07-1161-cr

To Be Argued By:
JAMES K. FILAN, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-1161-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

SONNY I. SZETO
Defendant-Appellant.

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

===

BRIEF FOR THE UNITED STATES OF AMERICA

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

JAMES K. FILAN, JR.
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, U.S. District Judge) had subject matter jurisdiction under 18 U.S.C. § 3231. The district court sentenced Szeto on March 6, 2007 (A7), and a final judgment entered on March 12, 2007 (A7, 194). Szeto filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on March 6, 2007. (A7, 197). 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 reasonably determined that a two-level upward adjustment was appropriate under U.S.S.G. § 2G1.3(b)(2).

2. Whether the district court reasonably considered the various factors set forth in 18 U.S.C. § 3553(a) in imposing on Szeto a within-Guidelines sentence.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 07-1161

UNITED STATES OF AMERICA,

Appellee,

-vs-

SONNY I. SZETO,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant-appellant Sonny I. Szeto used the popular social networking website www.myspace.com (hereinafter "MySpace") to meet an eleven-year-old girl from Connecticut (hereinafter "the victim"). He later traveled to Connecticut on three occasions during which time he molested the victim. The defendant was charged in a two-count Indictment with Use of an Interstate Facility to Engage in Sexual Activity with a Minor, in violation of 18

U.S.C. § 2422(b) ("Enticement") and Traveling in Interstate Commerce for the Purpose of Engaging in Illicit Sexual Conduct, in violation of 18 U.S.C. § 2423(b) ("Travel"). The defendant pleaded guilty to the Enticement charge as well as a one-count Information charging him with Possession of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). At the time of sentencing the district court (Janet C. Hall, U.S.D.J.) determined that the defendant's Guidelines calculation should be enhanced two levels under U.S.S.G. § 2G1.3(b)(2) for exercising undue influence over the eleven-year-old victim and, in the alternative, for misrepresenting his age to the victim. The district court then sentenced the defendant to the bottom of the Guidelines range, 168 months' imprisonment, followed by a lifetime term of supervised release.

On appeal, the defendant raises two issues. First, he claims that the district court committed error when it determined that his sentence should be enhanced two levels for exercising undue influence over the eleven-year-old victim. Second, he claims that the district court's imposition of a 168-month sentence – at the bottom of the Guidelines range – was unreasonable. For the reasons that follow, his claims should be rejected, and the judgment should be affirmed.

Statement of the Case

On March 7, 2006, a grand jury in the District of Connecticut returned an indictment against the defendant charging him with Use of an Interstate Facility to Engage

in Sexual Activity with a Minor, in violation of 18 U.S.C. § 2422(b) ("Enticement") and Traveling in Interstate Commerce for the Purpose of Engaging in Illicit Sexual Conduct, in violation of 18 U.S.C. § 2423(b) ("Travel"). (A9). A search of the defendant's residence in New York City resulted in the discovery of a substantial amount of child pornography.[1] The defendant was charged in a one count Information with Possession of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) ("Child Pornography").[2] (A11).

On June 26, 2006, the defendant pleaded guilty to Count One of the Indictment, the Enticement charge, and Count One of the Information, the Child Pornography charge. (A7). On March 6, 2007, the district court imposed a 168-month term of imprisonment and a lifetime

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[1] The child pornography charge arose out of a search of the defendant's apartment in New York City. The defendant agreed to waive venue and plead to that charge in Connecticut. (A27-28).

[2] The defendant filed an appendix. He also filed, under seal, his Presentence Report. The Government has filed a Government's Appendix comprised of Internet Chat Logs between the defendant and the victim that were introduced to the district court at sentencing. Because the chats identify the victim, the Government has filed its Appendix under seal. References are to those documents are as follows:

Appendix	("A ___.")
Presentence Report	("PSR ¶___.")
Government's Appendix	("GA___.").

term of supervised release. (A7, 182-186). Judgment entered on April 20, 2006. (A7, 194). On March 6, 2007, the defendant filed a timely notice of appeal. (A7, 197).

STATEMENT OF FACTS

A. Overview of the Investigation

The facts in this case are largely undisputed. During the defendant's sentencing, in the absence of objection from the parties (A125), the district court adopted the factual statements in the Presentence Report (A125-26). Those findings, in conjunction with other undisputed facts, reveal the following:

Sometime before September 2005, the victim created a user profile on MySpace. PSR ¶ 6. MySpace is a website that allows individuals to create user profiles and post personal information along with photographs. *Id*. It is used by individuals to meet and contact other users of the site. *Id*. On that website the victim posted personal information about herself along with a photograph. *Id*. After creating and posting her profile, the victim was contacted through MySpace by the defendant, then a 22-year-old man, in mid-September 2005. PSR ¶ 7. The defendant and the victim initially communicated via electronic mail hosted by MySpace. *Id*. Eventually, the defendant and the victim began communicating via America Online Instant Messenger ("AOL/AIM"). *Id*. The defendant used the AOL screen name jiujitsugrappler. *Id*.

The victim and the defendant thereafter continued their online communication. PSR ¶ 8. During this time the defendant further identified himself as Sonny. *Id*. He said that he had recently moved to New Jersey and that was where he was then residing. *Id*. He also lied about his age, telling the victim that he was 19 years old. PSR ¶ 8, 15. The defendant provided the victim with a cellular telephone number, and the defendant and the victim continued their communication. PSR ¶ 8.

During the course of their online communication both the defendant and the victim activated their webcams – cameras typically mounted on computers for the purpose of sending moving pictures via the Internet – and allowed each to view the other. PSR ¶ 9. A short time later, the defendant discussed with the victim a desire to meet her in person. *Id*.

The defendant subsequently traveled to the victim's parents' home in Connecticut on three separate occasions. PSR ¶ 10. All three instances of travel and meeting occurred late at night. *Id*. During the first encounter, the defendant and the victim sat in a neighbor's yard and talked. *Id*. The second and third encounters occurred in early October 2005 in the victim's home while her parents were sleeping. *Id*. During the second encounter, the defendant and the victim watched television in the playroom of her home. PSR ¶ 10. It was during this second encounter that the defendant kissed the victim. *Id*.

On the third of these encounters, the defendant again went into the victim's home while her parents were

sleeping. PSR ¶ 11. Also present in the victim's home were two minor friends of the victim. *Id*. The defendant and the victim went to the playroom of her home. While there the defendant molested the victim by placing his hands under her shirt and fondling her breasts and putting his hand inside the victim's pants and fondling her genitalia. *Id*.

After the Government's investigation into the defendant's activities, he was arrested and the Government obtained a search warrant and seized the defendant's computer equipment. (A58-59; PSR ¶ 19). Once seized, the computer equipment was searched and child pornography was discovered. PSR ¶ 19.

B. The Indictment and Information

On March 7, 2006, a grand jury returned an indictment against the defendant charging him with Use of an Interstate Facility to Engage in Sexual Activity with a Minor, in violation of 18 U.S.C. § 2422(b) ("Enticement") and Traveling in Interstate Commerce for the Purpose of Engaging in Illicit Sexual Conduct, in violation of 18 U.S.C. § 2423(b) ("Travel"). (A9). A search of the defendant's residence in New York City resulted in the discovery of a substantial amount of child pornography. The defendant was charged in a one-count Information with Possession of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) ("Child Pornography"). The case was originally assigned to United States District Judge Peter C. Dorsey, who accepted the defendant's

guilty plea, and later reassigned to Judge Hall, who imposed sentence.

C. The Guilty Plea and Imposition of Sentence

On June 26, 2006, the defendant pleaded guilty to Count One of the Indictment, the Enticement charge, and Count One of the Information, the Child Pornography charge. (A7). On March 6, 2007, the district court imposed a 168-month term of imprisonment and a lifetime term of supervised release. (A7, 182-186).

At the defendant's sentencing hearing, the district court stated that although this Court has yet to hold that a Guidelines sentence is presumptively reasonable, the district court recognizes them "as a very important factor in determining sentence because they are, of course, a statement by Congress of what it deems the appropriate sentence is based on the considerations that Congress gave to it in determining the guidelines. But again I obviously recognize I'm not bound to impose a sentence in those guidelines and I'm free based upon reasons that the court can articulate – appropriate reasons, I should say, to impose a sentence outside those guidelines I suppose anywhere up to the statutory maximum." (A124).

The district court first addressed – and rejected – the defendant's claim that the enhancement for use of an interactive computer service pursuant to U.S.S.G.

§ 2G1.3(b)(3)(B)[3] amounted to double counting because the defendant is charged with using an interactive computer service in the charging document. The defendant does not challenge the district court's determination of that issue on appeal.

The district court then addressed the defendant's claim that the two-level enhancement pursuant to U.S.S.G. § 2G1.3(b)(2)(B) because the defendant unduly influenced the victim, who was more than 10 years younger than the defendant, was rebutted because the eleven-year-old victim voluntarily engaged in sexual conduct with the defendant. The district court first noted that there was a rebuttable presumption based on the more than ten-year differential between the defendant's and the victim's ages, that the defendant had to come forward with evidence rebutting the presumption and then the Government had the ultimate burden of proving that the enhancement was appropriate. (A132-133).

The defendant first argued that U.S.S.G. § 2G1.3(b)(2)(B) required the district court to focus on the victim's conduct because, according to the defendant, that section "deals with the voluntariness of the victim's participation." (A134). The defendant argued that the victim initiated some of the telephone calls and some of the instant messages and that she activated her webcam and showed pictures of herself to the defendant and thus her conduct was voluntary and therefore the defendant could not have exercised undue influence over the victim.

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[3] Absent objection, the district court applied the 2005 Guidelines Manual. PSR ¶ 23; A125.

The district court then questioned the defendant whether it should consider the fact that the victim was only eleven years old when it determined whether her conduct was voluntary, to which the defendant answered that the age was not the issue but rather the issue was whether the will of the victim was overborne by the defendant. (A136).

The district court, again, noted that the victim did not have a history of engaging in situations such as one the defendant placed her in, and that acts are voluntary when the person doing them understands and appreciates what she is doing. In this case, the district court found that the eleven-year-old victim did not understand the consequences of her actions.

The district court, fully articulating its finding that the defendant did not defeat the presumption of undue influence, noted several elements of the defendant's conduct including the fact that the defendant lied about his age to appear to be a teenager, and groomed the victim in order to "win" her over. The district court concluded that the victim "was unduly influenced and actually did engage in the acts which were not ones she would freely choose had she not been unduly influenced." (A152).

The district court then turned to the calculation of the guideline level for the defendant, finding that the adjusted offense level was 35. (A155). The court addressed the defendant's request for a non-Guidelines sentence, based primarily on a psychiatric report prepared at his behest. After discussion of the report by both parties, the court

turned to a full consideration of the factors under 18 U.S.C. § 3553(a).

The district court considered the nature and circumstances of the defendant's conduct and the fact that the defendant had been viewing child pornography since he was 17 years old. (A178). The district court also considered the victim, an eleven-year-old girl to whom the defendant had lied. The court considered the defendant's actions, including that he visited the victim's home three times and offered to bring condoms when he met her. The court noted the defendant attempted to contact the victim at the school where she attended sixth grade by impersonating her brother. (A179). The defendant's repeated attempts to contact the victim were also an important factor in considering the need for a sentence to protect the public as well as the victim. (A179).

The district court considered the fact that the defendant was a first-time offender but stated that the need to protect the public from a person like this was an important consideration. (A181).

In imposing sentence, the district court stated as follows:

> At this point in the sentencing, the court needs to consider a number of other factors along with a guideline range. The first factor is the nature and circumstances of the offense and the history and characteristics of the defendant. I'm going to take first the history and characteristics of the

defendant. The court credits, the presentence reports it, Mr. Szeto has reported it, that he had in some respects a difficult upbringing that he suffered from some abuse and that there are perhaps roots in his upbringing that would cause him to have emotional problems and difficulties. He did, however, he went to college and did well and worked through college and even after college so while I know that history, it didn't strike me as a history that as in some of the cases that I looked at, in which abuses of such level; as to almost destroy a human being, that was not the case here. I do, of course, have the psychiatric report from Dr. Goldstein provided by Dr. Goldstein, yes, provided by defense counsel which is a nine-page report that carries with it two diagnoses and some conclusions about the relationship of his diagnosis to this offense. It is the only psychiatric examination that I have of the defendant but I don't believe that I'm required to accept it without question. And I must say even before receiving the government's memorandum, I was struck by the fact there didn't appear to be, at least, not reported in the letter, any tests that were done and given that the basis for the analysis is it seems to be at least in the face of the letter report, based on self-reporting by the defendant, I would have expected some sort of testing or other investigation to attempt to confirm or to in effect challenge that. I, of course, am not an expert. I'm not a board certified psychiatrist. I only

> know what I have learned from other reports and reviewing other reports but I would say for the most part, most of the reports that I received certainly from in criminal cases typically they will be from someone at Yale because the region we're in. I don't mean to say only Yale psychiatrists are valid but the reports do contain evidence of independent testing and attempts to confirm facts reported from other records which I don't see present in Dr. Goldstein's. But in saying that I don't mean to say I'm discounting his report completely. I'm mindful of what he's observed but I will stop at this point I guess time.
>
> The court is also mindful of the history and characteristics of the defendant that he's a first offender. Yes. That's taken into account in the guidelines but it is also a part of who he is. He's had no brush with the law at all. Zero points. I have also considered the fact that the defendant apparently has been viewing child pornography if I calculated it right since the age of 19 which is a cause of some concern to the court.

After consideration of all of these factors, the district court sentenced the defendant to the bottom of the Guidelines range, 168 months' imprisonment, followed by a lifetime term of supervised release. Judgment entered on April 20, 2006. (A7, 194). On March 6, 2007, the defendant filed a timely notice of appeal. (A7, 197).

SUMMARY OF ARGUMENT

I. The district court properly determined that the defendant exercised undue influence over the victim and thus the two-level enhancement was appropriate. The court considered numerous factors, including the victim's very young age, the victim's judgment at her age in discussing sexual matters, and whether the victim even understood the consequences of her actions. The district court also correctly relied on statements the defendant made in establishing a relationship with the eleven-year-old girl. Relying on these facts, the district court properly found that the defendant did not rebut the presumption that there was undue influence and, in fact, correctly found that the Government demonstrated by a preponderance of the evidence that the defendant exercised undue influence over the victim. Accordingly, the sentence was procedurally correct.

II. The sentence imposed by the district court on Szeto, at the bottom of the Guidelines range, also was substantively reasonable. In imposing sentence, the court considered all of the factors set forth in 18 U.S.C. § 3553(a). The district court properly viewed the defendant's psychiatric report with a critical eye, giving it the weight the district court said it deserved. The court imposed a sentence that reflected the nature and circumstances of the offense, the need for specific and general deterrence, and the need for punishment and the protection of society from further crime. Accordingly, the sentence should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ENHANCING THE DEFENDANT'S SENTENCE UNDER U.S.S.G. § 2G1.3(b)(2)(B)

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

U.S.S.G. § 2G1.3(b)(2) provides as follows:

> If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.

U.S.S.G. § 2G1.3(b)(2). The commentary to that section provides as follows:

> In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

> In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

U.S.S.G. § 2G1.3, app. note 3(B).

Applications of Sentencing Guidelines provisions that hinge on a district court's factual determinations are reviewed for clear error. *See United States v. Fuller*, 426 F.3d 556, 562 (2d Cir. 2005). The interpretation of a Sentencing Guideline, however, is generally a question of law subject to *de novo* review. *See United States v. Sloley*, 464 F.3d 355, 358 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1900 (2007). In the end, a district court's decision involving primarily an issue of fact will be reviewed for clear error, and a district court's decision involving primarily an issue of law will be reviewed *de novo*. *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005).

The dispute in the present case turns primarily on the factual questions of what the defendant did to the victim, and what effect his actions had on the victim's will. Accordingly, review here is for clear error. *See United States v. Myers*, 481 F.3d 1107, 1112 (8th Cir. 2007) ("the district court did not clearly err in concluding that . . . [the

defendant] did nothing that compromised [the victim's] volition").

C. Discussion

"The Guidelines do not provide any explicit definition of what constitutes 'undue influence.' However, the sentencing enhancement 'was added to the Guidelines in 2000 to capture those cases where 'coercion, enticement, or other forms of undue influence by the defendant . . . compromised the voluntariness of the victim's behavior and, accordingly, increased the defendant's culpability for the crime.'" *United States v. Castellon*, 213 Fed.Appx. 732, 2007 WL 172216 at *4 (10th Cir. 2007) (citing U.S.S.G. § 2A3.2, 2000 comments, background).[4] The first place where the Guidelines included an enhancement for undue influence was in U.S.S.G. § 2A3.2, which governs criminal sexual abuse of a minor. That section is identical to the "undue influence" enhancement promulgated in U.S.S.G. § 2G1.3(b)(2)(B), the section at issue in this case. *Castellon*, 2007 WL 172216 at *4 n.5.[5]

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[4] Federal Rule of Appellate Procedure 32.1 provides that "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been . . . (i) designated as "unpublished," "not for publication," "nonprecedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007."

[5] The defendant argues that in determining whether there has been undue influence the focus of the sentencing court must be on the victim's conduct. As the Tenth Circuit stated in *Castellon*, however,

(continued...)

The sentencing court did not commit clear error when it determined that the defendant exercised undue influence over the eleven-year-old victim prior to molesting her. Indeed, the defendant was "grooming" the victim. Sexual grooming is "the process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point of intercourse." *United States v. Johnson*, 132

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[5] (...continued)

> [t]he case law is sparse on this issue and not in agreement and involves situations where there is not a live victim, but rather a law enforcement agent acting as a minor victim. *See United States v. Chriswell*, 401 F.3d 459 (6th Cir. 2005); *United States v. Mitchell*, 353 F.3d 552 (7th Cir. 2003); *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002). We find we need not resolve that issue here. As the Guidelines state, the court must examine all the facts in the case, which includes obviously the defendant's conduct and the victim's conduct, including her response to the defendant's conduct. It makes little sense to apply such a 'totality of the circumstances' analysis with a narrow focus on either the defendant or the victim.

Castellon, 2007 WL 172216 *5 n.7.

The Government agrees that it is a "totality of the circumstances" test. Indeed, that conclusion is supported by the plain language of the application notes to § 2G1.3, which provide that "the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior." U.S.S.G. § 2G1.3, app. note 3(B). Under this language, the sentencing court must consider the participant's influence – that is, what the participant said and did – as well as the effect that the participant's influence had on the victim. Accordingly, the focus must be on both persons' actions.

F.3d 1279, 1283 n.2 (9th Cir. 1997). Grooming has also been described as desensitizing the victim by touching in an innocuous manner and thereafter escalating the sexual nature of the touching. *See United States v. Hitt*, 473 F.3d 146, 152 (5th Cir. 2006). A child molester such as the defendant will often engage in grooming in an effort to weaken a victim's will to defend herself against the eventual sexual attacks. Further, a child molester also will try to gain some advantage on a victim, such as finding out information about her that he can use to threaten her in an effort to keep her from disclosing his identity or his actions in molesting the victim. Here, the defendant did these very things.

For instance, the defendant spent considerable time talking with the victim via the Internet and by telephone before meeting her. PSR ¶ 7-8; (GA2-18). He also started out by just meeting the victim and establishing a rapport with her, as opposed to attempting to engage in some form of sexual activity immediately. PSR ¶ 10. When he first met her he simply sat with the victim in her neighbor's yard and talked to her. PSR ¶ 10. He did this to gain her trust.

On the second trip to Connecticut he went into the victim's home and kissed her and rubbed her back and stomach, slowly escalating the sexual activity. (A142; GA3). On the third trip to Connecticut he actually sexually molested the eleven- year-old girl by fondling her breasts and her genitalia. PSR ¶ 11; (A142) And, like virtually all child molesters, he intended to escalate the activity even more by asking the victim whether he should

bring condoms to their next meeting. (A145); PSR Addendum at 2.

The defendant also attempted to extract information from the victim that he could later use to prevent her from disclosing his identity or the fact that he molested her. For instance, the following exchange took place:

JiuJitsuGrappler: tell me something!
NEVERLETGO97: yes im on all the timee
JiuJitsuGrappler: i want to know something about you that no one knows
NEVERLETGO97: .....
JiuJitsuGrappler: ...
JiuJitsuGrappler: yeah
NEVERLETGO97: id....
JiuJitsuGrappler: tell me a secret
JiuJitsuGrappler: yes you doooooooooooooo
NEVERLETGO97: id....
NEVERLETGO97: idk* [I don't know]

(GA3).

The defendant was attempting to both groom the victim and gather information that he could use to keep her quiet in the event that someone found out about their illegal relationship. In this regard, the defendant is like virtually all child molesters, working to gain the victim's trust while simultaneously gathering information to use against her to protect himself if things turn bad.

The district court correctly found that the facts supported the undue influence enhancement. First, the district court noted that there is a rebuttable presumption, and that fact was a consideration in whether there was undue influence. (A151). The district court did not stop there, however. It also considered the victim's age and found that because the victim was only eleven years old she lacked judgment that other persons might have possessed. (A138-39, 146-47, 150-52). This, in turn, was why it carefully considered but rejected the defendant's argument that there could not have been undue influence when the victim takes any affirmative or proactive steps in the circumstances. (A150-51).

Second, the district court also properly determined that the defendant was in fact, grooming the victim. It held that

> while he may not have been sophisticated about it . . . [h]e nonetheless utilizes tools and sort of steps and building a relationship I guess I will say I guess might be normally in any relationship. When it is a 11 year old girl is not right. Building that relationship to a point where the crime here was actually committed. And so and I have reviewed very briefly the chats and there are there in those particular exchanges I think as pointed out by the government that reflect, as I say, if it may have been unintentional but nonetheless what would be called grooming in the sense of attempting and I think actually winning over an 11-year-old-girl.

(A152). It cannot be said that the district court's finding that the defendant was grooming the victim was clearly erroneous.

The defendant's reliance on *United States v. Mitchell*, 353 F.3d 552 (7th Cir. 2003), and *United States v. Chriswell*, 401 F.3d 459 (6th Cir. 2005), is misplaced. In each case there was no actual victim but instead an undercover law enforcement officer posing as an child.

Further, *United States v. Myers*, 481 F.3d 1107 (8th Cir. 2007), is easily distinguishable. Doe, the victim in *Myers*, was a fifteen-year-old girl who engaged in online conversations with various adults, including an individual from the Gaza Strip and another man, Mohammed, from Egypt. She became interested in Mohammed and threatened to run away with him. Doe's mother spoke with Mohammed, and they agreed that he would wait until Doe turned eighteen. Doe's mother tried to curtail Doe's online activities by ordering her not to chat with adults online and by putting controls in place to restrict her internet access to age-appropriate content, but Doe managed to continue chatting with adults online, one of whom included Myers. Myers was thirty-seven years old and lived in Kentucky. Myers and Doe talked by computer and phone for about three weeks, and Doe claimed to have fallen in love with Myers. Myers and Doe decided that Doe would leave home and marry him.

In 2005, Myers and a friend named Twining and Twining's ten-year-old daughter traveled by van from Kentucky to Iowa. Doe, after leaving her mother a note

falsely saying that she was running away with Mohammed, packed some items and met Myers near her home. Shortly thereafter, the pair departed for Kentucky. During the course of that morning and the following evening, Myers and Doe engaged in vaginal intercourse, anal intercourse, and oral sex. *Myers*, 481 F.3d at 1108-09.

The district court in *Myers* found that

> Myers presented sufficient evidence for the district court to determine that Myers had not 'compromised the voluntariness of [Doe's] behavior,' § 2G1.3, cmt. n.3. The depositions indicate that Doe had already possessed some inclination to leave home before she even encountered Myers and had contemplated running away with Mohammed. Moreover, in her deposition, Doe characterized the plan for her to run away and marry Myers as 'both of [their] ideas,' agreed that Myers 'didn't have to do anything to convince [her] to go to Kentucky,' and stated that she anticipated that she would at some point have sex with Myers. Given this evidence, the district court did not clearly err in concluding that, despite the difference in their ages, Myers did nothing that compromised Doe's volition, however misguided it may have been.

Myers, 481 F.3d at 1112.

Here, on the other hand, there is overwhelming evidence, from both the defendant and the victim, that her

will was compromised. First, the victim here was only eleven years old, while Doe was fifteen years old. While only four years apart, taken in context a fifteen-year-old is worlds apart from an eleven-year-old. The statute criminalizing sexual conduct, 18 U.S.C. § 2241, as well as the Guidelines, *see* § 2A3.1, recognize the importance of a difference in age of only four years and the difference between children who are older or younger than twelve years.

In U.S.S.G. § 2A3.1, for example, which is used in criminal sexual assault cases, the Guidelines provide in subsection (b)(2)(A) that "[i]f the victim had not attained the age of twelve years, increase by four levels; or (B) if the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels." *See also* U.S.S.G. § 2A3.1, Background ("Any criminal sexual abuse with a child less than twelve years of age, regardless of 'consent,' is governed by § 2A3.1"). The law therefore recognizes that someone under age twelve – such as the victim here – is treated differently than someone between twelve and sixteen – such as Doe in *Myers* – by providing for enhanced penalties for someone who molested an eleven-year-old as opposed to a fifteen-year-old. "Sentencing enhancement pursuant to § 2A3.1(b)(2)(A) punishes sexual contact with a child under the age of twelve years old, as such children are incapable of giving effective legal consent." *United States v. Reyes Pena*, 216 F.3d 1204, 1210 (10th Cir. 2000).

Second, unlike Doe, there is no evidence that the victim here had a propensity for chatting online and

wanting to run away with older men. Indeed, in *Myers*, Doe's mother tried unsuccessfully to limit her computer use and even had to step in and tell one adult male that he had to wait until Doe turned 18 before he could see her. Then Doe ran away with another man and lied to her mother, pretending to have run away with the first man. Here, on the other hand, the victim's parents successfully prohibited all computer and telephone usage and, far from running away with adult men, the victim is guarded and fearful. PSR Addendum at 2.

Third, Doe had all sorts of sex with Myers when she got to his trailer in Kentucky. Here, on the other hand, the victim is "physically guarded and no longer is comfortable with being touched, even by her parents." PSR Addendum at 2. In fact, unlike Doe in *Myers*, the victim here, according to the defendant himself, told the defendant that she was uncomfortable with his fondling her. PSR ¶ 20. The two cases could hardly be any more different.

Thus, based on the evidence before it, the district court properly found that the "government has demonstrated that [the victim] was unduly influenced and actually did engage in the acts which were not ones she would freely choose had she not been unduly influenced." (A152). Accordingly, the district court's judgment should be affirmed on that ground.

In the alternative, the district court's conclusion that the defendant lied about his age to the victim – claiming that he was 19 rather than 22 – and that his actions were

designed to entice her to engage in sexual activity was not clearly erroneous.

U.S.S.G. § 2G1.3(b)(2)(A) provides as follows:

> (2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct . . . .

U.S.S.G. § 2G1.3(b)(2). The commentary to that section provides as follows:

> 3. Application of Subsection (b)(2).–
>
> (A) Misrepresentation of Participant's Identity. The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

> *The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes* misrepresentation of a participant's name, *age*, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

U.S.S.G. § 2G1.3(b)(2), app. note 3(A) (emphasis added).

As an initial matter, the district court did not clearly err in finding as a factual matter that the defendant had, in fact, falsely claimed to the victim that he was 19 rather than 22 years old. Contrary to the defendant's claim on appeal, Def. Br. at 12, there were indeed "facts in the record" to support that finding. Specifically, the PSR, at ¶ 8, relates that the defendant "stated that he was 19 years of age." At the beginning of the sentencing hearing the district court specifically asked the defendant if there were any factual objections to the PSR, and the defendant replied that there were not. (A125). The district court then stated that "I will adopt in the absence of objection the facts as set forth in the Presentence Report as the facts upon which the court[] will base its decision today." *Id.* Further, defense counsel himself stated that the defendant "represented himself to be 19 years old." (A149). The defendant's claim on appeal is therefore unfounded.

Further, the defendant's contention that the difference in age – which he described as the difference between a college sophomore (a college freshman would be more accurate) and a college senior – is immaterial ignores the realities of this case and the process by which the defendant gained the victim's trust. It is common for a child molester such as the defendant to misrepresent his age in an effort to gain the victim's confidence and trust. It serves to make a potential victim less concerned about the age difference and is part and parcel of the "grooming" process by which a molester acts to place himself on the same plane as the victim. *See, e.g., United States v. Blas*, 360 F.3d 1268, 1273 (11th Cir. 2004) (no clear error in finding that defendant lied about his age to gain minor victim's confidence and trust; not reaching question of whether that finding alone warrants § 2A3.2 enhancement). The defendant made it seem as if, because he was still himself a teenager, he could be the victim's "boyfriend." Here, by lying about his age, the defendant was attempting to make the victim less uncomfortable about his age. His lying was specifically designed to induce or entice the victim into prohibited sexual conduct – that is, to make the molestation possible. Therefore, that misrepresentation clearly was material.

The materiality of the defendant's lie in this case is borne out by the contrast with the lie in, for instance, *United States v. Miranda*, 348 F.3d 1322, 1333 (11th Cir. 2003). There, the district court found that the 40-year-old defendant's lie that he was 35 years old was not material because it was not made with the intent to induce the victim to have sex with him. In reaching that result, the

district court noted that Miranda lied about his age – again stating that he was 35, not 40 – to the agents at the time he was arrested and it was only when he was confronted with his driver's license and asked his age again that he told the truth. Thus, the five-year age difference in that case – compared with the age of the 13-year-old victim in that case – would naturally seem to have less of an effect on the victim and thus the defendant's actual intent in lying was questionable.

Here, on the other hand, the defendant's lie that he was a teenager meshes perfectly with the victim's representation on MySpace that she was 14 years old. (A150). Because the focus here is on the defendant's intent, the relevant age differential is only five years – the difference between his claimed age and the age he believed the victim to be. The defendant, like the victim, claimed to be a teenager; he purported to be just like her and therefore he was safe and could be trusted. Unlike the age difference in *Miranda*, the lie narrowing the age difference here simply is too close than to be anything other than designed to induce the victim to have sex with the defendant.

In any event, even if the district court could have decided otherwise, its determination was a factual inquiry because it focused on the defendant's intent. *See Miranda*, 348 F.3d at 1333 (holding that "there [was] evidence from which the district court could have found" to the contrary, but deferring to district court's resolution of "factual issue"). The district court's determination that the defendant's misrepresentation that he was 19 instead of 22

closed "the gap significantly between his age and what he thought the victim's age was" is entitled to deference and should not be disturbed. That conclusion is supported by the record and provides an alternate ground for affirming the district court's application of a two-level enhancement under U.S.S.G. § 2G1.3(b)(2).

II. THE 168-MONTH WITHIN-GUIDELINES SENTENCE IMPOSED ON THE DEFENDANT BY THE DISTRICT COURT WAS REASONABLE

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

The Sentencing Guidelines are no longer mandatory, but rather represent one factor a district court must consider in imposing a reasonable sentence in accordance with Section 3553(a). *See United States v. Booker*, 543 U.S. 220, 258 (2005); *see also United States v. Crosby*, 397 F.3d 103, 110-18 (2d Cir. 2005). Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific factors to be considered such as the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence to serve the various purposes of punishment,

the sentencing guidelines, and the need to avoid unwarranted sentencing disparities. 18 U.S.C. § 3553(a).

In *Crosby*, this Court explained that, in light of *Booker*, courts should now engage in a three-step sentencing procedure. First, the court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the court should consider whether a departure from that Guidelines range is appropriate. *Id.* Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113. A failure to consider the Guidelines range and instead simply to select a sentence without such consideration is error. *Id.* at 115.

In *Booker*, the Supreme Court ruled that Courts of Appeals should review post-*Booker* sentences for reasonableness. *See Booker*, 543 U.S. at 261 (discussing the "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness]'") (quoting 18 U.S.C. § 3742(e)(3) (1994)). In *Crosby*, this Court articulated two dimensions to this reasonableness review. First, the Court will assess procedural reasonableness – whether the sentencing court complied

with *Booker* by (1) treating the Guidelines as advisory, (2) considering "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness – that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in § 3553(a). *Id.* at 114.

As this Court has held, "'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries." *Id.* at 115. The "brevity or length of a sentence can exceed the bounds of 'reasonableness,'" although this Court has observed that it "anticipate[s] encountering such circumstances infrequently." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

An evaluation of whether the length of the sentence is reasonable will necessarily "focus . . . on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005); *see Booker*, 543 U.S. at 261 (holding that factors in § 3553(a) serve as guides for appellate courts in determining if a sentence is unreasonable). As the Eighth Circuit has observed, a sentence "may be unreasonable if [it] fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice

dictated by the facts of the case." *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005).

To fulfill its duty to consider the Guidelines, the court will "normally require determination of the applicable Guidelines range." *Id.* at 1002. "An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *Selioutsky*, 409 F.3d at 118; *cf. United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable), *cert. denied*, 126 S. Ct. 388 (2005).

The Supreme Court recently held, in *Rita v. United States*, 127 S.Ct. 2456 (2007), that a court of appeals may presume that a sentence within the Guideline range is reasonable. The Court reasoned that a presumption of reasonableness reflects both that the sentencing judge and the Sentencing Commission reached the same conclusion as to the appropriate sentence (including that it is "sufficient but not greater than necessary" in the words of § 3553(a)), and that the Commission was required to consider the same § 3553(a) factors in writing the Guidelines as sentencing judges must consider, examined thousands of sentences, and continues to study sentencing, so that the Guidelines "reflect a rough approximation of sentences that might achieve §3553(a)'s objectives." 127 S. Ct. at 2463-65.

Further, the Court held that the presumption does not violate the Sixth Amendment, even if it encourages sentencing judges to impose Guideline sentences, because this appellate presumption does not require the sentencing court to impose a Guidelines sentence and, indeed, the sentencing court was required to consider the sentencing guidelines and the other § 3553(a) factors. *Id.* at 2465-68. The Court in fact emphasized that the presumption applies only on appellate review and, even on appeal, the presumption is not binding, does not shift the burden of proof, and is not as strong as the deference accorded an agency decision. *Id.* at 2463-65.

The *Rita* decision goes farther than this Court has, as this Court has declined to adopt a formal presumption that a within-Guidelines sentence is reasonable. That fact notwithstanding, this Court has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress."). Thus, although there is no formal presumption, this Court is in accord with *Rita*, which ultimately held that when a court of appeals reviews a Guidelines sentence, the fact that both the sentencing court and the Commission agree on the sentence "significantly increases the likelihood that the sentence is a reasonable

one," 127 S. Ct. at 2463, because "when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable," *id.* at 2465.

This Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). In assessing the reasonableness of a particular sentence imposed,

> [a] reviewing court should exhibit restraint, not micromanagement. In addition to their familiarity with the record, including the presentence report, district judges have discussed sentencing with a probation officer and gained an impression of a defendant from the entirety of the proceedings, including the defendant's opportunity for sentencing allocution. The appellate court proceeds only with the record.

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir.) (per curiam) (quoting *Fleming*, 397 F.3d at 100) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006).

C. Discussion

According to the defendant, the district court's sentence of 168 months was procedurally unreasonable because his sentence should not have been enhanced two levels under U.S.S.G. § 2G1.3(b)(2) and substantively unreasonable because it failed to give proper consideration to his history and characteristics – specifically, the psychiatric report presented on his behalf.

The Government has addressed the two-level enhancement above and will not address it again. The defendant's claim that his sentence was substantively unreasonable has no merit.

The defendant's primary reliance is on the psychiatric report prepared in aid of sentencing and his claim that the district court failed to consider adequately his history and characteristics as detailed in the report. The district court, however, went into great detail regarding those facts and determined nonetheless that it would impose a guideline sentence. In essence, it found that neither the report, nor the defendant's history and characteristics, warranted a non-Guidelines sentence.

First, the report was based on a brief meeting with the defendant in which the physician relied almost exclusively on the defendant's self-reporting. Second, it concluded that the defendant suffered from depression and avoidant personality disorder and that the defendant's depression was "associated with grossly impaired judgment and impulse control" and that it "substantially contributed to

his conduct." It also concluded that he was deeply remorseful about his misconduct and that with appropriate treatment his prognosis is good.

Indeed, there was no independent testing to see if the defendant is a pedophile, which is a separate diagnosis under DSM-IV-TR and subject to specific testing. There was no assessment to determine his risk of re-offending; no polygraph examination was employed to determine if he has done it before, particularly in view of the fact that he has been viewing child pornography for years. Instead, the report offers only unsupported, one-sentence conclusions.

The district court clearly considered the psychiatric report but recognized that it did not have to accept it uncritically and could ascribe it the weight it believed it deserved. *See, e.g., United States v. Thomas*, 454 F.3d 904, 905 (8th Cir. 2006) (affirming district court's imposition of within-Guidelines sentence despite psychologist's report outlining defendant's intellectual defects). After considering the report it held as follows:

> It is the only psychiatric examination that I have of the defendant but I don't believe that I'm required to accept it without question. And I must say even before receiving the government's memorandum, I was struck by the fact there didn't appear to be, at least, not reported in the letter, any tests that were done and given that the basis for the analysis is it seems to be at least in the face of the letter report, based on self-reporting by the

> defendant, I would have expected some sort of testing or other investigation to attempt to confirm or to in effect challenge that. I, of course, am not an expert. I'm not a board certified psychiatrist. I only know what I have learned from other reports and reviewing other reports but I would say for the most part, most of the reports that I received certainly from in criminal cases typically they will be from someone at Yale because the region we're in. I don't mean to say only Yale psychiatrists are valid but the reports do contain evidence of independent testing and attempts to confirm facts reported from other records which I don't see present in Dr. Goldstein's. But in saying that I don't mean to say I'm discounting his report completely. I'm mindful of what he's observed but I will stop at this point I guess time.

The district court considered the psychiatric report and it did not discount it. It simply concluded that it had limitations and took those limitations into account in sentencing the defendant. Thus, the district court considered the report in light of, and in addition to, all of the § 3553(a) factors, and ascribed it the weight it felt it deserved and, like the weight to be given any § 3553(a) factor, the district court's weighing of that report "is a matter firmly committed to the discretion of the sentencing judge and is beyond [this Court's] review." *Fernandez*, 443 F.3d at 32.

Moreover, the defendant simply is wrong in his claim that the Government "clever[ly] though erroneous[ly],

shift[ed] the burden of proof to the defense" on the defendant's psychiatric claims. Def. Br. 17. The Government does not always bear the burden of proving sentencing facts – it is the proponent of an adjustment who bears the burden of proof. *See Fernandez*, 443 F.3d at 32 ("As with departures, the proponent of a factor that would work in the proponent's favor has to provide the basis to support it.") (quoting *United States v. Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc)). Here, the defendant was seeking a reduction in sentence *below* the Guidelines range, either in the form of a departure or a variance. It was therefore his burden to prove the existence of a mitigating factor.

Indeed, the district court fully and thoroughly considered all of the § 3553(a) factors. It reviewed them in detail as follows:

> As I mentioned at the beginning, the court needs to consider these factors and I perhaps should explain to the victim's father that and I usually do say this. When I used to begin pre-*Booker* before the guidelines were transformed to advisory and they were in effect nearly mandatory, it would often sound like I was engaged in making alphabet soup when I was determining guidelines. It tends to give the impression both to the defendant and the victim that, you know, they are lost in this calculation. What I was trying to do was to comply with a scheme that Congress devised in an attempt to determine a range of sentence that they thought was appropriate in this

instance. And of course it is no longer binding on me as it is advisory. It is a factor to be consider. As indicted it is an important factor so I do need to consider it. At this point in the sentencing, the court needs to consider a number of other factors along with a guideline range. The first factor is the nature and circumstances of the offense and the history and characteristics of the defendant. I'm going to take first the history and characteristics of the defendant. The court credits, the presentence reports it, Mr. Szeto has reported it, that he had in some respects a difficult upbringing that he suffered from some abuse and that there are perhaps roots in his upbringing that would cause him to have emotional problems and difficulties. He did, however, he went to college and did well and worked through college and even after college so while I know that history, it didn't strike me as a history that as in some of the cases that I looked at, in which abuses of such level; as to almost destroy a human being, that was not the case here. I do, of course, have the psychiatric report from Dr. Goldstein provided by Dr. Goldstein, yes, provided by defense counsel which is a nine-page report that carries with it two diagnoses and some conclusions about the relationship of his diagnosis to this offense. It is the only psychiatric examination that I have of the defendant but I don't believe that I'm required to accept it without question. And I must say even before receiving the government's memorandum, I was struck by the fact there didn't appear to be,

at least, not reported in the letter, any tests that were done and given that the basis for the analysis is it seems to be at least in the face of the letter report, based on self-reporting by the defendant, I would have expected some sort of testing or other investigation to attempt to confirm or to in effect challenge that. I, of course, am not an expert. I'm not a board certified psychiatrist. I only know what I have learned from other reports and reviewing other reports but I would say for the most part, most of the reports that I received certainly from in criminal cases typically they will be from someone at Yale because the region we're in. I don't mean to say only Yale psychiatrists are valid but the reports do contain evidence of independent testing and attempts to confirm facts reported from other records which I don't see present in Dr. Goldstein's. But in saying that I don't mean to say I'm discounting his report completely. I'm mindful of what he's observed but I will stop at this point I guess time.

The court is also mindful of the history and characteristics of the defendant that he's a first offender. Yes. That's taken into account in the guidelines but it is also a part of who he is. He's had no brush with the law at all. Zero points. I have also considered the fact that the defendant apparently has been viewing child pornography if I calculated it right since the age of 19 which is a cause of some concern to the court.

(A175-78). The defendant's claim that the district court paid only "lip service" to all the § 3553(a) factors except seriousness of the offense clearly is rebutted by its thorough consideration as set forth above. The district court considered the history and characteristics of the defendant. It recognized that he was a first-time offender and that he had a difficult upbringing. It also noted, however, that he had significant achievements, such as a college education, and that he had been successful in college and after college. In any event, the defendant is essentially challenging nothing more than the particular weight that the district court ascribed to the various factors at issue. Those matters, however, are "firmly committed to the discretion of the sentencing judge and [are] beyond our review." *Fernandez*, 443 F.3d at 32.[6]

In sum, the district court took all appropriate factors into consideration in sentencing the defendant and explained those factors at length. Clearly, the district court was aware of what factors must be considered in sentencing the defendant and that sentence was reasonable. *See Rita*, 127 S. Ct. at 2468; *see Fernandez*, 443 F.3d at 21; *see also Rattoballi*, 452 F.3d at 127.

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[6] Equally unavailing is the defendant's reliance on Judge Dorsey's comments at the time of the guilty plea. Judge Dorsey made only non-case-specific musings. Judge Hall, on the other hand, had the benefit of the Presentence Report, the psychiatric evaluation and all other sentencing information, and was thus able to impose a case-specific, well-informed sentence.

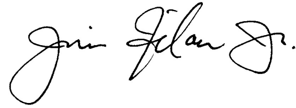
CONCLUSION

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

Dated: July 16, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

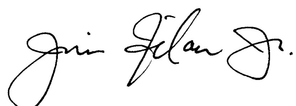


JAMES K. FILAN, JR.
ASSISTANT U.S. ATTORNEY

William J. Nardini
Assistant United States Attorney (of counsel)

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 9,951 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



JAMES K. FILAN, JR.
ASSISTANT U.S. ATTORNEY

ADDENDUM

Title 18, United States Code, Section 3553

(a) Factors to be considered in imposing a sentence.-- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

United States Sentencing Guideline § 2G1.3

Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(a) Base Offense Level: 24

(b) Specific Offense Characteristics

(1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of,

a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.

(3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.

(4) If the offense involved (A) the commission of a sex act or sexual contact; or (B) a commercial sex act, increase by 2 levels.

(5) If the offense involved a minor who had not attained the age of 12 years, increase by 8 levels.

(c) Cross References

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

(2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, § 2A3.1 shall apply, regardless of the "consent" of the minor.

(d) Special Instruction

(1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Szeto

Docket Number: 07-1161-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/16/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: July 16, 2007