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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, .
 .
Plaintiff, . No. 15-cr-2838-GPC
 .
v. . December 19, 2018
 . 1:30 p.m.
LUKE NOEL WILSON, .
 .
Defendant. . San Diego, California
.

TRANSCRIPT OF SENTENCING HEARING AFTER REMAND
BEFORE THE HONORABLE GONZALO P. CURIEL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: United States Attorney's Office
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For the Defendant: Warren & Burstein
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1 SAN DIEGO, CALIFORNIA; DECEMBER 19, 2018; 1:30 P.M.

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3 THE CLERK: Calling item number three on the
4 calendar, Case Number 15-cr-2838, U.S.A. v. Luke Noel Wilson,
5 on for a sentence after remand.

6 MS. GRIFFITH: Good afternoon, Your Honor. Amanda
7 Griffith on behalf of the United States.

8 THE COURT: Ms. Griffith.

9 MR. BURSTEIN: And Devin Burstein for Mr. Wilson, who
10 is present in custody -- shortly to be present in custody.

11 THE COURT: All right. Good afternoon, Mr. Burstein
12 and Mr. Warren.

13 MR. WARREN: Good afternoon.

14 (Defendant entered the courtroom.)

15 THE COURT: Good afternoon, Mr. Wilson.

16 THE DEFENDANT: Good afternoon, Your Honor.

17 THE COURT: We are here for a sentencing hearing
18 following remand by the Ninth Circuit Court of Appeals, and
19 that remand followed a post-sentencing agreement that was
20 entered into between the parties in July of 2018. And let me
21 address that post-sentencing agreement, which has been attached
22 to the government's sentencing memorandum.

23 MS. GRIFFITH: And, Your Honor, for -- I have the
24 original if the Court would like to have that for the record.

25 THE COURT: Please.

1 MS. GRIFFITH: May I approach?

2 THE COURT: Yes.

3 So I have been handed, now, the original of the
4 post-sentencing agreement, which purportedly has been entered
5 into by the parties. And it is a five-page document, and at
6 the bottom of each page, in the right-hand corner, there's a
7 notation for defendant initials, and there are the initials
8 L.W. written.

9 Are those your initials on each of these pages, sir?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: And then, at page 5, there also is a
12 signature line for Luke Noel Wilson, defendant, and above that
13 signature line is a signature. Is that your signature, sir?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: And it's dated July 5, 2018. Is that
16 when you signed it?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: And did you initial each of these pages
19 and sign it after you had completely read the contents of the
20 agreement and discussed it with your attorney?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Do you have any questions regarding this
23 agreement?

24 THE DEFENDANT: No, Your Honor.

25 THE COURT: And specifically, it provides for a

1 remand for sentencing purposes, and that is what we will be
2 doing today. We are vacating the sentence on Counts Two and
3 Three that were previously imposed by this Court, and the Court
4 will then proceed with resentencing on Counts Two and Three.

5 And as I understand it, based upon these proceedings, you
6 understand that there will be no other relief provided,
7 furnished to you, as a result of any claims related to the --
8 if not the withholding, the fact that you were not provided
9 with an e-mail between yourself and Emily Driver, where you
10 point out that certain child pornography produced by
11 Ms. Arriola was, in fact, provided to you unsolicited; that is,
12 that you did not initially request that that child pornography
13 be created or provided to you.

14 Is that true, sir?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: You understand that these proceedings
17 today will be the extent of any sort of relief for not having
18 that information available before, correct?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Are there any other operative provisions
21 relating to this agreement that I need to reference at this
22 time?

23 MS. GRIFFITH: No, Your Honor.

24 THE COURT: And, Mr. Burstein, you agree with your
25 client's decision to limit his remedies to those that are set

1 forth in this agreement?

2 MR. BURSTEIN: I do, Your Honor.

3 THE COURT: And do you believe that his entering into
4 this agreement is made knowingly, intentionally, with a full
5 understanding of the consequences of this agreement?

6 MR. BURSTEIN: Yes, Your Honor.

7 THE COURT: And, Mr. Wilson, you are fully satisfied
8 with the representation that's been provided to you to date by
9 Mr. Burstein?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: So the Court finds that this agreement
12 has been entered into by Mr. Wilson with a full understanding
13 of the terms of the agreement, the limitations of the
14 agreement, that he has discussed the terms with his lawyer and,
15 for all these reasons, it is knowingly and intentionally made,
16 with a full understanding of the consequences of this
17 agreement. The Court will then proceed to vacate the sentence
18 imposed on Counts Two and Three, and we will move forward with
19 a new sentencing hearing.

20 With respect to resentencing, the Court has reviewed a
21 number of documents, which I would like to identify for you. I
22 have considered the sentencing summary chart that was
23 originally filed by the government on March 1; the sentencing
24 summary chart filed by the defense on March 1; the sentencing
25 memorandum that has been recently filed by the defense, that

1 was filed on December 12th; and the response to the defendant's
2 sentencing memorandum, filed on December 14th. I have further
3 reviewed the defendant's reply to the government's proposed
4 guideline calculation, which was filed March 2. And these are
5 documents that I had previously reviewed at the original
6 sentencing but I have again reviewed them for purposes of this
7 proceeding.

8 I have again reviewed the addendum to the presentence
9 report prepared by the probation office and filed on March 1,
10 2018. And that was prepared in response to the objections to
11 the PSR filed by the defense on February 21. The government
12 had the opportunity to respond to those objections and filed a
13 memorandum to that effect on March 1.

14 I have also reviewed the report prepared recently by
15 Dr. Clark Clipson that was filed under seal on December 14. I
16 have once again reviewed the PSR that was prepared by the
17 probation office in this case, which was originally filed on
18 December 8, 2017. I have reviewed the proposed restitution
19 order that was lodged by the government within the last week or
20 so.

21 I have also reviewed the entirety of the 102-page
22 transcript of the sentencing hearing from March 8, 2018. At
23 that hearing, the Court addressed a number of issues. The
24 Court, among other things, went through the objections to the
25 presentence report, both legal and factual, and the Court

1 agreed or accepted certain objections and certain requests to
2 modify the presentence investigation report.

3 And at this point, let me inquire, do we need to revisit
4 those issues, given that we have previously done that?

5 MR. BURSTEIN: No, we don't, Your Honor.

6 Just, before I get there, just because I wrote a note, I
7 just wanted to make sure -- I am sure the Court did, but I
8 don't think the Court mentioned that it also reviewed the
9 original sentencing memo filed by the defense under seal.

10 THE COURT: I did not, and the reason is because that
11 would have been destroyed back at the time when this case first
12 was concluded, and it is not available in my ECF, so I did not.

13 MR. BURSTEIN: Well, I don't want to put words in the
14 Court's mouth, but I assume the Court generally remembers it.

15 THE COURT: As I stated, I have reviewed again a
16 great number of documents, and it was not clear to me whether
17 or not there was going to be a request to review again the
18 original sentencing memorandum since there was a new sentencing
19 memorandum filed. But I am prepared to at this time take a
20 break and review that once again to the extent that you wish or
21 that it's necessary for a complete review of all relevant
22 documents and an opportunity to ensure that your appeal to the
23 Ninth Circuit is -- the record is fully developed.

24 MR. BURSTEIN: I don't think it is necessary, Your
25 Honor. I think this Court is very, very, very familiar with

1 the facts of this case.

2 Turning to the Court's question, what the government and I
3 and Mr. Wilson have decided or at least we would ask the Court
4 is simply, to streamline these proceedings, we are prepared for
5 the Court, if it pleases the Court, to adopt all of the
6 guideline findings from the prior sentencing, to essentially
7 adopt the same supervised release conditions as the prior
8 sentencing, with us leaving Mr. Wilson's allocution, our
9 arguments as to 3553, and the appropriate sentence, and a
10 determination of the appropriate period of supervised release.

11 All that being said, we do that with the understanding, I
12 think, and agreement of the government that all of our prior
13 objections would be deemed preserved, so that we don't just
14 have to essentially redo everything that we did last time.

15 THE COURT: And I appreciate that. And I do note
16 that the original sentencing hearing took more than two and a
17 half hours, and I have reviewed the entirety of the transcript
18 regarding that proceeding. And it's clear that, at the end of
19 the day, the 3553 analysis is probably what is most
20 consequential to the defense at this point, given the record
21 that has already been developed.

22 But I am prepared to adopt the same guidelines that I had
23 previously found; that is, a base offense level of 22, which
24 the parties have agreed upon; plus two for material involving
25 prepubescent minor, which the parties agreed upon; plus two for

1 the use of a computer, which the parties agreed upon; plus five
2 for possession of 600 or more images, which the parties agreed
3 upon.

4 The only things that were in dispute originally were the
5 plus two for distribution, and part of that attack was based
6 upon *Blockberger* and the Ninth Circuit decision *Basa*. It
7 strikes me that that argument would not apply as to Count
8 Three, which was the possession count. I would be prepared to
9 incorporate by reference my earlier remarks but also recognize
10 that the distribution element would not have been something
11 required to prove the possession count.

12 As to the plus four for sadistic and masochistic conduct,
13 the Court had previously indicated that there was no knowledge
14 or intent requirement, and so it was not necessary to prove
15 that the defendant intentionally sought out these materials.

16 Then the Court did find that Mr. Wilson was entitled to a
17 two-level adjustment for acceptance of responsibility, which
18 left us with an offense level of 35, in a criminal history
19 category of I, and 168 to 210 months.

20 And the Court would be prepared to vary somewhat based
21 upon the collateral consequences of the virtual certainty of
22 the removal of Mr. Wilson from the United States to Canada; the
23 fact that he himself has been a victim of sexual abuse on two
24 separate occasions; and the proof of some post-arrest
25 rehabilitation efforts, which, as I pointed out at the earlier

1 hearing, might have been interrupted by a return to the
2 activity that brings him here today.

3 But that would be my tentative today, and, with that, I
4 will hear from you.

5 MR. BURSTEIN: Thank you, Your Honor.

6 And just so the record is 100 percent clear, I assume that
7 there's no opposition and everybody is agreeing that, for
8 purposes of the appellate record, all of the prior objections
9 that we made are preserved?

10 THE COURT: Is that correct, Ms. Griffith?

11 MS. GRIFFITH: Yes, Your Honor. I believe that is
12 part of the sentencing agreement. We are not asking to have
13 the Court do -- reinstitute a finding, considering the Court is
14 adopting the previous factual findings. We agree to the
15 Court's calculation of the guideline range at 35 and I,
16 considering the objections that were previously made by both
17 sides with respect to that. I don't think there is any
18 question -- if it's not clear for the record, it's clear now.

19 THE COURT: All right.

20 MR. BURSTEIN: Thank you, Your Honor.

21 So we are here, obviously, because of the e-mail or text
22 message, the discovery that wasn't turned over. We highlighted
23 for the Court, essentially, three reasons why we are asking the
24 Court to vary further down from the previously imposed 13
25 years.

1 We believe that, by far -- I think the most salient
2 information comes from Dr. Clipson's report. And if the Court
3 will recall, during the last sentencing hearing, we were
4 talking about having to do things in a way that I didn't really
5 want to do them because I had a hand tied behind my back, this
6 is the majority of what I was talking about. Obviously, in a
7 case like this, I urge the Court to focus just on the federal
8 conduct, not the state court conduct. The Court had said, "Am
9 I prohibited from considering it under 3553?"

10 And I told the Court candidly, "No, you are not
11 prohibited, but I don't think it was a proper basis."

12 In addition, I wasn't able to give the kind of
13 psychological evaluation that I wanted to give because it had
14 Mr. Wilson talking all about what happened with Ms. Arriola.

15 So I think, hopefully, we have done some additional work
16 to address the Court's very legitimate concerns about
17 Mr. Wilson, in terms of Dr. Clipson's report. I think the
18 e-mail that we provided -- that was provided bears out the idea
19 that Mr. Wilson did not initially solicit the molestation to
20 occur. That doesn't mean it is not a very troubling case, but
21 I think that's a salient factor, and obviously the government
22 agrees; otherwise, we wouldn't be back here on a joint motion
23 to remand the case.

24 So, the Court now has Dr. Clipson's evaluation. As far as
25 I know by all accounts -- the Court, the defense bar, and the

1 government -- he is respected for being a straight shooter. We
2 have Dr. Clipson's subjective and objective evaluation of
3 Mr. Wilson. That bears out what we have said; that Mr. Wilson
4 went down a very dark path, due in part to his own molestation;
5 became a sex addict; but is not truly a danger going forward,
6 as he never touched a child, is not somebody that the Court
7 really needs to be worried about going forward.

8 And then there's the giant elephant in the room, is he got
9 a sentence of 45 years to life in state court. And what I
10 wrote to the Court is, at some point, enough is enough. It is
11 just piling on. So he is now here on a writ from state court.
12 That means the state has primary jurisdiction, which means he
13 will go back to state custody, which means he won't be eligible
14 for parole for approximately 40 years, which means if this
15 Court imposes any type of consecutive term, he won't even begin
16 starting to serve a federal sentence for nearly four decades.

17 When we look at 3553(a) and we look at our own common
18 sense as human beings, even if you felt like he was truly a
19 danger to society, is he going to be a danger in 40 years, when
20 the moment he gets out, he is going to be deported to Canada?

21 There's a mandatory minimum here, and if there weren't, I
22 would be asking the Court to impose time served, concurrent.
23 Because it's all -- at some point, the term -- "it's all
24 academic." It's all academic.

25 Then the Court might say or the government might say,

1 "Well, if it's all academic, why don't I just give him 20 years
2 and run it concurrent? What is the difference?"

3 There's a point there, but I don't think that is the
4 operating assumption, because what we are looking for is the
5 parsimony principle; what is sufficient but not greater than
6 necessary? And anything at this point is greater than
7 necessary, given the state court sentencing.

8 We think there were other ways to do this. The government
9 disagreed. But at the end of the day, given what the Court now
10 has from Dr. Clipson, given the e-mail, given what the Court is
11 going to hear now from Mr. Wilson, we are just asking the Court
12 to find that enough is enough; that 45 years to life is enough;
13 if the Court is going to tack on the mandatory minimum, to run
14 it concurrently, and let Mr. Wilson begin serving what is, by
15 all accounts, an incredibly high sentence for somebody who
16 didn't touch somebody, somebody who didn't murder somebody. It
17 is really an outrageous sentence.

18 THE COURT: To what extent should the Court take into
19 account that Mr. Wilson will likely appeal the state sentence?
20 The Appellate Court could decide that, not only was the
21 sentence improper, but perhaps find some other basis to reverse
22 his conviction and then we are dealing with a totally different
23 set of facts. He could be resentenced and get five years or
24 ten years, or they could find that there was some other issue
25 which requires that he not be re-prosecuted.

1 I mean, there are a number of scenarios that could play
2 out which ultimately the Court can't be totally slavishly
3 devoted to attaching itself to what has happened in state
4 court.

5 MR. BURSTEIN: That's right. And that's the reason
6 why I tried to suggest that we not even do this until we
7 know -- wait until the state court conviction is final, because
8 for that exact reason, because it is such an elephant in the
9 room.

10 Mr. Warren and I were talking on the way over, and he
11 said, "Why don't you just defer the sentencing until we know
12 what is happening in state court?"

13 There's a lot to be said for that way of addressing it, so
14 that we have some certainty when the Court is calculating it,
15 so we don't have all these open questions.

16 We would like to do that. Unfortunately, you know, we
17 don't have an agreement to defer it.

18 THE COURT: Although, it seems to me that, at the end
19 of the day, this Court should, in a reasonably expedient
20 manner, impose sentence, consider the criminal conduct that's
21 before me. And to the extent that the Court concludes that
22 some part of the sentence should run concurrent with the state,
23 then impose such a sentence.

24 For example, if it turned out that there was a reversal of
25 the state conviction and he got ten years; but to the extent

1 that I impose ten, 11, 12 years, that, to the extent that it
2 was concurrent, well, now, it doesn't mean that the 12-year
3 sentence is reduced down to whatever he has now received in the
4 state court, right?

5 MR. BURSTEIN: That's right. And that was the main
6 thing we said in our sentencing memo. I think that was our
7 first arguing point. Whatever sentence the Court is going to
8 impose, please, please, please let it be concurrent. That
9 takes care of the problem if Mr. Wilson's state court
10 proceedings are wholly reversed, if the sentence is cut down;
11 that what the Court just said is right, it won't impact the
12 federal sentence, in the sense that it won't somehow cut it
13 short if the Court thinks more time is necessary.

14 If the Court thinks, just for example, eight years is the
15 right federal sentence for this federal conduct, and that eight
16 years runs concurrent, well, if, in a year, Mr. Wilson's state
17 court magically goes away, he will still have that entire
18 federal sentence to serve. He will be transferred to the Feds.
19 Federal government will have a hold on him, and he will be
20 transferred to complete the remaining portion of that
21 eight-year sentence.

22 So my main request, prayer to the Court, is that whatever
23 the term, whatever term is sufficient but not greater than
24 necessary, it run concurrent so that we are not in a position
25 that he begins only after the state court. Because we know, if

1 we are just playing the percentages, most cases get affirmed.
2 And if we are playing the percentages, if any portion of that
3 state sentence is consecutive, he won't be able to begin
4 serving until after his entire state term is done.

5 In addition, if there's any hope that he can transfer back
6 to Canada and save the United States taxpayers some money,
7 that's not allowed while there's a consecutive sentence
8 pending. So he would have to do the entire 40 years, assuming
9 he gets paroled at the first opportunity, before he could even
10 transfer and get off of the United States taxpayer dollar. So
11 that's another reason why any sentence should be concurrent.

12 I know Mr. Wilson wants to talk to the Court. I am happy
13 to address any questions, but I will try and prevent this from
14 being another two-and-a-half-hour proceeding.

15 THE COURT: Thank you.

16 Mr. Wilson, I am sure you understand you also have the
17 right to be heard at this proceeding. Would you like to say
18 something?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Please.

21 THE DEFENDANT: Thank you, Your Honor.

22 I am deeply sorry for the actions and all the collateral
23 damage I have created. It haunts me every day. I wake up
24 knowing that, from a keyboard, I let my sex addiction push the
25 envelope so far I caused this much harm. I have continued

1 intensive therapy while out on bond and now have numerous
2 coping tools to deal with this sexual addiction that I have
3 been dealing with. I am now hyperaware of the cause and effect
4 of any behavior that I take part in, either directly or
5 indirectly. For example, at the last sentencing, the
6 prosecution stated I knew better, because I myself was hands-on
7 victimized as a child. And you know what? I completely agree.
8 I did know better.

9 Working with my therapist, Cindy Rinker, we broke down how
10 and why, considering my past, my judgment had been so clouded
11 and disconnected. I know now to take extreme ownership in
12 every decision I make and to never lose sight of my moral
13 compass. I am the only person to blame for my actions, not
14 because of some neighbor who hurt me as a kid.

15 I understand my actions paint me as this terrible person.
16 I, too, am horrified every time I go through my discovery or I
17 think about my past behavior. But, as hard as it may be,
18 please don't let it define me. Apart from this behavior, 99
19 percent of my life, I was doing positive things. I had a
20 fiancée who was the love of my life, two dogs, and an amazing
21 circle of friends. I directed the marketing for a \$40 billion
22 company, overseeing 30 countries, and managing a team of over
23 100 people.

24 And from that I used my connections and a lot of the free
25 time I had, I volunteered within this community, most

1 significantly with San Diego County's Muscular Dystrophy
2 Association, as well as numerous fundraising efforts for
3 San Diego Police Department's Fallen Angel Foundation, as well
4 as the numerous different things that were requested of me from
5 the Riverside District Attorney's office.

6 I have a family who loves me and supports me. And,
7 obviously, I put -- I mean, they are more collateral damage on
8 top of everything else.

9 I have an amazing sister, Sarah, and she's helped me
10 through these difficult times. Sarah is a Children's Hospital
11 chief doctor, and she shares with me various families'
12 heartbreaking stories of loss, as well as triumphs of families
13 beating impossible odds, and it really affects me. Your Honor,
14 in the future, I swear to you, I will never contribute to any
15 family's heartbreak in any form.

16 The last thing I wanted to be in this life was the
17 villain, the bad guy. I am a person who is not wired to be
18 this way. Hurting children, or anyone, for that matter, is
19 incomprehensible to me. My point being, if I am ever released
20 into society again, my past behavior will never happen again
21 and my therapy and quest for forgiveness will never end.

22 Thank you.

23 THE COURT: Thank you.

24 Ms. Griffith?

25 MS. GRIFFITH: Your Honor, the difficulty that the

1 government has with this case is the multifaceted aspect of
2 Mr. Wilson. The defense attorney would have you believe that
3 he's just the one line in the correspondence with Emily Driver
4 that had us come back, that he wasn't the villain of the entire
5 story because he didn't ask for the first set of images.

6 It's disturbing for the government that, in the sentencing
7 memorandum, there was no discussion of the full context of the
8 communication, and we felt that it was important that, if this
9 case was going to get remanded for the Court's consideration of
10 the sentence, the defendant didn't get to pick and choose which
11 line was most favorable to him for the Court's consideration,
12 and that's why the entirety of the conversation I think is
13 relevant for the Court's consideration, in the fact that it
14 shows that a man, who may have not initially asked or at least
15 represented to another woman he was engaged in child
16 pornography exchanges with, that he didn't initially ask
17 Jenalyn Arriola to produce the image, but he certainly didn't
18 mind it, and it certainly caused him sexual arousal.

19 And, contrary to what he reported to Dr. Clipson as of
20 August 2 of 2018, it would appear by the context of this
21 conversation that he did distribute the images of Jenalyn
22 Arriola and her child to another woman in an effort to continue
23 their lewd and lascivious conversation and their exchange of
24 child pornography images.

25 THE COURT: Let me ask you about that. As I

1 understand, both parties agree that neither Counts Two or Three
2 involve the pornography that was produced and provided by
3 Ms. Arriola?

4 MS. GRIFFITH: That's correct, Your Honor. If the
5 Court will recall from the bench trial and the sentencing
6 hearing, Count Two is predicated on a distribution; the
7 distribution charge is predicated on an e-mail that Mr. Wilson
8 sent to Ms. Driver, the person in the subject of these
9 communications, and included attachments of child pornography
10 that this Court reviewed. That's the basis for the
11 distribution of child pornography charge.

12 The possession of child pornography charge is predicated
13 on the thousands of images and videos that were found in the
14 defendant's possession on his computer devices and the thumb
15 drive that was located pursuant to the search warrant.

16 Those did not include -- they did include, but the Court's
17 basis for finding and the images that were presented to the
18 Court for consideration in support of the possession count were
19 not the images involving the child.

20 THE COURT: At trial.

21 MS. GRIFFITH: At trial.

22 At the bench trial, the Court did see the images involving
23 Ms. Arriola, but that was in support of Count One, which the
24 government dismissed and the Court did not sentence on.

25 THE COURT: But, with respect to relevant conduct on

1 the possession --

2 MS. GRIFFITH: Yes.

3 THE COURT: -- as to the more than -- 600 or more
4 images --

5 MS. GRIFFITH: Yes.

6 THE COURT: -- included within those images would be
7 images that were produced by Ms. Arriola?

8 MS. GRIFFITH: I believe there was one image that
9 would have been in the defendant's possession. But the thrust
10 of the possession count, Your Honor, was predicated on the
11 thumb drive, which did not contain the images of Ms. Arriola
12 and the child. It contained all of the other images of child
13 pornography, that included the sadistic and masochistic conduct
14 and the images of prepubescent children.

15 THE COURT: And, as has been brought to my attention,
16 at the original sentencing hearing, this Court observed that
17 it's one thing to possess child pornography, but it's yet
18 another to have a role in the further production of it.

19 And by way of this e-mail between Mr. Wilson and
20 Ms. Driver, it appears that the one photo and the video that we
21 have was provided by Ms. Arriola and was not solicited by
22 Mr. Wilson?

23 MS. GRIFFITH: That is what the defendant is
24 representing happened, Your Honor, in this communication with
25 Ms. Driver, which took place months after the exchange with

1 Ms. Arriola.

2 THE COURT: Correct.

3 MS. GRIFFITH: So this is what the defendant is
4 representing to Ms. Driver, a different woman he was
5 communicating with and trading child pornography. And in this
6 communication is where the defendant maintains that he did not
7 initially ask Ms. Arriola to produce the images that she was
8 producing, at least the first time.

9 But it's undisputed, based on the e-mails that the Court
10 reviewed during the bench trial, which were referred to in our
11 sentencing memorandum -- and I have got them if the Court wants
12 to hear them again -- where the defendant, after the first
13 exchange, continued to communicate with Ms. Arriola and
14 continued to ask her to produce images involving that child.

15 THE COURT: But there weren't any additional images?

16 MS. GRIFFITH: Not that were found on Mr. Wilson's
17 devices. That's correct, Your Honor.

18 To the extent that the Court is relying on that
19 information, I think it goes to support a 3553(a) consideration
20 for this Court with respect to who this defendant is. This
21 isn't a defendant, Your Honor, that's facing a 45-year sentence
22 for possessing child pornography by the state and is again
23 being prosecuted by the federal government unwarrantedly, if
24 you will, and in violation of the *Petitte* policy.

25 What we have is Mr. Wilson facing a 45-year sentence for

1 his repeated communications, asking Jenalyn Arriola, after the
2 first time, to produce images involving her. That's what that
3 45-year sentence is for.

4 What the Court is considering here is the distribution to
5 Ms. Driver, and his massive collection of child pornography,
6 which are independent of those charges.

7 This is a unique defendant, Your Honor, because he is not
8 just here because of a peer-to-peer exchange. He possessed; he
9 distributed; and he created a market. So when the Court is
10 considering under 3553(a) who this defendant is, he is showing
11 you that.

12 And, Your Honor, I would submit to you that the
13 conversations that he is having with Ms. Driver in this
14 communication actually show, and based on her response, that he
15 took one of the images he received from Ms. Arriola and sent it
16 to Ms. Driver, which is in direct contradiction to what he
17 reported to Dr. Clipson on page 5 of his report. He reported
18 to Dr. Clipson, "I never distributed the images." This
19 communication would negate that.

20 Now, Your Honor, we can't tell what the image was that was
21 sent. We are relying on the reasonableness and the common
22 sense of the communication. And if we are going to take the
23 defendant at his word, based on the defense attorney's
24 representations, then I think we have to take the totality of
25 Mr. Wilson's words at face value when he is talking about what

1 is there, and he is describing it as straight incest.

2 So I would say that the question that the Court has before
3 the Court -- the question before the Court is whether or not
4 this exchange causes any sort of pause with respect to the
5 totality of the previous sentence that was given. This
6 defendant was sentenced by this Court to 13 years, which is not
7 an insignificant period of time, for his conduct of
8 distribution and possession of child pornography.

9 He reports to Dr. Clipson that he wasn't really sexually
10 aroused by any of the images of child pornography that were in
11 his possession unless, I believe the quote was, "They were
12 dressed up to be made more adult-like." But in his
13 communication with Ms. Driver, on page two, it's clear that he,
14 in his words, "jacked off" to the image, which would negate
15 what he told Dr. Clipson.

16 The point that the government has is Mr. Wilson may be
17 sorry now, but this conduct that he engaged in with Ms. Arriola
18 took place, as the Court can recall, after a time that he
19 claimed he was going to get help. He then engaged in this
20 conduct with Ms. Arriola, and then, after the conduct with
21 Ms. Arriola, continues his communications with Ms. Driver for a
22 period of several months, where they are trading and exchanging
23 child pornography. The defendant is bragging about the
24 exchanges that he is having, and ultimately distributed child
25 pornography with her, which is what supports Count Two.

1 Nothing before the Court should change this Court's
2 analysis. As we laid out in our moving papers, Your Honor, you
3 gave a thoughtful consideration with respect to the totality of
4 this case. The defendant at the time expressed the remorse
5 that he could have, given the pending state charge. He does so
6 again. I appreciate his words, and I, at least, agree with the
7 fact that he finally recognizes that he should not be made any
8 less responsible because he was a victim as well.

9 The question before the Court is is there anything before
10 you that should change the 13-year sentence, and the answer is
11 no, because he is being held accountable for the distribution
12 and possession of child pornography, which are federal
13 violations and federal charges, and that's what is before the
14 Court.

15 THE COURT: So, let me ask you, with respect to the
16 question of consecutive or concurrent sentence, what is the
17 government's position?

18 MS. GRIFFITH: Your Honor, we are going to defer to
19 the Court on that. I think, for our purposes, we want to make
20 sure that the defendant is held accountable for his federal
21 charges. And a 13-year sentence would put him consistent with
22 other defendants in this district who have distributed child
23 pornography, who have received child pornography, who have
24 engaged in pretty egregious actions beyond just possession of
25 child pornography.

1 We understand and don't take lightly that a 45-year
2 sentence is not -- it is a long time. But we also need to
3 recognize, as the Court has already done so, we are not
4 responsible for what happens to the state charges, and the
5 state charges are a separate sovereign. So to come in here and
6 ask for either the federal charges to be dismissed or for us to
7 just indefinitely kick out the sentencing until Mr. Wilson's
8 state fate can be decided ignores the fact that he violated
9 state and federal law. The charges he is facing on the
10 state-side have nothing to do with the distribution and
11 possession of child pornography. Everything on the state
12 charge involves the Jenalyn Arriola offenses and aren't before
13 the Court here, other than to the extent the Court is going to
14 consider the 3553(a) factors.

15 So it is the government's position that the 13-year
16 sentence should stand, the ten years of supervised release as
17 previously imposed should stand, and we will defer to the Court
18 with respect to whether or not the sentence should be
19 consecutive or concurrent and whether or not that would serve
20 the sentencing guidelines.

21 THE COURT: Thank you.

22 Anything from probation?

23 THE PROBATION OFFICER: Amberly Alvarado with
24 Probation.

25 Unless the Court has any questions, we don't have anything

1 to add, Your Honor.

2 THE COURT: Thank you.

3 The Court finds that the applicable sentencing guidelines
4 are as follows. The base offense level is 22, based upon
5 2G2.2(a)(2), which governs the distribution of child
6 pornography. There is a two-level enhancement based upon these
7 materials involving prepubescent minors, and that is under
8 2G2.2(b)(2). There is an additional two-level enhancement for
9 distribution, under 2G2.2(b)(3)(F). There's a further
10 four-level enhancement, given the materials depicting sadistic
11 and masochistic conduct, and that's under 2G2.2(b)(6). There's
12 a further plus-five enhancement, given the possession of 600 or
13 more images.

14 The Court finds Mr. Wilson has accepted responsibility,
15 and will grant him a two-level reduction based upon that fact.

16 That will leave us with an adjusted offense level of 35,
17 criminal history category of I, in an advisory guideline range
18 of 168 to 210 months.

19 Once the Court establishes the advisory sentencing
20 guideline range, it then turns to consider the relevant and
21 salient sentencing factors under 3553(a). The first such
22 factor is a review of the offense conduct.

23 With respect to the offense conduct, the amount of images
24 that were possessed are far in excess to what is required for a
25 plus-five enhancement. The Court had previously noted that the

1 sheer number of images that were possessed would warrant an
2 upward departure, given that there were 500 videos and 11,000
3 images, which would equate to upwards of 300,000 images, 80
4 times the threshold number for the application of a plus-five
5 enhancement. That was found, and the Court continues to find
6 that is an aggravating circumstance.

7 The Court had previously found that the communications
8 that were identified in the presentence investigation report at
9 paragraph 13, the communications with Ms. Arriola, showed more
10 than just someone content with viewing child pornography but
11 instead reflected someone who was aiming to have child
12 pornography created, produced for his pleasure.

13 Since the original sentencing, the Court has been
14 furnished the e-mail communication between Mr. Wilson and
15 Ms. Driver. The Court finds that, given that communication, it
16 necessarily affects the Court's prior view as to Mr. Wilson's
17 role in the production of child pornography by Ms. Arriola. I
18 am at this time not prepared to consider that conduct as
19 aggravating, as an aggravating circumstance, and the Court then
20 limits itself with respect to aggravating circumstances related
21 to the offense conduct to the sheer number of images that were
22 involved in this case.

23 Once the Court determines the sentencing guideline range
24 and looks at the offense conduct, the Court then turns to a
25 review of the person; that is, Mr. Wilson. He is 38 years old,

1 single, no children, has a high school degree, has a bachelor's
2 of art in business administration. He had worked from 2008 to
3 2015 as marketing director for Monster Energy. He was the
4 victim of sexual abuse by a schoolteacher at the age of six and
5 by a male acquaintance at the age of 11. He also suffered
6 profound loss when he lost his brother when he was young. And
7 these factors are ones pointed to as contributing to
8 Mr. Wilson's falling prey to pornography as some kind of coping
9 mechanism. And this coping mechanism, beginning with adult
10 pornography, eventually -- if not evolved, ended up resulting
11 in his introduction to child pornography and his attraction to
12 child pornography.

13 The defendant has no prior criminal history.

14 The defendant has made post-arrest rehabilitation efforts
15 to address his addiction to child pornography. The Court
16 previously noted that Mr. Wilson had tried to address his
17 addiction to child pornography earlier in his life,
18 approximately 2014, and that sometime after his initial attempt
19 to rid himself of these urges, he returned to the consumption
20 of, the viewing of, child pornography, and also the
21 communications with Ms. Arriola regarding providing additional
22 child pornography involving her relatives.

23 The Court has previously identified the collateral
24 consequences of the removal of Mr. Wilson as a basis for a
25 variance. The Court will take that into account in determining

1 the appropriate sentence.

2 The Court is required to impose a sentence that will
3 provide sufficient deterrence for Mr. Wilson and sufficient
4 general deterrence for the public at large. Given the number
5 of photographs, the types of media, the Court believes that
6 something not too far removed from the sentencing guidelines is
7 required. The Court is required to impose a sentence that not
8 only promotes respect for the law but reflects the seriousness
9 of the offense. And in this case, it is quite serious, for a
10 number of reasons: One, the sheer number of images; two, that
11 these images were being not distributed by some file-share
12 service, like Gnutella, but instead were being directed at
13 individuals such as Ms. Driver.

14 The Court, having reviewed the 3553(a) sentencing factors
15 that relate to this matter, is of the view that an 11-year
16 sentence is sufficient but not greater than necessary to
17 satisfy the policies underlying 3553(a). That will be a
18 132-month sentence. The Court will impose that sentence on
19 both Counts Two and Three. They will run concurrent with each
20 other. At this time, it doesn't appear to the Court to serve
21 any purpose to make this consecutive to the state sentence, so
22 the Court will run it concurrent. If the state courts reverses
23 the sentence and/or the conviction, the floor will continue to
24 be this 11-year sentence.

25 The Court will impose the same terms of supervised release

1 that were previously imposed for the same reasons as
2 identified, and I will go through those at this time.

3 You are to submit your person, property, residence,
4 abode -- number one, you are to submit your person, property,
5 residence, abode, vehicle, papers, computer, social media
6 accounts, any other electronic communications or data storage
7 devices or media and effects to search at any time, with or
8 without a warrant, by any law enforcement or probation officer
9 with reasonable suspicion concerning a violation of a condition
10 of probation, supervised release, or unlawful conduct and
11 otherwise in the lawful discharge of the officer's duties. And
12 that is pursuant to 18 U.S.C. Sections 3563(b)(23), 3583(d)(3).
13 The failure to submit to a search may be grounds for
14 revocation. You shall warn any other residents that the
15 premises may be subject to searches pursuant to this condition.

16 Number two, you are consent to third-party disclosure to
17 any employer, potential employer, concerning any restrictions
18 that are imposed by the Court.

19 Three, not use or possess devices which can communicate
20 data via modem or dedicated connection and may not have access
21 to the internet without prior approval from the Court or the
22 probation officer. The offender shall consent to the
23 installation of systems that will enable the probation officer
24 to monitor computer use on any computer owned or controlled by
25 the offender. The offender shall pay for the cost of

1 installation of the computer software.

2 Number four, not associate with or have any contact with
3 any known sex offenders unless in an approved treatment and/or
4 counseling setting.

5 Five, not initiate any contact, personal, electronic or
6 otherwise, or associate with anyone known to be under the age
7 of 18, unless in the presence of a supervising adult who is
8 aware of the offender's deviant sexual behavior and nature of
9 offense and conviction unless approved in advance by the
10 probation officer.

11 Six, not accept or commence employment or volunteer
12 activity without prior approval of the probation officer. And
13 employment should be subject to continuous review and
14 assessment by the probation officer.

15 Seven, not loiter within 200 yards of a school,
16 schoolyard, playground, park, amusement center/park, public
17 swimming pool, arcade, day-care center, carnival, recreation
18 venue, library, and other places primarily frequented by
19 persons under the age of 18 without prior approval of the
20 probation officer.

21 Eight, not knowingly possess or view any materials, such
22 as videos, magazines, photographs, computer images, or other
23 matter that depicts sexually explicit conduct involving
24 children, as defined by 18 U.S.C. Section 2256, subsection (2),
25 and/or actual sexually explicit conduct involving adults, as

1 defined by 18 U.S.C. Section 2257(h)(1), and not patronize any
2 place where any such materials or entertainment are the primary
3 material or entertainment available.

4 Nine, complete a sexual offender evaluation, which may
5 include periodic psychological/physiological testing and
6 completion of the Abel Assessment, at the direction of the
7 Court or probation officer. If deemed necessary by the
8 treatment provider, the offender shall participate and
9 successfully complete an approved state-certified sex offender
10 treatment program, including compliance with treatment
11 requirements of the program.

12 The Court authorizes the release of the presentence report
13 and available psychological evaluations to the treatment
14 provider, as approved by the probation officer. The offender
15 will allow the reciprocal release of information between the
16 probation officer and the treatment provider. The offender may
17 also be required to contribute to the costs of services
18 rendered, in an amount to be determined by the probation
19 officer, based on the ability to pay.

20 Polygraph examinations may be used following completion of
21 the formal treatment program, as directed by the probation
22 officer, in order to monitor adherence to the goals and
23 objectives of treatment and as part of the containment model.

24 Ten, reside in a residence approved in advance by the
25 probation officer, and any changes in residence shall be

1 preapproved by the probation officer.

2 11, the defendant shall comply with the requirements of
3 the Sex Offender Registration and Notification Act -- that's
4 under 42 U.S.C. Section 16901, et seq. -- as directed by the
5 probation officer, the Bureau of Prisons, or any other state
6 sex offender registration agency, in which he resides, works,
7 or is a student, or was convicted of a qualifying offense.

8 12, if deported, excluded, or allowed to voluntarily
9 return to country of origin, not reenter the United States
10 illegally and report to the probation officer within 24 hours
11 of any reentry to the United States. Supervision will be
12 waived upon deportation, exclusion, or voluntary departure.

13 The term of supervised release shall be ten years, per
14 count, to run concurrently.

15 The Court will waive any fine or any other assessment
16 based upon the nature of this crime, finding that the defendant
17 cannot afford to pay that amount. The Court, however, will
18 impose the \$100 penalty assessments, per count, for a total of
19 \$200.

20 With respect to restitution, have you reviewed the
21 proposed restitution order offered by the government,
22 Mr. Burstein?

23 MR. BURSTEIN: Yes, Your Honor. That order, we --
24 that was something that we jointly came to an agreement on.
25 Mr. Wilson wanted to acknowledge the victims of the crime, and

1 so we have made that offer, actually, to the victims, and the
2 victims accepted it. And the government facilitated that
3 acceptance.

4 THE COURT: All right. So, then, the Court will
5 include this restitution order as a part of the judgment and
6 note that it is pursuant to an agreement between the parties.

7 Mr. Wilson, in the event that you reserved any right to
8 appeal -- and you actually have; you have reserved the right to
9 appeal your conviction, your sentence, and the suppression
10 order denying your motion to suppress -- you must file your
11 notice of appeal within 14 days of the filing of the judgment
12 in this case. Do you understand, sir?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: And, then -- not everybody at the same
15 time. Yes?

16 THE PROBATION OFFICER: Amberly Alvarado with
17 probation.

18 Your Honor, was it ten years supervised release?

19 THE COURT: Ten years per count, concurrent. Yes.

20 MS. GRIFFITH: And, Your Honor, similar to what the
21 Court had previously done, we would ask that you would orally
22 pronounce forfeiture of the various computer items that had
23 been previously identified because the defendant was convicted.
24 We already have understandings that nothing will happen to the
25 evidence; but just for our forfeiture purposes, if the Court

1 could orally pronounce it so it could be included in the
2 judgment, and we will get an amended order of forfeiture to the
3 Court.

4 THE COURT: All right.

5 MR. BURSTEIN: Right. And part of that is
6 understanding there is legitimate property that is very
7 important to Mr. Wilson, so the government has agreed it won't
8 be destroyed, because at some point, we are going to want the
9 noncontraband images back.

10 THE COURT: So the Court will direct that the
11 judgment include forfeiture pursuant to the order filed on
12 February 8th, 2018.

13 And the assessment that I had waived previously was the
14 JVTA assessment. But I did impose the penalty assessment of
15 \$100 per count.

16 MR. BURSTEIN: Your Honor, two details, whenever
17 it's --

18 THE COURT: Yes.

19 With respect to designation, are you requesting Southern
20 California?

21 MR. BURSTEIN: Southern California, Your Honor. My
22 understanding is he's heading back to state custody now anyway;
23 but, still, the judgment should say, just in case he doesn't --

24 THE COURT: All right. So I will recommend
25 designation to the western region, specifically the Southern

1 California area.

2 And then?

3 MR. BURSTEIN: For purposes of the judgment, I think
4 it's best if the state court number actually appears,
5 "concurrent to the sentence in." And it's S, like Sam, C, like
6 Charlie, D, like Devin, 263466. SCD263466.

7 THE COURT: All right. I will direct my clerk to
8 include that case number.

9 And then?

10 MR. BURSTEIN: Two other little things, Your Honor.

11 THE COURT: Yes.

12 MR. BURSTEIN: Pretrial -- I am not sure.
13 Somebody -- I think it's still pretrial -- has Mr. Wilson's
14 passport. I would like to send that back to his mother for
15 safekeeping. We are looking at a long time in the future; if I
16 could have an oral order that it can be turned over to counsel,
17 to be provided to his family? I am not sure if that's
18 necessary.

19 THE PROBATION OFFICER: It would be with the pretrial
20 office. The probation office doesn't have it.

21 THE COURT: Any objection?

22 MS. GRIFFITH: No, Your Honor.

23 THE COURT: So I will direct that the amended order
24 be prepared requesting pretrial services to deliver
25 Mr. Wilson's passport to Mr. Burstein, counsel.

1 MR. BURSTEIN: Thank you, Your Honor.

2 And then the final thing is, as to the notice of appeal --
3 we filed a notice of appeal. Mr. Wilson's family paid for the
4 notice of appeal and then it was brought back here, really
5 through no fault of Mr. Wilson or his family. And so, if I
6 file a new notice of appeal -- which I am going to -- unless
7 the Court allows me to, his family is going to have to pay now
8 an additional \$500 fee, because it's a brand-new appellate
9 filing. I don't think that's fair to his family. They are
10 doing their best to cover my services and the state court
11 services. So if I could have a minute order just that the fee,
12 the notice of appeal fee, is waived.

13 THE COURT: Do I have that authority?

14 MR. BURSTEIN: I believe so, Your Honor, because you
15 have already found him indigent for purposes of waiving the
16 JVTA penalty, and it is the same indigence filing that allows
17 us to file the notice of appeal without fees, just like I can
18 in every appointed case.

19 THE COURT: I previously had found that he was unable
20 to pay the JVTA, but he was still required to pay a \$500 fee
21 for the notice of appeal?

22 MR. BURSTEIN: Yes. And that was probably something
23 that I should have raised at the time and I didn't, and so it's
24 probably my fault that I didn't get that order the first time.
25 So let me not make the same mistake twice.

1 THE COURT: All right. Any response from the
2 government?

3 MS. GRIFFITH: Your Honor, I would prefer not to get
4 involved with whether or not the Court has the authority to
5 waive the Ninth Circuit -- we have no opinion.

6 THE COURT: All right. The Court has found that
7 Mr. Wilson is unable to afford the JVTA. At this point, I will
8 waive the \$500 fee for a new notice of appeal, given the fact
9 that it has previously been paid by the defendant's family;
10 that the resentencing was not due to any mistake, any error by
11 Mr. Wilson; and that it would be unfair to require him to pay
12 an additional \$500 for a new notice of appeal.

13 MR. BURSTEIN: Thank you, Your Honor. If there's any
14 problem with that, I will submit a proposed order, but I think
15 the minute order should be sufficient.

16 THE COURT: All right. Anything else?

17 MS. GRIFFITH: Nothing from the government, Your
18 Honor.

19 MR. BURSTEIN: Nothing from the defense.

20 THE COURT: As to Count One, I know the government
21 had moved at the trial to dismiss that, so I think the record
22 should be clear on that. That's been dismissed.

23 We will just restate it. Is there any problem with
24 restating that Count One is a motion to dismiss?

25 MS. GRIFFITH: No, Your Honor. The government would

1 renew its motion.

2 THE COURT: The Court will once again confirm that
3 dismissal.

4 And then I will ask Mr. Burstein to hand Mr. Wilson the
5 terms of supervised release imposed by the Court.

6 And let the record reflect that Mr. Wilson has been handed
7 the terms of supervised release.

8 With that, that will conclude these proceedings at this
9 time. And, Mr. Wilson, good luck to you, sir.

10 THE DEFENDANT: Thank you, Your Honor.

11 MS. GRIFFITH: Thank you, Your Honor.

12 MR. BURSTEIN: Thank you, Your Honor.

13 (End of proceedings at 2:35 p.m.)

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C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with rules and requirements of the United States Judicial Conference.

DATED: January 5, 2019, at San Diego, California.

/s/ Chari L. Bowery

Chari L. Bowery
CSR No. 9944, RPR, CRR