States v. Andis***, 333 F.3d 886, 889 (8th Cir. 2003) (en banc), *quoting* ***Abney v. United States***, 431 U.S. 651, 656 (1977). This court "must confirm that the appeal falls within the scope of the waiver and that both the waiver and plea agreement were entered into knowingly and voluntarily." ***Id.*** at 889-90.

In the second plea agreement, Schneider waived "all rights to appeal or collaterally attack . . . [his] conviction or sentence [and] all non-jurisdictional issues." Because Schneider's appeal requests vacatur of his conviction and sentence, it falls within the scope of the waiver.

However, a violation of Rule 11(c)(1) is appealable unless the defendant specifically waives "an appeal challenging the voluntariness of his plea." ***United States v. Thompson***, 770 F.3d 689, 694 (8th Cir. 2014). The plea agreement in *Thompson* said: "By signing this agreement, defendant voluntarily waives defendant's right to appeal the Court's judgment against defendant . . . . Defendant reserves only the right to appeal from a sentence that is greater than the upper limit of the Court-determined Sentencing Guidelines range." Plea Agreement, ***United States v. Thompson***, No. 3:12-cr-00029, DCN 71 at 11 (N.D. Oct. 4, 2012), *available in* Appellee's Br., ***United States v. Thompson***, 2013 WL 2318007 at *21 (8th Cir. 2013). The defendant appealed his conviction and sentence, claiming Rule 11 violations. This court did not enforce the waiver: "Thompson specifically argues . . . that as a result of the alleged Rule 11 violations, both his guilty plea and appeal waiver were not entered into knowingly and voluntarily. Because Thompson did not waive an appeal challenging the voluntariness of his plea, we address his arguments." ***Thompson***, 770 F.3d at 694.

Schneider's waiver of appellate rights is like the waiver in *Thompson*—it does not specifically "waive an appeal challenging the voluntariness of his plea." ***Id.*** Schneider did not waive his right to this appeal.

II.

Because Schneider did not object before the district court, his Rule 11 argument is subject to plain error review. *See* ***United States v. Foy***, 617 F.3d 1029, 1034 (8th Cir. 2010) ("Instances of noncompliance with Rule 11 may be raised for the first time on appeal, but our review is for plain error."). Schneider must show that the district court committed an error, which is plain, which affected his substantial rights, and failure to correct the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See* ***United States v. Todd***, 521 F.3d 891, 896 (8th Cir. 2008), *citing* ***United States v. Olano***, 507 U.S. 725, 732 (1993).

A.

"Rule 11 governs pleas, and among other things, prohibits judicial involvement in plea negotiations with criminal defendants, stating that '[t]he court must not participate' in plea discussions." ***United States v. Nesgoda***, 559 F.3d 867, 869 (8th Cir. 2009), *quoting* **Fed. R. Crim. P. 11(c)(1)**. This court has "strictly construed the rule to require an absolute prohibition upon district court participation in plea negotiations." ***Id.*** "Under Rule 11, the judge's role is 'limited to acceptance or rejection of agreements after a thorough review of all relevant factors.'" ***Thompson***, 770 F.3d at 695, *quoting* ***United States v. Gallington,*** 488 F.2d 637, 640 (8th Cir. 1973).

The government likens this case to *Nesgoda*, where the district court "merely explained the effect of the terms already on the table" without "inject[ing] [its] own terms into the plea agreement." ***Nesgoda***, 559 F.3d at 869 (alterations added).

However, this case is more like *Thompson*. The plea agreement there reduced the drug quantity charged in exchange for a guilty plea to two counts. ***Thompson***, 770 F.3d at 690. The reduction lowered the statutory minimum sentence to 12 years; the maximum sentence remained life. The day before trial, Thompson notified the district court he would accept the plea agreement. ***Id.*** at 691. The next morning, however, Thompson stated he had changed his mind and wanted a trial. The district court told Thompson that he was "engaging in a 'high-risk strategy [ ] because on one hand you've got 12 years,' and '[y]ou're a young enough man that it seems probable that you will be able to serve that sentence and walk out of prison someday, all right?'" ***Id.*** at 695. After a 15-minute recess, Thompson decided to take the plea agreement. ***Id.*** at 692. The district court sentenced him to the statutory maximum of 480 months on the first count, and a consecutive statutory maximum of life on the second count. ***Id.*** at 693. Thompson appealed, claiming multiple Rule 11 violations.

Because "the district court's comments suggested a sentence of 12 years was a possible outcome if Thompson entered the plea agreement and pleaded guilty," this court "[a]ssum[ed] for the sake of analysis that the district court's comments constituted improper participation in plea negotiations in violation of Rule 11, and

that the error was plain." ***Id.*** at 696 (alterations added). This court condemned a district court "engag[ing] itself in the negotiation of particular terms or conditions of the plea agreement" by "committing itself to a 'sentence of at least a certain level of severity,'" "telling parties what sentence it would find acceptable," or "respond[ing] favorably" to new proposals. ***Id.*** at 695 (alterations added), *citing* ***United States v. Crowell,*** 60 F.3d 199, 205 (5th Cir. 1995); ***United States v. Kyle,*** 734 F.3d 956, 964-65 (9th Cir. 2013); *and* ***United States v. Kraus,*** 137 F.3d 447, 455-57 (7th Cir. 1998).

At the first change-of-plea hearing here, the district court said, "I will tell you this, I'll sentence [Schneider] within the guideline range . . . . [A]s I indicated, I'll sentence him within the guidelines under a 37—so we're looking at 210 to 262 months . . . ." These comments did more than suggest that a sentence of 210 months was possible. They committed the court to a sentence of at least a certain level of severity and within a particular range.[1] Under *Thompson*, this is plain error. *See* ***id.*** (district court may not "engage itself in the negotiation of particular terms or conditions of the plea agreement"), *citing* ***Crowell***, 60 F.3d at 204-05 (district court committing itself to a "sentence of at least a certain level of severity" is "precisely th[e] type of participation that is prohibited by Rule 11" (alteration added)); ***Kyle***, 734 F.3d at 960 (plain error where district court told the parties it would accept a sentence "substantially above-guideline" but lower than "the statutory maximum [of life imprisonment]"); *and* ***Kraus,*** 137 F.3d at 454 ("Once the court has rejected that agreement, its license to speak about what it finds acceptable and unacceptable—to suggest an appropriate sentencing range, for example—is at an end.").

[1]This renders irrelevant the government's assertion: "The court's statement regarding the potential sentencing range of 210 to 262-months was not offered by the court as an 'acceptable' range"; the district court "merely offered that it would impose a within the guidelines range sentence, whatever the range may be."

B.

Schneider must show that the district court's error affected his substantial rights. *See* ***United States v. Harrison***, 974 F.3d 880, 882 (8th Cir. 2020). "To show the errors affected his substantial rights in this context, [the defendant] must demonstrate a reasonable probability that but for the error, he would not have entered a guilty plea." ***Thompson***, 770 F.3d at 696 (alteration added) (quotation marks omitted), *citing* ***United States v. Dominguez Benitez***, 542 U.S. 74, 82 (2004).

Schneider cites other circuits' cases indicating that a Rule 11(c)(1) error necessarily affects substantial rights. *See* ***Kraus***, 137 F.3d at 457 ("[I]nsofar as judicial intervention in the negotiation of a plea agreement is concerned, the possibility of harmless error may be more theoretical than real."). *See also* ***United States v. Bradley***, 455 F.3d 453, 463 (4th Cir. 2006) ("[I]t will be rare that a clear violation of Rule 11's prohibition against judicial involvement in plea negotiations does not affect substantial rights."), *citing* ***United States v. Miles***, 10 F.3d 1135, 1141 (5th Cir. 1993) ("The government does not cite, nor does our research find, one instance in which a federal court has found judicial participation in plea negotiations to be harmless error.").

The cases Schneider cites were decided before the Supreme Court's decision in *United States v. Davila*, 569 U.S. 597 (2013). The Court there ruled that Rule 11(c)(1) violations are not structural error. The question presented was whether "the violation of Rule 11(c)(1) by the Magistrate Judge warranted automatic vacatur of Davila's guilty plea." ***Davila***, 569 U.S. at 600. The Court's answer: "Nothing in Rule 11's text . . . indicates that the ban on judicial involvement in plea discussions, if dishonored, demands automatic vacatur of the plea without regard to case-specific circumstances." ***Id.*** at 609. The Supreme Court emphasized that the "class of errors that trigger automatic reversal" is "very limited," and that "Rule 11(c)(1) error does not belong in that highly exceptional category." ***Id.*** at 611 (quotation mark omitted). *See also* ***Dominguez Benitez***, 542 U.S. at 81, n.6 ("Dominguez does not argue that either Rule 11 error generally or the Rule 11 error here is structural . . . . The argument, if made, would not prevail."); ***United States v.***

Coleman, 961 F.3d 1024, 1028 (8th Cir. 2020) (rejecting defendant's argument that the Rule 11 violation "'affect[ed] [his] substantial rights as a *per se* matter' and thus constitute[d] structural error that require[d] automatic reversal" (alterations added)). Courts reviewing Rule 11(c)(1) errors are to examine the "particular facts and circumstances" to determine "whether it was reasonably probable that, but for the [district court's] exhortations, [the defendant] would have exercised his right to go to trial." ***Davila***, 569 U.S. at 611-12 (alterations added).

Following *Davila*, this court in *Thompson* "look[ed] at the entire record" to determine whether the defendant satisfied his burden. ***Thompson***, 770 F.3d at 697, *citing* ***Davila,*** 569 U.S. at 612. Crucial to this court's analysis was the fact that the district court ensured that Thompson knew that it *could* impose a more severe sentence than the one suggested by its earlier improper comments:

> [E]vents on the day Thompson pleaded guilty . . . indicate . . . that the Rule 11 errors [did not] influence his decision to plead guilty . . . . [H]e was informed of th[e] fact . . . [that] he still faced a possible sentence of life imprisonment . . . in the plea agreement he signed in open court at the hearing. The court discussed the plea agreement with him at the hearing, and Thompson stated under oath he understood the maximum and minimum penalties he faced if he pleaded guilty or was convicted after trial . . . . As for Thompson's assertion that "the court['s comments] caused him to believe he might be sentenced to only 12 years," the district court expressly told Thompson that his sentence could be longer: "The Court could still sentence you to a higher amount but the least that they could sentence you to is that 12 years."

Id. at 696-97 (alterations added). Based on this colloquy, this court found no reasonable probability that, but for the Rule 11 errors, Thompson would not have pled guilty. ***Id.*** at 698*, citing* ***Todd***, 521 F.3d at 896 (defendant could not show that his substantial rights were affected because "[a]lthough [he] may have begun the plea hearing under the belief that he would be sentenced to a term of five years' imprisonment" due to a plain error under Rule 11, "the district court made clear at two different points in the hearing that the sentence could be 'harsher' than, and 'far in excess' of, five years' imprisonment").

At the second change-of-plea hearing here, the district court confirmed that Schneider was aware that the agreement's recommendations were not binding, that the district court could impose a sentence above the range it calculated at the first change-of-plea hearing, and that the maximum sentence was life. While Schneider may have hoped for a sentence within the range discussed at the first hearing, this colloquy shows that he knew the "plea agreement he entered offered that possibility, but not that guarantee." ***Id.*** Because Schneider repeatedly acknowledged that the district court could impose a life sentence despite its comments at the first change-of-plea hearing, he has failed to show a reasonable probability that he would not have pled guilty but for those comments. ***Id.*** at 696, *citing* ***Dominguez Benitez,*** 542 U.S. at 82.

Schneider stresses that his case is distinguishable from *Thompson* because he mentioned his reliance on the district court's improper comments at sentencing. *Compare* ***id.*** at 698 ("[E]ven during the sentencing hearing, Thompson failed to give any indication that the district court had lead [sic] him to expect a particular sentence in exchange for pleading guilty.") *with* Transcript of Sentencing Hearing, ***United States v. Schneider***, No. 1:19-cr-00124, DCN 48 at 39 (N.D. Jan. 18, 2022) ("I think Mr. Schneider was in part relying on that he'd be sentenced under a 37 looking at 210 to 262 months . . . . And in light of that, we would request that the Court proceed with a range consistent with the Plea Agreement and consistent with the Sentencing Guideline range discussed at the end of the initial plea hearing . . . .").

While this distinction does favor Schneider, other factors discussed by *Thompson* do not. Temporal proximity favored the defendant in *Thompson*. ***Thompson***, 770 F.3d at 696-97 ("Thompson told the district court three times he wanted to go to trial. After a brief recess, Thompson informed the court he wanted to plead guilty. The plea hearing immediately followed. The temporal proximity between a court's improper participation in plea negotiations and a plea hearing is a circumstance that may support a finding of prejudice."). In this case, six months passed between the court's improper participation (at the first change-of-plea hearing in March) and Schneider's guilty plea (at the second change-of-plea hearing in September).

Other factors that favored affirmance in *Thompson* also favor affirmance here. The second plea agreement offered Schneider the benefit of a recommended sentence at the bottom of the expected guideline range. ***Id.*** at 697 ("[W]e note that at the time he entered it, the plea agreement did offer Thompson a benefit: a lower mandatory minimum sentence on Count 1, and the opportunity to receive less than a mandatory life sentence on Count 2."). And like Thompson, Schneider did not move to withdraw his guilty plea after the PSR calculated a higher guideline range. ***Id.*** at 698 ("And, significantly, Thompson never sought to withdraw his guilty plea, because of Rule 11 errors or for any other reason, even after he received a copy of the PSR.").

Another consideration in *Thompson* was the defendant's ability to use the Rule 11 violation to obtain multiple bites at the apple. *See* ***Thompson***, 770 F.3d at 698 ("Thompson understandably hoped for a sentence of less than life imprisonment after pleading guilty and waiving his right to trial. The plea agreement he entered offered that possibility, but not that guarantee."). This case illustrates the potential for abuse of a structural-error approach to Rule 11(c)(1): if the defendant finds the sentence suggested by the improper comments unacceptable, he could object and get reassignment; if the suggested sentence is acceptable, the defendant could not object and hope the court imposes the suggested sentence; if the court imposes a higher sentence, the defendant could appeal and get vacatur, remand, and reassignment. *See also* ***Todd***, 521 F.3d at 897 ("[I]t was only after the district court imposed a sentence far in excess of five years (as it cautioned was possible), and Todd recognized that his plea agreement did not produce the benefit for which he had hoped, that Todd sought to set aside his guilty plea based on non-compliance with Rule 11. Accordingly, we conclude that relief is not warranted.").

Although at least one factor favors Schneider, the particular facts and circumstances in the entire record here do not show that the Rule 11 violation affected Schneider's substantial rights. *See* ***Thompson***, 770 F.3d at 696 (defendant's substantial rights not affected even though one factor "suggest[ed] that the Rule 11 errors may have influenced his decision to plead guilty" (alteration added)). *Accord* ***United States v. Davila***, 749 F.3d 982, 995 (11th Cir. 2014) ("several factors . . .

convinced us that, in light of the whole record, [the defendant] had failed to meet his burden" of showing that he would not have pled guilty but for the Rule 11(c)(1) violation, despite one factor "tend[ing] to suggest that the remarks precipitated the plea" (alterations added)), *describing* ***United States v. Castro***, 736 F.3d 1308, 1314 (11th Cir. 2013); ***United States v. Ushery***, 785 F.3d 210, 222 (6th Cir. 2015) ("two potentially negative factors" indicating that the defendant would not have entered a guilty plea but for the Rule 11(c)(1) violation were "substantially neutralized" by other facts and circumstances).

* * * * * * *

The judgment is affirmed.

GRUENDER, Circuit Judge, concurring in part and concurring in the judgment.

I agree with the court that Schneider cannot establish that the alleged Rule 11(c)(1) error by the district court affected his substantial rights. However, as the court did in *United States v. Thompson*, I would "[a]ssum[e] for the sake of analysis" that there was a plain error. *See* 770 F.3d 689, 696 (8th Cir. 2014). It is not necessary to decide this question, and our decision in *Thompson* does not support a finding of plain error in this case. In the absence of decisions of this court supporting a finding of plain error under these circumstances, I am reluctant to adopt out-of-circuit precedent on the question where it is not necessary to resolve the case before us.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1112

United States of America

Appellee

v.

Douglas James Schneider

Appellant

Appeal from U.S. District Court for the District of North Dakota - Western
(1:19-cr-00124-DMT-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

September 22, 2022

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

/s/ Michael E. Gans

DEFENDANT: **Douglas James Schneider**
CASE NUMBER: **1:19-cr-124**

ADDITIONAL IMPRISONMENT TERMS

The defendant must not communicate, or otherwise interact, with M.J., L.L., Jill Henry, or Jill Henry's family, either directly or through someone else.

The defendant must not have direct contact with any child under the age of 18. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.

DEFENDANT: **Douglas James Schneider**
CASE NUMBER: **1:19-cr-124**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

10 YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You 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 you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You 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. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☑ You 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 you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You 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: **Douglas James Schneider**
CASE NUMBER: **1:19-cr-124**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your 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 your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You 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. You 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 that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: **Douglas James Schneider**
CASE NUMBER: **1:19-cr-124**

SPECIAL CONDITIONS OF SUPERVISION

1. You must not have direct contact with any child you know or reasonably should know to be under the age of 18, including M.J., L.L., or any other child, without the permission of the probation officer. If you do have any direct contact with any child you know or reasonably should know to be under the age of 18, without the permission of the probation officer, you must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.

2. You must not communicate, or otherwise interact, with M.J., L.L., Jill Henry, or Jill Henry's family, either directly or through someone else, without first obtaining the permission of the probation officer.

3. You must participate in a program aimed at addressing specific interpersonal or social areas, for example, domestic violence, anger management, marital counseling, financial counseling, cognitive skills, parenting, at the direction of your supervising probation officer.

4. You must not engage in an occupation, business, profession, or volunteer activity that would require or enable you to have direct or indirect contact with minors without the prior approval of the probation officer.

5. You must participate in mental health treatment/counseling as directed by the supervising probation officer.

6. You must not go to, or remain at, any place you know is primarily frequented by children under the age of 18, including parks, schools, playgrounds, and childcare facilities.

7. You must not go to, or remain at, a place for the primary purpose of observing or contacting children under the age of 18.

8. You must not access the Internet except for reasons approved in advance by the probation officer.

9. You must not possess and/or use computers (as defined in 18 U.S.C. § 1030(e)(1)) or other electronic communications or data storage devices or media.

10. You must submit to periodic polygraph testing at the discretion of the probation officer as a means to ensure that you are in compliance with the requirements of your supervision and/or treatment program.

11. As directed by the Court, if during the period of supervised release the supervising probation officer determines you are in need of placement in a Residential Re-Entry Center (RRC), you must voluntarily report to such a facility as directed by the supervising probation officer, cooperate with all rules and regulations of the facility, participate in all recommended programming, and not withdraw from the facility without prior permission of the supervising probation officer. The Court retains and exercises ultimate responsibility in this delegation of authority to the probation officer.

12. You must submit your 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. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have 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.

13. You must participate in a sex offense-specific assessment. This participation in a sex offense specific assessment may include visual response testing.

14. You must participate in a sex offense-specific treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

DEFENDANT: **Douglas James Schneider**
CASE NUMBER: **1:19-cr-124**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	**$ 100.00**	**$ 19,615.01**	**$**	**$**	**$**

☐ 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.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
Jill Henry		**$19,615.01**	

TOTALS	**$ 0.00**	**$ 19,615.01**

☐ 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:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings 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: **Douglas James Schneider**
CASE NUMBER: **1:19-cr-124**

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 $ **19,715.01** 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:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, PO Box 1193, Bismarck, North Dakota, 58502-1193.

While on supervised release, the defendant shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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 shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall 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) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.