12-1295

To Be Argued By:
RAYMOND F. MILLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-1295

UNITED STATES OF AMERICA,
Appellee,

-vs-

DAVID L. BOURQUE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID B. FEIN
United States Attorney
District of Connecticut

RAYMOND F. MILLER
Assistant United States Attorney
ROBERT M. SPECTOR
Assistant United States Attorney (of counsel)

Table of Contents

Table of Authorities

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

Cases

Statutes

Rules

Guidelines

Statement of Jurisdiction

The district court had subject matter jurisdiction over this criminal prosecution under 18 U.S.C. § 3231. Judgment entered on February 15, 2012. Joint Appendix ("JA") 264. The defendant, after requesting and receiving an extension of time, filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on March 29, 2012, JA281, and this Court has appellate jurisdiction over the defendant's challenge to his sentence under 18 U.S.C. § 3742(a).

Statement of the Issue Presented for Review

Was the defendant's 120-month sentence, which was over seven years below the bottom of the guideline range agreed to by the parties and found by the court, substantively reasonable?

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Preliminary Statement

This is a sentencing appeal in which the court imposed a sentence 90 months below the bottom of the range stipulated to by the parties in the plea agreement. In this case, the investigation revealed that the defendant, a police officer, used a file sharing program to accumulate and trade an enormous collection of horrific child pornography. He actively traded and discussed child rape videos and used information gleaned

from his job as a police officer to help him avoid detection.

Both the plea agreement and the PSR concluded that the correct incarceration range under the Sentencing Guidelines was 210-262 months. The district court independently concluded that this was the correct range and found three aggravating factors: (1) the defendant sought to evade detection by using a computer wiping program and by relying on knowledge he obtained as a law enforcement officer (which he also shared with others to help them avoid detection); (2) the defendant was a law enforcement officer who worked on child pornography cases and should have been more aware of the devastating impact child pornography has on child victims; and (3) the defendant attended a law enforcement seminar that featured a presentation by the FBI concerning the file sharing program that he was then actively using to distribute child pornography and used that information to facilitate his trading of child pornography. The district court also concluded that the defendant substantially assisted law enforcement officers and granted the government's motion under U.S.S.G. 5K1.1. Weighing all of these factors, the court imposed a sentence of 120 months.

The defendant challenges the substantive reasonableness of his sentence, claiming that the district court mechanistically applied the Sen-

tencing Guidelines without regard for the factors enumerated in 18 U.S.C. 3553(a), improperly compared this case to cases involving the simple possession of child pornography, failed to give proper weight to the defendant's proffered mitigation evidence.

For the reasons that follow, these claims have no merit, and the district court's 120-month sentence was substantively reasonable.

Statement of the Case

On April 26, 2011, the defendant was arrested on a criminal complaint. JA2. On July 21, 2011, the defendant pleaded guilty to a one-count information that charged him with receipt and distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2). JA31-JA40.

On February 10, 2012, the district court (Alvin W. Thompson, J.) sentenced the defendant to a term of 120 months' incarceration, followed by a term of ten years' supervised release. JA264.

On February 15, 2012, the court granted the defendant's motion for an extension of time to file an appeal. JA7.

On March 28, 2012 the defendant filed a motion for an articulation of his sentence, asking that the district court specify the guideline range it replied upon in imposing sentence. JA274. On April 25, 2012, the district court granted the

motion and set out the guideline calculation that applied in the case. JA284-JA285.

On March 29, 2012, the defendant filed a timely notice of appeal. JA281. He is currently serving his federal sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. Factual basis

1. The search of the defendant's home and office

Had the case against the defendant gone to trial, the government would have presented the following facts, which were set forth in the Affidavit supporting the Criminal Complaint (Aff.), the government's sentencing memorandum (JA55-JA70) and the Pre-Sentence Report (PSR).

In March 2011, law enforcement officers utilized a file sharing program to download several images of child pornography from address associated with the defendant. Aff. ¶ 23; JA24. They secured search warrants. Aff. ¶ 31; JA26.

On April 11, 2011, law enforcement officers conducted a search of both the defendant's residence and his office at the Granby Police Department. PSR ¶ 10. They seized several pieces of computer equipment, some of which were encrypted. PSR ¶¶ 10-11. The defendant initially refused to provide the encryption keys for his computers. PSR ¶ 10.

On April 20, 2011, the defendant met with law enforcement officers and provided them with the encryption keys for his computers. PSR ¶ 11.

2. Analysis of the defendant's computers

Forensic analysis revealed that the defendant amassed an enormous collection of horrific child pornography including pictures, videos and stories. Investigators found 22,282 images and 4059 videos of child pornography on the hidden portion of his computer's hard drive. PSR ¶ 8. Some of these videos exceeded five minutes in length. PSR ¶ 8. The state police officer who reviewed the content of the defendant's computer indicated that the defendant's collection was worse than the usual offender and that the defendant possessed the single worst video that he had ever seen in the two and a half years that he had been conducting child pornography investigations. The FBI case agent reported that the defendant's collection was among the larger ones found in the district. JA57. Videos, however, were the mainstay of the defendant's collection. The defendant possessed over 4000 pornographic videos depicting the sexual abuse of children, some of which were incredibly graphic. PSR ¶ 10.

In addition to the pictures and videos, the defendant possessed seventeen text files that contained stories of children being molested. Forensic analysis also uncovered two .pdf versions of

"Modern Boy Lover Magazine," and one .pdf file entitled "The Penis," which was a copy of an old email that began, "Here are some basics that the boy in your life would like you to know." JA58-JA59.

3. Characteristics of the defendant's online trading of child pornography

The investigation revealed that the defendant used a file sharing service to communicate with his trading partners. PSR ¶ 9. When a prospective trading partner first viewed the defendant's online account, that individual would see five folders: A Peek, Pics Folders, Vids, Vids 2 and Vids 3. Only the folder named "A Peek" was accessible without a password. JA58. That folder contained non-pornographic images of young boys, some in various states of undress. JA58. The other folders containing the pornographic material could only be accessed if the defendant provided the individual with a password. JA58. The defendant and his trading partners could converse and exchange passwords via chat feature of the filing sharing service. JA58.

After reviewing the defendant's internet chats with his trading partners, it became apparent that young boys were focus of the defendant's interest. JA59. His chat logs with his trading partners were replete with requests for images of boys under the age of fourteen. JA59. When asked by prospective trading partners

about his interests, the defendant would typically respond by saying "boys under 14" or "boys < 14." JA59. The defendant asked one individual if he (the individual) would be interested in "a nice 11-12 year old?" JA59. Further, the following online discussion occurred between the defendant (D) and trading partner 1 (TP1). JA59-JA60.

TP1: W[ha]t do u like

D: boys under 14
you must have more to be invited here

TP1: what do u mean

D: min 25 gig . . . . or new material[1]

TP1: how do you expect anyone[]to grow their files if you only share with people who have that much, a lot of my stuf is original records that I do myself.[2]

---

[1] According to the investigator, this comment indicates that the defendant was trading in a location that required participants to have at least 25 gigabytes of material available for trading or possessed new material that was recently produced and had not yet been widely disseminated online. JA60.

[2] According to the investigator, this is a reference by TP1 that he produces his own child pornography for trading, i.e. that he produces new material. JA60.

D: thats why then. . . . enjoy. Where is original stuff.

JA60.

4. The defendant actively sought to avoid detection by other law enforcement agents

The investigation revealed that the defendant, a police officer serving a small town in Connecticut, knew he was committing a crime and actively sought to avoid detection by law enforcement. First, at the suggestion of another individual with whom he traded child pornography, the defendant installed sophisticated encryption software on his portable external hard drive specifically to safeguard his collection of child pornography. JA60; PSR ¶ 41. His computer hard drive contained a password that protected the main section containing files related to his duties as a police officer. JA61. On the same hard drive, however, the defendant created a hidden partition that contained tens of thousands of child pornography files. JA61; PSR ¶ 19. This section could be accessed only with a different password, and the defendant believed that computer analysis would not reveal the presence of the hidden partition.[3] JA61. The de-

[3] Indeed, the instructions for using the program employed by the defendant state the following:

fendant's password for the hidden volume was, in part, "keepmesafeIWO1P@SSword." JA61. According to the investigator, this password is a phonetic representation of the phrase "Keep me safe, I want only one password." JA61.

Typically when a file was accessed, information about the date and time of access is stored on the computer. In this case, however, the defendant employed a program that erased any record of the files that he accessed. JA61.

> Even when the outer volume is mounted, it should be impossible to prove whether there is a hidden volume within it or not*, because free space on *any* volume is always filled with random data when the volume is created and no part of the (dismounted) hidden volume can be distinguished from random data.
>
> The password for the hidden volume must be substantially different from the password for the outer volume. To the outer volume, (before creating the hidden volume within it) you should copy some sensitive-looking files that you actually do NOT want to hide. These files will be there for anyone who would force you to hand over the password. You will reveal only the password for the outer volume, not for the hidden one. Files that really are sensitive will be stored on the hidden volume.

JA61.

In addition to attempting to employ sophisticated electronic security to safeguard his collection of child pornography, the defendant used information gained as a police officer to assess the ability of other law enforcement officers to detect his criminal activity. JA62. He conducted child pornography investigations and was familiar with law enforcement techniques. JA62. Incredibly, the defendant was actually investigating a child pornography case while he was simultaneously collecting child pornography during his time off. JA62. He gave internet safety presentations to middle school students. PSR ¶ 29.

In January 2011, the defendant attended a law enforcement conference in his capacity as a captain in the Granby police department. JA62. At this conference, FBI agents presented information to state law enforcement supervisors about the FBI's current efforts to stop the spread of child pornography. JA62. The speaker discussed law enforcement's ability to infiltrate various platforms used by pedophiles, including the one the defendant had been using for about six months. JA62. After the presentation, the defendant approached the FBI agent who gave the presentation and asked questions about the platform and the issues the FBI was having in infiltrating it. JA62. Apparently satisfied that he was safe from detection by law enforcement, the defendant continued to use this platform to col-

lect child pornography until he was arrested. JA62.

It is also apparent from the defendant's online chats with his trading partners that he actively sought to avoid detection by law enforcement. JA62. For example, the defendant (D), after transmitting to trading partner 2 (TP2) the password required to access the defendant's online collection of child pornography, engaged in the following conversation:

> D: Then transfer immediate. Bye bye.
>
> TP2: lol, you're transferred
>
> D: k . . . . just never know.
>
> TP2: thanks for giving m[e] like 14 seconds to see if u were legit, lol.
> Yep, Where are you from?
>
> D: 14 seconds to get my ip [internet address] and get a knock on door.
>
> TP2: I've never had someone's files load as fast as yours, so I, So I was just curious. Yep, I know. I'm cautious too. Just gotta trust contacts who recommend, I guess.
>
> D: Ya . . . . till one f---- up.

JA62-JA63.

Further, the defendant (D) warned another trading partner (TP3) about the online presence of law enforcement, in the following chat:

> TP3: Your invitation has been accepted.
>
> D: Ya, ok . . . but I see DL [download], then see nothing and [it] looks very suspicious . . . one file DL by a cop and bye bye. And yes they can DL to verify that you have CP [child pornography].
>
> TP3: I gotcha sorry about that. Yea I always make sure people have CP before I give out my pass.

JA63.

5. The defendant discussed the trading of child pornography with others online

During the course of trading hard core pornographic material, the defendant displayed a callous disregard for the harm suffered by the children depicted in the videos and pictures he viewed and traded. JA63-JA64. Often, after he vetted and accepted a new trading partner, he would tell his trading partner to "enjoy" himself or to "have fun" while perusing the defendant's collection, as the following chat demonstrates. JA64.

D: wish to find a nice 11-12 year old? Good selection of stuff. How often u on?

TP2: it really depends. I don't live alone so I can't keep up and running when I'm not here but try to get on every few days. Usually it's in spurts. On a lot for a couple of days, then maybe not on for a week

D: k. . . . well enjoy.

JA64.

On another occasion, a prospective trading partner told the defendant that he had "more than 100GB boy." JA64. The defendant replied, "ya, me too" and later in the conversation told his new trading partner that he had "105 gig." JA64. They exchanged passwords, and the defendant wrote, "k . . . . enjoy. On and off at times, so be patient and we both enjoy." JA64. The material that the defendant wanted to his trading partner to "enjoy" included graphic and disturbing videos of violent acts against young children. JA64.

Indeed, it is apparent that the defendant actively sought out, viewed, and collected videos depicting the rape of young boys. JA64. In a chat with trading partner 2, the following exchange occurred:

TP2: are you into anything with boys

D: yep

TP2: what all?

D: if under 14 . . . I'm game

TP2: like bondage and stuff

D: ya

TP2: hot

D: ya, I agree

TP2: have any real bondage//torture//rape type pics? Or vids

D: couple. . . older thou

TP2: yeah, it seems like it's either fake or old. I think I really only have a couple of real rape ones, one from Russia and 1 or 2 Arab, nothing American. And all the bondage torture is fake.

D: ya the Arab one. . . and old ones . . . nothing new. Most fake and older than 18.

. . .

D: DL a rape one now. . . see if it's a new one in about a minute

TP2: let me know :-) brb

D: k. . . . old one . . .

TP2: how'd that rape vid turn out?

D: old . . . sucks when the names are off

TP2: nuts

JA64-JA65.

B. The guilty plea

On July 21, 2011 the defendant pleaded guilty to a one-count information charging him with receipt and distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2). JA31-JA33. In the plea agreement, the parties stipulated that, under U.S.S.G. § 2G2.2(a)(2), the base offense level was 22. JA45. Further the parties stipulated that the following specific offense characteristics applied: (1) a two level increase under U.S.S.G. § 2G2.2(b)(2) because the material involved a prepubescent minor or minor who had not attained the age of twelve; (2) a five level increase under U.S.S.G. § 2G2.2 (b)(3)(B) because the distribution was for the receipt or expectation of receipt of a thing a value, specifically child pornographic material; (3) a two level increase under U.S.S.G. § 2G2.2 (b)(6) because the offense involved use of a computer or interactive computer service for the possession, transmission, receipt or distribution of the material; (4) a four level increase under U.S.S.G. § 2G2.2(b)(4) because the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence; and (5) a five level increase under U.S.S.G. § 2G2.2 (b)(7)(D) be-

cause the offense involved 600 or more images. JA45. The parties also agreed that the defendant possessed the guideline equivalent of 328,582 images of child pornography. JA45. With a three-level reduction for acceptance of responsibility, the parties agreed that the total offense level was 37. JA45.

The parties also agreed that the defendant was within Criminal History Category I and that, under the Guidelines, he was exposed to a term of incarceration of 210-240 months and a term of supervised release up to life. JA45. The defendant reserved his right to argue for either a downward departure or a non-guideline sentence, and the government reserved its right to oppose these arguments. JA45-JA46.

The plea agreement contained the following factual stipulation of the defendant's criminal conduct:

> The defendant possessed approximately 22,282 images and 4084 videos of hard core child pornography, some of which exceeded five (5) minutes in length, primarily involving young boys aged 8-14. Under the Guidelines, this equates to 328,582 images. The defendant cannot stipulate that he viewed each and every one of these images.
>
> The defendant used the Internet to share pictures and videos of child pornog-

raphy with other individuals, including but not limited to:

a. File Name: !1!!!11.jpg. Description: This image file depicts a male child who appears to be between the ages of 1 and 3 years old. The penis of what appears to be an adult male is inserted into the male child's anus.

b. File Name: 001m-013_2.jpg. Description: This image file depicts a male child who appears to be between the ages of 3 and 6 years old. The child is naked from below the waist, and the penis of what appears to be an adult male is pressed against the child's anus.

c. File Name: xxxx_13_yo_008.jpg. Description: This image file depicts a naked male child who appears to be between the ages of 11 and 14 years old. The child is kneeling on a bed, and his legs are spread, exposing his penis in a lascivious manner.

d. File Name: img.20030116021957172688826lg.jpeg that depicts a child that appears to be less than a year old performing oral sex on an adult male. This image was stored in a folder labeled "photos - babies - men."

On April 11, 2011, law enforcement officers conducted searches of both the defendant's residence and his office at the Granby Police Department. Bourque identified a Dell laptop computer and several other items, including an external hard drive, as his personal property. He refused, however, to give consent to preview the Dell laptop computer. Bourque informed the Connecticut State Police that the computers and their associated data storage devices were encrypted, but refused to make any further statements.

On April 20, 2011, Bourque agreed to meet with the Connecticut State Police and the FBI. Bourque was cooperative with the law enforcement agents and provided them with the passwords required to access his accounts. Specially, he showed the officers how he had encrypted the hard drive to conceal his collection of child pornography and how to access his collection of child pornography.

A subsequent forensic analysis of the defendant's computers revealed that child pornography was located on the following computer equipment:

1. One (1) Dell Inspiron 1545 laptop #4HBB3K1 with cord

> 2. One(1)Western Digital my passport 750GB hard drive #WDBACX7500ABK
>
> 3. One (1) Seagate 320GB hard drive #2GE3Q7MM
>
> 4. One (1) Dell Latitude D810 laptop computer service tag G22HH91
>
> 5. One (1) Kingston 2GB SD card
>
> Forensic examiners were able to view over 300 sub-folders on the defendant's computer that contained child pornography, including, *inter alia*, "6-10yo boys pics," "11yr old holefull," "12yo xxxxxxx big dick," "13 yo Boy Firm Body," "12yr old American boy circumcised," and "little pubes full." To obtain this material, the defendant would communicate and barter with other internet users and agree to share child pornography with them if they in turn provided him with child pornography that they possessed.

JA51-JA52.

At the time of his plea, the defendant submitted a written plea petition that read, in part,

> I received and exchanged visual depictions of minors engaging in sexually explicit conduct on my computer. There were more than 600 images that I looked at concerning sexually explicit conduct of minors. Most of the images were of boys

> between the ages of eight (8) and fourteen (14) although there were other images of minors also. I did this between August of 2010 and April of 2011. I did not create any images myself, nor did I act out and inappropriately touch any minor. I sincerely regret my conduct and accept responsibility for my actions.

JA35-JA36.

C. The Pre-Sentence Report

The Pre-sentence Report prepared by the United States Probation Office calculated the defendant's base offense level as 22. PSR ¶ 32. Two levels were added because the material involved a pre-pubescent minor, five levels were added because the defendant distributed child pornography for a thing of value, four levels were added because the material portrayed sadistic or masochistic conduct, and two levels were added because the offense involved the use of a computer, and five levels were added because the offense involved more than 600 images, resulting in a total offense level of 40. PSR ¶¶ 33-41.

Subtracting three levels for acceptance of responsibility under U.S.S.G. § 3E1.1 resulted in a total offense level of 37. PSR ¶¶ 42-43. With a Criminal History Category of I, the defendant was exposed to a term of incarceration of 210-240 months. PSR ¶ 82.

D. The sentencing hearing

On February 10, 2012, the district court conducted a sentencing hearing. At the outset, the district court determined that neither party had any objection to the guideline range calculated in the PSR, which was the same range as the one contemplated in the plea agreement. JA142-JA143, JA146; JA45.

The defendant argued that the guideline range of 210-240 months was "obscene" and inconsistent with the 18 U.S.C. § 3553. JA190. "All I am asking the Court to do, your honor, is to throw out the Guidelines and simply sentence my client, as I know this Court is going to do, under 3553, which I think is inconsistent with the Guidelines." JA193-JA194. "I think it's fair for the Court, in deciding what's an appropriate sentence, . . . and I know this Court has in other cases, your Honor, taken the Guidelines and thrown them in the trash can." JA194.

Next, a number of the defendant's friends and family made statements to the court. JA214-JA224. The defendant apologized to the victims and his family. JA225-JA226. The government filed a motion for a downward departure under U.S.S.G. § 5K1.1 based on the defendant's substantial assistance and asked the court to give full consideration to that motion. JA238. The government responded to the defense counsel's comments and asked the court to impose a fair

and just sentence in light of the section 3553(a) factors.

The court granted the government's motion and explained the factors that it took into consideration in determining the sentence. JA238-JA239. The court indicated that it had reviewed the sentencing memoranda from both parties, the reports prepared by both the defense and court-appointed mental health professionals, and the character letters received from the defendant's friends and family. JA240. The court explained that it needed to consider just punishment, protection of the public, adequate deterrence, the seriousness of the offense and the possibility of rehabilitation. JA241. The court indicated it was "particularly aware of the need to impose a sentence that provides just punishment, the need to deter others from committing the offense committed by you, and the need for the sentence imposed to reflect the serious nature of the offense." JA241

The court also discussed the impact of this Court's decision in *United States v. Dorvee*:

> [In] assessing the appropriateness of the provisions in Section 2G2.2, I have also reviewed my analysis in four child pornography cases in which I've imposed sentences since the *Dorvee* decision. In one case I imposed a sentence of three months because I felt the offense conduct was well outside the heartland cases. In

> other cases, I imposed sentences in the range of 36 months to 46 months. In each case, I imposed a non-Guidelines sentence because certain of the enhancements in Section 2G2.2 were not appropriate for a variety of reasons. Each of these cases involved possession of child pornography, not receipt and distribution of child pornography, for which the statutory maximum and Guideline range are higher.

JA242. In this case, however, the court concluded that the offense conduct was well outside the heartland of cases involving first time offenders who have been convicted of receipt and distribution of child pornography and constituted "much more serious conduct and involves a much higher degree of culpability." JA242.

Moreover, the court concluded that, under *Dorvee*, since some enhancements apply in a high percentage of child pornography cases, it was necessary to determine whether "each enhancement is appropriate for the case under consideration." JA243. Considering the impact of the amendments to the guidelines, the court systematically analyzed each enhancement under the facts of this case.

First, the court determined that the enhancement for possession of prepubescent minors was applicable because in the defendant's "own words, which are quoted in the Presentence

report and in the government's memorandum, you reflect your interest in young boys."[5] JA245.

Next, the court determined that the enhancement for distribution for the receipt of a thing of value under § 2G2.2(b)(3)(B) was applicable. The court noted that this enhancement "was a logical approach" which focuses, not on the retail value of the pornographic material, but on the individual conduct of the defendant distributing the material "result[ing] in an increase that can range from two levels to seven levels depending on the particular offense conduct, thus giving individualized consideration to defendants." JA246.

The court also concluded that the enhancement in § 2G2.2(b)(4) for possession of material that portrays sadistic or masochistic conduct applied. JA246. The court informed the defendant:

> [Y]our conduct falls squarely within the type of conduct this enhancement was designed to capture. Your collection included videos depicting the rape of young boys. . . . Furthermore, it is apparent that the inclusion of such videos in your collection was the result of you actively

[5] The defendant routinely asked to see images of "boys under 14." JA59. In one exchange, the defendant asked a prospective trading partner if he was interested in "a nice 11-12 year old?" JA59.

> seeking out and collecting such videos. The conversation reported in the government's sentencing memo clearly demonstrates this fact.

JA247.

Next, the court found that the two-level enhancement under § 2G2.2(b)(6) for use of a computer was applicable for two reasons. First, the court found that the defendant used the computer to recruit new trading partners. JA249. Second, the court noted that, by using the computer, the defendant was able to avail himself of "sophisticated encryption technology to prevent law enforcement from finding the child pornography that had been stored on a hidden portion on your external hard drive." JA249-JA250.

Finally, the court determined that the enhancement under § 2G2.2(b)(7) based on the number of images possessed by the defendant was applicable in this case because the defendant "had 22,282 images plus 4059 videos of child pornography on the hidden portion of [his] computer's hard drive." JA251-JA252. The court stated, "I think it's clear that an increase of five levels actually seems a bit low for someone in this situation if we simply look to the fact that, as reflected in the government's sentencing memorandum, there's a quote [from the defendant] that's says 'I require a minimum of 25 gig,' which I think is 25 gigabytes." JA253.

After determining that the applicable range was 210-240 months, the same range that was specified in the PSR and contained in the plea agreement, the district court went on to explain its justification for determining the proper sentence in this case. JA254. The court concluded that "there are three aggravating factors present here that cannot be related to any particular Guidelines provision and, thus, are non-Guidelines factors. And constitute the basis for a non-Guidelines sentence in this case." JA254.

First, the court noted that the defendant sought to evade detection by using a wiping program and used knowledge about he obtained as a law enforcement officer, and conveyed that knowledge to other individuals. JA254. Second, the court determined that the defendant was a law enforcement officer who worked on child pornography cases and should have been more aware of the devastating impact child pornography has on child victims. JA254-JA255. Third, the court noted that the defendant attended a law enforcement seminar that featured a presentation by the FBI concerning the file sharing program that the defendant was then actively using to distribute child pornography. JA255. After the seminar, the defendant approached the FBI agent who gave the presentation and asked questions about the platform and the issues the FBI was having infiltrating it. JA255. The court concluded that "[i]t really is nothing short

of outrageous for law enforcement agents who are gathering to discuss the best strategies and means for combating the spread of child pornography to have to be concerned about whether one of their number is using that information to avoid detection." JA255. Based on this analysis, the court determined that this offense warranted a "significant increase" above any of the sentencing ranges suggested by prior versions of the Guidelines that did not include some of the enhancements that applied in this case. JA255.

Prior to imposing sentencing, the court directly addressed the defendant's assertion that his criminal conduct was the result of a mental condition:

> I do want to address an additional -- or two additional issues. One is the issue of diminished mental capacity. I'm not going into the reports that were filed by the two doctors, but I will say that I am not satisfied that Dr. Lothstein has established a nexus between the commission of the offense and the conditions that he identifies.[7] That's my own common sense

[7] The defendant had offered a psychological report authored by Dr. Lothstein, a psychologist who concluded that the defendant suffered from post-traumatic stress disorder and this condition contributed to his amassing a huge collection of child pornography. JA101-JA102, JA132. The district court ordered Dr. Borden, a psychiatrist, to examine the

> reading of the report. It also happens to be Dr. Borden's professional reading of the report. I do credit Dr. Borden's report. . . . Without quoting from the report, I will say that I have throughout this process and continue to believe that it's hard for me to assess this defendant because of lack of openness. I do believe it's accurate to describe him as superficially cooperative and also a person who is not a fully credible historian.

JA256.

After granting the government's motion for a reduced sentence, the court sentenced the defendant to a 120-month term of incarceration followed by a ten-year period of supervised release. JA256-JA257.

E. The defendant's motion for articulation of sentence.

On March 28, 2012, the defendant filed a motion for articulation of his sentence, specifically asking for a clarification of what guideline range the district court used in calculating the sentenced. JA274-JA275.

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defendant, and he issued a report refuting Dr. Lothstein's conclusions. JA256. This report was attached as part of the amended PSR, which, presumably, the defendant filed, under seal, along with his opening brief.

On April 25, 2012, the court granted the motion and stated,

> Prior to discussing the factors that a district court must take into consideration in determining the sentence to be imposed in a particular case, the court stated the Sentencing Guidelines calculations for this case. The court stated that the Total Offense Level was 37 and the defendant's Criminal History Category was Category I and that for that Total Offense Level and Criminal History Category the Sentencing Guidelines suggest imposing a term of imprisonment in the range of 210 to 240 months. . . .
>
> In the context of the fact that the Total Offense Level was 37 and the Criminal History Category was I, the court proceeded to consider the applicable Sentencing Guidelines provision[s] together with the other factors in 18 U.S.C. § 3553(a), which involved a detailed analysis of Guidelines § 2G2.2 and whether the provisions of § 2G2.2 in the November 1, 2011 Sentencing Guidelines Manual . . . were appropriate with respect to this particular defendant. The court's analysis included consideration of what the defendant's Total Offense Level would have been had two earlier versions

> of the Guidelines been used; it would have been 27 and 32, respectively.
>
> The court concluded that a Total Offense Level of 37, which represents a significant increase above both a Total Offense level of 27 and a Total Offense Level of 32, was appropriate with respect to this defendant, and that no adjustment to the Total Offense level as contemplated by *US. v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) was appropriate. The court gave the defendant credit in connection with the government's motion based on that conclusion.

JA284-JA285.

Summary of Argument

The defendant claims that his 120-month sentence was substantively unreasonable. Specifically, he claims that the court "displayed rote acceptance" of the Sentencing Guidelines and such "blind adherence" to the Guidelines conflicts with the requirements of 18 U.S.C. § 3553(a). A plain reading of the sentencing transcript rebuts the defendant's argument.

The district court carefully considered each of the guideline enhancements and made specific factual findings with respect to this defendant as to each enhancement. Further, the court plainly understood that the Guidelines were only one

factor in its application of the section 3553(a) factors. The sentence imposed by the court, which was 90 months below the guideline incarceration range, appropriately reflected both the seriousness of the offense conduct and the history and characteristics of the defendant, including the fact that the defendant, a veteran police officer who had investigated child pornography offenses, used his law enforcement knowledge to facilitate his offense.

Argument

I. The district court's 120-month, below-guideline sentence was substantively reasonable

The defendant argues that his sentence was substantively unreasonable. In making this argument, the defendant claims that (1) the district court's methodology for calculating the sentence is inconsistent with this Court's holding in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); (2) the district court improperly compared this case to cases involving the simply possession of child pornography; and (3) the district court failed to properly weigh mitigation evidence. *See* Def.'s Br. at 27-38.

A. Governing legal principles

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) "the nature and circumstances of

the offense and history and characteristics of the defendant"; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from 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 sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *Id.*

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for "abuse of discretion." *Gall v. United States*, 552 U.S. 586, 591 (2007); *see also United States v. Cavera,* 550 F.3d 180, 187 (2d. Cir. 2008). This reasonableness review consists of two components: procedural and substantive review. *See Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. This Court has stated it will "set aside a district court's substantive determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible

decisions.'" *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *See Cavera*, 550 F.3d at 190. The appellant bears a "heavy burden because review of a sentence for substantive reasonableness is particularly deferential." *United States v. Broxmeyer,* ---F.3d---, 2012 WL 3660316, at *44 (2d Cir. Aug. 28, 2012); *see Gall*, 552 U.S. at 51. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can "bear the weight assigned to [them]." *Cavera*, 550 F.3d at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.* "That deference derives from a respect for the distinct institutional advantages that a district court enjoys over their appellate counterparts in making an individualized assessment of sentence under 18 U.SC. § 3553(a). Among those advantages is the district court's unique fact finding position, which allows it to hear evidence, make credibility determinations and interact directly with the defendant, "thereby gaining insights not always conveyed by a cold record." *Broxmeyer*, 2012 WL 3660316, at *45 (internal quotation marks omitted); *see also Gall*, 552 U.S. at 51-52.

This Court neither presumes that a sentence within the guidelines range is reasonable nor

that a sentence outside this range is unreasonable, but may take the degree of variance from the guidelines into account when assessing substantive reasonableness. *See Cavera*, 550 F.3d at 190. Sentences are substantively unreasonable if they are "shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice." *Broxmeyer*, 2012 WL 3660316, at *45 (quoting *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 140 (2010)).

This deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *See Cavera*, 550 F.3d at 190. Sentencing courts commit procedural error if they fail to calculate the guideline range, erroneously calculate the guidelines range, treat the guidelines as mandatory, fail to consider the factors required by statute, rest their sentences on clearly erroneous findings of fact, or fail to adequately explain the sentences imposed. *Id.* These requirements, however, should not become "formulaic or ritualized burdens." *Id.* at 193. This Court thus presumes that a district court has "faithfully discharged [its] duty to consider the statutory factors" in the absence of evidence in the record to the contrary. *See United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). This procedural

review must maintain the required level of deference to sentencing courts' decisions and is only intended to ensure that the sentence resulted from the reasoned exercise of discretion." *Cavera*, 550 F.3d at 193.

B. Discussion

The defendant's 120-month sentence was reasonable and reflects the factors set forth in § 3553(a). A lengthy sentence in this case was necessary to provide for just punishment, to provide general deterrence, and to reflect the serious nature of the offense. These were the very factors which motivated the court to impose the 120-month sentence. JA241.

It is undisputed that the Sentencing Guidelines called for a term of incarceration of 210-240 months. The court identified a number aggravating factors, including the defendant's position as police officer. These factors allowed the court to conclude that this case was "well outside the heartland of cases involving first time offenders" since it constituted "much more serious conduct and involves a much higher degree of culpability." JA242.

Still, in light of the government's motion, the district court imposed a sentence that was 90 months below the bottom of the guideline range. In the end, the 120-month sentence fell below the advisory guideline range, was not excessively high or low, reflected a sensible application of

the § 3553(a) factors, and addressed the government's motion.

The defendant argues that his sentence was substantively unreasonable because (1) the district court treated the Sentencing Guidelines as absolute, contrary to the holding of this court in *Dorvee*; (2) the district court improperly compared this case to cases involving simple possession of child pornography; and (3) the district court failed to accord proper weight to the defendant's proffered mitigation evidence. Each argument is discussed in turn.

1. The district court applied the teachings of *Dorvee*.

The defendant first argues that that the district court failed to recognize that the Guidelines are not absolute, arguing that the district court displayed "rote acceptance of the sentencing range presented by the Guidelines." Def.'s Br. at 29.

In *Dorvee*, this Court held that a sentence for a first time offender at the statutory maximum of 240 months was procedurally and substantively unreasonable. The Court sharply criticized U.S.S.G. § 2G2.2, the guideline that applies to offenses involving the possession and distribution of child pornography, as having been "cobbled together" by the sentencing commission in response to repeated congressional interference. *See Dorvee*, 616 F.3d at 186. As a result, sen-

tencing enhancements that apply to "the vast majority" of child pornography defendants produce a recommended sentencing range "rapidly approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent to the crime of conviction." *Id.* (citing statistics published by Sentencing Commission). The Court noted that, because § 2G2.2 concentrates child pornography offenders at or near the statutory maximum penalty, it conflicts with the § 3553(a)'s requirement that sentencing courts should "consider the nature and circumstances of the offense and the history and characteristics of the defendant" and should avoid unwarranted sentencing disparities. *See Dorvee*, 616 F.3d at 187 (internal quotation marks omitted).

As this Court has explained in *Dorvee* and other cases, the Sentencing Guidelines are merely advisory. Indeed, in child pornography cases, it is clear that district courts must carefully calculate the Guidelines and may not presume that a Guidelines sentence is reasonable for any particular defendant. The court must conduct its own independent review of the § 3533(a) sentencing factors. *See Dorvee*, 616 F.3d at 182.

In this case, the district court did exactly that. Despite the defendant's assertions that the district's court's descriptions displayed "rote acceptance" and "blind adherence," Def.'s Br. at 29, to the Guidelines, the record clearly shows that the district court understood that the Guidelines

were advisory. At sentencing, it reviewed the § 3553(a) factors. JA238-JA239. The court indicated that it had "taken into account and thought about each of these factors . . . ." JA239. The court explained that, in determining a sentence, it needed to consider just punishment, protection of the public, adequate deterrence, the seriousness of the offense and the possibility of rehabilitation. JA241.

Further, expressly acknowledging how the holding of *Dorvee* impacted this case, the court indicated that it had reviewed four other child pornography cases in which it had imposed sentence after the release of the *Dorvee* decision. JA244. In each of those cases, the court imposed a non-Guidelines sentence because certain Guideline enhancements were not applicable in light of the holding in *Dorvee*. JA242. The court then described in detail its analysis of the applicability of each of the enhancements contained in the plea agreement and PSR under the specific facts of this case. JA245-JA254. Unlike the other post-*Dorvee* child pornography cases in which it had imposed sentence, the court determined that each of the enhancements applied here in light of the specific facts of this case. JA 245-254. After considering the range that resulted from these enhancements, the court decided to impose a sentence that was 90 months below the bottom of the range. Its approach to sentencing in this case was exactly what this Court

contemplated in *Dorvee*, i.e., an individual assessment of each of the § 3553(a) factors in light of the underlying facts here.

Indeed, in an unpublished summary order, a panel of this Court recently concluded that a very similar sentence was substantively reasonable. In *United States v. Pulsifer*, 469 Fed. Appx. 41 (2d Cir. Apr. 27, 2012) (unpublished decision), the defendant was convicted of transporting and distributing child pornography and was exposed to a Guideline incarceration range of 210-240 months. *See id.* at 43. Pulsifer, like the defendant here, had cooperated with the government, and the government had filed a § 5K1.1 motion. The district court granted the motion and sentenced him to 121 months of incarceration. *See id.* at 42. In concluding that such a sentence was substantively reasonable, this Court noted that the district court had engaged in a "detailed and individualized assessment of [the defendant's] crimes and relevant conduct" and had "considered the unusually harsh impact of the child pornography Guidelines as well as [the defendant's] assistance to authorities." *Id.* at 44.

Here, the district court engaged in the same type of analysis. It discussed why each enhancement was applicable to this particular defendant, considered the result as a whole against the mitigating and aggravating factors, and then imposed a sentence below the Guideline range which reflected a thoughtful and balanced appli-

cation of the § 3553(a) factors to the specific facts of this case.

2. The district court did not improperly compare this case to simple possession cases

Next, the defendant argues that the district court improperly compared his case, in which he pleaded guilty to the receipt and distribution of child pornography, to cases involving the simple possession of child pornography. *See* Def.'s Br. at 34. As set forth above, in imposing sentence, the district court stated, "[In] assessing the appropriateness of the provisions in Section 2G2.2, I have also reviewed my analysis in four child pornography cases in which I've imposed sentences since the *Dorvee* decision." JA242. The court explained that, "[i]n each case, I imposed a non-Guidelines sentence because certain of the enhancements in Section 2G2.2 were not appropriate for a variety of reasons. Each of these cases involved possession of child pornography, not receipt and distribution of child pornography, for which the statutory maximum and Guideline range are higher." JA242.

The defendant's claim that this "false comparison," Def.'s Br. at 36, resulted in a harsher sentence simply has no merit. Indeed, the district court makes plain that it did not "blindly adhere" to the Guidelines, but instead made specific factual findings in this and the other cases as

to the applicability of each enhancement. The court's description of its post-*Dorvee* decisions in possession cases merely highlighted the fact that it was well aware of the *Dorvee* decision and had specifically applied it in analyzing § 2G2.2 enhancements in several other cases.

Moreover, the enhancements in § 2G2.2 are equally applicable in both possession cases and receipt distribution cases, so that the analysis of the applicability of certain enhancements would be similar in both possession and distribution cases.[9] For this reason, the court's reference to other cases involving the possession, not the distribution, of child pornography made sense. It was looking to other post-*Dorvee* cases in which it had analyzed and applied § 2G2.2. But the court did not focus its analysis on a comparison of the underlying facts of this case and those cases. Instead, it made specific factual findings in this case for each of the enhancements provided for under § 2G2.2 and suggested by both the PSR and the plea agreement. JA243-JA254.

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[9] Under U.S.S.G. § 2G2.2(a), the base offense level for possession of child pornography is 18 while the base offense level for receipt and distribution of child pornography is 22. The specific offense characteristics contained in § 2G2.2(b) are applicable to both offenses.

3. The district court considered all of the evidence in determining a proper sentence under 18 U.S.C. § 3553(a)

Finally, the defendant argues that the court failed to give weight to his proffered mitigating factors, specifically his service as a police officer, his mental condition (that he described as post-traumatic stress disorder), and the fact the he was a first time offender with no criminal offenses over his fifty-year life. *See* Def.'s Br. at 37-38

This argument is utterly without merit. First, the district court plainly considered the fact that the defendant was an active police officer while he was distributing child pornography. The court, however, found this fact to be an *aggravating* factor, rather than a mitigating one.

In listing three "aggravating factors. . . that cannot be related to any particular Guideline provision," the district court noted that the defendant used information that he obtained as a law enforcement officer and conveyed that knowledge to other individuals. JA254. Second, the court determined that, because the defendant was a law enforcement officer who had worked on child pornography cases, he should have been more aware of the devastating impact child pornography has on its child victims. JA254-JA255. Third, court concluded that it was "nothing short of outrageous" that the defendant

had gathered information to aid his commission of his offense from an FBI agent at a seminar about the file sharing platform he was using to distribute child pornography. JA255. Rather than mitigate his culpability, the court concluded that his job as a police officer warranted a higher sentence. JA255.

Next, the court expressly considered the defendant's claim that he had a mental condition that tempered his culpability and rejected it. The court indicated that it was "not satisfied that Dr. Lothstein has established a nexus between the commission of the offense and the conditions that he identifies. That's my own common sense reading of the report. It also happens to be Dr. Borden's professional reading of the report. I do credit Dr. Borden's report."

Finally, the defendant argues that the court failed to consider his "proffered" mitigation evidence about his "good, positive and redeeming qualities." This statement has no basis in fact, as the court specifically commented that, in determining the sentence, it had considered the defendant's statements, the statements of his friends and family, the information in the PSR, and the arguments contained in his brief. JA240.

Further, it is well settled that the district court is in a "unique fact finding position" and can "gain insights not always conveyed by a cold record." *Broxmeyer*, 2012 WL 3660316, at *45

(internal quotes omitted); *see also Gall*, 552 U.S. at 51-52. Here, the district court did just that, concluding that the defendant was "superficially cooperative" and "not a fully credible historian." JA256. In light of this conclusion, it was well within the court's discretion to conclude the aggravating factors it had enumerated far outweighed the mitigating factors offered by the defendant. In other words, the record clearly demonstrates, contrary to the defendant's claim on appeal, that the district court fully considered the defendant's redeeming qualities and the impact of his mental condition on his offense. In considering this information, however, the district court was well within its discretion to give it little credence.

In sum, the district court sentenced the defendant, a police officer who (1) amassed a huge collection of child pornography that included despicable images of child sexual abuse; (2) actively traded child rape videos; and (3) used information gleaned from his job as a local police officer to help him avoid detection, to a ten-year term of incarceration. This sentence was 90 months below the bottom of the suggested Guideline range and was not so "shockingly high" that allowing it to stand would "damage the administration of justice." *Rigas*, 583 F.3d at 123. The district court's sentence should be affirmed.

Conclusion

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

Dated: October 16, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICTOF CONNECTICUT

RAYMOND F. MILLER
ASSISTANT U.S. ATTORNEY

Robert M. Spector
Assistant United States Attorney (of counsel)

Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,865 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

RAYMOND F. MILLER
ASSISTANT U.S. ATTORNEY