To be argued by Paul J. Angioletti

09-0648-cr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 09-0648-cr

JUSTIN K. DORVEE, :

Defendant-Appellant. :

----------X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

APPENDIX FOR DEFENDANT-APPELLANT JUSTIN K. DORVEE

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BRIEF FOR DEFENDANT-APPELLANT JUSTIN K. DORVEE

PRELIMINARY STATEMENT

Defendant Justin K. Dorvee appeals from the final appealable Judgment of the United States District Court for the Northern District of New York (Thomas J. McAvoy, J.), entered on February 12, 2009, convicting him upon plea of guilty of the crime of Distribution of Child Pornography [18 U.S.C. §§ 2252A (a)(2)(A), (b)(1) & 2256(8)(A)] and sentencing him principally to 240 months, with Dorvee given credit pursuant to U.S.S.G. § 5G1.3 for six months and fourteen days for which he would not

otherwise receive credit by the Bureau of Prisons (A 9-15).[1] The sentence was to run concurrently with a New York state court sentence. Dorvee was also sentenced to lifetime supervised release. Timely notice of appeal was filed on February 12, 2009 (A 7). By order dated March 9, 2009, this Court appointed Paul J. Angioletti as counsel for Dorvee pursuant to the Criminal Justice Act.

Dorvee is currently incarcerated pursuant to this judgment of conviction at Otisville Federal Correctional Institution in Otisville, New York.

SUBJECT MATTER AND JURISDICTION

The district court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over this direct appeal from a conviction in the district court pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

ISSUES PRESENTED

1. WHETHER THE DISTRICT COURT MISTAKENLY BELIEVED THAT THE 240-MONTH STATUTORY MAXIMUM SENTENCE IT IMPOSED WAS A BELOW GUIDELINES SENTENCE? WHETHER THE DISTRICT COURT ERRED IN IMPOSING SEVERAL § 2G2.2 ENHANCEMENTS?

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[1] Numbers in parentheses preceded by "A" refer to the pages of Appellant's Appendix. numbers in parentheses preceded by "P" refer to the pages of the plea; numbers in parentheses preceded by "S" refer to the pages of the sentencing.

2. WHETHER THE §2G2.2(b)(7) NUMBER-OF-IMAGES ENHANCEMENT WAS IMPROPER BECAUSE IT WAS CREATED THROUGH A GUIDELINES AMENDMENT PROCESS THAT VIOLATED THE SEPARATION OF POWERS?

3. WHETHER THE 240-MONTH SENTENCE WAS SUBSTANTIVELY UNREASONABLE WHERE IT GAVE IMPROPER WEIGHT TO A NUMBER OF FACTORS?

STATEMENT OF THE CASE

Introduction

In a criminal complaint dated May 1, 2008, Justin Dorvee was charged with Distribution of Child Pornography [18 U.S.C. §§ 2252A (a)(2)(A), (b)(1) & 2256(8)(A)]. The complaint alleged that Dorvee had sent via the internet to a Warren County Sheriff's Office Investigator posing as a fourteen-year old boy a computer image depicting male minors between the ages of seven and sixteen "engaged in oral sex, masturbation, and the lascivious exhibition of their naked genital areas." (A 16).

On September 9, 2008, pursuant to a written plea agreement, Dorvee pleaded guilty to a single-count information charging him with Distribution of Child Pornography (A 17-19).

On February 12, 2009, Dorvee was sentenced to a statutory maximum term of imprisonment of 240 months, giving him credit pursuant to U.S.S.G. § 5G1.3 for six

months and fourteen days for which he would not otherwise receive credit by the Bureau of Prisons (A 10). The sentence was to run concurrently with Dorvee's state court sentence of seven to twenty-one years.[2] He was also sentenced to lifetime supervised release with numerous conditions (A 11).

The Plea Agreement

In a written plea agreement signed on September 9, 2008, Dorvee agreed to waive indictment and plead guilty to a one-count information charging him with distribution of child pornography in violation of 18 U.S.C. § 2252A (a) (2). Plea Agreement at 1, ¶ 1 (a); (A 149). This plea would be in full satisfaction of all charges relating to Dorvee's distribution, receipt and possession of child pornography on or before October 19, 2007; his attempted production of child pornography on or between June 18, 2007 and October 19, 2007; his attempted online enticement of a minor between April 14, 2007 and June 21, 2007; and his attempted online enticement of a minor between July 18, 2007 and October 19, 2007. Id. at 1-2, ¶ 1 (a); 9-10, ¶ 8; (A 149-50). Dorvee understood that his mandatory minimum sentence

[2] The state court case involved charges that Dorvee had sent images of persons engaged in sexual conduct to the Warren County Investigator posing as a fourteen-year old boy, and had solicited him to engage in oral sexual conduct. Presentence Report at 13-14, ¶ 44. Dorvee pleaded guilty in Warren County Court to Attempted Use of a Child in a Sexual Performance [N.Y.P.L. §§ 110/263.05], a Class D felony, and Possession of a Sexual Performance by a Child [N.Y.P.L. § 263.16], a class E felony. Id. These charges involved conduct related to the instant offense. Id. at 10, ¶ 21.

was five years, that his maximum was twenty years, and that his term of supervised release would be not less then five years and up to life. Id. at 2, ¶¶ 2 (a) & (b); (A 150). He was aware that he would be required to register as a sex offender. Id. at 3-4, ¶ 2 (g); (A 151-52). He understood that the sentence to be imposed was within the discretion of the court, which had to take into account the Sentencing Guidelines along with the factors in U.S.C. §3553 (a) in arriving at a reasonable sentence. Id. at 4, ¶ 3; (A 152).

Dorvee understood that the elements of the offense to which he was pleading guilty were that a) between June 18, 2007 and October 19, 2007 he knowingly and willfully possessed child pornography; b) that the pornography depicted actual identifiable minors engaged in sexually explicit conduct; c) that he knew the sexually explicit nature and character of the materials and that a number of the visual depictions were of minors engaged in sexually explicit conduct; d) that the material had been shipped or transported in interstate or foreign commerce. Id. at 4, ¶ 4 (A 152).

The plea agreement set forth a stipulated factual basis. Id. at 5, ¶ 5; (A 153). Around April 17, 2007, Dorvee began conversing on the internet with a person who he thought was a fourteen-year old boy, but who was actually an undercover agent with the Maryland Heights, Missouri Police Department. Id., ¶ 5 (a); (A 153).

Dorvee discussed with him a foot fetish, and sent him some computer images of young boys which were not sexually explicit. Id. From June 29, 2007 through October 15, 2007, Dorvee conversed via the internet with a person who he thought was "Seth", a fourteen-year old boy, but who was actually a Warren County Sheriff undercover agent. Id. Dorvee had sexually explicit conversations with him. Id. at 6; (A 154). On August 13, 2007, Dorvee sent him via the internet images of minor boys exposing their penises and masturbating. Id. On September 28, 2007, Dorvee sent him a video via the internet depicting minor males "engaged in oral sex, masturbation, and the lascivious exhibition of their naked genital areas." Id. During the conversations, Dorvee indicated that he would like to meet "Seth" for the purposes of oral sex and mutual masturbation. Id. A meeting was arranged at a parking lot in Queensbury, New York; it was there that Dorvee was arrested. Id. At the time of his arrest, he had a camera in his backpack. Id.

On October 19, 2007, pursuant to the execution of a search warrant at Dorvee's residence, a computer and twenty-three disks were recovered. Id. at 7; (A 155). Forensic examination revealed several thousand still images and over 100 computer videos depicting "individuals under the age of 18 (children between the ages of 10 and 15 years of age) engaged in, among other things, oral sex, anal sex, masturbation and the lascivious exhibition of the genitals and public area." Id. Dorvee knew what

the images depicted and had obtained some of them from people outside of New York State. Id.

In an October 17, 2007 interview with law enforcement officials, Dorvee acknowledged the having conversations with "Seth", sending him the images, arranging for the meeting, possessing the images, and using a computer to do so. Id. at 7-8; (A 155-56).

If Dorvee demonstrated acceptance of responsibility and promptly entered a guilty plea, the United States Attorney would recommend a two-level downward adjustment pursuant to U.S.S.G. § 3E1.1 (a) and a one-level downward adjustment pursuant to U.S.S.G. § 3E1.1 (b) (2). Id. at 11, ¶ 9 (A 157).

Dorvee had read the plea agreement with the assistance of counsel, and understood the various rights he would be waiving by pleading guilty. Id. at 12-13, ¶ 12; (A 160-61).

The written plea agreement included a waiver of appellate rights if the sentence was below 210 months.[3] Id. at 14-15, ¶ 14 (A 162-63). At the time of the entry of the plea, all the parties agreed that there had been a revision to this part of the plea agreement under which Dorvee was waiving his right to appeal the conviction , but

[3] This earlier version of the plea agreement is found on the electronic docket and included in the appendix (A 149-63).

not waiving his right to appeal the sentence (P 22-23; A 42-43).

The Guilty Plea

On September 9, 2008, Dorvee, represented by Tucker Stanclift, appeared before Judge McAvoy (P 1; A 21). The parties confirmed the court's understanding that Dorvee wished to waive his right to grand jury indictment and to plead to a one-count information and to admit to the forfeiture counts in that information (P 2; A 22).

Dorvee was twenty-seven years old, was single, had no children, and had a twelfth grade education (P 3; A 23). He had done construction and retail work (P 3; A 23). He had discussed the information with his attorney, who had explained to him that he was charged with distributing materials that had traveled in interstate commerce and depicted persons under the age of eighteen engaging in sexually explicit conduct (P 4; A 24). The court explained the various rights Dorvee would be giving up by waiving indictment and pleading guilty (P 4-8; A 24-28)

The prosecutor stated that the government had sufficient evidence to prove Dorvee guilty beyond a reasonable doubt of the charge in the information (P 12; A 32). He recounted the stipulated facts set forth in the plea agreement (P 12-16; A 32-36). Dorvee heard the prosecutor's recitation of the facts, and acknowledged that this was what he had done (P 16; A 32-36).

The government's guidelines calculation was that under § 2G2.2 (a), the offense base level was 22 (P 18; A 38). This would be increased by two levels because some of the images involved prepubescent minors (P 18; A 38). There would be an additional five-level increase because Dorvee was trading child pornography on the internet (P 18; A 38). There was a four-level increase because some of the images depicted sadistic and masochistic acts (P 18; A 38). Because the offense involved use of a computer, there was an additional two-level increase (P 18; A 38). There was a five-level increase because the offense involved more than 500 images (P 18; A 38). Assuming Dorvee continued to accept responsibility, his offense level would be three, resulting in a total offense level of 37 (P 18; A 38). Dorvee's criminal history category was 1, and therefore his guidelines range would be 210 to 262 months (P 18; A 38).

The court noted that the plea agreement contained an appellate waiver that Dorve would not appeal a sentence of 210 months or less, while retaining the right to appeal a higher sentence (P 20). Defense counsel pointed out that there had been a revision to that part of the plea agreement (P 20). The parties agreed that according to the revised plea agreement, Dorvee was waiving his right to appeal the conviction, but there was no waiver of his right to appeal the sentence (P 22-23; A 42-43). Dorvee acknowledged that he was agreeing voluntarily to waive his right to appeal

the conviction (P 23-24; A 42-43).

The court found that Dorvee had pleaded guilty freely and voluntarily, that he was competent to enter such a plea, that he understood the charges against him and the consequences of pleading guilty, and that there was a basis for the court to accept the plea (P 27; A 47).

The Presentence Report

The Presentence Report ("PSR") of the Probation Office, dated January 7, 2009, reported that the base offense level was 22 pursuant to U.S.S.G. § 2G2.2. PSR at 11, ¶ 30. There was a two-level increase pursuant to § 2G2.2 (b) (2) because the material involved a prepubescent minor under twelve years old. Id. ¶ 31. There was a seven-level increase pursuant to § 2G2.2 (b) (3) (E) because Dorvee "distributed images of minors engaged in sexually explicit poses and conduct and made repeated references to engaging in sexual activities with the undercover posing as a 14 year old boy." Id. at 12, ¶ 32. There was a four-level increase pursuant to § 2G2.2 (b) (4) for material "that portrays sadistic or masochistic conduct or other depictions of violence." Id., ¶ 33; a two-level increase pursuant to § 2G2.2 (b) (6) for use of a computer. Id., ¶ 34; and a five-level increase pursuant to § 2G2.2 (b) (7) for 600 or more images. Id., ¶ 35. Thus, the adjusted offense level was 42. Id. at 13, ¶ 42. After a two-level reduction pursuant to § 3E1.1 (a) for acceptance of responsibility

[Id. at 13, ¶ 40] and a one-level reduction pursuant to § 3E1.1 (b) for timely notification of his intention to pled guilty [Id., ¶ 41], the total offense level was 39. Id., ¶ 42. Since Dorvee had no criminal history, his Criminal History Category was I . Id. at 15, ¶ 45. The guidelines range for imprisonment was 262 to 327 months;[4] because the statutory maximum was twenty years, the guidelines range was 240 months. Id. at 18, ¶ 63. Since Dorvee had been continuously incarcerated on a related offense since October 26, 2007, the court could order his term of imprisonment for the instant offense to run concurrently and Dorvee was eligible for custody credit since that date. Id. at 19, ¶ 63.

Defense Sentencing Submission

In a submission dated January 9, 2009, defense counsel characterized Dorvee as "not a predator but rather a lonely, submissive, inadequate young man who is cognitively bright, but socially and emotionally delayed." Defense Sentencing Submission at 1 (A 50). He noted that since his arrest, Dorvee had undergone

[4] The difference in the range arrived at by the Probation Office and that propounded by the Government at the plea proceeding (210 to 262 months), is accounted for by the fact that the Government's calculation included a five-level enhancement under U.S.S.G. §2G2.2 (b) (2) (B) for distribution for a thing of value, while the Pre-Sentence calculations did not (presumably because there was no evidence that Dorvee had *exchanged* pornography with the undercover). The presentence report included a seven-level adjustment pursuant to U.S.S.G. §2.2 (b) (3) (E) for distribution with intent to persuade a minor to engage in prohibited sexual conduct, while the government's calculations did not (for a discussion of the inappropriateness of this enhancement, see pp. 29-30 below).

"multiple psychological evaluations which revealed the he "suffers from severe Major Depressive Disorder complicated by a profound Schizoid Personality Disorder and displays anxiety symptoms in the range of someone who needs treatment." Id.

He recounted that Dorvee, who had no prior criminal record, had had a good highschool academic record, but had been unable to attend college due to severe social anxiety. Id. at 2 (A 51). Twenty-eight years old at the time of sentencing, Dorvee still lived with his mother and had never left Warren County prior to his incarceration. Id. He had had a difficult childhood, with two alcoholic parents who had separated when he was nine years old. Id. Dorvee had always been a reclusive and depressed individual. He turned to the Internet "in an attempt to cope with his emotional pain and confusion about being homosexual." Id.

Frank W. Isele, Ph.D., a clinical psychologist who had examined Dorvee, had concluded that Dorvee was passive, submissive, anxious and introverted, and therefore it was unlikely that he would be aggressive or take complete initiative in any relationship. Id. at 3 (A 52).

Defense counsel disputed several of the enhancements in the presentence report. He argued that the seven-level enhancement under U.S.S.G. § 2G2.2(b)(3)(E) was improper, because the image was sent after the undercover officer already agreed to engage in the prohibited act and therefore, there was no inducement by

distribution. Id. at 4-5 (A 53-54). He argued that the four-level increase pursuant to § 2G2.2 (b) (4) for depiction of sadism or violence was improper because the images did not portray violence. Id. at 5 (A 54). Thus, defense counsel concluded that Dorvee's guidelines range was from 78 to 97 months. Id.

He argued that there were bases for a downward departure under U.S.S.G. § 5K2.10 because the undercover had manipulated Dorvee [Id. at 6 (A 55)]; under U.S.S.G. § 5K2.13 for reduced mental capacity [Id. at 7 (A 56)] and that there were significantly overlapping enhancements [Id.].

He asked the district court to impose a non-guidelines sentence because Dorvee had not actually harmed any child, would be deterred from similar conduct in the future because he would forever be labeled a sex offender, did not present a future danger to the community, and was in need of psychiatric treatment. Id. at 8-11 (A 57-60).

Government Sentencing Submission

The government argued for a statutory maximum sentence of 240 months. Government Sentencing Submission at 1 (A 98). It contended that the enhancements under U.S.S.G. § 2G2.2 (b) (3) (E) and § 2G2.2 (b) (4) were appropriate. Id. at 1-5 (A 98-102) . Dorvee's request for a non-guidelines sentence should be rejected because Dorvee had communicated on-line with an undercover police officer who he

thought was a fourteen-year old boy and had arranged a meeting with him, had distributed child pornography to this person, and had possessed thousands of images of minors engaged in sexual activity, at least twelve of which depicted minors engaged in sadistic and masochistic conduct. Id. at 6-8 (A 103-105).

Sentencing

On February 12, 2009, Dorvee appeared before Judge McAvoy for sentencing (S 1; A 119). The court stated that it had reviewed all of the sentencing documents submitted (S 2-3; A 120-21) The court noted that there were factual disputes concerning a number of matters (S 4; A 122). They were not dispositive, because the court felt that "at bottom, there's pretty much a core agreement about what happened. And when you're talking about number of images and that kind of thing, the Court is not following the Warren County Sheriff's Department analysis. And I think there's enough of a separate analysis standing alone that the court can rely on." (S 4; A 122).

Defense counsel argued that the seven-level adjustment for intent to persuade should not apply (S 7; A 125). The e-mail messages between Dorvee and the undercover had "take[n] place over a great span of time." (S 7; A 125). The undercover had first indicated his willingness to engage in "sexual contact" with Dorvee; it was after that that the images had been sent (S 8; A 126). Thus, the images

were not sent to persuade the undercover (S 8; A 126).

The court viewed the evidence as showing that there had been a lot of dialogue between Dorvee and the undercover, there was an agreement at some point to meet in the parking lot of the mall, and that subsequent to that some of the images were sent (S 9; A 127). The court felt that under these facts, the § 2G2.2(b)(3)(E) enhancement was appropriate, because Dorvee had wanted to meet with the officer, believing him to be a 14-year old boy (S 9; A 127). The court noted that one of the images sent was to instruct the undercover how to masturbate Dorvee with his feet (S 9; A 127). The court concluded that this, "along with sending the other images, is persuading the officer not to change his mind and to come to the meeting." (S 9; A 127). There was room for disagreement on this issue, and the Second Circuit could review the court's application of this enhancement (S 10; A 128).

Defense counsel argued for the imposition of a non-guidelines sentence because Dorvee had never physically harmed another person sexually; this had been confirmed by a polygraph examination (S 11; A 129). Dorvee had already been prosecuted in Warren County Court, and was to receive a prison term of from seven to twenty-one years (S 12; A 130). Under New York State's civil commitment law, Dorvee would be reviewed to determine whether he posed a threat to society (S 12-13; A 130-31).

The statements made by Dorvee's doctors indicated that he did not pose a danger; he should not be detained longer than necessary in a case where there was no physical violence (S 14; A 132). Dorvee had lived in isolation, alone in his room with his computer except for the time had had spent at work (S 14; A 132). Defense counsel was not sure that Dorvee had known the import of what he was doing because of the fantasy and role-playing involved with the internet (S 14; A 132). It was clear to Dorvee now that his conduct had been wrong (S 14; A 132). An appropriate punishment for Dorvee would be seven years, the minimum he would serve under the state court sentence (S 15; A 133). Both sides agreed that Dorvee should receive credit for the six months and fourteen days he had been in custody on the state charges. (S 16-17; A 134-35).

The court stated that this was a very difficult case for everyone, particularly Dorvee, who had had a bad upbringing because of conflicts between his parents, and who had developed schizoid problems, depression, suicidal ideation and all of the other issues discussed in the psychiatric submission (S 17; A 135). The court believed that Dorvee was

> a very shy, retiring, non-aggressive individual. Do I think Justin would ever go out and drag some little boy off the street and rape him and murder him? No, I don't believe that. But I do believe that he's a pedophile, And I do believe that if he were given the opportunity, he would

> have sexual relations of the kind he feels are important to him with a younger boy, ages 6 to 15, in that range. But I don't think he ever initiated that. I think it would have to be situation where that came about. And that presents a danger as far as the Court is concerned, because no one knows what's going to happen in the future. And the court has a primary function to protect people in that age group and all persons who might be harmed by that.

(S 18; A 136).

The court noted that defense counsel had said that Dorvee would not hurt anyone, but "[f]or an adult of Justin's age to engage in sexual conduct with someone under the age of 14, or 14 and under, I think is extremely hurtful." (S 18; A 136). The court had "seen the results of what happens when such contact with minors has gone down, because the Court has sat through cases, I've read volumes of things regarding this. And the Court really believes that this - - in my mind, that hurting can be done in a lot of ways, and one of them is sexual conduct and the result that the victim undergoes." (S 18-19; A 136-37).

The court stated that it would be ideal that for such a crime the punishment would be treatment in a hospital (S 19; A 137). There were four federal institutions where there was

> concentration given on the rehabilitation that Justin so badly needs. He needs treatment. There's no question about it. He needs instruction. He needs guidance. He needs contact with other people that will show him that the

> things he's been concentrating on in the past almost exclusively, four hours a day on a computer, that that isn't right; that's got to be, that's got to be modified, that behavior has to be changed, and I think we've got - - the federal system has got the best shot to do it.

(S 19-20; A 137-38).

The court thought that the volume of photographs and images made this a very serious crime (S 20; A 138). It was

> also taking into consideration the fact that he took photographs of over 300 - - or 300 or less, around 300, neighborhood boys. And his spin on it is because he wanted pictures of their feet. Well, that's what turns him on sexually and that, in my mind, poses a danger when he does that surreptitiously and without their permission and consent. And who knows when that's not going to erupt into something that he previously said he wasn't going to do. I don't know that for sure.

(S 20; A 138).

The court noted that Dorvee had been depicted as having diminished mental capacity (S 20; A 138). Dr. Isele's report, however, stated that he did not have diminished capacity (S 20; A 138). The court noted that Dorvee was "a great student in high school." (S 20; A 138). Dorvee never went out and never socialized with anyone except for one brief socialization with a person with "homosexual problems." [sic] (S 20; A 138). Dorvee's mother had gotten him a job at which he had excelled (S 20-21; A 138-39). He had started in the back room sorting display items, and rose

to a "semi-management situation." (S 21; A 139). The court believed that Dorvee had "a tremendous amount of mental and emotional problems that need treatment. And the court believes that as strongly as I can believe anything, and I certainly hope that that's what happens to him." (S 21; A 139)

The court had reviewed all of the sentencing submissions, had calculated the guidelines along with the probation department, and had considered all of the §3553 (a) factors (S 21; A 139). It had considered the need for punishment, that Dorvee needed to be specifically deterred, and that the sentence would "send a message to other people out there who might be inclined to distribute child pornography." (S 21; A 139). The court felt that there was a need to protect the public from the type of harm it had described (S 21; A 139). There was "a very strong need for rehabilitation." (S 22; A 140).

The court found the total offense level to be 39, the criminal history category to be I, and the guidelines imprisonment range from 262 to 327 months[5]; the statutory maximum was 240 months (S22; A 140). The court would give Dorvee credit for the time he had already served in state court, six months and fourteen days (S 22; A 140). Thus, Dorvee was sentenced to 233 months and sixteen days, to run concurrently to the undischarged term of imprisonment he was serving in New York

[5] This was the range in the presentence report. PSR at 18, ¶ 63.

State (S 22; A 140). The court recommended that Dorvee participate in the Bureau of Prisons sex offender treatment program, and that he be placed in a facility that would maximize treatment (S 22; A 140). Dorvee would be placed on supervised release for life, including the following special conditions: he could not have any contact, direct or indirect, with a person under the age of eighteen unless supervised by a person approved by the probation officer; he could not be in situations in which he had any contact with a minor; he could not be in any area in which persons under the age of 18 were likely to congregate without the permission of the probation officer; he should register as a sex offender in any state where he resided or was employed or studied; and he should participate in a mental health program (S 23-24; A 141-42). Dorvee could not possess or use any computer or other online-capable device unless he participated in the computer restriction monitoring program (S 24; A 142). He was to permit periodic unannounced examination of any computer equipment he used or possessed (S 24-25; A 142-43). He could use a computer in connection with employment, provided he notified his employer of the nature of the conviction (S 25; A 143). If his treatment provider determined that the use of a computer or internet service was contraindicated, the court could prohibit his use of this (S 25; A 143). Dorvee was to submit his person and property to search by a probation officer (S 25-26; A 143-44). He was not to view materials depicting

sexually explicit conduct (S 26; A 144).

The court stated that it wanted to make the record more complete in terms of Dorvee's application for a non-guidelines sentence (S 27; A 145). It understood that the sentencing guidelines were not mandatory, but if it was going to impose a non-guidelines sentence, it had to indicate the reasons why this would be appropriate (S 27; A 145).

One of the factors the court had considered was

> how far below the guidelines any non-guideline sentence would go. And here, the guidelines sentence is 262 to 327, and a sentence imposed, as the Court did, giving credit for the time served is relatively far below the guideline, although not terribly far, and probably will be upheld at least in connection with the Court's decision. The rest of the sentence, the length of the sentence certainly can be challenged. There are a lot of arguments which can be made that it's excessive. And the court doesn't believe that it is. The Court thinks that it's enough but not more than necessary.

(S 27; A 145).

The court explained,

> I think Justin is not a bad person, never once did I think he was a bad person. But society has bad problems too. And the court cannot allow somebody to be out there creating more. And the court is cognizant of its duty to protect the public and young people in this case.

(S 28; A 146).

The court concluded,

> So I just hope Justin finds some help; I hope he finds some friends; I hope he finds some peace. And I think the federal system is not like spending 20 years in county jail. I think he's going to find out that he can if he wants to, if he decides himself to do it, he can make himself into a person that can well exist and be happy in society.

(S 28; A 146).

SUMMARY OF ARGUMENT

The district court committed procedural error when it perceived that the 240-month statutory maximum sentence it imposed was "relatively far below the guideline." (S 27; A 27). Dorvee's guidelines range was calculated the court as 262 to 327 months. Under U.S.S.G. § 5G1.1 (a), "[w]here the statutorily authorized maximum sentence is less that the minimum of the applicable guidelines range, the statutorily authorized maximum sentence shall become the guidelines sentence." Thus, the starting point for calculating the sentence was not, as the district court seemed to believe, 262 to 327 months; rather, it was 240 months. See United States v. Shaw, 313 F.3d 319 (4th Cir. 2002). So if, as the district court stated, its intention was to impose a sentence "relatively far below the guidelines", this intention was thwarted by its misunderstanding of what the correct starting point was.

The court improperly imposed a number of § 2G2.2 enhancements. The §

2G2.2(b) (7) enhancement for an offense involving 600 or more images was improper, because Dorvee pleaded guilty to Distribution of Child Pornography [18 U.S.C. §2252A (a) (2) (A).] The number of images he had sent in connection with this offense was far less than 600; this enhancement, based on other images he had collected but not distributed, was improper. See United States v. Taylor, 2008 U.S. Dist. LEXIS 446618 (S.D. N.Y. June 2, 2008). Similarly, the enhancement under §2G2.2 (b) (4) for material portraying sadistic, masochistic or violent conduct was improper; the images which Dorvee had distributed to the undercover did not depict such conduct. See United States v. Delmarle, 99 F.3d 80, 83 (2d Cir. 1996). Again, this enhancement was based on items in Dorvee's collection, not those he distributed.

The district court also erred in applying a seven-level enhancement under U.S.S.G. § 2G2.2 (b) (3) (e) for intent to persuade a minor to engage in prohibited sexual conduct. The undercover, posing as a fourteen-year old boy, had already agreed to engage in such conduct before Dorvee sent him the images.

The number-of-images enhancements under U.S.S.G §2G2.2 (b) (7) was improper because it was created through a guidelines amendment process that violated the separation of powers. United States v. Mistretta, 488 U.S. 361, 380 (1989). It resulted from two Justice Department attorneys convincing a novice Congressman to insert drastic changes to the child pornography guidelines into an

unrelated popular bill without notice to the Sentencing Commission. See Skye Phillips, Protect Downward Departures: Congress and the Executive's Intrusion Into Judicial Independence, 12 J.L. & Pol'y 947, 976-84 (2004).

In enacting the §2G2.2 (b) (7) enhancement, Congress crossed the separation-of-powers boundary identified by Mistretta because it promulgated its legislation not in the United States Code but rather in the Guidelines Manual. In so doing, Congress in effect impermissibly borrowed the reputation for impartiality and nonpartisanship of the judicial branch and "cloak[ed] [its] work in the neutral colors of judicial action." Mistretta, 488 U.S. at 406.

The 20-year statutory maximum sentence imposed upon Dorvee was substantively unreasonable. Despite its view of Dorvee as a non-aggressive person, the district court repeatedly said it was imposing this incapacitative sentence because it did not know whether Dorvee might harm children in the future. Courts should not assume that a defendant will commit future additional crimes without a reliable basis or base a sentence on such assumptions. United States v. Olhovsky, 2009 U.S. App. LEXIS. 7895 (3d Cir. April 16, 2009), amended, 2009 U.S. App. LEXIS 9107 (3d Cir. April 24, 2009); United States v. Phinney, 599 F.Supp. 1037 (E.D. Wisc. 2009). Additionally, the sentencing court ignored the fact that the onerous conditions of lifetime supervised release it had imposed would preclude future crimes by Dorvee.

The district court gave undue weight to the possession by Dorvee of approximately 300 images of neighborhood children which were taken without their knowledge. The court ignored the fact that these were non-pornographic images, and that police investigation had revealed that Dorvee had never harmed, or even approached, any of the children depicted in the photographs.

In imposing sentence, the district court did not give proper weight to the psychiatric factors enumerated in a report by a defense expert, and ignored that report's warning as to the dire potential consequences of incarceration on Dorvee.

The district court repeatedly acknowledge Dorvee's need for treatment, making a recommendation to the sex offender treatment program at Fort Devens. It was unaware of the fact that the twenty-year sentence it imposed precluded such treatment for eighteen years, since in order to participate in the Fort Devens program, an inmate must have a maximum of twenty-four months and a minimum of twelve months remaining on his sentence. See United States v. Rausch, 570 F.Supp.2d 1295, 1307 (D.C. Colo. 2008).

ARGUMENT

POINT I

THE DISTRICT COURT MISTAKENLY BELIEVED THAT THE 240-MONTH STATUTORY MAXIMUM SENTENCE IT IMPOSED WAS A BELOW-GUIDELINES SENTENCE; IT ERRED IN IMPOSING SEVERAL §2G2.2 ENHANCEMENTS.

A. Because the Statutory Maximum Was Less than the Minimum of the Guidelines Range, The Statutory Maximum Became the Guidelines Sentence.

In explaining the 240-month statutory maximum sentence it imposed and its rejection of the defense request for a below-guidelines sentence, the district court stated, "One of the factors the Court has to consider is how far below the guidelines any non-guideline sentence would go. And here, the guidelines sentence is 262 to 327 [months], and a sentence imposed, as the Court did, giving credit for the time served is relatively far below the guideline, although not terribly far, and probably will be upheld at least in connection with the Court's decision." (S 27; A 145). The district court truly believed that the 240 months it was imposing was a below-guidelines sentences, as evidenced by its statement later in the proceeding that "the Court understands full well that if it's going to give non-guidelines sentence, it has to articulate a reason in connection with all the facts and circumstances of this case why that would be appropriate." (S 27; A 145).

In reality, the sentence the district court imposed was not "relatively far below the guideline"; it *was* the guideline. The district court's sentence was procedurally flawed in that it mistakenly took the 262 to 327 month range as its starting point, when the starting point should have been 240 months.[6]

U.S.S.G. § 5G1.1 (a) provides that "[w]here the statutorily authorized maximum sentence is less that the minimum of the applicable guidelines range, the statutorily authorized maximum sentence shall become the guidelines sentence." As the commentary to this section explains,

> This section describes how the statutorily authorized maximum sentence . . . may affect the determination of a sentence under the guidelines. For example, if the applicable guidelines range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under subsection (a) is 48 months; *a sentence of less than 48 months would be a guideline departure.*

U.S.S.G. § 5G1.1 comment (emphasis added).

Thus, the starting point for calculating the sentence was not, as the district court seemed to believe, 262 to 327 months; rather, it was 240 months. See United States v. Shaw, 313 F.3d 319 (4th Cir. 2002); United States v. Santopietro, 996 F.2d

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[6] Although both the presentence report [at 18, ¶ 63] and the Government's sentencing submission [at 12] both correctly noted that the guidelines sentence was the statutory maximum of 240 months, the district court's statements at sentencing certainly did not reflect these correct conclusions.

17 (2d Cir. 1993). So if, as the district court stated, its intention was to impose a sentence "relatively far below the guidelines", this intention was thwarted by its misapprehension as to what the starting point was.

An error in determining the applicable guidelines range renders a sentence procedurally unreasonable. Gall v. United States, 128 U. 586, 597 (2007); United States v. Selioutsky, 409 F.3d 144, 118 (2d Cir. 1995). Since defense counsel did not raise the issue concerning the incorrect starting point below, this issue should be considered "under all the circumstances on the somewhat relaxed application of plain error that we and other courts have on occasion deemed appropriate for unpreserved sentencing errors." United States v. Confredo, 528 F.3d 143, 149 (2d Cir. 2008) citing United States v. Simmons, 343 F.3d 72, 80 (2d Cir. 2003); United States v. Cortes-Claudio, 312 F.3d 17, 24 (1st Cir. 2002); United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002).

An error is "plain" if it is "clear" or obvious at the time of appellate consideration. Johnson v. United States, 520 U.S. 461, 467-68 (1997). To show that the error impaired substantial rights, prejudice must be established which affected the outcome of the district court proceedings. United States v. Gore, 154 F.3d 34, 47 (2d Cir. 1998). Here, the error affected the sentence imposed. If the error alleged is a sentencing error, the prejudice is clear. United States v. Guevara, 277 F.3d 111, 124

(2d Cir. 2001).

B. The District Court Erred in Imposing Several § 2G2.2 Enhancements

The district court erred its imposition of several U.S.S.G. § 2.G2.2 enhancements.[7] It incorrectly imposed a five-level enhancement under U.S.S.G. § 2G2.2(b) (7) for an offense involving 600 or more images. The offense to which Dorvee pleaded guilty was Distribution of Child Pornography [18 U.S.C. § 2252A (a) (2) (A)]. The enhancement, however, was based on the approximately 7,000 still images and approximately 100 to 125 movie files found in Dorvee's home pursuant to the execution of a search warrant. See PSR at 12, ¶ 33. The only images with which Dorvee was charged with distributing, however, were those he sent to the undercover, a number far less than 600. As explained in United States v. Taylor, 2008 U.S. Dist. LEXIS, 446618 (S.D. N.Y. June 2, 2008):

> Even accepting the Government's assertions that agents discovered at least 40 videos on Defendant's computer media, each considered to contain 75 images, pursuant to U.S.S.G. § 2G2.2, Application Note 4 (B)(ii), he Government has thus demonstrated that [defendant] possessed more than 600 images, but has not offered any evidence of when or how [defendant] received, or if he distributed, those images. Given the Government's decision to charge [defendant] with receipt and distribution, rather

[7] This Court reviews a district court's findings of fact as they apply to sentencing enhancements for clear error, and its interpretation and application of sentencing guidelines de novo. United States v. Garcia, 413 F.3d 201, 221-22 (2d Cir. 2005).

> than possession, the Court finds that the only images that can be counted as "involved" in the instant offense are those exchanged with the UC, which, given the evidence before the Court, total no more than 300.

Id. at 18. See also United States v. Fowler, 216 F.3d 459 (5th Cir. 2000) (possessed images not relevant conduct which could be used to enhance sentence for distribution charge); United States v. Boudreau, 250 F.3d 279 (5th Cir. 2001) (possession of collection of downloaded images improperly used to enhance sentence for possession of child pornography magazines); see also United States v. Gill, 348 F.3d 147, 153 (6th Cir. 2002) (possessing drug for personal use not relevant conduct for distribution-type offense).

The collected images were not conduct relevant to the distribution offense of conviction under U.S.S.G. § 1B1.3. The compiling of the total of the images in the collection did not occur "during the commission of the offense of conviction, in preparation for the offense, or in the course of attempting to avoid detection or responsibility for that offense." See U.S.S.G. § 1B1.3 (a) (1) (A). Nor was the compiling of all of the images part of the "same course of conduct as the offense of conviction." See U.S.S.G. § 1B1.3 (a) (2). The compiling of the collection of images was different in nature and time frame from the sending of images to the undercover. See U.S.S.G. § 1B1.3, Application Note 9 (B). Thus, the enhancement under §2G2.2

(b) (7) was improperly applied.

For the same reason, the four-level enhancement under § 2G2.2 (b) (4) for material portraying sadistic, masochistic or violent conduct was improper. See Fowler, 250 F.3d at 460-61. The offense to which Dorvee pleaded guilty involved the distribution of child pornography to the undercover. The images sent to the undercover, as described in the stipulated set of facts in the plea agreement at 5-6 did not depict such conduct. See United States v. Groenendal, 557 F.3d 419, 425-426 (6th Cir. 2009); United States v. Delmarle, 99 F.3d 80, 83 (2d Cir. 1996). Indeed, the presentence report in applying this enhancement referenced that Dorvee had admitted that his "*collection* of child pornography contained images that portrayed sadistic and masochistic conduct. PSR at 12, ¶ 33. The presentence report's reference to the factual basis in the plea agreement supporting this enhancement [Id., Plea Agreement at 6] again relates to the collection, not to the images distributed. See Taylor, 2008 U.S. Dist. LEXIS at 18.

The district court also erred in applying a seven-level enhancement under U.S.S.G. §2G2.2 (b) (3) (e) for intent to persuade a minor to engage in prohibited sexual conduct. The district court accepted defense counsel's version of the events that the images were sent to the undercover subsequent to the agreement to meet (S 9). The district court nonetheless applied this enhancement because "that, along with

sending the other images, is persuading the undercover not to change his mind and come to the meeting." (S 9). This conclusion ignored the fact that it had been the undercover who had expressed concern in the emails that *Dorvee* would back out of the meeting" "ur not going to back out ru cuz id be hurt and disappointed." Isele Report at 9. The recognition that this enhancement was inapposite may account for the fact that the government did not include this enhancement in its initial guidelines calculations.

Because of these various procedural errors, the case should be remanded for resentencing.

POINT II

THE ENHANCEMENT UNDER U.S.S.G § 2G2.2 (b) (7) WAS IMPROPER BECAUSE IT WAS CREATED THROUGH A GUIDELINES AMENDMENT PROCESS THAT VIOLATED THE SEPARATION OF POWERS.

The Supreme Court of the United States has consistently reaffirmed "the central judgment of the Framers of the Constitution that, within our political system, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." United States v. Mistretta, 488 U.S. 361, 380 (1989) citing Morrison v. Olson, 487 U.S. 654, 685-89 (1988); Bowsher v. Synar, 478 U.S. 714, 725 (1986). An examination of the process through which the U.S.S.G. §

2G2.2 (b)(7) number-of-images enhancement, which drastically enhanced Dorvee's guidelines range, was enacted reveals that it violated the principle of separation of powers.

No separation-of-powers challenge to these enhancements was made in the district court. This Court applies de novo review to the question of whether a Guideline is invalid for violating the Constitution. See Stinson v. United States, 508 U.S. 36, 38 (1993); United States v. LaBonte, 520 U.S. 751, 757, 762 (1997).

In Mistretta, 488 U.S. at, 378, 383, the United States Supreme Court rejected an argument that the United States Sentencing Guidelines violated the separation of powers because the Sentencing Commission was both too independent of, and too subservient to, the political branches. Mistretta viewed the Sentencing Commission as have both substantial congressional guidance and substantial discretion to promulgate the guidelines. Id. at 374-78, 393-94, 407-08.

The Supreme Court noted, however, that it was "troubled" by the defendant's argument that "the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch." Id. at 407. Because the Commission is a part of the Judiciary and is engaged in work that is "primarily a judicial function" [Id. at 390], the Judiciary's imprimatur of "impartiality and nonpartisanship" is in effect stamped on each Guideline. Id. at 407.

If the Guidelines were not in fact impartial and nonpartisan, the Judiciary would simply be promulgating the edicts of a political branch, and thus its integrity would be undermined. Id. Based on its understanding of the nature of the Sentencing Commission and its work, the Supreme Court believed that the promulgation of the Guidelines would be "essentially a neutral endeavor and one in which judicial participation is particularly appropriate." Id. at 407. This conclusion was supported by the fact that the Commission was created as "an independent agency in every relevant sense", was expressly charged with using science and expertise to develop, review and revise guidelines, and was left with "significant discretion to determine which crimes have been punished too leniently, and which too severely." Id. at 374, 377, 393.

While it is true that defining crimes and setting parameters of punishment is exclusively a legislative function, the balance of power upheld in Mistretta demonstrates that sentencing remains primarily a judicial function. "Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control. Id. at 364 (internal citation omitted). However, "federal sentencing - - the function of determining the scope and extent of punishment - - never had been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three

Branches of Government." Id. at 364. By placing the Sentencing Commission within the Judicial Branch, Congress recognized that "sentencing has been and should remain 'primarily a judicial function.'". Id. at 390.

The Supreme Court concluded in Mistretta that the Guidelines did not involve "a degree of political authority inappropriate for a non-political Branch" only because "they do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." Id. at 396. Rather, "judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business - - that of passing sentence on every criminal defendant." Id. at 408.

The § 2G2.2 (b) (7) number-of-images enhancement was created by the Feeney Amendment. United States v. Detwiler, 338 F. Supp. 2d 1166, 1171 (D. Or. 2004); U.S.S.G. App. C. Amend 649 (April 30, 2003). It resulted from two attorneys at the Justice Department convincing a novice Congressman to insert drastic changes to the child pornography guidelines into an unrelated popular bill without notice to the Sentencing Commission. See Skye Phillips, Protect Downward Departures: Congress and the Executive's Intrusion Into Judicial Independence, 12 J.L. & Pol'y 947, 976-84 (2004). These changes nullified the ability of judges to consider many

downward departures for child pornography offenses and drastically changed the penalties. Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (available at http://mow.fd.org/3%20July%202008%20Edit.pdf).

Debate on the amendment was limited to twenty minutes. Phillips at 983. The House later passed the Child Abduction Protective Act with the Feeney Amendment added. Id. at 992-94. Despite objections by the Sentencing Commission, the Chairman of the House Judiciary Committee, the Judicial Conference of the United States and the American Bar Association that these changes were made without adequate analysis and review, the Protect Act became law. Stabenow at 18.

The original version of the Feeney Amendment and the final version of the Protect Act both included a direct amendment to U.S.S.G. §§ 2G2.2 and 2G2.4, adding up to a five-level increase depending upon the number of images possessed. See Protect Act, Pub. L. 108-21, §401 (1) (1) (B), (C).” Id. It also adjusted the mandatory minimum and maximum sentences for child pornography offenses. As one court which studied these modifications has noted,

> As far as this court can tell, these modifications do not appear to be based on any sort of empirical data, and the Court has been unable to locate any particular rationale for them beyond the general revulsion that is associated with child exploitation-related offenses.

United States v. Johnson, 588 F.Supp. 2d 997, 1003 (S.D. Iowa (2008) (citations omitted). Indeed, the number-of-images enhancement appears to run counter to the conclusion formally found by Congress in the Protect Act itself that "the production of child pornography is the byproduct of, and not the primary reason for, the sexual abuse of children." Pub. L. 108-21. Title V, § 510 (April 30, 2003), 117 Stat. 650, 678.

This direct amendment of the Guidelines by the Feeney Amendment drew the disapproval of Chief Justice Rehnquist, who, acting in his capacity as Chairman of the Judicial Conference, wrote to Congress "oppos[ing] legislation that directly amends the sentencing guidelines, and suggest[ing] that, in lieu of mandated amendments, Congress should instruct the Sentencing Commission to study suggested changes to particular guidelines and report to Congress if it determines not to make the recommended changes." 49 Cong. Rec. S5113, S5120. He warned that "this legislation, if enacted, would do serious harm to the basic structure of the guideline system."[8] Id. The Secretary of the Judicial Conference also voiced opposition to "direct congressional amendment of the sentencing guidelines because

[8] Chief Justice Rehnquist also expressed a concern that this legislation was "enacted without any consideration of the views of the judiciary." 2003 Year-End Report of the Federal Judiciary (available at http://www.supremecourtus.gov/publicinfo/year-end/year-end reports.html).

such amendments undermine the basic premise in establishment of the Commission -- that an independent body of experts . . . is best suited to develop and refine sentencing guidelines." 149 Cong. Rec. S5113, S5121.[9]

Despite these misgivings, because an administrative agency cannot declare a statutory provision unconstitutional, the Commission was absolutely required to incorporate the § 2G2.2 (b) (7) enhancement into the guidelines. See Pasha v. Gonzalez, 433 F.3d 530, 536 (7th Cir. 2005). Thus, although the cover of the Guidelines manual says that it is promulgated by the Sentencing Commission, the §2G2.2 (b) (7) enhancement contained within that manual was in fact promulgated by Congress.

In enacting the § 2G2.2 (b) (7) enhancement, Congress crossed the separation-of-powers boundary identified by Mistretta because it promulgated its legislation not in the United States Code but rather in the Guidelines Manual. In so doing, Congress in effect impermissibly borrowed the reputation for impartiality and nonpartisanship of the judicial branch and "cloak[ed] [its] work in the neutral colors of judicial action." Mistretta, 488 U.S. at 406. Thus, manner in which this enhancement was

[9] The legislative record of the Protect Act is also "replete with remarks by some members of Congress, and the Attorney General's deputies, expressing hostility toward the Judicial Branch and toward judges who fail to decide cases in the manner favored by those individuals." Detwiler, 338 F.Supp.2d at 1172.

enacted "impermissibly threatens the institutional integrity of the Judicial Branch." Id. at 383 citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986). As such, this portion of the Protect Act violates the separation of powers doctrine and is therefore unconstitutional and invalid. See Stinson , 508 U.S. at 38.

When portions of a statute are found to violate the separation of powers doctrine, "the invalid portions of a statute are to be severed unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not." Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 931-32 (1983). The § 2G2.2 (b) (7) number-of-images enhancement fits this description of a severable provision, because it is just one in a series of discrete and only partially-related provisions which can be invalidated without affecting any other provision of the Protect Act.[10]

A sentencing court commits procedural error when it miscalculates the Guidelines range. United States v.Gall, 128 S.Ct. 586, 597 (2007). In the instant case, included in the court's calculations was the number-of-images enhancement, which was constitutionally infirm and which substantially boosted Dorvee's guidelines range. The sentence was also improper because by relying on an

[10] The Protect Act contains a severability clause. See Pub. L. No. 108-2, 117 Stat. 650, 651 (2003).

unconstitutional guideline, the sentencing court relied on an "impermissible factor." United States v. Tate, 516 F.3d 459, 469 (6th Cir. 2008). Therefore, the case should be remanded for resentencing without the number- of-images enhancement.

POINT III

THE 240-MONTH STATUTORY MAXIMUM SENTENCE IMPOSED ON THIS FIRST OFFENDER WAS SUBSTANTIVELY UNREASONABLE BECAUSE IT GAVE IMPROPER WEIGHT TO A NUMBER OF FACTORS.

Justin Dorvee, a first-time offender, received the statutory maximum sentence of 240 months. An examination of the factors presented by Dorvee and the sentencing court's rationale for imposing this twenty-year sentence reveals that it is outside the boundaries of substantive reasonableness.

A. The History and Characteristics of Justin Dorvee

The only psychiatric evaluation of Justin Dorvee was that performed by Dr. Frank Isele: this was attached to the defense sentencing submission. The Government did not request a pre-sentencing evaluation of Dorvee. Dr. Isele's report detailed Dorvee's difficult family circumstances and his almost complete social isolation. Isele Report at 3 (A 64). Dorvee was so shy that he neither made or received telephone calls. Id. He was a compulsive collector of numerous innocuous objects, such as John Deere and Dale Earnhardt paraphernalia; his

amassing of the thousands of pornographic images discovered pursuant to the execution of the search warrant was another manifestation of this compulsiveness. Id. at 4 (A 65).[11]

A battery of psychiatric tests led to the conclusion that Dorvee was "a seriously depressed, socially isolated, anxious individual who is, and has been for years, frankly suicidal. He is seriously withdrawn and introverted and extremely anxious, passive and deferential in interpersonal interactions. He is curious and may take advantage of opportunities that are presented to him but is also quite inhibited, shy, and very suspicious of the motives of other people." Id. at 5 (A 66). Dorvee was in the range of someone who would be treated as an out-patient for clinical depression; he had a schizoid personality. Id.

Dr. Isele found that it was "unlikely that Justin would be aggressive or take complete initiative in any relationship. Such a finding is important because it supports the contention that Justin alone would not push or develop a relationship with any other person, child or adult, *unless the other person took the lead.* Justin is simply too passive, shy, socially anxious, retiring, introverted, submissive, unsure of himself and distrustful to do so" Id. at 7 (A 68) (emphasis in original).

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[11] The significance of such a "pack-rat" mentality is discussed in United States v. Grober, 595 F.Supp.2d 382, 410 (D.N.J. 2008).

Dr. Isele concluded that Dorvee was not a predator, but rather "a lonely, socially anxious, submissive inadequate young man who is very likely delayed by some twelve years or more in his social development." Id. at 9 (A 70). An examination of the e-mails between Dorvee and the undercover led Dr. Isele to conclude that they suggested prompting on the part of the undercover in arranging the meeting; an example of this was the e-mail message from the undercover: "u wanna meet at 4rite." Id. That the undercover promoted the meeting was evidenced by the e-mail which stated, "ur not going to back out ru cuz id be hurt and disappointed." Id.

Also attached to the defense sentencing submission were the results of a polygraph examination finding truthful Dorvee's responses that he had never masturbated to images of violent sexual acts, had never had sexual contact with a person under the age of seventeen since he had turned twenty-one, and had never prior to the instant case attempted to meet any person under the age of seventeen since he had turned twenty-one. Polygraph Results at 2 (A 90-92).

B. Why the 240-Month Sentence is Substantively Unreasonable

In reviewing substantive reasonableness, this Court determines "whether the length of the sentence is reasonable," focusing its attention on the district court's explanation of its sentence in light of the factors detailed in 18 U.S.C. § 3553 (a).

United States v. Sindima, 488 F.3d 81, 84 (2d Cir. 2007) citing United States v.Rattoballi, 452 F.3d 127, 132 (2d Cir. 2006). At the substantive stage of reasonableness review, an appellate court may consider whether a factor relied on by a sentencing court can bear the weight assigned to it under the totality of the circumstances. United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008). Under such an approach, reviewing courts "continue to patrol the boundaries of reasonableness". Id. An examination of the reasons set forth by the district court shows that factors on which it relied cannot bear the weight assigned to them, and that it did not give adequate weight to other compelling factors. Thus, the resulting 240-month sentence was squarely outside of the boundaries of reasonableness.

Clearly, the main thrust of the purpose of the sentence imposed by the court was deterrence, both specific and general. See While this is certainly a valid §3553 (a) factor, the district court's application of it was flawed in several key respects.

The court characterized Dorvee as a "pedophile", and stated that "if he were given the opportunity, he would have sexual relations with a younger boy, ages 6 to 15, in that range." (S 18; A 18). This conclusion was certainly at odds with the report of Dr. Isele, the only psychological evaluation the court had before it. The court did appear to give some recognition to the conclusion of the psychological evaluation that Dorvee, because of his extreme timidity and other problems, would

not initiate such sexual conduct; after doing so, however, it veered off into the realm of rank speculation: "But I don't think he ever initiated that. I think it would have to be situation where that came about. And that presents a danger as far as the Court is concerned, *because no one knows what's going to happen in the future*. And the court has a primary function to protect people in that age group and all persons who might be harmed by that." (S 18; A 136) (emphasis added). The court later continued in this vein: "And who knows when that's not going to erupt into something that he previously said he wasn't going to do. I don't know that for sure." (S 20; 138).

Thus, the district court sentenced Dorvee not because there were facts which supported a conclusion that he would commit future crimes, but because the district court could not be sure that he wouldn't.[12] Such unsupported speculation is an impermissible factor on which to base a sentence and constitutes a denial of due process. United States v. Berry, 553 F.3d 273, 281 (3d Cir. 2009); United States v. Shonubi, 998 F.2d 84, 909 (2d Cir. 1993); United States v. Perrone, 936 F.2d 1403, 1419 (2d Cir. 1991). "The notion that a child pornography defendant has or will

[12] The Tenth Circuit, in indicating its disapproval of using potential future crimes as a sentencing factor, found that such an approach replicated "the scenario from Minority Report, a film that depicts a world in which would-be criminals are apprehended and punished for crimes they are predicted to commit, before they have a chance to actually commit them." United States v. Allen, 488 F.3d 1244, 1260 (10th Cir. 2007)

commit a contact offense is always lurking in the background in these cases. But courts should not assume that a defendant has or will commit additional crimes without a reliable basis." United States v. Phinney, 599 F.Supp. 1037 (E.D. Wisc. 2009) (citation omitted).

This sentencing error in the instant case mirrors that in United States v. Olhovsky, 2009 U.S. App. LEXIS. 7895 (3d Cir. April 16, 2009), amended, 2009 U.S. App. LEXIS 9107 (3d Cir. April 24, 2009):

> Here, the district court imposed a substantial prison term while explaining that it could not predict the future with any certainty[13] and that prior rehabilitative efforts had failed. We have already explained how the latter statement is simply incorrect. *The former explanation is of little assistance because no court can ever be absolutely certain that a defendant will not reoffend. Moreover, that rationale would justify an incapacitative sentence for any defendant regardless of criminal history or the success of any criminal history because the possibility of recidivism can never be reduced to zero.*

Id. at 52 (emphasis added).

In imposing the twenty-year sentence in the instant case, the district court expressly relied on the possession by Dorvee of approximately 300 images of

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[13] The district court in Olhovsky had stated, "He's young and as the psychologists have admitted, they don't know what he's going to do in the future. He has certainly indicated pedophile proclivities in the past and they can't tell me whether or not he will be a pedophile in the future." Id. at 38.

children in his neighborhood which were taken without their knowledge (S 20; A 138).[14] Several salient points were ignored by the district court as it ascribed such great weight to this factor.

First, according to the pre-sentence report, these images were decidedly *non-pornographic:* the children were "walking home from school, playing on a trampoline and riding bikes." Presentence Report at 9, ¶ 18. Second, "Investigators reviewed the evidence in an attempt to determine if any local children were victimized by Dorvee and it appeared to them, at the time, that no local children were victimized by the defendant." Id. In the district court's view, this factor required an incapacitative sentence because "who knows when that's not going to erupt into something that he previously said he wasn't going to do. I don't know that for sure." (S 20). What the district court *could* "know for sure" was that there was not a shred of evidence that Dorvee had harmed or even approached any of the children in the photographs. What the district court could have reasonably assumed, based on the psychological profile provided by Dr. Isele, was that given Dorvee's painfully introverted nature and aversion to human contact, the surreptitious taking of these photographs was simply

[14] "The Court is also taking into consideration the fact that he took photographs of over 300 - - or 300 or less, around 300, neighborhood boys. And his spin on it is because he wanted pictures of their feet. Well, that's what turns him on sexually and that, in my mind, poses a danger when he does that surreptitiously and without their permission and consent. And who knows when that' not going to disrupt into something that he previously says he wasn't going to do. I don't know that for sure." (S 20; A 138).

a pathetic voyeuristic *substitute* for human contact, not a potential prelude to it.

At bottom, the district court's sentence manifests the danger described in Olhovsky: "the court was so offended by the nature of [defendant's] conduct that it sentenced the offense at the expense of determining an appropriate sentence for the offender." Id. at 53. See also United States v. Goff, 501 F.3d 250, 260 (3d Cir. 2007) ("Child pornography is so odious, so obviously at odds with common decency, that there is a real risk that offenders will be subjected to indiscriminate punishment based solely on the repugnance of the crime and in disregard of other Congressionally mandated sentencing considerations.").

Further, the district court in assuming that there was no way of knowing what Dorvee would do in the future seems to have forgotten the stringent conditions which would kick in once Dorvee was released. He would be placed on supervised release for the rest of his life, had to register as a sex offender in any state in which he resided, was prohibited from having any contact with minors, and could not use a computer or other device with online capabilities unless he participated in the computer restriction monitoring program (S 22-26; A 140-44).[15] Thus, this was a case where upon release, defendant would "be subject to rigorous conditions of

[15] These conditions of supervised release exceeded those provided for by the Guidelines. See U.S.S.G. § 5D1.3 (7) (A), (B).

supervised release by federal authorities. Given the terms of his sentence, never will Defendant be a truly free man again." United States v. Irey, 563 F.3d 1223, 1226 (11th Cir. 2009). The rigorous monitoring required by the conditions of supervised release would be sufficient to protect society from any future crimes: "[t]his is particularly true with respect to a conviction for child pornography. It would be quite difficult for any defendant who is complying with a rigorous monitoring program to successfully hide the possession of child pornography. This is in stark contrast to a defendant who poses an immediate risk of violence, for whom the mere threat of ex-post punishment is, by definition, insufficient to protect society." United States v. Stern, 590 F.Supp.2d 945, 958 n. 12 (N.D. Ohio 2008).

The court also ignored the factor raised by defense counsel [(S 12-13; 130-31)] that under the related New York state court conviction, if it was determined that Dorvee was predisposed to engage in future sex offenses, he would be committed civilly. See N.Y. Mental Hygiene Law §§ 10.01-10.11; for examples of civil commitment proceedings, see State v. Kenneth Thompson, (Kings County Supreme Court) New York Law Journal, p. 27, col. 1 (July 10, 2009); State v. Junco, 16 Misc.2d 327 (Washington County Supreme Court 2007).

Thus, the sentencing court's speculation about potential future crimes ignored the exceedingly tight leash Justin Dorvee would be on for the rest of his life.

At various points in the sentencing, the court gave lip service to the mitigating factors in Dorvee's background as raised n the defense psychological evaluation. The court made it clear, however that in the end, it was discounting them when it stated, "He's got bad problems. But society has bad problems too. And the Court cannot allow somebody to be out there creating more." (S 28; A 146). Nowhere in § 3553 (a) is there an indication that the fact that "society has bad problems" should be viewed to cancel out proper consideration of "the history and characteristics of the defendant".

Among the information relevant to Dorvee's history and characteristics was Dr. Isele's conclusion that

> Justin is a lonely, socially isolated, socially anxious, submissive, inadequate young man who is very likely delayed by some 12 or more years in his social and emotional development. He seems to have fixated close to the age at which he had discovered his sexuality and had not had the experiences to move his development forward from that time. Although Justin appears bright from a cognitive standpoint he has no social experience (never had a friend except for his cousin Jeb) and is quite emotionally immature.

Isele Report at 9 (A 70).

The district court erroneously ignored the issue of Dorvee's social and emotional immaturity. In Olhovsky, the Third Circuit faulted the district court for not addressing this factor: "the sentencing court should have either explained the extent

to which, if any Olhovsky's immaturity factored into its sentence of six years imprisonment or explained why it was irrelevant." Olhovsky at 54-55. The Third Circuit also noted that like the defendant in the instant case, Olhovsky's level of psychological maturity was far less than his chronological age.[16] Id. at 55.

Just as did the district court in Olhovsky, [Id. at 55] the district court in the instant case also erroneously ignored the concern expressed in the psychological evaluation as to the deleterious impact of an extended term of incarceration on the defendant. [Isele Report at 10; (A 71)]. The district court in the instant case dealt with this consideration by indulging in some "happy talk" about federal prison: "I think in the federal system the conditions are fairly, fairly safe, and as long as Justin follows the rules and doesn't make trouble, and as I sit here I don't believe he would ever do that in that context, I think he's going to be fine." (S 28; A 146). This is no substitute for an explanation as to why the district court rejected concerns about the impact of a lengthy sentence on Dorvee. A more realistic view of federal incarceration is found United States v. Grober, 595 F.Supp.2d 382, 412 (D.N.J. 2008): "Anyone who thinks five years of incarceration is a slap on the wrist has not visited a federal prison lately. Even under the most humane and enlightened conditions (which are imperiled once fellow inmates learn about why a downloader

[16] Chronologically the defendant in Olhovsky was twenty years old at the time of sentence. Id. at 5. A psychiatrist who treated him characterized him as a developmental "fourteen or fifteen year old who is stumbling toward adulthood." Id. at *31, n. 9.

is serving time), five years is a significant loss of liberty." See also United States v. Rausch, 570 F.Supp.2d 1295, 1309 (D. Colo. 2008) (noting inmate violence against convicted sex offenders in federal prison).

The district court did acknowledge that Dorvee was in need of treatment:

> There are now four institutions across the country, including one in Massachusetts where there's concentration given on the rehabilitation that Justin so badly needs. He needs treatment. There's no question about it. He needs instruction. He needs guidance. He needs contact with other people that will show him that the things he's been concentrating on in the past almost exclusively, four hours a day on a computer, that that isn't right; that's got to be, that's got to be modified, that behavior has to be changed, and I think we've got - - the federal system has got the best shot to do it.

(S 19-20; A 137-38).

18 U.S.C. 3553 (a) (2) (D) requires a sentencing court to consider the need to "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment *in the most effective manner*." (emphasis added). The twenty-year sentence imposed virtually assured that Dorvee would not receive *any* treatment, let alone treatment in the most effective manner. Despite the fact that the court recommended that Dorvee receive treatment at Fort Devens, Dorvee is currently incarcerated at Otisville. In order to participate in the Fort

Devens program[17], an inmate must have a maximum of 24 months and a minimum of twelve months remaining on his sentence. Rausch, 570 F.Supp.2d at 1307. See also Resource Guide to the Federal Bureau of Prisons (2008) at 30 (factors considered in approving prisoners for participation in sex offender treatment program include the amount of time remaining on inmate's sentence). Thus, the district court's "strong recommen[ation]" that Dorvee participate in the sex offender treatment program [(S 22; A 140)] was meaningless. It had imposed a sentence that ensured that Dorvee would not be able to participate in this program for some 18 years. After proclaiming that the federal system offered Dorvee "the best shot" to get treatment and hoping for the best [(S 20; 138)], the district court's sentence precluded such treatment.

Further, according to one district court judge who actually consulted with professionals at the Fort Devens Sex Offender Treatment Program, "in most cases, a sentence of 3-5 years incarceration followed by a lengthy period of supervision (at least 5 years) optimizes the chance that in-custody treatment will achieve its aims." United States v. Goldberg, 2008 Dist. LEXIS 35723 at 25 (E.D. Ill. April 30, 2008). The sentence in the instant case was certainly not informed by such crucial

[17] The sex offender treatment program at Fort Devens is "oversubscribed", "shrinking", and "may not be available to all who need it". United States Goldberg, 2008 Dist. 35723 LEXIS at 13.

considerations.

The district court's failure to properly consider the §3553 (a) factors, taken together with the wildly inflated U.S.S.G. §2G2.2 enhancements, created a "perfect storm" resulting in Dorvee's twenty-year statutory maximum sentence. One judge has explained the manner in which the §2G2.2 enhancements thwart proper consideration of the §3553 (a) factors:

> At the urging of Congress, the Sentencing Commission has amended the guidelines under § 2G2.2 on several occasions over the past two decades, recommending more severe penalties. As far as this Court can tell, these modifications do not appear to be based on any sort of empirical data, and the Court has been unable to locate any particular rationale for them beyond the general revulsion that is associated with child exploitation-related offenses. See Skye Phillips, Protect Downward Departures: Congress and Executive's Intrusion into Judicial Independence, 12 J.L & Pol'y 947, 967-84 (2004) (discussing the history of the guideline modifications made in the PROTECT Act and the fact that the changes were made without notifying or consulting the Sentencing Commission); see also United States v. Detwiler, 338 F. Supp. 2d 1166, 1170-71 (D. Or. 2004) (discussing the Feeney Amendment to the PROTECT Act). Thus, because the guidelines at issue in this case do not reflect the unique institutional strengths of the Sentencing Commission in that they are not based on study, empirical research, and data, this Court, as it did in United States v. Shipley, "affords them less deference than it would to empirically-grounded guidelines." 560 F. Supp. 2d 739, 745-46 (S.D. Iowa 2008); see also Kimbrough [v. United States], 128 S. Ct. at 574 [20o7)] (noting that guideline ranges created

> when the Commission departed from past practices are a less reliable appraisal of a fair sentence).
>
> Congress has created a fifteen-year window, between the statutory minimum (5 years) and maximum (20 years) sentences, within which this Court can penalize a convicted child pornographer. See 18 U.S.C. §§ 2252(a)(2), (b)(1). However, on account of Congress' tinkering with the guidelines, the Commission now recommends that nearly all defendants be incarcerated near the twenty-year statutory maximum. Thus, strict adherence to the sentencing guidelines effective at the time of Defendant's arrest, and even more so to those effective today, would make it difficult for the Court to consider the individualized factors that § 3553(a) requires. Stated differently, the Court would struggle to differentiate between the punishment appropriate for the most and the least egregious acts of child pornographers. As this Court noted in Shipley, the Court must consider the need to avoid unwarranted similarities in the punishment handed down to differently situated defendants. 560 F. Supp. 2d at 745-46. The statute provides a broad range of punishments for the crime Defendant committed. If Congress does not want the courts to sentence individual defendants throughout that range based on the facts and circumstances of each case, then Congress should amend the sentencing statute, rather than manipulate the advisory guidelines, thereby blunting the effectiveness and reliability of the work of the Sentencing Commission. While the Court has consulted the advice of the guidelines, the Court finds this advice is less reliable in the present case than in others where the guidelines are based on study and empirical data.

United States v. Johnson, 588 F.Supp. 997, 1003 (N.D. Iowa 2008).

The unfairness inherent in the U.S.S.G. § G2.2 enhancements has been

described as follows:

> The flaw with U.S.S.G. §2G2.2 today is that the average defendant charts at the statutory maximum, regardless of acceptance of responsibility for Criminal History. As noted by the Guidelines Commission, there are "several specific offense characteristics which are expected to apply in almost every case (*e.g.* the use of a computer, material involving children under the 12 years of age, number of images)." See Amendment 664, U.S.S.G. App. C "Reason for Amendment", (November 1, 2004). The internet provides the typical means of obtaining child pornography resulting in a two-level enhancement. See U.S.S.G. § 2G2.2(b)(6). Furthermore, as a result of internet swapping, defendants readily obtain 600 images with minimal effort, resulting in a five-level increase. See U.S.S.G. § 2G2.2(b)(7)(D). The 2004 Guidelines created an Application Note defining any video-clip as creating 75 images. See U.S.S.G. § 2G2.2(b)(2),(4). Thus one email containing eight, three-second video clips would also trigger a five-level increase. Undoubtedly, as the Commission recognized, some of these images will contain material involving a prepubescent minor and/or material involving depictions of violence (which may not include "violence" per se, but simply consist of the prepubescent minor engaged in a sex act), thereby requiring an additional six-level increase. See U.S.S.G. § 2G2.2(b)(2),(4). Finally, because defendants generally distribute pornography in order to receive pornography in return, most defendants receive a five-level enhancement for distribution of a thing of value. See U.S.S.G. § 2G2.2(b)(3)(B). Thus, an individual who swapped a single picture, and who was only engaged in viewing and receiving child pornography for a few hours, can quickly obtain an offense level of 40. Even after Acceptance of Responsibility, an individual with no prior criminal history can quickly reach a Guideline Range of 210-262 months, where the statutory maximum caps the

sentence at 240 months. See U.S.S.G. § 5G1.1(a).

> The results are illogical; Congress set the statutory range for first time distributors as five to twenty years. Congress could not have intended for the average first time offender with no prior criminal history to receive a sentence of 210 to 240 months. An individual with a Criminal History Category of II faces a Guideline range of 235 to 240 months, and any higher Criminal History score mandates the statutory maximum. These results run contrary not only to Congressional will, but also to a principal Guideline policy -- providing harsher penalties to individuals with more significant Criminal History scores while still retaining an incentive for pleas at all Criminal History levels.

United States v. Hanson, 561 F. Supp. 2d 1004, 1010-11 (E.D. Wis. 2008) (quoting Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines..

An illustration of the above considerations is found in a comparison to instant case with the facts of United States v. Kiderlen, 569 F.3d 358 (8th Cir. 2009). In Kiderlen, the defendant, who was convicted after trial of distributing child pornography [18 U.S.C. § 2252 (A) (a) (1)] had such an extensive criminal record that he had twice the number of points required for Criminal History Category VI, and had admitting to having molested three minor girls; he received the same 240-month statutory maximum sentence as did Dorvee.

The above-discussed problems with the guidelines for child pornography

offenses, and the conflict that they create with proper consideration of the §3353 (a) factors, have led numerous district courts to conclude that a guidelines sentence is not an appropriate sentence. See e.g., United States v. Biermann, 599 F.Supp.2d 1087, 1104-05 (N.D. Iowa 2009); United States v. Phinney, 599 F.Supp.2d 1037 (E.D. Wis. 2009); United States v. Grober, 595 F.Supp.2d 382 (D.N.J. 2008); United States v. Stern, 590 F.Supp.2d 945 (N.D. Ohio 2008); United States v. Johnson, 588 F.Supp.2d 997 (S.D. Iowa 2008); United States v. Rausch, 570 F.Supp.2d 1295 (D.C. Colorado 2008); United States v. Hanson, 561 F.Supp.2d 1004 (E.D. Wis. 2008); United States v. Shipley, 560 F.Supp.2d 739 (S.D. Iowa 2008); United States v. Taylor, 2008 U.S. Dist. LEXIS, 446618 (S.D. N.Y. June 2, 2008)

After considering all of the 3553 (a) factors, the court must impose a sentence that is "sufficient but not greater than necessary" to satisfy the purposes of sentencing. 18 U.S.C. §3553 (a) (2). This so-called "parsimony provision" represents the "overarching" command of the statute. Kimbrough v. United States, 552 U.S. ___, 128 S.Ct. 558, 570 (2007). Although the sentencing in the instant case features a talismanic incantation of this provision (S 27), the sentence imposed runs directly counter to it. The sentence was primarily fashioned to foreclose a vague possible prospective "danger" stemming from the fact that "no one knows what's going to happen in the future." (S 18).

In Koon v. United States, 518 U.S. 81, 113 (1996), the Supreme Court wrote: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." As detailed above, Justin Dorvee was not accorded such consideration, and therefore, his case should be remanded for resentencing.

CONCLUSION

FOR THE REASONS SET FORTH IN POINTS I , II & III THE CASE SHOULD BE REMANDED FOR RESENTENCING.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B).

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