Docket Nos. 09-1318 & 09-2120

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,

Appellant/Cross-Appellee,

v.

DAVID GROBER,

Appellee/Cross-Appellant.

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On Cross-Appeals from Judgment in a Criminal Case
filed Dec. 8 and entered Dec. 30, 2008, in Crim. No. 06-CR-880
in the United States District Court
for the District of New Jersey (Hayden, J.)

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SECOND-STEP BRIEF FOR DAVID GROBER: APPELLEE'S RESPONSE BRIEF AND PRINCIPAL BRIEF AS CROSS-APPELLANT

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Jersey had subject matter jurisdiction under 18 U.S.C. § 3231, because the superseding indictment charged federal offenses allegedly committed there. IIApp. 1876.[1] This Court has jurisdiction under 18 U.S.C. § 3742(a,b) and 28 U.S.C. § 1291. Mr. Grober was sentenced on December 8, 2008 (VApp. 1626-29); a judgment was signed and filed that day and was entered on December 30, 2008. IApp. 2; VIApp. 1870 (Dkt. #97). The government filed a timely notice of appeal to this Court on January 28, 2009. IApp. 1; VIApp. 1871 (Dkt. #103). The defendant filed a timely notice of cross-appeal on February 5, 2009, 1App. 1, and an amended notice of cross-appeal on March 4, 2009. 1App. 2.

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[1] "IIApp." refers to the separately-bound appendix filed by the appellant/cross-appellee United States, and marked "Volume II." The government's appendix is in six volumes, designated volumes I through VI. "IApp." refers to the government's Volume I Appendix, which is bound with its First Step brief. Mr. Grober's Volume One Appendix, bound with this (his principal and response) brief, contains the district court's opinion as published in the Federal Supplement. A Volume 2 appendix for the cross-appellant, cited as "2App. --," is also being filed with this brief.

STATEMENT OF THE ISSUES WITH STATEMENT OF PLACE RAISED

Counter-Statement of the Issues on Government's Appeal:

Should the judgment of sentence be affirmed, where:

(a) The district court committed no significant procedural error; to the contrary, the judge properly exercised her discretion to reject USSG § 2G2.2 on policy grounds and to refuse to apply it to the case at hand, after first considering fully and extensively all of the parties' written and oral arguments;

(b) Any procedural error by the district court in rejecting USSG § 2G2.2 on policy grounds would, in any event, be harmless; the record as a whole, including the court's individualized determinations under 18 U.S.C. § 3553(a), makes clear that the court's ultimate selection of the sentence was not affected by any alleged error identified by the prosecution; and

(c) The government, as appellant, has not argued that the sentence is substantively unreasonable and therefore has waived any such argument?

Where in the Record Raised and Ruled Upon: Appellee Grober does not dispute that the government adequately raised below the "procedural" issues it now claims as error on appeal.

Statement of Issues as Cross-Appellant:

Did the district court err, for either of two reasons, in concluding that it was bound to impose a sentence of at least five years' imprisonment?

1. Notwithstanding his pleas of guilty to six separate counts of receiving, transmitting, and possessing child

pornography, where the record shows that the particular images the defendant received (as e-mail attachments) in July and August 2005, and those he "transported" (attached to outgoing e-mails) in July 2005, were all among those he still possessed in December 2005, was the district court bound at sentencing to merge the redundant counts and then exercise discretion to sentence on either the five particularized counts or on the one all-inclusive count, which would not carry a mandatory minimum?

Where in the Record Raised and Ruled Upon: Not raised below, other than in a motion for bail pending appeal (DDE 110); however, the error is plain under this Court's decisions in United States v. Miller, 527 F.3d 54, 70-74 (3d Cir. 2008), and United States v. Tann, 577 F.2d 533 (3d Cir. 2009).

2. Did the court have authority, notwithstanding 18 U.S.C. § 2252A(b)(1), to impose a sentence of less than five years' imprisonment pursuant to 18 U.S.C. §§ 3551(a) and 3553(a)?

Where in the Record Raised and Ruled Upon: Raised in a pre-sentence motion and memorandum filed December 1, 2008 (DDE 89, at 16-19), and at the hearing that day (DDE 121, at 98-103, 105-07), VApp. 1454-59, 1461-63. The point was not expressly addressed in open court on the day of sentencing (cf. VApp. 1522; Tr. 12/8/2008, at 59), but is summarily rejected in the post-sentence opinion. IApp. 17 (Op. 12); 595 F.Supp. 2d at 390.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Defendant/appellee/cross-appellant Grober is not aware of any related cases or proceedings.

STATEMENT OF THE CASE

Appellee/cross-appellant David Grober was convicted upon his plea of guilty, without a plea agreement, to all six counts of a superseding indictment charging receipt, transmission and possession of graphical images constituting child pornography. He received the sentence the district court believed to be the mandatory minimum, to wit, concurrent prison terms of 60 months. The court determined that a sentence consistent with the guide-line range suggested by USSG § 2G2.2 would be excessive.

a. The Course of Proceedings

A grand jury sitting in the District of New Jersey returned a two-count, one-defendant indictment on October 26, 2006, VIApp. 1862 (Dkt. # 12). Count 1 charged appellee/cross-appellant David Grober with receipt and distribution of material containing images of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B). Count 2 charged possession of a computer hard drive containing at least 3 images of child porno-graphy, contrary to id. § 2252A(a)(5)(B). Before and after this initial indictment was returned, the government offered Mr. Grober a plea agreement that would have involved his pleading guilty to possession of child pornography only.[2] In exchange, the government would have dismissed the receipt/distribution charge, which carried on its face a five-year mandatory minimum

[2] The extent to which his attorneys did or did not communi-cate these offers to Mr. Grober and explain their signifi-cance, remains in dispute on this record.

sentence. See IApp. 14 (Op. 12/22/08, at 9); 595 F.Supp. 2d at 388.[3]

On September 26, 2007, two weeks before the October 9, 2007, date set for trial, the grand jury returned a six-count superseding indictment. VIApp. 1876; IApp. 15 (Op. 10); 595 F.Supp. 2d at 388. The superseding indictment charged Mr. Grober in Counts 1 and 3 with transportation of child pornography, in violation of 18 U.S.C. § 2252A(a)(1); in Counts 2, 4 and 5, with receipt of child pornography in violation of id. § 2252A(a)(2)(A); and in Count 6, with possession of computers and disks containing child pornography, which prohibited by id. § 2252A(a)(5)(B). VIApp. 1876-82.[4] The superseding indictment was based upon the same conduct of which the government had possessed full information prior to the issuance of the initial indictment. On October 4, 2007, Mr. Grober pleaded guilty to all counts without a plea agreement. VIApp. 1864 (Dkt. #29).

As the district court explained in its sentencing opinion, "The [sentencing] hearings took place over several days. ... In October, both sides submitted briefs about the rationality of the sentencing guidelines as applied in this case, and the Court took argument on this issue." IApp. 17 (Op. 12); 595 F.Supp. 2d at 390. In fact, there there 13 days of hearings; evidence was

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[3] The district court's post-sentence opinion, filed December 22, 2008, and published at 595 F.Supp.2d 382 (D.N.J. 2008), is hereinafter cited simply as "Op." (along with parallel Appendix and Federal Supplement citations).

[4] The brief for the United States as appellant ("Gov't Br.") twice misstates the number of counts in the superseding indictment charging each offense. Gov't Br. 2, 4.

taken on 12 of those days. In addition, defense counsel argued both orally and in writing that the court should not apply the statutory mandatory minimum, for several different reasons. VApp. 1454-59, 1461-63 (Tr. 12/1/08, at 98-103, 105-07); Deft. Sent. Mem. (12/1/08).

At the hearings, the defense presented several witnesses. They included Mr. Grober's treating psychologist, Dr. Douglas Martinez, and Dr. Richard Krueger, a psychiatrist. In addition, law professor Douglas Berman testified; he is co-managing editor of two journals including the Federal Sentencing Reporter as well as a scholarly blog entitled Sentencing Law and Policy. Mr. Grober's wife, son, sister, sister-in-law, Rabbi, neighbors, and friends, also testified or made statements on his behalf, as did Mr. Grober. In addition, the defense submitted numerous letters attesting to Mr. Grober's good character and good work. In its written opinion, the district court described the extensive and unusual support Mr. Grober had received. The court found this outpouring of support very significant in applying the statutory factor requiring it to consider the "history and characteristics of the defendant." IApp. 39-43 (Op. 34-38); 595 F.Supp. 2d at 404-08. Dr. Barry Katz, a clinical and forensic psychologist, testified for the government,[5] as did Special Agent Michell Chase who completed a

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[5] The government's opening brief as appellant recites portions of Dr. Katz's testimony claiming "shortcomings" in the analysis by Mr. Grober's experts, Gov't Br. 12, and falsely asserts that the district court "ignored" Katz's testimony, id. 17. It is impossible to read the aspects of

forensic analysis of four hard drives and three CDs seized from Mr. Grober's home.[6] The court was more impressed with the testimony of government witness "MC," the mother of two children who were depicted being sexually abused in images found on Mr. Grober's computer. IApp. 43-45 (Op. 38-40); 595 F.Supp. 2d at 408-09.[7]

In addition to receiving the testimony of witnesses for most of 12 days and hearing full argument on the issues, the court engaged counsel at the various sentencing hearings in extensive colloquies regarding their positions. The parties submitted multiple sentencing memoranda, and the defense also filed objections to the PSI.

The district court's written opinion states that it "rejected the [defendant's Eighth Amendment] constitutional

_____(footnote continued)

the sentencing opinion addressing the psychological issues without realizing that the district court simply (and permissibly) credited the defense experts' testimony over that of the government's hired expert. Judge Hayden's assessment of conflicting evidence is binding on this Court; nothing in the appellant's 112-page brief even attempts to show that the district court's careful evaluation of the experts' credibility was clearly erroneous.

[6] As the district court opinion makes clear (although it is politely worded), Judge Hayden found significant portions of Agent Chase's testimony to be biased and evasive, thus undermining its credibility and usefulness. IApp. 14, 33, 35 (Op. 9 n.6, 28, 30); 595 F.Supp.2d at 388 n.6, 400, 402.

[7] Despite the fact that Judge Hayden was clearly moved by MC's testimony, summarized it for more than two full pages and commented entirely favorably on it under the heading "Need for the Sentence Imposed ... to reflect the seriousness of the offense ... and to provide just punishment," IApp. 43 (Op. 38); 595 F.Supp. 2d at 408, the government would have this Court believe that the court below essentially ignored this testimony. Gov't Br. 16.

argument [against applying the mandatory minimum,] because it did not find that the legal grounds set forth in the supporting brief [D.E. 89] were persuasive, and this point was made only at the conclusion of all the testimony and submission of final briefs." IApp. 17 (Op. 12); 595 F.Supp. 2d at 390. Although the same pre-sentence memorandum for the defendant had also included non-constitutional, statutory reasons why the mandatory minimum sentencing provision of the child pornography statute did not apply (DDE 89, at 16-19), the court did not comment on or even acknowledge that argument.

b. Statement of Facts

The Passaic County, New Jersey, Sheriff's Office was alerted by AOL, a national internet service provider, in October 2005 that child pornography was being attached to emails sent to and from Grober's account. PSI ¶¶ 15-18. The sheriff executed a search warrant, resulting in the seizure of computer hard drives and discs which yielded the evidence underlying all the charges in this case. PSI ¶ 24.

(i) Facts Underlying the offense:

The district court's opinion, at 5-7 (IApp. 10-12; 595 F.Supp. 2d at 386-87), contains a statement of "The Proofs" which is a succinct and complete statement of the underlying facts of this case which will be reprinted here:

> **The Proofs**
>
> At his plea hearing, David Grober admitted the following facts through negotiated questioning:
>
> > he sent someone an e-mail message on his computer that contained a video of child pornography on July 9, 2005, using his AOL account;

> on his computer, using the same AOL account, on July 27, 2005, he received an e-mail message from someone else that contained an image of child pornography and minutes later he sent back an e-mail message that contained approximately 17 images of child pornography;
>
> on his computer, using the same AOL account, on August 16, 2005, he received two separate e-mails from yet another sender that contained an image of child pornography;
>
> during the month of December, 2005, he collected images and videos containing child pornography from the internet that he stored and possessed on computer hard drives and portable compact discs;
>
> in the child pornography above there were numerous individuals who were clearly minors, some of whom were under the age of 12, and that on the images and videos he received, exchanged, possessed and stored, these individuals were engaging in sexual conduct with other minors or adults and/or posing in a sexually explicit manner.

IApp. 10-12 (Op. at 5-6); 595 F.Supp.2d at 386; see generally 2App. 48-56 (transcript of plea hearing).[8] In addition to summarizing Grober's admissions at the plea hearing, this section of the opinion also states:

> The government presented testimony of a forensic specialist, Special Agent Michell Chase ("SA Chase") of Immigration and Customs Enforcement ("ICE"), who analyzed the content of David Grober's seized computer hard drives and compact discs. She stated that Grober possessed a large collection of porno-graphy, most of it adult porn and therefore legal [to

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[8] Accordingly, the government's petty complaint that Judge Hayden misstated the offense of conviction in her opinion by using an evocative but nonlegal term ("downloading"), Gov't Br. 13 -- as if to imply that the district court's thorough and thoughtful opinion represented some careless or casual exercise -- is unworthy of further response. The accusation that the district court was ignorant of the cumulative maximum sentence that could have been imposed, id., is similarly misguided. In context, it is apparent that Judge Hayden was referring to the statutory maximum sentence permitted for one count of the most serious offense of which Mr. Grober was convicted. IApp. 7-8 (Op. 2-3); 595 F.Supp.2d at 384.

> possess in his home].[fn 5] In the mix were more than 1500 images and over 200 videos of child pornography. SA Chase testified that she examined all the images and videos of child pornography, and classified them as to content. On two hard drives, she found 12 e-mails sent to and received by Grober that had images of pornography attached, among them child pornography.
>
> In support of the sentencing enhancements, the government prepared a CD for the court's review of 14 images and 10 videos chosen by SA Chase that according to her testimony, "applied to the charges at hand as far as sadistic or bondage or prepubescent." (SA Chase Test., July 31, 2008, 98.) In open court, using a bench laptop computer, the Court personally reviewed the disc. The selected images the Court reviewed are of prepubescent minors engaged in sexual activity, including images of posed bondage and images of what appeared to be actual penetration, which is considered a depiction of violence. As support for the distribution activity, the documented e-mails that David Grober sent and received establish the use of a computer or an interactive computer service for the possession, transmission, receipt or distribution of child pornography. Quickly, all of the speci[fic] offense characteristics in § 2G2.2-(b)(1) through (7) were established with one exception. Section 2G2.2(b)(5) increases the base offense level by 5 levels if the defendant "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." There was no evidence or charge that David Grober ever committed a contact offense against a child. The government has never wavered from this position.
>
> [fn 5:] Aside from SA Chase, the only other witness who examined the content of the Grober computer storage was Dr. Barry Katz, who testified for the government. He spent several hours reviewing the images, and told the court that the adult pornography images numbered in the tens of thousands. (Nov. 12, 2008 Katz Test., 32:25-33:3.)

IApp. 10-12 (Op. 6-7); 595 F.Supp.2d at 386-87 & n.5.[9] In other words, although Mr. Grober possessed, in all, some 1700 still

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[9] What Dr. Katz actually testified was that "it was described to me" (by agent Chase) that there were "in the 10s of thousands" of images of adult pornography on Mr. Grober's hard drives. VApp. 1287; Tr. 11/12/08, at 33.

images and 200 videos depicting child pornography, IApp. 32 (Op. 27); 595 F.Supp.2d at 400,[10] material of this kind was not the

_____(footnote continued)

When asked directly by Judge Hayden, however, Agent Chase evaded that question, claiming that she "wouldn't be comfortable giving a number." VApp. 1394; Tr. 12/1/08, at 38. Even when pressed, she refused to offer "any impression" or even to say whether the quantity of adult pornography was "a little, a lot or a whole lot," insisting that "Honestly[,] I don't know." VApp. 1393-94; Tr. 37-38. For this and related reasons, Judge Hayden determined that the government's attempt to portray Mr. Grober's conduct as egregious, relative to other possessor-traders, was not persuasive (IApp. 32-33; Op. 27-28; 595 F.Supp.2d at 400), and that the court could accord "little weight" to the agent's evasive testimony. IApp. 35 (Op. 30); 595 F.Supp.2d at 402. Notwithstanding this well-grounded adverse credibility determination -- a pure finding of fact supporting the court's sentencing decision -- the government's appellate brief relies extensively and uncritically on Agent Chase's presentation. E.g., Gov't Br. 10 (inappropriately reiterating claims made by prosecutor below that Mr. Grober's collection was especially large and particularly egregious in content -- testimony which the district court expressly found not to be convincing. IApp. 33-35, 38 (Op. 28-30, 33); 595 F.Supp.2d at 402, 404).

[10] Many of these were duplicates, however, stored in more than one location on Mr. Grober's computer(s). According to Government Sentencing Exhibit (hereinafter "GX") 22, prepared by Agent Chase, there were actually 928 unique pictures and 81 unique videos on the three CD-ROMs and four hard drives (one of which had nothing illegal) combined. VIApp. 1994, admitted at IIIApp. 649-50 (Tr. 7/31/08, at 5-6). (In reciting the size of Mr. Grober's collection, the government's brief (at 3 n.2) invokes the 75:1 ratio used to establish an equivalence between videos and still pictures for purposes of a guidelines offense severity rating; see USSG § 2G2.2, appl. note 4(B)(ii). Using that ratio to generate a claim of "16,000 images" just obfuscates the actual facts. The government's brief also provides erroneous appendix citations for this point.) In addition, here as elsewhere, the appellant repeatedly advances factual claims it made below but which the district court did not credit, without ever showing that Judge Hayden's findings are clearly erroneous or even acknowledging that it has a burden to meet on appeal if it does not accept the lower court's view of the facts. For example, the appellant's brief asserts three times that Mr. Grober's collection of child pornography was well organized and backed up (Gov't

principal focus of his sexual interests.[11] At worst (interpreting "tens of thousands" to mean the minimum 20,000), items classifiable as child pornography represented around 8% or less of his collection.

(ii) The Same Continuously-Possessed Images Underlay the Receipt and Transmission Counts as the Possession Counts

Mr. Grober pleaded guilty to six counts. Under Counts 1 and 3, he was convicted of and sentenced for "transport[ing] ... child pornography" by computer (that is, attaching files to outgoing e-mails) on July 9 (one video) and July 27, 2005 (17 still images). Similarly, Mr. Grober's convictions under Counts 2, 4 and 5 concerned his receipt of child pornography on particular dates in July and August 2005, again as attachments to e-mails (all of them single graphical images). Under Count 6, he was convicted of possessing in December 2005 certain hard drives and CD-ROMs which contained, inter alia, the same child pornographic images and video charged in Counts 1-5.

At the time of their transmission or receipt, Mr. Grober necessarily possessed the files which he attached to e-mails or received as attachments, as referenced in Counts 1 through 5.

_____(footnote continued)

Br. 3, 7, 99), when Judge Hayden found otherwise. IApp. 38 (Op. 33); 595 F.Supp.2d at 404 ("sloppily mixed in").

[11] The government fails to present the facts as found by the court below when it highlights Dr. Katz's claim that Mr. Grober could be diagnosed with "pedophilia." See Gov't Br. 12. Judge Hayden did not credit this testimony. See IApp. 48-49 (Op. 43-44); 595 F.Supp.2d at 411 (accepting Katz testimony only that Grober posed no risk of acting out against children). The district court's finding that Mr. Grober is not a pedophile is not clearly erroneous, and the appellant does not even attempt to show otherwise.

He continued to possess all of those files (as part of the larger collection) through and including December 2005, when computer hard drives containing those files were found in his home, as charged in Count 6. Agent Chase viewed and described them after receiving and reviewing the seized media. VIApp. 1938-46 (GX1b and GX17). Although the particular contraband files were not named in the indictment or during the change of plea hearing, their identity is apparent from the details mentioned at the plea hearing upon examination of the government's sentencing exhibits, including GX2 -- SA Chase's July 6, 2007, report[12] of her forensic examination of three hard drives and three CD-ROMs seized under the sheriff's search warrant executed on December 7, 2005.[13]

Specifically, Agent Chase's analysis of the 55.9 GB Seagate hard drive ("Grober 0201") revealed a saved copy of the e-mail dated 7/9/05 and sent to "Cwboyfrd," and its attachment (a video), which was the basis of Count 1. See 2App. 51 (Plea Tr. 10/4/07, at 22); 2App. 98 (GX2, at 36 [items V.2., VI (#1)]); 2App. 161, 163 (GX2 Appx. 12 (#48, video attachment) & Appx. 14 (second item; "sent" e-mail)); see also GX24, VIApp. 1890 (video inventory; IIIApp. 659, 663-64 (Tr. 7/31/08, at 15, 19-20)). Likewise, analysis of the Maxtor 57.3 GB hard drive ("Grober 0101") disclosed in an AOL backup file the deleted message dated

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[12] 2App. 63-163 (used by Agent Chase during her testimony; identified, IIApp. 65 (Tr. 7/15/08, at 8)).

[13] The Sheriff actually seized four computers, but only three of them were found to contain any child pornography. IApp. 32 (Op. 27); 595 F.Supp.2d at 400.

7/27/05 at 7:29 a.m. to "FreqflyerV" including all 17 JPEGs which were the basis of Count 3. 2App. 52-53 (Plea Tr. 10/4/07, at 23-24); 2App. 68, 151-58 (GX2, at 6; GX2 Appx. 8).[14]

Agent Chase's examination of the "Grober 0101" hard drive also revealed the continued presence in December of the e-mail and JPEG attachment received from "FreqflyerV" on 7/27/05 at almost 7:27 a.m. which supported Count 2 (2App. 52-53; Plea Tr. 10/4/07, at 23-24). "Grober 0101" further disclosed the e-mail and JPEG attachment received on 8/16/05 at almost 3:24 a.m. from "Wanna8731" which underlay Count 4; and the e-mail and JPEG attachment received on 8/16/05 at 3:15 a.m. from "Wanna8731" which supported Count 5 (2App. 53-54; Plea Tr. 10/4/07, at 24-25). 2App. 157-58 (GX2, Appx. 8, at 6th-7th pages)[15]; see also 2App. 149; GX2, Appx. 4 (#12) (basis for Count 2).

The possession of those two hard drives (Grober 0101 and 0201) and their contraband contents was part (but not the entirety) of the basis for Count 6. 2App. 54; Plea Tr. 10/4/07, at 25. In short, neither receipt nor transportation of an item can occur without possession of that item, and all of what was received or transported, as charged in Counts 1-5, was included

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[14] Additional copies of many of these Count 3 JPEGs were also located on Grober 0401; see 2App. 100-25 (GX2, at 38-63 (items 11, 15, 17, 28, 26, 27, 44, 95, 96, 98, 111, 701, 702, 715, 716); GX2 Appx. 18; see also VIApp. 1896-1937 (GX23, inventory of non-video CP images found on all media).

[15] The first complete item on the sixth page of Appendix 8 to GX2 underlies Count 4; the item beginning at the bottom of the sixth page and continuing onto the seventh underlies Count 5; the first full item on the seventh page is the basis for Count 2 (inventoried in GX23, VIApp. 1897, line 27).

in the collective possession for which Mr. Grober was convicted under Count 6. See IIApp. 65 (GX2); VIApp. 1890–1937 (GX23, inventory of images possessed; GX24, inventory of videos possessed).

SUMMARY OF ARGUMENT

On Cross-Appeal: The district court erred in concluding that a five-year mandatory minimum sentence constrained the court's sentencing discretion in this case. The five counts of receiving or transporting child pornography by attachments to e-mails were all the "same offense," for multiplicity and double jeopardy purposes, as the single count of combined possession of all the computer equipment which contained those very same files. Yet six separate sentences were imposed. This plain error is not waived by the defendant's guilty plea, because the factual basis for it is evident from the existing record. Binding precedent requires that the judgment be vacated and the case remanded for an exercise of discretion whether to vacate the possession count, or the five other counts. If the court on remand elects the latter, no mandatory sentence will apply.

The seemingly mandatory five-year terms for receiving and possessing child pornography were not binding at sentencing for another reason. By statute, 18 U.S.C. § 3551(a), the Sentencing Reform Act trumps all inconsistent federal sentencing provisions, unless otherwise "specifically provided." The penalty provisions of 18 U.S.C. § 2252A do not "specifically" provide that they should supersede other inconsistent laws, so § 3551(a)

controls. That provision, in turn, makes mandatory 18 U.S.C. § 3553(a), as the controlling sentencing provision. Under that law, the court's obligation was to impose the sentence which the court in its discretion concluded was "not greater than necessary," so long as it was "sufficient" to satisfy the purposes of sentencing. Inconsistent provisions, such as § 2252A(b) were thus made matters for the court's "consider[ation]" under § 3553(a)(3), but could not be treated as mandatory.

On the Government's Appeal: Judge Hayden committed no "significant procedural error" in reaching the conclusion that any sentence longer than five years' imprisonment would be "greater than necessary." This case does not present an occasion for the Court to consider adopting a novel, more lenient standard of "abuse of discretion" review, as the government urges, for cases sentenced outside the Guidelines, where the range represents an exercise of the Sentencing Commission's "characteristic institutional role." The child pornography guideline is a paradigm example of a Congressionally-driven guideline, not a reflection of the Commission's expertise. Moreover, such a modified standard of review would only make sense as applied to appellate challenges to the substantive reasonableness of a sentence. But the government has not advanced a substantive reasonableness challenge in this case; indeed, it has affirmatively waived any such claim. But even if the Court thought the child pornography guideline reflected the Commission's own expertise, the Court would be ill-advised to adopt yet another new standard of review, thus further compli-

cating sentencing appeals and risking the establishment of a presumption of reasonableness, which it has so far rejected.

On the merits, no procedural error of any significance was committed. Judge Hayden heard and considered all the government's arguments, did not misunderstand the rationale for Congress's persistent pressure to inflate the sentences recommended by USSG § 2G2.2, assessed the statistics it found persuasive, and weighed the testimony of witnesses as she was authorized to do. The judge also properly considered sources of unwarranted disparity, and thoughtfully assessed the impact of aggravating factors and the difficulty of comparing the defendant's case to others. Her lengthy and detailed opinion justifying the sentence is the epitome of reasonableness. And in any event, the record shows plainly that any "procedural" error that may have occurred did not affect the final sentencing decision. No reversal of this sentence can be legally justified for any of the many reasons advanced by the government.

ARGUMENT FOR DAVID GROBER AS CROSS-APPELLANT

THE DISTRICT COURT MISTAKENLY BELIEVED THAT A MANDATORY MINIMUM FIVE-YEAR TERM APPLIED TO DEFENDANT GROBER'S SENTENCING.

Standard or Scope of Review: A defendant's legal challenge to the applicability of a mandatory minimum sentence is subject to plenary review. See United States v. Walker, 473 F.3d 71, 75 (3d Cir. 2007); United States v. MacEwan, 445 F.3d 237, 247 (3d Cir. 2006); United States v. Robinson, 167 F.3d 824, 830 (3d Cir. 1999). Legal error of this kind renders a sentence unreasonable and constitutes a per se abuse of discretion. See Koon v. United States, 518 U.S. 81, 100 (1996); United States v. Wise, 515 F.3d 207, 217 (3d Cir. 2008). This Court does not apply a deferential abuse of discretion standard in reviewing an alleged procedural error that is "purely legal." United States v. Russell, 564 F.3d 200, 203 (3d Cir. 2009); United States v. Washington, 549 F.3d 905 (3d Cir. 2008).

Imposition of sentence on more than one count, when multiple counts merge as a matter of statutory and constitutional law, is plain error. United States v. Tann, 577 F.2d 533, 537-38 (3d Cir. 2009); United States v. Miller, 527 F.3d 54, 73 (3d Cir. 2008).

Discussion:

For either or both of two independent reasons, the district court was mistaken in concluding that a five-year prison sentence was the least that could legally be imposed in this case. Because the court thus failed to properly "consider ... the kinds of sentences available," 18 U.S.C. § 3553(a)(3), the

five-year sentence that Judge Hayden imposed was rendered "unreasonable" by procedural error, that is, legal error.

A. Because All Six Counts of Conviction Merged, as a Matter of Law, into a Single Continuing Offense of Possession, the District Court Had Discretion to Impose a Sentence Without Regard to Any Mandatory Minimum.

Cross-appellant Grober was convicted on one count under 18 U.S.C. § 2252A(a)(5) and five counts under id. § 2252A(a)(1) and (a)(2)(A). In United States v. Miller, 527 F.3d at 70-74, this Court held that possession of child pornography in violation of § 2252A(a)(5) is a lesser-included offense of (that is, in Double Jeopardy terms, the "same offense" as) receipt of the same material in violation of § 2252A(a)(2)(A). By the same logic, an (a)(5) possession violation would also be the "same offense" as a count of "transporting" the same material under subsection (a)(1). The defendant cannot transport the material unless at that moment, he is already in possession of it.

When a court has entered judgments of sentence for both offenses, this Court held in Miller, the remedy for such multiplicity (whether seen as a statutory or constitutional violation) is ordinarily to vacate the judgment and remand for an exercise of the district court's discretion "to vacate one of the underlying convictions," merging the excess counts into one. 527 F.3d at 74, quoting Ball v. United States, 470 U.S. 856, 864 (1985). However, where the defendant has pleaded guilty to multiple counts and then argues on appeal that those counts should merge, the remedy is to let the convictions stand, but remand for imposition of a single, merged sentence. United

States v. Pollen, 978 F.2d 78, 83 n.12 (3d Cir. 1992)[16]; see Braverman v. United States, 317 U.S. 49, 55 (1942). Moreover, even though the point had not been raised in the district court, this Court held in Miller that the error was plain, requiring reversal. 527 F.3d at 73-74.

1. All six counts of the superseding indictment charged the "same offense" as Count 6, a continuing offense of possession which encompassed all the others as a matter of fact and law.

The Miller holding applies to Mr. Grober's case. Under Counts 1 and 3 of the superseding indictment Mr. Grober was convicted of transportation of child pornography, in violation of 18 U.S.C. § 2252A(a)(1); and under Counts 2, 4 and 5, with receipt of child pornography in violation of id. § 2252A(a)-(2)(A). Under Count 6, Mr. Grober was convicted of possession, in the aggregate, of a number of materials containing child pornography, prohibited by id. § 2252A(a)(5)(B). VIApp. 1876-82. First, as to Counts 2, 4 and 5, all charging the receipt of child pornography on particular dates in July and August 2005, the instant case is indistinguishable from Miller.[17] Government Exhibits 1b, 2 and 17 at sentencing, as presented and described

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[16] But see United States v. Cesare, 581 F.3d 206 (3d Cir. 2009) (finding plain error and remanding for vacatur of redundant conviction in two-count bank robbery case, without citing Pollen, where appellant argued only (as he had below) for vacatur of multiplicitous sentence but record was clear that one count was lesser included offense of the other).

[17] In United States v. Terpack, 316 Fed.Appx. 122 (3d Cir. 3/11/09), the government confessed error in a case of this kind, in response to a query from the panel, notwithstanding that Terpack's attorney had filed an "Anders brief" (3d Cir. LAR 109.2).

by Agent Chase (IIApp. 65 (GX2), VIApp. 1938-46 (GX1b and GX17)), disclose that those same items were among the materials possessed in December 2005, as charged in Count 6. Likewise, as to the items "transported" by computer (that is, attached to outgoing e-mails) on July 9 (one image) and July 27, 2005 (17 images), as charged in Counts 1 and 3, Mr. Grober necessarily possessed those images at the time of transmitting them (that is, they were available to him, on his computer, to attach to e-mails), and his possession of them (as part of the larger collection) continued through and including December, as charged in Count 6.

That Mr. Grober was charged in Count 6 only with possession of the contraband "in or about December 2005" is immaterial, since possession is a continuing offense. See United States v. Berndt, 530 F.3d 553, 554-55 (7th Cir. 2008) (citing earlier cases from several circuits). What is in law a continuing offense cannot be divided into smaller prosecutorial units, or limited in the indictment to a specified time period, if the effect is to multiply punishment. See United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952); Pollen, 978 F.2d at 85-87 (discussion relationship of "unit to prosecution" to problem of multiplicity). The existing record establishes that the possession which was discovered in December (and thus charged as occurring then) had in fact begun in the summer (on the dates charged in Counts 1-5, when various e-mails with attachments were sent or received) or earlier. The possession charge was therefore the "same" offense as the other five

counts, requiring a remand for resentencing on the separate counts (1–5) or on the single all-encompassing count (6), in the district court's discretion.

2. The District Court's failure to recognize its duty to merge the six counts for sentencing purposes constituted plain error under the Double Jeopardy Clause, an error which was not waived by Mr. Grober's guilty plea.

In United States v. Tann, 577 F.2d 533 (3d Cir. 2009), this Court reaffirmed that the multiplicity issue recognized in Miller is not waived by the defendant's guilty plea to multiple counts, and is reversible on plain error review, even though never raised in the district court. See also United States v. Terpack, 316 Fed.Appx. 122 (3d Cir. 2009) (not precedential) (government confessed error on this point, in response to panel's query; reversed and remanded). The Supreme Court holds that when a multiplicity/Double Jeopardy violation of this nature can be ascertained without supplementing the plea and sentencing record, the issue is not waived by an otherwise-valid guilty plea to multiple counts. Pollen, 978 F.2d at 84, explaining United States v. Broce, 488 U.S. 563, 569–76 (1989), and Menna v. New York, 423 U.S. 61 (1975) (per curiam). To be ascertainable "on the existing record" does not require that the multiplicity be apparent from a simple reading of the indict-ment. Rather, it means that the double jeopardy violation can be established without a further evidentiary hearing, on the factual record made in connection with the plea and sentencing proceedings. Pollen, id. As shown in detail above (at 12–15), the record in this case is already fully developed.

In Broce, the defendant pleaded guilty, in a single proceeding, to two separate bid-rigging indictments charging similar antitrust conspiracies alleged to have existed at different times in relation to different projects. Despite waiving any direct appeal, Broce later filed a motion under former Fed.R.Crim.P. 35(a) (correction of illegal sentence; since repealed and incorporated into 28 U.S.C. § 2255), seeking an evidentiary hearing at which he might demonstrate, in contradiction of factual admissions contained in his plea agreement, that the two conspiracies were actually part of a single, overarching agreement in restraint of trade. In the instant case, by contrast, Mr. Grober seeks no evidentiary hearing, and in no way contradicts the factual basis for his plea. (Nor does he seek to withdraw from a plea agreement, as did Broce.) The factual basis of Mr. Grober's multiplicity/ double jeopardy claim is fully established by the exhibits introduced by the government in connection with his sentencing, and is not inconsistent with any facts proffered or admitted in connection with his guilty pleas. He neither seeks nor requires any further hearing to supplement the record.

The exhibits introduced into evidence by the government at the sentencing hearing reveal that the contraband images Mr. Grober received via e-mail in the summer of 2005 (Counts 2, 4 and 5), like the e-mail attachments he transmitted to others (Counts 1 and 3), were among the material he possessed (that is, continued to possess) on hard drives a few months later, in December 2005 (Count 6). Under 18 U.S.C. § 2252A(b)(1), the

receipt counts carry five-year minimum terms (with a 20-year maximum), as do the transmission counts. The possession count, on the other hand, has a ten-year maximum and no minimum. Id.(b)(2). The Court should remand this case with directions to the district court to exercise its discretion under Miller and Ball whether to vacate the judgment of sentence on Count 6 as a lesser-included offense, or instead to vacate the judgment of sentence on Counts 1-5 in favor of a single sentence on the all-encompassing Count 6. Because the court has this discretion, the minimum terms on Count 1-5 are not actually mandatory.

B. Because 18 U.S.C. § 2252A(b)(1) Does Not "Specifically Provide" that the Sentencing Reform Act Shall Not Apply, the District Judge Was Not Obligated to Impose Any "Mandatory Minimum" Sentence that She Concluded Was "Greater than Necessary," 18 U.S.C. § 3553(a).

As defense counsel argued in their memorandum of law filed prior to sentencing (DDE 89), the court below had authority pursuant to 18 U.S.C. §§ 3551(a) and 3553(a), notwithstanding id. § 2252A(b)(1), to impose a sentence for Mr. Grober's convictions on Counts 1-5 under id. § 2252A(a)(1) and (a)(2)(A) of less than five years' imprisonment. Section 2252A(b) states, in pertinent part, that "Whoever violates ... paragraph (1) [or] (2) ... of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years" for a first offense. In light of section 3551(a), which is the statutory gateway for all federal sentencing, the terms of § 2252A(b) do not establish a true "mandatory minimum" sentence requirement.

Section 3551(a) of title 18 requires the court at every sentencing to apply the Sentencing Reform Act, including the parsimony clause of § 3553(a), "[e]xcept as otherwise specifically provided" by law. Some "mandatory minimum" laws do "specifically provide" that such general provisions as § 3553(a) must not be applied. See, e.g., 18 U.S.C. § 1028A(b) (minimum term for aggravated identity theft applies "Notwithstanding any other provision of law ...."). In such cases, mandatory minimum sentences do not conflict with § 3553(a) and may be enforced. See United States v. Walker, 473 F.3d 71, 84-85 (3d Cir. 2007) (holding that § 3553(a) does not supersede 18 U.S.C. § 924(c)). Section 2252A lacks any "notwithstanding any other provision of law"-type proviso, however. Absent such language, the sentencing court is only bound to "consider" the so-called mandatory sentence, as a type of sentence that is "available." 18 U.S.C. § 3553(a)(3). Accordingly, contrary to the argument advanced in opposition to Mr. Grober's pre-sentence motion on this point, the issue presented is not governed by Walker. To the contrary, the district court was not required to limit its sentencing discretion to sentences at or above five years.

In United States v. Kellum, 356 F.3d 285 (3d Cir. 2004), a case not cited in Walker, this Court did reject an argument substantially similar to that advanced here, but Kellum is no longer good law. When Kellum was decided, the incompatibility between the "shall" command of 18 U.S.C. § 3553(a) (to impose no sentence which is "greater than necessary") and the "shall" found in such provisions as id. § 2252A(b)(1) ("shall be ...

imprisoned not less than 5 years"), for all intents and purposes, did not exist. This is because, before 2005, the "shall" in § 3553(a) was never independently enforced.

Prior to United States v. Booker, 453 U.S. 220 (2005), courts had dealt with the apparent conflict between the "shall" in § 3553(a) and the seemingly inconsistent "shall" in 18 U.S.C. § 3553(b) (to impose a sentence in every case within the Guidelines, unless extraordinary facts justified a departure) by subordinating the former to the latter so completely as to utterly negate any mandatory quality of § 3553(a)'s parsimony clause. See United States v. Denardi, 892 F.2d 269, 272-84 (3d Cir. 1989) (Becker, J., dissenting). Thus, the pre-Booker decision in Kellum expressly treated the parsimony clause of § 3553(a) not as a command, which is how Congress wrote it, but merely as one of "a number of ... factors that a sentencing court must consider ...." 356 F.3d at 288. With § 3553(b) excised by Booker, that approach is no longer permissible. The parsimony provision of § 3553(a) now provides the "overarching instruction," United States v. Olhovsky, 562 F.3d 530, 547 (3d Cir. 2009), quoting Kimbrough v. United States, 552 U.S. 85, 128 S.Ct. 558, 563 (2007) -- except under sentencing statutes which "expressly provide" that the general provisions of the Sentencing Reform Act shall not apply.

Kellum also suggested, 356 F.3d at 289, that the existence of subsections (e) and (f) of § 3553 shows that subsection (a) does not supersede any mandatory statutory penalty. But neither § 3553(e) (substantial assistance reduction) nor § 3553(f)

(safety valve) states that sentences below a mandatory minimum are prohibited except as authorized therein. Nor does either state that it is the exclusive mechanism authorizing a sentence below an otherwise-stated mandatory minimum; indeed, neither subsection even refers to the other. And there is no other provision of law stating that these two subsections are the only two paths to a below-"minimum" sentence. In fact, they are not; at least two others exist. See, e.g., Fed.R.Crim.P. 35(b); and see United States v. Dorsey, 166 F.3d 558 (3d Cir. 1999) (construing USSG § 5G1.3 and 18 U.S.C. § 3584 as authorizing imposition of sentence below mandatory minimum to achieve concurrency).[18] For all these reasons, based on a careful reading of all the pertinent statutory provisions and reconciling them as internally consistent, as we are bound at least to try to do, the district court erred in treating five years as a mandatory minimum term in this case.

Even if there were some ambiguity in the relationship between §§ 3551(a)-3553(a) and § 2252A(b)(1), such as in how clear and explicit a "notwithstanding" clause has to be to qualify as "specifically provid[ing]" for non-applicability of

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[18] Kellum held, in the alternative, that 21 U.S.C. § 841(b)-(1)(A) and 18 U.S.C. § 924(c) are laws which "otherwise specifically provid[e]," 18 U.S.C. § 3551(a), that id. § 3553(a)(2) does not apply. That conclusion is expressed in one sentence with an introductory "clearly" and no discussion. 356 F.3d at 289. There is no indication in the Kellum decision that this Court was presented with the argument set forth here (in short, the difference between a law which "otherwise provides" and one which "otherwise specifically provides"). In fact, it appears from this Court's decision that appellant Kellum, unlike Mr. Grober, failed to address § 3551(a) at all. See 356 F.3d at 289.

the Sentencing Reform Act, that doubt would have to be resolved in favor of lenity. See United States v. R.L.C., 503 U.S. 291, 305 (1992); Busic v. United States, 446 U.S. 398, 406-07 (1980); United States v. Fenton, 309 F.3d 825, 828 n.3 (3d Cir. 2002) (lenity rule applies to construction of criminal penalty provisions). Compare United States v. Barbosa, 271 F.3d 438, 455 (3d Cir. 2001) (utilizing rule of lenity to resolve uncertainty in construction of § 841(b)), with Walker, 473 F.3d at 84-85 (reciting same principle but finding no ambiguity).

In addition, the defendant argued below that imposition of a five year prison sentence which did not, in a given case, serve the legitimate criminal justice purposes articulated in § 3553(a)(2) and which is "greater than necessary," would constitute cruel and unusual punishment, in violation of the Eighth Amendment, and violate constitutional principles of equal justice and separation of powers. DDE 89, at 9-15 (memorandum filed 12/1/08). The presence of these constitutional questions in the background, which would arise if the statutory argument does not prevail, also counsels in favor of adopting the defendant's statutory construction. See United States v. Lopez, 514 U.S. 549, 562 (1995) (avoidance of unnecessary constitutional issues); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); see also Jones v. United States, 526 U.S. 227, 239-40 (1999) (related doctrine of "constitutional doubt"). For all these reasons, the supposed "minimum" sentence in § 2252A(b) is not "mandatory."

The core legal question is whether anything in 18 U.S.C. § 2252A(b) renders 18 U.S.C. § 3553(a) inapplicable. Proper statutory analysis and interpretation, with § 3551(a) as the linchpin, show that the answer to that question is No. The 1987 Sentencing Reform Act, following its severance and excision in 2005 in Booker, now works an implied amendment to many "mandatory minimum" clauses. See Fasano v. Federal Reserve Bank, 457 F.3d 274, 284-86 (3d Cir. 2006) (explicating and applying doctrine of implied amendment). Because the district court mistakenly rejected this argument, and therefore misapprehended the governing law, the sentence imposed on Mr. Grober is unreasonable. The judgment must be vacated and remanded for resentencing, without the misapprehension that a prison term of at least five years is mandatory.

ARGUMENT FOR DAVID GROBER AS APPELLEE

IF RELIEF IS NOT GRANTED ON MR. GROBER'S CROSS-APPEAL, THE SENTENCE IMPOSED BY THE DISTRICT COURT MUST BE AFFIRMED.

Standard or Scope of Review: This Court will affirm a sentence unless it finds an abuse of discretion in complying with 18 U.S.C. § 3553(a). See United States v. Jackson, 523 F.3d 234, 243 (3d Cir. 2008), explaining Gall v. United States, 552 U.S. 38, 128 S.Ct. 586, 597-98 (2007). Where a district court has rejected the application of a guideline on policy grounds, but the formulation of that guideline does not exemplify the Sentencing Commission's exercise of its "characteristic institutional role," Kimbrough v. United States, 552 U.S. 85, 128 S.Ct. 558, 575 (2007), the standard of review is no less deferential to the district court. Spears v. United States, 555 U.S. --, 129 S.Ct. 840 (2009) (per curiam).

Discussion:

Judge Hayden conducted a sentencing proceeding in this case that would be hard to match in recent judicial history in terms of its thoroughness, thoughtfulness, and transparency. She heard everything that either party had to offer of either a factual or a legal nature, delivered a detailed oral statement of reasons in open court and then filed a lengthy and comprehensive written opinion. The sentence includes a substantial, five year term of imprisonment, followed by three years of supervision and a lifetime of mandatory registration and reporting. But for its mistaken constraint at the low end by an inapplicable mandatory minimum term (see Argument for Cross-Appellant,

ante), both the sentence itself and the process by which it was determined and imposed represent the very epitome of "reasonableness." Yet the government launches a fusillade of criticism at the district court that includes the remarkable contention that the sentence resulted from the commission of no less than ten significant procedural errors. The exact opposite is the truth. The government-appellant is therefore entitled to no relief on its present appeal.

The record unmistakably shows that the defense and government received multiple opportunities to argue their sentencing positions, both orally and in writing. Both parties took full advantage of these opportunities. The court considered and discussed the parties' positions at length, both in open court and in an exceptionally thorough and thoughtful 46-page sentencing opinion, and carefully exercised its discretion to impose what the district judge believed to be a fair sentence. Obviously aware that this sentence cannot be overturned by the application of the ordinary standards of appellate review, see United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) (en banc), the government/ appellant seeks refuge in a heightened standard -- claiming that the sentence resulted from nothing but the judge's purely subjective rejection of a well-founded sentencing guideline provision, which should result, the government claims, in "closer review." Kimbrough, 552 U.S. 85, 128 S.Ct. at 563. The assertion that review of the district court's normally broad discretion should be stricter in this case lacks merit on both legal and factual grounds. And the record makes very clear that

any error that the district court may have committed did not affect the ultimate choice of a sentence. If this Court does not grant greater relief on Mr. Grober's cross-appeal, it should at least affirm the sentence that Judge Hayden imposed.

A. Judge Hayden Rejected USSG § 2G2.2 on Policy Grounds and Refused To Apply it to Mr. Grober's Case Only After a Painstaking and Proper Exercise of Discretion, Including Full Consideration of the Defendant's and Government's Written and Oral Submissions.

The government has placed all of its arguments as appellant under one umbrella point: that the district court committed "numerous" procedural errors in refusing to apply USSG § 2G2.2. It makes no alternative claim that the sentence was unreasonably lenient. The government's major subpoint, which is the crux of its entire argument, is the contention that the court below failed "to consider" the government's arguments or "to explain or justify its contrary analysis." Gov't Br. 28 (heading). (The following point, claiming that Judge Hayden misunderstood the rationale for the child pornography guidelines, Gov't Br. 33-77, then reiterates the arguments it made below which the appellant claims were disregarded.) To the contrary, the district court went to great lengths to ensure a thorough and complete sentencing process so that it could carefully exercise its discretion and arrive at a fair and reasoned sentencing decision. In truth, the government's principal point as appellant is a thinly disguised effort to reiterate in this Court, as if de novo, the merits of the arguments it advanced but the district court rejected below. Appellate review of sentences is not available on that basis.

Both the Supreme Court and this Court have emphasized the primacy of district court discretion in post-Booker sentencing. As the Supreme Court has reminded us:

> 'The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.' ... 'The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before [her] than the Commission or the appeals court.' ... Moreover, '[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.'

Gall v. United States, 552 U.S. 38, 128 S.Ct. 586, 597-98 (2007) (internal citations omitted). This Court is no stranger to this highly deferential standard, having emphasized and applied it as the foundation of its en banc decision in the Tomko case. 562 F.3d at 560-61, 569-71. See also United States v. Russell, 564 F.3d 200 (3d Cir. 2009); United States v. Lofink, 564 F.3d 232, 240 n.17 (3d Cir. 2009). In light of the record in Mr. Grober's case, the government's central contention -- that its arguments were not fully and fairly considered below -- is almost absurd. Its other claims of procedural error are equally unpersuasive.

1. The government is not entitled to a more favorable standard of review based on the district court's policy disagreement with the formulation of USSG § 2G2.2.

The government argues that a less deferential standard of review applies in appellee Grober's case because, the government contends, the district court's sentencing decision is essentially predicated on a policy disagreement with the Sentencing

Commission on the matters which underlie the formulation of the applicable guideline range. The government contends that a "closer look" is warranted, see Gov't Br. 25, because the Commission, according to the prosecutors' assessment, exercised its "characteristic institutional role" in amending USSG § 2G2.2 over the years. Nevertheless, as the government concedes (id. 23-24), this Court in the end would still have to find an abuse of discretion. The government-appellant's quest for shelter in a more favorable standard fails. Deferential review for abuse of the district court's broad discretion is the correct standard of review.

Neither the Supreme Court nor this Court has ever held that a different standard of review applies to a district court's choice of sentence that is based, in whole or in part, on a policy disagreement with a Guideline range, even one that appears to reflect an exercise of the Commission's "characteristic institutional role." The government's claim to a more favorable standard of review -- on which, in turn, hinges its entire appeal -- depends on a mere suggestion floated in dictum by the majority in Kimbrough:

> Carrying out its charge [as set forth in the Sentencing Reform Act of 1984], the [Sentencing] Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.' ... The sentencing judge, on the other hand, has 'greater familiarity with ... the individual case ....' ... In light of these discrete institutional strengths, a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.' ... On the other hand,

> while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case.

128 S.Ct. at 574-75 (citations omitted). Because the crack cocaine guideline, tied to an arbitrary 100:1 powder-to-base ratio dictated by Congress, did not reflect a professional, expert assessment by the Commission itself of "empirical data and national experience," the Court had no occasion in Kimbrough to consider how or when, if ever, any such "closer review" might be implemented. Accord Spears v. United States, 555 U.S. --, 129 S.Ct. 840, 843 (2009) (per curiam).

The further complication of appellate review of sentences that would result is itself a sufficient reason not to adopt a two-tiered system. Indeed, it is difficult, if not impossible, to see how such a two-level abuse-of-discretion review could be employed without establishing just the sort of presumption of reasonableness for within-Guideline sentences that this Court has declined to adopt, even after Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456 (2007). See Tomko, 562 F.3d at 575; United States v. Grier, 475 F.3d 556, 588 n.24 (3d Cir. 2007) (en banc) (Ambro, J., concurring in jmt.); United States v. Cooper, 437 F.3d 324, 331-32 (3d Cir. 2006). The government has sought to take advantage of the Supreme Court's "closer review" hint before, but this Court has never agreed. See United States v. Arrelucea-Zamudio, 581 F.3d 142, 153 n.10 (3d Cir. 2009); Tomko, 562 F.3d at 570-71 & n.9. There is no good reason to do so here that would outweigh the institutional costs.

Even if this Court were inclined to consider adopting a more searching "abuse of discretion" review for outside-the-Guidelines sentences that are wholly based on a policy disagreement with independently-adopted guideline provisions, this would not be such a case. In repeatedly revising the child pornography guidelines over the last decade and more to vastly increase the recommended sentence for typical cases, the Commission did not exercise its "characteristic institutional role," as defined in Kimbrough. This is apparent not only from the appellant's own 60-page elaboration of the history (Gov't Br. 33-93), which acknowledges the Commission's repeated acquiescence in specific Congressional directives, but also from the Commission's own recently-released history of the same developments. See U.S. Sent. Comm'n, *The History of the Child Pornography Guidelines* 6 (Oct. 30, 2009) ("Through [such actions as] providing directives to the Commission, Congress has repeatedly expressed its will regarding appropriate penalties for child pornography offenders."), available at <http://www.ussc.gov/general/20091030_History_Child_Pornography_Guidelines.pdf>.

It is apparent that the Commission does not exercise "its characteristic institutional role" when it quickly adopts verbatim certain Congressionally-devised language (whether per Congressional directive or otherwise), and does so without first finding error in its own prior assessments. The History Report "provides a history of the child pornography guidelines, which were initially promulgated in 1987 and substantively revised nine times in the following 22 years." Id. 54 ("III.

Summary"). Explaining why it issued this Report, the Commission stated:

> Congress has demonstrated its continued interest in deterring and punishing child pornography offenses, prompting the Commission to respond to multiple public laws that created new child pornography offenses, increased criminal penalties, directly (and uniquely) amended the child pornography guidelines, and required the Commission to consider offender and offense characteristics for the child pornography guidelines.
>
> Sentencing courts have also expressed comment on the perceived severity of the child pornography guidelines through increased below-guidelines variance and downward departure rates. Consistent with the Commission's duties to review and revise the guidelines, and the Supreme Court's direction, the Commission has established a review of the child pornography guidelines as a priority for the amendment cycle ending May 1, 2010. This report is the first step in the Commission's work on this priority.

Rpt. 54 (footnotes omitted). A review of the Commission's detailed report reveals that the amendments to the child pornography guideline (USSG § 2G2.2) in the last two decades, resulted primarily from the Commission's response to directives (general or specific) or correction from Congress rather than determinations of the Commission based upon its staff's systematic empirical study. The History cites in detail numerous examples. E.g., id. at 17, 19-24 (1991 amendments), 26 (1996 amend.), 32-37 (2000 amend.), 38-39 (2003 amend.), 41-44 (2004 amend.).[19]

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[19] Given the Commission's recent promulgation of this presumably unbiased and authoritative history, there is no need or reason to respond to the government's desperate attempt to poke holes in the published analysis that the district court found persuasive, 1App. 18-19 (Op. 13-14); 595 F.Supp.2d at 390-91. See Troy Stabenow, "Deconstructing the Myth of Careful Study: A Primer on the Flawed Progres-

As this Court held in Arrelucea-Zamudio, when the Commission designs a guideline in response to Congressional directives, it is not carrying out its "characteristic institutional role" within the meaning of Kimbrough.[20] Not only may the sentencing court in such cases freely exercise its own characteristic independence of judgment and discretion, but this Court's deferential standard of review is not affected. Only if Congress addresses itself directly to the power of the district court -- such as by amending the Sentencing Reform Act, by establishing a binding mandatory minimum term, or by removing the authority to grant probation -- is that court's statutory sentencing authority modified. 581 F.3d at 150.[21] Similarly,

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sion of the Child Pornography Guidelines" (2009 rev.), available at <www.fd.org/pdf_lib/child porn july revision.pdf>. ("FD.org" is the website of the Administrative Office of U.S. Courts, Office of Defender Services, Training Branch.) In any event, the government's brief demonstrates neither legal error nor any clearly erroneous finding in Judge Hayden's reliance, in part, on this widely-quoted, AO-published study.

[20] Until downward departures from USSG § 2G2.2 were greatly restricted by the PROTECT Act, and as the prison sentences called for by 2G2.2 continued to increase, the percentage of cases involving judicial downward departures continued to increase as well; they decreased after the Act, and increased again after Booker. See pp. 46-47 and nn. 25-28 infra. Yet, despite clear judicial dissatisfaction with the increasing severity of § 2G2.2, the Commission was forced to disregard its duty under 28 U.S.C. § 994(o) to respond to actual judicial practice and instead continued to increase its severity, as directed by Congress. In this respect as well, the resulting Guideline did not reflect the Commission's exercise of its "characteristic institutional role." Thus, no less deferential standard of review could apply.

[21] The Arrelucea-Zamudio case, decided three weeks after the government filed its opening brief, thus negates the argument advanced by appellant under its Point C (pp. 77-83) to the effect that a judge has less discretion to reject a Congressionally-mandated guidelines than otherwise.

only if Congress amends this Court's statutory standard of review (under 18 U.S.C. § 3742(e), as interpreted in Booker, Rita and Gall) would this Court's oversight of the district court's sentencing authority be affected.

There are two final reasons why Judge Hayden's decision in this case is not in any event subject to any more searching standard of review than would otherwise apply. First, once it was decided in Kimbrough (and particularly as reaffirmed in Spears and as applied by this Court in Arrelucea-Zamudia) that the district court has authority to premise a sentence on a disagreement with the policy expressed in any of the Guidelines, the "closer review" dictum in Kimbrough could have relevance, if at all, only in relation to appellate review of the substantive reasonableness of the sentence.[22] It has no bearing on the question whether the district court did or did not commit any alleged procedural error. Yet in this appeal, the government has disavowed any claim of substantive unreasonableness in Mr. Grober's sentence. In other words, the government's entire argument here about a more favorable standard is nothing but a red herring.

Second, and last, the government's proposed lenient review applies only where a district court has based its sentence

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[22] The government does not advance any attack on Judge Hayden's sentencing decision that could be called "purely legal." Compare United States v. Russell, 564 F.3d 200, 203 (3d Cir. 2009). True claims of legal error, of course, receive plenary review, even within the overall rubric of "abuse of discretion" analysis. United States v. Washington, 549 F.3d 905 (3d Cir. 2008); United States v. Wise, 515 F.3d 207 (3d Cir. 2008).

entirely on a disagreement with the Guidelines range. But it is clear from a review of Judge Hayden's decision that she did not choose Mr. Grober's sentence from a pseudo-Guidelines range of her own design, based solely on a policy disagreement. Rather, her sentence in this case also relies, in the end, on several personal considerations peculiar to Mr. Grober's own particular case. See IApp. 39-43, 46-49 (Op. 34-38, 41-44); 595 F.Supp.2d at 404-08, 409-11.

For all these reasons, the usual, highly-deferential, abuse of discretion standard of appellate review of sentences applies to the government's appeal in this case. Under that standard, the judgement of sentence must be affirmed.

2. The district court did not fail to consider the government's sentencing arguments.

It is difficult to imagine any district court's conducting a more thoroughgoing sentencing process than occurred in this case. Judge Hayden heard witnesses for most of 12 days, including any that the government cared to call, as well as witnesses for the defense. These witnesses addressed the details of the offense conduct in this case, the formulation of the sentencing guideline for child pornography, and Mr. Grober's personal characteristics. The court also invited and received written submissions, placing no limit on their length or scope. At the final sentencing hearing, Judge Hayden delivered a detailed explanatory statement, and then, a few weeks later, a thorough and analytical written sentencing opinion. While the district court did not, either orally or in writing, restate

each of the government's arguments (or the defendant's) and then explain why the court disagreed or found it insufficiently persuasive to justify a different result, there is absolutely no requirement that a judge do so. The government thus fails to demonstrate any "significant procedural error," Gall, 552 U.S. 38, 128 S.Ct. at 598, that might warrant a remand.

Even if Judge Hayden did not address, in either her oral statement of reasons or in the written opinion, each of the government's arguments (elaborated in over 75 pages of briefing, plus exhibits, VIApp. 1683-1773) regarding the Commission's creation of and amendments to USSG § 2G2.2, the record as a whole yields more than adequate assurance that the court considered those arguments, along with all others presented to it. This Court's cases, viewed together, establish that when parties make potentially meritorious arguments, the district court must "consider" and cannot ignore them. But this does not mean the court must discuss or explicitly address every such argument; all the record must show is that the sentencing judge considered all non-frivolous contentions. "The court need not discuss every argument made by a litigant." United States v. Jackson, 523 F.3d 234, 243 (3d Cir. 2008), quoting United States v. Cooper, 437 F.3d 324, 329 (3d Cir. 2006). Rather, what is required is that the record "demonstrate the trial court gave meaningful consideration to the § 3553(a) factors." Id.

In United States v. Olhovsky, 562 F.3d 530 (3d Cir., as amended 5/5/09), this Court quoted with approval Judge Hayden's introduction to the sentencing opinion in this case. In that

passage, she quoted the opinion of the late Chief Judge Becker, writing for this Court in United States v. Faulks, 201 F.3d 208, 209 (2d Cir. 2000), referring to the judge's responsibility at sentencing as "daunting." See IApp. 7 (Op. 2); 595 F.Supp.2d at 383. In echoing that sentiment in Olhovsky, another case involving possession of child pornography, this Court notably chose not just to quote its own precedent directly, but rather to quote Judge Hayden's invocation of it in this, a similar case. This Court further noted that fulfilling the district court's responsibility required a "careful balancing of societal and individual needs, and an ability to determine a sentence based on dispassionate analysis of those often competing concerns." 562 F.3d at 551. This Court thus has recognized and approved Judge Hayden's view of the district court's awesome responsibility to exercise its sentencing discretion with extreme care.

There is no question, upon reviewing all of the sentencing proceedings that the district judge held in this case, and in particular her oral statement of reasons and her 46-page sentencing opinion, that Judge Hayden provided an adequate -- indeed, more than adequate -- explanation of her reasoning. See 18 U.S.C. § 3553(c). In particular, the court offered an unusually extensive explanation of its reasons for selecting and imposing the particular sentence that it did. And although she had no affirmative duty to do so, Judge Hayden made clear that she had considered the arguments advanced in the government's

79-page Sentencing Memorandum; see VIApp. 1683. As stated in her written opinion:

> After taking testimony over days of hearings and reviewing numerous written submissions, the Court has concluded that U.S.S.G. § 2G2.2, fails to provide a just and reasoned sentencing range given the facts of this case and the background of the defendant. As a consequence the Court has significantly varied downward in sentencing David Grober.

Op. at 3 (IApp. 8) (emphasis added); 595 F.Supp.2d at 384. Indeed, the court below referred expressly to that memorandum by filing date[23] and docket number (Op. 33 (IApp. 38); 595 F.Supp. 2d at 404), when specifying that it "rejects the government's argument ... that there is no need to distinguish between [child-]abusers and [pornography-]producers[,] on the one hand, and consumers on the other." While not repeating in detail all of the government's arguments concerning USSG § 2G2.2, the opinion makes crystal clear that the court did in fact consider them. No more is required, though Judge Hayden provided more.

The court below also demonstrated it had considered the government's arguments when it addressed the Commission's process over many years in developing the child pornography guidelines, including the amendments to § 2G2.2 which formed the heart of the government's written submission. Judge Hayden's oral statement at sentencing referenced the Commission's state-

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[23] The government's memorandum was filed October 1, 2008 (DDE 76). The copy reproduced in the Appendix, however, appears to be dated December 4, 2008 (VIApp. 1764) -- perhaps illustrating the perils of inferring too much from the often automatically-generated date stamps on items saved in a computer (including dates supposedly disclosing when a file was "created" or "last accessed") -- be those items legal documents or graphical images.

ments to and interaction with Congress, and thus belies the appellant's argument:

> Clearly, from [Professor Berman's] testimony and the remarks of the Commission[,] the source [of the applicable version of § 2G2.2] is manifold[;] Congress had directly amended the guidelines, [and] the Commission has adopted more stringent levels in response to Congress. It boosted the base level without adjusting for the number of levels upwards that were in place, not because this makes sense but because of Congressional concern that sentences aren't high enough. This has had a bad result[,] of course.

See VApp. 1615 (emphasis added).[24] See also id. 1507 (prosecutor referring to attachment to its sentencing memorandum concerning development of § 2G2.2).

To suggest that Judge Hayden's decision in this case was predicated on a disregard of the arguments and evidence before her is not tenable.

B. The District Court Committed No Other Significant Procedural Error.

None of the other eight so-called "procedural errors" advanced by the government in its appeal warrants reversal, whether considered separately or cumulatively. Cf. Ruggero Aldisert, *Winning on Appeal* § 8.06[1], at 122-23 (1992) ("Litmus Test: Number of Issues in the Brief"). Indeed, none of the

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[24] As Arrelucea-Zamudia states analogously (in its different context), however, it was proper for the district court to consider the Commission's own "criticism of the disparity" created by the child pornography guideline Congress directed it to create. 581 F.3d at 155 ("The Commission's criticism of the disparity created by fast-track programs could be considered by a district court under this factor as well." [referring to § 3553(a)(5), court to consider "any pertinent policy statement"]).

claimed errors even rises to the level of "significant" (Gall v. United States, 552 U.S. 38, 128 S.Ct. 586, 597, 598 (2007); Tomko, 562 F.3d at 567), which is essential if any is to result in a reversal on appeal.

In Gall, the Supreme Court shed light on the kind of "procedural error" which it deemed "significant" and thus potentially capable of rendering a sentence reversibly "unreasonable." The examples it offered were:

> failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [other] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence -- including an explanation for any deviation from the Guidelines range.

128 S.Ct. at 597. Nothing identified in the government's brief remotely rises to the level that would constitute reversible procedural error.

1. Judge Hayden did not err in identifying the rationale for the child pornography guideline, as amended.

The government claims that the district court erred in concluding Congress and the Sentencing Commission lacked any valid rationale for the child pornography guidelines, as presently designed, other than "revulsion." Gov't Br. 33-77. Most simply, this misstates the lower court's view. While quoting passages from two other district judges' opinions which used that expression (IApp. 20, 21 (Op. 15, 16); 595 F.Supp.2d at 392, 393), the court below did not rest its ruling on that basis. The judge's quest was for a rationale that would explain why the Guideline-recommended sentence in these cases was so

high, relative to other crimes. The purpose of asking this question was not academic; the court wanted to know if she might be wrong in her initial thinking that a just sentence would be very different. Indeed, the quotations appear in a part of Judge Hayden's opinion which is designed only to show that many other "practical, courageous" (IApp. 23 (Op. 18); 595 F.Supp.2d at 394) district judges agree that the child pornography guidelines have become categorically too harsh.

The latest statistics from the Sentencing Commission reveal that many more district courts agree with Judge Hayden than she was able to identify. In Fiscal Year 2008 (ending Sept. 30, 2008), including the time period during which Judge Hayden was conducting the sentencing proceedings in this case, 1335 federal offenders were sentenced under USSG § 2G2.2. U.S. Sent. Comm'n, *Final Quarterly Data Report: Fiscal Year 2008* (March 24, 2009), at 14 (Table 5), available at <www.ussc.gov/sc_cases/ussc_Quarter_Report_Final_FY2008.pdf>. Of these, only 53.7% (718) received sentences within the Guidelines range. Id.[25] Fully 41.8% (558) of the 1335 received sentences below the range for reasons other than government-sponsored cooperation (§ 5K1.1) and fast-track (§ 5K3.1) motions.[26] During the first three quarters of FY2009, the period during which Mr. Grober was

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[25] During the same time period, 59.4% of all federal defendants received within-Guidelines sentences. Id. at 1 (Table 1).

[26] Nationally, during FY2008, the rate of non-government sponsored below-range sentences for all offenses was only 13.4%. Id. at 1 (Table 1).

sentenced (and the latest for which statistics are available) the rate of dissatisfaction among district judges with the child pornography guideline escalated rapidly. Of 1195 defendants sentenced under § 2G2.2 during those nine months, only 44.6% (533) received within-Guidelines terms, with more than half -- 51.3% (614) -- receiving non-government sponsored below-range sentences. U.S. Sent. Comm'n, *Preliminary Quarterly Data Report: 3rd Quarter Release* (Sept. 8, 2009), at 14 (Table 5), available at <www.ussc.gov/sc_cases/ussc_2009_Quarter_Report_3rd.pdf>.[27] Judge Hayden's assessment of the child pornography guideline in Mr. Grober's case as not reflecting a proper balancing of the various purposes of sentencing was not aberrational, and the resulting sentence was not unreasonable in any way.[28]

The court below never relied on the "revulsion alone" argument as a basis for her decision. The government's focus on those words, taken out of context from Judge Hayden's opinion, fails to establish any error, much less reversible error. In truth, the district court recognized that Congress did have a perceived rationale for § 2G2.2, to wit, the severity of the crime. E.g., IApp. 43-45 (Op. 38-40); 595 F.Supp.2d at 408-09. The district court determined, however, that the Sentencing

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[27] During the same period, just 15.7% of all federal defendants received such sentences. Id. at 1 (Table 1).

[28] In fact, in light of this widespread judicial revolt, the Sentencing Commission has made reconsideration of the child pornography guideline one of its top priorities for the coming year. USSC, "Notice of Final Priorities," 74 Fed.Reg. 46478, 46479 (Sept. 9, 2009). Its purpose in doing so can hardly be to explore ways to make the guideline harsher.

Commission simply followed Congress's directives, and did not exercise its independent judgment in this regard. Accordingly, Congress's emphasis on a single consideration, to the detriment of all other statutory factors which the Commission would otherwise have had to balance, had produced an unreasonable guideline range, even for "heartland" cases. That judgment -- reached after careful consideration, and expressed in a lengthy and fully developed decision -- was reasonable, and within the district court's discretion.

2. Judge Hayden's assessment of the Commission's statistical data, a minor factor in her decision, was not wrong, and she did not overlook the impact of charging decisions in her assessment of the "typical" offender.

The district court concluded that the child pornography guideline does not suggest a just sentence in what Judge Hayden referred to as "downloading" cases -- typical cases, like Mr. Grober's, centering on personal possession of illicit images obtained on line, and involving no production or distribution other than noncommercial bartering. IApp. 27-28 (Op. 22-23); 595 F.Supp.2d at 397. The court cited as evidence the fact that such cases can readily generate guideline ranges equal to or exceeding the statutory maximum for a single count of either "possession" or "receiving." The government claims that Judge Hayden committed significant procedural error by misinterpreting statistical data about the application of various enhancements under USSG § 2G2.2. Gov't Br. 83-93. This argument demonstrates neither error nor abuse of discretion.

The government's argument is built on an undefended false premise: that the Guidelines are designed to address the gamut of all theoretically possible violations of federal criminal statutes rather than being meant to address only those violations which are typically prosecuted. Gov't Br. 85 ("The Guidelines, like the statutes, are drawn to cover all potential defendants. ... [T]he district court here simply assume[d] away the far larger pool of offenders not prosecuted ...."). That is flatly incorrect. The guidelines were built around a database of actual sentences in 10,500 cases from 1985, elaborated with "enhanced" presentence reports, Kimbrough, 552 U.S. at 96 ("10,000 cases"); USSG ch. 1.A.3 (p.s.), at 4; Kate Stith & Jose Cabranes, *Fear of Judging* 59 (1998) ("10,500").[29] Obviously, all of those cases involved offenses that were prosecuted, and which then were sentenced. It is the government's brief, not

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[29] The ranges themselves, however, were derived not from real sentences imposed in the 10,500 cases, but rather only from the relatively few cases out of this dataset which involved first offenders who went to trial and on whom a sentence of imprisonment was imposed, excluding the 50% or more who in 1985 and earlier would have received probation. USSC, *Supplemental Report on the Initial Sentencing Guidelines* 21–22 (June 18, 1987). The guidelines, of course, have been significantly modified from there in the last 20+ years. Thus, the truth is that the original Guidelines, far from representing an empirical study of appropriate sentences for the full range of real offenders, prosecuted or not, as the government suggests, actually reflect sentences for those in the 1985 dataset who (a) were prosecuted, and (b) stood trial, and (c) whom judges deemed the most culpable and least amenable to rehabilitation. And those are the ranges on which all later amendments and adjustments by the Commission have been built.

Judge Hayden, whose argument is founded on factual error.[30] And the government, before launching into its de novo-style statistical argument, apparently based on a Commission report (Gov't Br. 86 & n.28) that was not submitted below and was not subject to adversarial analysis, identifies no other alleged "error" which it might be asking this court to correct.

The district judge based her conclusions on expert testimony that it credited, including certain admissions by the government's own witness. IApp. 27-28 (Op. 22-23); 595 F.Supp. 2d at 397. Those findings are not clearly erroneous (assuming that's the government's claim), and cannot be overruled by citing a study that the prosecutor prefers. The court below did not claim that the "typical" defendant receives "every possible" enhancement, compare Gov't Br. 88, but rather that he receives the enhancements for more than 600 images, at least some of which are "sado-masochistic." Given that all sexual penetration of children is so characterized, and that non-commercial, non-pecuniary trading of images among private downloaders is treated under the Guideline as "distribution" for "gain,"[31] it is

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[30] Nor did the court ignore the role of prosecutorial discretion. Compare Gov't Br. 84-85. The opinion discusses extensively its impact in driving sentences. IApp. 30-31 (Op. 25-26); 595 F.Supp.2d at 398-99.

[31] Thus, the government refers to Mr. Grober's occasional e-mail correspondence with similar individuals, in which they exchange illicit attachments for no compensation, as "egregious conduct in distributing child pornography." Gov't Br. 88. The district court did not abuse its discretion in rejecting such hyperbole as unhelpful and unpersuasive.

unsurprising that the "typical" case begins to look "egregious" and appears to call for a near-maximum term.[32]

The government's brief drifts off into a critique of other passages in an article that Judge Hayden cited, but this Court is not the forum for debating the merits of one article or another. The academic "marketplace of ideas" will sort that out. What is before this Court is the five-year prison sentence imposed by Judge Hayden in Mr. Grober's case. The district court determined that a suggested guidelines range near the statutory maximum in this sort of case produced unwarranted disparity, exaggerated the case's aggravating circumstances, and did not properly account for all the purposes of sentencing. The court's analysis of the adjustments which went into the calculation of that range was not predicated on any clear error.

3. The court committed no "significant procedural error" when it considered the testimony of a law professor who was called as an expert on federal sentencing policy, or when it sought testimony from the Sentencing Commission.

The amount of weight to give a particular witness's testimony is peculiarly within the discretion of the factfinder who heard that witness -- and the other witnesses -- testify.

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[32] Nor did the district court commit any "significant procedural error" when it noted in passing that the sentencing range called for by the child pornography guideline often encompasses the statutory maximum for a single count, thus negating the opportunity to sentence more severely in unusually aggravated cases. IApp. 23 (Op. 18); 595 F.Supp.2d at 394. Although the government makes a separate argument against it, Gov't Br. 105-07, this remark was simply not a separate basis for any decision by the court below. Under no conceivable circumstances could it constitute reversible error.

Congress has directed that the evidence received at a federal sentencing is not restricted by any non-constitutional rules. See 18 U.S.C. § 3661; Fed.R.Evid. 1101(d)(3). Professor Douglas Berman holds a chaired faculty position at a major law school, is an editor of the Federal Sentencing Reporter, and is the co-author of the leading textbook on sentencing. Unsurprisingly, Judge Hayden found his expert testimony helpful. The appellant suggests that Berman's testimony was entitled to less weight than the court gave it. Gov't Br. 93-95. This Court does not sit to reweigh the evidence or reconsider the credibility of witnesses. United States v. Jones, 566 F.3d 353, 361 (3d Cir. 2009); United States v. Reyeros, 537 F.3d 270, 277 (3d Cir. 2008) (citing earlier cases); Miller, 527 F.3d at 60. In the end, however, the district court made its own determination, not adopting any one witness's or author's views, based on the totality of many days of testimony from many witnesses called by both sides. No reversible error occurred when the court included Professor Berman's testimony in the mix of what influenced it to give less deference to the child pornography guideline range.

Similarly, it is apparent that the court did not err when it simply sought testimony from a member of the Sentencing Commission or its staff. Gov't Br. 95. Contrary to the Commission's letter refusing to supply testimony, an affirmative response would not have been barred by 18 U.S.C. § 3553(b)(1), see IApp. 53-54, since that statute only governs how "departures" can be justified, which was not the court's objective.

Moreover, § 3553(b)(1) is the principal provision that was held unconstitutional by the Supreme Court in Booker and accordingly "excised" from the statute. In any event, when the Commission declined to send a witness, the court did not issue a subpoena or cite anyone for contempt. Instead, it willingly gave full consideration to whatever else the government cared to submit as rebuttal of the defense presentation. How this could possibly amount to reversible error is beyond imagining.

4. The district court committed no "significant procedural error" when it considered the disparity resulting from the defendant's rejection of three plea offers.

A sentencing judge is obligated to take into consideration any issues of unwarranted sentencing disparity. 18 U.S.C. § 3553(a)(6). As a factor listed separately from consideration of the Guidelines, addressed under (a)(4), Congress necessarily meant to require consideration of disparities that may exist notwithstanding application of the Guidelines. Judge Hayden therefore properly took this factor into account.

Contrary to the government's argument, Gov't Br. 97-105, disparities resulting from the exercise of prosecutorial discretion may indeed be deemed "unwarranted," in a sentencing judge's discretion. Arrelucea-Zamudia, 581 F.3d at 149.[33] That is not to say that a defendant who pleads guilty may not properly fare better than one who is convicted after trial, or -- as here -- one who rejects earlier offers and pleads "open" on the eve of

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[33] In this regard, Arrelucea-Zamudia overrules the authority relied upon by the government (Gov't Br. 102-03).

trial. The future of plea bargaining is not at stake in this appeal, contrary to the government's exaggerated arguments. Rather, the question is the authority of the district court to assess the extent of the "penalty" that comes with putting the government to its constitutional burden of proof (or the similar penalty for delaying the decision to plead guilty). If, as here, the difference is a threatened four-fold increase in the suggested sentence, rising from about five years' imprisonment to twenty, a judge is entitled to cry foul and use her legitimate power to mitigate that injustice.

Again, Judge Hayden committed no "significant procedural error" when she took into account that the government was willing to forego, in exchange for a guilty plea, most of the guideline enhancements for which it later argued (and continues to argue) so vociferously. The disparities that continue to exist between outcomes for defendants who plead guilty early and those who do not are a principal source of distortion and unfairness in the superficially even-handed Guideline sentencing system. Judge Hayden properly took that factor into account, along with others, in fashioning her sentence in this case.

5. The district court committed no "significant procedural error" when it concluded that courts cannot reliably assess the relative seriousness of a pornography collection or apply the enhancement for sadistic images.

In its final point, Gov't Br. 108-10, the appellant argues that Judge Hayden committed procedural error in offering, as a further justification for rejecting USSG § 2G2.2 as a benchmark for sentencing, the problem that the Guideline calls upon judges

to make comparative assessments of the present defendant's child pornography collection and the extent or egregiousness of others' conduct. IApp. 33-35 (Op. 28-30); 595 F.Supp.2d at 401-02. In attacking this aspect of the district court's opinion, the government ignores Judge Hayden's actual point -- that it is utterly impractical, if not legally impossible, for either a judge or a defense lawyer to access and evaluate a sufficient quantity and variety of such contraband material to be in a position to evaluate intelligently, objectively, and critically the expert testimony of the government's agent.[34]

Judge Hayden never said or ruled that making the assessments required by § 2G2.2 was impossible. In fact, in this very case, relying on her own view of the evidence and her discerning consideration of Agent Chase's testimony (some of which the court credited and some it rejected), the court did make those determinations -- all in favor of the government, and without objection from the defense. IApp. 10, 11-12 (Op. 5, 6-7); 595 F.Supp.2d at 385-86, 386-87, 401-02. The difficulty, subjective nature, and potential unfairness of this process, however, affected the court's final judgment as to the empirical soundness of the Guideline itself as a yardstick for just sentencing in individual cases. In reaching this conclusion, the district

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[34] The appellant claims that the judge can adequately assess whether an image of child pornography represents "sadistic or masochistic conduct or other violence" simply "by looking at it." Gov't Br. 108. Judge Hayden's concern, however, was with comparative and contextual evaluation of the material, not simple factual assessment.

court committed no "significant procedural error" in this or any other respect.

C. Any Procedural Error by the District Court in Rejecting § 2G2.2 on Policy Grounds Would, in Any Event, Be Harmless.

A review of the district court's oral and written statements in connection with sentencing reveals with clarity that the court's determination of the appropriate sentence was not materially affected by any of the claimed errors, and must therefore be affirmed.

1. The district court would have imposed the same sentence if she had not committed any procedural error that the government claims occurred.

Even if the government had identified some sort of procedural error in Judge Hayden's meticulous sentencing process in Mr. Grober's case, it is clear that any such error was harmless, since the court would have imposed the same five year sentence in any event. Judge Hayden concluded her lengthy opinion by stating that:

> The Court believes as a matter of conscience that the imposition of any term of incarceration above the mandatory minimum of 60 months attached to the offenses to which David Grober pleaded guilty would be unfair and unreasonable.

IApp. 50-51 (Op. at 45-46); 595 F.Supp.2d at 412. Simply stated, the court determined that a sentence of 60 months' imprisonment was sufficient to fulfill the purposes of sentencing as provided in 18 U.S.C. § 3553(a)(2).

"Where ... a sentencing court has made a non-constitutional error, 'we will remand for resentencing unless [we] conclude on

the record as a whole ... that the error did not affect the district court's selection of the sentence imposed.'" United States v. Langford, 516 F.3d 205, 215 (3d Cir. 2008)." United States v. Brown, 578 F.3d 221, 226-27 (3d Cir. 2009) (internal quote from Williams v. United States, 503 U.S. 193, 203 (1992)). See also 18 U.S.C. § 3742(f) (criteria for reversal). There is no reasonable probability that assigning more weight to the Guidelines range or changing any of the other comments and remarks to which the government's brief takes exception would have led Judge Hayden to impose a different sentence.

The district court's written sentencing opinion and her oral statement of reasons on the sentencing date together make clear that, notwithstanding her disagreement with USSG § 2G2.2 on policy grounds, her review of all of the "3553(a) factors" and consideration of those factors as a whole had convinced her that to impose any greater sentence would have been to impose a sentence "greater than necessary," contrary to § 3553(a)'s "overarching" command. See Olhovsky, 562 F.3d at 547, quoting Kimbrough, 128 S.Ct. at 563. Thus, if the district court committed any "significant procedural error," which the defendant/appellee disputes, that error would be harmless. The appellant has made no showing that the sentence was to any extent affected by any error.

The court expressed the conclusions upon which it based its sentencing decision as follows. First, the court determined, without objection from defense counsel, that the probation office's and government's numerical calculation of the guide-

lines, including enhancements, was correct. VApp. 1477; Tr. 12/8, at 14. The court discussed the § 3553(a) factors at length (VApp. 1603–25; Tr. 140–62), noting that one statutory factor "is to avoid unwarranted sentencing disparities." Yet "[f]ully a third of sentences [under this guideline in 2007] expressing variances downward and negotiated pleas making obvious the charging decisions, including the original one made in this case, are creating a zone in the double digits." VApp. 1621; Tr. 158.[35] The court concluded that "a sentence in the range of 20 to 25 years is far greater than necessary to comply with the purposes of sentencing discussed above." VApp. 1611; Tr. 148. In imposing sentence, the court stated that "the sentence in light of the typicality of the offense and the history and characteristics of this defendant will be 60 months with a term of three years of supervised release to follow." VApp. 1625; Tr. 162.

In the court's written opinion (IApp. 35–40 (Op. 30–45); 595 F.Supp.2d at 402–12), the court again discussed the § 3553(a) factors, separately and in detail. The court began by stating that it found that § 2G2.2 "produces an unreasonable sentencing range even before considering the sentencing factors in § 3553(a)." IApp. 35 (Op. 30); 595 F.Supp.2d at 402. After reviewing those factors in the context of Mr. Grober's specific case, the court stated that "Having considered the sentencing

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[35] As noted above, pp. 46–47, the level of disagreement with this guideline among district judges has continued to increase in each subsequent year, having now exceeded 50%.

factors at length, the Court is convinced that the goals of sentencing are reached by imposition of the mandatory minimum sentence of 60 months and not any more than that." IApp. 50 (Op. 45); 595 F.Supp.2d at 411-12 (emphasis added). The court then explained its belief that it could impose no greater sentence than the mandatory minimum "as a matter of conscience" (IApp. 50-51 (Op. 45-46), 595 F.Supp.2d at 412), and that:

> In reaching this conclusion, the Court joins thoughtful district court judges whose work has convinced them that the present guideline, § 2G2.2, must be given less deference than the guidelines traditionally command. The Court's scrutiny of the guideline has led it to conclude that the guideline does not guide. So the Court has performed the traditional analysis under 18 U.S.C. § 3553(a), keeping in mind that Congress has imposed a mandatory minimum. The court has satisfied itself that what it must do -- that is, impose a five year sentence -- is all it need do to sentence David Grober reasonably under § 3553(a).

IApp. 51 (Op. 46); 595 F.Supp.2d at 412. A consideration of the court's discussion reveals that the court would have imposed the same sentence whether or not she had made any of the particular "procedural errors" discussed in the government's brief.

That the district court had discretion to refuse to apply USSG § 2G2.2 on policy grounds -- and the government's recognition of this discretion -- are important. Even if this Court were to remand for resentencing to require a more extensive or more careful explanation of reasons by the district court, the judge would not be obliged change her refusal to apply 2G2.2 on policy grounds -- that is, she would not be obliged to apply 2G2.2's range. At most, the court would have to alter its justification. The harmless error question is whether the court

would impose the same sentence. Calling the choice of sentence in this case a "matter of conscience" is about as clear as any statement of record could be that the Court would not impose a longer prison sentence. All but one of the "errors" that the government here characterizes as "procedural" have to do with the process of explanation of the sentence, not with the fairness of the process leading to that decision. If anything, these claims go to the sufficiency of the court's statement of reasons, yet the government makes no claim that those reasons are unlawful or inadequate. The only exception is the claim that the court did not "consider" the government's arguments -- a contention that is manifestly untrue.

Accordingly, any error of a procedural nature that may have been committed in this case was harmless.

2. The government/appellant has affirmatively waived any argument that the sentence is substantively unreasonable.

The government/appellant, in the Conclusion section of its brief, takes the position that, pending further analysis on remand of the Commission's process in amending § 2G2.2, "it would be premature to consider whether the sentence imposed by the District Court in this case was substantively unreasonable." Gov't Br. 111. Appellant does not argue in the alternative -- as it might have -- that, even if this Court were to reject the appellant's position that the district court committed procedural error, the sentence should in any event be vacated as substantively unreasonable.

Thus, if this Court agrees with Mr. Grober that the district court did not abuse its broad discretion in any procedural respect, the government cannot obtain reversal of the sentence on the ground of substantive unreasonableness, should it decide to change its position.[36] See United States v. Hoffecker, 530 F.3d 137, 159 (3d Cir. 2008) (issues not raised in appellant's opening brief will be deemed to be waived); United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005) (same); United States v. Voigt, 89 F.3d 1050, 1064 n.4 (3d Cir. 1996).

Having affirmatively asserted in its brief that this Court should not reach the question of the substantive reasonableness of the sentence, the government has done more than merely "waive" the substantive reasonableness question in the colloquial sense of having forfeited it through failure to raise the point. Instead, it has affirmatively waived the issue in the technical, legal sense. In such cases, the Court cannot even consider "plain error." United States v. Olano, 507 U.S. 725, 732-34 (1993) (no "error" by district court within meaning of plain error rule if defendant has affirmatively waived the point, thus extinguishing any "error," plain or otherwise). The

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[36] Because the government/appellant has not argued in the alternative that the sentence was substantively unreasonable, the extent of the variance in this case is immaterial to the Court's analysis. But even were it not, this Court "must give due deference to the district court's decision that the 3553(a) factors, on a [sic] whole, justify the extent of the variance." United States v. Tomko, 562 F.3d 558, 561 (3d Cir. 2009) (en banc) (quoting Gall v. United States, 552 U.S. 38, 128 S.Ct. 586, 597 (2007)).

sentence should for that reason simply be affirmed -- unless this Court grants greater relief on Mr. Grober's arguments as cross-appellant, regarding the district court's erroneous decision that a mandatory minimum sentence applied.

CONCLUSION

For the reasons set forth above, the judgment of sentence must be vacated and remanded for resentencing without being bound by application of a mandatory minimum sentence. Absent that relief, the judgment of sentence must be affirmed.

Dated: December 2, 2009

Respectfully submitted,

s/Peter Goldberger

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REQUIRED CERTIFICATIONS

A. Bar Membership. I certify that the attorney whose name and signature appear on this brief is a member of the Bar of this Court.

B. Type-Volume. This brief was prepared in a 12-point Courier, nonproportional typeface, with no more than 10.5 characters per inch. Pursuant to Fed.R.App.P. 28.1(e)(3), I certify, based on the word-counting function of my word processing system (XyWrite ver. 4.07), that this brief complies with the type-volume limitation imposed by this Court's Order filed September 22, 2009, in that the brief contains fewer than the 35,389 words, to wit, no more than 19,902 words.

C. Electronic Filing. I certify pursuant to LAR 31.1(c) that the text of the electronically filed version of this brief is identical to the text in the paper copies of the brief as filed with the Clerk. The anti-virus program Avast! vers. 4.8, with current updates, has been run against the electronic (PDF) version of this brief before submitting it to this Court's CM/ECF system, and no virus was detected.

__/Peter Goldberger_____

CERTIFICATE OF SERVICE

On December 1, 2009, I served a copy of the foregoing brief on counsel for the appellant/cross-appellee, the United States, via this Court's CM/ECF system, addressed to:

Caroline A. Sadlowski, Esq.
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On December 1, 2009, having previously hand-delivered four copies of the cross-appellant's appendix to the office of the Clerk of ths Court, I caused ten copies of this Brief to be mailed by first-class mail to the Clerk of this Court.

__s/Peter Goldberger_____