06-4946-cr
To Be Argued By:
ERIC J. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4946-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

CARLOS RIVERA,also known as
Chavin1970, also known as Latin Rican 70,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Kravitz, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment was entered on October 20, 2006. A148. The defendant filed a timely notice of appeal on October 25, 2006, pursuant to Fed. R. App. P. 4(b) (A149, A8), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in denying the defendant's motion to sever for improper joinder under Rule 8(a) of the Federal Rules of Criminal Procedure, or abused its discretion in denying the defendant's motion to sever under Rule 14.

2. Whether the district court erred in denying the defendant's motion for judgment of acquittal on Count Four on the grounds of insufficient evidence, or abused its discretion in denying the defendant's motion for a new trial on Count Four based on erroneous jury instructions.

3. Whether a life sentence for production of child pornography after a previous conviction for first-degree sexual assault of a minor is so grossly disproportionate as to constitute cruel and unusual punishment under the Eighth Amendment.

4. Whether the district court correctly followed Supreme Court and Second Circuit precedent in sentencing the defendant based on a prior conviction not alleged in the indictment or found by a jury.

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Preliminary Statement

The defendant was convicted by a jury on five counts related to a pattern of sexual abuse, exploitation, and molestation of minor boys as young as thirteen during a four-month period in 2004. Because of the defendant's previous conviction for first-degree sexual assault, which involved hundreds of sexual assaults of minors as young

as 7, he was sentenced to a mandatory term of life in prison under 18 U.S.C. § 3559(e).

The defendant now appeals a variety of issues including the district court's decision not to sever the charges, insufficient evidence on Count Four, the jury instructions on Count Four, and the constitutionality of his sentence. The district court did not abuse its discretion in declining to sever because the charges were properly joined, were similar in nature, and were part of a common scheme or plan. Similarly, the photographs presented at trial were more than sufficient evidence that the defendant produced sexually explicit photographs of a minor in violation of 18 U.S.C. § 2251(a). Moreover, in light of the nature of the defendant's crimes and his prior conviction for sexually abusing minors, a life sentence was appropriate, and in any event did not run afoul of the Constitution's prohibition on cruel and unusual punishment.

Statement of the Case

On October 12, 2005, a grand jury returned an indictment charging Carlos Rivera with engaging in sexual intercourse with a minor boy, age fifteen, after using a computer to entice or coerce him and with possession of child pornography. Subsequent superseding indictments were returned on March 21, 2006, and April 19, 2006, adding charges related to the coercion and enticement of an additional victim, a thirteen-year-old boy, production of child pornography relating to yet another minor, and interstate travel for the purposes of illicit sexual conduct with a minor.

The trial took place on July 10 and 11, 2006. The jury returned a verdict of guilty on all counts on July 11, 2006. On October 24, 2006, the district court sentenced the defendant to 40 years in prison for each of Counts One and Two, the coercion charges; 40 years for Count Three, the interstate travel charge; life imprisonment for Count Four, the production of child pornography; and 20 years for Count Five, the possession of child pornography. A147. The life sentence was mandatory under 18 U.S.C. § 3559(e) based on the defendant's previous state court conviction for first-degree sexual assault of a minor. The defendant filed a notice of appeal on October 25, 2006. Rivera is currently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Trial Evidence

1. Brian

The incidents which led to Rivera's trial and conviction began in 2004 when the defendant started grooming Brian,[1] the first of four of his victims to testify at trial. GSA 5. Brian met the defendant in an internet chat room, where one of the first things the defendant asked Brian was how old he was. GSA 6. Brian told the defendant he was 12. As the grooming progressed, the defendant

[1] Because the victims were minors, only their first names were given orally at trial. The victims wrote their full names on pieces of paper, which were made court exhibits and placed under seal.

repeatedly masturbated on a web cam for Brian to see. GSA 7. The defendant also sent Brian pictures of other minors he claimed to have been with and told Brian he was jealous of the other people Brian was talking to online. *Id.*

After a few months, Brian, who was from Nebraska, mentioned to the defendant that his family was taking a trip to Washington, D.C., to visit relatives. The two discussed the possibility of meeting during this trip to have sex. GSA 8. The defendant drove from his home in Connecticut and booked a room at the hotel at which Brian's family was staying in Virginia. He left a trail of post-it notes from the hotel elevator to his room so that Brian could find him. GSA 9. The defendant later met Brian in the hotel lobby while Brian's family was having breakfast there, and gave Brian the key to his room. GSA 10-11. After Brian returned the key to the defendant by sliding it under the door, Brian noticed that the defendant began leaving his hotel door slightly open. GSA 11.

Seeing the slightly open door on one occasion, Brian entered the defendant's room. GSA 11-12. When Brian told the defendant that he was nervous and scared, the defendant replied that he would "make it a quick one." GSA 12. The defendant told Brian to take off his clothes and lay down on the bed. GSA 12-13. He then administered an enema to Brian; he later told an investigator that he did so because "he didn't like shit on his cock." GSA 14, 46. The defendant and Brian then engaged in oral and anal sex. GSA 15. Brian was 13 at the time. GSA 8.

Brian later returned to the defendant's hotel room to say goodbye. GSA 16. At this point the defendant appeared upset and later remarked that he "didn't even get the chance to come inside [Brian]" and that Brian was "a total waste of time and money." GSA 24, 77. Brian's mother later found a note he wrote to a friend explaining what had happened. GSA 17.

After receiving a report from Brian's mother, Nebraska State Trooper Scott Haugaard began posing as Brian on the internet. GSA 19. The defendant's sexually explicit conversations with Officer Haugaard posing as Brian revealed details of the defendant's encounter with Brian and this information was forwarded to authorities in Virginia. GSA 20-28, 98-100. During an interview with law enforcement from Virginia, the defendant admitted meeting Brian and described how he engaged in sexual activity with the minor. GSA 29-50. The detective provided the defendant with his *Miranda* rights, and the defendant indicated that he wished to waive those rights and proceed with the interview. However, because the defendant did not wish to sign a written waiver of those rights, the detective wrote "refused" on it. GSA 39-40. Subsequent investigation identified numerous other victims, several of whom testified at trial.

2. Garrett

The defendant began sending instant messages to Garrett in the latter part of 2004 after meeting him in an internet chat room. GSA 52. As with Brian, the conversations were largely of a sexual nature, and the defendant and Garrett began to discuss meeting for the

purposes of sex. GSA 53. Garrett was 14 at the time, although he had told the defendant that he was 15. GSA 58-59.

After a week or two of chatting, including more instances of the defendant masturbating in front of his web cam, the defendant and Garrett arranged a meeting. GSA 54-55. Garrett, not yet old enough to drive, rode his bike to meet the defendant. However, they were unable to get a hotel room and Garrett refused to go with the defendant to his house. GSA 57.

About a week later, they agreed to meet in the woods near Garrett's house. GSA 56. The defendant asked Garrett to clean himself prior to the meeting, and when they met, they engaged in anal sex, with the defendant penetrating Garrett. GSA 57.

A few weeks later, the defendant gave Garrett money to buy a paintball gun for his birthday, saying "I told you if you were my fuck buddy, your boyfriend, whatever, LOL,[2] I would treat you like a prince." GSA 59. The defendant also later bragged about having taken Garrett's virginity. GSA 60.

Garrett eventually became uncomfortable with the situation involving the defendant and refused to chat with him anymore. When Garrett told the defendant that he would not meet with him again for sex, the defendant became angry and threatened to call Garrett's mother and tell her what happened and to remain outside Garrett's

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[2] "LOL" stands for "laugh out loud."

house waiting for him. GSA 61. Garrett told him that if he were to do either of those things he would call the police, at which point the defendant asked him not to do that and calmed down. *Id.*

3. David

David was 16 when he began chatting with the defendant. David agreed to meet the defendant to have sex, and the defendant drove from Connecticut to Massachusetts and came to David's house around midnight, when David's parents were sleeping. GSA 63. David snuck out of the house and the defendant took him to a hotel. *Id.* Once there, the defendant and David took a shower together, before moving to the bed. GSA 64.

The defendant then had David lie down naked on the bed, and had David pose for several pictures. GSA 64-65. These poses included having David on his stomach with his buttocks raised, a pose fully displaying David's genitals, and a picture of David in a Mouseketeer hat, which he testified belonged to the defendant. GSA 65-66. Six of these photos were introduced in conjunction with Count Four of the indictment, and in finding the defendant guilty on Count Four the jury specifically found four of the photos to depict sexually explicit conduct. A92; GSA 85.

After taking the photographs, the defendant and David engaged in oral sex. They tried twice to have anal sex, with the defendant penetrating David. GSA 67. David was nervous, said that it hurt, and asked the defendant to stop. *Id.*

4. Michael

Michael was 16 when he met the defendant in an online chat room. The two chatted about sex, and as with the other victims, Rivera raised the idea of meeting for sex. GSA 69. The defendant sent Michael nude pictures of himself, and asked Michael to take similar ones of himself, including nude photographs of Michael's rear. GSA 70-71. Michael did so and sent them to the defendant over the internet. GSA 71.

While Michael initially said he would meet the defendant, he later changed his mind. GSA 69. When Michael told the defendant as much, the defendant became angry and threatened to send Michael's pictures to the other students at his school. GSA 71.

5. Computer Evidence

Special Agent Jeff Rovelli of the FBI testified about a forensic examination he conducted of the defendant's laptop. This examination revealed additional evidence about the defendant's pattern of sexual exploitation of minors. Located on the defendant's computer was a list the defendant maintained of boys he had sex with, including entries next to each name for "age," "year," "virgin," and "fucked." GSA 75-76, 92. The file name of the document was "scores.doc." GSA 75. The government also introduced a handwritten list seized from the defendant's house with largely the same information on it. GSA 74-76, 90. Both lists included Garrett and Brian.

Moreover, in an online "chat" with another minor, the defendant described the time period shortly before his arrest: "I've had a very good two months. I met and fucked five virgin guys. . . . I fucked them good. LOL." GSA 77. Rivera then proceeded to support his claim by providing the first name and age of Garrett (15), Brian (13) and others, as well as a description of them. *Id.* (Rivera had not yet encountered David, the minor-victim in Count Four.)

Special Agent Rovelli also recovered pornographic pictures of minors on the defendant's laptop, including the pictures the defendant took of David and photographs that Garrett and Michael had taken for him and sent to him. GSA 79-83.

The forensic analysis uncovered a template blackmail letter on the defendant's computer which read:

> Hey _____ I decided to blackmail you. U WILL have sex with ME in real LIFE again and you WILL let me make a PORN video with you. IF you don't do as I say and let me do what I want, I'll write to your PARENTS at this address _____and I will let them know that you are GAY. I will also send them info about your online "activities," chats, and will also tell them where they can find more info. NOTE:If you banish from online without giving in to my demands I will still do what I just said above. U can't hide. U will be the loser.

GSA78-79, 95. The file name of the document was "BlackMail.doc." *Id.*

After deliberating, the jury found defendant guilty on all five counts.

B. Sentencing

Section § 3559(e) of Title 18 provides as follows:

> A person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim, unless the sentence of death is imposed.

18 U.S.C. § 3559(e). The defendant was previously convicted in Connecticut state court on May 3, 1996, of first-degree sexual assault in violation of Conn. Gen. Stat. § 53(a)-70(a)(1). The defendant pled guilty to sexually assaulting his niece, who the defendant admitted in his plea colloquy was either 11 or 12 years old. GSA 112. During a transcribed police interview related to that conviction, the defendant admitted that he first began assaulting the girl when she was 7 or 8 and that he may have assaulted her 100 times before being arrested. GSA 112; *see also* Def. Br. at 11, n.22.

Defendant's confession in the 1996 case also included details about his sexual assault of two minor boys. One of these boys was only 7 when the assaults began, and there may have been as many as 500 incidents before defendant's arrest. GSA 113. After years of abuse by the

defendant, one of the boys committed suicide. *Id.*; A139. As in this case, the defendant kept a log of his activities and used a similar pattern of favors and punishments to persuade his victims. He would promise the young boys gifts in exchange for sex. As the minors grew older and more reluctant, the defendant threatened to reveal that they were gay in order to force them to continue to have sex with him. GSA 113.

The district court found that the defendant did have a previous conviction for a sex crime in which a minor was the victim based on a certified copy of the Connecticut conviction and the transcript of the plea colloquy. Sent. Tr. 22-23. He then remarked that "adjectives really are inadequate to describe the conduct that was proved beyond a reasonable doubt at the trial. Words like 'appalling' and 'depraved' and 'horrific' really don't do justice . . . . It was premeditated. It was preying on our most vulnerable, our youth." A138.

The district court took note of an additional chat transcript recovered from the defendant's laptop, showing more of the defendant's actual threats against victims.

> [Mr. Rivera]: I used to be in the gang called "Latin Kings" a coast to coast gang . . . I fuckin got connectin. I can screw you and terrorize you beyond your fucking imagination . . . . motherfucker
>
> . . .
>
> [minor]: I'm going to stop this nonsense . . . I'll tell my parents what's going on

and come out to them . . . and tell them you are stalking me

. . .

[minor]: then after my family accuse[s] you . . . I can commit suicide and end my happy life

. . .

[Mr. Rivera]: that I will love to read in the papers

[Mr. Rivera]: how are you planning to kill your pittiful self?

[Mr. Rivera]: so ..... how are you gonna do it?

[minor]: you don't need to know

[Mr. Rivera]: I can buy you a gun . . . it's faster

[Mr. Rivera]: anyway . . . u better kill your fucking self after your family accuses me, cuz after they do I'll send someone after your ass to do it for you if you don't do it yourself

GSA 114.

The district court agreed with the government that the public needed to be protected from the defendant, A139, and it imposed a life sentence on the defendant on Count Four pursuant to 18 U.S.C. § 3559(e). A140-41. The defendant was also sentenced to 40 years each for Counts One, Two, and Three, and 20 years for Count Five, all to run concurrently with the life sentence imposed on Count Four. A147.

SUMMARY OF ARGUMENT

I. The district court was correct to deny the defendant's severance motion because joinder was originally proper under Rule 8. The charges against the defendant were similar in that they each related to his repeated sexual exploitation of minors over a short span of approximately four months. Furthermore, joinder was proper since each of the charges stemmed from a common scheme to sexually exploit these minors during that time period in 2004. The court issued a cautionary instruction to the jury to minimize any prejudice that could have resulted from trying the counts together, and in any event almost all of the evidence offered by the government at the trial in this case would have been admissible in separate trials under Rule 404(b) (other crimes and bad acts) and Rule 414 (evidence of similar crimes in child molestation cases). Moreover, for the same reasons, the district court acted well within its discretion in denying the defendant's motion for severance under Rule 14.

II. The district court properly denied the defendant's Rule 29 and Rule 33 motions, as there was sufficient evidence for a jury to find that the photographs he took of the minor-victim depicted sexually explicit conduct and therefore violated 18 U.S.C. § 2251(a). Furthermore, the jury was properly instructed on the so-called *Dost* factors for evaluating whether the photographs at issue depicted a "lascivious exhibition of the genitals." The jury acted well within reason in applying these factors to find that the photographs were a lascivious exhibition. The *Dost* factors have been upheld in numerous other circuits as appropriate guidelines in evaluating whether a depiction is

lascivious under 18 U.S.C. § 2256(2)(A), and should be affirmed here.

III. The defendant claims that his life sentence violates the Eighth Amendment, but did not raise this claim in the district court. This Court has previously declined to address constitutional challenges that were not raised at the trial level, and should decline to do so here. Should this Court choose to address the challenge, it is clear that the defendant's sentence of life in prison was not so grossly disproportionate as to constitute unconstitutionally cruel and unusual punishment. The Supreme Court has previously upheld life sentences for recidivists whose triggering crime was much less severe. Those cases in which courts have found prison sentences to be unconstitutional involved nonviolent crimes against property, crimes which are in stark contrast to the defendant's crime here. In addition to not reaching the threshold of "gross disproportionality" under *Rummel v. Estelle*, 445 U.S. 263 (1980), the defendant's sentence also satisfies each of the proportionality tests of *Solem v. Helm*, 463 U.S. 277 (1983).

IV. The defendant's challenge to *Almendarez-Torres* should be rejected. The Supreme Court and this Court have repeatedly held that recidivism is a sentencing factor that need not be alleged in a charging document or found by a jury.

ARGUMENT

I. THE DISTRICT COURT DID NOT COMMIT ERROR OR ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S SEVERANCE MOTION

A. Relevant Facts

The defendant moved to sever Count One (enticement of Garrett), Count Four (production of child pornography involving David), and Count Five (possession of child pornography, including photographs of Garrett and David) so that they could be tried individually and separately from Counts Two and Three, which alleged enticement and interstate travel relating to Brian, respectively. The defendant argued that the charges were not properly joined under Rule 8 and also requested that the district court exercise its discretion and sever the counts under Rule 14.

The district court denied the motion to sever. A16-19. The court found that joinder was proper under Rule 8 because all five counts related to a four-month period in which the defendant allegedly engaged in the sexual exploitation of minors. A18. The district court concluded that all the crimes alleged were of a similar character, and arguably represented a common scheme or plan. *Id.* The district court also denied the motion to sever under Rule 14(a) for largely the same reasons. *Id.* The court also noted that although the defendant suggested that joinder might prejudice his right to testify on certain counts and not on others, the defendant never made a particularized showing of the testimony he would give on certain counts

and his reasons for remaining silent on others. *Id.* ("an unexplained assertion of this sort is not sufficient to support severance").

B. Governing Law and Standard of Review

Rule 8 of the Federal Rules of Criminal Procedure allows for joinder of charges if any one of three conditions is met. Separate charges can be joined if they "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a). This Court has previously defined "similar" as "(n)early corresponding; resembling in many respects; somewhat alike; having a general likeness." *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980) (Friendly, J.) (citing *Webster's New International Dictionary* (2d ed.)). It has also interpreted Rule 8 to imply that "[j]oinder is proper where the same evidence may be used to prove each count." *United States v. Blakney*, 941 F.2d 114, 116 (2d Cir. 1991). Rule 8(a) allows for joinder of claims as long as they "have sufficient logical connection." *United States v. Ruiz*, 894 F.2d 501, 505 (2d Cir. 1990).

An appeal claiming error based on the denial of a motion for improper joinder under Rule 8(a) must satisfy a two-pronged test. First, the defendant must show that the joinder was not proper. Second, he must further show that the misjoinder was prejudicial to him. *Id.* This Court reviews "the propriety of joinder *de novo* as a question of law." *United States v. Tubol*, 191 F.3d 88, 94 (2d Cir. 1999).

The denial of a motion under Rule 14 of the Federal Rules of Criminal Procedure is reviewed for abuse of discretion. "A motion for severance under Rule 14 is addressed to the discretion of the trial court, and the sound exercise of that discretion is 'virtually unreviewable.'" *United States v. Arocena*, 778 F.2d 943, 949 (2d Cir. 1985) (citing *Opper v. United States*, 348 U.S. 84 (1954), and *United States v. Sotomayor*, 592 F.2d 1219, 1228 (2d Cir. 1979)). Furthermore, a "defendant must demonstrate that the denial of the motion caused substantial prejudice, that is, prejudice so severe as to amount to a denial of a constitutionally fair trial." *United States v. Diaz*, 176 F.3d 52, 102 (2d Cir. 1999) (citing *United States v. Cardascia*, 951 F.2d 474, 482 (2d Cir. 1991)) (internal quotation marks omitted).

C. Discussion

Joinder was proper in this case because the charges were all similar and because they stemmed from the defendant's common scheme of sexual exploitation of minors over a four-month period. The government proffered to the district court in connection with the defendant's motion to sever that the offenses were part of a common scheme by Rivera to sexually exploit minors. The government's proffer, and its proof at trial, included a handwritten list and a matching computer list that the defendant maintained of individuals with whom he had sex. The list contained the names of Garrett (Count One), Brian (Counts Two and Three), and others; the age of each; the year Rivera met them; whether each was a virgin; and the number of times Rivera had sex with them. GSA 74-76. The government also introduced an on-line

"chat" in which Rivera, boasting of his sexual exploitations, stated that he has "had a very good 2 months, I met and fucked 5 virgin guys since I met you." Rivera then proceeded to support his claim by providing the first name and age of Garrett (15), Brian (13), and others, as well as a description of them. GSA 77. (Rivera had not yet encountered David, the minor-victim in Count Four.) Unfortunately, these were not idle boasts, but part of Rivera's ongoing scheme to exploit minors for his sexual gratification. Under these circumstances, joinder of the charges was clearly proper.[3]

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[3] The defendant notes, without further argument or citation of case law, that "the indictment did not allege any plan or scheme of which the charged offenses were parts," and that a court should not infer "from the timing or the general nature of the charged offenses that they arose from any such requisite common scheme or plan." Def. Br. at 15. But a district court is not limited to the face of the indictment in assessing the propriety of joinder. It may properly take into account the government's proffer of what the evidence at trial will show with respect to a common scheme or plan. *See United States v. Halliman*, 923 F.2d 873, 883 (D.C. Cir. 1991) ("the government need not demonstrate the propriety of its joinder decisions on the face of the indictment . . . . Rather, the government need only present evidence before trial" sufficient to establish that joinder is proper); *United States v. Dominguez*, 226 F.3d 1235, 1241 (11th Cir. 2000) ("It is enough when faced with a Rule 8 motion, the prosecutor proffers evidence which will show the connection between the charges."). *But see United States v. Chavis*, 296 F.3d 450, 458-60 (6th Cir. 2002) (holding that the propriety of joinder must be determined from the face of the indictment). Even if the Rule 8(a) inquiry (continued...)

As the Eleventh Circuit has held in affirming joinder of child pornography charges with charges of sexual activity with a minor, there is a close relationship between child pornography and illegal sexual activity with minors. *See United States v. Hersh*, 297 F.3d 1233, 1242 (11th Cir. 2002). In this case, the defendant took the pornographic pictures of one of the victims during the same encounter where they had sex. Furthermore, this victim was lured to the hotel in the same manner in which the defendant's other victims were enticed, via chatting with the defendant over the internet. Each of the victims was groomed in a similar way after the defendant first contacted them online. He moved their conversations from sexual subjects to the topic of a meeting, easing the victims' fears and reassuring them.

Because joinder was proper, the court need not address the second prong of the test, whether any misjoinder was prejudicial to the defendant. However, the defendant's objections of prejudice fail as well. "When the accused's conduct on several separate occasions can properly be examined in detail, the objection disappears, and the only consideration is whether the trial as a whole may not become too confused for the jury." *Werner*, 620 F.2d at

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[3] (...continued)
were limited to the face of the indictment, the district court could have reasonably inferred a common scheme or plan from the nature of the charges and the fact that the indictment alleged the offenses to have occurred in a four-month time span. Moreover, the indictment alone clearly showed the categorically similar character of the offenses, which is sufficient to find joinder proper under Rule 8(a).

929 (quoting *United States v. Lotsch*, 102 F.2d 35, 36 (2d Cir. 1939) (Hand, J.)). Each of the charges against the defendant here could easily be examined individually, and there is no claim that the trial as a whole was confusing to the jury.

The defendant argues three ways in which joinder was prejudicial. He first argues that "the jury may consider that a person charged with doing so many things is a bad man who must have done something, and may cumulate the evidence against him." Def. Br. 17 (quoting Wright, *Federal Practice and Procedure* § 222 at 778). This danger is present whenever joinder occurs, but is often outweighed by the benefit of judicial economy. *Werner*, 620 F.2d at 928. To avoid any adverse effects from joinder, cautionary instructions are often issued to the jury, and such an instruction was given in this case:

> The indictment contains a total of five counts. . . . Each count charges Mr. Rivera with a separate crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each of them. Whether you find Mr. Rivera guilty or not guilty as to one offense should not affect your verdict as to any other offense charged.

A51.[4]

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[4] The Court also instructed the jury as follows:

> There has been some evidence received during the trial that Mr. Rivera may have engaged in other conduct which was similar in nature to the acts charged

(continued...)

The defendant also argues that prejudice may have occurred because evidence of one offense may have been used to convict on another charge for which it would not be admissible. However, as the district court noted, because Federal Rule of Evidence 404(b) allows for the introduction of other crimes and bad acts and Federal Rule of Evidence 414 allows for evidence of other incidents of child molestation to be admitted in a trial where the defendant is charged with child molestation, "evidence regarding certain charges in the Superseding Indictment may well [have been] admissible on other charges." A19. The defendant could not have been prejudiced by evidence that would have most likely been admitted anyway in

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[4] (...continued)
in the indictment. In a criminal case in which Mr. Rivera is accused of child molestation, evidence of Mr. Rivera's commission of another offense or offenses of child molestation is admissible and may be considered for its bearing on whether Mr. Rivera committed the offense for which he is charged in the indictment.

However, evidence of another offense on its own is not sufficient to prove Mr. Rivera guilty of the crimes charged in the indictment.

As you consider this evidence, bear in mind at all times that the Government has the burden of proving that Mr. Rivera committed each of the elements of the offenses in the indictment as I have explained them to you.

I remind you that Mr. Rivera is not on trial for any act, conduct or offense not charged in the indictment.

A47-48.

separate trials. *See United States v. Amato*, 15 F.3d 230, 236 (2d Cir. 1994) (joinder proper where evidence was overlapping); *United States v. Blakney*, 941 F.2d 114, 116 (2d Cir. 1991) ("Joinder is proper where the same evidence may be used to prove each count.").[5]

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[5] The defendant mistakenly argues that the government in this case increased "the danger of spillover" evidence by introducing evidence that the defendant had made "certain threatening comments" to the minor-victims. Def. Br. at 17. Two minor-victims did in fact testify that the defendant threatened them when they informed him that they would not agree to meet him for sex, but it was admissible testimony that was not used for any improper purpose.

Garrett testified that when he told the defendant that he was not willing to meet again for sex with him, the defendant threatened him by saying that he would call Garrett's mom and explain what had been going on, or sit in front of Garrett's house and wait for him. GSA 61. Garrett told him that if he were to do either of those things he would call the police, at which point the defendant asked him not to do that and calmed down. *Id.*

Michael testified that when he told the defendant that he did not want to meet for sex, the defendant got angry and "blackmailed me and said he was going to send those pictures I sent him to another student that goes to my school." GSA 71. Rivera knew the town in which Michael lived and the high school he went to. GSA 71-72.

The defendant never objected to the testimony of either Garrett or Michael in this regard. Rather, he objected only to two documents that the government sought to introduce. GSA 2. One of those documents was a blackmail template set forth

(continued...)

Lastly, the defendant argues that joinder creates the danger that a defendant may wish to testify with regard to one of the charges, but remain silent on another. But the defendant never made a particularized showing in the district court, and does not even offer one in hindsight to this Court, that he had "both important testimony to give concerning one count and strong need to refrain from testifying on the other." *Baker v. United States*, 401 F.2d 958, 977 (D.C. Cir. 1968). As the district court correctly found under this Court's case law, "[a]n unexplained assertion of this sort is not sufficient to support severance." A18 (citing *Werner*, 620 F.2d at 930 ("It is settled that a mere unexplicated assertion of [prejudice] is

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[5] (...continued)
above at pages 9-10. GSA 78-79, 95. The other was a template in which the defendant advised a minor's parents that their son was gay. GSA 105. In response to the Court's inquiry as to whether the objection would still stand if one or more witnesses were to testify that they had to continue to do things with the defendant or their parents would be notified, defense counsel agreed that the documents would be corroborative of that testimony. GSA 3. Suffice it to say that notwithstanding the defendant's claim in his brief that this evidence was somehow improper and added to the so-called "spillover" effect, it did no such thing and was in no way improper.

The defendant's other claim – that the government suggested that the jury should find the defendant guilty of producing child pornography under Count Four based on evidence introduced to prove other counts (Def. Br. at 17) – is addressed in connection with the defendant's argument on the jury instructions and closing argument.

not enough.")); *see also United States v. Fenton*, 367 F.3d 14, 22 (1st Cir. 2004) (same).

II. THE DISTRICT COURT DID NOT COMMIT ERROR IN DENYING THE DEFENDANT'S RULE 29 MOTION OR ABUSE ITS DISCRETION IN DENYING HIS RULE 33 MOTION

A. Relevant Facts

Count Four of the Second Superseding Indictment charged the defendant with production of child pornography in violation of 18 U.S.C. § 2251(a) based on the photographs that the defendant took of David, as described above. The district court instructed the jury that the government was required to prove the following elements beyond a reasonable doubt:

> First, that David, the subject of the visual depictions, was under the age of eighteen (18);
>
> Second, that Mr. Rivera employed, used, persuaded, induced or enticed David, the subject of the visual depiction, to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and
>
> And, third, that the visual depiction was actually transported in interstate commerce, or that the defendant knew or had reason to know that the visual depiction would be transported in interstate commerce, or that the visual depiction was

> produced using materials that had been mailed, shipped or transported in interstate or foreign commerce.

A91, A68-69. On the second element, the district court instructed the jury that "sexually explicit conduct" is defined as including a "lascivious exhibition of the genitals or pubic area of any person." A70, A91. *See also* 18 U.S.C. § 2256(2)(A)(v). The district court went on to instruct the jury regarding the phrase "lascivious exhibition" in the following way:

> The term lascivious exhibition means a depiction which displays or brings to view to attract notice to the genitals or pubic area of minors in order to excite lustfulness or sexual simulation in the viewer.
>
> Not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In deciding whether a particular depiction constitutes a lascivious exhibition which displays or brings to view to attract notice to the genitals or pubic area of minors in order to excite lustfulness or sexual stimulation in the view, you should consider the following questions:
>
> Whether the focal point of the visual depiction is on the minor's genitals or pubic area, or whether there is some other focal area;
>
> Whether the setting of the visual depiction makes it appear to be sexually suggestive, for

example, in a place or pose generally associated with sexual activity;

Whether the minor is displayed in an unnatural pose or in inappropriate attire, considering the age of the minor;

Whether the minor is fully or partially clothed or nude, although nudity is not in and of itself lascivious;

Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

The weight or lack of weight that you decide to give to any one of these factors is for you to decide. You must make this determination based on the overall content of the visual depiction. You may not find that these depictions are lascivious merely because you may be upset by them or merely because you find them to be in bad taste or offensive.

Your determination must focus on the depictions themselves and the intended effect on the viewer. You may not judge the depictions based on any actual effect on the viewer.

A70-71. These instructions, commonly known as the *Dost* factors, were based on factors first articulated in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom.*, *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). A97. The defendant objected generally

to the use of the *Dost* factors in the jury instructions, but he never asked the district court to define who the "viewer" was for purposes of the court's instructions. A98. The jury asked no questions about these instructions during deliberations.

The jury returned a verdict of guilty on Count Four. In special interrogatories accompanying their guilty verdict on Count Four, the jury was asked to state which of the six government exhibits constituted visual depictions of sexually explicit conduct, as defined above. The jury found Government Exhibits 59(d), 59(f), 59(g) and 59(i) to be visual depictions of sexually explicit conduct, and Government Exhibits 59(e) and 59(h) not to be visual depictions of sexually explicit conduct. A92; GSA 87.

B. Governing Law and Standard of Review

A defendant claiming that a count of conviction was not supported by sufficient evidence carries "a heavy burden." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998). Such a motion under Rule 29 should be granted only "if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" when "consider[ing] the evidence in the light most favorable to the government, [and] crediting every inference that the jury might have drawn in favor of the government." *Morrison*, 153 F.3d at 49; *see also Jackson*, 335 F.3d at 180. This Court reviews a district court's decision on a Rule 29(c) motion *de novo*, and all evidence must be viewed in the light most favorable to the

government. *See, e.g.*, *United States v. Irving*, 452 F.3d 110, 117 (2d Cir. 2006); *Jackson*, 335 F.3d at 180.

Rule 33 provides that the district court may grant a new trial upon the defendant's motion "if the interest of justice so requires." A trial court "exercises 'broad discretion' in ruling on a new trial motion." *United States v. Canova*, 412 F.3d 331, 348 (2d Cir. 2005) (quoting *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001)). The ultimate question for the district court in ruling on a Rule 33 motion is "whether letting a guilty verdict stand would be a manifest injustice." *Ferguson*, 246 F.3d at 134. A manifest injustice is a "real concern that an innocent person may have been convicted." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992); *see also Canova*, 412 F.3d at 349. This Court reviews the district court's decision on a new trial motion "deferentially, reversing only for abuse of discretion." *Canova*, 412 F.3d at 348.

"'A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" *United States v. Naiman*, 211 F.3d 40, 50-51 (2d Cir. 2000) (quoting *United States v. Walsh*, 194 F.3d 37, 52 (2d Cir. 1999)). Even if one portion of a court's instructions is potentially misleading, not every such error warrants reversal, because "[r]eversal is required only if the instructions, viewed as a whole, caused the defendant prejudice." *Naiman*, 211 F.3d at 51 (citing *Walsh*, 194 F.3d at 52).

The test for whether a depiction is "lascivious" is less strict than the test for obscenity. *See United States v.*

Villard, 885 F.2d 117, 122 (3d Cir. 1989). Although this Court has not had a chance to comment on the *Dost* factors, other circuits have found them to be a useful, though not a definitive or exhaustive, list of factors or guideposts in assessing whether an image is "lascivious" under the statute. *See United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999); *United States v. Amirault*, 173 F.3d 28, 31 (1st Cir. 1999); *United States v. Knox*, 32 F.3d 733, 747 n.10 (3d Cir. 1994); *United States v. Wolf*, 890 F.2d 241, 244-46 (10th Cir. 1989); *United States v. Rubio*, 834 F.2d 442, 448 (5th Cir. 1987) (affirming use of factors without citing *Dost*); *Wiegand*, 812 F.2d at 1244; *see also United States v. Moore*, 215 F.3d 681, 686 (7th Cir. 2000) (discussing *Dost* factors under Illinois law). Several district courts in this circuit have also used the *Dost* factors. *See United States v. Gaynor*, 2006 WL 3254479 (D. Conn. Nov. 9, 2006); *United States v. Dauray*, 76 F. Supp. 2d 191, 195-96 (D. Conn. 1999), *rev'd on other grounds*, 215 F.3d 257 (2d Cir. 2000).

The question of whether "a given depiction is lascivious is a question of fact for the jury." *United States v. Frabizio*, 459 F.3d 80, 85 (1st Cir. 2006); *see also United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987); *United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001) ("[T]he question whether materials depict 'lascivious exhibition of the genitals,' an element of the crime, is for the finder of fact.").

Because the defendant failed to object below about the issue of the "viewer" in the jury instructions, any error in that instruction must rise to the level of "plain error," as the defendant concedes. Def. Br. at 26 n.37. An error not

preserved by timely objection must have been "so 'plain' [that] the trial judge and prosecutor were derelict in countenancing it." *United States v. Frady*, 456 U.S. 152, 163 (1982); Fed. R. Crim. P. 52(b).

C. Discussion

1. The District Court Properly Denied the Defendant's Motion for Judgment of Acquittal

There is simply "no doubt," as the district court concluded, that a rational jury could find that Exhibits 59(d), (f), (g) and (i) were depictions of "lascivious exhibitions of the genitals or pubic area" of David. A93. A rational jury could (and the jury here clearly did) view the four depictions as follows:

> *Government Exhibits 59(d) and 59(g)*: These depictions show the minor laying on his stomach on a bed, naked, with a pillow tucked up under his arms and chest and his face facing down at the bed (a place generally associated with sexual activity). The minor's legs are spread in an unnaturally wide position – a pose clearly suggestive of a willingness and readiness to engage in anal sex. The [minor's] genitals are in clear view and, along with his buttocks, are the focal point of the depictions. The photographs are taken from the perspective of a person about to engage in, or desirous of engaging in, anal sex with the subject of the photo.

> *Government Exhibit 59(f)*: This depiction shows the minor laying naked on his stomach on a bed, a place generally associated with sexual activity. The minor's legs are spread. The minor's genitals are in view and along with his buttocks are at the center of the photograph and can reasonably be said to be the focal point. The pose the minor is in is suggestive of anal sex.
>
> *Government Exhibit 59(I)*: The minor is [lying] naked on his back on a bed reclining the right side of his upper body on his right elbow and looking at the camera. The minor's fully-exposed genitals are at the center of the photograph and indeed are the focal point of the depiction. The pose and setting on the bed is suggestive of sexual[] activity – specifically that the minor has either engaged in or is about to engage in sexual activity.

A94. The district court found that these descriptions "accurately and properly capture[d] the depictions in the light most favorable to the jury's verdict." A94. A rational jury could clearly find that photographs containing such depictions were "lascivious exhibitions" under the statute.

Even the defendant acknowledges that "[a]ll four images depict the minor naked on a bed and all show, to varying extent, his genitals." Def. Br. at 23. He also concedes that "three of the pictures show the subject on his stomach with legs spread and genitals partially visible (Exhibits 59(d)(f) and (g)), and the fourth shows the

subject reclining backwards, leaning on an elbow with one knee up and genitals fully visible (Exhibit 59(I))." *Id.* "In all the images the genitals are in the center of the image . . . ." *Id.*

As the First Circuit has noted, "[l]ascivious' is a 'commonsensical term' . . . ." *Frabizio*, 459 F.3d at 85; *see also United States v. Reedy*, 845 F.2d 239, 241 (10th Cir. 1988) ("This Court agrees . . . that 'lascivious' is . . . a commonsensical term . . . .") (internal quotation marks omitted).[6] As the district court concluded,

> A commonsense review of the photographs shows that a rational jury could conclude that the poses of the minor, which were directed by Mr. Rivera after showering with the minor in a hotel room and shortly before having anal sex with him, were unnatural (given that the minor's legs were spread so as to make his genitals visible and, his rear was raised to the camera) and were highly suggestive of anal sex.

A95. *See Frabizio*, 459 F.3d at 86 ("A jury could reasonably conclude that none of the girls' postures were natural or spontaneous, [and] that each girl was deliberately posed to exhibit her pubic area . . . .").[7]

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[6] As the district court noted, the care and discernment that the jury here brought to their task is evidenced by the fact that the jurors found two photographs not to be lascivious exhibitions. A93; GSA 87.

[7] The defendant argues that the four photographs for (continued...)

2. The District Court Properly Denied the Defendant's Motion for New Trial Under Rule 33

The district court also did not abuse its discretion in denying the defendant's motion for a new trial. The defendant's primary arguments in this regard are that the jury was influenced by the other charges against the defendant and the evidence against him on those charges, and that the district court's inclusion of the so-called *Dost* factors was confusing and inherently subjective.

First, with respect to the other charges and the evidence related to them, as set forth above in part I, the charges were properly joined and the district court did not abuse its discretion in refusing to sever them. Moreover, the district court explicitly instructed the jury about the need to consider each count separately and the fact that its verdict on one count should not affect its verdict as to any other. A51.

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[7] (...continued)
which he was convicted on Count Four depicted the minor at issue "no more lasciviously" than the photographs in a book, *The Age of Innocence*, that is sold at the Yale Book Store and available at amazon.com. Def. Br. at 24. That book was admitted into evidence over the government's objection, but with the following limiting instruction which makes the defendant's point irrelevant: "[T]he fact that this book is publicly available and is being admitted into evidence in this case does not necessarily mean that it is lawful under the federal child pornography statute or that the persons depicted in the photographs in that book are necessarily minors." GSA 84.

Second, the district court's instructions to the jury on "lascivious exhibition of the genitals or pubic area" were not erroneous. Rather, read in their entirety, the instructions "provided the jury with an intelligible and accurate portrayal of the applicable law." *United States v. Males*, 459 F.3d 154, 156 (2d Cir. 2006). As set forth above, the *Dost* factors have been approved by numerous Courts of Appeals. Although "lascivious" is a "commonsensical term," *Frabizio*, 459 F.3d at 85, these courts have concluded that "the *Dost* factors are generally relevant and provide some guidance in evaluating whether the display in question is lascivious." *Amirault*, 173 F.3d at 32. As the Third Circuit has stated, "[w]e adopt the *Dost* factors . . . not out of any precedential obligation, but instead because the *Dost* factors provide specific, sensible meaning to the term 'lascivious.'" *Villard*, 885 F.2d at 122. The *Dost* factors "serve to distinguish between the innocent family photo or artistic depiction of a nude child and the victimization of that child in the creation of child pornography." *United States v. Villard*, 700 F.Supp 803, 812 (D.N.J. 1988), *aff'd*, 885 F.2d 117 (3d Cir. 1989).

However, like the district court here, courts that have approved use of the *Dost* factors have emphasized that "these factors are neither comprehensive nor necessarily applicable in every situation." *Amirault*, 173 F.3d at 32; *see also Horn*, 187 F.3d at 790 (stating that "it goes without saying that the *Dost* criteria are neither definitive nor exhaustive"). The district court was "satisfied that they provided appropriate guidelines in this case." A99. Moreover, the jury was instructed that "[t]he weight or lack of weight that you decide to give to any one of these factors is for you to decide. You must make this

determination based on the overall content of the depiction." Tr. 357. This instruction helped to clear up any danger of too rigid or arbitrary an application of the *Dost* factors, and made clear to the jury that it should based its decision on its assessment of the overall content of the photograph. Ironically, the concern noted about the *Dost* factors by most courts is that they may be too favorable to a defendant. *See, e.g.*, *Fabrizio*, 459 F.3d at 88 ("[T]here is a risk that the *Dost* factors will be used to inappropriately *limit* the scope of the statutory definition . . . .") (emphasis in original); *Weigand*, 812 F.2d at 1244 (noting that the *Dost* factors were "over-generous to the defendant").

Although the defendant did not object at trial, he also argues that the failure to instruct on who the "viewer" should be in the sixth *Dost* factor was inherently confusing. There was no error in the trial court's decision to instruct on who a "viewer" might be, much less any error that was "plain."

"[T]he sixth *Dost* factor, rather than being a separate substantive inquiry about the photographs, is useful as another way of inquiring into whether any of the other five *Dost* factors are met." *Villard*, 885 F.2d at 125. In this case, the defendant directed the minor to pose in the particular positions to suit his own tastes, and the satisfaction of the previous five factors demonstrates that the photograph was lascivious. "It was a lascivious exhibition because the photographer arrayed it to suit his peculiar lust." *Wiegand*, 812 F.2d at 1244.

The defendant cites *Villard* in support of the proposition that the definition of the "viewer" in the district court's instructions, or lack thereof, caused confusion. He further argues that the government's comment during closing arguments suggesting that the defendant himself could be the viewer added to this confusion. *See* Def. Br. at 24; *see also id.* at 9 (quoting government summation: "It may not excite lustfulness in some people but I think the evidence is fairly clear in a variety of ways that those are shots Mr. Rivera liked to take . . . to excite lustfulness in Mr. Rivera.") ("he's in position for Mr. Rivera's fantasies").

The government's brief comments were not, as the defendant seems to suggest, an attempt to focus the jury solely on the idiosyncracies of the defendant as the "viewer," and thereby "bootstrap" under *Villard*. Rather, the government simply pointed out that Rivera's subjective intent was to satisfy his pedophilic sexual proclivities, which is in accord with previous interpretations of the *Dost* factors. But the government did not argue that the intended effect of the photographs on a like-minded pedophile were not also a factor to consider. "[T]he focus should be on the photographer's subjective intent to arrange the composition to satisfy his or like-minded pedophiles' sexual appetite." *Amirault*, 173 F.3d at 24 (paraphrasing *Wiegand*, 812 F.2d at 1244). The government was not, in other words, arguing that "the photographs were lascivious *merely* because [Rivera] found them sexually arousing," *see Villard*, 885 F.2d at 125, but that his intent in taking the photographs is a factor in the determination of whether the depictions would incite lustfulness in a pedophile and the overall determination of

whether they were lascivious. Notably, the instruction to the jury to decide the weight of any of the particular factors in consideration of the whole photograph are consistent with *Villard's* holding that the sixth factor is meant to determine whether the other five factors were met.

In any event, as the district court noted, the defendant never objected to the government's closing argument. Moreover, the comment at issue was brief and, as the district court found, "would not in any event warrant a new trial." A99. The error, if there was any, was clearly harmless, and certainly not plain.

III. THE IMPOSITION OF A LIFE SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

A. Relevant Facts

The district court calculated the defendant's sentencing guidelines range on each count to be 360 months to life. A129. The district court imposed sentences of 480 months on each of Counts One, Two and Three; life imprisonment on Count Four; and 240 months on Count Five. The sentence of life imprisonment on Count Four, production of child pornography, was within the guidelines range of 360 months to life but was also mandatory under 18 U.S.C. § 3559(e) once the district court found that the defendant had a previous conviction for first-degree sexual assault of a minor. That previous conviction involved hundreds of sexual assaults of his minor niece and nephew

over the course of many years, beginning when each was young as seven or eight years old. A138.

At the sentencing hearing, the district court commented on the nature of the defendant's offense conduct, which included "searching the Internet for victims, cultivating the victims via the Internet and via web cams, and then preying on the victims and . . . acquiring the means to compel the victims to continue in that activity whether they wanted to or not." A139. Judge Kravitz also said the following about the offense conduct and the defendant's previous state sexual assault conviction:

> I will say that adjectives really are inadequate to describe the conduct that was proved beyond a reasonable doubt at the trial. Words like "appalling" and "depraved" and "horrific" really don't do justice, I think, to the kinds of conduct that was reflected in the testimony, as reflected in the email exchanges, and the photographs that were found on Mr. Rivera's computer. It was premeditated. It was preying on our most vulnerable, our youth, and it was just horrendous in terms of the follow-up.
>
> As Mr. Glover says, one of these minors indicates he will commit suicide and Mr. Rivera's response is, you better do it fast because if you tell your parents, I'll have someone murder you.
>
> This is an individual who also pled guilty to having abused his niece and nephew, in the case of the nephew, almost 500 times and over a period of

> seven years and the nephew sadly later committed suicide.
>
> The lives of Mr. Rivera's victims will never be the same, that's for certain.
>
> Sadly, in this day and age, I have had a number of sex crime cases but I will say that this is the most horrendous that I have seen in my short career on the bench and I certainly hope that [it] is the most horrendous I ever see.

A138-39. In light of all this, Judge Kravitz found a life sentence to be appropriate and concluded that "the public needs to be protected from Mr. Rivera." A138, A139.

B. Governing Law and Standard of Review

This Court has previously declined to address constitutional challenges that were not initially raised in the district court, deeming them waived. "There is no reason why [the defendant's] constitutional challenges could not have been raised below, where he had ample opportunity to raise them and where the district court would have had the opportunity to address them." *United States v. Feliciano*, 223 F.3d 102, 125 (2d Cir. 2000). At a minimum, "virtually all circuits in recent years" have deemed these challenges either waived, or subject only to a "plain error" standard. *Id.* (citing *United States v. Baucum*, 80 F.3d 539, 541 (D.C. Cir. 1996) (per curiam)).

If this Court chooses to address the issue under the plain error standard, the defendant must show (1) that the

district court committed error, (2) that the error was "plain," a term synonymous with "clear" or "obvious," (3) that the error "affect[ed] substantial rights" and (4) that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993).

A defendant's sentence constitutes cruel and unusual punishment only when it "shocks the collective conscience of society." *United States v. Gonzalez*, 922 F.2d 1044, 1053 (2d Cir. 1991). Successful Eighth Amendment challenges to the lengths of sentences are and should be "exceedingly rare" and "federal courts should be reluctant to review legislatively mandated terms of imprisonment." *Hutto v. Davis*, 454 U.S. 370, 374 (1982). The Supreme Court has repeatedly emphasized that deference should be given to the legislature's judgment regarding the appropriateness of punishment. *Rummel*, 445 U.S., at 275-76 (1980); *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring).

Two main Supreme Court precedents govern Eighth Amendment challenges to sentence lengths. *Rummel v. Estelle* laid out a "gross disproportionality" standard for comparing a defendant's conduct with his sentence. *Solem v. Helm*, 463 U.S. 277 (1983), then upheld this standard while also introducing a set of three comparisons into the analysis. Justice Kennedy then articulated the way these cases interact in *Harmelin*.[8]

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[8] Justice Scalia delivered the opinion for the Court, but only one part of this opinion gained a majority. The rest of the (continued...)

> *Solem* is best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review. . . . A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.

501 U.S. at 1004-05 (Kennedy, J., concurring). Thus, it is only after a threshold finding of "gross disproportionality" that the *Solem* factors should even begin to be analyzed. If such a threshold finding is made, those factors are "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 292. Even after a finding of gross disproportionality, those factors are meant only as guidelines, rather than a rigid test, in determining whether a sentence constitutes cruel and unusual punishment. *Harmelin*, 501 U.S. at 1004.

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[8] (...continued)
opinion rejected entirely the notion of proportionality, stating that the Eighth Amendment only prevented particular methods of punishment. Justice Kennedy's concurrence has come to be the guiding opinion. *See generally Ewing v. California*, 538 U.S. 11 (2003).

C. Discussion

Because the defendant did not raise any Eighth Amendment challenge to his sentence at the district court level, this Court should decline to address the issue under *Feliciano*. His challenge also fails to meet the "plain error" standard, since the Supreme Court has previously upheld life sentences for recidivists where the triggering crime was much less severe. Life sentences both for stealing three golf clubs worth $1,200 and for obtaining $120.75 under false pretenses have been deemed sufficient to withstand Eighth Amendment challenges. *Ewing v. California*, 538 U.S. 11 (2003); *Rummel v. Estelle*, 445 U.S. 263 (1980). Simply put, Rivera "presents as great a risk of recidivism and a likely greater risk to the safety of the community than the persistent felon" who stole the golf clubs in *Ewing,* and his "criminal conduct is as serious and his risk of recidivism demonstrably greater than the first-time drug offender" in *Harmelin*. *See United States v. Snype*, 441 F.3d 119, 152 (2d Cir. 2006) (affirming mandatory life sentence by this comparison where violent robbery was the triggering offense). Accordingly, the defendant's sentence fails to satisfy both the error requirement and the plainness requirement.

Even apart from plain error, these cases also show why the defendant's sentence fails to rise to the level of "gross disproportionality" demanded by *Harmelin*. Like the defendant in *Ewing v. California*, the defendant "incorrectly frames the issue." 538 U.S. at 28. Rivera did not receive a life sentence for taking "four nude photographs of a sixteen year old" and having a prior conviction for "sexual misconduct," as the defendant

would have it. Def. Br. at 29. Rather, the defendant received a life sentence for being convicted of producing child pornography in a case in which he used the pornographic photographs of minors to extort them into having sex with him after having previously been convicted and incarcerated for the "hundreds of occasions where he had anal and oral intercourse with his nephew, and numerous acts of sexual abuse of his niece." Def. Br. at 11 n.22. *Ewing* makes it clear that the defendant's triggering crime is not to be considered in a vacuum, but rather that his offense should be viewed against the backdrop of his very serious prior criminal record. *Id.*

The facts of the defendant's case are easy to distinguish from *Solem*, and no finding of gross disproportionality is warranted. In *Solem*, the triggering crime that resulted in a life sentence was "uttering a 'no account' check for $100." *Solem*, 463 U.S. at 277. The Court went so far as to call the crime "'one of the most passive felonies a person could commit.'" *Id.* at 296 (quoting the lower court dissent). Mr. Helm's criminal history was similarly innocuous. Each of his previous crimes was "nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case." *Id.* at 280. This is in stark contrast to the facts of the defendant's case, which include active, premeditated molestation and threats against minors. Def. Br. at 11 n.22.

Further support for the constitutionality of the defendant's sentence can be found by comparing his actions to the facts of *Ewing*, where a sentence of 25 years to life in prison was upheld. In Mr. Ewing's case, the

triggering crime was the theft of three golf clubs each valued at about $400, and his previous convictions for burglary were sufficient to subject him to California's three strikes laws. While comparing the severity of various crimes is not always a straightforward task, crimes against property, like Mr. Ewing's, are generally viewed as less serious than those committed against a person, as Rivera's were. *See, e.g., Solem*, 463 U.S. at 293. It would be incongruous to find a life sentence for Rivera to be grossly disproportionate given the Supreme Court's refusal to do so in *Ewing*.

The defendant urges this Court to undertake a comparative jurisdictional analysis under *Harmelin*, but Justice Kennedy's opinion in *Harmelin* makes clear that where the crime in question is serious, a comparative analysis under *Solem* is not necessary. *Harmelin*, 502 U.S. at 1004. Furthermore, the three enumerated *Solem* factors are not a test, but merely parts of the analysis to determine whether a sentence exceeds the bounds of constitutional proportionality. *Id.* "The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime." *Id.* at 1005. Justice Kennedy also points out the limits of such a comparative analysis saying, "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure." *Id.* at 999. Despite these caveats, even a straightforward application of *Solem*'s factors shows that the defendant's sentence is constitutional.

The first comparison *Solem* outlines is between "the gravity of the offense and the harshness of the penalty." *Solem*, 463 U.S. at 292. Again, the Supreme Court's caution about properly framing the issue is relevant. The defendant produced child pornography as part of a common scheme of sexual exploitation of minors lasting several months, having previously sexually assaulted minors. The records shows that Rivera used photographs of minor children to attempt to blackmail them into agreeing to meet him for illicit sex, and that he threatened physical harm to them if they threatened to tell their parents about him. The gravity of this offense and his prior record demonstrate that no gross disproportionality exists.

The second comparison outlined in *Solem* is between the sentence imposed and "the sentences imposed on other criminals in the same jurisdiction." *Id.* This comparison should keep in mind that the "absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel*, 445 U.S. at 275. The Supreme Court has defended the notion that "[r]ecidivism has long been recognized as a legitimate basis for increased punishment." *Ewing*, 538 U.S. at 12. In this respect, the defendant's increased sentence is no different from other increases for repeat offenders. *See* 18 U.S.C. § 3359(c). The legislature has determined that the danger posed by repeat felons who have shown a willingness to commit violence is similar to that of recidivist sexual offenders who prey on minors, and courts should give deference to that determination.

Finally, *Solem* entails a comparison between the sentence given and the sentences in other jurisdictions for the same crime. Simply because a jurisdiction has the harshest punishment for a particular crime is insufficient to render it unconstitutional. *Rummel*, 445 U.S. at 281. In fact, the defendant points out that Wisconsin imposes the same punishment, and several states impose sentences over 30 years. *See* Def. Br. at 30 n.41. Just as in *Rummel*, the differences in sentences among the various jurisdictions "are subtle rather than gross." *Id.* at 279. These comparisons make it clear that no gross disproportionality exists in this final comparison either.

IV. THE DISTRICT COURT DID NOT COMMIT ERROR BY ENHANCING THE DEFENDANT'S SENTENCE BASED ON A PREVIOUS CONVICTION

A. Relevant Facts

The defendant's life sentence was based on the district court's finding at the sentencing hearing that the defendant had previously been convicted of a sex offense involving a minor victim. Because of this finding, 18 U.S.C. § 3559(e)(1) applied, resulting in a mandatory minimum life sentence for the defendant.

B. Governing Law and Standard of Review

This Court has previously declined to depart from the exception for recidivism carved out in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and reaffirmed by

United States v. Booker, 543 U.S. 220, 244 (2005). *See United States v. Snype*, 441 F.3d 119 (2d Cir.), *cert. denied,* 127 S. Ct. 285 (2006); *United States v. Estrada*, 428 F.3d 387 (2d Cir.), *cert. denied,* 126 S. Ct. 1451 (2005); *see also United States v. Santiago*, 268 F.3d 151 (2d Cir. 2001). This Court has held that notwithstanding any "tension between the spirit of *Booker* . . . and the Supreme Court's decision in *Almendarez-Torres*, the 'prior conviction' exception nonetheless remains the law." *Estrada*, 428 F.3d at 391. "[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

C. Discussion

In light of the binding precedent directly addressing this question, this Court should reject the defendant's challenge. As acknowledged in the defendant's brief, only the Supreme Court has the power to overturn the exception carved out in *Apprendi* for recidivism.

CONCLUSION

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

Dated: June 29, 2007

Respectfully submitted,

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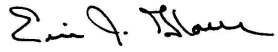

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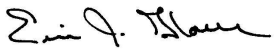
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(c)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,871 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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Addendum

Amendment VIII. Excessive Bail, Fines, Punishments.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C.A. § 2251(a). Sexual exploitation of children.

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

. . ..

18 U.S.C. § 2256(2)(A). Definitions for chapter.

For the purposes of this chapter, the term--
(1) . . .;
(2) (A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated--

(i) . . .;
(ii) . . .;

(iii) . . .;

(iv) . . .; or

(v) lascivious exhibition of the genitals or pubic area of any person;

. . ..

18 U.S.C. § 3559(e). Sentencing classification of offenses.

(a) Classification . . .

(b) Effect of classification . . .

(c) Imprisonment of certain violent felons . . .

(d) Death or imprisonment for crimes against children...

(e) Mandatory life imprisonment for repeated sex offenses against children.--

(1) In general.--A person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim, unless

the sentence of death is imposed.

Conn. Gen. Stat. § 53(a)-70(a)(1). Sexual assault in the first degree: Class B or A felony.

(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or . . ..

Fed. R. Crim. P. 8(a). Joinder of Offenses or Defendants.

(a) Joinder of Offenses. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged--whether felonies or misdemeanors or both--are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

Fed. R. Crim. P. 14. Relief from Prejudicial Joinder.

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

Fed. R. Crim. P. 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within

7 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must

proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Fed. R. Crim. P. 33. New Trial.

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.

Fed. R. Evid. 404(b). Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.

(a) Character evidence generally . . .

(b) Other Crimes, Wrongs, or Acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 414. Evidence of Similar Crimes in Child Molestation Cases.

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government

shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)- (5).