NO. XXXX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID SMITH,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DISTRICT COURT NO. XXXX

APPELLANT'S BRIEF

ISAIAH S. GANT
MICHAEL C. HOLLEY
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Attorneys for Mr. Smith

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STATEMENT REGARDING ORAL ARGUMENT

The appellant requests oral argument because this appeal raises substantial questions about the constitutionality of a particular Sentencing Guideline and about the District Court's basis for sentencing a first-time offender to a sentence virtually at the statutory maximum.

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction under 18 U.S.C. §3231, which provides it with jurisdiction over all federal crimes. This Court has jurisdiction under 28 U.S.C. §1291, which provides it with jurisdiction over appeals from final orders of the district courts. This appeal is taken from the District Court's sentence imposed orally on November 17, 2008, and in writing on November 20 and 26, 2008. (R.52, Judgment; R.58 Amd. Judgment.) On November 21, 2008, David Smith timely filed his notice of appeal. (R.53, Notice of Appeal.)

ISSUES PRESENTED

I.

Did the sentencing judge err by relying on a Sentencing Guideline enhancement that was directly and unilaterally promulgated by Congress, with the Sentencing Commission playing no role but to distribute the enhancement as Congress wrote it?

II.

The sentencing judge thought the Guideline range of 235 – 293 months was the advice of the Sentencing Commission, not solely that of Congress. The judge relied heavily on that advice to impose what she viewed as a fairly "draconian" sentence. Is remand necessary since the judge misunderstood the source, and thus significance, of the advisory range?

III.

When accused of swapping child pornography on-line, David Smith confessed, pled to all charges, and asked for leniency because for decades he had been a responsible, hard-working family man. The statutory maximum punishment for his offense was 240 months. Is his 235-month sentence substantively unreasonable?

STATEMENT OF THE CASE

I. Nature of the Case.

Sentencing Guidelines are supposed to be the product of the neutral, expert work of an independent agency belonging to the Judicial branch, *i.e.*, the Sentencing Commission. But Congress, when producing a child-pornography enhancement keyed to the amount of images possessed, took the unprecedented step of amending a Guideline directly and unilaterally. David Smith primarily asks the Court to decide whether this amount-of-images enhancement, because promulgated by Congress rather than the Commission, is unconstitutional under the separation of powers doctrine. Smith also argues that his sentence is substantively unreasonable. Even though Smith is far from exemplifying the worst type of child-pornography offender, his 235-month sentence is just five months short of the statutory maximum.

II. Course of the Proceedings Below.

In December 2007, the Government charged David Smith with shipping, receiving, and possessing child pornography in violation of 18 U.S.C. § 2252A(a)(1), (2) and (5). (R.1, Indict.) In June 2008, Smith, without a plea agreement, pled guilty to all counts. (R.26, Plea Pet.) On November 17, 2008, the

District Court sentenced Smith, age 49, to serve 235 months in prison. (R.58, Amd. Judgment.) Smith timely appealed. (R.53, Notice of Appeal.)

STATEMENT OF THE FACTS

For decades, David Smith lived the life of a responsible, hard-working, family man. (R.63, N. Harmon, Sent. Tr. at 18-24; R.63, F. Harmon, Sent. Tr. 26-30; R.63, Allen, Sent. Tr. at 33-38; R.63, R. Smith, Jr., Sent. Tr. at 42-45; R.63, Hamilton, Sent. Tr. at 47-53; Presentence Report (PSR) at 10-12.) When he started working the night shift to better support his family, he started to spend time during the day surfing the Internet. (*See* R.63, Hamilton, Sent. Tr. at 52.) He began trading child pornography on-line, at times with a federal agent working undercover. (PSR at 5-6.)

On February 15, 2007, a couple years after Smith had started trading child pornography on-line, federal agents searched his home where he lived with his wife and two stepchildren. (PSR at 6.) Although Smith denied sexually abusing the children, he confessed to collecting and trading the child pornography on-line. (*Id.*; R.63, Rodriguez, Sent. Tr. at 15.) Agents found in Smith's computer 95 still images and 15 videos. (PSR at 8.)

Smith moved out of his home. (PSR at 8.) State authorities investigated the children, developed suspicion that Smith had acted inappropriately towards his 9-year-old stepdaughter, and had Smith's wife telephone him to ask questions. (*Id.* at 6, 9; R.63, Rodriguez, Sent. Tr. at 16-17.) Smith admitted that one time about a

month earlier he was looking at pornography (adult pornography evidently) on the computer, called his stepdaughter over to the computer, and rubbed her "'bottom' and vaginal area on the outside of her clothes" before his stepdaughter told him to stop and left the room. (PSR at 9.) In June 2007, Smith pled guilty in state court to attempted aggravated sexual battery for this singular incident of, as the Government has described it, "fondling" his stepdaughter. (*Id.*; R.63, Daughtrey, Sent. Tr. at 40.) He was sentenced to serve three years, with all but six months suspended. (*Id.*)

In December 2007, just before Smith was released from state custody, the Government initiated the instant case, charging him with shipping, receiving, and possessing child pornography in violation of 18 U.S.C. § 2252A(a)(1), (2) and (5). (R.1, Indict.) The statutory maximum punishment for the most serious of these charges was 20 years. (PSR at 15.) Upon his release, Smith was taken into federal custody, and he soon pled guilty to all counts. (R.26, Plea Pet.; PSR at 7.)

On November 17, 2008, the District Court sentenced Smith, who was 49 years old. (R.63, Sent. Tr.) Smith's mother, father, uncle, ex-wife, and son each testified on his behalf. (*Id.* at 18-54.) They testified to being "shocked" or "stunned" to learn of Smith's misconduct. (R.63, F. Harmon, Sent. Tr. at 29; R.63, Allen, Sent. Tr. at 37; R.63, R. Smith, Jr., Sent. Tr. at 44; R.63, Hamilton, Sent. Tr.

at 50.) They explained such behavior was completely "totally out of character" for Smith. (R.63, Hamilton, Sent. Tr. at 50; *see* R.63, N. Harmon, Sent. Tr. at 23; R.63, F. Harmon, Sent. Tr. at 29; R.63, Allen, Sent. Tr. at 36-37; R.63, R. Smith, Jr., Sent. Tr. at 45.) Smith had been fully, steadily, and responsibly employed his entire adult life. (PSR at 12.) He had raised three children to adulthood, taking them to church and coaching their sports. (R.63, N. Harmon, Sent. Tr. at 22; R.63, F. Harmon, Sent. Tr. at 28-29; R.63, Allen, Sent. Tr. at 35; R.63, R. Smith, Jr., Sent. Tr. at 42-43.) He was always someone others could "depend" on. (R.63, F. Harmon, Sent. Tr. at 29.) His adult son described his father's character: "Hard working man, never scared to take the lead, take the control and responsibility of making sure everybody else around him had what they needed to live." (R.63, R. Smith, Jr., Sent. Tr. at 45.) Allocuting, Smith expressed his deep shame for having hurt his family. (R.63, Sent. Tr. at 75-76.)

The Probation Officer provided the Court with Sentencing Guidelines calculations. Due to his state conviction that had stemmed from the child-pornography investigation, Smith had two criminal history points and fell in Criminal History Category II. (PSR at 9-10.) His base offense level was 22. That level was boosted to 35 due to enhancements for the content of the images and using a computer to swap them. (PSR at 7-9.) And that level was further boosted

five levels, up to level 40, because he effectively possessed more than 600 images.[1] (PSR at 8 (relying on enhancement mandated by U.S.S.G. § 2G2.2(b)(7)(D)).) When reduced by three levels for acceptance of responsibility, his total offense level was 37, yielding a Guideline range of 235 – 293 months. (PSR at 8, 12.) The bottom of this range, 235 months, was five months short of the statutory maximum, 240 months. Absent the five-level enhancement for the amount of images, his Guideline range would have been about nine years shorter: 135 – 168 months.

Smith argued for a sentence of 140 months. (R.63, Gant, Sent. Tr. at 72-73.) Smith criticized the five-level, amount-of-images enhancement because it was produced, in the Feeney Amendment to the Protect Act of 2003, by Congress making an unprecedented "direct amendment" to the Guidelines. (R.43, Def.'s Sent. Position Paper at 8.) Smith argued that because this enhancement (along with some others) was produced through an improper procedure, the District Court should withhold reliance on it. (*Id.* at 7-11.)

The sentencing judge imposed a sentence of 235 months. (R.63, Sent. Tr. at 82.) The sentencing judge said she believed Smith had "done a lot of good in [his]

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[1]Smith's 95 still images and 15 videos counted as 1,220 images because each video was counted as 75 images. (PSR at 8.)

life," had "lived a productive life," was a "good son," and was "a good father to [his] three children." (*Id.* at 80-81.) But the sentencing judge decided that, because Smith had traded the images for more than a brief period and had fondled his stepdaughter, "[t]his case is in the court's view the kind of case that Congress and the Sentencing Commission meant to apply what can be considered fairly draconian guideline calculations to." (*Id.* at 79.) It added: "this is exactly what these very harsh punishments were aimed at." (*Id.*) In conclusion, the sentencing judge said: "the court can find no reason to do anything but give you [a] guideline sentence in this case given the seriousness with which this is viewed in our society at the moment." (*Id.* at 82.)[2]

[2]In lieu of a written statement of reasons in the Judgment, the sentencing judge relied upon a transcript of the verbal statement of reasons it gave during the hearing. (R.58, Amd. Judgment.)

SUMMARY OF THE ARGUMENT

I.

The Sentencing Commission is an independent, neutral, expert agency in the Judicial branch. It is the promulgator of the Sentencing Guidelines. In *United States v. Mistretta*, 488 U.S. 361 (1989), the Supreme Court rejected a separation-of-powers attack on the constitutionality of those Guidelines in general because the Commission seemed to have enough freedom from the political branches to truly act as a neutral and expert agency when promulgating Guidelines. Nonetheless, the Supreme Court indicated that the separation-of-powers doctrine would be breached if a political branch tried to "cloak [its own] work" in the "neutral colors of judicial action" by commandeering the Sentencing Commission. *Id.* at 407.

The amount-of-images enhancement at issue here is the product of precisely that kind of forbidden commandeering. The enhancement was added to the child-pornography Guideline when Congress itself amended the Guideline directly and unilaterally. The pertinent legislation reduced the Commission from its usual role as "promulgat[or]" of Guidelines to the role of a mere "distribut[or]" a Congressional edict. Pub. L. 108-21, Title V, § 401 (Apr. 30, 2003), 117 Stat. 650, 672-73. Through this novel type of legislation, Congress "cloak[ed]" its own

edict in the "neutral colors" of the Guidelines Manual. *Mistretta*, 488 U.S. at 407. Consequently, the amount-of-images enhancement is unconstitutional and invalid. The District Court erred by placing any reliance on that invalid enhancement, which boosted David Smith's Guideline range by about nine years, to a level just five months short of the statutory maximum.

II.

A sentence is procedurally unreasonable and thus must be vacated and remanded when the sentencing judge fails to accurately understand his or her authority to vary from the Guideline range. Here, the sentencing judge made that mistake. Although she recognized that for David Smith a 235-month sentence would be fairly "draconian," she imposed that sentence out of deference to the Sentencing Guidelines, which advised a sentence of 235 – 293 months. In doing so, the judge indicated it was important to her that the Sentencing Commission (an independent, neutral, expert agency) had advised such a harsh sentence. But in fact Congress was solely responsible for advising that harsh sentence for Smith. Because the sentencing judge mistook the Guideline range as the advice of the Commission, not solely of Congress, the judge did not fully appreciate her discretion to vary from the range, and, consequently, the case should be remanded for resentencing.

III.

"[P]roportionality" – the imposition of "appropriately different sentences for criminal conduct of differing severity" – has long been a primary aim of the federal sentencing system. U.S.S.G., Ch. 1, Pt. A, intro., comment. 3 (2008). This proportionality principle would prohibit, for example, sentencing every offender to the statutory maximum punishment: the most severe punishment must be reserved for the worst offenders.

David Smith is far from being one of the worst offenders. He was effectively a first-time offender. Into middle age, he lived an entirely responsible life, working hard and supporting his family. He has shown deep remorse and pled guilty to all charges, which carried a statutory maximum of 20 years. The sentencing judge recognized that a 235-month sentence would be fairly "draconian." But she imposed it anyway in light of the fact that Smith's Gudieline range was 235 – 293 months. She gave too much weight – even a presumption of reasonableness – to the Guideline range. Therefore, the 235-month sentence is unreasonable.

ARGUMENT

I. The sentencing judge erred by placing reliance on an invalid Guideline.

The sentencing judge erred by placing any reliance whatsoever on a Guideline – specifically the "amount-of-images" enhancement of U.S.S.G. § 2G2.2(b)(7)(D) – that is unconstitutional. That enhancement is unconstitutional because it was created through an unprecedented Guideline amendment process that "undermine[s] the integrity of the Judiciary" and thereby violates the separation of powers doctrine. *United States v. Mistretta*, 488 U.S. 361, 385 (1989).

A. The standard of review is de novo.

This Court applies de novo review to the question whether a Guideline is invalid for violating the Constitution. *See Stinson v. United States*, 508 U.S. 36, 38 (1993); *see generally United States v. LaBonte*, 520 U.S. 751, 757, 762 (1997).

B. To be constitutional, a Guideline must be promulgated by the Sentencing Commission, not by Congress.

In *Mistretta*, the Supreme Court granted certiorari to decide whether the Sentencing Guidelines promulgated[3] by the newly formed Sentencing Commission were constitutional. *Id.*, 488 U.S. at 362. The *Mistretta* Court upheld those

[3]Throughout this Brief, "promulgate" is used in its legal-terminology sense, i.e., "to put (a law) into action or force," rather than its general sense, i.e., "to make known." Merriam-Webster's Collegiate Dictionary 931 (10th Ed. 2002).

Guidelines based on its understanding of the way the Commission had produced, and would produce, Guidelines. *Id.* As explained below, the amount-of-images Guideline enhancement was promulgated in a manner completely at odds with that understanding, and is unconstitutional.

The *Mistretta* court understood the Commission to be a "peculiar institution" because the Commission, as formed by the Sentencing Reform Act of 1984, is an "independent" and "expert" agency within the Judiciary that exercises "administrative powers" to create legislative-like rules to guide individual adjudications in the area of criminal sentencing – an area that "has been and should remain 'primarily a judicial function.'" *Mistretta*, 488 U.S. at 368, 379, 384, 390, 404 (quoting legislative report). The defendant in *Mistretta* argued that this new type of judicial branch agency was unconstitutional under the nondelegation and separation of powers doctrines because it was both too independent of, and too subservient to, the political branches. *Id.* at 378, 383. The *Mistretta* Court saw the new agency differently, understanding the new agency to have both substantial congressional guidance and substantial discretion in its promulgation of Guidelines. *Id.*, 374-78, 393-94, 407-08. Thus, the Court basically held that the Sentencing Reform Act, when delineating the Commission's relationship with the political branches, had successfully navigated

the Scylla and Charybdis of excessive independence and excessive subservience. *Id*.

Nonetheless, the *Mistretta* Court said it was "troubled" somewhat by the defendant's argument that "the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch." *Id.* at 407. Because the Commission is a part of the Judiciary and is engaged in work that is "primarily a judicial function," *id.* at 390, the Judiciary's imprimatur of "impartiality and nonpartisanship" is stamped on each Guideline. *Id.* at 407. Indeed, the cover of the Guidelines Manual says the Guidelines are promulgated by the Commission – an agency of the Judiciary. The *Mistretta* Court was "troubled" because, if the Guidelines are not in fact impartial and nonpartisan, the Judiciary would in fact be promulgating the edicts of a political branch, and so its "integrity" would be "undermined." *Id.* at 404, 407.

The *Mistretta* Court allayed its own concern by reiterating its understanding of the nature of the Sentencing Commission and its work. The Court approved the Judiciary's entanglement in the Commission's somewhat political work because the Court believed the promulgation of the Guidelines would in fact be "essentially a *neutral* endeavor and one in which judicial participation is peculiarly appropriate." *Id.* at 407 (italics added). The *Mistretta* Court believed

neutral, "judicial experience and expertise" would in fact "inform the promulgation" of Guidelines. *Id.* at 408. The Court believed this would be so because the Commission was created as "an independent agency in every relevant sense," was expressly charged with using sciences and expertise to develop, review and revise Guidelines, and was left with "significant discretion to determine which crimes have been punished too leniently, and which too severely." *Id.* at 374, 377, 393.[4] In sum, the *Mistretta* Court believed that the Judiciary could, without undermining its integrity, promulgate the Guidelines because those Guidelines would be the product of the independent exercise of expert and reasonable discretion.

When expressing these beliefs, the *Mistretta* Court also described an important boundary – a limit to the Judiciary's permissible "entanglement" in "political work." *Id.* at 407. Setting that boundary, the Court reiterated that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Id.* at 407. And the Court concluded: "That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Id.* The gist of that statement is clear. Since

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[4]In a similar vein, the Court observed that "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." *Id.* at 379.

the Judiciary (in the form of its agency, the Sentencing Commission) is nominally the independent, expert, and neutral promulgator of the Guidelines, the Guidelines cannot be promulgated in fact by Congress. That is, to be constitutional, a Guideline must be promulgated by the Sentencing Commission exercising its delegated powers, not by Congress through direct legislation.

C. The amount-of-images enhancement is unconstitutional because unilaterally and directly promulgated by Congress.

The amount-of-images enhancement was created by the Feeney Amendment. *United States v. Detwiler*, 338 F. Supp. 2d 1166, 1171 (D. Or. 2004); U.S.S.G. App. C, Amend. 649 (April 30, 2003). In 2003, the Feeney Amendment was "abruptly" added to an "unrelated but popular" bill shortly before consideration by the House of Representatives. *Detwiler*, 338 F. Supp. 2d at 1171. That Amendment included various directives concerning the Guidelines and the Commission. *Id.* With respect to the child-pornography Guideline, it also included an "unprecedented" type of legislation, namely, a "direct[]" amendment to the Guideline. *Id.* at 1171 & n.3. The directness of the amendment was unmistakeable, reducing the Commission from its role as producer and "promulgat[or]" of Guidelines to the mere "distribut[or]" of Congressional edicts; in its final form, the relevant provision stated:

SEC. 401. SENTENCING REFORM

...

(i) SENTENCING GUIDELINE AMENDMENTS. – (1) Subject to subsection (j), the Guidelines Manual *promulgated* by the Sentencing Commission pursuant to section 994(a) of title 28, United States Code, is amended as follows:

...

(C) Section 2G2.2(b)[5] is amended by adding at the end the following:
"(6) If the offense involved–
"(A) at least 10 images, but fewer than 150, increase by 2 levels;
"(B) at least by 150 images, but fewer than 300, increase by 3 levels;
"(C) at least 300 images, but fewer than 600, increase by 4 levels; and
"(D) 600 or more images, increase by 5 levels.".

...

(j) CONFORMING AMENDMENTS.--

(1) Upon enactment of this Act, the Sentencing Commission shall forthwith *distribute* to all courts of the United States and to the United States Probation System the amendments made by subsections (b), (g), and (i) of this section to the sentencing guidelines ... . These amendments shall take effect upon the date of enactment of this Act, in accordance with paragraph (5).

[5]The amount-of-images Guideline is now located at U.S.S.G. § 2G2.2(b)(7) because the Commission rearranged some of the child-pornography Guidelines in 2004. U.S.S.G. App. C, Amend. 664 (Nov. 1, 2004).

Pub. L. 108-21, Title V, § 401 (Apr. 30, 2003), 117 Stat. 650, 672-73 (italics added). *See* U.S.S.G. App. C, Amend. 649 (Apr. 30, 2003) (incorporating this amendment into Guidelines Manual).

Substantively, that amendment created a whole new criterion for punishing a child-pornography offender because it established, for the first time, an enhancement keyed to the amount of images possessed. That criterion made little sense as a substantive matter. "[M]ost images [of child pornography] are posted free on the Internet or are swapped for other images." Katherine S. Williams, *Child Pornography and Regulation of the Internet in the United Kingdom*, 41 Bandeis L.J. 463, 498 (Spring 2003). And, as Congress formally found in the Protect Act itself, "the production of child pornography is the byproduct of, and not the primary reason for, the sexual abuse of children." Pub. L. 108-21, Title V, § 501 (Apr. 30, 2003), 117 Stat. 650, 678. Because child-pornography images are the by-product of abuse (and not vice versa), and because most of those images are available for free or trade, an on-line trader's acquisition of additional images typically does not substantially cause additional abuse and, consequently, does not justify a dramatic increase in punishment (e.g., here the enhancement boosted Smith's range from about 11 years to 20 years).

Regardless the soundness of its substantive changes, the Feeney Amendment soon drew attention, after initial approval in both houses of Congress, for its controversial procedural aspects, such as directly amending the Guidelines. *Detwiler*, 338 F. Supp. 2d at 1171. Most significantly, Chief Justice Rehnquist, in his capacity as Chairman of the Judicial Conference, wrote to Congress "oppos[ing] legislation that directly amends the sentencing guidelines, and suggest[ing] that, in lieu of mandated amendments, Congress should instruct the Sentencing Commission to study suggested changes to particular guidelines and report to Congress if it determines not to make the recommended changes." 49 Cong. Rec. S5113, S5120. The Secretary of the Judicial Conference added that the Conference opposed "direct congressional amendment of the sentencing guidelines because such amendments undermine the basic premise in establishment of the Commission – that an independent body of experts . . . is best suited to develop and refine sentencing guidelines." 149 Cong Rec. S5113, S5121. As Chief Justice Rehnquist explained, "this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system." 49 Cong. Rec. S5113, S5120.

Congress nonetheless enacted the amount-of-images amendment as a direct amendment to the Guidelines (in the form quoted above). Because an

administrative agency cannot rule a statutory provision unconstitutional, the Commission was absolutely required to incorporate and distribute Congress's amount-of-images enhancement into its Guidelines Manual. *See Pasha v. Gonzales*, 433 F.3d 530, 536 (7th Cir. 2005).[6] Congress thereby directly and unilaterally legislated the five-level increase for offenders possessing 600 or more images. The end result is concretely this: although the cover of the Guidelines Manual says it is promulgated by the Sentencing Commission, the amount-of-images Guideline contained within that Manual has been, in fact, promulgated by Congress.

Congress crossed the separation-of-powers boundary identified by *Mistretta* because it has promulgated its legislation not in the United States Code but rather in the Guidelines Manual. By directly and unilaterally adding its amount-of-images enhancement to the Guidelines Manual, Congress has borrowed the Judiciary's reputation to "cloak" its political work "in the neutral colors of judicial action." *Mistretta*, 488 U.S. at 407. Consequently, this amount-of-images amendment is an "'impermissabl[e] threat[] to the institutional integrity of the Judicial Branch.'" *Id.* at 383. And, as such, that portion of the Protect Act violates

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[6]Moreover, it appears the amount-of-images must be, absent congressional action, a *permanent* amendment to the Guidelines since the Commission cannot amend a Guideline such that it conflicts with a statute. *LaBonte*, 520 U.S. at 757.

the separation of powers doctrine and is unconstitutional. *Id.* Accordingly, it must be deemed invalid. *Stinson*, 508 U.S. at 38.

Finally, when portions of a statute are found to violate the separation of powers doctrine, "the invalid portions of a statute are to be severed unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 931-32 (1983). The amount-of-images enhancement precisely fits this profile of a severable provision. It is just one in a series of discrete and only partially related provisions. It can be invalidated without affecting any other provision of the Protect Act. Under *Chadha*, it is clearly severable and may be invalidated without addressing the constitutionality of the rest of the Protect Act.

D. The sentencing judge's erroneous reliance on an invalid Guideline requires a remand.

A remand for resentencing is necessary when the sentencing judge has materially miscalculated the Guideline range. *United States v. Hazelwood*, 378 F.3d 792, 801 (6th Cir. 2005). The sentencing judge effectively miscalculated the Guideline range because it included in that calculation the amount-of-images enhancement, which should have been disregarded as invalid. That miscalculation was material because it boosted Smith's Guideline range by about 9 years, and the

sentencing judge sentenced him at the very bottom of that range (235 months). Under such circumstances, the error is material, and a remand necessary. *Id.*

Similarly, the sentence is rendered substantively unreasonable because, by relying on an unconstitutional guideline, the sentencing judge relied on an "impermissible factor." *United States v. Tate*, 516 F.3d 459, 469 (6th Cir. 2008) (internal quotation marks and citations omitted). A remand for resentencing is necessary for that reason as well.

II. In the alternative, remand is necessary because the sentencing judge misunderstood the Guideline's authority.

Even assuming *arguendo* that the amount-of-images Guideline is not held unconstitutional or invalid, the Court should still remand for resentencing because the sentencing judge evidently understood the amount-of-image Guideline to be promulgated by the Sentencing Commission, when in fact it was promulgated by Congress. This misunderstanding was material to the sentencing judge's selection of Smith's sentence.

The sentencing judge acknowledged that the calculated Guideline range – which placed the first-time offender Smith virtually at the statutory maximum – was fairly "draconian." (R.63, Court, Sent. Tr. at 79.) Indeed, the low-end of that range, 235 months, was just five month short of the statutory maximum, 240 months. But that is not the range that the Sentencing Commission recommended

because the Commission did not promulgate the amount-of-images enhancement; rather Congress did that. As promulgated by the Commission (i.e., absent the amount-of-images enhancement), the Guidelines advised a sentence of 135 – 168 months – a stiff but perhaps not "draconian" punishment. The draconian advice (235 – 293 months) was solely the advice of Congress because Congress was solely responsible for choosing to add the five-level enhancement on top of the existing Guidelines promulgated by the Commission. That is, Congress alone chose to boost the range for an offender like Smith from 135 – 168 months up to 235 – 293 months. The draconian advice was solely the choice of Congress.

The sentencing judge mistook the draconian advice to be the advice of the Commission, not solely that of Congress. Saying she could find "no reason" to vary from the Guidelines, the sentencing judge expressly chose to defer to the draconian Guidelines range, which the sentencing judge took to embody the advice not just of Congress but also of the Sentencing Commission: "This case," said the sentencing judge, "is in the court's view the kind of case that Congress *and the Sentencing Commission* meant to apply what can be considered fairly draconian guideline calculations to." (R.63, Court, Sent. Tr. at 79 (italics added).)

That explanation was flawed because, in fact, the enhanced Guideline range was the unilateral, political work of Congress. Had the judge recognized that fact,

she could have considered it merely the symptom of "they tyranny of a shifting majority," *Chadha*, 462 U.S. at 966 (Powell, J., concurring), rather than the product of neutral, expert judgment. *See Kimbrough v. United States*, 128 S. Ct. 558, 575 (2008) (confirming that the sentencing judge has the authority to categorically disagree with a Guideline when that Guideline fails to "exemplify the Commission's exercise of its characteristic institutional role" as an independent, neutral, expert agency). Recognizing the Guideline range to be the product of a mere political decree rather than that of neutral, expert analysis, the judge would have been much less likely, in light of its authority confirmed in *Kimbrough*, to simply defer to the draconian range. Indeed, as explained above at page 20, the amount-of-images enhancement is unsound because, at least in the context of an on-line trader, it makes little sense to key the severity of the punishment to the quantity of images. Had the sentencing judge recognized the full extent of its authority to vary from Smith's Guideline range since it was the product of a congressional edict rather than the product of neutral, expert analysis, there is a substantial chance she would have varied from that draconian range.

Where, as here, a sentencing court seems not to fully appreciate its freedom to vary from the Guideline range, it is proper for this Court to remand for resentencing. *United States v. Stephens*, 549 F.3d 459, 466-67 (6th Cir. 2008)

(remanding for resentencing because sentencing judge seemed to misunderstand its authority to vary from the career-offender Guideline).

III. Smith's nearly statutory-maximum sentence is substantively unreasonable since he is essentially a first-offender who pled guilty.

A. The standard of review is reasonableness.

Under the advisory Sentencing Guidelines system, this Court reviews a sentencing judge's sentence for substantive reasonableness under an abuse-of-discretion standard. *Gall v. United States*, 128 S. Ct. 586, 597 (2007). In conducting this deferential review, the Court must take into account the "totality of the circumstances" and determine whether "the sentence imposed is warranted by the §3553(a) factors." *Gall*, 128 S. Ct. at 597; *United States v. Tate*, 516 F.3d 459, 469 (6th Cir. 2008) (explaining that the "touchstone" of substantive reasonableness review is "whether the length of the sentence is reasonable in light of the §3553(a) factors"). A sentence is substantively *unreasonable* "where the district court select[ed] the sentence arbitrarily, bas[ed] the sentence on impermissible factors, fail[ed] to consider pertinent §3553(a) factors, or [gave] an unreasonable amount of weight to any pertinent factor." *Tate*, 516 F.3d at 469 (internal citations omitted).

When reviewing a sentence that falls within the guidelines range, the Sixth Circuit applies a rebuttable presumption of reasonableness. *United States v.*

Vonner, 516 F.3d 382, 389 (6th Cir. 2008) (en banc) (explaining its decision to continue employing presumption of reasonableness to within-Guidelines sentences even though Supreme Court merely allows – and does not require– such a presumption). "*[P]resumptively* reasonable does not [however] mean *always* reasonable; the presumption . . . must be genuinely rebuttable." *Rita v. United States*, 127 S. Ct. 2456, 2474 (2007). If the appellant rebuts the presumption before the Court of Appeals, demonstrating that the sentencing judge's sentence is not warranted by the §3553(a) factors and is thus unreasonably long, the Court of Appeals should vacate and remand for resentencing. *Id.* The Supreme Court has explained that "the rebuttability of the presumption is real" and that "appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range . . . or outside that range"). *Id.*

B. At the expense of proportionality, the sentencing judge effectively presumed the Guideline range reasonable.

"[P]roportionality" – the imposition of "appropriately different sentences for criminal conduct of differing severity" – has long been a primary aim of the federal sentencing system. U.S.S.G., Ch. 1, Pt. A, intro., comment. 3 (2008). In *Booker,* the Supreme Court confirmed that proportionality remains an important aim of sentencing. *United States v. Booker*, 543 U.S. 220, 264 (2005). After *Booker*, sentencing courts "should generally reserve sentences at or near the

statutory maximum for the worst offenders." *United States v. Wachowiak*, 412 F. Supp. 2d 958, 964 (E.D. Wis. 2006); *see United States v. Lister*, 432 F.3d 754, 762 (7th Cir. 2005) (reminding sentencing judge that a near-statutory-maximum sentence "leaves little room for ... proportional sentencing"); *United States v. Williams*, 481 F. Supp. 2d 1298, 1303-04 (M.D. Fla. 2007).

One cannot reasonably classify Smith as one of the worst child-pornography offenders. The worst offenders would have some of the following characteristics not infrequently found in criminal defendants: (1) a substantial criminal history; (2) a life history of irresponsible, harmful, or antisocial behavior; or (3) a lack of remorse and refusal to accept responsibility by pleading guilty. Smith has none of these characteristics. He is for all practical purposes a first offender. Into middle age, he lived an entirely responsible life, working hard and supporting his family. He has shown deep remorse and pled guilty to all charges. While the fact that he fondled his stepdaughter may ensure Smith isn't classified as one of the least culpable of offenders, he is far from being one of the worst.

Nonetheless, the sentencing judge sentenced him to 235 months, just five months short of the 240-month statutory maximum. This sentence leaves no meaningful room to impose a proportionately more severe punishment on an offender who is worse because, for example, he has refused to accept

responsibility for the crime or has accrued a much higher criminal history category.

The Guidelines themselves offer a tool – the Sentencing Table at the back of the Guidelines Manual – for estimating what lesser sentence would be appropriate for an offender of Smith's type so that room is reserved for proportionately harsher sentences for worse child-pornography offenders. Specifically, the Sentencing Table provides that an offender with an offense level of 33 and criminal history category of VI would have a Guideline range of 235 – 293 months – a range that roughly correlates to the 240-month statutory maximum penalty for Smith's offense. That is, for purposes of this analysis, one could consider the maximum penalty for Smith's offense to be, not 240 months, but rather "offense level 33/CHC VI."

The next step in this analysis is to ascertain what reduction from that maximum "Level 33/CHC VI" penalty an offender deserves to reflect the fact that he pled guilty and has little criminal history. The Guidelines give defendants a three-level reduction for accepting responsibility, U.S.S.G. § 3E1.1; Smith should get that reduction. The Guidelines also advise lesser sentences for defendants (like Smith) in CHC II than those in CHC VI; Smith should get that reduction too. So to find a proportionate range below the "Level 33/CHC VI" range (viz., the

range that should be reserved for the worst offender convicted of Smith's offense), one should consider Smith an offender with an offense level of 30 and a CHC II. Those levels produce a sentencing range of 108 – 135 months. This range would be proportionate in that it would reserve the appropriate amount of room needed to impose proportionately harsher sentences on worse child-pornography offenders – i.e., those who refuse to accept responsibility and have a significant criminal history.

The sentencing judge imposed a sentence of 235 months. That sentence was 100 months longer than the top of that proportionate range. It was just five months short of the 240-month, statutory maximum.

The sentencing judge imposed that near-statutory-maximum sentence only because she presumed the Guideline range reasonable. First, she described the 235-month sentence as fairly "draconian," thereby opining that, in the court's view, it was disproportionately severe. (R.63, Sent. Tr. at 79.) But then she observed that the Sentencing Guidelines are designed to impose "these very harsh punishments" on merely "typical" child-pornography offenders (*id.* at 79), rather than reserving them for the worst child-pornography offenders. And she explained that she could "find no reason to do anything but give [Smith a] guideline sentence ... given the seriousness with which this is viewed in our society at the moment."

(*Id.* at 82.) Put bluntly, she reasoned that, if the Guidelines want to impose the most severe punishment possible on even the typical offender, then it must be a reasonable sentence. She presumed a draconian sentence reasonable because the Guidelines advised it.

By doing so, the sentencing judge thereby afforded the Guidelines a presumption of reasonableness, which is something a sentencing judge cannot do. *Gall*, 128 S. Ct. at 596-97 (stating that sentencing judges "may not presume . . . that the Guidelines range is reasonable"). Or, viewed a bit differently, the sentencing judge thereby gave "an unreasonable amount of weight" to the Guideline range. *Tate*, 516 F.3d at 469. Either way the error is described, the error renders Smith's 235-month sentence substantively unreasonable. Accordingly, the case must be remanded for resentencing.

CONCLUSION

The District Court would not have imposed such a draconian sentence on David Smith absent the advice of the Sentencing Guidelines. But the Guidelines advised such a harsh sentence for Smith only because Congress, to create the amount-of-images enhancement, had wrongfully commandeered the Commission. It was error for the District Court to rely on the draconian Guideline range at all because the amount-of-images enhancement was promulgated by Congress

unconstitutionally. In the alternative, even if the enhancement is constitutional, it was nonetheless error for the District Court to rely on that Guideline range as heavily and exclusively as it did. For either or both reasons, this Court should remand for resentencing.

Respectfully submitted,

s/ Isaiah S. Gant
ISAIAH S. GANT
MICHAEL C. HOLLEY
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Appellant's Brief* has been forwarded via CM/ECF to Philip H. Wehby, Assistant United States Attorney, 110 Ninth Avenue North, Suite A961, Nashville, Tennessee, 37203 on this the 24th day of March, 2009.

s/ Isaiah S. Gant
ISAIAH S. GANT

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) in that it contains 6,235 words. In certifying the number of words in the brief I have relied on the word count of the word-processing system used to prepare the brief.

s/ Isaiah S. Gant
ISAIAH S. GANT

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(b), the appellant designates the following district court documents as relevant.

Description of Entry	Date Filed in District Court	Record Number
Indictment	Dec. 12, 2007	1
Plea Petition	June 1, 2008	26
Defendant's Sentencing Position	Sept. 19, 2008	30
Defendant's Sentencing Position	Nov. 7, 2008	43
Order accepting plea petition	Nov. 17, 2008	50
Judgment	Nov. 20, 2008	51
Sealed Statement of Reasons	Nov. 20, 2008	52
Notice of Appeal	Nov. 21, 2008	53
Amended Judgement	Nov. 26, 2008	58
Sealed Statement of Reasons	Nov. 26, 2008	59
Transcript of plea hearing	Jan. 9, 2009	60
Transcript of sentencing hearing	Jan. 9, 2009	63