11-2286

To Be Argued By:
DAVID B. FEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2286

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UNITED STATES OF AMERICA,
Appellee,

-vs-

WILLIAM OEHNE,
aka William Karl Ludwig Oehne, Jr.
Defendant-Appellant.

———

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

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID B. FEIN
United States Attorney
District of Connecticut

KRISHNA R. PATEL
ROBERT M. SPECTOR *(of counsel)*
Assistant United States Attorneys

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

This is an appeal from a judgment entered on June 6, 2011, after the defendant, William Oehne ("Oehne") pleaded guilty to a two-count Indictment charging him with production of child pornography and distribution of child pornography. Joint Appendix ("JA")7, JA550-JA551. The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On June 3, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), JA548, and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

1. Whether the district court clearly erred in denying Oehne's motion to suppress based on its factual findings that he had not invoked his right to counsel prior to making incriminating statements, he had waived his right to counsel in any event by making spontaneous admissions, and he had knowingly and voluntarily consented to the search of his residence.

2. Whether the district court abused its discretion and imposed an unreasonable sentence when it correctly calculated the guideline range, thoroughly analyzed the relevant factors under 18 U.S.C. § 3553(a), and sentenced the defendant to 540 months' imprisonment, which was 60 months below the guideline range, based on the egregious nature of the criminal conduct in this case.

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Preliminary Statement

The defendant, William Oehne, pleaded guilty to both counts of a two-count Indictment, charging him with production and distribution of child pornography. Oehne sexually abused the eight-year-old daughter of a woman with whom he lived, and his abuse of the minor victim continued for two years. He photographed the sexual abuse of the minor victim and distributed the images on the Internet, resulting in one of

the most prolific series of child pornography viewed worldwide. The district court sentenced Oehne to 540 months' imprisonment followed by a life term of supervised release.

Having waived his right to appeal on all but two grounds, Oehne challenges (1) the district court's factual findings on his motion to suppress statements that he made on the day of his arrest and physical evidence obtained from the consensual search of his residence, and (2) the reasonableness of the court's sentence. These claims lack merit. Following an evidentiary hearing, the district court properly denied Oehne's motion to suppress based on its findings that (1) on the day of his arrest, Oehne did not invoke his right to counsel, (2) even if he had invoked his right to counsel, his spontaneous statements to the investigating agents constituted a waiver of that right; and (3) his consent to the search of his residence and shed was voluntary, knowing, intelligent and free from coercion. Moreover, at sentencing, the district court properly weighed the factors under 18 U.S.C. § 3553(a) and determined that Oehne's egregious criminal conduct in producing child pornography while repeatedly sexual abusing the eight-year victim over a two-year period of time, along with specific concerns that Oehne presented a high risk of recidivism and a danger to others, warranted a sentence of 540 months' incarceration.

Statement of the Case

On March 4, 2010, a federal grand jury returned a two-count indictment charging Oehne with production of child pornography, in violation of 18 U.S.C. § 2251(a), and distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2). JA9-JA10.

On August 10, 2010, Oehne filed a motion to suppress the statements he made and the physical evidence seized as a result of his interaction with law enforcement officers in Virginia prior to his arrest in this case. JA66. On October 1, 2010, the district court (Janet C. Hall, J.) held an evidentiary hearing to address this motion. JA71. On October 6, 2010, the court denied the motion in its entirety. JA246. On October 19, 2010, Oehne pleaded guilty to both counts of the indictment, but specifically reserved his right to appeal the court's ruling on the suppression motion. JA297-JA305.

On May 31, 2011, the district court sentenced Oehne principally to 540 months of imprisonment, and judgment entered on June 6, 2011. JA7. On June 3, 2011, Oehne filed a timely notice of appeal. JA7. He is currently in federal custody serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. Factual Basis

The following facts leading to Oehne's arrest were set forth in the Government' sentencing memorandum or the Pre-Sentence Report ("PSR") and were not disputed by Oehne at the time of sentencing.

In or about 2004, Oehne met the mother of the Minor Victim ("MV") and eventually moved in with her in her home in Fairfield County, Connecticut, where MV also resided. JA428. Oehne engaged in a lengthy grooming process with MV, which included showing her pornography, touching her, taking her to a nude beach, walking in on her while she was showering, and walking around the home nude. JA429, JA431.

From 2004 to 2006, Oehne photographed his sexual abuse of MV. *See* PSR ¶ 7. The images depict MV forced to pose in lewd and seductive positions. *See* PSR ¶ 7. There are images of penetration with Oehne's penis and with a "dildo." *See* PSR ¶ 7. Oehne performed oral sex on MV and masturbated in front of her, and he had MV put her lips on his penis, which he also photographed. *See* PSR ¶ 7; JA432.

Utilizing peer-to-peer networks, Oehne distributed the abusive images of MV on the Internet, creating a permanent and prolific record of

the harm. JA428. The series of abusive images of MV that Oehne photographed and uploaded was, at the time, the second most prolific series of child pornography worldwide. JA428; *see* PSR ¶ 7.

In 2006, an agent of the Federal Bureau of Investigation ("FBI") forwarded to the National Center for Missing and Exploited Children ("NCMEC") child pornographic images that the agent had located while acting in an undercover capacity on the Internet. JA430. An INTERPOL child exploitation working group in Lyon, France forwarded additional images of the same victim to NCMEC. JA430. INTERPOL was able to find identifying information after magnifying the photographs. JA430. In one image, the minor victim was standing in front of a plate bearing a first name and birth date. JA430. A separate image depicted a "Mickey Mouse" hat with the same first name stenciled on the back. JA430. Utilizing the information received from various law enforcement officials, the FBI identified people in the United States who matched the first name and date of birth. JA430.

In March 2009, special agents from the FBI's New Haven Field Office located MV in Connecticut. JA430. An FBI child/adolescent forensic interviewer spoke to MV in an effort to determine the identity of her abuser because the images in the series do not reveal his identity. JA430. During the forensic interview, MV identified

Oehne as her abuser and provided details about the abuse. JA430-JA431. MV's mother was also interviewed, and she confirmed that Oehne lived in her home with MV for significant periods of time from 2003 until 2007. JA431. MV's mother stated that Oehne would borrow her camera, which agents searched and found pornographic images of MV. *See* PSR ¶ 6.

After identifying and speaking with MV, law enforcement officers located Oehne at his residence in Virginia. JA431. They interviewed Oehne, who made some admissions but minimized his conduct. JA431. He provided written consent for the agents to search his residence, car and shed. In the shed, agents recovered distinctive rings that matched the rings worn by the abuser in the images of MV's sexual abuse. JA431. Oehne was arrested, executed a written Miranda waiver and provided a handwritten confession in which he made further admissions, but continued to minimize his crimes. JA431. Specifically, he wrote:

> [MV] asked me to take photos of her and the[y] unintentionally got uploaded to Limewire. There was never any sexual relations with her, and I did the photos to make her happy. There was never any other abuse. There was never any penetration of any of her body parts. Upon discover[y] of the Limewire upload I immediately deleted the Limewire program.

> I feel horrible for any hardships this has caused anyone and there was never any intention of uploading or sharing photos. I am truly sorry for everything that has happened.

JA431; Government's Appendix ("GA")5.

During the search of Oehne's residence, the agents located, among other things, a camera containing images of four girls. JA432. The girls were identified as Virginia residents, and each was interviewed and described instances of in appropriate contact and touching by Oehne. JA433.

B. Motion to Suppress

On August 10, 2010, Oehne filed a motion to suppress all evidence and statements obtained on the day of his arrest. JA66. In support of his motion, Oehne submitted an affidavit stating that on the day of his arrest, he invoked his right to counsel and that law enforcement nevertheless continued to question him. JA68. Oehne stated that he was not permitted to access his telephone or speak to his attorney, and that he was in terrible pain having recently undergone a dental procedure and that he was not permitted to access his medication. JA68. Finally, Oehne stated that he felt threatened by the officers' actions and did not want to speak to law enforcement, but was compelled to do so. JA68.

The district court held a suppression hearing on October 1, 2010 at which time the government offered testimony from Virginia State Trooper Tony Chrisley, a task force officer ("TFO") with the FBI in Virginia, and FBI Special Agent Odette Tavares. Oehne did not testify at the hearing or offer any evidence.

TFO Chrisley and Agent Tavares testified that on March 31, 2009, they received an investigative lead as a result of MV having identified her abuser and the agents in Connecticut determining that the abuser resided in Virginia, where he had a pending state criminal case for alleged sexual abuse of another minor girl. JA80-JA81. Chrisley and Tavares initiated surveillance at a home address associated with Oehne and surveilled it from across the street in a restaurant parking lot. JA88-JA90. At approximately 3:19 p.m., they saw a man matching Oehne's description leave the house and get on a motorcycle. JA91. Chrisley exited his vehicle and asked the man if he was William Oehne. JA91. The man nodded, and Chrisley identified himself as a law enforcement officer and asked to speak with him. JA91.

Oehne looked back to and approached the house, then looked at Chrisley and looked at the motorcycle. JA92. Because of Oehne's actions and a bulge Chrisley noticed in Oehne's pocket, Chrisley placed Oehne in handcuffs and patted him down. JA92, JA174. Chrisley found and re-

moved a cell phone, keys and wallet from Oehne's pocket. JA92.

Chrisley told Oehne that he was not under arrest, but that he was going to detain him until the agents secured the residence pending a search warrant. JA92. At approximately 3:22 p.m., Chrisley put Oehne in the front seat of the car and placed Oehne's cell phone, keys and wallet on the floorboard of the car. JA92, JA175-JA176. Agent Tavares got into the driver's seat, while Chrisley got in the back seat, and Tavares drove the car back to the restaurant parking lot to wait for additional law enforcement so the residence could be secured. JA92-JA93.

While sitting in the parked car, Oehne began explaining that MV's mother called him the previous night. Realizing the call might relate to the investigation, Agent Tavares interrupted Oehne and read him his rights from an Advice of Rights form. JA93-JA94, JA176-JA179. As she read the first line of the form, Oehne said that he had a lawyer. JA94, JA178. Chrisley asked Oehne if the lawyer was for his pending case in Virginia, and Oehne said yes. JA94, JA179. Tavares then read the form, line by line, and Oehne confirmed, after each line, that he understood his rights. JA178. After Tavares finished reading Oehne his rights from the form, she signed the form, handed it back to Chrisley, who also signed the form, and then Agent Tavares wrote on the form that Oehne "was detained and re-

fused to sign." JA178. According to Tavares, Oehne had not actually refused to sign the form, but Tavares had stopped the questioning because Oehne had advised that he had an attorney. JA179.

Both Chrisley and Tavares got on their cell phones to check on the status of any arrest or search warrants for Oehne or his residence. JA95, JA179. Oehne again initiated conversation, stating that he was not a bad guy. JA95, JA180. Agent Tavares testified:

> Q. At any time during this period in the car, does William Oehne ever say to you I would like to exercise my right to remain silent?
>
> A. No.
>
> Q. I would like to invoke my Fifth Amendment to stay silent?
>
> A. No.
>
> Q. Does he indicate at all that he would like to stay silent?
>
> A. No.
>
> Q. In fact what does he do?
>
> A. He continues to talk.
>
> Q. Did you in any way initiate the conversation to him after the Miranda rights were read and he said I have a lawyer?
>
> A. No.

JA180-JA81.

At approximately 3:36 p.m., Oehne was released from his temporary detention. JA182. TFO Chrisley removed his handcuffs, returned his property, and told him that he was not under arrest and that he was free to go except into his house, which the agents had secured pending a search warrant. JA101, JA182. Chrisley offered Oehne an opportunity to explain his side of the story, and Oehne said he wanted to go sit on the back porch of his house. JA101.

Around this same time, Agent Tavares spoke to Oehne and asked him if it would be okay for them to do a protective sweep of the residence for officer safety. JA184. Oehne replied that it was okay and also said that they had his consent to search the residence. JA184. About ten minutes after he provided his oral consent, at approximately 4:29 p.m., Oehne signed a consent form for the search of his residence, and at approximately 4:30 p.m., he signed a consent form for the search of his vehicle. JA185; GA1-GA2. He later gave oral and written consent for the search of a shed on his property. JA103-JA105, JA184, JA186, JA190; GA1. The shed had a combination lock on it, and Oehne agreed to open it for the officers. JA107. Oehne said his sister's things were stored in the shed. JA107-JA108.

As the searches commenced, Oehne headed back to the porch and told TFO Chrisley and

Agent Tavares about his relationship with MV and MV's mother. JA108-JA123, JA194-196. Agent Chrisley testified:

> Q. While you were speaking to Mr. Oehne on the porch, was he free to leave?
>
> A. Yes.
>
> Q. Were you blocking his exit?
>
> A. No.
>
> Q. Was anybody blocking his exit?
>
> A. No.
>
> Q. Did he have, as far as you know, did he have his wallet, keys and telephone with him?
>
> A. Yes. He pulled out his cell phone on several different occasions. At times he was talking on the cell phone or messing with the cell phone. I would walk off the porch and check the status of the team.
>
> Q. Did you monitor his use of the cell phone?
>
> A. No.

JA109-JA110. Oehne was free to leave the property, and the officers recognized that they had no authority to detain him. JA110.

TFO Chrisley testified that Oehne was "cooperative, nice, cordial[,]" and that they "were talking like we [were] friends." JA110. Oehne de-

scribed how he had met MV's mother and the circumstances under which he had moved in with her and MV in Connecticut. JA111-JA112. He denied ever taking pictures of MV, even after being confronted with the images that formed the basis of this investigation. JA112-JA113. He did say that the neighborhood kids often teased MV and said that Oehne was her boyfriend. JA113. He claimed that MV's mother had a serious drinking problem, which eventually caused him to move out and relocate to Virginia. JA113. When asked who could have taken the photos, he suggested that MV's father, who sometimes came to the house and drank with MV's mother, also had access to MV. JA115.

At some point during this conversation, officers who had been searching the shed found a box containing rings that were similar to the rings worn by Oehne in some of the images depicting him and MV. JA117-JA118. TFO Chrisley showed the rings to Oehne and asked him about them. JA120-JA121. After first denying that the rings were his, he claimed that, when he lived with MV, he would take his rings off when he went to work and that it was possible that MV's father had worn them without Oehne's knowledge. JA122. He insisted that he had not taken the photographs, and claimed that MV's father had taken them. JA123.

During this conversation, at approximately 8:00 p.m., an FBI agent from Virginia ap-

proached and advised Oehne that he was under arrest. JA124. TFO Chrisley did not place him in handcuffs because "he was not a threat. He talked for those hours there. He was very cordial, very cooperative." JA124. At the time of his arrest, Oehne was read his rights, and he signed the Advice of Rights form. JA124; GA3. On the form, Oehne acknowledged that he was under arrest, that he wished to talk to the agents further, and that he had been read his rights. JA125; GA3. At the hearing, Agent Tavares testified:

> Q. Based on your observation was Mr. Oehne under any type of duress or coercion to sign this form?
>
> A. No.
>
> Q. After he signs this form, what, if anything, happens next?
>
> A. After he signs the form, Agent McKenzie leaves and Agent George Hall and TFO Chrisley again asks him are you sure you still want to continue with this interview . . . . Are you sure you want to continue talking to us. Oehne says yes.
>
> Q. How did he appear to you at this time?
>
> A. Just normal. The same way he has been with the whole time. He's just fine.

JA197.

At that point, TFO Chrisley explained to Oehne that he was under arrest and going to jail, but that Chrisley wanted to hear Oehne's side of the story. JA128, JA198. Oehne started crying and said that Chrisley would not believe him if he told him what had happened. JA128. TFO Chrisley promised that whatever Oehne told him, he would "repeat again in court and tell the judge[,]" and told him "this is your opportunity to tell the truth . . . ." JA128. Oehne admitted that he took the photos, but said that he did it to make MV happy. JA129.

When asked to explain how "did this start[,]" Oehne said that he used to go to a nude beach in Long Island with MV and her mother, and that he would take pictures of himself and MV's mother naked. JA129. He also said that MV would walk around "half dressed" at home and would leave the door open while she showered. JA120-JA130. He denied sexually abusing MV. JA130. When asked about a photograph that showed him sexually abusing MV, he admitted that the photo depicted him and MV, and that he had taken the photo, but claimed that he had done so at MV's behest and denied ever engaging in intercourse with her. JA130. When asked about the fact that the photographs were being traded on the Internet, he admitted that he had put them "out there" on the Internet, but claimed he had done so by accident. JA131.

After taking a break to eat dinner together, TFO Chrisley asked Oehne if he would write a statement, and Oehne agreed. JA131, JA135. Chrisley testified:

> A. I had him write that out for me after he told me that he took those photos for her and I asked him[,] did you write that out so you can explain in your own words what you are telling me here now[,] and he agreed to it.
>
> Q. Did you dictate the words he wrote here?
>
> A. No.
>
> Q. Did anybody?
>
> A. No.
>
> Q. Did you observe him write this?
>
> A. Yes.

JA133.

TFO Chrisley and Agent Tavares testified that at no point during the day did Oehne appear to be in pain or distress. JA194. He did not request any medication or ask to see a medical professional. JA142-JA143. Prior to transporting him from the residence, the officers allowed him to walk, unrestrained, in his house, use the bathroom, feed his cat, make several phone calls, including one to his attorney to "let him know

where he was going to be staying for the night," and leave a note for his sister. JA136.

Following the evidentiary hearing, the district court denied the motion to suppress in an oral ruling. JA248. In deciding the motion, the court stated that there were "two questions": "[f]irst, did the defendant . . . invoke his right to counsel before making inculpatory statements to the agents on March 31, 2009[, and] [s]econd, if Oehne invoked his right to counsel, did Oehne validly waive that right to counsel by shortly thereafter speaking to the agents about the crime in question." JA248.

The court concluded that "Oehne did not invoke his right to counsel at any point during the day in question." JA248. Specifically, the court found that Oehne's statement that he "had a lawyer" and the absence of his signature on the initial Advice of Rights Form "did not constitute an unambiguous invocation of his right counsel." JA253. The court found that "[n]o reasonable police officer under these circumstances would understand Mr. Oehne to be requesting an attorney." JA253. Moreover, the court found that "Oehne did not refuse to sign the Advice of Rights Form." JA257. The court explained, "Notwithstanding that notation by Agent Tavares on the form, the court has credited Agent Chrisley's testimony that Mr. Oehne was not asked to sign the form because he was handcuffed at the time it was read out loud to him."

JA257. The court also noted that it "sounds as if Agent [Tavares] did not proceed to seek to have him sign it because of his mentioning of the lawyer in the other case. However, the clarifying question by Agent Chrisley, in this court's view, vitiates any suggestion that that statement that he had a lawyer in another case is in anyway an invocation of his right to counsel in this case." JA257.

Next, the court pointed out that a suspect may initially invoke his right to counsel and then later "choose to speak to an interrogator without counsel present[,] . . . effectively waiving his right to counsel." JA257. Thus, "the question remains if the court is mistaken that Mr. Oehne did not invoke the right to counsel[,] . . . did [he] shortly thereafter waive that right." JA257-JA258. The court concluded that Oehne waived his right to counsel, after having "only recently been apprised of his rights," by "voluntarily initiating a conversation with the agents on the subject relating to the investigation." JA262. The court explained, "Mr. Oehne demonstrated a clear willingness to speak with investigators after Agent Tavares initially advised him of his Miranda rights at about 3:22 p.m. The agents did not encourage or interrogate Mr. Oehne before he spoke again after being advised of these rights." JA262.

The court further found that Oehne voluntarily consented to the search of his home, his shed

and his car. JA263. The officers did not threaten or intimidate him, and there was no "credible evidence . . . that Mr. Oehne experience any . . . physical pain on the day in question." JA264. Addressing the claim in his affidavit, the court concluded that, "[w]hile he claims that this is the case, he never told agents he was experiencing pain from a dental procedure. He never requested access to pain medication. He didn't evidence to the agents in any fashion . . . that he was in pain . . . ." JA264. He appeared to be "alert, upright and engaged . . . ." JA265. Thus, the court found that the consent he provided was "voluntarily knowing, intelligent and free from coercion." JA264.

C. Guilty Plea

On the eve of trial, Oehne pled guilty to both counts of the Indictment pursuant to a written plea agreement. JA297-JA308. The Government agreed to recommend a full three-level reduction for acceptance of responsibility because it did not have "to prepare the minor victim to testify in this case[,]" but stated that it would "absolutely oppose" any reduction for acceptance if "the defendant seeks to withdraw his guilty plea or takes a position at sentencing, or otherwise, that, in the Government's assessment, is inconsistent with affirmative acceptance of personal responsibility for all of his criminal conduct." JA299. Oehne waived his right to appeal on all

but two issues: the district court's denial of his motion to suppress and his eventual sentence. JA300. Oehne was informed at the time of plea and in the agreement that the Government believed the applicable term of incarceration under the Guidelines was fifty years of imprisonment. JA300.

The plea agreement also contained the following stipulation of offense conduct:

> Between in or about 2004 until in or about 2006, Oehne produce[d] visual depictions of a minor victim residing in Fairfield County, Connecticut that depicted the minor victim engaging in sexually explicit conduct as that term is defined in 18 U.S.C. § 2256. The minor victim was between the ages of eight and ten years old when the images were produced. Oehne produced the images using a Nikon camera that was manufactured in China. Oehne knowingly distributed visual depictions of the minor victim engaged in sexually explicit conduct, using the Limewire program which transported the images in interstate and foreign commerce.

JA305.

D. Sentencing

In anticipation of Oehne's sentencing, the Probation Office prepared a Presentence Investigation Report ("PSR"). The PSR found that the base offense level, under U.S.S.G. § 2G2.1, was 32, that four levels were added because the offense involved a victim under the age of 12 under § 2G2.1(b)(1)(A), that two levels were added because the offense involved the commission of a sex act under § 2G2.1(b)(2)(A), that two levels were added because the offense involved distribution under § 2G2.1(b)(3), that four levels were added because the offense involved sadomasochistic conduct under § 2G2.1(b)(4), that two levels were added because the offense involved a minor who was in the custody, case or supervisory control of the defendant under § 2G1.3(b)(1), and that three levels were subtracted for acceptance of responsibility, for a total offense level of 43. *See* PSR ¶¶ 17-22, 27-28.

Oehne fell into Criminal History Category I, so that he faced a guideline range of life. *See* PSR ¶¶ 31, 65. Because the statutory maximum penalty for both offense was fifty years' incarceration, the effective guideline range was fifty years' incarceration. *See* PSR ¶ 65.

The Government and Oehne filed simultaneous sentencing memoranda on May 26, 2011. The Government's memo requested a "term of incarceration approximating the Guidelines calculation of 50 years." JA428. The Government

argued that Oehne had committed two separate and distinct crimes. JA428. First, Oehne sexually abused MV for a lengthy period of time and filmed the abuse. JA428. Second, Oehne used the Internet to distribute the abuse images ensuring that MV's victimization will continue for the rest of her life. JA428. Indeed, MV's images are some of the most prolific images downloaded by offenders around the world. JA428. The Government had requested that the district court view approximately fifteen images on the issue of whether the conduct was sadistic, which the district court did. JA 481-482. The photos depicted penetration of foreign objects in the victim's vaginal area. JA499-500. One of the images appears to show the defendant's penis entering the victim's vaginal area. JA 496.

In Oehne's sentencing memo, Oehne urged the court to impose a sentence less than the sentence recommended by the guidelines. Calling attention to the requirement in 18 U.S.C. § 3553(a) that a court must impose a sentence that is sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing set forth in § 3553(a)(2), Oehne's counsel urged the court to impose a non-guideline sentence. JA389. In addition, Oehne objected to two enhancements: that the abuse was sadistic and that he had supervisory control over the victim. JA492, JA500-502.

Sentencing took place on May 31, 2011. At the start of the hearing, the court addressed several factual questions to both sides. First, it asked the Government for the basis of its assertion that the images of MV are "the second most prolific set of Internet child pornography." JA449. The Government replied that, according to an affidavit from the Nation Center for Missing and Exploited Children, from January 2006 through March 1, 2010, 3326 offenders were found in the United States with MV's images. JA450. Later in the hearing, MV's father confirmed that he had received over 3000 notifications regarding offenders found with MV's images. JA451, JA475.

Next, the court asked defense counsel about a psychiatric report that he submitted in support of his claim that Oehne did not present a high risk of recidivism. The court questioned the report's value given that it was based almost entirely on self-reported information from Oehne, much of which directly contradicted statements that he made during his guilty plea and evidence in the record. JA452. For example, the report relied on statements by Oehne that he had not intentionally distributed images of MV over the Internet, which were in direct contradiction to statements he made during his guilty plea. JA453. The report also relied on statements by Oehne that he did not "have any sexual intercourse or penetrative sex or masturbated with

the minor victim," which contradicted paragraphs in the PSR and photograph images submitted by the Government. JA455-JA456. When asked to address the psychiatric report, the Government argued that it was entirely irrelevant because it was "based on a faulty factual premise . . . . [and] on the self reporting by Mr. Oehne for the most part." JA458. The Government pointed out that Oehne had minimized his conduct and blamed the victim for somehow taking advantage of him, and that the report ignored these facts, as well as Oehne's "four year history of extraordinary abuse" of MV. JA459. In the context of this discussion of the Oehne's risk of recidivism, the Government referenced additional pornographic images of minor children from Virginia whom were photographed by Oehne and argued that the fact that he had victimized these children in Virginia showed "how dangerous he truly is . . . ." JA460-JA462.

Finally, the court asked the Government to address the claim that the child pornography sentencing guidelines are not as worthy of consideration because of recent Second Circuit case law that is "highly critical" of them. JA462. The Government replied that this case law was inapposite because Oehne is "the worst of the worst. . . . In the world of child exploitation, there's nothing that Mr. Oehne has not done. Nothing. He has possessed them, he has traded them, he has distributed them. He produced them and most

importantly has abused her. If there's a place where the guidelines matter, this is where it is." JA463-JA465. The court then confirmed with defense counsel that none of the cases he relied upon involved facts similar to this case. JA466. The court also discussed in detail the various court decisions, which it had reviewed thoroughly, and expressed some skepticism at the idea that Congress should not impose stiff penalties for child exploitation crimes. JA468. The court explained:

> The record should not suggest that I don't understand that I have the power to impose the sentence that I think is appropriate after consideration of all of the factors, and I'm not bound by the guidelines so in some respects the discussion of whether the guidelines are right or not, is in my view beside the point. I always calculate them and they are important and they have to be calculated. That isn't the end of the analysis. But putting that aside, having made that I hope very clear, it strikes me that . . . Congress does get to decide this. . . . I'm not sure why I get to say that's wrong in terms of the guidelines. You may call it hysteria but there's certainly I think evidence in the public record that Congress relies on as to the growing menace of child pornography and child abuse.

JA468.

At that point, prior to making its factual findings and calculating the guideline range, the court heard from two Government witnesses. First, MV's biological father spoke. JA475. He told the district court that Oehne's conduct had "torn this family apart for the last two years. It's something you wouldn't wish on your worst enemy." JA475. He stated that Oehne stole MV's innocence and left her with "emotional scars that will be with her for the rest of her life." JA475. He said, "[T]his kind of behavior we must find a way to stop or send some kind of message to these parasites and say this is not acceptable behavior in any society. . . . Honestly, your honor, you have the power to say enough is enough." JA476.

The court also heard from a mother of one of the Virginia victims. JA477. She spoke about discovering that her eight-year-old daughter, who had been outside playing with friends, was missing. JA477. After checking in the apartments of several friends and in every apartment building in their complex, she eventually found her daughter, covered in makeup, with her friends in Oehne's apartment. JA478. He had lured them into the apartment with toys and makeup. JA480. One year later, the FBI knocked on her door and showed her images of her daughter, which were found in Oehne's camera. JA478. "Those pictures are burned into the

inside of my eyes. Every time I close my eyes I see them. She was eight years old." JA478. The mother also talked about how she had found her daughter's journal and that the journal entries referenced having "[s]ex a lot" and having "babies a lot." JA479. The mother told the court that Oehne "stole her innocence." JA479. "[S]he's in counseling. She's afraid to go outside and play. . . . She's begun binge eating. . . . She has night terrors." JA478-JA479. The mother also stated, "I know of three victims in Virginia that he's done this to. He's a habitual." JA479. The Government submitted the photographs of the Virginia victims, which had been located on a camera seized from Oehne's shed. JA481.

The court then turned to the PSR and reviewed Oehne's various objections to some of the recommended enhancements. JA489-JA490, JA493. On the issue of the supervision of MV, defense counsel conceded that Oehne, while not the sole caregiver, certainly had "opportunities and times" when he was alone with her and no one else was there. JA491. The court noted that the enhancement had "broad application and includes offenses involving a minor entrusted to the defendant whether temporary or permanently." JA492. The court confirmed with defense counsel that Oehne did, in fact, have custody and control over MV, and applied the enhancement. JA492.

On the issue of commission of a sexual act, defense counsel conceded, in response to questions by the court, that certain images of MV and Oehne satisfied that guideline's definition of "sexual act." JA493-JA494. The court then made specific findings that several of the images of MV showed penetration and, therefore, depicted a sexual act. JA500.

The court agreed with the PSR's guideline calculation. It found that the base offense level was 32, that four levels were added because the offense involved a victim under the age of 12, that two levels were added because the offense involved the commission of a sex act, that two levels were added because the offense involved distribution, that four levels were added because the offense involved sadomasochistic conduct, that two levels were added because the offense involved a minor who was in the custody, case or supervisory control of the defendant, and that three levels were subtracted for acceptance of responsibility, for a total offense level of 43. JA501-JA502. At a Criminal History Category I, Oehne fell into a guideline range of 600 months' incarceration, based on the statutory maximum penalty for the offenses. JA502. Neither Oehne, nor the Government, objected to this calculation. JA502.

Defense counsel argued for leniency based on the psychiatric report, the fact that Oehne had suffered abuse "himself on at least one occasion,"

the fact that he raised a son who "is an incredibly intelligent young man," and the fact that a mandatory minimum sentence of fifteen or twenty years would result in Oehne's incarceration until he was 65 or 70 years old. JA503, JA505. The court did not agree with his assertion that "recidivism goes down with age," at least as that proposition is applied to pedophiles. JA505.

Oehne's son, Christopher, addressed the court and talked about how good a father Oehne had been to him. JA510-JA511. Defense counsel also submitted several letters from family members. JA511. Oehne himself spoke, offered his apologies to his victims, assumed "full responsibility" for his actions, and asked for forgiveness and mercy. JA513-JA514.

Prior to imposing sentence, the district court reviewed the § 3553(a) factors it had to consider in determining what term of incarceration was sufficient, but not greater than necessary to serve the purposes of a criminal sanction. JA524-JA525. In referencing the guideline range, the court found that the case law criticizing the sentencing guidelines in child pornography cases was irrelevant because this case involved child pornography production and distribution on "an enormous scale" and "sexual assault upon a minor victim repeatedly and over a long period of time." JA525. In discussing the seriousness of the offense, the court explained:

> As a society we have an obligation to people who are helpless who can't care for themselves and that's children. And we as a society, have an obligation to protect our children and when someone undertakes a vicious assault upon a child and does it not once in a moment of weakness but does it over and over again, then proceeds to record it and then share the recording of it, with . . . hundreds of thousands of people, maybe millions. The fact that 3000 plus are under criminal investigation is probably the tip of the iceberg. In my view, that has to rank among the most serious crimes we have. I wouldn't want to diminish this crime if it were a 12 or 14 year old. I wouldn't want to diminish the seriousness of it if you did it once. I wouldn't want to diminish the seriousness of it if you took no pictures of it. It would still be a serious crime but you did all of those things.

JA528-JA529.

The court also explained, "The sentence . . . has to provide deterrence. And related to that is the protection of the public from further crimes." JA529. The court found that "the conduct that occurred in Virginia following what you did in this offense of conviction here in Connecticut, raises serious questions in my mind about what can be done to deter you until you would be un-

likely or not likely at all to do this again." JA529. "Also as I say the Virginia experience causes me to be terribly concerned over the protection of the public by further crimes by you." JA530.

In discussing the nature of the offense, the court explained:

> We're speaking about the distribution of child pornography and we're speaking about the manufacture and the making of the child pornography through a sexual assault upon an eight-year-old girl. You obviously came to know this child and she was very young sevenish and you began clearly to groom her and indeed the few pictures I have seen . . . it is clear that you escalated in your sexual contacts and actions with her. You groomed perfectly, you bribed her perfectly, and she became, in effect, your object to do what you wanted to satisfy yourself and then to tout that to the world. You continued in the conduct for approximately two years. . . . This wasn't a moment of weakness for you, sir. This was repeated and constant. . . . You took advantage of this young girl on many, many occasions. And that's just one of the crimes. The other crime was sharing that with the world. . . . [T]hat's a lifelong constant revictimization of this child.

JA530-JA531.

The court also talked about Oehne's history and characteristics, noting that he was a "good father" who had "raised a very impressive young man as your son." JA532. But, as the court explained, "[t]he problem is your other history and characteristics. It is very troubling to me . . . your denials. . . . [Y]ou have a number of circumstances and not that long ago even as late as February of this year to Dr. Krueger [who prepared the psychiatric report], [you] attempted in my view to downgrade or suggest lack of responsibility for what you have done in terms of uploading the pictures to the Internet, about the victim's attitude toward what you were doing to her, the victim's role in what happened, she was seven years old, Mr. Oehne. If you truly think that she enticed you in some way or she like it, that's extremely troubling." JA533. Moreover, with respect to the Virginia conduct, "[t]he idea that you could entice three eight or nine-year-old girls who are playing in their yard into your apartment that quickly and take the pictures you took, suggests characteristics of you that raise very serious questions about the sentence that will deter you. . . . There's a pattern here of grooming and abusing very young girls." JA534.

The court reviewed and rejected the psychiatric report by Dr. Krueger for several reasons. First, Dr. Krueger did not view the pornographic images from Connecticut or Virginia. JA535.

Second, Dr. Krueger relied almost entirely on Oehne's self-reported statements and made no effort to determine if Oehne was lying. JA535. Third, the self-reported statements by Oehne to Dr. Krueger were false. "You said you didn't have any penetrative sex with her, and one of the images shows impartially that you did. You denied the conduct in Virginia [in] which . . . you engaged in sexual conduct with the 15 year old, you engaged in sex abuse of the eight and nine year olds that went into your apartment. . . . You also indicated to Dr. Krueger . . . that you hadn't meant to distribute the photographs . . . . [T]hat's not the fact." JA535-JA536. Finally, the court pointed out that Dr. Krueger had credited Oehne's statement that he was in "complete control" of his "sexual behavior" despite the fact that Oehne had "sexually assault[ed] an eight year old girl and take[n] pictures of it." JA536. As a result, "I do not credit his conclusion that you are a low risk of recidivism. . . . [Y]ou are not in complete[] control and . . . are likely to recidivate." JA536.

In the end, the court imposed an incarceration term of 360 months on Count One and 180 months on Count Two, to be served consecutively, for a total effective term of 540 months. JA537. The court also ordered a life term of supervised release. JA537. This was imposed as a non-guideline sentence. JA542. The court explained that, although "this sentence needs to be

extremely long in light of the nature and circumstances of the two offenses of conviction and the history and characteristics of the defendant, particularly as they relate to the issue of deterrence and protection of the public[,]" some leniency was warranted "to somehow credit the defendant for albeit perhaps late, nonetheless pleading guilty and avoiding a trial in which the victim herself or certainly her parents might have to have testified and the defendant I think is to be credited in some respect for that." JA542-JA543.

Summary of Argument

1. The district court properly denied Oehne's motion to suppress. Oehne did not invoke his right to counsel or his right to remain silent. Moreover, even if Oehne had invoked his *Miranda* rights, the district court properly found that Oehne's spontaneous statements constituted a waiver of his rights. In addition, Oehne knowingly and voluntarily executed a written consent to search, and the district court did not clearly err in finding that this consent was valid.

2. The district court's sentence was procedurally and substantively reasonable. The court properly calculated the guideline range, considered whether that range was excessive in light of the nature of this offense and the other § 3553(a) factors, tried to compare Oehne to other similarly situated defendants, and determined

that Oehne's various arguments for leniency were unpersuasive. After carefully and thoroughly weighing the various § 3553(a) factors, the court exercised proper discretion in determining that a 540-month sentence was sufficient, but not greater than necessary, to reflect the most important factors in this case: the nature of the offense, and the need to deter the defendant and protect the public. As the court explained, the sentence was necessary to punish Oehne's egregious conduct in sexually abusing MV over a two-year period, producing child pornography, distributing images of this abuse on the Internet, lying about the conduct at the time of his arrest and during the post-plea psychiatric examination by suggesting that MV had enticed Oehne to commit the crimes, and subsequently victimizing other young girls by touching and photographing them. Oehne committed a horrific crime that warranted the severe punishment he received.

Argument

I. The district court properly denied Oehne's suppression motion

A. Relevant facts

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

B. Governing law and standard of review

1. *Miranda* rights

"[T]he prosecution may not use statements made by a suspect under custodial interrogation unless: (1) the suspect has been apprised of his Fifth Amendment rights; and (2) the suspect knowingly, intelligently, and voluntarily waived those rights." *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966)). In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court crafted a prophylactic rule to protect suspects from being pressured into waiving *Miranda* rights after invoking them. Noting that "additional safeguards are necessary when the accused asks for counsel," the Court held that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85.

The Supreme Court has held that for a suspect to invoke his *Miranda* right to counsel, a suspect must make "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). An ambiguous or equivocal reference to an attorney does

not require the police to cease questioning. *Davis v. United States*, 512 U.S. 452, 459 (1994). Statements such as: "Maybe I should talk to a lawyer," *Davis*, 512 U.S. at 462; "Do you think I need a lawyer?" *Diaz v. Senkowski*, 76 F.3d 61, 64-65 (2d Cir. 1996); and a suspect's statement that he "was going to get a lawyer," *United States v. Scarpa*, 897 F.2d 63, 69-70 (2d Cir. 1990), have been found to be insufficient to constitute an unambiguous request for counsel. Moreover, law enforcement is not required to end any interrogation or to ask clarifying questions. *Davis*, 512 U.S. at 459, 461-62. Indeed, a defendant who wishes to exercise his right to remain silent under *Miranda* must do so through a clear, unambiguous affirmative action or statement. *See Berghuis v. Thompkins*, 130 S.Ct. 2250, 2260 (2010).

"Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis*, 130 S. Ct. at 2262. Indeed, the *Miranda* Court stated that a suspect may knowingly and voluntarily waive his rights to silence and counsel. *See Miranda*, 384 U.S. at 444. To prove a valid waiver, the government must show two facts: "(1) that the relinquishment of the defendant's rights was voluntary, and (2) that the defendant had a full awareness of the right being waived and of the conse-

quences of waiving that right." *United States v. Jaswal*, 47 F.3d 539, 542 (2d Cir. 1995). Where a suspect validly waives his rights (and, per *Edwards*, has not invoked his right to counsel), the police may question him without a lawyer present. Any statements he makes are admissible in court. *See Davis*, 512 U.S. at 458.

2. Consent to search

Under the Fourth Amendment, a search can only be conducted with a warrant issued upon probable cause. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). There are exceptions to the warrant requirement, such as a valid consent, which can excuse the absence of a warrant. *See id.* For a consent to be valid, it must be given freely and voluntarily. *See United States v. Davis*, 967 F.2d 84, 86 (2nd Cir. 1992). "The Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." *United States v. Snype*, 441 F.3d 119, 130-131 (2d Cir. 2006)(quoting *Schneckloth*, 412 U.S. at 228). "It is well settled that a warrantless search does not violate the Fourth Amendment if 'the authorities have obtained the voluntary consent of a person authorized to grant such consent . . . , and that 'so long as the police do not coerce consent, a search conducted on the basis of consent is not an unreasonable search.'" *United States v. Hernandez*, 85 F.3d 1023, 1029 (2d

Cir. 1996). "While more than 'mere acquiescence in a show of authority' is necessary to establish the voluntariness of a consent, . . . the fact that a person is in custody or has been subjected to a display of force does not automatically preclude a finding of voluntariness . . . ." *Snype*, 441 F.3d at 131; *see United States v. Ansaldi*, 372 F.3d 118, 129 (2d Cir.2004) (holding that use of guns to effectuate arrest and handcuffing of defendant did not render his consent to search his home involuntary).

When "the government relies on consent to justify a warrantless search, it bears the burden of proving by a preponderance of the evidence that the consent was voluntary." *See Snype*, 441 F.3d at 131. The determination of voluntariness is based on the "totality of circumstances." *Id.* (internal quotation marks omitted). In considering the voluntariness of a consent, the court should consider the consenter's age, educational background, level of intelligence, the extent of the advisement of constitutional rights, the length of detention, the nature of any questioning, and the use of any physical force. *See Schneckloth*, 412 U.S. at 226. "Written consent supports a finding that the consent was voluntary." *United States v. Boone*, 245 F.3d 352, 362 (4th Cir. 2001).

3. Standard of review

This Court reviews factual determinations in connection with a motion to suppress for clear error, viewing the evidence in the light most favorable to the government. *See United States v. Whitten*, 610 F.3d 168, 193 (2d Cir. 2010). It reviews a denial of a motion to suppress *de novo* for legal conclusions. *Id.* This Court has stated that "credibility determinations are the province of the trial judges, and should not be overruled on appeal unless clearly erroneous." *United States v. Yousef*, 327 F.3d 56, 124 (2d Cir. 2003).

A factual finding is clearly erroneous only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *see also United States v. Iodice*, 525 F.3d 179, 185 (2d Cir. 2008). There is no clear error when the reviewing court is simply "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573-74. Additionally, "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Id.* at 574.

C. Discussion

1. Oehne did not invoke his right to counsel

After holding an evidentiary hearing and considering the testimony of the two law enforcement officers who dealt with Oehne on the day of his arrest, the district court properly credited the testimony of these officers and concluded that Oehne had not invoked his right to counsel prior to making oral and written statements about his offense conduct in this case. When Oehne advised the officers that he had a lawyer, he was not referring to this investigation, but was referring to separate pending charges in Virginia. The officers made sure to clarify this point with Oehne when they reviewed his rights with him. As the district court explained, "[T]he clarifying question by Agent Chrisley . . . vitiates any suggestion that that statement that he had a lawyer in another case is in anyway an invocation of his right to counsel in this case." JA257. In addition, the district court properly concluded that the absence of Oehne's signature on the initial Advice of Rights Form "did not constitute an unambiguous invocation of his right counsel," JA253, because "[n]o reasonable police officer under these circumstances would understand Mr. Oehne to be requesting an attorney." JA253. Oehne did not refuse to sign the form; he was not asked to sign it.

The district court also properly concluded, again crediting the testimony of the officers who testified at the hearing, that, even if Oehne's statement regarding his lawyer could be considered an invocation of his right to counsel, he soon after explicitly waived that right by spontaneously discussing his offense conduct with the officers. As the district court found, Oehne, after having "only recently been apprised of his rights," waived these rights by "voluntarily initiating a conversation with the agents on the subject relating to the investigation." JA262. He "demonstrated a clear willingness to speak with investigators after Agent Tavares initially advised him of his Miranda rights." JA262. The officers did not encourage Oehne to speak with them or otherwise interrogate him; he chose to speak to the officers with a full understanding of his rights. He also chose to continue to speak with the officers despite the fact that he was not under arrest and, indeed, was free to walk around the outside of his residence, use his cellular telephone, and leave the property entirely.

The district court's factual findings did not constitute error, let alone clear error. Two different officers testified to the same general chronology, in which Oehne made statements, was advised of his *Miranda* rights, continued to make additional statements that mostly constituted denials of any wrongdoing, and then, later in the day, after having been formally arrested,

executed a written *Miranda* waiver and provided a handwritten statement. According to their testimonies, Oehne fully understood his rights and chose to talk with the officers without exercising his rights to counsel or to remain silent. The officers did not coerce, threaten or intimidate Oehne. According to their testimonies, they treated him fairly, fully informed him of his rights and only spoke to him that day because he expressed a clear desire to talk with them about this case. He was free to use his cellular telephone, permitted to walk around his property, and could have left the residence at any time prior to his arrest. Prior to being taken into custody, the officers permitted him to walk, unrestrained, into his residence, use the bathroom, feed his cat, make several phone calls, including a call to his attorney, and leave a note for his sister. JA136.

Oehne relies on *United States v. Plugh*, 576 F.3d 135, 141–42 (2d Cir. 2009) ("*Plugh I*"), to argue that his failure to sign the first Miranda form, along with the fact that he said that he had a lawyer, demonstrated an unequivocal invocation of his right to counsel. *See* Def.'s Br. at 13. First and foremost, as the district court concluded, in distinguishing *Plugh I*, Oehne did not refuse to sign the waiver form and did not invoke his right to counsel. As the court found, crediting the officers' testimonies, they never asked Oehne to sign the form because he was

handcuffed at the time, and Oehne's statement about an attorney was not an invocation of any right, but a reference to a lawyer he had for an entirely separate case pending in Virginia.

Moreover, Oehne's reliance on *Plugh I* is misplaced because, as he himself notes in his brief, the decision in that case was vacated and reversed in 2011. In *United States v. Plugh*, 648 F.3d 118 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1610 (2012) ("*Plugh II*"), this Court, relying on the Supreme Court's decision in *Berghuis*, overturned *Plugh I* and held that the refusal to sign a waiver of rights is not "equivalent to an unambiguous decision to invoke them." *Id.* at 125. As this Court stated, "*Berghuis* departed from the law applied by the *Plugh I* majority in several, critical ways. Most important, . . . the *Berghuis* Court made clear that for a defendant successfully to invoke his *Miranda* rights, he must do so through a clear, unambiguous affirmative action or statement." *Plugh II*, 648 F.3d at 124. The "requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoids the difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity." *Id.* at 123 (internal quotation marks, ellipses and brackets omitted). "Alternatively, if an accused makes a statement concerning the right to counsel that is ambiguous or equivocal or makes no statement, the police are not required to end the interrogation, or ask

questions to clarify whether the accused wants to invoke his or her *Miranda* rights." *Id.* (internal quotations marks omitted).

The defendant suggests that the decisions in *Pugh II* and *Berghuis* do not undermine his argument. But both decisions stand for the unassailable proposition that a suspect must explicitly and unequivocally state that he is invoking his right to counsel, and that a simple refusal to sign a waiver of rights form is insufficient to constitute an unequivocal invocation of that right. Here, Oehne never invoked his right to counsel or his right to remain silent. Consistent with the analysis in *Berghuis* and *Plugh II*, the district court here properly found that Oehne understood his *Miranda* rights, did not invoke his right to counsel or his right to remain silent, and waived these rights when he began to speak with the law enforcement agents. Simply stated, like the defendant in *Berghuis*, Oehne fully understood his rights and knew what he gave up when decided to speak. *See Berghuis*, 130 S. Ct. at 2263 (holding that, when the suspect chooses to speak with the custodial officers, he makes a deliberate choice to relinquish the protections those rights afford). He was fully informed of his rights and made the voluntary decision to waive them and speak to the officers. Accordingly, the district court properly denied his motion to suppress his statements.

2. Oehne consented to the search of his residence

Oehne also argues that the district court should have suppressed the items taken from his property on the day of his arrest because his oral and written consent to search were not valid. Specifically, he claims, in summary fashion, that his consent to search was a product of the alleged Fifth Amendment violation discussed above and that, had the officers ceased talking to him when he allegedly invoked his right to counsel, he would not have given the consent to search. *See* Def.'s Br. at 15. This argument lacks merit because, as discussed above, Oehne never invoked his right to counsel and knowingly and voluntarily waived his Fifth Amendment rights by talking with the officers after having been fully informed of these rights.

Moreover, to the extent that Oehne now challenges the district court's factual findings as to the consent, his argument lacks merit. The district court was entitled to credit the testimony of both officers that Oehne was fully informed of his rights and made a knowing and voluntary and choice when he consented to the search of his property. By the time Oehne was asked for his consent, the officers had already informed him fully of his Fifth Amendment rights to counsel and to remain silent. They had returned his cellular telephone to him, allowed him to make calls, permitted him to walk freely around the

outside of the property, and told him that he was not under arrest and was free to leave. They had also explained the consent to search forms to him, as well as his right not to consent to the search. He understood his right to refuse to consent to the search, just as he understood his right to counsel and his right to remain silent. The consent was not the product of any coercive or deceptive law enforcement actions.

In addition, the district court was well within its province to discredit Oehne's suggestion, through an affidavit, that, on the day of his arrest, he "was in terrible pain . . . having very recently undergone a dental procedure" and "was not allowed access to medication." JA68. As the court found, both officers who were in Oehne's presence for a lengthy period of time did not detect that he was under any type of distress or discomfort, and did not deny him medical care. JA224. To the contrary, the officers found Oehne to be an intelligent individual who understood everything that was happening around him and whose mental abilities were not impaired in any way. The officers did not threaten, coerce or intimidate him; instead, their exchanges were polite and cordial, so that Oehne was not improperly influenced or pressured into signing the consent form and did so of his own free will and with a full understanding of his rights. Accordingly, the district court properly denied Oehne's motion to suppress the physical evidence.

II. The district court's 540-month sentence was procedurally and substantively reasonable

Oehne maintains that his sentence should be vacated and that he should be resentenced. He claims that his sentence is procedurally unreasonable both because the district court improperly considered enhancements under the child exploitation guidelines that are arcane and should not be applied, and because the district court failed to take into account the disparity between this sentence and sentences for other similarly situated defendants. *See* Def.'s Br. at 17. He also claims that his sentence was substantively unreasonable because it was "shockingly high" and excessive given his lack of a criminal history, his age, his vulnerability to harm in prison and the sentences imposed on other similar defendants. *See* Def.'s Br. at 27-28.

A. Relevant facts

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

B. Applicable legal principles

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines "effectively advisory." *Booker*, 543 U.S. at 245. After *Booker*, at sentencing, a district court must begin by calcu-

lating the applicable guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). "The Guidelines provide the 'starting point and the initial benchmark' for sentencing, and district courts must 'remain cognizant of them throughout the sentencing process.'" *Id.* (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors." *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006).

Because the Guidelines are only advisory, district courts are "generally free to impose sentences outside the recommended range." *Cavera*, 550 F.3d at 189. "When they do so, however, they 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *Id.* (quoting *Gall*, 552 U.S. at 50).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United*

States v. Crosby, 397 F.3d 103, 114-15 (2d Cir. 2005)). For a sentence to be procedurally reasonable, the sentencing court must calculate the guideline range, treat the guideline range as advisory, and consider the range along with the other § 3553(a) factors. *See Cavera*, 550 F.3d at 189. Where a defendant fails to object at the time of sentencing to the district court's alleged procedural error in not fully considering the § 3553(a) factors or in making a mistake in the guideline calculation, this Court reviews the claim for plain error. *See United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007).

Nonetheless, a district court need not specifically respond to all arguments made by a defendant at sentencing. This Court has "never required a District Court to make specific responses to points argued by counsel in connection with sentencing." *United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1698 (2011). "The District Court must satisfy us only that it has considered the party's arguments and has articulated a reasonable basis for exercising its decision-making authority." *Id.* (citing *Cavera*).

In some cases, a "significant procedural error" may require a remand to allow the district court to correct its mistake or explain its decision, *see Cavera*, 550 F.3d at 190, but when this Court "identif[ies] procedural error in a sentence, [and] the record indicates clearly that 'the district

court would have imposed the same sentence' in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing." *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 197), *cert. denied*, 130 S. Ct. 1149 (2010) and *cert. denied,* 130 S. Ct. 2128 (2010).

The Supreme Court has reaffirmed that the reasonableness standard requires review of sentencing challenges under an abuse-of-discretion standard. *See Gall*, 552 U.S. at 46. Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see also Rita v. United States*, 551 U.S. 338, 347-51 (2007) (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

Further, the Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 140 (2010). This Court recently likened its substantive review to "the consideration of a motion for a new criminal jury trial, which should be granted only when the jury's verdict was 'manifestly unjust,' and to the determination of intentional torts by state actors, which should be found only if the alleged tort 'shocks the conscience.'" *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (quoting *Rigas*, 583 F.3d at 122-23). On review, this Court will set aside only "those outlier sentences that reflect actual abuse of a district court's considerable sentencing discretion." *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

C. Discussion

1. Oehne's sentence was procedurally reasonable

Oehne does not claim that the district court failed to calculate or improperly calculated the guideline range. *See Cavera*, 550 F.3d at 189. Nor does he claim that the district court treated the guidelines as mandatory. *See Gall*, 552 U.S. at 51; *Cavera*, 550 F.3d at 190. Instead, he claims that his sentence was procedurally unreasonable because the district court gave too much weight to sentencing guidelines that he characterizes as "arcane" and because the court failed to weigh properly the disparity between this sentence and the sentences for other alleged similarly situated defendants. *See* Def.'s Br. at 17-26. These arguments fail.

First, as the district court explained in rejecting the identical attack on the child exploitation guidelines below, the facts of this case are entirely different from the facts of the cases upon which Oehne relies. This case did not involve the crime of simple possession of child pornography. This case involved child pornography production and distribution on "an enormous scale" and "sexual assault upon a minor victim repeatedly and over a long period of time." JA525. Oehne engaged in the most egregious and serious offense conduct possible for these types of offenses. He is certainly not the type of offender

contemplated by the case law and academic articles that attack the severity of the child exploitation guidelines. For him, the guidelines are appropriately severe.

In *Dorvee*, the principal case that Oehne cites, the Court sharply criticized U.S.S.G. § 2G2.2, the guideline that applies to offenses involving the possession and distribution of child pornography, as having been "cobbled together" by the sentencing commission in response to repeated congressional interference. *See Dorvee*, 616 F.3d at 186. As a result, sentencing enhancements that apply to "the vast majority" of child pornography defendants produce a recommended sentencing range "rapidly approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent to the crime of conviction." *Id.* (citing statistics published by Sentencing Commission). This Court noted that, because § 2G2.2 concentrates child pornography offenders at or near the statutory maximum penalty, it conflicts with the § 3553(a)'s requirement that sentencing courts should "consider the nature and circumstances of the offense and the history and characteristics of the defendant" and should avoid unwarranted sentencing disparities. *See Dorvee*, 616 F.3d at 187 (internal quotation marks omitted).

This case, however, did not involve the simple possession or distribution of child pornography; it involved the production of child pornography

and the sexual assault of a minor. As such, it was not governed by § 2G2.2; it was governed by §§ 2G2.1 and 2G1.3, and *Dorvee* is inapposite. The district court made this point in rejecting the argument raised again here. JA466. None of the cases relied upon by Oehne involved similar egregious facts as the ones here, and none implicated the controlling guideline sections used here. Also, any claim of procedural error is absolutely rebutted by the district court's careful findings on the record that it had read and reviewed all of the case law and related material that Oehne referenced and found it to be entirely unhelpful. The district court commented appropriately that, at least in the context of this case, the guidelines should be severe. It also stated, explicitly, that it had "the power to impose the sentence that I think is appropriate after consideration of all of the [§ 3553(a)] factors, and I'm not bound by the guidelines so in some respects the discussion of whether the guidelines are right or not, is in my view beside the point." JA468; *see United States v. Aumais*, 656 F.3d 147, 157 (2d Cir. 2011) (upholding guideline sentence under § 2G2.2 where district court properly weighed the § 3553(a) factors).

Oehne's argument that the district court failed to consider unwarranted sentencing disparities for similarly situated defendants likewise lacks merit. In explaining its sentence, one of the first things that the district court stated

was that it had to consider "the need to avoid unwarranted sentencing disparity among defendants with similar records and similar conduct." JA525. It then went on to explain that this was a "challenge" here because "I think there are no more than a handful of cases that are like your case in the country. I didn't really find any reported cases that speak to facts like yours." JA526. In other words, in the district court's view, Oehne's conduct was so egregious that he was not at all similar to defendants in the other cases relied upon by his counsel. JA526. As the court stated, "I don't believe those cases address the production of child pornography which in your case involves actual sexual abuse." JA526. Although Oehne may not agree with the district court's characterization of the serious nature of his offense conduct or its justification for its sentence, he cannot seriously dispute that the court carefully weighed each of the § 3553(a) factors and complied with this Court's procedural requirements for imposing sentence. The court "conducted an individualized assessment of the sentence warranted by § 3553(a) based on the facts presented . . . ." *Aumais*, 656 F.3d at 156-157 (internal quotation marks omitted).[1]

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[1] Oehne also seems to suggest that the district court gave "short shrift" to Dr. Krueger's psychological report. *See* Def.'s Br. at 26. To the contrary, the court discussed the report at length and gave it ample con-

2. Oehne's sentence was substantively reasonable

Oehne also claims that that the sentence imposed was substantively unreasonable because it was too severe. He compares his sentence to those received by other defendants in other, dissimilar cases and relies heavily on his lack of criminal history. But Oehne's sentence was appropriately harsh. He engaged in extreme and unmitigated sexual abuse of MV; he filmed the abuse; he distributed the images so that they have been downloaded by offenders all around the world; he abused and photographed other children; and, during his conversations with law enforcement officers at the time of his arrest and Dr. Krueger at the time of the post-plea psychological evaluation, he placed the blame for his crime on the eight-year old victim and downplayed his own culpability.

Although the district court imposed a non-guideline sentence that was five years below the guideline range and the statutory maximum penalty, it did so only because Oehne had spared the victim from having to testify by pleading

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sideration. But in doing so, the court found that Dr. Krueger's conclusions were based on false information supplied by Oehne, information that directly conflicted with the record evidence and Oehne's sworn admissions during the plea colloquy. JA534-JA535.

guilty. The primary motivation for its sentence in this case was its view of the seriousness of the offense conduct and Oehne's high risk of recidivism. As the court explained, "In my view, that has to rank among the most serious crimes we have. I wouldn't want to diminish this crime if it were a 12 or 14 year old. I wouldn't want to diminish the seriousness of it if you did it once. I wouldn't want to diminish the seriousness of it if you took no pictures of it. It would still be a serious crime but you did all of those things." JA529. In addition, the court was concerned about specific deterrence because Oehne had continued to abuse children and produce child pornography in Virginia: "the conduct that occurred in Virginia following what you did in this offense of conviction here in Connecticut, raises serious questions in my mind about what can be done to deter you until you would be unlikely or not likely at all to do this again." JA529. The court was "terribly concerned over the protection of the public by further crimes" by Oehne. JA530.

In the end, the 540-month sentence was primarily and appropriately motivated by the court's view of the nature of the offense. As the court explained, "We're speaking about the distribution of child pornography and we're speaking about the manufacture and the making of the child pornography through a sexual assault upon an eight-year-old girl. You obviously came

to know this child and she was very young sevenish and you began clearly to groom her and indeed the few pictures I have seen . . . it is clear that you escalated in your sexual contacts and actions with her. You groomed perfectly, you bribed her perfectly, and she became, in effect, your object to do what you wanted to satisfy yourself and then to tout that to the world." JA530. Oehne then subjected MV to a "lifelong constant revictimization" by distributing her images across the Internet, so that they became, at the time, the second most prolific set of child pornographic images to be viewed, possessed and distributed. JA531.

Oehne seems to suggest that his personal history and characteristics warranted a lower sentence. The district court, exercising proper discretion, did not agree. The court viewed Oehne's repeated "denials" to the police and to Dr. Krueger as further evidence that he presented a high risk of reoffending. It thought his statements that MV had somehow enticed him into engaging in the criminal conduct showed his clear failure to appreciate the extreme and serious nature of his conduct. It considered his conduct in Virginia to be indicative of a "pattern . . . of grooming and abusing very young girls." JA534. In short, based on the facts in the record, the court concluded that there were almost no mitigating factors in the case and several serious

aggravating factors indicating that a sentence near the statutory maximum was appropriate.[2]

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[2] In a footnote, Oehne cites to several cases to demonstrate that similarly situated defendants have received lower sentences. *See* Def.'s Br. at 29, n.5. He advanced similar arguments before the district court, which properly rejected them the other cases were "quite different factually from this case." JA471. Not surprisingly, the press releases that Oehne cites in his brief describe cases that are factually different and, therefore, do not provide a valid basis for comparison to the facts of this case. According to these press releases, Donna Mary Zauner was sentenced to 216 months in jail for taking pornographic photos and sending them to another individual; Jose Antonio Soto was sentenced to 360 months in jail for producing pornographic images of four girls on seventeen occasions over a three-year period; and Nicole Jean Schneider and Terry Lee Schneider were sentenced to 180 months and 252 months in jail, respectively, for videotaping a three-year-old engaged in sexually explicit conduct in September 2005. None of these cases involves facts similar to this case, wherein Oehne first groomed and then sexually abused an eight-year minor over a two-year period, documented the abuse by producing images of it, distributed the images extensively over the Internet so that they became, at the time, the second most prolific series of child pornographic images possessed and distributed, abused several other minor children, and denied his culpability repeatedly by placing blame for his offenses on the minor victim.

Based on all of these reasons, the sentence imposed here was substantively reasonable. The record demonstrates that the district court fully understood its authority to depart or vary from the guidelines and its obligation to consider and apply the § 3553(a) factors. Given all of the circumstances of Oehne's conduct and especially the magnitude of abuse and revictimization to which he subjected MV and other minor victims over several years, the sentence here was not unduly harsh. This was a horrific crime that warranted a substantial penalty.

Conclusion

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

Dated: April 27, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

KRISHNA R. PATEL
ASSISTANT U.S. ATTORNEY

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

Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,568 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

KRISHNA PATEL
ASSISTANT U.S. ATTORNEY