APPENDIX

Appendix A – Ninth Circuit Opinion Affirming Sentence 2a

Appendix B – Ninth Circuit Order Denying Petition for Rehearing En Banc 6a

Appendix C – Excerpt of Sentencing Hearing Transcript 7a

Appendix D – Excerpt of Defendant's Sentencing Memorandum 21a

Appendix E – Statutory Provisions 30a

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 16-10237
	)	
Plaintiff-Appellee,	)	D.C. No. 4:14-cr-00638-JD-1
	)	
v.	)	MEMORANDUM*
	)	
KONRAD WOLFF,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
For the Northern District of California
James Donato, District Judge, Presiding

Argued and Submitted October 19, 2017

San Francisco, California

Before: IKUTA and HURWITZ, Circuit Judges, and GWIN,** District Judge.

Konrad Wolff appeals his conviction and sentence entered after a bench trial on stipulated facts for receiving child pornography in violation of 18 U.S.C. § 2252(a)(2). We affirm.

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

*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

1. Wolff argues that police violated the Fourth Amendment's prohibition against unreasonable seizures by accepting his hard drive and other electronic devices from his wife. The district court correctly rejected this argument. There is no evidence that Wolff's wife acted as an agent of the police; rather, the record is clear that she contacted the police and voluntarily relinquished the items because she was concerned they contained child pornography. "The government's acceptance of documents obtained in a private search and voluntarily relinquished to government agents does not constitute a seizure ...." *United States v. Black*, 767 F.2d 1334, 1340 n.4 (9th Cir. 1985); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) ("Had [the defendant's wife], wholly on her own initiative, sought out her husband's guns and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence."). We reject Wolff's argument that *Black* was superseded by *United States v. Jacobsen*, 466 U.S. 109 (1984) and *United States v. Jones*, 565 U.S. 400 (2012). A three-judge panel must follow the decisions of previous panels unless the prior decision "is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). *Jacobsen* is not "intervening" authority because it was decided after *Black*. *Jones* is not "clearly irreconcilable" with *Black* because it is concerned with searches rather than seizures, *see Jones*, 565 U.S. at 408, 132 S.Ct. 945, and does not consider whether a Fourth Amendment seizure occurs when a private citizen voluntarily relinquishes another's property to the government.

2. Wolff argues that the search warrants pursuant to which the hard drive and the electronic devices were searched were not premised on a showing of probable cause. To the contrary, the affidavits submitted by a police officer in support of the warrant applications provided ample reason to find probable cause. The affidavit in support of the warrant application to search the hard drive stated that Wolff's wife had personally viewed the photos on the hard drive and reported seeing " 'hundreds' of images of minors engaged in sexual acts or exposing themselves in a sexual manner." *See United States v. Smith*, 795 F.2d 841, 847–49 (9th Cir. 1986). The affidavit in support of the warrant application to search the other devices added that, based on the officer's training and experience, "pedophiles collect and keep such sexually explicit materials ... on computers, computer peripherals, and other electronic devices capable of storing and/or viewing electronic information." *See United States v. Lacy*, 119 F.3d 742, 746 & n.6 (9th Cir. 1997).

3. Wolff argues that the district court committed procedural error by failing to recognize at the time of sentencing its ability to vary from the child pornography Guidelines under *Kimbrough v. United States*, 552 U.S. 85 (2007). "[A] district court commits procedural error when it fails to appreciate its Kimbrough discretion to vary from the child pornography Guidelines based on a categorical policy disagreement with them." *United States v. Henderson*, 649 F.3d 955, 964 (9th Cir. 2011). But, "district courts are not obligated to vary from the child pornography Guidelines on policy grounds if they do not have, in fact, a policy disagreement with them." *Id.* The judge expressly noted that he had "read and considered" Wolff's sentencing memorandum, which reminded the court of its discretion under *Kimbrough*. The judge also characterized the Guidelines during sentencing as "advisory," and imposed a sentence in the middle of the Guidelines range. And, the judge noted that though he had "some concerns that [the sentence] understates the gravity of Mr. Wolff's offense," the sentence was "sufficient but not greater than necessary to meet ... the policies of sentencing." There is thus no indication in this case that the district court either thought the Guidelines were too harsh or failed to appreciate its *Kimbrough* discretion.

4. Wolff argues his waiver of his challenge to the restitution award is invalid because the district court negotiated this waiver at sentencing. But, the district court neither "initiated" nor "directly negotiated" the waiver. *United States v. Gonzalez–Melchor*, 648 F.3d 959, 965 (9th Cir. 2011). Rather, the judge initially expressed his concerns about awarding Wolff a reduction under § 3E1.1(b) of the United States Sentencing Guidelines for "assist[ing] authorities in the investigation or prosecution of his own misconduct" because he "did not plead guilty," "has opposed all restitution," and "reserved his right to appeal," and invited counsel to respond. Wolff's counsel then indicated that the challenge to restitution was entirely "on legal grounds" and offered to "concede the restitution issue and moot that issue on appeal." After confirming that this was Wolff's desire, the court granted Wolff an additional level of reduction under § 3E1.1(b). The court neither requested an appellate waiver nor promised the § 3E1.1(b) reduction in return for the waiver. This case is thus not like *Gonzalez–Melchor*, in which the judge initiated the exchange by stating he would "like to hear" the defendant waive his right to appeal and that he would grant a "substantial reduction" in the sentence if the defendant did so. 648 F.3d at 961.

AFFIRMED.

GWIN, District Judge, dissenting:

I concur with the majority's Fourth Amendment analysis. However, I believe we should remand this case for resentencing. For that reason, I dissent in part.
At sentencing, the district court unnecessarily involved itself in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1). The district judge essentially engaged the defendant in a trade. If the defendant waived the defendant's objection to restitution, the district court would award a third level for acceptance of responsibility under § 3E1.1(b).

Although the government had earlier moved the court for a full three-level Guidelines reduction for acceptance of responsibility, the district judge refused the government's motion unless Wolff withdrew his objection to restitution. Thereafter, in exchange for Wolff's agreement not to challenge a restitution order, the district judge gave Wolff the full three-level acceptance of responsibility reduction.* Functionally, Wolff's Guidelines recommended incarceration shifted downward in exchange for Wolff's agreement not to challenge $6,000 in restitution.
Additionally, I believe that the district judge failed to adequately address Wolff's arguments regarding reasons to vary from the Guidelines under *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007).

Both the Supreme Court and the Ninth Circuit have held that "when a party raises a specific, non-frivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, then the judge should ... explain why he accepts or rejects the party's position." *United States v. Carty*, 520 F.3d 984, 992–93 (9th Cir. 2008) (en banc) (citing *Rita v. United States*, 551 U.S. 338, 356 (2007)). While the district judge here did provide a number of reasons for why he imposed the sentence he chose, he did not "go further and explain why he ... rejected" Wolff's nonfrivolous argument. *See Rita*, 551 U.S. at 357.

I respectfully dissent in part.

*Transcript of Sentencing Hearing at 6 ("The Court: 'So – we're clear . . . Mr. Wolff will pay the restitution to the three victims in the amounts specified in the presentence report and not challenge that order on appeal; is that right?' [Defense Attorney] Hansen: 'So waived.' The Court: 'Okay. All right. I will grant, then, the additional level of reduction on the government's motion.'").

APPENDIX B

FILED

DEC 20, 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 16-10237
	)	
Plaintiff-Appellee,	)	D.C. No. 4:14-cr-00638-JD-1
	)	
v.	)	Northern District of California,
	)	Oakland
KONRAD WOLFF,	)	
	)	ORDER
Defendant-Appellant.	)	
	)	

Before: IKUTA and HURWITZ, Circuit Judges, and GWIN,* District Judge.

The panel has voted to deny the appellant's petition for panel rehearing. Judges Ikuta and Hurwitz have voted to deny the petition for rehearing en banc, and Judge Gwin so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc (Dkt. 55) is DENIED.

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX C

EXCERPT OF SENTENCING HEARING TRANSCRIPT

Thursday, May 26, 2016 9:46 a.m.

PROCEEDINGS

THE CLERK: Calling criminal 14-638, United States of America versus Konrad P. Wolff.

(Pause in the proceedings.)

MR. JOINER: Good morning, Your Honor. Scott Joiner on behalf of the United States.

MS. HANSEN: Good morning, Your Honor. Angela Hansen on behalf of Mr. Wolff, who is present and out of custody.

PROBATION OFFICER: Good morning, Your Honor. Emily Libby from Probation.

THE COURT: Okay. We're here for Mr. Wolff's sentencing.

MS. HANSEN: Yes, Your Honor.

THE COURT: There a couple things I want to do before we get to the sentence itself.

Mr. Joiner, on the reductions for acceptance of responsibility, you've asked or proposed -- you've agreed, I guess, to three points; is that right?

MR. JOINER: That is correct, Your Honor.

THE COURT: All right. Why is that?

MR. JOINER: Because the defendant by agreeing to a stipulated bench -- stipulated fact bench trial did save the government considerable time and resources from preparing for trial.

THE COURT: Yeah, but why the third point? I can see the first two, but this is your motion. You've got to move for that third point, so I -- I'm skeptical about why he's entitled to a third point in this case. And here's my view and you can tell me why you disagree.And I'll hear from the defendant.

I mean, he did not plead guilty. He has opposed all restitution. He's reserved his right to appeal. I'm just not seeing what the third point's for. And with respect to a trial, I mean, this was not going to be a complicated trial. This was a fairly -- this could have been the easiest trial of your career based on the evidence that I saw, so what is this extra point for? I just -- I'm not following why he's entitled to that.

MR. JOINER: Your Honor, I do believe that the stipulated facts bench trial was more streamlined than an actual trial.We didn't have to call witnesses. I didn't have to spend any time preparing witnesses for their testimony.

THE COURT: But he did not plead guilty. I mean --

MR. JOINER: I agree with that.

THE COURT: So --

(Simultaneous colloquy.)

THE COURT: -- I mean, the trial would have been short and swift in my view. I mean, the evidence was pretty straightforward, so I just -- just help me out. Why is he getting a third point. I'm not -- I'm not seeing that extra level of cooperation, so –

MR. JOINER: I don't know that I can say it any differently.

THE COURT: Well, it's your motion. I mean, what's -- what are you calling --

(Simultaneous colloquy.)

THE COURT: That's it, just the stipulated trial?

MR. JOINER: Yes.

THE COURT: That's it.

MR. JOINER: That's the primary consideration because he did save the government significant time and resources. We did not have to prepare for trial. And I recognize that there's authority on both sides of that issue.

I don't think the fact that he proceeded with a stipulated fact bench trial in order to preserve his appeal would be an appropriate grounds for us to withhold that point.

THE COURT: Ms. Hansen.

MS. HANSEN: I agree with Mr. Joiner's last statement in particular, Your Honor. We -- As the court may recall, if we had done a conditional plea to preserve the appellate issue, he would have certainly received the third point. So it's just a matter of form in how we were able to preserve the appeal was to have to go through with the stipulated facts bench trial.

And, Your Honor, I do want the court to know we are opposing restitution on -- on legal grounds that the burden has not been met. If that's a concern of the court, Mr. Wolff and I have discussed it. We would obviously defer to Your Honor if the court would want to impose restitution and waive the issue.

THE COURT: What does that mean?

MS. HANSEN: That means that if the court is concerned about not awarding the third point based on restitution, Mr. Wolff would concede the restitution issue and moot that issue on appeal if it's important to Your Honor.

THE COURT: Well, is he agreeing to pay a certain amount for the victims?

MS. HANSEN: We would agree to pay the amount that the Probation Office recommended. I don't think it's a sound legal analysis; however, I would waive that issue for appeal, Your Honor, if that is something that Your Honor is concerned about.

THE COURT: Mr. Joiner?

MR. JOINER: If the defendant is willing to waive that issue on appeal and agree to the restitution amounts that have been recommended, then I think that would be an appropriate resolution, Your Honor.

I think it is important to award restitution here, particularly because restitution is mandatory and because the apportionment issues that the Ninth Circuit identified in *Galvan*, are incredibly difficult, so I have no objection if the defendant wants to waive that issue and agree to pay restitution.

THE COURT: All right. So -- So we're clear, Ms. Hansen, Mr. Wolff will pay the restitution to the three victims in the amounts specified in the presentence report and not challenge that order on appeal; is that right?

MS. HANSEN: So waived.

THE COURT: Okay. All right.

I will grant, then, the additional level of reduction on the government's motion. And we will require Mr. Wolff to pay the restitution. That's stated in the presentence report. I will get to release pending appeal at the end. So let me go forward, then.

I have read and considered the presentence report addendum and recommendation. The confidential psychological evaluation of Mr. Wolff which is under seal. The government's memorandums and attachments -- there are several of – those and the defendant's memorandums and attachments, which there are several as well.

Now, any other documents you think I should have read?

MS. HANSEN: No, Your Honor.

THE COURT: Mr. Joiner?

MR. JOINER: No, Your Honor.

THE COURT: Okay.

Now, Ms. Hansen, you met with Mr. Wolff and reviewed and discussed the presentence report?

MS. HANSEN: I did.

THE COURT: Do you have any concerns about his ability to understand the report?

MS. HANSEN: No concerns.

***

THE COURT: All right. Mr. Wolff, did you get that presentence report?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And did you read it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And did you understand it and feel like you grasped everything that that report was expressing?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Did you discuss any questions that you may have had about it with your attorney, Ms. Hansen?

THE DEFENDANT: I have discussed it with my attorney.

THE COURT: Did she answer all of your questions and inquiries to your full satisfaction?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And do you have any questions now about either the report or anything that you'd like to discuss with Ms. Hansen before I get to your sentence?

THE DEFENDANT: No, I don't have any questions to ask.

THE COURT: All right. Now, if anything comes up, just let me know, and you and Ms. Hansen can have a private word. Okay?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right.

Now, let's turn to the calculation of the advisory guidelines range. The superseding indictment in this case charged two counts against defendant. The government dismissed count one on December 18, 2015. And after a stipulated facts bench trial held that same day, the court found Mr. Wolff guilty of count two of the superseding indictment for receipt of child pornography in violation of 18 United States Code, Section 2252(a)(2).

And here are the advisory guidelines range calculation that I have determined. The court finds that base offense level is 22 under Sentencing Guideline Section 2G2.2(a)(2).

I have decreased the offense level by two points under Guideline Section 2G2.2(b)(1) because there is no evidence indicating that Mr. Wolff distributed the images that he possessed or received.

And I am applying a two-level increase under Guideline Section 2G2.2(b)(2)

because Mr. Wolff possessed material of children under the age of 12.

I am adding a four-level increase in addition to the two-level increase under Guideline Section 2G2.2(b)(4) because the material Mr. Wolff had portrayed sadistic or masochistic conduct specifically but not limited to material that portrayed children who were bound.

I'm applying an additional two-level increase under 2G2.2(b)(6) 'cause Mr. Wolff's offense involved the use of a computer.

An additional five-level increase also applies. That's under Sentencing Guideline Section 2G2.2(b)(7)(D) because Mr. Wolff had more than 600 images.

My understanding from the record, which I think was largely un- -- which is undisputed is that he possessed, in fact, over 96,000 digital images and over 700 videos depicting child pornography.

That results in an adjusted offense level of 33. As we discussed at the start of the today, I will award a three-level decrease for acceptance of responsibility. And that takes us to a total adjusted offense level of 30.

Okay.Mr. Joiner?

MR. JOINER: Agreed, Your Honor.

THE COURT: Ms. Hansen?

MS. HANSEN: Yes, Your Honor.

THE COURT: All right. Now, Mr. Wolff's criminal history category is one as discussed on the presentence report. I accept the category as appropriate for Mr. Wolff so criminal history category of one with a total offense level of 30 yields a guidelines range of 97 to 121 months of imprisonment.

And because the range falls into Zone D of the sentencing table, guidelines provide that the minimum term is to be satisfied by a sentence of imprisonment. That's under Sentencing Guideline Section 5C1.1(f).

The -- 18 United States Code Section 3583(k) and the guidelines require the court to impose a term of supervised release of between five years to life. Probation is expressly precluded by statute, 18 United States Code Section 3561(a)(2).

Now, with respect to fines, the maximum fine is $250,000 under 18 United States Code Section 3571B. And a special assessment of $100 is mandatory under 18

United States Code Section 3013.

Under Sentencing Guidelines Sections 5E1.2(c)(3) and 5E1.2(h)(1), the guidelines range for a fine in this case is between 15,000 and $150,000.

The sentencing guidelines also provide that the cost of prosecution should be imposed on Mr. Wolff as required by statute.

Restitution is to be ordered under 18 United States Code Section 3663(a). And as we discussed and put on the record this morning, Mr. Wolff has withdrawn his objections to restitution and will pay the amounts specified in the presentence report.

Forfeiture is also to be imposed on Mr. Wolff as provided by statute.

Is there a -- Is there forfeiture, Ms. Libby?

PROBATION OFFICER: Your Honor, the government would have to make a motion for forfeiture. It was not agreed upon in the plea agreement; therefore, we don't include it.

THE COURT: Mr. Joiner, what is it? The computers or –

MR. JOINER: It's the computers. The issue I have, Your Honor, is that the computers are actually contraband because they contain child pornography. I think we are going to move to forfeit those. And so I'll make that motion at this time.

THE COURT: You going to be able to identify them today?

MR. JOINER: I can by reference back to the indictment. We listed them by serial number.

THE COURT: Why don't you think about that while I'm -- have half a mind toward that while you're listening to what I'm doing so we can get to that, okay?

No departures have been requested, and the court sees no reason to depart in this case.Are there any victims present?

MR. JOINER: There are not, Your Honor, as far as I know.

THE COURT: Okay. The court has received victim statements, but there are no in-person victims who are going to appear today.

Now, Mr. Wolff, I'm getting close to pronouncing your sentence. Before I do, you have the right and the opportunity to make a statement to me if you'd like to. Now, it's not required. So if you choose not to, that's perfectly fine and will not be held against you. But if you wish to say something, now is the time.

THE DEFENDANT: I would like to address the court, Your Honor.

THE COURT: Get a little closer to the mic, please.

THE DEFENDANT: Excuse me. I'm a bit nervous.

THE COURT: You want a little water? Have some water.

THE DEFENDANT: Thank you, Your Honor.

(Pause in the proceedings.)

THE DEFENDANT: Your Honor, for 20 years I have worked my way to have a better life. I didn't come to the United States to become a criminal -- with intention of becoming a criminal. I came here to get my Bachelor's in history. I joined the Army. And I wanted to become a lawyer. Sorry. I -- I need to -- I wrote it down.

THE COURT: Take your time, look at your notes if you have them.

THE DEFENDANT: Now because of this situation, the plans that I have and the things I wanted to do are coming to pieces. Everything that I was hoping to achieve will be made mute (sic) because of this, and -- but most importantly, I have -- I will lose the chance to be with my father if I'm taken in today.

I guess you read that he is 85 years old. There are some health issues with him that have been brought up to my attention now. And I've -- I am very worried that I -- if I'm taken in, it would be -- I will never see him ever again.

My mother, she's not able to be here 'cause she's in Denmark. My father, he can't be here 'cause the thought that I'll be taken away by the marshals is too much for him to bear. The only one I have here is my sister who is taking off time from her school in San Diego. She's sitting over there.

THE COURT: Where is your sister?

THE DEFENDANT: And I have hurt them, and I have brought shame on them. And it's something I have to live with for the rest of my life, besides being register

as a sex offender and the -- whatever the outcome, you will never see me again here. That's for sure. Or in this situation.

This has been a very devastating experience. And I feel sorry for the victims of child pornography. When before I was ignorant of their pains, their situation has become very real and very aware to me right now.

Child pornography is a very serious and a devastating thing, and I should have known that.

THE COURT: Let me ask you a question, so you are going to get prison time. You know that. I will tell you the exact time but, you know, you're going to have time, and it's not going to be short. I mean, you know that whatever estimate you've had --

THE DEFENDANT: Yes, Your Honor.

THE COURT: It's going to be, you know, at least five years, okay?

THE DEFENDANT: Yes.

THE COURT: I will get to the amount in a moment. I'm not trying to drag that out.But what are you going to do during that time, Mr. Wolff? How are you going to use that time when you're in custody?

THE DEFENDANT: Well, I will do -- I want to do – I want to get counseling that is provided that will be provided for me.

THE COURT: You're doing that now.

THE DEFENDANT: Yes, Your Honor, I am seeing a – a counselor where I live.

THE COURT: And this is specific to --

THE DEFENDANT: He's --

THE COURT: -- sexual addiction to children?

THE DEFENDANT: His field is wide-ranging, but he's it's one of fields he works on.He works in. Sorry.

I mean, he and I have, we have a good rapport. And he's -- and we have worked through things. And there are some -- some issues that I have begin to realize might have been a reason for certain actions I have -- I might have done that in

the past have happened to me. But I still working on that.

THE COURT: All right. So you're going to continue with counseling. What else?

THE DEFENDANT: Honestly, Your Honor, I don't know what I can do in prison. I don't know what -- what options. I think I'll go school, or I don't -- I don't know what it is to do over there.

THE COURT: You have a BA in history, right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. I mean, if you were inclined, you might participate in -- I don't know if BOP does this, but you might have an opportunity to help tutor other inmates, maybe assist in reading programs, help people who have language problems, you know, become more literate.

You know, you could be a good volunteer and a resource. You stand out because you have had a more conventional background than most of the people I see, and you have a University of California Bachelor's degree so that's something that if you're so inclined, you might be able to put to good use while you're in custody.

But I'm -- I'm still waiting to hear, though, how you're going to make progress. I mean, counseling's fine. But you had 96,000 photographs of children, okay?

THE DEFENDANT: Yes, Your Honor.

THE COURT: That is not -- That is an atypically large amount. This was not a passing interest. This was not mere curiosity. Okay? This is a big issue that you need to work on, so I just -- I want to hear more about what you intend to do about that 'cause it is going to influence, you know, how long I think you should be in custody.

THE DEFENDANT: You're right, Your Honor. It was a lot. And -- And I -- I would like to say -- but if I say something, I will -- might mute (sic) things that for the motion.

THE COURT: Well, don't -- don't get into that. Just talk about your time and what you -- how you're going to use your
time.That's all you got to focus on, all right?

THE DEFENDANT: Well, I want to participate in counseling. I want to work through those issues and see if I can get them fixed.

THE COURT: All right. Anything else, Mr. Wolff?

THE DEFENDANT: Well, I just wanted to say I'm willing and ready to do whatever sentence you're ready to sentence upon me.

THE COURT: All right. Ms. Hansen, any comments?

MS. HANSEN: No, Your Honor.

THE COURT: All right.

MS. HANSEN: Oh, Your Honor.

THE COURT: I'm sorry. Did you say "yes"?

MS. HANSEN: May I just --

THE COURT: Get a little closer. I'm having trouble hearing.

MS. HANSEN: Thank you, Your Honor.

Your Honor raised a very good point about being a resource in prison to other inmates. And I did want to highlight for the court his sister's letter expressed how he's actually doing that right now for disadvantaged folks in his community. He's working at a grocery store in a disadvantaged neighborhood, and a lot of different folks who work there have gone to Konrad to help with things like resumes or legal issues that they're having -- not really legal but small issues, tickets and such.

And so he is already doing that in his life, and so I do see him continuing in that regard in custody, and so I appreciate the court's recommendation.

THE COURT: Okay.

Let's get to the sentence in a -- in determining the appropriate sentence for Mr. Wolff, I have considered the relevant factors set out by Congress in 18 United States Code Section 3553(a) to ensure that the sentence is sufficient but not greater than necessary to comply with the purposes of sentencing.

Sentence must reflect the seriousness of the crime, promote respect for the law, and provide just punishment for the offense.The sentence should also deter criminal conduct and protect the public from future crime by the defendant.

That's a factor I consider particularly important in this case, as well as promote

rehabilitation.

And in arriving at the sentence, I have considered also the nature and circumstances of Mr. Wolff's offense, his history and characteristics, the need to avoid unwarranted sentence disparities among similarly situated defendants and the types of sentences available.

And I have also carefully considered in addition to the Section 3553(a) factors the Sentencing Guidelines with respect to Mr. Wolff's offense.

Now, as I touched upon a moment ago, I am concerned --greatly concerned by the fact that Mr. Wolff had a unusually large number of images. You know, 96,000 still images and more than 700 videos. Some of these images showed girls as young as toddlers being sexually abused. And some picked -- Some depict children in pain and have captions referring to torture.

I'm also very concerned about the manuals that Mr. Wolff had in his possession. These manuals gave detailed, lengthy, very specific instructions on how to engage and subject children to sexual abuse.

Now, I read those manuals. They were painful for me to go through for obvious reasons, but I wanted to be clear about what Mr. Wolff may have been giving his attention to and what he may have had on his mind. And those manuals gave me some insight into that. And that has influenced my sentencing decision today.

In a nutshell, those manuals were effectively step-by-step guides on how to be a sexual predator of children.

Now, I am also particularly troubled by Mr. Wolff's attention to evading law enforcement detection. Another aspect of the manuals was a very detailed set of instructions on how to escape detection and avoid being arrested or found

out by law enforcement. They were a recipe book on how to conceal bad acts.

And the records indicates (sic) that Mr. Wolff's – some of his first words to his former wife when she discovered and confronted about him the child pornography on his devices -- some of his first words were to tell her to delete the files.

In addition to that, Mr. Wolff used the TOR, T-O-R, software. We -- it is well established that the TOR software is used primarily and possibly exclusively to try to conceal identity on the Internet and to remain anonymous. It is designed specifically to allow users to browse and share files without detection.

And it's a significant to me that Mr. Wolff was actually successful in avoiding law

enforcement detection and was actually turned in by his former wife when she by accident discovered his large collection of child pornography.

I am also concerned that Mr. Wolff has not fully taken responsibility for his conduct. Now, I have allowed the reductions under the Sentencing Guidelines for the reasons stated earlier. But as a sentencing principle and a 3553(a) concern, I -- I am worried about Mr. Wolff's tendency and consistent tendency to try to dismiss the huge collection of child pornography and manuals that he had as a product of being merely curious. That word turns up repeatedly in Mr. Wolff's description of why he engaged in this activity.

This is not curiosity. That goes without saying. But what I find troubling about his use of that term and his insistence on that term is that it indicates a failure to fully recognize and accept responsibility for his choice to engage in this type of conduct.

Now, the Probation Office has recommended a custodial sentence of 1108 months, which is about the middle of the guidelines range, followed by 15 years of supervised release.

The government concurs with that recommendation. Mr. Wolff requests that the court impose a custodial sentence of 60 months to be followed by no more than 5 years of supervised release.

Is there a problem?

PROBATION OFFICER: No, Your Honor. I mean, we recommended the low end of the old guideline range, so I would just note that for the record. The new low end of the guideline range is 97 months at a -- offense level.

THE COURT: PSR recommends 108 months.

PROBATION OFFICER: It was (sic), Your Honor.

THE COURT: I said the middle of the guidelines range.

PROBATION OFFICER: Yes.

THE COURT: Okay.

PROBATION OFFICER: Of -- The middle of the current guideline range.

THE COURT: Yes.

PROBATION OFFICER: -- is where it will be now. At the time, it was the low end of the guideline range.

MS. HANSEN: Are you still recommending the low end, is the question.

PROBATION OFFICER: We -- Our intention was to recommend the low end of the guideline range, so -- I guess what I'm saying is since that has changed, our recommendation was 108 at the low end of prior guideline range.

THE COURT: All right. So what's the recommendation now?

PROBATION OFFICER: So we would stick with our low-end recommendation of 97.

THE COURT: All right.

Mr. Joiner, what do you recommend?

MR. JOINER: 108 months, Your Honor.

THE COURT: All right.

Okay.So I will amend that by saying the Probation Office apparently now recommends 97 months.The government recommends 108, and the defendant recommends 60. Now, I am rejecting both 60 and 97. And with respect to the 108 months, I have some concerns that it understates the gravity of Mr. Wolff's offense and understates the need to protect the public from a man who at the very least appears poised to act on his child pornography interests with actual victims.

Now, I know there's no indication in the record that that has happened, and I'm certainly not assuming that that has happened, but it is hard to see how that size of collection with those types of manuals are not leading him on a fast track to actual victimization.

Now, nevertheless, although I do have the ability to go up significantly in his assistance (sic) -- in the sentence, I am going to accept the government's recommendation of 108 months of imprisonment and the Probation and government's recommendation of 15 years of supervised release.

Mr. Wolff will also be ordered to pay $100 in the mandatory special assessment.

All right. Now –

APPENDIX D

EXCERPT OF DEFENDANT'S SENTENCING MEMORANDUM

INTRODUCTION

Konrad Wolff had just turned 27 years old when his wife discovered child pornography on his hard drive and on other digital devices in their home. A forensic review of the images revealed that Mr. Wolff had been collecting images over the span of many years. Sizable collections like those recovered on the hard drive in this case are, unfortunately, common in the digital age where it is relatively simple to download and store voluminous amounts of data on computers and other storage devices. No one disputes the horrific nature of the videos and the images recovered in this case. Mr. Wolff acknowledges and understands the serious human cost of child pornography. But it must be understood that Mr. Wolff was a low-end possessor of illegal images. He did not molest a child, he did not produce child pornography, he did not distribute child pornography, and he did not have any inappropriate contact or communication with any minor. Moreover, Mr. Wolff did not communicate by phone, text message or over the Internet – in chat rooms, on web sites or by e-mail – with any pedophiles, molesters or collectors of similar images. His on-line collecting was self-contained and entirely private.

After his wife discovered the illegal pornography, she secretly recorded a call on which Mr. Wolff told her to get rid of it and that he did not want it. On this call, he confirmed what the forensic evidence in this case revealed: in all the years that he had been collecting, he had never made any attempt to reach out to harm a child. Months later when the FBI arrested Mr. Wolff and confiscated new devices, the FBI recovered no evidence that Mr. Wolff had resumed any of his on-line hoarding. In addition, Mr. Wolff was honest with the federal agents and accepted responsibility.

Because of a fear that those who possess child pornography will molest children, our criminal justice system has cast too wide a net, overly incarcerating collectors of readily- available images who, like Mr. Wolff, are not predators but require intensive treatment, counseling and community supervision to address their abnormal fixation on child pornography. Hopefully one day Congress will specifically tailor the child pornography laws to correct this anomaly. Until then, less-culpable collectors like Mr. Wolff who are in the federal system will continue to face substantial custodial terms, long periods of intense supervision and lifetime sex offender registration. Recently, Senior Judge Jack B. Weinstein of the Eastern District of New York, authored a lengthy opinion on child pornography sentencing excoriating the lengthy sentences prescribed by the Guidelines. In it, he sets forth the varying degrees of culpability of child pornography offenders. Mr. Wolff falls within the lowest category: "Possession-only child pornography users." *United States v. R.V.*, __ F. Supp. 3d __, 2016 WL 270257, at *2-3 (E.D.N.Y. Jan. 26, 2016).

Mr. Wolff's behavior on pretrial and post-conviction confirms that he was in this lowest category and that he is not a danger to children or to the community. He

has been out of custody for a year and a half and has performed perfectly on release. He is employed full time, he is beloved by his co-workers and he was recently promoted to supervisor at his job. He contributes financially to his household, and he provides daily care to his elderly father. He has been attending weekly counseling sessions for over a year and a half, and, most importantly, he has been evaluated by a forensic psychologist who concluded that he is not a pedophile, and that he poses the lowest likelihood of recidivism. The psychologist opines that individual counseling together with community supervision would be an appropriate sentence for this defendant. But Mr. Wolff cannot be sentenced to community supervision. The government's decision to charge this possession case as "receipt" negatively affects Mr. Wolff's sentencing exposure. The statutory mandatory minimum and maximum sentences for "receipt" – which is indistinguishable from possession – are the same as the penalties for the actual distribution of child pornography.

Specifically, Mr. Wolff faces a mandatory sentence of five years in custody and a maximum sentence of 20 years. The receipt charge also carries a much higher advisory Guidelines range than a straight possession charge. Had the government allowed Mr. Wolff to enter into a conditional plea to count one, the simple possession count, which was the only charge in the original indictment in this case, he would be facing a maximum sentence of ten years, no mandatory minimum and the Guidelines range would be much lower than the nine to eleven years in custody suggested by the Presentence Investigation Report ("PSR").

In the PSR, the Probation Office recommends a low-end Guidelines sentence of 108 months (or nine years). The PSR relies primarily upon factors that support a harsh sentence and it bases its recommendation in large part on an undifferentiated adherence to the applicable advisory sentencing Guidelines range. Mr. Wolff submits, and a substantial number of courts in this district and elsewhere have concluded, that the Guidelines ranges for child pornography offenses – and, notably, several enhancements therein that apply to Mr. Wolff – are not entitled to significant deference because they were not developed through the Sentencing Commission's statutorily mandated evidence- and expert-based process.

A punishment is of course required for this conviction, but Mr. Wolff urges the Court to consider his background and history, the psychological report, sentences of similarly situated defendants and the other factors identified below to impose no more than the mandatory minimum sentence of five years in the custody of the Bureau of Prisons. He further requests that the Court impose a five-year term of supervised release, which means that Mr. Wolff will be incarcerated or supervised for a over decade of his life, a more than sufficient term given the facts of this case.

THE ADVISORY GUIDELINES

On December 18, 2015, following a stipulated facts bench trial, the Court convicted Mr. Wolff of the unlawful receipt of child pornography, a violation of 18 U.S.C. § 2252(a)(2) as charged in Count Two of the Superseding Indictment. The Court dismissed the possession count charged in Count One. As with any sentence

in federal court, we must start with the Federal Sentencing Guidelines. This is unfortunate because the advisory guideline range provides an "anchoring effect." *See* Daniel Kahneman, *Thinking, Fast and Slow* (2011). An anchoring effect means that a prescribed number – whether or not the number has a reasonable basis – overly influences one's belief in what an actual outcome, price or result should be, and, as applied to sentencing, this number or range can often blind a probation officer, prosecutor or judge to the unique aspects of a case that might merit a lower sentence. Id. Nevertheless, because the Guidelines are the cornerstone of federal sentencing, we must begin with this analysis.

The applicable Guideline in this case is USSG § 2G2.2. Mr. Wolff starts at an offense level 22. It is critical to understand that the charging decision made by the government here not only requires a five-year mandatory minimum, it dictates the base offense level. Had Mr. Wolff been convicted of the offense of possession instead of receipt of child pornography, his starting base offense level would be four levels lower, at an offense level 18 instead of 22. Put simply, the indistinguishable act of "receiving" an image that one "possessed" drives up the advisory range. Compare § 2G2.2 (a)(1) with § (a)(2). Next, Mr. Wolff receives a two-level downward adjustment because he did not distribute or traffic in the material he possessed. *See id.* § 2G2.2 (b)(1). This puts Mr. Wolff at a base level 20. This base offense level is then substantially increased by a number of sentencing enhancements.

First, the offense level is increased by two because the images Mr. Wolff received were located on a computer. See § 2G2.2 (b)(6) ("if the offense involved the use of a computer or an interactive computer service . . . increase by 2 levels"). This enhancement is meaningless. Even print adult pornography is a dying art form. Playboy magazine stopped publishing nude photographs in print this year because pornography is so readily available on the Internet. *See* Ravi Somaiya, Nudes are Old News at Playboy, *New York Times*, Oct. 12, 2015. Indeed, most adults view and/or download legal pornography over the Internet by using a computer, tablet or similar device, and this applies to the illegal consumption of child pornography as well. *Id.* ("Pornography magazines, even those as storied as Playboy, have lost their shock value, their commercial value, and their cultural relevance."); *see also R.V.*, 2016 WL 270257, at *19-20 (explaining how the "Internet revolution enabled child pornography consumption").

The offense level also is increased by five levels because of the voluminous nature of Mr. Wolff's collection. *See* Guideline § 2G2.2 (b)(7)(D). In addition, Mr. Wolff receives a two-level enhancement for possessing images that contained pre-pubescent minors (§ 2G2.2 (b)(2)), and a four-level increase for possessing images that contained sadistic material (§ 2G2.2 (b)(4)). These three enhancements are typical in Internet-based child pornography cases because massive quantities of graphic images involving very young victims are, sadly, widely circulated on the Internet. *R.V.*, 2016 WL 270257, at *20. Indeed, all of the above-listed upward adjustments apply to most child pornography defendants. To illustrate, of all sentences under § 2G2.2 in fiscal year 2014, 95.4% involved an adjustment for material involving a minor under the age of twelve; 83.6% involved images depicting sadistic or masochistic conductor

other forms of violence; 94.9% involved the use of a computer; and 78.3% involved more than 600 images. *See* United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics (2014). Moreover, specific offense characteristics applied in 99.8% of the cases sentenced under § 2G2.2 in fiscal year 2014. *Id.* This concentration of nearly all offenders at the higher end of the sentencing spectrum, based on factors that are innate to the offense of conviction, should be factored into the Court's sentencing determination.

After applying an additional 13 levels for these four specific offense characteristics, the resulting offense level is 33, which, in Mr. Wolff's view, should be reduced by three levels for acceptance of responsibility for a final adjusted offense level 30. At an Offense Level 30, Criminal History Category I, the resulting advisory Guidelines range is 97 to 121 months. For the reasons set forth in the argument section below, Mr. Wolff submits that the range prescribed by the advisory Guidelines yields an unreasonable and unduly high sentence.

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ARGUMENT

I. THE CHILD PORNOGRAPHY GUIDELINE IS EXCESSIVE AND IS NOT BASED ON EMPIRICAL EVIDENCE

As this Court noted after the stipulated facts bench trial, there is a movement growing to reassess the child pornography sentencing scheme. In 2012, for example, the Sentencing Commission requested that Congress review federal sentencing practices, including the § 2G2.2 Guideline enhancements that were dictated by Congress and the imposition of mandatory minimums in receipt cases like this one. United States Sentencing Commission, REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES at 326-29 (Dec. 2012)[1] ("after reviewing over 2,000 cases of offenders sentenced for receipt and possession offenses . . . the Commission reaffirms its prior conclusion," id. at 329, that there is "little difference" in the offense seriousness between receipt and possession cases) (internal quotation and citation omitted); *see also R.V.*, 2016 WL 270257 at *45. But Congress has not acted and, as a result, the Sentencing Commission has not amended the applicable guideline, §2G2.2, which continues to prescribe unduly harsh and excessive sentences for low-level possessors/receivers like Mr. Wolff.

The advisory Guidelines range implicated here is as high as 97 to 108 months. Ordinarily the Guidelines are entitled to deference because they are the product of years of careful study. But when a particular guideline is not the result of careful study or empirical analysis, such deference is unfounded. *See Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007). In *Kimbrough*, a case involving the sentencing disparity between crack cocaine and powder cocaine offenses, the Supreme Court held

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[1] *Available at* http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses.

that district courts have discretion to vary from a correctly calculated Guidelines range "based solely on policy considerations, including disagreements with the Guidelines." *Id.* at 101. In particular, the Court recognized that when guidelines are not the result of "empirical data and national experience, guided by a professional staff with appropriate expertise," they do not "exemplify the Commission's exercise of its characteristic institutional role." *Id.* at 109. In such cases, sentencing courts may conclude that the guideline "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes even in a mine-run case." *Id.* at 110.

The Ninth Circuit has reached the same conclusion regarding the child pornography guidelines, § 2G2.2.[2] *See United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011). Not only does the *Henderson* decision recognize that "district courts may vary from child pornography guidelines, § 2G2.2, based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case," *id.* at 963, but it holds that a district court "commits procedural error when it fails to appreciate its *Kimbrough* discretion to vary from the child pornography Guidelines based on a categorical disagreement with them," *id.* at 964.

The Guidelines for child pornography offenses have increased dramatically over the years, and in nearly every instance, these increases were mandated by Congress, often over the objection of the Sentencing Commission. *See Henderson*, 649 F.3d at 960-62. When possession of child pornography was criminalized in 1990, the Sentencing Commission created a new guideline for that offense, with a base offense level of 10 and a two-level enhancement for material involving a prepubescent minor. *Id.* (citations omitted). Congress was not satisfied, however, and in 1991, "over the objection of the Commission," Congress directed the Commission to increase penalties for child pornography offenses. *Id.* at 960. Among other changes, Congress "explicitly ordered the Commission" to increase the base offense levels to 15 (for receipt, transportation, and trafficking) and 13 (for possession). *Id.* at 960-61.

Congress demanded further increases in 1995, increasing the base offense level by two levels and adding a two-level enhancement for use of a computer. *Id.* When the Sentencing Commission submitted a report to Congress that was critical of the congressionally mandated two-level computer enhancement because "it failed to distinguish serious commercial distributors from more run-of-the-mill users," Congress "responded with legislation that directed the Commission to add enhancements for the use of a computer to persuade, induce, entice, coerce or facilitate the transport of a child; to increase penalties in any case in which the

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[2] Other Circuits have reached similar conclusions. *See, e.g., United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010) (holding that § 2G2.2 "can lead to unreasonable sentences that are inconsistent with what § 3553 requires"); *United States v. Grober*, 624 F.3d 592, 608-09 (3d Cir. 2010) (holding that because § 2G2.2 was not developed pursuant to the Commission's characteristic institutional role, district courts may vary from on policy grounds); *United States v. Stone*, 575 F.3d 83, 90 (1st Cir. 2009) (same).

defendant engaged in a pattern of activity; and to clarify that distribution included distribution for nonpecuniary gain." *Id.* at 961 (citations omitted).

With the enactment of the 2003 PROTECT Act, "Congress – for the first time and the only time to date – made direct amendments to the Guidelines." *Id.* (citation omitted). These amendments included an enhancement for images of sadistic or masochistic conduct and a range of enhancements based upon the number of images. *Id.* In sum, the child pornography guidelines have been substantively revised nine times during their 23 years of existence. Most of the revisions were Congressionally-mandated and not the result of an empirical study. As the Sentencing Commission itself has explained, "[t]he frequent mandatory minimum legislation and specific directives to the Commission to amend the [G]uidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress." *Id.* (citation omitted).[3]

The result is that many of the individuals sentenced under § 2G2.2 face sentences that are excessive and unwarranted. Mr. Wolff's case is illustrative. When the Sentencing Commission promulgated the first set of guidelines in 1987, Mr. Wolff's offense conduct would not have been covered because possession of child pornography was not a federal crime at that time. *See* United States Sentencing Commission, THE HISTORY OF CHILD PORNOGRAPHY GUIDELINES at 10-11 (Oct. 2009).[4] When possession was made a crime, under the Guidelines adopted in 1990 his Guideline range with the adjustment for acceptance of responsibility would have been 6 to 12 months. Had he been sentenced under the 2001 version, his sentencing range would have been 27 to 33 months. *See id.*

After Congress passed the PROTECT Act of 2003, however, the applicable Guidelines range for Mr. Wolff's conduct increased dramatically. By the time the Sentencing Commission implemented all of the changes mandated by the PROTECT Act, Mr. Wolff's recommended range had increased to the current 97 to 121 months with acceptance. *See id.* at 48.

The escalating Guideline ranges in child pornography cases have caused "widespread dissatisfaction" among district court judges. *United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir. 2011) (citing United States Sentencing Commission, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010).[5] For example, 71% of the federal judges surveyed in 2010 believed that

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[3] Not only were these revisions mandated without regard for the Sentencing Commission's input, but many were "the result of arbitrary increases by Congress slipped into other bills, often with little or no debate." *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008).

[4] *Available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.

[5] *Available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

the mandatory minimum sentence for receipt of child pornography was too high, and 69% believed that the guidelines for receipt offenses were too high. *Id.* The judiciary's discomfort with the child pornography guidelines is reflected in the sentences imposed. In fiscal year 2015, only thirty percent of the sentences imposed were within the advisory § 2G2.2 guideline range. *See* United States Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2015) at Table 28.[6]

Section 2G2.2's overly harsh sentencing ranges also run afoul of the requirement that the sentencing court impose a sentence based on the individual characteristics of the offender. *See* 18 U.S.C. § 3553(a); *see also Henderson*, 649 F.3d at 965 (Berzon, J., concurring). As Judge Berzon notes, "an unduly deferential application of § 2G2.2 will lead to the vast majority of offenders being sentenced to near the statutory maximum term," a result which "stands in significant tension with a sentencing judge's duties 'to consider every convicted person as an individual.'" *Id.* (citation omitted).

Indeed, as noted in the Advisory Guidelines section of this memorandum above, supra at 5, specific offense characteristics applied in 99.8% of the cases sentenced under § 2G2.2 in fiscal year 2014. *See* United States Sentencing Commission, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS (2014).[7] According to the Sentencing Commission's fiscal year 2014 figures, the percentage of child pornography defendants who received the exact same enhancements that Mr. Wolff receives are as follows:

§ 2G2.2(b)(2)	Victim under the age of 12 years (two levels): 95.4% of defendants
§ 2G2.2(b)(4)	Sadistic/masochistic or other violence (four levels): 83.6% of defendants
§ 2G2.2(b)(6)	Use of a computer (two levels): 94.9% of defendants
§ 2G2.2(b)(7)(D)	600 images or more (five levels): 78.3% of defendants

Id.

Because the enhancements apply in virtually every case, there is little room for the sentencing court to distinguish between more and less culpable offenders. In particular, § 2G2.2 makes it difficult to "differentiate between those who create child pornography and those who consume it." *United States v. Cruikshank*, 667 F. Supp. 2d 607, 701-02 (S.D.W.Va. 2009). The enhancements also raise troubling issues regarding intent and knowledge. As one district court has observed, the "nature of

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[6] *Available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table28.pdf.

[7] *See* fn.1, supra.

file-sharing software is such that offenders often have little control over or awareness of the number of images being downloaded." *United States v. Burns*, 2009 WL 3617448, at *7 (N.D. Ill. Oct. 27, 2009). Similarly, defendants often acquire images that trigger enhancements – for example, images of prepubescent minors or images depicting sadistic or masochistic conduct – without intending to acquire such images or even realizing that they have done so. *See id.; see also R.V.*, 2016 WL 270257 at *20-21 ("technological changes have resulted in exponential increases in the volume and ready accessibility of child pornography, including many graphic sexual images involving very young victims . . . as a result of such changes, entry-level offenders now easily can acquire and distribute large quantities of child pornography . . . .") (citing United States Sentencing Commission, REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES at 312-13 (Dec. 2012)).[8]

The effect on Mr. Wolff's Guidelines range of the Sentencing Commission's amendments and enhancement to the child pornography Guidelines is both excessive and unwarranted. By calling for a decade-long sentence for nearly every first-time offender who uses a computer and possesses a number of videos, the Guidelines leave no room for more serious sentences for offenders who are more culpable or dangerous. In a concurrence in *Henderson*, Judge Berzon wrote separately "to emphasize that unjust and sometimes bizarre results will follow if § 2G2.2 is applied by the district courts without a special awareness of the Guideline's anomalous history." *Henderson*, 649 F.3d at 964-65 (Berzon, J., concurring) (citing Troy Stabenow, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES (Jan. 1, 2009)). Section 2G2.2 often recommends "longer sentences for those who receive or distribute images of minors than the applicable Guidelines recommend for those who actually engage in sexual conduct with minors." *Id.* at 965 (citation omitted). For example, a person pleading guilty to enticing a child to cross state lines and then molesting the child would have a lower recommended Guidelines range than Mr. Wolff.[9]

The sentences produced by other Guidelines that address very serious, violent conduct further highlight the excessive ranges produced by § 2G2.2: had Mr. Wolff robbed a bank and brandished a gun to threaten bank employees, and committed a carjacking to effectuate his getaway, he would face an offense level 26.[10] Had he assaulted someone with the intent to commit a second degree murder and caused his

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[8] *See* fn.5, supra.

[9] *See* USSG § 2G1.3 (base offense level 28 plus two levels for an offense involving a sexual act or sexual conduct minus three levels for acceptance of responsibility results in adjusted offense level of 27).

[10] Guideline § 2B3.1(a) sets a base offense level of 20, to which two levels are when a financial institution is robbed, and an additional five levels for the brandishing of a firearm, and two more for the carjacking, totaling 29 from which three levels would be deducted for acceptance of responsibility.

victim a life-threatening injury, his offense level would be 28, lower than it is for the instant case where no actual person was physically touched.

In summary, the Guidelines usually are considered a cornerstone of reasonableness only because it is assumed that each section was "the product of years of careful study." *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006). Where, as here, it has been established that the Guidelines were not a product of careful study or empirical analysis any presumption that the child pornography Guidelines are reasonable is especially unfounded. Accordingly, the range articulated under § 2G2.2 should be afforded significantly less weight by this Court than in the ordinary case.

APPENDIX E

STATUTORY PROVISIONS

Federal Rule of Criminal Procedure 11 states:

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. 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:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(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;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(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);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. 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. If the defendant pleads guilty or nolo contendere to either a

charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule

11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.