

# 12-4181

*To Be Argued By:*  
DEBORAH R. SLATER

---

---

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 12-4181**

—  
UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

JUAN CARLOS MELENDEZ,  
*Defendant-Appellant.*

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

---

---

**BRIEF FOR THE UNITED STATES OF AMERICA**

---

---

DEIRDRE M. DALY  
*Acting U. S. Attorney*  
*District of Connecticut*

DEBORAH R. SLATER  
ROBERT M. SPECTOR (*of counsel*)  
*Assistant United States Attorneys*

## Table of Contents

|   |      |
|---|------|
| Table of Authorities .....  | iii  |
| Statement of Jurisdiction .....   | vii  |
| Statement of Issue Presented for Review.....  | viii |
| Preliminary Statement .....   | 1    |
| Statement of the Case .....   | 3    |
| Statement of Facts and Proceedings<br>Relevant to this Appeal .....   | 4    |
| A. The offense conduct.....   | 4    |
| B. The PSR and the sentencing hearing.....  | 8    |
| 1. The PSR.....   | 8    |
| 2. The sentencing memoranda .....   | 13   |
| 3. The sentencing hearing .....   | 14   |
| Summary of Argument .....   | 19   |
| Argument.....   | 21   |
| I. A sentence of 168 months of incarceration,<br>42 months below the bottom of the Guideline<br>range, was substantively reasonable based<br>on the factors set forth in 18 U.S.C.<br>§ 3553(a) ..... | 21   |

|   |    |
|---|----|
| A. Governing law and standard of review ..... | 21 |
| B. Discussion .....                           | 26 |
| Conclusion .....                              | 39 |
| Certification per Fed. R. App. P. 32(a)(7)(C) |    |
| Addendum                                      |    |

## 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

|   |                |
|---|----------------|
| <i>Gall v. United States</i> ,<br>552 U.S. 38 (2007).....                     | 21, 22, 24     |
| <i>Rita v. United States</i> ,<br>551 U.S. 338 (2007).....                    | 25             |
| <i>United States v. Aumais</i> ,<br>656 F.3d 142 (2d Cir. 2011) .....         | 31, 33, 38     |
| <i>United States v. Booker</i> ,<br>543 U.S. 220 (2005).....                  | 21             |
| <i>United States v. Bronxmeyer</i> ,<br>699 F.3d 265 (2d Cir. 2012). .....    | 30             |
| <i>United States v. Cavera</i> ,<br>550 F.3d 180 (2d Cir. 2008) .....         | 21, 23, 30, 38 |
| <i>United States v. Coopman</i> ,<br>602 F.3d 814 (7th Cir. 2010).....        | 29             |
| <i>United States v. Delong</i> ,<br>486 Fed. Appx. 945<br>(2d Cir. 2012)..... | 32, 33, 38     |

|  |                    |
|--|--------------------|
| <i>United States v. Dorvee</i> ,<br>616 F.3d 174 (2d Cir. 2010) .....                  | <i>passim</i>      |
| <i>United States v. Fernandez</i> ,<br>443 F.3d 19<br>(2d Cir. 2006).....              | 22, 24, 25, 36, 37 |
| <i>United States v. Gouse</i> ,<br>468 Fed. Appx. 75<br>(2d Cir. April 13, 2012) ..... | 24, 30             |
| <i>United States v. Grober</i> ,<br>624 F.3d 592 (3rd Cir. 2010) .....                 | 29                 |
| <i>United States v. Henderson</i> ,<br>649 F.3d 955 (9th Cir. 2011).....               | 29                 |
| <i>United States v. Johnson</i> ,<br>221 F.3d 83 (2d Cir. 2000) .....                  | 27                 |
| <i>United States v. Jones</i> ,<br>531 F.3d 163 (2d Cir. 2008) .....                   | 25                 |
| <i>United States v. Preacely</i> ,<br>628 F.3d 72 (2d Cir. 2010) .....                 | 21                 |
| <i>United States v. Rattoballi</i> ,<br>452 F.3d 127 (2d Cir. 2006) .....              | 25                 |
| <i>United States v. Reingold</i> ,<br>No. 11-2826 (2d Cir. Sept. 26, 2013) .....       | 5, 27              |

|   |            |
|---|------------|
| <i>United States v. Rigas</i> ,<br>583 F.3d 108 (2d Cir. 2009) .....                  | 24, 25     |
| <i>United States v. Savoca</i> ,<br>596 F.3d 154 (2d Cir. 2010) .....                 | 24         |
| <i>United States v. Shay</i> ,<br>478 Fed. Appx. 713<br>(2d Cir. June 28, 2012) ..... | 32, 33, 38 |
| <i>United States v. Thomas</i> ,<br>628 F.3d 64 (2d Cir. 2010) .....                  | 21         |
| <i>United States v. Verkhoglyad</i> ,<br>516 F.3d 122 (2d Cir. 2008) .....            | 22         |
| <i>United States v. Wagner-Dano</i> ,<br>679 F.3d 83 (2d Cir. 2012) .....             | 22         |
| <i>United States v. Wayenski</i> ,<br>624 F.3d 1342 (11th Cir. 2010).....             | 29         |

### Statutes

|                         |               |
|-------------------------|---------------|
| 18 U.S.C. § 2252 .....  | 8             |
| 18 U.S.C. § 2252A ..... | 3             |
| 18 U.S.C. § 3231 .....  | vii           |
| 18 U.S.C. § 3553 .....  | <i>passim</i> |
| 18 U.S.C. § 3742 .....  | vii           |

28 U.S.C. § 1291 ..... vii

**Rules**

Fed. R. App. P. 4 ..... vii

**Guidelines**

U.S.S.G § 2G2.2.....*passim*

U.S.S.G § 3E1.1.....9

U.S.S.G § 5H1.3 .....9

U.S.S.G § 5H1.4 .....9

## **Statement of Jurisdiction**

The district court (Vanessa L Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 9, 2012. Defendant's Appendix ("DA") 1-5, 202. On October 16, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DA192. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

## **Statement of Issue Presented for Review**

Whether a sentence of 168 months' incarceration for receiving child pornography, which was 42 months below the bottom of the Guideline range, was substantively reasonable, where the defendant possessed and traded an enormous collection of child pornography that included graphic images of rape and sexual abuse of young children, and failed to understand the impact of his actions on the known victims depicted in the photographs.

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4181

---

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

JUAN CARLOS MELENDEZ,  
*Defendant-Appellant.*

---

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

---

**BRIEF FOR THE UNITED STATES OF AMERICA**

---

## **Preliminary Statement**

The defendant, Juan Carlos Melendez, pleaded guilty to one count of receipt of child pornography. The defendant possessed over 24,000 images and video files of child pornography that he had organized and catalogued on his computers, including images of children under the age of twelve; children being subjected to sadistic, masochistic, and bondage activities; and numerous pictures of infants and

toddlers. The defendant also distributed child pornography to other offenders in exchange for more child pornography. The Pre-Sentence Report (“PSR”) calculated the Guideline range to be 210 to 240 months of incarceration.

The district court rejected the Guideline enhancement for use of a computer, and recalculated the Guideline range as 168 to 210 months of incarceration. The court also applied the 18 U.S.C. § 3553(a) factors, highlighting the severity of the offense, the devastating impact of child pornography on society and the victims of the offense, the need to protect the public from the defendant, the defendant’s lack of empathy for the victims, the fact that he bartered his images akin to a commercial enterprise, and his titling and organization of the child pornography images. After stating that the Guidelines were neither mandatory nor presumptively reasonable, the court imposed a sentence of 168 months of incarceration, 42 months less than the bottom of the correct Guideline range.

On appeal the defendant argues that a 168-month sentence is substantively unreasonable, and that the district court should have imposed a lesser sentence. He claims first that the sentence imposed by the district court is substantively unreasonable because it is within the range set by the United States Sentencing Guidelines, which are unduly harsh. Def.’s Br. at 5. He also claims that, had the court properly

applied the 18 U.S.C. § 3553(a) factors in imposing sentence, it would have imposed a lesser sentence. Def.'s Br. at 9. More specifically, he argues that there were a "large number of factors that should have mitigated his sentence under § 3553," yet he was still sentenced to 70% of the statutory maximum. *Id.* As a sentence lower than the Guideline range is not presumptively unreasonable and the court properly applied the § 3553(a) factors, this Court should affirm the sentence imposed.

### **Statement of the Case**

On March 2, 2010, a search warrant was executed by the FBI at the defendant's residence, resulting in the seizure of computer equipment containing over 124,000 child pornography images, including a large number of images of infants and toddlers, which the defendant admitted belonged to him. PSR ¶ 8-15. On November 22, 2010, the defendant was arrested based on a criminal complaint and arrest warrant charging him with violating 18 U.S.C. § 2252A (production, distribution, receipt, and possession of child pornography). DA 195. On December 20, 2011, a federal grand jury sitting in Hartford, Connecticut, returned an indictment against the defendant, charging him with one count of receipt of child pornography, in violation of 18 U.S.C. § 2252A. DA 6-8.

On April 18, 2012, the defendant pleaded guilty to the one count charged in the indictment. DA 88. On October 4, 2012, the district court (Vanessa L. Bryant, J.) conducted the defendant's sentencing hearing and imposed a sentence of 168 months' incarceration, a life term of supervised release, a \$100 special assessment, and \$7,000 in restitution, to be divided equally between two victims. DA 188. Judgment issued on October 9, 2012. DA 202. The defendant filed a timely notice of appeal on October 16, 2012. DA 192. The defendant is serving his sentence.

**Statement of Facts and Proceedings  
Relevant to This Appeal**

**A. The offense conduct<sup>1</sup>**

Between 2005 and 2010, the defendant downloaded thousands of child pornography images to his home computers. PSR ¶¶ 10, 12, 15. While initially his child pornography viewing was only sporadic, beginning in 2009 he viewed images of child pornography on his computer, and actively sought new images, on a daily basis. PSR ¶¶ 17, 18. Although in his presentence interview, the defendant denied being sexually aroused by child pornography, PSR ¶ 16, he had previously admitted to agents

---

<sup>1</sup> This summary of offense conduct is primarily taken from the PSR, the factual basis of which was adopted by the court at sentencing. DA 151.

of the Federal Bureau of Investigation (“FBI”) that he masturbated to the child pornography that he downloaded, received, and viewed. PSR ¶ 12. In addition to downloading child pornography, the defendant also exchanged images of child pornography with other individuals he was “friends” with on Gigatribe, a Peer-to-Peer (“P2P”) network.<sup>2</sup> PSR ¶ 11.

On August 6, 2009 a special agent of the FBI, working in the Innocent Images Operation Unit (“IIOU”) in Calverton, Maryland, accessed a P2P network, Gigatribe, using a username obtained from an individual arrested for distribution of child pornography through the network. PSR ¶¶ 6, 10. While connected to the P2P network, the agent observed that an individual with the username “Trader0120” was logged on to the network. PSR ¶ 6. The agent browsed Trader0102’s shared directories, observed files with images of child pornography, and downloaded 82 images for review. PSR ¶ 6. The agent also identified the IP address of Trader0102. Upon review, it was determined

---

<sup>2</sup> Gigatribe is a computer program which allows users to download material onto their computers and then choose what to place in folders designated for sharing with other users. Access to shared folders requires membership which is by invitation only from another member. See *United States v. Reingold*, No. 11-2826, slip op. at 4 (2d Cir. Sept. 26, 2013).

that the 82 images did contain child pornography, including images of identified victims from a known series. PSR ¶ 7. The images included adult males sexually assaulting infants and toddlers. PSR ¶ 7 (descriptions of ten images downloaded from Trader0102's Gigatribe folder).

The FBI agent subsequently identified the internet service provider for Trader0102's IP address. PSR ¶ 8. In response to a subpoena, the internet service provider submitted to the FBI the physical address for the IP address associated with Trader0102. PSR ¶ 8. The address was located in Stamford, Connecticut. PSR ¶ 8. The case was then referred to the FBI office in New Haven, Connecticut. PSR ¶ 8.

On March 2, 2010, agents executed a search warrant the residence. PSR ¶¶ 8, 9. The defendant was present at the time. PSR ¶ 9. Without any prompting from the agents, the defendant stated that he knew why the agents were there and that his family had nothing to do with it. PSR ¶ 9. The defendant admitted to possessing "approximately 90 gigabytes of child pornography" on multiple computers at the residence. PSR ¶ 10. He further admitted to exchanging child pornography with "friends" on Gigatribe. PSR ¶ 11. Agents seized one computer and two external hard drives from the defendant. PSR ¶ 14. Agents also presented the defendant with ten images that were

downloaded from his Gigatribe account by the original investigating agent. PSR ¶ 10. The defendant initialed and dated six images indicating that he knew they were in his shared folder. PSR ¶ 10.

A forensic examination was conducted on the computer and two hard drives. PSR ¶ 5. The analysis revealed in excess of 124,000 images of child pornography. PSR ¶ 15. More than 600 of those images were identified by the National Center for Missing and Exploited Children (“NCMEC”) as “known” victims and 4,609 image files and 80 video files were matched to images maintained by NCMEC in the Child Victim Identification Program (“CVIP”). PSR ¶ 15. A large number of images of infants and toddlers were found. PSR ¶ 15. Further, between 100 and 200 images involved bondage, sadistic, and/or masochistic activity. PSR ¶ 15. Forensic review also confirmed that the defendant was engaged in the sharing and distribution of child pornography through Gigatribe. PSR ¶ 15. Despite claiming that he had only viewed approximately 10% of his collection, the defendant had spent time organizing the images into categories with folder names such as “baby rape” and “girls 3 to 5 fucking with men” that indicated knowledge of the contents of the images. PSR ¶ 17; DA 158.

At the time of the search of the Stamford residence, the defendant was residing there with

his parents, along with his young niece and nephew. PSR ¶ 53. Shortly after the search, the defendant moved to a one bedroom apartment so that he was no longer residing with his niece and nephew. PSR ¶ 53. In July 2010, the defendant met his future wife, Melitza. PSR ¶ 53. Later that summer, four months following their meeting, the defendant married Melitza, and they moved into a larger apartment together with her four children, ranging in age from eight to fourteen. PSR ¶ 54. The defendant denied ever having inappropriate contact with his niece, nephew, or stepchildren. PSR ¶ 16. Although he admitted to agents that, in online chat rooms, he had claimed to have been sexually active with children, he later claimed that these statements were lies. PSR ¶ 11. At the time of his sentencing, the defendant was estranged from his wife. PSR ¶ 56.

## **B. The PSR and the sentencing hearing**

### **1. The PSR**

Based on the offense conduct and defendant's characteristics, the PSR established a total Sentencing Guideline offense level of 37 with a Criminal History Category I. PSR ¶¶ 40, 42. The base offense level for 18 U.S.C. 2252(a)(2), as found in U.S.S.G. § 2G2.2(a)(2), was 22. PSR ¶ 29. The PSR then calculated a two-level enhancement for material involving a prepubescent minor or minor under the age of 12, pursuant to § 2G2.2(b)(2), PSR ¶ 30; a five-

level enhancement for distribution for receipt of a thing of value, pursuant to § 2G2.2(b)(3)(B), PSR ¶ 31; a four-level enhancement for sadistic or masochistic material, pursuant to § 2G2.2(b)(4), PSR ¶ 32; a two-level enhancement for use of a computer, pursuant to § 2G2.2(b)(6), PSR ¶ 33; and a five-level enhancement for 600 or more images, pursuant to § 2G2.2(b)(7)(D), PSR ¶ 34. The PSR next calculated a two-level reduction for acceptance of responsibility, under § 3E1.1(a), and a one-level reduction for timely notification of an intent to plead guilty, under § 3E1.1(b). The resulting Guideline range was 210 to 262 months of incarceration, which reduced to 210 to 240 months due to the statutory maximum term of incarceration. PSR ¶ 85. While noting his right to argue for a within-Guideline departure under §§ 5H1.3 and 5H1.4 and a non-Guideline sentence, the defendant did not contest the factual basis or Guideline calculation in the PSR. PSR, Addendum; DA 150.

The PSR also described 10 of the 82 images that the defendant, using the name “Trader0120,” maintained on his shared directory that was accessed by the FBI special agent working in the IIOU. PSR ¶ 6. By way of example, one of the files was described as depicting “a white male child, approximately one-year-old, wearing a pajama top and diaper, standing between the legs of an adult white mail

that is nude from the waist down. The adult's face is not visible, and he is placing his penis in the toddler's mouth." PSR ¶ 7 (a). Another image was described as "a white female child, approximately nine-months-old, lying on her back, completely nude. The child's left wrist appears to be bound with black tape. An adult white male penis is pressed into her vagina." PSR ¶ 7(c).

The PSR included victim impact statements for two identified victims whose images were among those in the defendant's child pornography collection, both of whom also requested restitution from the defendant. PSR ¶¶ 19-25

The first minor victim is the subject of a series that has been actively traded since 2005 and has been encountered in more than 5,000 evidence reviews submitted by law enforcement. PSR ¶ 21. The victim was "sadistically sexually abused by multiple offenders over approximately 2-3 years." As a result of the chronic abuse, the victim suffers from speech and language delay, cognitive impairments, obsessive compulsive behaviors, severe anxiety, post-traumatic stress disorder and depression. PSR ¶ 21.

The second minor victim has been in and out of hospitals, psychiatric facilities, group homes and individual counseling since the age of fifteen, when she reported the abuse. PSR ¶ 25. She has attempted suicide at least four times

and suffers from severe anxiety and depression. PSR ¶ 25. Additionally, she is “constantly reminded that she is being violated every day” by the continued viewing of her images. PSR ¶ 25.

In addition to the PSR, the court was provided copies of victim impact statements on file from other identified victims from the defendant’s child pornography collection. DA 165.

The PSR contained a discussion of the defendant’s personal history. He was born in Peru and illegally entered the United States at the age of seven, along with his mother and sister. PSR ¶¶ 43, 46. Since that time, he has lived in Connecticut. PSR ¶ 43. While his family members attained legal status in this country, the defendant acknowledged residing in the United States illegally and working and filing taxes under a false Social Security number. PSR ¶ 52.

The defendant contracted the polio virus as an infant in Peru. PSR ¶ 60. As a result of the virus, the defendant’s left leg did not develop properly. PSR ¶ 60. The defendant underwent numerous operations in Peru and Connecticut. PSR ¶¶ 48, 61. Despite multiple surgeries, the defendant requires crutches to walk. PSR ¶ 61.

In his PSR interview, the defendant stated that he was sexually abused beginning at the

age of four by neighbors in Peru. PSR ¶¶ 68, 69. The defendant also advised that he was sexually assaulted by boys at his grandparents' house in Peru, when he was between the ages of five and six. PSR ¶ 69. After coming to the United States, the defendant stated that he had an incestuous relationship with one of his sisters. PSR ¶ 70. He stated that an adult male then forced the defendant to engage in sexual acts with him under threat of the man revealing the incestuous relationship to the defendant's parents. PSR ¶ 70. The defendant never told anyone, including his parents, of any instances of sexual abuse prior to his pre-sentence interview. PSR ¶¶ 69, 70. The defendant did not reveal the identities of any of his abusers to probation because he "[didn't] want to get anyone in trouble." PSR ¶ 70.

The defendant has attempted suicide on multiple occasions, PSR ¶ 72, and has undergone psychiatric treatment and supervision on and off from the age of ten. PSR ¶¶ 71, 73, 74. He acknowledged that he has abused prescription pain medication, engaged in heavy drinking, used marijuana and cocaine and sold cocaine. PSR ¶¶ 64 – 66.

## **2. The sentencing memoranda**

The defendant and the Government both filed sentencing memoranda. DA 92-147. The Government argued that the nature and circumstances of the offense, the history and characteristics of the defendant, and principles of specific and general deterrence dictated a within Guideline sentence for the defendant in that he was in possession of an enormous number of horrific images depicting child pornography which were meticulously categorized and distributed so that he could receive even more material depicting the sexual abuse of minors. DA 131. The Government additionally noted that the defendant did not express remorse for his actions, which will likely scar each of the victims for the entirety of their lifetimes, but, instead, spoke only of his own personal circumstances. DA 138. The Government recommended that the court to impose a sentence within the Guideline range of 210-240 months in prison.

In his sentencing memorandum, the defendant argued for the “minimum sentence that may be imposed.” DA 110. He outlined the history of the child pornography guidelines and cited, at length to the principles outlined in *United States v. Dorvee*, 604 F.3d 84 (2d Cir. 2010), to support his claim that “imposition of excessive sentences based on a Guideline calculation are unreasonable, especially for [sic]

person such as Mr. Melendez who is a first time offender and not a person who is among the most dangerous, who distributed images for money or who fall into a higher criminal history category.” DA 95.

### **3. The sentencing hearing**

At the sentencing hearing, the district court asked the defendant if he had read the PSR and whether he had any objections to it. DA 149-150. The defendant stated that he had read the report and did not have any objections. The court then adopted the factual findings in the PSR. DA 151. The court next heard arguments from the Government and defense counsel. DA 151-179.

The Government urged the court to impose a sentence within the guideline range of 210-240 months of incarceration, stating that the defendant conservatively possessed more than 90 gigabytes of child pornography on his computer media. DA 154. The Government explained that the child pornography included hundreds of thousands of images on a total of 110 compact discs containing, among other child pornography depictions, approximately 100-200 sado-masochistic images of infants and toddlers involving actual penetration, and 370 video files. DA 154-158. The Government also noted that a total of 124,000 images were submitted to the NCMEC, the largest number submitted by the Connecticut FBI in a child pornography case at

that time, and that 17,000 were identified as depicting images of known victims. DA 154–157. The Government also detailed that the defendant’s collection of child pornography was extremely organized; it was organized by title and subject matter to include labels of “baby rape” and “girls 3 to 5 fucking with men.” DA 158.

The Government additionally noted that, given that the defendant claimed that he, himself, had been a victim of sexual abuse, he, of all people, should understand what the victims depicted in the images he “hoarded” were going through each and every time someone viewed the sexual abuse they endured. DA 162.

Next, the defendant’s younger sister addressed the court, expressing her support for the defendant and asking the court for compassion. DA 179-180.

The defendant also addressed the court personally. DA 180-184. The defendant stated that he was not aware, at the time of his conduct, that viewing child pornography re-victimizes the children shown in the images each time an image is distributed or viewed. DA 181. The defendant then focused on his own emotional and sexual abuse. DA 181-182. The defendant also apologized to the court, his family, and “anybody he inconvenienced with [his] actions.” DA 182-183.

After hearing arguments from both sides, as well as the statements to the court by the defendant and his sister, the court proceeded to consider the factors set forth in 18 U.S.C. §3553. DA 184. The court went through the factors individually applying the facts of the case to each relevant factor. DA 184-186.

In considering the nature and circumstances of the offense, under 18 U.S.C. § 3553(a)(1), the court focused on the extremely young ages of many of the victims in the images, concluding that penetration by an adult of an infant or toddler, or even a child as old as 8 or 12, was sado-masochistic due to “the excruciating pain that any young child [would] experience undergoing that kind of contact.” DA 184-185. The court also noted the impact that the defendant had in re-victimizing the children whose images he viewed. DA 184.

In considering the history and characteristics of the defendant, under 18 U.S.C. § 3553(a)(1), the court focused on the lack of insight the defendant had for the impact of his conduct. DA 185-186. The court emphasized how the defendant focused on himself during his allocution and “gave short-shrift at best to the victims.” DA 186. The court also noted that, while the defendant asked for leniency due to his sexual abuse, such abuse should have informed the defendant of how devastating his conduct

was to the child victims. DA 185-186. The court continued, stating:

I lost count of the number of times that Mr. Melendez used the terms “I” and “my.” The Government is correct that Mr. Melendez lacks insight, understanding [of] the horrific nature and impact of his conduct, and until that insight is achieved, recovery cannot even be hoped for, thus increasing the likelihood of recidivism.

DA 186. The court further noted that the defendant’s lack of insight would reduce the chance of recovery and increase the likelihood of recidivism. DA 186.

The court agreed with defense counsel that general deterrence, under 18 U.S.C. § 3553(a)(2)(B), was not a serious factor in this case because the offense is more like an addiction and, in such a case, sentencing of one offender is unlikely to deter another. DA 186. However, the court stated that other factors under 18 U.S.C. § 3553(a)(2) were “extreme motivators” in this case, including “protection of the public, engendering respect for the law . . . as well as providing the defendant with the needed medical and corrective treatment in the most efficient manner.” DA 186.

The court addressed the need to avoid unwarranted sentence disparities under 18

U.S.C. § 3553(a)(5) by distinguishing the conduct of the defendant from other cases.

This case is distinguishable from others where defendants have received large volumes of images over the internet and had them on hard drives with titles that didn't identify what these images consisted of. This defendant took the time to organize them. Many defendants say, oh well, I downloaded something. I didn't look at them. This defendant looked at them. He admitted he looked at them. He organized them, and not only did he organize them, but he offered them to others in exchange for the receipt of images he did not have thereby commercializing his conduct.

DA 186-187.

The court also exhibited knowledge that the Sentencing Guidelines were merely advisory: “[The Sentencing Guideline] range is neither mandatory, nor is it presumptively reasonable.” DA 187. The court then rejected the two-level enhancement for use of a computer due to the fact that virtually all offenders utilize a computer and recalculated the Guideline range as 168 to 210 months of incarceration, based on a total offense level of 35. DA 187-188.

Taking all of the sentencing factors into consideration, the court imposed a sentence of

168 months of incarceration, followed by a lifelong period of supervised release, a \$100 special assessment, and \$7,000 in restitution (\$3,500 for each of the two victims requesting restitution, as agreed upon prior to sentencing). DA 188-190. Due to the defendant's lack of financial resources, the court elected not to impose a fine. DA 191.

### **Summary of Argument**

The defendant claims that his sentence should be reduced because it is substantively unreasonable. In support of his claim, the defendant argues that the sentencing guidelines for possession of child pornography are unduly harsh, and therefore presumptively unreasonable. The defendant also argues that, if the Guidelines are viewed in the proper light, consideration of the other 18 U.S.C. § 3553(a) factors, to include the "large number of factors that should have mitigated his sentence," support leniency. Def.'s Br. at 9.

The defendant's claim fails for two reasons. First, the defendant received a sentence that was 42 months below the bottom end of the Guideline range in this case. In imposing sentence, the district court here did exactly what this Court suggested it do in *Dorvee*: it approached the child pornography Guideline with great care and exercised its discretion in choosing not to apply a two-level enhancement

that clearly should have applied. Moreover, although a district may impose a non-Guideline sentence based on policy disagreements with the child pornography Guideline, it is not obligated to do so. The district court here understood that, under *Dorvee*, it needed to proceed with caution when considering the advisory child pornography Guideline, and it did just that.

The ultimate sentence here represented the court's measured exercise of discretion based on a proper balancing of the § 3553(a) factors. The defendant possessed an enormous collection of child pornography images and videos that he viewed, labeled with graphic titles, carefully organized by subject matter, and bartered to obtain even more images. Many of these images were graphic and horrific, depicting infants and toddlers being forced to engage in violent sexual activity. Moreover, the defendant showed no empathy for the victims depicted in the images despite his claim that he, too, had suffered sexual abuse; he displayed little to no understanding of the impact of his actions on society. The 168-month sentence reflected, *inter alia*, the seriousness of the offense conduct, the defendant's high risk for recidivism, and the extreme harm caused to the identified victims.

## Argument

### **I. A sentence of 168 months of incarceration, 42 months below the bottom of the Guideline range, was substantively reasonable based on the factors set forth in 18 U.S.C. § 3553(a)**

#### **A. Governing law and standard of review**

The United States Sentencing Guidelines are “effectively advisory.” *United States v. Booker*, 543 U.S. 220, 245 (2005). At sentencing, a district court must begin by calculating the applicable guidelines range. *See United States v. Thomas*, 628 F.3d 64, 67 (2d Cir. 2010) (citing *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc)). *See United States v. Preacely*, 628 F.3d 72, 79 (2d Cir. 2010) (“The district court should ordinarily ‘begin all sentencing proceedings by correctly calculating the applicable Guidelines range,’ and then consider the factors listed in 18 U.S.C. § 3553(a).”) (citing *Gall v. United States*, 552 U.S. 38, 49 (2007)). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50.

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) any 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.*

This Court “presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors.” *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). *See also United States v. Wagner-Dano*, 679 F.3d 83, 89 (2d Cir. 2012) (“In this Circuit, ‘we presume that a sentencing judge has faithfully discharged her duty to consider the statutory factors.’”) (quoting *United States v. Verkhoglyad*, 516 F.3d 122, 129 (2d Cir. 2008)).

The court’s review has two components: procedural review and substantive review. *See Gall*, 552 U.S. at 51. The court “must first

ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence - including an explanation for any deviation from the Guideline range.” *Id.*.

Once the court determines that the sentence is procedurally sound, the court then reviews the substantive reasonableness of the sentence, “reversing only when the trial court’s sentence ‘cannot be located within the range of permissible decisions.’” *Dorvee*, 616 F.3d at 179 (quoting *Cavera*, 550 F.3d at 189).

U.S.S.G. § 2G2.2 governs child pornography offenses. This Court has been critical of § 2G2.2 due to its lack of empirical support and legislative history. *See Dorvee*, 616 F.3d at 184-185. In *Dorvee*, this Court expressly permitted district judges to deviate from the § 2G2.2 for strictly policy reasons and directed them to exercise caution in applying the Guideline in individual cases. *Id.* at 187. However, while allowing courts to deviate from § 2G2.2, this Court has also affirmed within-Guidelines sentences after *Dorvee*. “Of course, while the district court *may* depart from the Guidelines based on a policy agreement, the district court may also determine that the Guidelines range is

appropriate in a particular case.” *United States v. Gouse*, 468 Fed. Appx. 75, 77 (2d Cir. April 13, 2012) (unpublished summary order) (emphasis in original).

Determining substantive reasonableness thus involves considering the totality of the circumstances. *See Gall*, 552 U.S. at 51. Further, the Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge ‘exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.’” *Fernandez*, 443 F.3d at 27 (citations omitted). *See also United States v. Savoca*, 596 F.3d 154, 160 (2d Cir. 2010) (quoting *Fernandez*). A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

This Court has also likened its substantive review to “the consideration of a motion for a new criminal jury trial, which should be granted only when the jury’s verdict was ‘manifestly

unjust,’ and to the determination of intentional torts by state actors, which should be found only if the alleged tort ‘shocks the conscience.’” *Dorvee*, 616 F.3d at 183 (quoting *Rigas*, 583 F.3d at 122-23). On review, this Court will set aside only “those outlier sentences that reflect actual abuse of a district court’s considerable sentencing discretion.” *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

Additionally, substantive reasonableness review is not an opportunity for the appellate court to substitute its own judgment for that of the district court. *Rigas*, 583 F.3d at 123. Rather, a sentence may only be found to be substantively unreasonable in the “rare case” that it is “shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *Id.*

Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has “recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Fernandez*, 443 F.3d at 27; *see also Rita v. United States*, 551 U.S. 338, 347-51 (2007) (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) (“In calibrating our review for

reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.”).

## **B. Discussion**

The defendant argues that the child pornography sentencing Guidelines (U.S.S.G. § 2G2.2) are unduly harsh and, in and of themselves, substantively unreasonable. The defendant fails to appreciate that his 168 month sentence of incarceration was 42 months below the bottom end of the calculated Guideline range of 210-240 months. Additionally, while § 2G2.2 must be applied with caution and in certain cases may result in a sentence that is higher than that necessary to satisfy the § 3553(a) factors, the Guideline is not presumptively unreasonable in all cases and a within-Guidelines sentence may be substantively reasonable in particular cases.

In this case, the sentencing court imposed a substantively reasonable sentence of 168 months of incarceration, recognizing that § 2G2.2 was not mandatory or presumptively reasonable. DA 187. Indeed, the court demonstrated its awareness that it could vary from the Guideline by choosing not to impose the two-level enhancement for use of a computer, reasoning that the vast majority of offenders use a

computer to access child pornography. DA 187. The court's rejection of this enhancement shows that it was particularly mindful of the concerns raised by this Court in *Dorvee*.<sup>3</sup>

U.S.S.G. § 2G2.2 has been the subject of comment from all sides, including the Department of Justice, the defense bar, and the federal judiciary. United States Sentencing Commission, *Report to Congress: Federal Child Pornography Offenses* 10 (2012). The five major criticisms compiled by the Sentencing Commission are: (1) the specific offense characteristics do not reflect changes in technology, apply to the vast majority of offenders, and fail to meaningfully distinguish among offenders in terms of culpability and dangerousness; (2) § 2G2.2 fails to account for certain types of aggravated conduct, such as abuse of very young victims, including infants and toddlers; (3) the Guideline does not adequately assist sentencing judges in differentiating among offenders with respect to their past and future dangerousness; (4) the lack

---

<sup>3</sup> It bears note that, in *Reingold*, this Court ruled that the district court's failure to apply the two-level computer enhancement based on a belief that it was impermissible "double counting" was unwarranted in light of *United States v. Johnson*, 221 F.3d 83, 99 (2d Cir. 2000), in which the double counting challenge to the application of a § 2G2.2(b)(6) enhancement was specifically rejected. *See Reingold*, slip op. at 41.

of proportionality between § 2G2.2 and contact sex offenses; (5) the disparate treatment between receipt and possession offenses. *Id.* at 10-13. Critics are troubled both by unduly harsh sentences and sentences that are not severe enough in light of individual offense characteristics. *Id.*

This Court raised many of the same issues in *Dorvee*. In particular, the Court in *Dorvee* expressed concern regarding the lack of empirical study used in creating § 2G2.2. *Id.*, 616 F.3d at 184. The court was further troubled by the fact that many enhancements in § 2G2.2 apply to the majority of cases. *Id.* at 186. Therefore, the Guideline, if mechanically applied, fails to distinguish between the seriousness of offenders and leads to unwarranted similarities between offenders with dissimilar conduct. *Id.* Due to these policy issues, “*unless applied with great care*, [the Guideline] can lead to unreasonable sentences that are inconsistent with what § 3553 requires” because the § 2G2.2 enhancements “routinely result in Guidelines projections near or exceeding the statutory maximum, even in run of the mill cases.” *Id.* at 184, 186 (emphasis added).

Circuit courts agree that a district judge may impose a non-Guidelines sentence based solely on policy disagreements with § 2G2.2 and have held that a judge who does not, in fact, have a

policy disagreement is not obligated to vary from the Guidelines for policy reasons. *See United States v. Grober*, 624 F.3d 592, 609 (3d Cir. 2010) (“Moreover, if a district court does not in fact have a policy disagreement with § 2G2.2, it is not obligated to vary on this basis.”); *United States v. Coopman*, 602 F.3d 814, 818 (7th Cir. 2010) (“While district courts perhaps have the freedom to sentence below the child-pornography guidelines based on disagreement with the guidelines they are certainly not required to do so.”); *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011) (“We further emphasize that district courts are not obligated to vary from the child pornography Guidelines on policy grounds if they do not have, in fact, a policy disagreement with them); *United States v. Wayenski*, 624 F.3d 1342 (11th Cir. 2010) (within-Guidelines sentence is substantively reasonable when the court considers the § 3553(a) factors and selects a sentence that matches its application of those factors).

Despite the Court’s criticism of § 2G2.2, the defendant’s reliance on *Dorvee* is misplaced. The defendant proposes that *Dorvee* stands for the principle that the child pornography Guidelines are, as a general rule, substantive unreasonable. *See* Def.’s Br. at 7. That is not the case. The court in *Dorvee* directed district judges to “take seriously the broad discretion they possess in fashioning sentences under § 2G2.2 . . . bearing

in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, *unless carefully applied*, can easily generate unreasonable results.” *Id.* at 188 (emphasis added). Further, the Court stated that “a district court may vary from the Guidelines based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses.” *Id.* at 188 (quoting *Cavera*, 550 F.3d at 191).

“[The Court] nowhere suggested that it would be an abuse of discretion for the district court to accord some weight to the referenced Guidelines in imposing a sentence above the statutory *minimum*.” *United States v. Bronxmeyer*, 699 F.3d 265, 291 (2d Cir. 2012) (emphasis in original) (noting that *Dorvee* court was concerned with Guidelines that push sentences beyond the statutory maximum). “Of course, while the district court *may* depart from the Guidelines based on a policy agreement, the district court may also determine that the Guidelines range is appropriate in a particular case.” *Gouse*, 468 Fed. Appx. at 77.

Notably, this Court has affirmed within-Guidelines sentences in a number of child pornography cases after *Dorvee*. Many of these cases bear facts strikingly similar to those presented in the present case.

For example, Gerald Aumais was convicted of transportation and possession of child

pornography when, during a secondary inspection while he was entering the United States from Canada, he was found to be in possession of computers containing thousands of still images and over one hundred video images of child pornography, including images of pre-pubescent minors and sadistic images. *United States v. Aumais*, 656 F.3d 142, 149 (2d Cir. 2011). Aumais admitted to border agents that the computers were his and he had downloaded child pornography from a P2P network. *Id.* The district court sentenced Aumais to 121 months of incarceration, the low end of the Guidelines range. *Id.* at 150.

Aumais appealed his sentence, citing *Dorvee*, and claiming that his sentence was “longer than necessary to serve the purpose of sentencing.” *Id.* at 157. The Court found his argument without merit. *Id.* at 157. The Court distinguished Aumais’s case from *Dorvee* because Aumais’s Guideline range was well short of the statutory maximum. *Id.* at 157. Further, the district court had found that 121 months was “sufficient, but not greater than necessary to comply with the purposes of § 3553(a)” and “given the violent nature of the images, the number of them, and other considerations.” *Id.* at 157 (internal quotation marks omitted).

In another similar case, Joseph Mark Shay collected over 41,000 images and 372 video files

of child pornography over a twelve year period including images portraying the “sadistic abuse of children.” *United States v. Shay*, 478 Fed. Appx. 713, 714 (2d Cir. June 28, 2012) (unpublished summary order). Shay pleaded guilty to one count of distribution and one count of receipt of child pornography and was sentenced to 210 months of incarceration, the low end of the Guidelines range. *Id.* After Shay’s sentence was imposed, this Court decided *Dorvee*. On appeal, the Court vacated the judgment and remanded to the district court for review under *Dorvee*. On remand, the district court resentenced Shay to the same within-Guidelines sentence. *Shay*, 478 Fed. Appx. at 714. In imposing the sentence, the district court discussed “the child pornography guidelines, the 18 U.S.C. § 3553(a) factors, the substantial length of time over which Shay committed the offense, the volume of child pornography involved, the victim statements, and the public harm caused by Shay’s conduct.” *Id.* On appeal, this Court affirmed the sentence by summary order.

And in *United States v. Delong*, the defendant, who had pleaded guilty to one count of receipt of child pornography and one count of possession with intent to view child pornography, was sentenced to 240 months’ incarceration for his conduct in possessing 138,000 still images and 2,018 video images of

child pornography. *See id.*, 486 Fed. Appx. 945, 946 (2d Cir. Oct. 9, 2012) (unpublished summary order). The Court distinguished Delong’s case from *Dorvee* based primarily on the volume of child pornography possessed and the fact that Delong had a criminal record. *Id.* In addition, the Court noted that, unlike in *Dorvee*, the court in *Delong* had relied on specific factors, such as the defendant’s risk of recidivism, the harm caused to the victims, the number of images possessed and the defendant’s “apparent inability to recognize the seriousness of his offenses.” *Id.*

By now, it appears well-settled that *Dorvee* requires sentencing judges to approach § 2G2.2 with caution and an awareness for the risk of disproportionate sentencing that the Guideline poses. *Dorvee*, 615 F.3d at 184, 186. As cases like *Aumais*, *Shay* and *Delong* make clear, however, a within-Guideline sentence may be substantively reasonable if the sentencing court considers § 2G2.2 as one § 3553(a) factor among many and imposes a sentence that the court determines is “sufficient, but not greater than necessary” to comply with the purposes of 3553(a). *Aumais*, 656 F.2d at 157.

In this case, the court not only approached the Guideline with caution and with an awareness of the risks of disproportionate sentencing, the court undertook an analysis of the § 3553(a) factors before imposing a below

Guideline sentence. DA 184-187. While the court was not required to explain its conclusion concerning each factor, the court still did so in articulating why 168 months in jail reflected a proper balancing of the § 3553(a) factors.

The court first undertook a consideration of § 3553(a)(1) by discussing the nature and circumstances of the offense. DA 184. The court focused on the “devastating impact that [the offense] has on our society and certainly on the individual victims of this offense.” DA 184. The court further discussed the fact that a number of images included sexual penetration by an adult male of a very young child and the extreme pain that penetration would inflict on such a child, particularly an infant or toddler. DA 184-85.

The court also discussed how the public needs to be protected from an individual who “find[s] pleasure or relief in viewing a child suffering excruciating pain.” DA 185. Protection of the public is a sentencing factor under § 3553(a)(2)(C). It is significant to note that, unlike the sentencing court in *Dorvee*, the sentencing court here did not presume that the defendant would commit a future contact offense, but was concerned with the risk of future non-production child pornography offenses and the harm that such offenses would inflict on the public. *See Dorvee*, 616 F.3d at 183 (holding that sentencing court placed unreasonable weight on the need for specific

deterrence despite expert testimony that the defendant was unlikely to commit such an offense again). Although the defendant asserts in his appeal that he is unlikely to repeat his offense, Def.'s Br. at 7, the district court was well within its discretion to reach a contrary conclusion based on the information presented to the court, including the PSR, arguments by counsel, and the defendant's own allocution. In the court's view, the defendant, even as of the date of sentencing, did not understand or appreciate the harm his conduct caused the victims despite the fact that he himself had been a victim of sexual abuse.

The court next considered the history and characteristics of the defendant. DA 185. Both at sentencing and in his appeal, the defendant sought leniency due to his own sexual abuse as a child. DA 181-182; Def.'s Br. at 7. The sentencing court had the opportunity to observe the defendant speak about his own abuse and the impact of his conduct. DA 181-182. Based on the court's observations, the court concluded that the defendant's prior sexual abuse was not a mitigating factor. DA 186. Instead, it was an aggravating factor because the defendant was in a better position than most individuals to know the devastating impact of abuse on child victims. DA 186. Despite this knowledge, the defendant, by receiving and distributing child pornography, "encourage[ed], induc[ed] others to assault

children.” DA 186. While the defendant urges that his prior sexual abuse points to a more lenient sentence, Def.’s Br. at 7, it was within the discretion of the sentencing court to give the defendant’s history different weight than the defendant proposed. *Fernandez*, 443 F.3d at 32.

The court also considered the fact that the defendant, in his allocution, focused on himself and his family and “gave short-shrift at best to the victims.” DA 186. It was appropriate for the court to consider the apparent inability of the defendant to understand the seriousness of his offense. The court had the benefit of observing the defendant as he addressed the court in reaching its conclusions. Based on the court’s own observations, it concluded that “[the defendant] lacks insight, understanding o[f] the horrific nature and impact of his conduct, and until that insight is achieved, recovery cannot even be hoped for, thus, increasing the likelihood of recidivism.” DA 186.

The court agreed with the defendant that deterrence, under § 3553(a)(2)(B) was not a major factor because “this is an offense that’s in the nature of an addiction.” DA 186. However, while the court discounted § 3553(a)(2)(B), it emphasized other factors as “extreme motivators” including protection of the public, § 3553(a)(2)(C), engendering respect for the law, § 3553(a)(2)(A), providing the defendant with needed medical and corrective treatment in the

most efficient manner, § 3553(a)(2)(D), and the avoidance of unwarranted disparities, § 3553(a)(6). It was within the discretion of the sentencing judge to afford more weight to these factors than to deterrence. *Fernandez*, 443 F.3d at 32.

The court also articulated why the defendant's case was distinguishable from other cases that fall under § 2G2.2. DA 186-187. Unlike many defendants who download large volumes of images and never view many of them, the court noted that the defendant here looked at the images and "took the time to organize them." DA 186-187. Further, he "packaged them" and "put labels on them to make them more attractive for barter in essence engaging in what could be called a commercial enterprise." DA 187. By distinguishing the defendant's conduct from that of the typical offender, the sentencing court addressed the defendant's specific conduct in committing the offense.

After considering the § 3553(a) factors along with the § 2G2.2 Guideline range, the court imposed a sentence of 168 months of incarceration, 42 months below the bottom of the Guideline range. DA 188. A sentence of 168 months of incarceration, based on the totality of the circumstances, is not only below the bottom of the Guideline range, but "within the range of permissible decisions." *Dorvee*, 616 F.3d at 179 (quoting *Cavera*, 550 F.3d at 189). In similar

cases, this Court has upheld similar sentences as substantively reasonable. *See, e.g., Aumais*, 659 F.3d 142 (121 months; thousands of images, no distribution); *Shay*, 478 Fed. Appx. 713 (210 months; 41,000 images including sadistic activities); *DeLong*, 486 Fed. Appx. 945 (240-month; 138,000 still images and over 2,000 videos). As 168 months' incarceration is well within the range of permissible decisions, the sentence is substantively reasonable.

The sentencing court in *Dorvee* was found to have erred when it imposed a maximum statutory sentence without explaining why such a sentence was necessary. *Dorvee*, 616 F.3d at 184-185. Here, the sentence imposed was well below the statutory maximum of 240 months of incarceration. While it was certainly a substantial sentence, the district court determined that such a sentence was necessary based on the specific nature of the offense, including the fact that the defendant viewed and catalogued most of his images, had images of infants and toddlers, had actively distributed images to other people, and presented a high risk of recidivism based on his failure to understand the impact of his offense on the victims. Therefore, this Court should find that the sentence of 168 months' incarceration, which was 42 months below the bottom of the actual Guideline range, was substantively reasonable

and supported by specific findings justifying such a lengthy sentence.

**Conclusion**

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

Respectfully submitted,

DEIRDRE M. DALY  
ACTING U. S. ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "DR Slater". The signature is written in a cursive, flowing style.

DEBORAH R. SLATER  
ASSISTANT U.S. ATTORNEY

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

Alma R. Nunley  
Law Student Intern (on the brief)

**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 8,280 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink that reads "DR Slater". The letters are cursive and fluid.

DEBORAH R. SLATER  
ASSISTANT U.S. ATTORNEY

## **Addendum**

**U.S.S.G. § 2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor**

**(a) Base Offense Level:**

**(1)** 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

**(2)** 22, otherwise.

**(b) Specific Offense Characteristics**

**(1)** If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.

**(2)** If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.

**(3)** (Apply the greatest) If the offense involved:

**(A)** Distribution for pecuniary gain, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

**(B)** Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.

**(C)** Distribution to a minor, increase by 5 levels.

**(D)** Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.

**(E)** Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.

**(F)** Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.

**(4)** If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

**(5)** If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

**(6)** If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.

**(7)** If the offense involved--

**(A)** at least 10 images, but fewer than 150, increase by 2 levels;

**(B)** at least 150 images, but fewer than 300, increase by 3 levels;

**(C)** at least 300 images, but fewer than 600, increase by 4 levels; and

**(D)** 600 or more images, increase by 5 levels.

**(c)** Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.