ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 12-3032

UNITED STATES OF AMERICA, **Plaintiff-Appellee,**

v.

BRANDON ROCK, **Defendant-Appellant.**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CORRECTED BRIEF OF APPELLANT

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District Court
Cr. No. 11-376 (RMC)

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellant Brandon Rock, hereby states as follows:

A. Parties and Amici: The parties to this appeal are defendant-appellant, Brandon Rock, and the plaintiff-appellee, the United States of America. There are no intervenors or *amici*.

B. Rulings Under Review: Defendant seeks review of the sentence of imprisonment imposed by the district court (the Honorable Rosemary M. Collyer), 5/11/12 Tr. at 33, and the imposition of conditions of supervised release. 5/11/12 Tr. at 36-40. The district court's decision is not reported.

C. Related Cases: There are no related cases. This case has not been previously before this Court.

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*Authorities principally relied upon are marked with an asterisk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 12-3032

UNITED STATES OF AMERICA, **Plaintiff-Appellee,**

v.

BRANDON ROCK, **Defendant-Appellant.**

CORRECTED BRIEF OF APPELLANT

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. A timely notice of appeal having been filed, this Court has jurisdiction under 18 U.S.C. § 3742(a).

STATUTES AND GUIDELINES

Pursuant to D.C. Circuit Rule 28(a)(5), relevant statutes and sentencing guidelines are included in the addendum to this brief.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed procedural error in determining Mr. Rock's sentence based on the incorrect belief that child pornography offenses involve a higher rate of recidivism?

2. Whether Mr. Rock's sentence was infected by procedural error where the government falsely represented that Mr. Rock did not accept Detective Palchak's

invitation to participate in a hands-on sexual encounter involving a fictitious 12-year-old only because he was arrested first?

3. Whether the district court erred in imposing supervised release conditions that impose greater restrictions on Mr. Rock's liberty than are reasonably necessary and/or that were otherwise invalid?

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of Proceedings, And Disposition In The Court Below.

On February 10, 2012, Brandon Rock entered a plea to one count of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2). A.6.[1] Mr. Rock's plea was pursuant to a written plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). A. 16. The plea agreement set forth a recommended sentence of between 144 and 180 months' incarceration. A.16. On May 11, 2012, the district court sentenced Mr. Rock to 172 months' incarceration, to be followed by 120 months of supervised release. A.234; 5/11/12 Tr. at 35. On May 21, 2012, Mr. Rock filed a timely notice of appeal. A.241.

B. Statement Of Facts.

On June 9, 2011, Metropolitan Police Department Detective Timothy Palchak

[1] "A." refers to the Appendix of Appellant filed with this brief. A copy of the transcript of the sentencing proceeding is included in the Appendix behind a tab and cited by original date and page number (e.g., "5/11/12 Tr. at ___"). "PSR" refers to the Presentence Investigation Report (e.g., "PSR ¶__").

was acting in an undercover capacity as part of a multi-jurisdictional MPD/FBI Child Exploitation Task Force. Detective Palchak (hereinafter "the UC" or "Detective Palchak") was operating out of a satellite office in Washington, D.C. He entered a predicated social networking site posing as an individual who had access to a 12-year-old girl, specifically his girlfriend's daughter. A.27.

At approximately 4:55 p.m., the UC posted the following message inviting anyone to respond: "Any other no limit pervs in DC MD VA." A.27. Mr. Rock responded by saying, "near hagerstown here." A.27. The UC then began a private chat with Mr. Rock via instant messenger.

After Mr. Rock typed "near hagerstown here," the UC typed, "DC here into lil. You?" A.28.[2] "Lil" is a term for a minor boy or girl. Mr. Rock responded that he "like[s] to perv on [his] stepdaughter," whom he said was 11 years old. A.28. When the UC responded, "very hot mine is 12 and have been active for 2 years now," Mr. Rock typed, "damn, i just wish i was active lol." A.28. Mr. Rock asked the UC if the mother of the 12-year-old girl to whom he had access knew what he was doing. The UC told Mr. Rock that "at first" he worried a lot, but "now I am more calm and she [the 12-year-old] is totally into it." A.28. The UC then typed, "be hot if you were active and we could all get together that is a big fantasy of mine to see my girl sucking a strange cock." A.213. Mr. Rock typed,

[2] The instant messages exchanged between Mr. Rock and the UC contain numerous spelling, grammatical, and punctuation errors. Those errors are generally left intact herein, except where brackets are used when necessary to convey meaning.

"now I REALLY wish i was active lol." A.213. The UC then typed, "lol, im just glad to meet someone close into it, would consider sharing." A.213. Mr. Rock responded, "yea, me 2, haven't found to many people near me thats into it." A.213.

At approximately 5:07 p.m., the UC re-initiated contact with Mr. Rock on Yahoo instant messenger. A.215. Mr. Rock told the UC, "im not active with her [his 11-year-old stepdaughter] but i do have a hidden cam in her room." A.215. The UC said "very hot any good shots damn that is hot." A.215. Mr. Rock typed, "some good shots, havent caught any fingering or anything yet." The UC then typed, "nice man i bet you shot a big load when you first got the pics back." Mr. Rock responded, "you better believe it lol." A.215.

On June 9, 2011, Mr. Rock sent several of the secretly recorded still images of his stepdaughter to the UC. The UC typed, "man fuck she is cute you get any pussy shots yet my cock is hard lol." A.215. Mr. Rock responded, "a few." The UC asked Mr. Rock if he could "stroke" to the images of the girl. A.216. The UC typed, "you must go crazy[]." A.216. Mr. Rock responded, "you have no idea lol." A.216. In response to the UC's statement, "just don't let your gf find it," Mr. Rock typed that "would be bad lol." A.216.

In response to the UC's question, "what ages are your fav," Mr. Rock typed that his favorite age range is "early teen," specifically ages 10 to 15. A. 217. The UC typed, "i will share christy with you oral only if you want just want to be careful about it." Mr. Rock responded, "i would love to." A. 218. When asked whether

it would be easy for Mr. Rock to find time to meet, Mr. Rock typed, "kinda tough tonight . . . most of the time not bad tho." The UC typed that he could schedule it "one day next week." Mr. Rock responded, "just let me know when and where." The UC then gave Mr. Rock his phone number and asked Mr. Rock if he was a "cop." Mr. Rock responded, "no way," and asked the UC the same question. When the UC typed, "NO . . . just a perv," Mr. Rock typed, "sweet," and provided his cellular telephone number and identified himself as "bj" from Hagerstown. A.219. The UC then asked Mr. Rock if he could meet at night during the week. Mr. Rock typed that he finishes work at 3:30 p.m. and could meet at night during the week. Specifically, Mr. Rock typed that he could meet the following Tuesday. The UC typed that he was looking forward to meeting and Mr. Rock typed, "me too." A.219.

On June 13, 2011, the UC re-initiated contact with Mr. Rock again via Yahoo instant messenger. A.220. The UC told Mr. Rock that he would have his girlfriend's 12-year-old daughter on Wednesday. A.220. Mr. Rock responded, "i just don't know if im ready to cross that line, don't need to get busted if ya know what i mean." A. 220.

When Mr. Rock expressed reticence about an in-person meeting, the UC suggested continuing to exchange pictures or Mr. Rock watching the UC engage in sexual activity with his girlfriend's 12-year-old daughter on the computer via web camera. A. 220. Specifically, the UC typed, "maybe for now we can just do the[]

pics or maybe even web cam she would be cool because she knows it is a fantasy of mine." A.220. Mr. Rock responded, "that would probably make me a bit more comfortable, would rather get to know ya at least a little first." A.220.

On June 13, 2011, the UC asked Mr. Rock if he had any new pictures of his girlfriend's 11-year-old daughter. Mr. Rock typed, "no, she went back to her dads on Friday but i do have some you havent seen." A.220. Later during the chat on June 13, the UC asked if Mr. Rock had "any other clear" photographs of his stepdaughter. A.221. Mr. Rock sent him another photograph of his stepdaughter at that time.

In reference to Mr. Rock's stepdaughter, the UC asked, "you think there is a chance you can play with her or she would tell." A.222. Mr. Rock responded, "i don't know, thats my problem, she doesn't even seem interested." A.222. When the UC asked, "have you tried at least," Mr. Rock responded, "I've tried but not very hard, 'accidently' left a vibrating egg in her room, shes seen me naked, shes seen me hard, nothing." A.222. The UC asked what Mr. Rock's stepdaughter did with the vibrating egg and "did she know what it was?" Mr. Rock typed, "i think she knew, she just brought it back to me and told me she found it . . . and walked away." A.222.

The UC asked Mr. Rock when his stepdaughter would next be home and if he had the video camera ready. A.223. Mr. Rock responded that his stepdaughter would be home on Friday and that he did not have the camera ready yet but would. The UC asked Mr. Rock if he had ever used the video camera on anyone else. Mr.

Rock responded, "no, it spends most of its time in [his stepdaughter's] room lol." A.223. The UC asked if Mr. Rock had ever put the camera in the bathroom. Mr. Rock typed, "I've thought about it but not good place to put it, the downfall is it needs plugged in." A.223. The UC responded, "oh shit that does suck." Mr. Rock typed, "yes it does, but it sure does work out in her room." A. 223.

Also on June 13, 2011, the UC asked, "how may lil puusy [sic] pies of under 11 do you have? would you wanna trade for a cam show with my girl?" A.225. Mr. Rock responded, "hmmm, now that i could do." A.225. The UC responded, "now how many do you have that are hardcore like the first you sent, i was thinking 20 for a 15 min show." A.225. Mr. Rock typed, "i can come up with that many." The UC asked Mr. Rock, "what is the youngest and do you have any of them like fucking or sucking." A.225-26. Mr. Rock typed, "i actually think i have more than i think i do lol, i didn't see any fucking, do have a few sucking. . . . i have no idea how young the youngest is . . . maybe 9?" The UC responded, "cool, i think like 10 [images] as a downpayment [sic] would be fair and ill even let you talk to her before we start." A.226.

The UC then told Mr. Rock that Mr. Rock should send the other 10 images once the UC's 12-year-old girl was present with him for the web camera. Mr. Rock typed, "when will she be there." The UC told him that he would find out that night. Mr. Rock typed, "ok." A.226.

During the course of this conversation on June 13, 2011, Mr. Rock sent

eleven image files ia Yahoo Instant Messenger., six or seven of which depicted children engaged in sexually explicit conduct. A.32.

On June 13, 2011 the UC asked Mr. Rock what he wanted to see on the 15-minute web camera show. Mr. Rock typed, "whatever you want." A.226. When the UC typed, "what you wanna seee [sic] and ill do it," Mr. Rock responded, "have you fucked her?" The UC typed "I have." In response, Mr. Rock typed, "i would love to see that." The UC then typed, "i can def make that happen," to which Mr. Rock replied, "sweet." A.227.

On June 14, 2011, Detective Palchak initiated a conversation with Mr. Rock by stating, "hey looks like she will be here Sat," to which Mr. Rock simply responded "cool." A.228. Mr. Rock did not attempt to follow up in any manner concerning a possible meeting or web-cam show. Then, on June 15, 2011, Palchak again initiated contact with Mr. Rock, writing, "cool, she may come over Friday but for sure on sat. What time are you around Fri i[f] she comes then? [W]hat time is your step[-daughter] coming over?" A.229. Mr. Rock never responded in any manner to Detective Palchak's message.

Mr. Rock was arrested two days later, on June 17, 2011. A.33. At the time of his arrest, he spoke to Detective Palchak and admitted to visiting the social networking site and to having chats with the detective. He also said that he has a desk-top computer in his bedroom to which only he had access. A.33.

The police conducted a search of Mr. Rock's home, where they recovered a

desk- top computer from his bedroom. A.33. They also recovered a lap top belonging to Mr. Rock from his girlfriend's home, where Mr. Rock sometimes stayed overnight. On these computers, they found more than 100 videos containing child pornography. Also on defendant's computers, the police found numerous short video segments of Mr. Rock's girlfriend's 11-year-old daughter in her bedroom. A review of the segments revealed that on at least two occasions Mr. Rock moved the camera from a position where it initially captured only the child's upper body, to a position where it captured most of her body. The camera was focused on the child's bed. In some of the footage the child enters the camera's field of vision wearing only a towel and proceeds to get dressed. There are images of the child naked from the front and back. A.33.

C. The Parties' Sentencing Memoranda.

1. Mr. Rock's Sentencing Memorandum.

In his sentencing memo, Mr. Rock requested a sentence of 144 months. A.38. At the outset of the memo, defense counsel argued as follows:

> For a defendant who refused the undercover detective's ("the UC's") repeated offers to join him and a fictitious minor for a sexual encounter, who on his own quit communicating with the UC, and given the sentences imposed in cases where the defendants *accepted* the UC's offer and *did* travel to meet him and a minor for sex, twelve years of Mr. Rock's life is a severe sentence.

A.37. At a later point in the memo, the defense again raised this point, noting that "[i]mportantly . . . Mr. Rock at no time attempted -- or would have attempted --

physical contact with a minor." A.38. Similarly, the defense wrote as follows:

> [T]he evidence is . . . clear that Mr. Rock did not -- and would not -- in fact 'cross the line' that separates viewing images from the actual physical touching of a minor. Indeed, what is notable from the emails in this case is that following the June 13, 2011 communications, Mr. Rock essentially ceased communicating with Detective Palchak or "JP," either barely responding at all to his invites (on June 14, 2011), or ignoring them all together (on June 15, 2011). *See* Ex. 3 (June 14-15 emails between Detective Palchak and "JP"). Relative to other cases where the defendant not only continued to communicate with JP but traveled to meet him with the intent of engaging in sexual contact with minors, a sentence of twelve years is already severe and more than sufficient.

A.41. Finally, in addressing the § 3553(a) factors, the defense noted that "[m]ost importantly, there is no evidence that Mr. Rock has ever physically touched a child." A.56.

Based on the above argument, as well as Mr. Rock's otherwise positive history and characteristics (such as his sterling work ethic), the defense urged the Court to sentence Mr. Rock to 144 months' imprisonment. A.57.

2. The Government's Sentencing Memorandum.

In its sentencing memorandum, the government requested a sentence of 180 months' incarceration, the maximum the Court could impose under the Rule 11(c)(1)(c) plea agreement. A.192.

In the absence of any evidence to prove the point, the government argued that Mr. Rock's failure to meet with Detective Palchak or engage in Detective Palchak's proposed "web cam" show was "not due to any lack of effort on the defendant's

part." A.199 (emphasis added). The government further argued that Mr. Rock took "steps to engage in the sexual abuse of the UC's purported 12-year-old girl. Luckily for him (and for us) *he was prevented from doing so*." A.200 (emphasis added); *see also* A.206 ("the defendant took affirmative steps to try to . . . witness the abuse of an to abuse the UC's 12-year-old minor. That the defendant fortunately was not successful does not negate his sexual interest or intentions."); *id.* ("that the defendant has not admitted prior sexual acts and there are no records [or] documentation [of] such sexual acts certainly does not mean that the defendant was no trying to engage in sexual activity, at some point, with . . . the UC's purported 12-year-old girl[.]"); A.207 (government arguing that "[t]he defendant's communications with Detective Palchak are a prime example of the defendant attempting to raise his conduct to another level altogether.").

3. Mr. Rock's Reply to the Government's Sentencing Memorandum.

The defense filed a reply to the government's sentencing memo. Responding to the government's claim regarding the reason for Mr. Rock's failure to meet Detective Palchak for a sexual encounter involving the minor, the defense stated:

> [T]he government claims that the defendant's failure to meet with Detective Palchak or engage in Detective Palchak's proposed "web cam" show was "not due to any lack of effort on the defendant's part." Gov't Opp'n at 9; *see also id.* at 10 (defendant "took additional steps to witness and engage in the sexual abuse of the UC's purported 12-year-old girl"). That is simply incorrect. As the final communications between Detective Palchak and Mr. Rock make crystal clear, Mr. Rock stopped communicating with Detective Palchak and did not follow up on his aggressive and repeated invitations to do the

> web-cam show and to meet in person. *See* Def. Mem. at Ex. 3 (June 14-15 emails between defendant and "JP"). The fact of the matter is that Mr. Rock was not going to engage in those activities. While the government has a right to be passionate in its sentencing position, it does not have the right to deliberately distort the facts underlying this offense.

A.231.

D. The Sentencing Hearing.

At the sentencing hearing, the parties reiterated their arguments with respect to where Mr. Rock's sentence should fall within 144-180 month sentencing range. During defense counsel's allocution, the court asked, "[h]ow can you be sure that he won't do anything like this again? I don't mean to call into question the current sincerity of Mr. Rock's statement, but historically this has not been an easy sort of crime to avoid recidivism." 5/11/12 Tr. at 6. The defense responded that, "the literature shows a big difference between contact offenders and non-contact offenders," *id.*, and emphasized the critical point that Mr. Rock ultimately refused the UC's repeated suggestions to participate in real sexual activity. *See id.* ("Even though Detective Palchak was continuously trying to get Mr. Rock to come to Washington D.C. to do things, there would be . . . contact, Mr. Rock was not willing to do that and he made that clear. So we have got the non-contact versus contact.").

Defense counsel allocuted as follows:

> 12 [years] is enough, it's a very long time for someone who refused Detective Palchak's repeated invitations to come, travel down there and do things.

> I mean, if we put this in perspective, the doing versus the looking is a meaningful distinction . . . especially when [the UC is] aggressively urging him to do that and it's just not something that he [w]ould have done. At least we should recognize that fact in fashioning the sentence.

5/11/12 Tr. at 18.

The government contested the defense's factual contention that Mr. Rock was not going to travel to Washington, D.C. for the UC's suggested threesome.

> I want to raise another issue. And it's a suggestion somehow that the defendant never took Detective Palchak up on his offer, Detective Palchak was aggressively pursuing this particular defendant. . . .
>
> And it is true that the defendant never traveled to the District of Columbia. The defendant never followed through on that but there's a reason for that.
>
> It's because when Detective Palchak discovered and law enforcement discovered that there was a real child at risk in peril, we essentially went and got the defendant to get her out of this situation to prevent her from being filmed and potentially sexually abused.

5/11/12 Tr. at 21.

The defense responded to the government's statement as follows:

> [As reflected in the Internet chat,] [the UC] writes Mr. Rock on June 14 and 15. On June 15 [the UC] says cool, she may come over Friday, but for sure on Saturday. What time are you around on Friday if she comes then?
>
> Mr. Rock . . . does not respond to this e-mail. Okay. It is not because he's arrested. It's not because she's taken out of there. [We know that] because he's not arrested until three days later.
>
> So I mean, for the Government to get up here and state that that's why that happened is just, it's incorrect . . . [Mr. Rock] did not respond

> to this because he did not want to is what I would say, but it's certainly not because he was arrested. That did not happen until several days later.

5/11/12 Tr. at 26.

The court did not resolve the dispute between the parties regarding the reason behind Mr. Rock's failure to follow up on Detective Palchak's repeated invitations to participate in underage sex. Without addressing the argument, the district court imposed a sentence of 172 months' imprisonment, to be followed by 120 months' supervised release. 5/11/12 Tr. at 33. In sentencing Mr. Rock to the high end of the permissible range, the court expressly relied on its earlier comment concerning a higher rate of recidivism for child pornography offenders. 5/22/12 Tr. at 32 (court stating, "[s]o protecting the public from further crimes of the defendant is a critical component to this particularly because recidivism is very hard to predict or lack of recidivism, very hard to predict in this kind of crime.")

The court noted that it would have sentenced Mr. Rock to 180 months' incarceration, but would "reduce that somewhat because of the risk of abuse and rape the defendant may face while in prison." 5/11/12 Tr. at 33. The court stated that, "it strikes me that [the conditions at federal prisons] makes serving a sentence particularly dangerous for those who are at risk which is almost everybody but most particularly persons convicted of crimes such as this one." *Id.*

Regarding special conditions of supervised release, the district court imposed the following conditions on Mr. Rock relevant to this appeal:

- Computer/Internet Restriction: "The defendant shall not possess or use a computer, or have access to any online service, without the prior approval of the United States Probation Office. The defendant shall identify all computer systems, internet capable devices, and similar memory and electronic devices to which he has access, and allow installation of a computer and internet-monitoring program. The defendant is limited to possessing only one personal internet capable device, to facilitate our ability to effectively monitor your internet related activities. Monitoring may include random examinations of computer systems along with internet, electronic, and media storage device under his control. The computer system or device may be removed for a more thorough examination, if necessary. The defendant shall be responsible for the cost of such monitoring services." (5/11/12 Tr. at 36; A.236.)

- Computer Pornography Restriction: "The defendant shall not use a computer, internet capable device, or similar electronic device to access pornography of any kind. This includes, but is not limited to, accessing pornographic web sites, including web sites depicting images of nude adults or minors. The defendant shall not use his computer to view pornography stored on related computer media, such as CD's or DVD's, and shall not communicate via his computer with any individual or group who promotes the sexual abuse of children." (5/11/12 Tr. at 36-37; A.236.)

- Contact Restriction: "The defendant shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children frequently congregate including, but not limited to, schools, day care centers, theme parks, theatres, playgrounds, shopping malls, swimming areas, community recreation centers, and arcades." (5/11/12 Tr. at 37; A.236.).

- Employment Restriction: "The defendant shall not be employed in any capacity that may cause him to come into direct contact with children, except under circumstances approved in advance by the supervisory probation officer. The defendant shall not participate in any volunteer activity that may cause you to come into direct contact with children, except under circumstances approved in advance by his probation officer." (5/11/12 Tr. at 37; A.236.).

- Physiological Testing: "The defendant shall submit to penile plethysmograph testing as directed by the United States Probation Office as part of your sex offender therapeutic treatment. The costs of the testing are to be paid by the defendant, as directed by the probation office." (5/11/12 Tr. at 39; A.236.).

- Significant Romantic Relationship Condition: "The defendant shall notify the US Probation Office when he establishes a significant romantic relationship, and then shall inform the other party of his prior criminal history concerning your sex offenses. The defendant shall understand that he must notify the US Probation Office of the significant other's address, age, and where the individual may be contacted." (5/11/12 Tr. at 40; A.236.).

The defense objected to the imposition of all of the above special conditions of release "so that the objection[s] [are] preserved." 5/11/12 Tr. at 41. In addition to specially objecting to an alcohol restriction that the court subsequently declined to impose, defense counsel singled out for discussion the "significant romantic relationship" condition. *See* 5/11/12 Tr. at 41.

> Defense counsel: The other one I have never heard of before is that if you get into a significant relationship you have to inform the significant other. I don't –
>
> The Court: The reason for that I assume is because of the nature of the relationship here. Mr. Rock was in a significant relationship and used that as a vehicle to prey on a young child.
>
> Defense counsel: There [are] plenty of restriction[s] in there about not going near children. I think's that's [been] done five different ways, so I think that will pretty much cover that concern. . . . I have never heard that before and it just sounds wrong[.]
>
> The Court: All right. Well, that objection, all of your objections, your objections to all of the conditions but most particularly that objection are noted for the record so they're preserved.

5/11/12 Tr. at 41-42.

SUMMARY OF ARGUMENT

Mr. Rock's sentencing was procedurally unreasonable for at least two reasons. First, the district court erred in determining Mr. Rock's sentence based on the incorrect belief that it should increase Mr. Rock's sentence to protect the public because child pornography offenders recidivate more often than those convicted of other offenses. The district court did not state any basis for its belief, which, in any event, was mistaken. Second, the sentencing here was infected by the government's false representation that Mr. Rock did not attempt the hands-on sexual abuse of the fictitious 12-year-old only because he was arrested first. Both parties clearly viewed that issue as critical to the appropriate sentence, and yet the government falsely represented the underlying facts to the district court, and the district court did not disclaim reliance on the government's representation. For both of the above reasons, this Court should vacate the sentence and remand for resentencing.

In addition, a number of the special conditions of supervised release the district court imposed do not comport with the governing statute, 18 U.S.C. § 3583(d), as interpreted in this Circuit and elsewhere. Certain of the special conditions are also invalid for other reasons, including that they violate substantive due process. As a result, this Court should vacate the challenged conditions.

ARGUMENT

I. MR. ROCK'S SENTENCE WAS PROCEDURALLY UNREASONABLE BECAUSE WHEN IMPOSING SENTENCE THE DISTRICT COURT EXPRESSLY RELIED ON THE INCORRECT PREMISE THAT CHILD PORNOGRAPHY OFFENSES INVOLVE A GREATER RATE OF RECIDIVISM.

A. Standard Of Review.

In response to the district court's statement that Mr. Rock's offense involved a higher rate of recidivism, defense counsel argued that it did not when the offense was a non-contact offense. The district court nevertheless relied on its earlier statement in imposing Mr. Rock's sentence. The defense accordingly preserved its objection, and the standard of review is abuse of discretion.

B. Legal Framework.

In reviewing a sentence of procedural reasonableness, this Court "'ensure[s] that the district court committed no procedural error, 'such as . . . selecting a sentenced based on clearly erroneous facts.'" *In re Sealed Case*, 552 F.3d 841, 844 (D.C. Cir. 2009) (quoting *Gall v. United States*, 128 S. Ct. 586, 597 (2007)). This Court had held that, under the Due Process Clause, "a sentence may not be based on 'improper or inaccurate information.'" *United States v. Lemon*, 723 F.2d 922, 933 (D.C. Cir. 1983) (quoting *Dorsyznski v. United States*, 418 U.S. 424, 431 n.7 (1974)); *see also Stewart v. Erwin*, 503 F.3d 488, 491 (6th Cir. 2007) (holding that it is "clearly established" that the Due Process Clause "protect[s] against a trial court's reliance on materially false information at sentencing"); *United States v. Curran*, 926 F.2d 59, 61 (1st

Cir. 1991) ("It is well settled . . . that a defendant has a due process right to be sentenced upon information which is not false or materially incorrect."). Indeed, appellate courts "must be concerned not merely when a sentencing judge has relied on demonstrably false information, but 'when the sentencing process created a significant *possibility* that misinformation infected the decision.'" *Lemon*, 723 F.2d at 933 (quoting *United States v. Bass*, 535 F.2d 110, 118 (D.C. Cir. 1976) (emphasis in original)). Challenged information is deemed false or unreliable if it lacks "'minimal indicium of reliability beyond mere allegation.'" *United States v. McGowan,* 668 F.3d 601, 606 (9th Cir. 2012) (quoting *United States v. Vanderwerfhorst*, 576 F.3d 929, 935 (9th Cir. 2009)).

C. Discussion.

The district court did not cite any basis for its belief that recidivism rates for child pornography offenders are higher than for other offenses. This remained true even after the defense challenged the district court's statement with respect to non-contact offenders. *See* 5/11/12 at 6. To the extent the district court was articulating a popular misconception about recidivism and child pornography offenses, that proposition has been disproven time and again, including in a definitive study conducted by the United States Sentencing Commission. *See, e.g.*, United States Sentencing Commission, *Federal Child Pornography Offenses, Chapter 11: Recidivism*

By Child Pornography Offenders (2012)[3] at 293 ("the Commission's study of known recidivism by child pornography offenders suggests that the rate of known recidivism (in particular, sexual recidivism) may not be as high as commonly believed"); *id.* at 310 ("The known general recidivism rate found in the [United States Sentencing] Commission's study [for child pornography offenders] is similar to the known general recidivism rate for a comparable segment of the total federal offender population (i.e., United States citizen white male federal offenders) studied by the Commission in 2004, as well as the supervised release revocation rate for federal offenders generally (as discussed in the Commission's 2010 report).").

Where a district court has relied on incorrect information in imposing its sentence, as it did here, the appropriate course is to remand for resentencing. *See, e.g.*, *Lemon*, 723 F.2d at 933. Accordingly, Mr. Rock respectfully requests such a remand.

II. MR. ROCK'S SENTENCE WAS PROCEDURALLY UNREASONABLE DUE TO THE GOVERNMENT'S FALSE REPRESENTATION REGARDING THE REASON MR. ROCK FAILED TO JOIN THE UC AND THE FICITIOUS MINOR IN SEXUAL ACTIVITY.

A. Standard Of Review.

Mr. Rock preserved his objections to the government's incorrect representation both in the written sentencing memoranda and at the sentencing hearing. 5/11/12

[3] Found at: http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Chapter_11.pdf.

Tr. at 41-42. The standard of review is accordingly abuse of discretion.

B. Legal Framework.

The law surrounding inaccurate information at sentencing is set forth *supra,* in section I.A. Also relevant here is a district court's duty to address all non-frivolous defense arguments for a lighter sentence. *See United States v. Bigley*, 786 F.3d 11, 12 (D.C. Cir. 2015) ("A sentencing court, post-*Booker*, must consider nonfrivolous arguments for mitigation"); *see also United States v. Poulin*, 745 F.3d 796, 800 (7th Cir. 2014) ("District courts must consider a defendant's 'principal, non-frivolous arguments in mitigation' when selecting an appropriate sentence for a defendant" and "must explain [their] rationale for why a given sentence is appropriate." (quoting *United States v. Chapman*, 694 F.3d 908, 913 (7th Cir. 2012))); *United States v. Ramirez-Mendoza*, 683 F.3d 771, 776 (7th Cir. 2012) (vacating sentence as defendant's duress claim at sentencing "was a principal argument worthy of the district court's attention"); *United States v. Ressam*, 629 F.3d 793, 826 (9th Cir. 2010) ("'[W]hen a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, then the judge should normally explain why he accepts or rejects the party's position.'" (quoting *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (citing *Rita*, 551 U.S. at 357))); *United States v. Lynn*, 592 F.3d 572, 583-85 (4th Cir. 2010) (finding reversible error where the district court gave "no indication that [it] considered the defendant's nonfrivolous arguments prior to sentencing him" and stated only that it found Lynn's sentence to be "fair and

appropriate and consistent with the requirements of § 3553(a)" before imposing Lynn's sentence (internal ellipses and brackets omitted)); *United States v. Peters*, 512 F.3d 787, 789 (6th Cir. 2008) ("When a defendant or prosecutor 'presents nonfrivolous reasons for imposing a different sentence,' . . . a sentencing judge should address the 'parties' arguments' and 'explain why he has rejected those arguments.'" (quoting *Rita*, 551 U.S. at 357)); *United States v. Goff*, 501 F.3d 250, 256 (3d Cir. 2007) ("Although the District Court is not required either to comment on every argument counsel advances or to make findings as to each § 3553(a) factor, it nevertheless should expressly deal with arguments emphasized by the parties.").

C. Discussion.

The defense's central argument in mitigation was that the evidence, taken as a whole, demonstrated that Mr. Rock had not -- and would not -- attempt hands on sexual contact with a minor. In other words, that Mr. Rock is not a molester, which, among other things, means he is less likely to recidivate. In response, the government argued that Mr. Rock was prevented from attempting to engage in the web-cam or the rendezvous for illegal sex only because he was arrested first. But that was a false representation made only so as to obtain the highest possible sentence. As the chats between Mr. Rock and Palchak clearly demonstrate, Mr. Rock ceased engaging with Palchak -- despite Palchak's best efforts -- three days before his arrest. Even more tellingly, Mr. Rock stopped communicating with Palchak when Palchak had written to him on the specific issue of engaging in a

three-way sexual encounter.

Here, in derogation of *Rita* and the case law requiring district courts to address a defendant's primary arguments in mitigation, the court did not resolve the dispute between the government and the defense regarding why Mr. Rock did not accept Palchak's invitation for the webcam or three-way sexual encounter. That itself was error. *See, e.g., Bigley*, 786 F.3d at 12. In addition, however, under the circumstances present here, there was a significant possibility that the misinformation provided by the government infected the district court's sentencing decision and unfairly disproved, in the district court's mind, Mr. Rock's primary argument in mitigation. Accordingly, this Court should remand for resentencing.

III. THE SPECIAL CONDITIONS OF SUPERVISED RELEASE ARE NOT REASONABLY RELATED TO MR. ROCK OR HIS OFFENSE CONDUCT AND INVOLVE A GREATER DEPRIVATION OF LIBERTY THAN IS REASONABLY NECESSARY UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

A. Standard Of Review.

The defense objected to the special conditions of supervised release at issue in this appeal and the district court expressly stated that the defense's objections to the conditions were preserved. *See* 5/11/12 Tr. at 42. Accordingly, this Court's review is for abuse of discretion. *United States v. Love*, 593 F.3d 1, 11 (D.C. Cir. 2010) ("We review the imposition of [objected-to] conditions for abuse of discretion."). In conducting that review, this Court "considers how the trial court measured the conditions imposed against the statutorily enumerated sentencing goals." *United*

States v. Sullivan, 451 F.3d 884, 895 (D.C. Cir. 2006); *see also United States v. Stanfield*, 360 F.3d 1346, 1352-53 (D.C. Cir. 2004). If "independent review shows that the challenged condition[s]" do not meet the requirements of § 3583(d), those conditions "must be vacated." *United States v. Russell*, 600 F.3d 621, 637 (D.C. Cir. 2010).

B. Legal Standard.

Pursuant to 18 U.S.C. § 3583(d), special conditions of supervised release must be "reasonably related" to the nature and circumstances of the offense and the history and characteristics of the defendant, as well as to the purposes of sentencing, including the need to afford adequate deterrence; protect the public from further crimes of the defendant; and provide the defendant with needed vocational, educational, and correctional treatment. 18 U.S.C. § 3583(d)(1) (referencing 18 U.S.C. § 3553(a)(1), (a)(2)(B)-(D)). Further, courts are statutorily obligated to ensure that non-mandatory conditions of release "involve[] no greater deprivation of liberty than is reasonably necessary" to provide adequate deterrence, to protect the public, and to meet the defendant's vocational and medical needs, 18 U.S.C. § 3583(d)(2), and are consistent with any pertinent policy statements issued by the Sentencing Commission, *id.* at § 3583(d)(3); *see also United States v. Malenya*, 736 F.3d 554, 559-60 (D.C. Cir. 2013).

As now-Justice Sotomayor recognized in *United States v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005):

> If a special condition implicates a fundamental liberty interest, we must carefully examine it to determine whether it is "reasonably related" to the pertinent factors, and "involves no greater deprivation of liberty than is reasonably necessary," 18 U.S.C. § 3583(d), and our application of these criteria must reflect the heightened constitutional concerns. If the liberty interest at stake is fundamental, a deprivation of that liberty is "reasonably necessary" only if the deprivation is narrowly tailored to serve a compelling government interest.

The government bears the burden of demonstrating that the statutory standards have been met. *See United States v. Weber*, 451 F.3d 552, 558-59 (9th Cir. 2006).

C. The Special Conditions Imposed On Mr. Rock Do Not Satisfy The Requirements of § 3583(d).

The special conditions addressed below are either not reasonably related to the specific facts and circumstances of this case and/or involve a greater deprivation of liberty than is reasonably necessary. This Court should accordingly remand this case to the district court with an order to vacate the challenged conditions.

Mr. Rock addresses each contested special condition of supervised release in turn.

1. Computer/Internet Restriction.

The sweeping computer/Internet restriction imposed by the district court meets neither the "reasonably related" nor the "reasonably necessary" requirement of § 3583(d). Here, the district court imposed a condition of supervised release broadly restricting Mr. Rock's access to computers and the Internet -- a condition that infringes his First Amendment rights and also operates as an occupational restriction.

The broad computer/internet restriction is at odds with this Circuit's opinion in *Malenya*, a case in which this Court struck down precisely the same condition imposed here on the ground that it violated 18 U.S.C. § 3583(d). 736 F.3d at 560 (invalidating identically worded computer/internet ban and observing that it "illustrates the failure to consider the consequences of the conditions"); *see also United States v. Perazza-Mercado*, 553 F.3d 65, 73-74 (1st Cir. 2009) (vacating ban on internet in defendant's home given internet's ubiquitous presence and "all-encompassing" nature where an appropriate restriction could otherwise be fashioned); *United States v. Voelker*, 489 F.3d 139, 142, 146 (3d Cir. 2007) (vacating computer/internet restriction because condition not narrowly tailored to be consistent with § 3553(a)); *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (vacating restriction on computer/internet use as too broad given particular circumstances of case which necessitated more narrowly-tailored restrictions such as prohibiting access to certain categories of websites and internet content, random computer searches, and use of filtering software); *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003) (vacating ban on computer in home as well as ban forbidding use of computer without probation officer approval as overbroad and not reasonably necessary); *United States v. Holm*, 326 F.3d 872, 878 (7th Cir. 2003) (vacating ban on internet use because it imposes greater deprivation on liberty than necessary, and remanding for more narrowly tailored condition given that internet is used today for numerous practical tasks, and referring to absolute ban on internet access as the "early 21st century equivalent of forbidding

all telephone calls, or all newspapers"); *United States v. Sofsky*, 287 F.3d 122, 126-27 (2d Cir. 2002) (under plain error standard of review, vacating ban on computer use as overbroad and remanding for more "focused restriction" given that commerce and information are tied to computers in modern life); *United States v. Peterson*, 248 F.3d 79, 84 (2d Cir. 2001) (vacating computer ban as overbroad given defendant's offense and characteristics and the prevalence and need of computers in modern society); *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001) (vacating computer ban that "would bar [defendant] from using a computer at a library to do any research, get a weather forecast, or read a newspaper online").

Here, the district court did not consider less restrictive conditions available to accomplish the statutory purposes of supervised release without unreasonably impacting Mr. Rock's liberty and First Amendment interests. For example, Mr. Rock could be monitored "by unannounced inspections . . . and examination of material stored on his hard drive or removable disks."[4] *Sofsky*, 287 F.3d at 127. Additionally, filtering software could be used to interpose a barrier between Mr. Rock's computer's web browser and the internet that blocks access to certain sites or only allows access to certain sites. *See, e.g., White*, 244 F.3d at 1206; *United States v. Scott*, 316 F.3d 733, 735 (7th Cir. 2003) (district court could have prohibited defendant

[4] Indeed, the current restriction already provides for several layers of monitoring should the Probation Office permit Mr. Rock to access a computer and/or the internet.

from accessing particular websites "as opposed to the entire Internet"). Moreover, the Probation Office could monitor Mr. Rock's internet usage through review of records maintained by any internet service provider he utilizes. *See, e.g., United States v. Lifshitz*, 369 F.3d 173, 191 (2d Cir. 2004). As it stands, Mr. Rock is not permitted to use -- not just the internet -- but a *computer* without the express permission of the Probation Office. Such a restriction will limit Mr. Rock's ability to even prepare a résumé through a basic word processing program to search for future employment -- something he will likely have difficulty obtaining in light of the restriction in any event.

The district court entirely ignored the reality that a ban on computer use will unreasonably limit Mr. Rock's ability to work, and thereby constitutes an occupational restriction negatively impacting an alternate goal of supervised release -- rehabilitation. *See Perazza-Mercado*, 553 F.3d at 71 ("Unduly harsh conditions would, instead of 'facilitat[ing] an offender's transition back into the every day life of the community,' be a 'significant barrier to full reentry into society.'" (citation omitted)); *Holm*, 326 F.3d at 878 (restricting computer access places a "devastating burden on [one's] ability to be a productive person in this culture"). This Court's opinion in *Russell* held that even where there is a specific connection between the offense and the internet, blanket computer restrictions are inappropriate as they "affirmatively and aggressively interfere[] with the goal of rehabilitation." *Russell*, 600 F.3d at 637.

Finally, any suggestion that the restriction is saved by delegating to the

Probation Office the power not to enforce it should be rejected by this Court. First, nothing in the restriction *requires* the Probation Office to grant exceptions or provides it with any guidance as to how its discretion should be exercised; the baseline is that Mr. Rock is forbidden from accessing a computer and/or the internet. If, for whatever reason, Probation decides not to permit Mr. Rock to use a computer or the internet, the restriction will be a blanket one, no different than any of the restrictions cited above. *See, e.g., Freeman*, 316 F.3d at 392 (treating restriction allowing probation office to make exceptions no different than blanket ban); *Crume*, 422 F.3d at 733 (same).

Second, the delegation here offends Article III of the United States Constitution. In *United States v. Pruden*, 398 F.3d 241 (3d Cir. 2005), the Third Circuit analyzed this very issue -- under the plain error standard -- in the context of a similar delegation of power. In one of its ordered conditions of release, the district court in *Pruden* delegated to the probation office the decision whether to require mental health treatment. *Id.* at 250. Marshaling authority from numerous circuits, the *Pruden* court determined that the "wealth and unanimity of the precedents on th[is] issue[]" made the district court's error plain. *Id.* at 251. The court explained:

> Probation officers have broad statutory authority to advise and supervise probationers, and to "perform any other duty that the court may designate." 18 U.S.C. § 3603(10). But the breadth of these powers is "limited by the probation officer's status as a nonjudicial officer." *United States v. Kent*, 209 F.3d 1073, 1078 (8th Cir. 2000). The most important limitation is that a probation officer may not decide the nature or extent of the punishment imposed upon a probationer.

> *Id.; see also Ex parte United States*, 242 U.S. 27, 41-42[] (1916) ("[U]nder our constitutional system the right to ... impose the punishment provided by law is judicial....").

This limitation extends not only to the length of a prison term imposed, but also to the conditions of probation or supervised release. *See United States v. Johnson*, 48 F.3d 806, 808 (4th Cir. 1995). Several courts have derived this limitation on probation officers' authority from the United States Sentencing Guidelines, *see* U.S.S.G. § 5B1.3(b) ("The court may impose other conditions of probation...."); *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001), but it is of constitutional dimension, deriving from Article III's grant of authority over "cases and controversies" to the courts, *see United States v. Meléndez-Santana*, 353 F.3d 93, 101 (1st Cir. 2003); *United States v. Bernardine*, 237 F.3d 1279, 1283 (11th Cir. 2001); *Kent*, 209 F.3d at 1078-79; *Johnson*, 48 F.3d at 808-09.

The *Pruden* court adopted the test set forth by the Second Circuit in *Peterson*, which reconciles the commands of Article III with the need for probation officers to exercise discretion. That test provides:

> If [the defendant] is required to participate in a mental health intervention only if directed to do so by his probation officer, then this special condition constitutes an impermissible delegation of judicial authority to the probation officer. On the other hand, if the District Court was intending nothing more than to delegate to the probation officer the details with respect to the selection and schedule of the program, such a delegation was proper.

398 F.3d at 251 (quoting *Peterson*, 248 F.3d at 85 (citations omitted)); *see also United States v. Allen*, 312 F.3d 512, 515-16 (1st Cir. 2002) (adopting *Peterson* test); *Kent*, 209

F.3d at 1078-79 (same). Applying the *Peterson* test to this case, it is clear that the computer/Internet restriction is an improper delegation of sentencing authority, as it grants the probation officer unilateral control over Mr. Rock's computer/internet use and provides no guidance as to how that control should be exercised. The *Peterson* test also invalidates several other conditions imposed by the court in this case, including the contact, employment, and residential restrictions, as well as the sex offender treatment condition and penile plethysmograph testing. *See infra.*

2. Computer Pornography Restriction.

The district court also imposed a computer pornography condition, prohibiting Mr. Rock from viewing pornography -- even legal adult pornography -- on a computer or internet-capable device, but apparently allowing him to view pornography through other media. The district court did so in the absence of any evidence demonstrating that viewing adult pornography would increase Mr. Rock's likelihood of reoffending.

In addition to being unnecessary, the condition suffers from being unconstitutionally vague and overly broad. In *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001), the Third Circuit struck down a similar condition on those grounds, as the term "pornography" "might apply to a wide swath of work [including] serious art." *Id.* at 267. In this case, the restriction covers "pornography" "including . . . images of nude adults." Such a definition expands the breadth of "pornography" well beyond that which is specified in 18 U.S.C. § 2256(8), the statute defining child

pornography. As in *Loy*, the restriction in this case "threatens to chill protected conduct" and should be vacated. 237 F.3d at 265. Without any discussion of how or why such a restriction is appropriate in this specific case, it should likewise be vacated.

3. Physiological Testing.

The district court ordered that Mr. Rock "shall submit to penile plethysmograph testing[.]" 5/11/12 Tr. at 39. There was no demonstration of what such testing actually requires or if it is effective, and no discussion of why it is necessary, i.e., why there are no more narrowly tailored alternatives.

Penile plethsymography does not meet the requirements of § 3583(d) and represents a violation of Mr. Rock's substantive due process rights. Notably, even the dissenting judge in *Malenya* favored vacating that particular condition. *See Malenya*, 554 F.3d at 566 (Kavanaugh, J., dissenting) (stating, "I would vacate the special condition that requires penile plethysmograph testing" and observing that "significant liberty interests" are "infringed by this invasive procedure"). In *United States v. McLaurin*, 731 F.3d 258 (2d Cir. 2013), the Second Circuit analyzed a plethysmograph condition against the 18 U.S.C. § 3583(d), and the Due Process Clause. The *McLaurin* court held as follows:

> In the end, we hold that the plethysmographic condition does not bear adequate relation to the statutory goals of sentence to outweigh the harm it inflicts, that it involves a greater deprivation of liberty than is reasonably necessary to serve any of those statutory goals, and that it may not, consistent with due process, be imposed on McLaurin.

Id. at 264.

Similarly, in *United States v. Weber*, 451 F.3d at 563, the Ninth Circuit conducted a thorough examination of the penile plethysmograph procedure, concluding that the test "implicates a particularly significant liberty interest" as it is "exceptionally intrusive in nature and duration." Citing numerous studies and articles, the court also found that "the accuracy and reliability of penile plethysmograph testing have been severely questioned," *id.* at 564, and that "[t]here are alternatives available . . . that are considerably less intrusive . . . and may be sufficiently accurate," *id.* at 567. In light of these findings, the court determined that, to satisfy § 3583(d)'s requirements:

> a district court must consider whether, given the level of intrusion required by the test, its noted flaws, and its downsides, plethysmograph testing is sufficiently likely, given a defendant's specific characteristics, to yield sufficiently useful results. Only a finding that plethysmograph testing is likely[,] given the defendant's characteristics and criminal background[,] to reap its intended benefits can justify the intrusion into a defendant's significant liberty interest in his own bodily integrity.

Id. at 567 (footnote omitted). No such analysis was performed in this case. Given the liberty interests at stake, this condition should be vacated.

4. Other Relationship Condition.

The district court imposed a condition requiring Mr. Rock to notify the Probation Office when he establishes a "significant romantic relationship" and to inform the other party as to his "prior criminal history concerning [his] sex offense[]." (A.237.) The condition on its face applies regardless of whether the "significant

other" has children. Mr. Rock must also provide a variety of information about the "other party" to the government so that the Probation Office may contact the individual.

This very condition was invalidated in *United States v. Reeves*, 591 F.3d at 80-83, where the Second Circuit held it was unconstitutionally vague, not reasonably related to the goals of sentencing, and a greater restriction on liberty than necessary. The Second Circuit held that the condition violated the Due Process Clause, "easily conclud[ing]" that "people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a 'significant romantic relationship.'" *Id.* at 81. The court continued:

> [T]he supervised release condition has no objective baseline. No source provides anyone - courts, probation officers, prosecutors, law enforcement officers, or Reeves himself - with guidance as to what constitutes a 'significant romantic relationship.' We accept the force behind Reeves's assertion that his continued freedom during supervised release should not hinge on the accuracy of his prediction of whether a given probation officer, prosecutor, or judge would conclude that a relationship was significant or romantic.

Id.

The court also concluded that the special condition was not "'reasonably related' to the sentencing objectives of 18 U.S.C. § 3553(a), as required by § 3583(d)," *id.*, and that it "effects an unnecessary deprivation of liberty," *id.* at 82. Further, the court found that the condition was not narrowly tailored in light of the "protected

associational interest" involved, explaining:

> Although the government's interest in protecting a romantic partner's children is no doubt compelling, the special condition makes no mention of children. Consequently, it is not reasonably directed - or directed at all for that matter - towards this objective. Even assuming arguendo that the goal of the condition is the protection of children, we would conclude that it is not narrowly tailored since it applies to any significant romantic relationship, even those which would not bring Reeves into contact with children.

Id. at 83-84.

Here, the restriction is equally as vague as it was in *Reeves*, and also does not require that the "significant other" even have children. Thus, for the same reasons set forth in *Reeves*, as well as its lack of any reasonable relation to the facts and circumstances of this case, this Court should vacate this condition.

CONCLUSION

For the reasons stated above, the district court relied on two incorrect factual contentions in sentencing Mr. Rock. The district court also imposed supervised release conditions that violate 18 U.S.C. § 3583(d) and/or are invalid for other reasons. Mr. Rock, therefore, respectfully requests that this Court vacate his sentence and remand for resentencing.

Respectfully submitted,

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/S/

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

I hereby certify that this brief was prepared in 14 point Garamond font and contains 9,019 words, in compliance with Fed. R. App. P. 32(a)(7)(B) and D.C. Circuit Rule 32(a)(2).

_____/s/_____
JONATHAN S. JEFFRESS

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Corrected Brief for Appellant, along with the accompanying Appendix for Appellant, with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on January 6, 2016.

Elizabeth Trosman, Chief - Appellate Section, Criminal Division, U.S. Attorney's Office for the District of Columbia, counsel for appelle, elizabeth.trosman@usdoj.gov, who is a registered CM/ECF user, will be served by the appellate CM/ECF system.

_____/s/_____
JONATHAN S. JEFFRESS