09-4630-cr

To be Argued By:
JONATHAN S. FREIMANN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-4630-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANTONIO LASAGA
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

This is an appeal from a judgment entered October 23, 2009 (Alvin W. Thompson, J.) in which the district court issued a written ruling refusing to resentence the defendant in light of *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on November 3, 2009, and this Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of Issue Presented

I. Whether the district court's decision on a *Crosby* remand that it would not have imposed a different sentence under an advisory Guidelines regime was both procedurally and substantively reasonable.[1]

II. Whether any further remand by this Court would require re-assignment to a different district judge.

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[1] The defendant raises three separate issues in his challenge to the district court's *Crosby* ruling. First, he claims that the district court, despite denying the motion for re-sentencing, did, in fact, conduct a *de novo* sentencing hearing. Next, he claims that the district court erred in re-sentencing him without following the dictates of Fed. R. Crim. P. 32. Finally, he argues that the district court's three-level upward departure for the defendant's possession of a large volume of images of child pornography "violates the law of the case." Def.'s Brief at 2. The Government addresses all three of these arguments under one subheading which discusses the procedural and substantive reasonableness of the district court's decision denying the request for a full re-sentencing.

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Preliminary Statement

This appeal requires an examination of whether the district court abused its discretion in refusing to re-sentence the defendant after a remand pursuant to *United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005). The district court initially sentenced the defendant-appellant Antonio C. Lasaga to a term of 15 years' imprisonment. This sentence was based, in part, on a two-level upward departure for extraordinary volume of child pornographic images, *see* U.S.S.G. § 5K2.0, and a one-level upward departure for extraordinary harm that the defendant caused

by sexually abusing a young boy. *See* U.S.S.G. § 5K2.3. On initial appeal, this Court affirmed the first departure for the volume of images, but vacated the second departure, concluding that the district court had failed to apply the correct legal standard of "comparative harm" to support an upward departure for extraordinary psychological harm. Without specifically restricting what issues the district court could consider on remand, the Court ordered resentencing "consistent with" its opinion.

On resentencing, the government withdrew its request for a departure for extraordinary harm to the child victim. Instead, the government recommended that the district court depart upward on the ground of under-representation of criminal history, *see* U.S.S.G. § 4A1.3, and that it also depart upward one additional level for the extraordinary volume of child pornographic images. The government had specifically asserted both of these grounds at the first sentencing, and the district court had found them both to be applicable. In the end, however, the district court chose not to rely upon them because they were unnecessary to the court's decision to impose a sentence of 15 years' imprisonment. At the second sentencing, in light of this Court's decision invalidating the upward departure for extraordinary psychological harm, the district court decided to depart upward on both alternative grounds proposed by the government, resulting in a guideline incarceration range of 168 months to 210 months. The district court then once again imposed a sentence of 15 years' imprisonment.

In the second appeal, this Court affirmed the district court's application of the quantity departure and rejected

the defendant's argument that the district court violated the mandate rule when it imposed the quantity and criminal history departures. This Court also rejected the defendant's complaint that the district court erred when it declined to permit him to relitigate the issue of whether the pornographic images he stored were of "virtual" children. Finally, the Court remanded the case under *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005) and explicitly noted the discretion afforded to the district court under these cases. The Court did not resolve the defendant's separate challenge to the criminal history departure, but instead referred it to the district court on remand.

On the *Crosby* remand, the district court denied the defendant's request for a resentencing. In its written order, the court treated the guidelines as advisory and concluded that it would not have imposed a different sentence had the guidelines been advisory at the time of the sentencing. It also determined that the criminal history departure was irrelevant because the fifteen year sentence that it believed to be appropriate was encompassed by overlapping guidelines ranges applicable for either criminal history category.

In this appeal, the defendant argues that, in refusing to re-sentence him, the district court did, in fact, conduct a full re-sentencing hearing, and did so without affording him the procedural requirements set forth in Fed. R. Crim. P. 32. The defendant also claims that the district court violated the "law of the case" doctrine by relying on a three-level departure for the volume of images of child pornography possessed by the defendant. Finally, the

defendant asserts that the case should be re-assigned to a different district judge on remand. For the reasons set forth below, these claims lack merit.

Statement of the Case

On June 17, 1999, a federal grand jury in the District of Connecticut returned an indictment charging the defendant with four counts of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2), and three counts of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).

On February 18, 2000, the defendant elected to plead guilty to Counts Two and Six of the Indictment. Count Two charged that, on or about November 1, 1998, the defendant knowingly received "numerous graphic image files" of child pornography, in violation of 18 U.S.C. § 2252A(a)(2). Count Six charged that, on or about November 6, 1998, the defendant knowingly possessed "two videotapes containing images of child pornography," in violation of 18 U.S.C. § 2252A(a)(5)(B).

On May 18, 2000, the district court conducted an initial sentencing hearing. The court did not impose sentence because the defendant moved to withdraw his guilty plea as to Count Six and moved to dismiss Count Six based on the claim that the statute alleged in that count was unconstitutional under the Commerce Clause. The defendant ultimately withdrew that challenge on January 8, 2002.

On February 12 and 13, 2002, Judge Thompson conducted additional sentencing hearings and ultimately sentenced the defendant to 180 months' imprisonment on Count Two and a concurrent term of 60 months' imprisonment on Court Six.

On February 22, 2002, the defendant filed a timely notice of appeal. On May 2, 2003, this Court affirmed the defendant's conviction, but vacated and remanded his sentence on the ground that the district court had not made sufficient findings to support a one-level upward departure for extraordinary harm to a minor victim under U.S.S.G. § 5K2.3. *See United States v. Lasaga*, 328 F.3d 61 (2d Cir. 2003) ("*Lasaga I*").

Following the remand, the district court held sentencing hearings on August 28 and September 5, 2003. At resentencing, the district court departed upward on two separate bases. First, it departed horizontally from criminal history category I to criminal history category II, on the basis that criminal history category I significantly under-represented both the seriousness of the defendant's criminal history and the likelihood that he will commit further crimes. Second, the district court enhanced the offense level calculation by one level pursuant to U.S.S.G. § 5K2.0, on the grounds that the Guidelines did not adequately take into consideration the enormous volume of child pornography collected by the defendant. This adjustment of one offense level was in addition to the two level upward departure for volume of child pornography applied at the first sentencing. A332-334.

These departures resulted in a criminal history category II, an offense level of 34, and a commensurate sentencing range of 168 months to 210 months. The court then sentenced the defendant to 180 months' imprisonment on Count Two and a concurrent term of 60 months' imprisonment on Count Six. A335.

On September 12, 2003, the defendant filed a timely notice of appeal. In a Summary Order issued on June 27, 2005, this Court rejected the defendant's argument that the district court violated the mandate rule when it imposed the quantity and criminal history departures and found that the district court had made the required factual findings to support the imposition of those departures at the initial proceeding. *See United States v. Lasaga*, No. 03-1592, 2005 WL 1527762, at *2-3 (2d Cir. June 27, 2005) ("*Lasaga II*"). This Court also rejected the defendant's challenge to the quantity departure and concluded that the district court did not err in precluding him from submitting additional evidence on the issue of digitized "virtual" pornography. *See id.*, at *3-4. This Court did not resolve the defendant's challenge to the criminal history departure. Instead, it remanded the case under *Booker* and *Crosby* and directed the district court to reconsider the criminal history departure in light of *United States v. Shepard*, 125 S. Ct. 1254 (2005) (holding police reports to be insufficient to establish nature of prior conviction for enhanced sentencing) and *Williams v. United States*, 503 U.S. 193, 201 (1992) (holding that criminal history departure could not be based solely on consideration of police arrest reports). *See id.*, at *4. Finally, this Court noted the district court's discretion under *Booker* and *Crosby*. *See id*.

Following the *Crosby* remand, the district court solicited and considered written briefs from the parties. A349. On October 23, 2009, the court issued a written order concluding that it would not have imposed a different sentence had the sentencing guidelines been advisory at the time the sentence was imposed. The district court then declined to address the issue of the criminal history departure because the "appropriate sentence" of 15 years was also encompassed by the advisory guidelines absent the disputed enhancement. A350-351.

On November 3, 2009, the defendant filed a timely notice of appeal. A352. The defendant is presently serving his sentence.

Statement of Facts

A. The offense and related conduct

At the time of the charged offenses, the defendant was a senior professor at Yale University in the Department of Geology and Geophysics. He lived on campus where he served as "Master" of Saybrook College, one of Yale's twelve residential "colleges" for undergraduate students. Presentence Investigation Report (PSR) ¶ 12.[2]

On approximately October 23, 1998, a graduate student at the defendant's geology department advised one of the department's computer specialists that he believed the

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[2] The government has submitted the PSR in a separated, sealed appendix.

defendant was using the department's computers and its Internet server to download child pornography. In an attempt to verify the student's claim, the computer specialist wrote a program that, in essence, instructed the computer to send the specialist an electronic mail message if and when any user accessed the specific directories identified by the student as the repository to which child pornography was being downloaded. Shortly thereafter, the specialist received an e-mail. He then accessed the system to learn that an individual who was logged on in the defendant's name was downloading graphic images of minors engaged in various sexual acts. At the time, the defendant was in his office with the door closed. The defendant later returned to his campus home at Saybrook College, where he remotely accessed the department's computers and transferred the downloaded files to his home computer. PSR ¶¶ 16-18.

One week later, on October 30, 1998, and into the early morning hours of October 31, 1998, the specialist again monitored the defendant through the computer system as he logged into the department's server, downloaded numerous child pornography files, logged off again and left the building. The defendant re-logged on to the system from his home computer at Saybrook College, transferred the pornographic files to his home computer, deleted the downloaded files from the office server, and then logged off again. PSR ¶¶ 19-20.

The defendant's conduct was referred through Yale authorities to the Federal Bureau of Investigation. In the early morning hours of November 6, 1998, federal law enforcement agents executed a court-authorized search

warrant at the defendant's home at Saybrook College. The agents seized more than 200 "Zip" disks, a computer hard drive, and numerous other diskettes, cumulatively containing tens of thousands of graphic image files, the majority of files containing minors posed in the nude or engaged in various sexual acts. Among other examples, the images included a four-year-old boy being anally penetrated by an adult; an adult male ejaculating on the face of a five- or six-year-old girl; and a prepubescent girl being subjected to "oral sex" by a dog. The defendant had accessed newsgroups including "alt.sex.pedophilia.boys," "alt.binaries.pictures.boys," "alt.sex.incest," and "alt.sex.pedophilia.boys." PSR ¶¶ 21, 24.

The agents also seized numerous videotapes from the defendant's campus home, including the two videotapes that served as a basis for the child pornography possession charge of Count Six of the Indictment. Both these tapes showed sexually explicit conduct involving a young boy from New Haven, for whom the defendant had served as a volunteer "mentor" over the past several years. The first videotape showed the boy with his pants around his ankles when he was approximately 9 years old, focusing on the boy's buttocks, anus and genitalia. The scene was filmed in a science classroom at Yale and featured the defendant's hand spreading the boys buttocks and instructing him by name to open further. PSR ¶ 25.

The second film showed the boy when he was approximately 12 years old, engaging in masturbation while he watched television. The defendant's voice on the video told the boy to walk toward the defendant, and the video panned downward to show the defendant's erect

penis coming into view and touching and rubbing against the child's penis. PSR ¶ 25.

The child victim was later interviewed and described with great difficulty the extent of abuse he suffered from the defendant, beginning at a young age and continuing through his 12th birthday. The boy estimated that, on 10 or 20 separate occasions, the defendant took him to a science classroom at Yale, to his residence at Saybrook College, and once on a trip to New Hampshire, where he took sex-laden videos and digital photographs of the boy. Not content simply to film or photograph the boy, the defendant also forced the child to perform oral sex on him and sodomized the child on numerous occasions. The forensic examination of the items seized from the defendant's home also revealed numerous digital images depicting the defendant sodomizing the child. PSR ¶26.

The defendant told investigators at the time of the search warrant that he regularly downloaded child pornography from the Internet and did so just hours before the warrant was executed. He had no academic purpose in doing so and he knew it was illegal, but he believed that it should not be. Despite what investigators would later learn from the seized videotapes, he denied any sexual contact with the child victim. PSR ¶ 22.

The defendant also had a history of uncharged sexual misconduct with young boys, that spanned a 20 year period. At the initial sentencing, the government presented additional arrest reports and memoranda of interview detailing the defendant's numerous instances of sexual misconduct with four or five other young boys in

incidents occurring at a swimming pool in 1981 and at a YMCA facility in 1986-87 and 1991. A313-330.

B. The first sentencing

At the defendant's first sentencing in 2002, the parties agreed, and the district court found, that the applicable adjusted offense level was 31 and the applicable criminal history category was Level I, with a resulting range of 108 -135 months of incarceration. A58. From this range, the government sought upward departures on a variety of bases: (1) the extraordinary harm to the minor victim, *see* U.S.S.G. § 5K2.3; (2) the enormous volume of child pornography, *see* U.S.S.G. § 5K2.0; and (3) the understatement of the defendant's criminal history category, *see* U.S.S.G. § 4A1.3. The government requested that the maximum statutory sentence of 20 years.

In rendering its sentencing decision, the court first reviewed the factors under 18 U.S.C. § 3553(a) that had to be considered in fashioning the sentence. A147. It then stated that it had taken into account these factors, had reviewed the PSR, had considered the sentencing memoranda and counsel's remarks and all of the written and oral submissions that had been made by both parties. A148. It reviewed the various purposes of sentencing, including general and specific deterrence, protection of the public and rehabilitation. A148-A149. It found that the two factors "that I believe make the most difference in the sentence I'm going to impose are the need to provide just punishment and the need to protect society." A149. The court also noted that it had considered the comments of the

defendant's wife and son, and that their perspective of his positive qualities "do lead me to impose a sentence that is lower than I otherwise would impose." A150.

Although the district court characterized the government's request for a 20 year sentence as "not unreasonable," it determined that a sentence of 15 years would adequately address and achieve the myriad of sentencing goals as described in 18 U.S.C. § 3553(a). With this sentence in mind, the court then addressed the government's various motions for upward departure. A150.

First, the district court determined that a two-level upward departure was appropriate due to the defendant's possession of 150,000 images of child pornography. The court concluded that a departure of more than two offense levels was warranted, but chose to depart upward only two offense levels, stating:

> The conservative estimate is that you amassed a collection with approximately 150,000 pornographic images of children. ...
>
> For each of the images that is created, there is at least one victim; namely, the child in the image, and some images include more than one child. Although you collected the images and did not create them, by collecting them, you lend support and encouragement to the people who engage in the practice of creating child pornography. That is the theory behind our criminal laws in this area.

> Here in the courtroom there is a danger that one may be tempted to look at these children as nameless and faceless victims, but each one of them is important and in this case tens of thousands of them are involved. ...
>
> While I believe that a departure of more than two offense levels is warranted, if one looks only at the offense behavior, I am going to depart upward only two offense levels on this basis. I will depart upward only two offense levels on this basis because I'm also going to depart upward on another basis and because I believe that to some degree your conduct was somewhat obsessional in nature and it appears that you could not possibly have viewed all the images.

A151-A153.

Next, the court determined that the record supported a finding of extraordinary harm to the victim child. The court reviewed the evidence submitted by the government in support of the departure and found that a one-level departure for this ground was appropriate. A153-A157.

Finally, the court agreed with the government that an upward departure to a higher criminal history category was supported by the defendant's demonstrated history of abusing young children. The court fully credited the reports and records introduced by the government and concluded that the defendant had engaged in a pattern of sexual misconduct with children spanning a 20-year period. Specifically, the court stated:

> I conclude that the government has produced reliable information that the defendant engaged in prior uncharged sexual contact with minors on at least three occasions. The details of these incidents are documented in the government's exhibits submitted on May 18, 2000.
>
> There is no doubt that as to the identity of the defendant and that he was involved in these incidents. There is a similar pattern for each of these incidents. In addition, the defendant's explanation as to why he did nothing wrong is similar in each of these instances.
>
> Looking at all of the evidence together, there is a clear pattern of activity on the part of the defendant.

A157-A158.

In view of the court's determination that a sentence of 15 years' imprisonment was the appropriate sentence to be imposed, and because the court could arrive at a guideline range that encompassed that sentence without the need for an additional "horizontal" criminal history departure, it declined to depart upward on that ground. The court stated:

> At this point we are now dealing with very wide ranges under the Sentencing Guidelines and those ranges overlap.
>
> If I were to depart on this basis and place the defendant in criminal history category II, I would

> conclude it was most appropriate to impose a sentence at or towards the mid point to the bottom of the range when I look at the defendant in the context of other people in criminal history category II.
>
> Since the ranges overlap, the same sentence can be imposed by sentencing the defendant near or at the top of the range applicable to criminal history category I. Therefore, I do not believe a departure on this basis is necessary in order to impose an appropriate sentence in this case.

A158-A159. With a three-level upward departure, the defendant's offense level was 34, and the resulting guideline range was 151-188 months. The court sentenced the defendant to 180 months. A162.

C. The first appeal

The defendant appealed both upward departures. He claimed on appeal that the departures were factually and legally unsupported. With respect to the volume of child pornography, he further challenged whether the images in question were of "real" or "virtual" children. This Court upheld the district court's upward departure under U.S.S.G. § 5K2.0 for the enormous volume of images. *Lasaga I*, at 67. It further found, not only that the defendant had waived his argument that the images were "virtual," but also that the defendant's own admissions supported a factual basis for a finding that the images were real. *See id.* at 68. The Court determined, however, that the district court failed to consider the "comparative harm"

to the victim in its upward departure under U.S.S.G. § 5K2.3. *See id.* at 66 ("the district court erred in departing under § 5K2.3 without making the additional finding that the victim suffered much more serious harm than would normally be the case"). Therefore, the Court vacated the sentence and remanded for resentencing.

On May 16, 2003, the government moved for clarification of the scope of the mandate, specifically asking if the district court, on remand, was free to revisit the upward departures that it had found appropriately applied, but had not imposed at the first sentencing. The Court denied the motion without comment.[3]

D. The resentencing

At resentencing, in light of additional information received from the child victim's psychotherapist, the government withdrew its request for an upward departure based on extreme psychological harm, under § U.S.S.G. 5K2.3. A174-A175.

Instead, the government recommended that the district court upwardly depart on the two grounds that it had previously determined had been unnecessary to resolve. First, the government recommended that the court augment by one level its prior two-level upward departure for extraordinary volume of child pornography. The court

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[3] A court of appeals' denial of a request for clarification of its opinion does not have inferential or precedential weight. *See Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1479 (Fed. Cir. 1998).

agreed that a three-level departure was appropriate and explained that he had previously departed by only two levels because a further departure had not been necessary to achieve what he believed to be an appropriate sentence:

> I concluded that the government had established that a departure of more than two offense levels was warranted pursuant to Guideline Section 5K2.0 because of the enormous quantity of child pornography collected by the defendant. . . . I did not make a specific determination as to how many offense levels in excess of two offense levels would have been a warranted departure because I realized at the time that such a question was moot in view of the fact that I intended to limit the extent of the combined departures in the case, and I also planned to depart pursuant to Guideline Section 5K2.3.
>
> I believe it is self-evident that I had concluded that an upward departure of at least three offense levels was warranted. . . .

A172-A173. The court later explained: "The only other thing I will say, just so you have the benefit of all my thinking, is that I really haven't changed my original view of the record here." A253. "If, in fact, it is permissible to go up three offense levels under 5K2.0, I would." A253. "And if it's permissible to do that without hearing additional evidence from the defendant, I would, because I was comfortable at the time of sentencing that the record showed that such departure was appropriate." A253. "I hope it is obvious then that I believed then and now that a departure of three offense levels is warranted since in

order to be more than two you have to be at least three offense levels." A333.

In addition, as it had at the first sentencing hearing and on the basis of the same evidence introduced at the first sentencing, the government requested that the district court depart upward for under-representation of criminal history, *see* U.S.S.G. § 4A1.3. The court agreed that a one-level criminal history category increase was appropriate in view of the defendant's extensive and reliably documented history of abusing young boys. After a lengthy recitation of the supporting evidence, largely taken from law enforcement reports, *see* A313-A331, the court concluded that the defendant's criminal history category under-represented the "likelihood that the defendant will commit further crimes of this nature." A331.

The court made clear that these finding were consistent with its findings at the first sentencing hearing:

> Thus, whereas I opted not to make findings with respect to the likelihood that the defendant will commit further crimes on the day of the original sentencing; namely, because I didn't want to go through all of that detailed information, particularly with the defendant's wife sitting here and having already been so humiliated, I am expressly making that finding in addition to the finding with respect to the defendant's criminal history that I made on the day of sentencing.

A330-331.[4]

Ultimately, at resentencing, the district court departed upwards three offense levels pursuant to U.S.S.G. § 5K2.0 for the enormous volume of child pornography amassed by the defendant, and it departed horizontally upwards from criminal history category I to criminal history category II pursuant to U.S.S.G. § 4A1.3. Thus, the court concluded, the applicable offense level was 34, with a criminal history category of II, which resulted in a sentencing range of 168 months to 210 months. A334-A335.

As it had done during the first sentencing hearing, the court again stated that it had "considered the factors that a district court must take into consideration in determing a particular sentence to be imposed under Title 18 United States Code Section 3553, as well as the purposes that a criminal sentence needs to serve." A311. The court explained, "And my analysis in this case had not changed from the original sentencing and I will simply incorporate by reference my discussion" regarding the § 3553(a) factors that the court engaged in during the first sentencing hearing. A311. The court further stated, "I will note that at that time I explained that the factors that I believe are most significant in terms of the sentence I conclude is appropriate in this case are the need to provide just punishment and the need to protect society. My views on that have not changed." A311.

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[4] The court noted as well that additional facts, which came to the court's attention since the 2002 sentencing, if he were to revisit the issue would now indicate that there is a substantial likelihood of recidivism. A332.

The court sentenced the defendant to 180 months' incarceration. A335. During the resentencing, the district court made clear that its alternative departures were consistent with its actions at the first sentencing and with its intention to impose a total sentence of 180 month imprisonment. The court explained, at the first sentencing, "I exercised my discretion to depart to a lesser extent than the government had established was justifiable because I had concluded the extent of the combined departures in the case should be limited so that the total effective sentence did not exceed 180 months." A172. The court later stated, "The whole point here is I was holding the sentence down to 180 months, against the vigorous argument of the government." A296.

E. The second appeal

The defendant again appealed his sentence. First, he contended that the new departures violated the mandate rule. Second, he argued that the district court abused its discretion by imposing the quantity departure without permitting him to present additional evidence regarding quantity. And third, the defendant argued that the district court abused its discretion in imposing the criminal history departure.[5] *Lasaga II*, at *1. In a Summary Order, this Court rejected the defendant's argument regarding the mandate rule, noting that "the district court's rationale for not imposing [the additional departures] initially – that the appropriate sentence could be reached without them – was nullified by our reversal of the Injury Departure." *Id.* at

[5] The third challenge was not asserted until the defendant's reply brief.

*2-3. This Court held that the district court did not err in imposing these departures, even without first allowing the defendant to present more evidence, since these issues were "fully litigated and rejected by the district court and this court in the first round of sentencing and appeal." *Id.*, at *3. This Court also rejected the defendant's challenge to the quantity departure and concluded that the district court did not err in precluding him from submitting additional evidence on the issue of the issue of digitized "virtual" pornography. *See Id*. at * 3-4.

The Court did remand this case under *Booker* and *Crosby*. In doing so, the Court refrained from addressing the defendant's challenge to the criminal history departure and directed the district court to reconsider the issue in light of the Supreme Court's decisions in *United States v. Shepard*, 125 S. Ct. 1254 (2005) (holding police reports to be insufficient to establish nature of prior conviction for enhanced sentencing) and *Williams v. United States*, 503 U.S. 193, 201 (1992) (holding that criminal history departures could not based solely on consideration of police arrest reports). *See Lasaga II*, at *4. This Court also noted that the decision in *Lasaga II* "in no way limit[s] the discretion afforded to the district court in *Booker* and *Crosby*." *Id.*

F. The *Crosby* remand

Following this Court's *Crosby* remand, the district court solicited and considered written briefs from the parties. A349. In the defendant's written submission, he

urged the court to decrease the sentence. GA14-GA16.[6] Although he did not specifically request a new sentencing hearing, he did note that, should one be ordered, he affirmatively requested *not* to be present. GA12. The defendant asked the court to consider several factors related to his personal history, such as his childhood difficulties, his success in higher education, and his advancement of knowledge in his field. GA15. He also asked the court to consider the "compulsive" nature of his possession of the child pornography in question, as well as the fact that he was prosecuted by the state for the sexual abuse of the young boy whom he mentored. GA15-GA16.

In its *Crosby* filing, the government urged the district court to issue the same sentence without holding an evidentiary hearing. GA8. The government noted that the district court "had made it abundantly clear, on two prior occasions, that for multiple reasons the appropriate sentence for this defendant is 180 months' imprisonment. . . . On both occasions, the [district court] has carefully explained why such a sentence is appropriate." GA7. The government pointed out that this Court had approved the district court's most recent offense level calculation of 34. GA7. In the government's view, it was not necessary to resolve the dispute concerning the criminal history departure because, even without that departure, the guidelines range encompassed the prior sentence of 180 months' imprisonment. GA7. The government stated, "Nothing that has occurred on appeal has resulted in any criticism, whatsoever, of the reasons stated by [the district

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[6] The Government Appendix will be referred to using "GA" and the appropriate page number.

court] for imposing the 180 month sentence [and] the reasons for a 180 month sentence for this defendant have never changed." GA7-GA8.

On October 23, 2009, the court issued a written order concluding that it would not have imposed a different sentence had the sentencing guidelines been advisory at the time the sentence was imposed. Specifically, the court held:

> On two prior occasions, after looking at all the facts and circumstances of this case, the court has concluded that the most appropriate sentence is a sentence of 180 months' imprisonment on Count Two and 60 months' imprisonment on Counts Six, imposed concurrently. On both occasions, the court explained that it had taken into account the factors set forth in 18 U.S.C. § 3553(a). No point raised by the defendant persuades the court that any different conclusion should be reached.

A350. The court declined to address the criminal history departure because the "appropriate sentence" of 180 months was also encompassed by the advisory guidelines absent the disputed enhancement. A350-A351. The court stated, "Assuming *arguendo* a Criminal History Category of Category I, the resulting range . . . encompasses the sentence the court continues to view as being the appropriate sentence. Therefore the court need not address the issue of departure to Criminal History Category II." A350-A351.

The court identified and rejected two defense arguments in its *Crosby* ruling. First, it rejected the defendant's argument that an upward departure was impermissible unless it was based on facts admitted by the defendant or proven to a jury beyond a reasonable doubt. A349. Second, it concluded that it had already taken into consideration various positive aspects of the defendant's life, including "his extraordinary success in higher education, his distinguished career in academia, his extraordinary contributions to the advancement of knowledge in his field, and the fact that his downloading of child pornography was 'compulsive.'" A350.

Summary of Argument

The district court properly followed the sentencing requirements for a *Crosby* remand. After soliciting written arguments from the parties, it properly exercised its discretion in determining that it would have imposed the same sentence had the sentencing guideline been advisory at the time the previous sentence was imposed. The court explained that it had twice previously gone through an exhaustive § 3553(a) analysis and, on both occasions, concluded that 180 months' incarceration was the appropriate sentence. The court held that it had already considered the various positive characteristics relied upon by the defendant in his *Crosby* remand memorandum and factored them into its previous sentencing decisions. In addition, the court properly ruled that it did not need to address the disputed criminal history departure, since the applicable guideline without that departure encompassed the sentence it deemed to be appropriate. The court did not sentence the defendant *de novo*, and, therefore, the

defendant was not entitled to a full sentencing hearing pursuant to Fed. R. Crim. P. 32.

In addition, should this Court determine that an additional remand is required, the unusual circumstances that would require reassingment to a different district judge do not exist here. The district court has shown that it would have no difficulty putting aside previously expressed views if ordered to do so by this Court, nor is reassignment necessary to preserve the appearance of justice. Finally, any such reassignment would waste substantial judicial resources, as the district court has already held multiple lengthy hearings, carefully evaluated numerous submissions by the parties, and provided the necessary assurance that all relevant factors have been considered when issuing the defendant's sentence.

Argument

I. The district court's decision, on the *Crosby* remand, that it would not have imposed a different sentence under an advisory Guidelines regime was both procedurally and substantively reasonable.

A. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." This results in a system in which this Court, while required to consider the Guidelines, may impose a sentence within the statutory maximum penalty for the offense of conviction. Such a sentence will be subject to appellate review for "reasonableness."

This Court summarized the impact of *Booker* as follows:

> First, the guidelines are no longer mandatory. Second, the sentencing judge must consider the guidelines and all of the other facts listed in Section 3553(a). Third, consideration of the guidelines will normally require determination of the applicable guideline range, or at least identification of the arguably applicable ranges, and consideration of applicable policy statements. Fourth, the sentencing

> judge should decide, after considering the guidelines and all other factors set forth in Section 3553(a), whether (i) to impose the sentence that would have been imposed under the Guidelines, i.e., a sentence within the applicable guidelines range, or within permissible departure authority, or (ii) to impose a non-Guideline sentence. Fifth, the sentencing judge is entitled to find all the facts appropriate for determining either a guideline sentence or a non-guideline sentence.

Crosby, 397 F.3d at 103. This Court also stated that a district count must be mindful that *Booker* and section 3353(a) "do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of the sentencing judge." *Id*. Both the Supreme Court and this Court expect "sentencing judges faithfully to discharge their statutory obligation to 'consider' the guidelines and all of the other factors listed in Section 3353(a), . . . and that the resulting sentences will continue to substantially reduce unwarranted disparities while now achieving somewhat more individualized justice." *Id*. at 113-14.

In *Crosby*, this Court determined that it would remand most pending appeals involving challenges to sentences imposed prior to *Booker* "not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine whether to resentence, . . . and if so, to resentence." *Crosby*, 397 F. 3d at 117. Thus, this Court stated that a remand would be necessary to "permit the district court to determine whether it would have imposed a non-trivially different

sentence . . . if it has known that the Guidelines are merely advisory." *United States v. Carr*, 557 F. 3d 93, 98-99 (2d Cir. 2009). In making that threshold determination upon a *Crosby* remand, "the District Court should obtain the views of counsel, at least in writing, but 'need not' require the presence of the defendant. . . ." *Crosby*, 397 F. 3d. at 120. (Internal citations omitted).

"Upon reaching its decision (with or without a hearing) whether to resentence, the district court should either place on the record a decision not to resentence, with an appropriate explanation, or vacate the sentence and, with the defendant present, resentence in conformity with the [Sentencing Reform Act], *Booker/Fanfan*, and [the *Crosby*] opinion, including an appropriate explanation, see § 3553(c)." *Id*. A hearing pursuant to Rule 32 of the Federal Rules of Criminal Procedure ("Rule 32") is only required if the district court actually decides to resentence the defendant. *See Id*.

Following *Booker*, a district court has "broad latitude to impose either a Guidelines sentence or a non-Guidelines sentence." *United States v. Rigas*, 583 F. 3d 108, 114 (2d Cir. 2009) (citations omitted). This Court will "review a district court's factual findings made in the course of imposing a sentence under the guidelines for clear error and the application of the guidelines to those findings for abuse of discretion, in which case [the Court will] employ a *de novo* standard of review." *United States v. Ravelo*, 370 F. 3d 266, 269 (2d Cir. 2004). This Court still "review[s] a sentence for reasonableness even after a District Court declines to resentence pursuant to *Crosby*."

United States v. Williams, 475 F.3d 468, 474 (2d Cir. 2007).

B. Discussion

The district court complied with the requirements for a *Crosby* remand. The court obtained the views of counsel in writing and specifically noted in its Order that it had "considered the arguments in the Defendant's Crosby Brief." A349. It then made the threshold conclusion that "it would not have imposed a different sentence had the Sentencing Guidelines been advisory at the time the sentence was imposed." A349. It explained that it had twice previously looked at all of the facts and circumstances of the case, taken into account the factors set forth under § 3553(a) and concluded that 180 months' incarceration was the appropriate sentence. A350. It found that the defendant had not raised any point to persuade the court to impose a different sentence. A350. Since the court had made the determination not to resentence the defendant, it was not required to hold, and did not hold, a hearing pursuant to Fed. R. Crim. P. 32, *see Crosby*, 397 F.3d at 120.

The district court also properly exercised the discretion noted by this Court in *Lasaga II*, at *4, when it chose not to address the criminal history departure. Had the court again imposed that departure, the defendant's guidelines incarceration range would have been 168 months to 210 months. *See* A334-A335. Without imposing the departure, his guidelines range was 151 months to 188 months. A350-A351. Since the sentence that the district court again determined was the "appropriate sentence" for

the defendant – 180 months' incarceration – was encompassed by both ranges, the court properly decided not to address the departure. A351.

Even before the guidelines became advisory, this Court ruled that it was appropriate for a district court to exercise its discretion in this manner. In *United States v. Bermingham*, 855 F. 2d 925 (2d Cir. 1988), this Court analyzed whether district courts must resolve guidelines disputes when the imposed sentence falls within two ranges being considered. This Court held that "such disputes need not be resolved where the same sentence would have been imposed under either of the guideline ranges urged by the parties." *Id.* at 926. In fact, this Court stated that the overlapping nature of the guidelines ranges was in fact designed to minimize the need to resolve those types of disputes. *Id.* at 926, 930-932. In cases where the sentencing judge indicates that the same sentence would have been imposed regardless of the outcome of the dispute, as the district court here so indicated, "[i]t makes little sense to hold, and review the outcomes of, all the hearings necessary to make these precise determinations . . . where the sentence is unaffected by the outcome." *Id.* at 932; *see also United States v. Shuster*, 331 F. 3d 294, 297 (2d Cir. 2003) (ruling that because the sentencing judge gave "sufficient guidance" that the sentence would have been the same in any event, this Court had no obligation to decide whether the district court was correct in rejecting the requested upward adjustment).

Sentencing courts did not lose this discretion when the guidelines took on the advisory role. For example, in *United States v. Jass*, 569 F. 3d 47, 68 (2d Cir. 2009), the

sentencing judge had "unequivocally stated that it would impose" the same sentence however a disputed enhancement "ultimately works out [on appeal]." This Court held that because the district court stated it would have imposed the same sentence in any event, the misapplication of that enhancement was a "harmless sentencing error." *Id*. Similarly, since the district court stated unequivocally that it would have imposed a 180 month sentence regardless of whether the defendant was in criminal history category I or II, a misapplication of that enhancement would be harmless. As such, the sentencing court was within its discretion to choose not to resolve that particular dispute.

The defendant claims that the district court violated the "law of the case" doctrine because it had supposedly previously determined that the upward departure for the volume of child pornography was "'worth' something less than a 180 month sentence." Def.'s Brief at 25. This claim relies on an overly formulaic view of the guidelines. According to the defendant, when the district court imposed a sentence of 180 months utilizing the criminal history departure, it must have associated that departure with a set numeric "value" of a predetermined number of months.[6] When the district court imposed the same sentence while assuming *arguendo* the guidelines range without that enhancement, the defendant argues that it must then have given the remaining sentencing factors additional numeric "value." According to the defendant,

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[6] The defendant goes so far as to assume the sentencing court put a "substantial" value on the criminal history departure. *See* Def.'s Brief at 10.

this new "valuation" of the other sentencing factors constituted a *de novo* resentencing, which in turn required a Rule 32 hearing. This Court has not required such rigid sentencing calculations.

In *United States v. Barresi*, 361 F. 3d 666 (2d Cir. 2004), this Court rejected the sort of numerical sentencing requirement urged by the defendant. In an earlier sentencing of that case, the district court had used four factors to justify an eight-level upward departure. This Court later ruled that two of those factors were impermissible. At resentencing, the district court again determined the eight-level departure was appropriate based on the two remaining permissible grounds. The defendant again appealed, arguing that the size of the departure must be smaller because the court relied upon only two of the four grounds used to originally impose the departure. *See id.* at 672. This Court rejected the defendant's contention, holding that the same sized departure was justified, even if based on fewer factors than when originally imposed. *Id.*

Similarly, in *United States v. Borrego*, 388 F. 3d 66 (2d Cir. 2004), this Court rejected the notion that each departure must carry a set sentencing value. In affirming a sentence of 240 months, this Court noted that the district court had considered all the pertinent factors in a complex case and determined that 240 months was the appropriate sentence. "The court made clear that the duration of the sentence would not be changed either by different findings" on the disputed adjustment and departure issues. *See id.* at 70. This Court noted that in some cases it is conceivable that a sentencing judge could structure

departures by assigning them a set numeric value. For example, it is possible a district judge could determine that a certain departure meant "I find it appropriate to deduct 60 months." *Id*. It is error to assume, however, that kind of "oversimplified" argument. *Id*. This Court explained that a departure may be "conceived in a manner that departs more completely from the structure of the Guidelines" in cases when the factors justifying a departure have a "dominant importance which eclipses the adjustments specified by the Guidelines." *Id*. This Court determined that the sentencing judge considered all the pertinent factors and determined the appropriate sentence without assigning each requested departure or adjustment a set number of months. Therefore, the court "is not obliged to waste its time making findings that would have no effect on the sentence or on the appeal." *Id*.

In this case, the district court considered all of the pertinent § 3553(a) factors and the various guideline departure requests by both parties in their written submissions and at several lengthy sentencing hearings. The government sought the imposition of a number of upward departures and argued for the imposition of the statutory maximum sentence of 20 years. *See Lasaga II*, at *1. The district court "carefully considered the government's recommended departures and found that each departure was fully warranted by the evidence of the case." *Id*. On three different occasions, however, after taking into account "the totality of the defendant's personal history and characteristics [and] all the facts and circumstance of this case, the court concluded that the most appropriate sentence" was 180 months' imprisonment. A350.

At the first sentencing, the court decided it was not necessary to apply each departure that was warranted to achieve an appropriate sentence, which demonstrates that the court did not put a set numeric "value" on each departure. *See Lasaga II*, at *1. As in *Borrego*, 388 F.3d at 70, here the factors justifying the departures, and the totality of all the facts and circumstances of the case, guided the district court in its determination of the appropriate sentence. The court did not utilize a strict mathematical formula in which each departure required an increase of a certain number of months, nor was it required to do so.

In short, the district court met the requirements for a *Crosby* remand by considering the parties' written submissions and then determining that it would not have imposed a different sentence had the sentencing guidelines been advisory at the time the sentence was imposed. The court specifically found that it had twice previously conducted an extensive analysis under § 3553(a) and concluded that, in light of the various statutory factors that had to be considered, the appropriate sentence in this case was 180 months' incarceration. The court exercised its discretion recognized in *Bermingham* by choosing not to resolve the dispute regarding the defendant's criminal history category, since it would not have had any impact on the ultimate sentence. As such, the district court did not abuse its discretion in denying the *Crosby* remand, and the defendant's sentence should be affirmed.

II. This case lacks the unusual circumstances that would require reassignment to a new district judge should it be remanded

A. Governing law

The defendant further urges this Court, should it decide a further remand is necessary, to reassign the case to a new district judge. This Court has recognized that "in a few instances there may be unusual circumstances where . . . an assignment to a different judge" is necessary. *See United States v. Robin*, 553 F. 2d 8, 9-10 (2d Cir. 1977).

> Three considerations listed in *Robin*, 553 F.2d at 10, are useful in deciding whether to reassign a case on remand: "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous [,] . . . (2) whether reassingnment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

United States v. DeMott, 513 F. 3d 55, 59 (2d Cir. 2008) (alterations in original).

B. Discussion

If this Court decides to remand this case again, it should not assign it to a different district judge. The

district court has already demonstrated it can put aside its previously-expressed views or findings determined by this Court to be erroneous. In *Lasaga I*, for example, this Court held that the district court failed to consider the "comparative harm" to the victim in its departure under U.S.S.G. § 5K2.3. *See id.* at 66. At the resentencing, the district court spent considerable time determining the proper scope of this Court's remand and exactly what this Court had decided was erroneous from its prior rulings. *See e.g.* A248-A270. It did so to ensure that going forward it would only consider views deemed not erroneous by this Court. Therefore, at the resentencing, the district court did not attempt to recast the issue involving the harm to the victim to fit into some other upward departure. Rather, it departed an additional level based upon the extraordinary volume of child pornography, a finding it had determined was appropriate at the first sentencing, A172-A173, A333, and one upheld by this Court in *Lasaga II*. *See Id.* at *3-4.

After the *Crosby* remand, the district court again showed it could put aside previously-expressed views to ensure it only considered factors that this Court determined to be proper. Referencing recent Supreme Court decisions, which addressed the reliability of statements in police reports, this Court noted in *Lasaga II* that the criminal history departure as imposed may be improper and, if imposed again, would warrant further consideration. *See Id.* at *4. The district court demonstrated that it could put aside it previously-expressed views on this departure and decided that it need not, and would not, impose it again to reach an appropriate sentence. *See* A350-A351. Based on the district court's

prior efforts to sentence the defendant in accordance with this Court's rulings, this Court can expect that the district court will put aside any previously-expressed, erroneous views if another remand is required.

Reassignment of this case to another district judge would also entail a substantial waste of judicial resources that is far "out of proportion to any gain in preserving the appearance of fairness." *Robin*, 553 F.2d at 10. The district court has already invested substantial judicial resources in this case and "carefully considered" complex requests for departures from both parties. *See e.g. Lasaga II,* at *1; A334. If this case is reassigned, the new sentencing judge would not have the benefit of having already held multiple lengthy hearings on the relevant issues, of having considered numerous written submissions by the parties and of having heard the defendant's oral statement made to the court. *See* A300-A311. Unlike the recent case of *United States v. Hernandez*, 604 F. 3d 48, 56 (2d Cir. 2010), in which this Court reassigned a case to a new district judge after a fifteen year period between a (non-*Crosby*) remand and resentencing, the district court has provided "the necessary assurance that all of the relevant factors have been considered" and done the "work of updating the record and re-weighing the Section 3553(a) factors." To require a different judge to start anew would be a substantial waste of judicial resources. Therefore, should this Court decide a remand is necessary, it should not reassign it to a new sentencing judge.

The defendant suggests that, because the district court determined on three separate occasions that a sentence of

180 months was appropriate, the court would be unable to put its previously-expressed views out of his mind. *See* Def.'s Brief at 28. This argument incorrectly assumes that the district court made miscalculations in its prior sentencing determinations and chose not to make corrective alterations. Rather, this Court has already found that the district court made "no error" in its calculations at the resentencing. *See Lasaga II*, at *4. And when this Court remanded this case pursuant to *Crosby*, it did so for the limited purpose of allowing the district court to determine if it would have given the same sentence if the guidelines had not been mandatory. In fact, this Court explicitly noted that it was "in no way limit[ing] the discretion afforded to the district court by *Booker* and *Crosby*." *Id*. The district court certainly should not be faulted for exercising that discretion in making the determination that it would have issued the same sentence absent mandatory guidelines.

The defendant also argues that the district court "no longer retains the ability to preserve the appearance of impartiality or the appearance of justice" because he thrice sentenced the defendant to serve 180 months' imprisonment and because of the four year delay between the *Crosby* remand and the district court's determination that the defendant's sentence would not be changed post-*Booker*. *See* Def.'s Brief at 28-29. This allegation is also unsupported by the record. The district court has held multiple, lengthy sentencing hearings and considered several written submissions by the defendant. A27, A169. The defendant has had ample opportunity to be heard. *Cf.*, *DeMott*, 513 F. 3d at 59 (holding that reassignment was appropriate when the sentencing judge failed to "elicit the

views of the defendant or the prosecutor"). In fact, after the *Crosby* remand, the court stated that he had previously considered the factors upon which the defendant relied in arguing for a new sentencing hearing. A350. Further, the court has clearly demonstrated its impartiality in rejecting the government's request at the original sentencing for a statutory maximum sentence of 20 years. Although the district court found that each departure requested by the government was fully warranted, it decided not to impose them all in order to achieve a lesser sentence for the defendant. *See Lasaga* II, at*1. [Finally, since the determination made by the district court upon a *Crosby* remand is whether it would have imposed a different sentence at the time the previous sentence was imposed, *see Carr*, 557 F.3d at 98-99; A349, the defendant could not have suffered any prejudice in the delay between his *Crosby* remand and the district court's order.]

CONCLUSION

For the foregoing reasons, the judgment and sentence of the district court should be affirmed.

Dated: July 29, 2010

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,685 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range

exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

ANTI-VIRUS CERTIFICATION

Case Name: United States v. Lasaga

Docket Number: 09-4630-cr

I, Karen Wrightson, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/29/2010) and found to be VIRUS FREE.

/s/Karen Wrightson
Karen Wrightson
Record Press, Inc.

Dated: July 29, 2010

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Sworn to me this

July 29, 2010

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Notary Public, State of New York
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Qualified in Kings County
Commission Expires November 15, 2012

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