03-1763

To be Argued By:
JEFFREY A. MEYER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1763

UNITED STATES OF AMERICA,
Appellee,

-vs-

RICARDO VASQUEZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF AND APPENDIX
FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Alvin W. Thompson, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court abuse its discretion at sentencing when it concluded that a defendant's sexual abuse of the same female inmate on multiple days did not result in a single, composite harm to the inmate victim and therefore did not warrant "grouping" separate counts of conviction under U.S.S.G. § 3D1.2?

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 03-1481

UNITED STATES OF AMERICA,
Appellee,

-vs-

RICARDO VASQUEZ,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

The defendant was a federal prison guard who sexually abused numerous female inmates under his control at the Federal Correctional Institution in Danbury, Connecticut. Four of his seven counts of conviction involved sexual encounters on different days with the same two inmate victims (*i.e.*, sex on day A and day B with victim #1, and sex on day C and day D with victim #2). In this appeal, the defendant argues that these four counts should have been treated as only two counts for purposes of calculating his offense level under the "grouping" rules of the United States Sentencing Guidelines. He contends that the same-victim counts should have been grouped, because sexually abusing the same female inmate on two different days

purportedly results in just "one composite harm" to the victim. The Court should reject this argument as the district court did. It should conclude that the district court did not abuse its discretion when it determined that each instance of abuse was a separate harm to the victim. Accordingly, the Court should affirm.

STATEMENT OF THE CASE

On September 17, 2002, a federal grand jury in Connecticut returned an eight-count indictment charging the defendant-appellant Ricardo Vasquez with various offenses arising from his sexual abuse of female inmates while he was employed as a federal correctional officer at the Federal Correctional Institute in Danbury, Connecticut ("FCI-Danbury"). See Appendix to the Brief for Defendant-Appellant Ricardo Vasquez at A17-22.

Count One of the Indictment charged the defendant with knowingly and willfully making false statements to a federal law enforcement agent, in violation of 18 U.S.C. § 1001(a)(2). Counts Two through Seven charged the defendant with violations of a federal sexual abuse statute that prohibits a correctional officer from engaging in a sexual act with an inmate who is subject to the officer's custodial, supervisory or disciplinary control. See 18 U.S.C. § 2243(b).[1] Count Eight of the Indictment charged

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[1] The statute is titled "Sexual Abuse of a Minor or Ward" and provides in relevant part:

(b) Of a ward. – Whoever, in the special maritime and

(continued...)

the defendant with violating a related statute that prohibits abusive sexual contact with an inmate subject to the officer's custodial, supervisory, or disciplinary control. See 18 U.S.C. § 2244(a)(4).

The case was assigned to United States District Judge Alvin W. Thompson, and it proceeded to jury trial in June 2003. Over the course of two days of trial on June 9 and 10, 2003, numerous present and former inmates testified concerning the defendant's sexual activities with female prison inmates. Shortly before the start of the third day of trial on June 11, 2003, the defendant agreed to enter a plea of guilty to seven of the eight charged counts: Count One (false statement), Counts Two to Four and Six to Seven (sexual abuse of inmates), and Count Eight (sexually abusive contact with an inmate).

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[1] (...continued)
territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is– (1) in official detention; and (2) under the custodial, supervisory, or disciplinary authority of the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

18 U.S.C. § 2243(b). This statute was enacted as a part of the Sexual Abuse Act of 1986, Pub. L. No. 99-654, 100 Stat. 3660, with a stated purpose "to modernize and reform Federal rape statutes." H.R. Rep. 99-594, 99th Cong. 2d Sess. at 1 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 6186, 6186 (1986).

On October 9, 2003, the district court sentenced the defendant to a term of 21 months of imprisonment on Count One, with concurrent terms of the statutory maximum 12 months on each of Counts Two, Three, Four, Six, and Seven, and 6 months on Count Eight. A15, A23. On October 20, 2003, the defendant filed a timely notice of appeal. Judgment of the district court entered on November 5, 2003. A15.[2]

STATEMENT OF FACTS

A. The Offense Conduct

The defendant was employed since 1996 as a federal correctional officer at FCI-Danbury. PSR ¶ 10.[3] He knew he was not permitted to engage in sexual acts or contact with any of the female inmates under his control. PSR ¶ 11; Trial Transcript ("Tr.") at 65-66. The trial

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[2] The notice of appeal was filed prior to entry of judgment and therefore "is treated as filed on the date of and after the entry." Fed. R. App. P. 4(b)(2). The defendant's appendix does not include a copy of the notice of appeal as required by this Court's rules. See Second Circuit Rule 30(d). Nor does the defendant's appendix include the complete sentencing transcript. Accordingly, the government has reproduced a copy of the notice of appeal and a complete transcript of the sentencing in the appendix attached to this brief.

[3] The government has separately filed under seal with the Court a copy of the presentence report and two addenda (which include victim impact letters from inmates Sanchez-Luna, Varon, and Clover).

evidence and the defendant's guilty plea established the defendant's sexual abuse of four female inmates between 1998 and March 2002, as detailed below.

The Defendant's Abuse of Carmenza Varon

At some point in time from approximately mid-1998 to early 1999, the defendant had sexual intercourse with inmate Carmenza Varon in a prison staff bathroom. PSR ¶ 14. This conduct was charged as Count Four of the Indictment. Varon testified at trial that she was housed in the latter part of 1998 on Unit 9 where the defendant was stationed at the time. Tr. 395-96. One night at around 11:00 or midnight, he signaled her to meet in the staff bathroom, where they began to kiss, and then had sexual intercourse and oral sex. Tr. 398-400, 404. Varon described how their frontal intercourse "was painful" and that "I kind of push him back up a little bit," before "[h]e turned me around with his hands," and "he made me bend over," then "[w]e have intercourse again." Tr. 400.

The Defendant's Abuse of Christine Clover

On various dates in December 1999, the defendant engaged in abusive sexual contacts against inmate Christine Clover, including touching her buttocks and squeezing her breasts, all without her consent while Clover was incarcerated in the Special Housing Unit of FCI-Danbury.[4] PSR ¶ 15. This conduct is charged in Count

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[4] The Special Housing Unit (also known as "the SHU" or "seg") is the prison's most restrictive form of confinement, (continued...)

Eight of the Indictment. Clover testified at trial concerning several of the defendant's unwanted sexual advances. On December 10, 1999, Clover was permitted to leave her cell on the Special Housing Unit to make a telephone call. She was wearing a "belly chain" around her waist with hand cuffs, and she was accompanied by the defendant. Tr. 447-48. The defendant squeezed Clover's buttocks and suggested that she go with him up to another "library" cell on the Special Housing Unit where he would give her a "gift." Tr. 448-49. About ten days later, the defendant approached Clover, "pulled down his pants and showed me his penis, and he said, 'I know you want this.'" Tr. 450.

According to Clover, the defendant also "was in my cell and he squeezed my breast" on another occasion while she was at the Special Housing Unit. Tr. 455. Clover complained to a prison psychiatrist about the defendant's abuse of her. Tr. 457. A few months later, when Clover was transferring to another federal prison, the defendant taunted her: "See, I told you nobody will believe you." Tr. 459.

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[4] (...continued)
where inmates are generally locked down for most of the day in their cells. The occupants of the Special Housing Unit are ordinarily there because of disciplinary violations or for purposes of a pending investigation of misconduct (*e.g.*, sexual misconduct) that warrants their separation from the general inmate population. Tr. 40-42, 75-76.

The Defendant's Abuse of Tiffany Myers

On approximately January 4, 2001, the defendant had sexual intercourse with inmate Tiffany Myers in the shower area of Unit #2. PSR ¶ 16. This conduct was charged as Count Six in the Indictment. Myers testified at trial that the incident occurred around 2:30 or 3:00 in the morning, while the defendant was working the third shift on her unit one night. Tr. 158. He offered Myers some candy. Myers asked the defendant if he liked her body, and the defendant said yes. He asked her to come over to him and kiss him, to which Myers responded, "don't play games with me," because "I've been locked up too long." Tr. 147. Myers then gave the defendant a kiss. "I stepped back and I felt really stupid." Id. Then "out of the blue [the defendant] said, Do you want to fuck?" Tr. 148. Myers replied "Hell, yeah." Id. The two went into the inmate shower area where the defendant "entered me from behind," and "it was real quick and that was it," testified Myers. Id.

On approximately January 5, 2001, the defendant again had sexual intercourse with inmate Tiffany Myers in the shower area of Unit #2. PSR ¶ 16. This conduct was separately charged as Count Seven of the Indictment. Myers could not recall how many days elapsed between the first and second sexual encounters with the defendant but testified that "the next time it happened, we went into the shower again," after the defendant "signaled me from my bed." Tr. 149. They kissed, then performed oral sex on each other, and then "I stood up against the wall and he again entered me from behind and I think we heard something and it startled both of us so we stopped." Id.

The defendant later warned Myers not to tell anybody about what they did. Tr. 150.

The Defendant's Abuse of Sanchez-Luna

On a date between March 14 and March 18, 2002, the defendant engaged in sexual intercourse with inmate Johanna Sanchez-Luna while she was incarcerated on the Special Housing Unit. PSR ¶ 17. This conduct was charged in Count Two of the Indictment. Sanchez-Luna, an illegal alien from Mexico who testified with the assistance of an interpreter at trial, stated that the defendant came up to the outside of her cell on the Special Housing Unit at about 1:30 or 2:00 on the morning of March 14, 2002. Tr. 295. He told her how he would like to marry a Mexican woman one day, then he started stroking her on her cheek. Tr. 289-90. "And then when he touched me," testified Sanchez-Luna, "I was like shocked because I know the rules of the institution. You cannot – the officer, they cannot touch the inmates." Tr. 290. Sanchez-Luna reached out through the bars to touch the defendant's waist, and the defendant then started touching her outside the clothing between her legs. Tr. 291. The defendant "lowered my underwears, he move me like close to the bars," and, with Sanchez-Luna facing away from him, he had sexual intercourse with her through the bars of her cell. Tr. 292.

Sanchez-Luna attested that she was nervous and that the intercourse hurt her. "After he ejaculate I was bleeding." Tr. 293. The defendant cleaned her back off with a towel, then told her he had to go to his office; he later came back to her cell with her breakfast in the

morning. Tr. 293-94. Sanchez was not hungry, and testified that "I was in my bed all day" and "the next day I was feel sick." Tr. 295.

In the early morning hours of March 20, 2002, the defendant received oral sex from Johanna Sanchez-Luna while on duty again at the Special Housing Unit. PSR ¶ 18. This conduct was charged in Count Three of the Indictment. Sanchez-Luna testified at trial that at around 3:30 in the morning of March 20, the defendant was outside her cell showing her a letter, and he reached into the cell to touch her breasts. Tr. 299-301, 311. She reached through the bars to touch his penis outside his clothing, and he "was indicating to me what he wanted me to do as if he wanted me to go down." Tr. 301. "I was doing the oral sex. I put it in my mouth. He grabbed my head, like for me to do it." Tr. 302. Sanchez-Luna further testified that, after the defendant ejaculated, "I was going to the toilet and I was throwing up. I was throwing everything in the toilet. And I brush my teeth." Tr. 303.

When the defendant later came back to Sanchez-Luna's cell, he remarked that he was under investigation. He added, "'If I'm going to jail, you're going to write me." Tr. 303.

The defendant was then under more investigation than he knew. Acting on a tip from another inmate in a cell near Sanchez-Luna, law enforcement authorities had covertly observed and videotaped the defendant's sexual activity with Sanchez-Luna in the early morning hours of March 20, 2002. Special Agent Stanley Ferguson of the United States Department of Justice Office of Inspector

General then confronted and questioned the defendant at the end of his shift, and the defendant knowingly and willfully lied to Agent Ferguson in several ways: (a) falsely claiming that he had never had sexual relations with any inmate at FCI-Danbury; (b) falsely claiming that he had not engaged in a sexual act with Sanchez-Luna in the early morning hours of March 20, 2002; and (c) falsely claiming that he had performed the 2:30 and 5:00 a.m. "counts" of inmates on the Special Housing Unit. PSR ¶ 19.

B. The Sentencing

The district court imposed sentenced on October 9, 2003. Inmates Sanchez-Luna, Clover, and Varon submitted "victim impact" letters attesting to their feelings of fear and shame resulting from the defendant's abuse. For example, Sanchez-Luna wrote:

> Sometimes at night when it's dark I feel that Mr. Vasquez is there staring at me. I can't get over it. I try, though. . . . I don't want none of the staff to get to know me. I feel ashamed.

GA 29.

The presentence report, as amended, calculated a final offense level of 14, corresponding to a sentencing guideline range of 15-21 months. For the false statement charged in Count One, the report calculated a final offense

level of 6. See U.S.S.G. § 2B1.1(a)(2).[5] For each of Counts Two, Three, Four, Six, and Seven charging the defendant with sexual abuse of inmates Myers, Sanchez-Luna, and Varon, the PSR calculated an offense level of 9. See § 2A3.3.[6]

To calculate a final sentencing offense level, the PSR applied the Sentencing Guidelines' "grouping rules" that govern sentencing for multiple counts of conviction. See §§ 3D1.1-3D1.5. As amended, the PSR identified six distinct offense groups with corresponding offense levels as follows:

Count One (false statement)	6
Count Two (sex with Sanchez-Luna on 3/20/02)	9
Count Three (sex with Sanchez-Luna on 3/14/02)	9
Count Four (sex with Varon in 1998)	9
Count Six (sex with Myers on 1/4/01)	9
Count Seven (sex with Myers on 1/5/01)	9

[5] All references are to the 2002 Guidelines Manual, which was in effect at the time of the defendant's sentencing on October 9, 2003.

[6] As noted above, the defendant did not plead guilty to Count Five, another sexual incident with Tiffany Myers that the government was unable to prove at trial due to Myers' lack of memory concerning the incident. The abusive sexual contacts offense charged as to Christine Clover in Count Eight is a Class B misdemeanor that is not subject to the Sentencing Guidelines. See § 1B1.9. Therefore, Count Eight did not play a role in the sentencing guidelines calculation.

PSR Second Addendum. In accordance with the guidelines application instructions, the PSR calculated a combined, multiple-count offense level by starting with the highest offense level for a single group (Level 9). Each of the six groups was then counted as a "unit" for purposes of § 3D1.4(a), since each was equally serious or within four offense levels of the primary offense group level. This resulted in a total offense level of 14, corresponding to a guidelines range of 15-21 months of imprisonment.

The defendant objected to this calculation. He agreed that the false statements group should not be combined into a single group with the sexual abuse counts. And he agreed that the counts involving *different* inmate victims should also count as distinct offense groups. He contended, however, that the counts involving the *same* inmate victim involved "substantially the same harm" under § 3D1.2, and therefore should be combined into a single offense group for each victim. Thus, he argued that Counts Two and Three involving inmate Sanchez-Luna and Counts Six and Seven involving inmate Myers should each be combined into their own offense groups. Applying § 3D1.4, the result under the defendant's approach would be two fewer groups (and thus two fewer "units"), and therefore a final offense level of 13, corresponding to a guidelines range of 12-18 months of imprisonment.

The district court rejected the defendant's argument. It concluded that each of the sexual encounters with the same victims "occurr[ed] on different days." GA 5. "In each instance, there was a separate instance of harm to the victim; as to neither of these two victims do the two counts

at issue represent essentially one composite harm." GA 6-7.

Noting commentary in the Sentencing Guidelines suggesting that counts involving the same victim should not be combined into a single offense group for robbery, rape, or assault offenses, the defendant argued that, by implication, "the use or threatened use of force is a prerequisite to the non-grouping of offenses involving the same victim." GA 7. The district court rejected this view, noting that there was "no authority supporting this proposition" and that non-grouping of same-victim counts had been upheld on appeal in other cases cited by the government even "where there was an absence of facts suggesting threats or violence" against the victim. GA 7.

Finally, the court rejected the defendant's reliance on the rule of lenity. "[T]his is not a situation where a reasonable doubt persists about a guideline[']s intended scope even after resorting to the language[,] structure, legislative history, and motivating policies of the guideline." GA 7.[7]

Accordingly, the district court calculated a final offense level of 14. It imposed a total effective sentence of 21

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[7] Having concluded that the counts at issue did not involve one composite harm, the district court declined to rule on the government's alternative argument in its sentencing memorandum that the defendant's activity did not involve "a single course of conduct with a single criminal objective," as further required for grouping of same-victim offenses under Application Note 4 to § 3D1.2(b). GA 14.

months, at the top of the guidelines range, citing the need to "vindicate the individual victims in this case and the damage to the institution you had a responsibility to serve." GA 36.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it decided not to group the counts of conviction involving the same inmate victims. It reasonably concluded that sexually abusing the same female inmate on different days does not amount to simply "one composite harm" to the victim. Because prison inmates are not fungible items, such a sexual abuse offense is not comparable to offenses involving the theft of money or sale of illegal drugs for which multiple counts are ordinarily grouped together for sentencing purposes. Each offense involved a distinct risk of fear and harm. The district court correctly rejected the defendant's argument that the absence of force or threat of force dictated a contrary result. Its reasoning comports with the purpose of the grouping rules to prescribe additional punishment for conduct that is not otherwise accounted for by the guidelines. In any event, any possible error was harmless, because the record conclusively refutes the defendant's ability to satisfy the alternative grouping requirement that his same-victim conduct was connected by a common criminal objective or was part of a common scheme or plan. Accordingly, the Court should affirm.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO GROUP COUNTS OF SEXUAL ABUSE INVOLVING THE SAME FEMALE INMATE VICTIMS.

A. GOVERNING LAW AND STANDARD OF REVIEW

The United States Sentencing Guidelines prescribe rules for "grouping" multiple counts of conviction to calculate a combined offense level for sentencing. See U.S.S.G. §§ 3D1.1-3D1.5. Consistent with the guidelines' preference for "real offense" rather than "charged offense" sentencing, the purpose of these "grouping" rules is to ensure that "[c]onvictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines." U.S.S.G. Ch. 3, Pt. D, intro. comment.

When applying the grouping rules, a sentencing court's initial inquiry is whether multiple counts involve "substantially the same harm" as each other and should therefore be "grouped" – that is, consolidated into a single group of closely related counts. See § 3D1.2. If two or more counts are determined to involve "substantially the same harm" as one another and therefore are "grouped," then the guideline offense level is determined on the basis of the single group of closely related counts, and no additional increase in offense level results simply from the fact that the government has obtained multiple counts of conviction against the defendant. See § 3D1.3.

By contrast, if two or more counts are not grouped, then the guidelines prescribe a procedure for calculating a *combined* enhanced offense level based on the multiple counts of conviction. This combined offense level is calculated by starting with the offense level for the count (or the group of closely related counts) that has the highest offense level, then adding from one to five more offense levels depending on the number and severity of additional groups of closely related counts. See § 3D1.4. The combined offense level is then used to determine a final sentencing guideline range. See § 3D1.5. See generally United States v. Szur, 289 F.3d 200, 214-15 (2d Cir. 2002) (describing operation of "grouping" rules).

The focus of this appeal is the first step of the grouping analysis under § 3D1.2: whether counts involving a defendant's sexual abuse of the same female inmate victim on different days involve "substantially the same harm." In particular, § 3D1.2(b) requires grouping "[w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan."[8]

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[8] Section 3D1.2 identifies three other circumstances in which grouping is required, including when the counts "involve the same victim and the same act or transaction," § 3D1.2(a); when "one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts," § 3D1.2(c); and when "the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the (continued...)

Despite the broad language of § 3D1.2(b), its accompanying application note makes clear that grouping is not required simply because a defendant serially perpetrates the same kind of offense against the same victim. Rather, the critical inquiry is whether the multiple offenses resulted in "essentially one composite harm" to the defendant's victim. As the application note explains:

> Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent *essentially one composite harm* (*e.g.*, robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

§ 3D1.2 comment. (n.4) (emphasis added).

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[8] (...continued)
offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior," § 3D1.2(d); see also United States v. Gordon, 291 F.3d 181, 192-93 (2d Cir. 2002) (discussing operation of § 3D1.2), cert. denied, 537 U.S. 1114 (2003). Here, the defendant does not claim that any of these other provisions applies to this case, and therefore the discussion is limited to "same victim" offenses under § 3D1.2(b).

The application note lists several examples of how the "one composite harm" principle should be evaluated. On the one hand, if "[t]he defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme," then "[t]he counts are to be grouped together, even if the mailings and telephone call occurred on different days." Id. (Example #2). On the other hand, if "[t]he defendant is convicted of two counts of rape for raping the same person on different days," then "[t]he counts *are not* to be grouped together." Id. (Example #5) (emphasis in original).

This Court reviews "a district court's interpretation of the Sentencing Guidelines *de novo*, its findings of fact for clear error, and its application of the Guidelines to the facts for abuse of discretion." United States v. Lucien, 347 F.3d 45, 55 (2d Cir. 2003). Here, because the defendant challenges the manner in which the district court has applied the grouping rules to the particular facts of his case, the abuse-of-discretion standard of review applies. See 18 U.S.C. § 3742(e) (requiring "due deference to the district court's application of the guidelines to the facts"); United States v. Hamilton, 334 F.3d 170, 188 (2d Cir.), ("We will not overturn the court's application of the Guidelines to the facts before it unless we conclude that there has been an abuse of discretion."), cert. denied, 124 S. Ct. 502 (2003); United States v. McElroy, 910 F.2d 1016, 1026-27 (2d Cir. 1990) (applying abuse-of-discretion review to district court's grouping decision under § 3D1.2).

The defendant's brief incorrectly asserts that "[i]ssues relating to the application of grouping rules are reviewed

de novo." Def. Br. at 10. He principally cites United States v. Szur, 289 F.3d 200 (2d Cir. 2002), in which this Court stated that "[w]e review the district court's interpretation and application of the Guidelines *de novo*." Id. at 215.[9] The government respectfully submits that Szur's suggestion of *de novo* review for a sentencing court's "application" of the guidelines to the facts was not necessary to the Court's result in that case. Even if this statement in Szur were accepted as a holding, the government respectfully submits that it cannot be considered to be good law for three reasons.

First, it contravenes without acknowledgment a statutory command that the Court apply deferential review to a sentencing court's application of the Sentencing Guidelines, see 18 U.S.C. § 3742(e). The Supreme Court has emphasized the degree to which this statute commands deferential review to the manner in which a sentencing court applies provisions of the guidelines to specific facts. See Buford v. United States, 532 U.S. 59, 64-66 (2001) (district court's determination whether two prior convictions were "related" under U.S.S.G. § 4A1.2(a)(2) was subject to deferential appellate review, not *de novo* review).

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[9] The defendant also cites another case that is silent on the standard of review governing a district court's application of the sentencing guidelines. See United States v. Napoli, 179 F.3d 1, 6 (2d Cir. 1999) (stating that "[w]e review the factual determinations underlying the district court's application of the Sentencing Guidelines under the clearly erroneous standard, but we review the court's legal interpretation of the Guidelines *de novo*").

Second, the Szur dicta contravenes prior precedent of this Court in McElroy, *supra*, in which the Court specifically applied abuse-of-discretion review to a district court's application of the guidelines grouping rules. "A panel of this court is bound by a previous panel's opinion, until the decision is overruled en banc or by the Supreme Court." Board of Educ. v. Hufstedler, 641 F.2d 68, 70 (2d Cir. 1981); see also United States v. Wilkerson, – F.3d –, 2004 WL 528427 at *12 (2d Cir. Mar. 18, 2004) (same).

Finally, the Szur dicta relies on case authority that does not correctly state the law. A genealogy of cases leading up to Szur reveals its founding upon cases that misread this Court's prior precedent and that conflate the standard of review governing an "interpretation" of the guidelines with the standard of review governing an "application" of the guidelines to particular facts.[10] For all

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[10] Specifically, Szur cites United States v. Ahmad, 202 F.3d 588, 590 (2d Cir. 2000). In turn, Ahmad cites United States v. Zagari, 111 F.3d 307, 323 (2d Cir. 1997), which in turn cites United States v. Palmer, 68 F.3d 52, 54 (2d Cir. 1995), which in turn cites both United States v. Loeb, 45 F.3d 719, 722 (2d Cir. 1995), and United States v. Studley, 47 F.3d 569, 573 (2d Cir. 1995). The Loeb case states "we review the district court's application of the Sentencing Guidelines *de novo*," 45 F.3d at 722, but cites only United States v. Deutsch, 987 F.2d 878, 884 (2d Cir. 1993), in which this Court stated just the opposite: "[w]e give due deference to the district court's application of the Guidelines to the facts." Meanwhile, the Studley case cites United States v. Mucciante, 21 F.3d 1228, 1237 (2d Cir. 1994), a case stating only that a district court's legal interpretation of the Guidelines is reviewed *de* (continued...)

these reasons, the Court should apply abuse-of-discretion review to the district court's determination that the counts involving the same female inmate victims did not involve essentially one composite harm.

B. DISCUSSION

The district court did not abuse its discretion when it declined to group Counts Two and Three (involving inmate Sanchez-Luna) and to group Counts Six and Seven (involving inmate Myers). The court reasonably concluded from the very nature of these sexual abuse offenses as well as the particular facts of this case that each pair of the same-victim counts of sexual abuse did not amount to "essentially one composite harm" to their victims.

As an initial matter, the district court aptly noted that each of these encounters took place on different days from one another. The defendant's two encounters with Myers took place a full day apart from one another, and his encounters with Sanchez-Luna were two to six days apart from one another.

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[10] (...continued)
novo and its related findings of fact for clear error; it does not address the standard of review for a district court's application of the Sentencing Guidelines. See 21 F.3d at 1237. Studley also cites United States v. Stanley, 12 F.3d 17, 20 (2d Cir. 1993), which in turn cites only Deutsch, the same case, as noted above, that correctly stands for a rule of deferential review to a district court's application of the guidelines to particular facts.

Each such encounter poses its own distinct risk of injury and psychological harm. A female inmate is little more than prey for the impulsive sexual appetite of a male entrusted with disciplinary and supervisory control. She is in no position to protect herself against the risk of pregnancy or sexually transmitted disease from each encounter. And with each act of sexual depredation by her captor, the inmate is diminished in her dignity, and the rehabilitative purposes of her incarceration are equally betrayed. Regardless whether an inmate may nominally "consent" to sexual activity with a prison guard, the harm suffices to warrant separate treatment of each act of sexual abuse. See United States v. Miller, 993 F.2d 16, 21 (2d Cir. 1993) (affirming non-grouping of three counts of offenses involving sending threatening letters to same victim on different dates within three-year period).

The defendant's abuse of Sanchez-Luna through the bars of her prison cell most clearly demonstrated distinct harm from each encounter. Sanchez-Luna was bleeding and sick after the first time, and she was throwing up after the second one. Tr. 293-95, 303. This was distinct, non-composite harm from each of the defendant's sexually predatory acts.

The Court should reject the defendant's effort to compare his exploitation of inmates to a wire fraud or drug distribution offense. See Def. Br. at 11. The nature of harm from each of the defendant's same-victim sexual encounters cannot be sensibly equated with lying on a credit application or selling baggies of drugs on different days. Neither wire fraud nor drug dealing involves the

inherently personal harm and degradation of a sexual abuse offense.

Moreover, money and drugs are fungible items. Female inmates are not. Noting this distinction, the introductory commentary to the Sentencing Guidelines explains that the grouping rules "essentially provide: (1) when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction." U.S.S.G. Ch. 1, Pt. A, intro. comment.

Indeed, the purpose of the grouping rules is "to provide incremental punishment for significant additional criminal conduct" in cases where multiple counts of conviction "represent additional conduct *that is not otherwise accounted for by the guidelines*." U.S.S.G. Ch. 3, Pt. D, intro. comment. (¶¶ 2, 4) (emphasis added); see also U.S.S.G. § 3D1.2 comment. (b'grd.) (where decision whether to group same-victim counts is not "clear cut," sentencing court "should look to the underlying policy" of grouping rules).

In contrast to the fraud and drug guidelines, which already prescribe enhanced offense levels for additional wrongful transactions,[11] the sexual abuse guideline does not account for repeated acts of abuse. See U.S.S.G.

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[11] See U.S.S.G. § 2B1.1(b)(1) (monetary loss table); U.S.S.G. § 2D1.1(c) (drug quantity table).

§ 2A3.3. It prescribes the same offense level of 9, no matter how many times a correctional officer elects to engage in sexual acts with a particular inmate. The district court properly decided to ensure that the defendant's offense level take account of each of his wrongful acts of abuse.

In United States v. Griswold, 57 F.3d 291 (3d Cir. 1995), the Third Circuit rejected a defendant's argument that separate counts of conviction arising from his false statements made to purchase multiple guns over a period of two years should be grouped. It recognized that to accept the defendant's request for grouping of the counts "would reward [the defendant], who made discrete purchases of firearms over a substantial period of time, by punishing him the same as an offender who made one purchase." Id. at 296.

Citing the commentary to § 3D1.2, the defendant concedes that grouping is not required for rape offenses. See Def. Br. at 11 (citing U.S.S.G. § 3D1.2, comment (n.4) (Example #5)). But he elsewhere concedes that his offense is "analogous to statutory rape" and that "Congress has made a legislative determination that as a matter of law sex with an inmate cannot be consensual." Def. Br. at 12.

Despite these concessions, he maintains that because his sexual abuse of Sanchez-Luna and Myers did "not involve the use of force or threat of force," they "should be considered to represent essentially one composite harm." Def. Br. at 10. This argument should be rejected, because it is not supported by the text of the guidelines or commentary. Neither the guidelines nor commentary

identify any requirement that a same-victim offense of conviction have as an element the use of force or threatened use of force in order to be separately counted under the grouping rules.

Indeed, the defendant is incorrect in his apparent assumption that "rape" invariably requires the use of force or threat of force. See, e.g., United States v. Yanez-Saucedo, 295 F.3d 991, 996 (9th Cir. 2002) (identifying offense involving non-consensual sexual intercourse as "rape in the third degree" under Washington State law; "third-degree rape under [Wash. Crim. Code] § 9A.44.060(a) fits within a generic, contemporary definition of rape, which can, but does not necessarily, include an element of physical force beyond that required for penetration"), cert. denied, 537 U.S. 1214 (2003). Accordingly, by referencing "rape" offenses as among those that should not be grouped, it cannot be presumed that the Sentencing Commission intended to import a force or threat-of-force requirement.

Furthermore, although the government is not aware of case authority explicitly addressing the defendant's novel claim, the Seventh Circuit has affirmed non-grouping of same-victim counts under § 3D1.2(b) in the absence of facts suggesting any threats or violence. See United States v. Bahena-Guifarro, 324 F.3d 560, 563 (7th Cir. 2003) (illegal re-entry offenses two years apart not groupable under § 3D1.2(b), in part because the "offenses did not constitute a single, composite harm").

Even if the defendant were correct that force is somehow relevant to the Guidelines' grouping calculus,

the sexual offenses at issue here would still be properly counted as multiple groups. This Court has recently made clear (albeit in a different statutory context) that a statutory rape offense is a "crime of violence," because it poses a substantial risk of the use of force, notwithstanding the absence of any offense-element requirement of force or non-consent. See Chery v. Ashcroft, 347 F.3d 404, 407-09 (2d Cir. 2003) (holding that sexual assault offense under Conn. Gen. Stat. § 53a-71 is a deportable "crime of violence" under 18 U.S.C. § 16(b)). In particular, among the several types of offenses at issue in Chery were prohibitions of sexual intercourse between a person "under eighteen years of age (where the defendant is the victim's guardian)" and "between individuals in positions of influence over their victims (*e.g.*, patient-psychotherapist)." Id. at 407. Referring to these provisions, the Court concluded that because of "the defendant's position of authority over the victim, the crime, *semper et ubique*, includes a substantial risk of physical force." Id. at 409.

The reasoning of Chery applies with at least equal force here where the victim is no less than a jailed inmate subject to the defendant's personal supervisory and disciplinary control. As in Chery, regardless whether force is actually used or threatened, the risk of fear, force, and harm is inherent in each sexual encounter. This warrants separate treatment of the counts of conviction under the grouping rules. See Griswold, 57 F.3d at 296 ("Because each time Griswold illegally acquired a firearm there was a separate and distinct fear and risk of harm to society, we hold that his illegal purchase of firearms on multiple occasions should not be grouped together.").

With little discussion, the final paragraph of the defendant's brief invokes the rule of lenity. Def. Br. at 13. But "'[t]he rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" Chapman v. United States, 500 U.S. 453, 462 (1991) (quoting Callanan v. United States, 364 U.S. 587, 596 (1961)); United States v. Simpson, 319 F.3d 81, 86-87 (2d Cir. 2002) (rule of lenity applicable to interpretation of federal sentencing guidelines).

Contrary to the defendant's complaint that "there is no bright line rule dispositive of th[e] issue" in this case (Def. Br. at 13), the Supreme Court has made clear that "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." Muscarello v. United States, 524 U.S. 125, 138 (1998). Rather, the rule "is reserved for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute," and the rule may be applied in a criminal defendant's favor only when "there exists a grievous ambiguity in a statute, such that after seizing everything from which aid can be derived, a court can make no more than a guess as to what Congress intended." United States v. Kavoukian, 315 F.3d 139, 144 (2d Cir. 2002) (internal quotation marks omitted).

The defendant has failed to establish such grievous ambiguity here. The sexual abuse of inmates is far more

like rape or assault offenses that are specifically identified as non-groupable than like fraud or drug distribution offenses that are specifically identified as groupable. Regardless whether the victim of a defendant's abuse remains the same, each episode of abuse involves distinct risks of fear, force, and harm. These multiple acts are not accounted for by the underlying sex abuse guideline and effectively go unpunished if grouped in the manner that the defendant suggests. Accordingly, the district court did not abuse its discretion when it declined to group the same-victim counts of conviction.

Finally, as the government contended below, see *supra* note 7, any possible error was harmless, because the record does not establish the further requirement under § 3D1.2(b) that the same-victim acts were "connected by a common criminal objective or constitut[ed] part of a common scheme or plan." § 3D1.2(b). As the Fourth Circuit has explained, grouping of same-victim counts under § 3D1.2(b) is required where "the criminal conduct of the defendant constitutes ongoing behavior toward a single goal that is in fact accomplished only by the entirety of the defendant's conduct, and where the behavior is ended upon the completion of that single goal . . . ." United States v. Pitts, 176 F.3d 239, 245 (4th Cir. 1999). By contrast, where "the defendant's criminal conduct constitutes single episodes of criminal behavior, each satisfying an individual–albeit identical–goal, then the district court does not group the offenses." Id.

Thus, in Pitts, the Fourth Circuit affirmed a district court's decision not to group two espionage-related counts of conviction, noting that "[t]he defendant did not intend

merely to transfer a sum certain of sensitive information to a foreign power with the intent to terminate the relationship as soon as that goal was completed," but "aimed to hand over as much sensitive information as he could." Id. at 245. "Each act of espionage satisfied that goal to a degree unrelated to and independent of every other act of espionage." Id.; see also United States v. Bradford, 277 F.3d 1311, 1316 (11th Cir.) (*per curiam*) (prison escapes one month apart not groupable under § 3D1.2(b), because "Bradford has not demonstrated that his two separate escapes were connected by a common criminal objective"), cert. denied, 537 U.S. 918 (2002).

As in Pitts and Bradford, the defendant's wrongful acts were complete upon termination of each incident, independent of each subsequent act of abuse. Accordingly, even assuming error in the district court's determination that the same-victim counts were not "one composite harm," any error was harmless, because grouping was not otherwise appropriate under § 3D1.2(b).

CONCLUSION

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

Dated: April 7, 2004

Respectfully submitted,

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ADDENDUM

U.S.S.G. § 3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total

amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§ 2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§ 2C1.1, 2C1.2, 2C1.7, 2C1.8;
§§ 2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§ 2E4.1, 2E5.1;
§§ 2G2.2, 2G2.4;
§ 2K2.1;

§§ 2L1.1, 2L2.1;
§ 2N3.1;
§ 2Q2.1;
§ 2R1.1;
§§ 2S1.1, 2S1.3;
§§ 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:
all offenses in Chapter Two, Part A;
§§ 2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§ 2C1.5;
§§ 2D2.1, 2D2.2, 2D2.3;
§§ 2E1.3, 2E1.4, 2E2.1;
§§ 2G1.1, 2G2.1;
§§ 2H1.1, 2H2.1, 2H4.1;
§§ 2L2.2, 2L2.5;
§§ 2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§ 2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

CERTIFICATE OF SERVICE

___This is to certify that two copies of the foregoing was sent by first-class United States mail to the following counsel of record:

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