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In the
United States Court of Appeals
For the Second Circuit

August Term, 2015

No. 14-4295-cr

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH VINCENT JENKINS
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of New York.
No. 11-cr-602 — Glenn T. Suddaby, *Chief Judge.*

Argued: May 18, 2016
Decided: April 17, 2017

Before: KEARSE, JACOBS, and PARKER, *Circuit Judges.*

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Defendant-appellant Joseph Vincent Jenkins appeals from a judgment of conviction in the United States District Court for the Northern District of New York (Suddaby, *Chief Judge*). Jenkins was convicted of possession and transportation of child pornography

1 after he was found with a collection of child pornography on his
2 laptop and thumb drive as he crossed the U.S.-Canada border on his
3 way to a family vacation. The district court sentenced him
4 principally to 225 months in prison followed by 25 years of
5 supervised release. We conclude that this sentence was substantively
6 unreasonable. Accordingly, we vacate this sentence and remand for
7 resentencing.¹

8 Judge KEARSE concurs in part and dissents in part in a
9 separate opinion.

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11 _____
12 DANIEL DEMARIA, Merchant Law Group LLP,
13 New York, NY, *for Defendant-Appellant*.

14 RAJIT S. DOSANJH (Tamara Thomson, *on the brief*),
15 Assistant United States Attorneys, *for* Richard S.
16 Hartunian, United States Attorney, Northern
17 District of New York, Syracuse, NY, *for Appellee*.

18 BARRINGTON D. PARKER, *Circuit Judge*:

19 A jury found Joseph Vincent Jenkins guilty of one count of
20 possession of child pornography in violation of 18 U.S.C.
21 § 2252A(a)(5)(B) and one count of transportation of child
22 pornography in violation of 18 U.S.C. § 2252A(a)(1), based on the
23 government's proof at trial that Jenkins owned a collection of child
24 pornography and brought it across the U.S.-Canada border on the
25 way to a family vacation for his personal viewing.

26 The United States District Court for the Northern District of
27 New York (Glenn T. Suddaby, *Chief Judge*) imposed concurrent
28 sentences of 120 months for the possession count, the statutory

¹ A summary order issued concurrently with this opinion affirms the judgment of conviction with respect to the remaining issues raised by Jenkins on his appeal.

1 maximum, and 225 months for the transportation count, just below
2 the statutory maximum of 240 months. The court also imposed a
3 term of 25 years of supervised release. Jenkins challenges his
4 conviction and the procedural and substantive reasonableness of his
5 sentence.

6 The government's evidence established that Jenkins, a first
7 time felony offender, maintained a collection of child pornography
8 on a personal computer and thumb drive for personal use. He did
9 not produce or distribute child pornography and did not contact or
10 attempt to contact a minor. He "transported" his images in the
11 technical sense that he brought them on a family vacation that
12 involved his crossing the Canadian border and he was apprehended
13 at the Canadian side. For the reasons that follow, we hold that a
14 sentence of 225 months and 25 years of supervised release is
15 substantively unreasonable. Accordingly, we vacate the sentence
16 and remand for resentencing.

17 **BACKGROUND**

18 On May 24, 2009, Jenkins attempted to enter Canada from the
19 United States at the border crossing in Landsdowne, Ontario.
20 Jenkins, who was 39 years old at the time, was traveling alone from
21 his home in Geneva, New York to spend a week with his parents at
22 their summer home in Quebec. Canadian border agents searched his
23 vehicle and discovered a Toshiba laptop, a Compaq laptop, and
24 three USB thumb drives.

25 Jenkins's "demeanor" prompted the agents to search the
26 devices. After finding child pornography on the Toshiba laptop and
27 on one of the thumb drives, the agents seized all the devices and
28 arrested and subsequently charged him with child pornography
29 offenses under the Canadian Criminal Code.

30 After being released on bail, Jenkins did not appear on his
31 scheduled trial date and the Canadian court issued a bench warrant

1 for his arrest. Canadian agents subsequently contacted the U.S.
2 Department of Homeland Security (“DHS”), inquiring whether DHS
3 was interested in information about the case. DHS then commenced
4 an investigation, obtained Jenkins’s electronic devices from
5 Canadian authorities, and proceeded to examine them. This
6 examination confirmed that the devices contained images and
7 videos depicting child pornography. Jenkins was subsequently
8 arrested by U.S. law enforcement officials and charged with
9 possessing and transporting child pornography. The case proceeded
10 to trial, where the government introduced the devices and the
11 images into evidence, and presented both Canadian and DHS
12 officials as witnesses.

13 Jenkins testified at trial, making a number of contentions that
14 turned out to be false. First, he contended that contractors working
15 for his electrical contracting business had frequent access to all areas
16 on his laptops and could take his laptops home. Jenkins denied that
17 the thumb drives were in his truck and asserted that he had never
18 seen them before. Finally, he claimed that he was absent from the
19 Canadian trial because his lawyer there had suggested to him that
20 “you could just not return to Canada if you want to just not deal
21 with the charge.” App. 631. The jury ultimately credited the
22 government’s version of events and returned a guilty verdict on
23 both counts on February 6, 2014.

24 The Probation Office issued its Presentence Investigation
25 Report (“PSR”) in April 2014. Applying United States Sentencing
26 Guideline § 2G2.2 for child pornography offenses, the PSR
27 calculated Jenkins’ base offense level as 22. § 2G2.2(a)(2). The PSR
28 recommended four enhancements: (i) two levels for possessing
29 material involving a prepubescent minor, *id.* § 2G2.2(b)(2); (ii) four
30 levels for material portraying sadistic or masochistic conduct or
31 other forms of violence, § 2G2.2(b)(4); (iii) two levels because the
32 offenses involved the use of a computer, *id.* § 2G2.2(b)(6); and (iv)
33 five levels because the offenses involved 600 or more images, *id.*

1 § 2G2.2(b)(7)(D). These enhancements raised Jenkins offense level
2 from 22 to 35. Jenkins received no offense level reductions for
3 acceptance of responsibility. Because Jenkins only had a prior
4 misdemeanor offense, he was found to have a Criminal History
5 Category of I. In addition, at the sentencing hearing, the government
6 sought a two-level enhancement for obstruction of justice
7 contending that Jenkins had offered false exculpatory testimony at
8 trial. *See id.* § 3C1.1. The district court agreed and applied the
9 enhancement. It also adopted the factual findings and Guidelines
10 recommendations from the PSR. The result was a total offense level
11 of 37, yielding a Guidelines range of 210 to 262 months.

12 The sentencing hearing was a stormy one at which Jenkins, an
13 intemperate, out-of-control pro se litigant, repeatedly clashed with
14 the court. For example, the following colloquy transpired after
15 Jenkins conceded that it was too late for him to retain new counsel,
16 and the court informed Jenkins that the sentencing hearing would
17 nevertheless proceed:

18 THE DEFENDANT:

19 Well, I mean, I've pretty much demanded that -- I don't
20 feel you have any right to sentence me after all these
21 antics and there's a lot of screwing around here and I
22 don't agree with it and I've repeatedly asked Ms.
23 Peebles [Jenkins's attorney] here to file a petition to
24 have you removed and I think that there's grounds for
25 it. I've been going over submissions the last few weeks
26 and court transcripts. I mean, that's what I want. I'd
27 rather -- I mean, you've set a record that -- I mean, she
28 hasn't done what I've asked her to do. We've been going
29 around for a few months arguing.

30 ...

31 THE COURT:

1 No attorney's done what you've asked them to do,
2 according to you, despite being represented by a
3 number of different counselors. You started with Mr.
4 Parry. You referred to him as an idiot and not knowing
5 what he was doing. The Court sent numerous attorneys
6 to meet with you in the jail so you could retain
7 someone. You made derogatory comments about the
8 people that were very well-regarded in this community,
9 legal community, as far as representing federal
10 defendants. Then we provided you with a list of CJA
11 attorneys that are admitted to the Northern District of
12 New York to give you an opportunity to retain
13 somebody. You did retain an Aaron Goldsmith out of
14 New York who represented you at trial and then he
15 requested to be relieved because of his irreconcilable
16 differences with you and not being able to get along
17 with you. And then, you know, the federal public
18 defender's office was assigned by Judge Peebles and has
19 represented you, in this Court's view, in a very capable
20 and competent manner and here we are again.

21 So, sir, you can demand all you want. You can criticize.
22 You can blame everybody else. You can say it's the
23 attorney's fault. But we're at a point, sir, where we're
24 going to proceed with sentencing. You have counsel.
25 You've been represented well and you've had an
26 opportunity to submit everything that you've wanted to
27 to this Court and I've reviewed everything that you
28 submitted, despite its derogatory tone and comments,
29 disrespectful comments to this Court and everybody
30 else that you've had to deal with, sir.

1 So, you'll be given a full opportunity to say anything
2 you want. If you're not going to retain somebody,
3 certainly this Court is not going to appoint another
4 attorney to represent you at this point.

5 ...

6 So you can proceed by representing yourself today.
7 That's up to you, sir, but we're going to proceed with
8 sentencing.

9 App. 835-37.

10 The district court imposed a sentence of 225 months for the
11 transportation charge and a concurrent sentence of 120 months for
12 the possession charge, the statutory maximum. *See* 18 U.S.C.
13 §§ 2252A(b)(1) and (2). Judge Suddaby also imposed on Jenkins 25
14 years of extensive conditions of supervised release. Some of them
15 were obviously appropriate but others were unexplained by the
16 sentencing judge and were imposed without regard to the personal
17 characteristics of the defendant and the circumstances of his offense.
18 In view of Jenkins's age, this sentence effectively meant that Jenkins
19 would be incarcerated and subject to intense government scrutiny
20 for the remainder of his life.²

21 Jenkins was required to register as a sex offender in any state
22 in which he resided or worked. He was required not to "use or
23 possess any computer or any other device with online capabilities, at
24 any location, except at your place of employment, unless you
25 participate in the Computer Restriction and Monitoring Program."

² As a 44-year-old impecunious white male with a high school education, Jenkins's life expectancy was 76.5 years at the time of his sentencing. *See* Kenneth D. Kochanek *et al.*, Ctr. for Disease Control, U.S. Life Tables, 2014, Nat'l Vital Statistics Rep., June 30, 2016, at 8, available at: http://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_04.pdf. Although no one knows with any certainty how long Jenkins will live, we do know that, as a statistical matter, the life expectancy of an incarcerated person drops 2 years for each year of incarceration. *See* Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 Am. J. of Pub. Health 523, 526 (2013). Thus Jenkins's life expectancy is likely significantly less than 76.5 years.

1 The Probation Office was further allowed “to conduct periodic,
2 unannounced examinations of any computer equipment you use or
3 possess, limited to all hardware and software related to online use.”
4 Notwithstanding the fact that he had never contacted or attempted
5 to contact any minor, he was forbidden from having “any direct
6 contact with a person under the age of 18 unless it is supervised by a
7 person approved of by the probation officer.” Further, he was
8 forbidden from having any “indirect contact [sic] with a person
9 under the age of 18 through another person or through a device
10 (including a telephone, computer, radio, or other means) unless it is
11 supervised by a person approved by the probation officer.” He was
12 further directed to “reasonably avoid and remove” himself from
13 “situations in which [he has] any other form of contact with a
14 minor.” He was directed “not to be in any area in which persons
15 under the age of 18 are likely to congregate, such as school grounds,
16 child care centers, or playgrounds, without the permission of the
17 probation officer.”

18 Jenkins’s possibility of any post-release employment during
19 the 25-year period was also severely limited by Judge Suddaby.
20 Jenkins was permitted to work only at locations approved by the
21 Probation Office. If his employment involved the use of a computer,
22 Jenkins was required to notify his prospective employer of the nature
23 of his conviction and the fact that his conviction was facilitated by the
24 use of a computer. Finally, Jenkins was effectively forbidden by the
25 district court from using credit cards during his supervised release.
26 Specifically, he was forbidden from incurring charges to his credit
27 cards or from opening additional lines of credit without prior
28 approval from the Probation Office.

29 The district court offered only formulaic reasoning for the
30 period of incarceration and the broad-ranging post-release
31 restrictions it imposed. The court’s reasoning centered on Jenkins’s
32 lack of respect for the law. The district court stated:

1 conveyed by a transcript. *United States v. Broxmeyer*, 699 F.3d 265, 289
2 (2d Cir. 2012). Nonetheless, the length of a sentence may, with or
3 without far reaching post-release restrictions, make it excessively
4 punitive or needlessly harsh. *See Rigas*, 583 F.3d at 123. Sentences that
5 fall into these categories are “shockingly high” ones that serve no
6 valid public purpose. *United States v. McGinn*, 787 F.3d 116, 129 (2d
7 Cir. 2015).

8 Our review of a sentence for substantive reasonableness is
9 governed by the factors set forth in 18 U.S.C. § 3553(a). *United States*
10 *v. Carr*, 557 F.3d 93, 107 (2d Cir. 2009). One important factor is the
11 need for the sentence to reflect the seriousness of the offense and to
12 promote respect for the law. 18 U.S.C. § 3553(a)(2)(A). Others are to
13 “provide just punishment for the offense;” “afford adequate
14 deterrence to criminal conduct;” and “protect the public from further
15 crimes of the defendant,” *id.* § 3553(a)(2), or more succinctly, to fulfill
16 the purposes of “retribution, deterrence, and incapacitation,” *United*
17 *States v. Park*, 758 F.3d 193, 200 (2d Cir. 2014). Additional factors are
18 supplied by the Guidelines under which sentencing courts are
19 required to consider “the nature and circumstances of the offense and
20 the history and characteristics of the defendant,” and “the need to
21 avoid unwarranted sentence disparities among defendants with
22 similar records who have been found guilty of similar conduct.” 18
23 U.S.C. §§ 3553(a)(1) and (6).

24 We are also obligated to consider whether conditions of
25 supervised release imposed by the district court are reasonably
26 related to certain statutory sentencing factors listed in §§ 3553(a)(1)
27 and (a)(2); involve no greater deprivation of liberty than is reasonably
28 necessary to implement the statutory purposes of sentencing; and are
29 consistent with pertinent Sentencing Commission policy statements.
30 *United States v. Dupes*, 513 F.3d 338, 343 (2d Cir. 2008) (citing 18 U.S.C.
31 § 3583(d)). While district courts have broad discretion to tailor
32 conditions of supervised release, *United States v. Gill*, 523 F.3d 107,
33 108 (2d Cir. 2008), that discretion is not unfettered, *United States v.*

1 *Doe*, 79 F.3d 1309, 1320 (2d Cir. 1996). It is the responsibility of our
2 court to carefully scrutinize conditions that may be excessively harsh
3 or inexplicably punitive.

4 We evaluate in turn whether each sentencing factor, “as
5 explained by the district court, can bear the weight assigned it under
6 the totality of circumstances in the case.” *Cavera*, 550 F.3d at 191. We
7 conclude that the factors upon which the district court relied—
8 retribution, deterrence, and incapacitation, and the attributes of
9 Jenkins and his crimes—cannot bear the weight of the sentence the
10 district court imposed. Our conclusion that the sentence is excessive
11 is reinforced by the need to avoid unwarranted sentence disparities
12 and by the need to avoid excessively severe conditions of supervised
13 release. On remand, we are confident that Jenkins will eventually
14 receive a sentence that properly punishes the crimes he committed.
15 But Judge Suddaby, in imposing his sentence, went far overboard.

16 I.

17 Consistent with 18 U.S.C. § 3553(a)(4), the district court’s
18 starting point was U.S.S.G. § 2G2.2, the guideline governing child
19 pornography offenses. In *United States v. Dorvee*, we held that this
20 Guideline “is fundamentally different from most and that, unless
21 applied with great care, can lead to unreasonable sentences that are
22 inconsistent with what § 3553 requires.” 616 F.3d 174, 184 (2d Cir.
23 2010).

24 First, we observed that the Sentencing Commission has not
25 been able to apply its expertise but instead has increased the severity
26 of penalties “at the direction of Congress,” despite “often openly
27 oppos[ing] these Congressionally directed changes.” *Id.* at 184–86.
28 Second, we noted that four of the sentencing enhancements³ were so
29 “run-of-the-mill” and “all but inherent to the crime of conviction”
30 that “[a]n ordinary first-time offender is therefore likely to qualify for

³ That is, enhancements for (i) an image with a prepubescent minor, (ii) an image portraying sadistic or masochistic conduct or other forms of violence, (iii) use of a computer, and (iv) 600 or more images.

1 a sentence of at least 168 to 210 months” based on an offense level
2 increased from the base level of 22 to 35. *Id.* at 186. We emphasized
3 that this range was likely to be unreasonable because it was “rapidly
4 approaching the statutory maximum” for distribution of child
5 pornography, and because the offense level failed to sufficiently
6 distinguish between “the most dangerous offenders” who “distribute
7 child pornography for pecuniary gain and who fall in higher criminal
8 history categories” and those who distribute for personal, non-
9 commercial reasons. *Id.* at 186–87. Also, we held that this range
10 demonstrated “irrationality in § 2G2.2” because it was substantially
11 more severe than for an adult “who intentionally seeks out and
12 contacts a twelve-year-old on the internet, convinces the child to
13 meet and to cross state lines for the meeting, and then engages in
14 repeated sex with the child.” *Id.* at 187.

15 The concerns we expressed in *Dorvee* apply with even more
16 force here and none of them appears to have been considered by the
17 district court. Jenkins received precisely the same “run-of-the-mill”
18 and “all-but-inherent” enhancements that we criticized in *Dorvee*,
19 resulting in an increase in his offense level from 22 to 35. These
20 enhancements have caused Jenkins to be treated like an offender who
21 seduced and photographed a child and distributed the photographs
22 and worse than one who raped a child. Because he also received an
23 enhancement for his false exculpatory testimony at trial, which we
24 conclude was appropriate, his offense level was 37, producing a
25 Guidelines range of 210 to 262 months.⁴ Even without this additional
26 enhancement, the Guidelines range of 168 to 210 months exceeds the
27 statutory maximum of 120 months for Jenkins’s possession charge.

28 Our conclusion that Jenkins’s sentence was shockingly high is
29 reinforced by the important advances in our understanding of non-

⁴ That range extends *beyond* the statutory maximum of 240 months for his count of transportation of child pornography, the more severe of his two offenses; Jenkins’s Guideline range is therefore 210 to 240 months. *See Dorvee*, 616 F.3d at 182.

1 production child pornography offenses since we decided *Dorvee*. To
2 begin with, the latest statistics on the application of sentencing
3 enhancements confirm that the enhancements Jenkins received under
4 this Guideline are all-but-inherent. In 2014, for example, 95.9% of
5 defendants sentenced under § 2G2.2 received the enhancement for an
6 image of a victim under the age of 12, 84.5% for an image of sadistic
7 or masochistic conduct or other forms of violence, 79.3% for an
8 offense involving 600 or more images, and 95.0% for the use of a
9 computer. See U.S. Sentencing Comm’n, *Use of Guidelines and Specific*
10 *Offense Characteristics (Offender Based), Fiscal Year 2014* 42–43, available
11 at [http://www.ussc.gov/sites/default/files/pdf/research-and-](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use_of_SOC_Offender_Based.pdf)
12 [publications/federal-sentencing-statistics/guideline-application-fre-](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use_of_SOC_Offender_Based.pdf)
13 [quencies/2014/Use_of_SOC_Offender_Based.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use_of_SOC_Offender_Based.pdf).

14 Since *Dorvee*, the Sentencing Commission has also produced a
15 comprehensive report to Congress examining § 2G2.2. U.S.
16 Sentencing Comm’n, *Report to the Congress: Federal Child Pornography*
17 *Offenses* (2012) [hereinafter “USSC Report”], available at
18 [http://www.ussc.gov/sites/default/files/pdf/news/congressional-](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf)
19 [testimony-and-reports/sex-offense-topics/201212-federal-child-porno-](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf)
20 [graphy-offenses/Full_Report_to_Congress.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf). In this report, the
21 Commission explains that it “believes that the current
22 non-production guideline warrants revision in view of its outdated
23 and disproportionate enhancements related to offenders’ collecting
24 behavior as well as its failure to account fully for some offenders’
25 involvement in child pornography communities and sexually
26 dangerous behavior.” *Id.* at xxi. Since the Commission has effectively
27 disavowed § 2G2.2, it should be clearer to a district court than when
28 we decided *Dorvee* that this Guideline “can easily generate
29 unreasonable results.” 616 F.3d at 188.

30 Here, § 2G2.2 yielded a sentence that derived substantially
31 from “outdated” enhancements related to Jenkins’s collecting
32 behavior. Meanwhile, the government has not alleged that he was
33 involved in the production or distribution of child pornography or

1 that he was involved in any child pornography community. In
2 particular, the government did not claim he used peer-to-peer
3 sharing software, distributed images, or participated in chat rooms
4 devoted to child pornography. Nor does the government allege that
5 he contacted or attempted to contact a child or that he engaged in any
6 “sexually dangerous behavior” separate from his crimes of
7 conviction. Thus, here, as in *Dorvee*, § 2G2.2 cannot “bear the weight
8 assigned it” because the cumulation of repetitive, all-but-inherent,
9 enhancements yielded, and the district court applied, a Guideline
10 range that failed to distinguish between Jenkins’s conduct and other
11 offenders whose conduct was far worse. *Cavera*, 550 F.3d at 191. It
12 was substantively unreasonable for the district court to have
13 applied the § 2G2.2 enhancements in a way that placed Jenkins at the
14 top of the range with the very worst offenders where he did not
15 belong.

16 II.

17 The district court justified its sentence with reference to the
18 size of Jenkins’s collection of child pornography, his refusal to accept
19 responsibility, his attempts to blame others, his disrespect for the
20 law, and his likelihood of reoffending. Paraphrasing the language of
21 18 U.S.C. § 3553(a)(2), the court concluded that a sentence of 225
22 months would reflect the seriousness of Jenkins’s offenses, promote
23 respect for the law, provide adequate deterrence, and protect the
24 public. The purposes of retribution, deterrence, and incapacitation
25 are important, and we in no way condone either his consumption of
26 child pornography or his misconduct before various authorities
27 including the district court.

28 However, every Guidelines sentence is limited by § 3553(a)’s
29 “parsimony clause,” which instructs a district court to impose a
30 sentence “sufficient, but not greater than necessary,” to achieve
31 § 3553(a)(2)’s goals. *Dorvee*, 616 F.3d at 182. District courts are
32 required to carefully consider on an individualized basis “the nature
33 and circumstances of the offense and the history and characteristics

1 of the defendant.” 18 U.S.C. § 3553(a)(1). Further, those
2 considerations must be applied in the context of the other § 3553(a)
3 factors. After the other factors are considered, upward adjustments
4 may be appropriate for the sake of retribution, deterrence, and
5 incapacitation. However, we conclude that the district court’s
6 considerations cannot reasonably justify regarding Jenkins as the
7 worst of the worst and sentencing him as such.

8 While he should receive stern punishment for his crimes, the
9 fact remains that the sentence he received fails, as required by
10 § 3553(a)(1), to account for the important differences between the
11 sentence Jenkins and those who produced or distributed child
12 pornography or who physically abused children received. For
13 example, in upholding a sixty-year sentence in *United States v. Brown*,
14 we found it significant that the defendant had repeated sexual
15 contact with multiple young victims and engaged in the production
16 of child pornography during the course of that abuse. 843 F. 3d 74, 83
17 (2d Cir. 2016). Likewise, in *Broxmeyer*, we affirmed a thirty-year
18 sentence for child pornography where the defendant was convicted
19 of attempted production of child pornography and committed
20 statutory rape of girls he was supposedly mentoring. 699 F.3d at 297.
21 Whether a child pornography offender has had or has attempted to
22 have contact with children is an important distinction. “The failure to
23 distinguish between contact and possession-only offenders [is]
24 questionable on its face,” and this failure “may go against the grain of
25 a growing body of empirical literature indicating that there are
26 significant, § 3553(a)-relevant differences between these two groups.”
27 *United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir. 2011); *see e.g.*,
28 Shelley L. Clevenger et al., “A Matter of Low Self-Control? Exploring
29 Differences Between Child Pornography Possessors and Child
30 Pornography Producers/Distributors Using Self-Control Theory,” 28
31 *Sexual Abuse* 555 (2016) (finding online offenders have greater victim
32 empathy and greater levels of self-control than offline offenders).

1 Further, among defendants convicted of transportation,
2 Jenkins is relatively less culpable because he was bringing his
3 collection for his own personal use, rather than carrying child
4 pornography to sell or distribute to others. In 2010, 88.7% of those
5 convicted of transportation “engaged in knowing distribution to
6 another.” USSC Report 189 n.72. Along this dimension, then, Jenkins
7 is near the bottom of the distribution of offenders. However, the
8 district court imposed a sentence of 225 months, near the top of the
9 statutory range of 60 to 240 months. 18 U.S.C. § 2252A(b)(1).
10 Admittedly, Jenkins may be unlike many other transporters because
11 he refused to accept responsibility, offered false exculpatory
12 testimony at his trial, and was disrespectful to the district judge.
13 However, these factors cannot justify a sentence that is 165 months
14 above the statutory minimum and a mere 15 months below the
15 statutory maximum.

16 Moreover, bringing a personal collection of child pornography
17 across state or national borders is the most narrow and technical way
18 to trigger the transportation provision. Whereas Jenkins’s
19 transportation offense carried a statutory maximum of 20 years, the
20 statutory maximum for his possession offense was “only” 10 years.
21 Jenkins was eligible for an additional 10 years’ imprisonment because
22 he was caught with his collection at the Canadian border rather than
23 in his home. The government argues that Jenkins was “so captivated
24 by child pornography that he could not leave behind his collection
25 even for a short vacation to Canada,” Appellee Br. 84. We disagree
26 that bringing a personal collection to the start of a vacation as
27 opposed to leaving it at home supplies an appropriate basis for
28 sentencing a person to an additional 10 years in prison.

29 In addition, though we accept the district court’s observation
30 that Jenkins’s conduct at trial and during sentencing proceedings
31 reflected a “disdain for the law,” we find problematic the district
32 court’s exclusive reliance on this factor as justification for
33 dramatically increasing Jenkins’s sentence. *See* App. 860-61. While we

1 do not condone Jenkins's lack of respect for the law, it simply cannot
2 bear the weight the district court assigned to it. *Dorvee*, 616 F.3d at
3 183; *cf. United States v. Gerezano Rosales*, 692 F.3d 393, 401 (5th Cir.
4 2012) (holding district court's decision to increase a defendant's
5 sentence from 71 to 108 months based on defendant's disrespect for
6 the law constituted clear error in judgement in balancing the
7 sentencing factors). Jenkins had already paid heavily for his
8 disrespectful behavior. The Court denied him any offense level
9 reduction for acceptance of responsibility. Apparently concluding
10 that this significant sanction was insufficient, the district judge
11 proceeded to add years and years onto Jenkins's sentence in light of
12 his failure to accept responsibility, as demonstrated by his persistent
13 rudeness and disrespect. While we appreciate the district judge's
14 frustration, we are unwilling to sanction dramatically increasing a
15 sentence because an angry out-of-control pro se defendant facing
16 decades in prison fails to manifest sufficient respect for the system
17 that is about to incarcerate him.

18 We also disagree with the district court's conclusion that
19 Jenkins's lack of respect makes him "a very high risk to reoffend."
20 App. 861. The district court's conclusion ignores widely available,
21 definitive research demonstrating that recidivism substantially
22 decreases with age. *See e.g., U.S. Sentencing Comm'n, Measuring*
23 *Recidivism: The Criminal History Computation of the Federal Sentencing*
24 *Guidelines* 8, available at
25 [http://www.ussc.gov/sites/default/files/pdf/research-and-publications](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf)
26 [/research-publications/2004/200405_Recidivism_Criminal_History.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf).
27 That research documents that offenders with a Criminal History
28 Category I between ages 41 to 50 have a 6.9% recidivism rate, as
29 opposed to a 29.5% recidivism rate for Category I offenders under
30 21. These statistics from the Commission, which include offenders
31 who accepted responsibility as well as those who did not, suggest
32 that Jenkins, an offender with no criminal history points who will be
33 63 when he is released from his lengthy prison sentence, will be a

1 low—not a high—risk to reoffend since more than 90% of individuals in
2 his age group do not reoffend. Although it would be well within a
3 district court’s discretion to increase a sentence based on a likelihood
4 of reoffending, there must, in a case like this, be some support in the
5 record for that conclusion, such as, for example, a record of previous
6 convictions or previous attempts to harm children. Here there is
7 none. A sentence of 225 months for a first-time offender who never
8 spoke to, much less approached or touched, a child or transmitted
9 explicit images to anybody is unreasonable.

10 Additional months in prison are not simply numbers. Those
11 months have exceptionally severe consequences for the incarcerated
12 individual. They also have consequences both for society which bears
13 the direct and indirect costs of incarceration and for the
14 administration of justice which must be at its best when, as here, the
15 stakes are at their highest.⁵

16 Finally, the government highlights the seriousness of Jenkins’s
17 offenses as a consumer of child pornography, saying that he
18 “encouraged the market for this content and spurred the abuse of
19 other children whose exploitation would be necessary to create new
20 images and videos, to feed the demand of consumers like Jenkins.”
21 Appellee Br. 84. But this observation is true of virtually every child
22 pornography offender. It is undoubtedly correct that “[a]ll child
23 pornography offenses are extremely serious because they both
24 perpetuate harm to victims and normalize and validate the sexual
25 exploitation of children.” USSC Report 311. We do not for a moment
26 dispute that Jenkins deserves a substantial term of imprisonment.
27 Nonetheless, some types of conduct in this area are more culpable
28 than others. District courts should generally reserve sentences at or
29 near the statutory maximum for the worst offenders. Treating Jenkins

⁵ The annual cost of incarcerating a 60-year-old state prisoner is \$60,000 to \$70,000, as compared to \$27,000 for younger inmates. U.S. Department of Justice, National Institute of Corrections, *Correctional Healthcare: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates* 11, available at <http://static.nicic.gov/Library/018735.pdf>.

1 as the worst of the worst has no grounding in the record we are
2 reviewing and is inconsistent with the parsimony clause.

3 **III.**

4 The sentence the district court imposed also created the type
5 of unwarranted sentence disparity that violates § 3553(a)(6).⁶
6 Statistics from the Sentencing Commission validate our concern. In
7 general, a district court need not consult the Commission's statistics
8 because there is "no assurance of comparability." *United States v.*
9 *Irving*, 554 F.3d 64, 76 (2d Cir. 2009). Here, however, the
10 Commission's statistics, which were readily available to the district
11 court at the time of sentencing, allow for a meaningful comparison of
12 Jenkins's behavior to that of other child pornography offenders.

13 First, just as § 2G2.2 produces Guidelines ranges that are
14 higher than those for individuals who engage in sexual conduct with
15 a minor, Jenkins's sentence is longer than typical federal sentences for
16 sexual offenses against in-person victims. In 2013, the latest year
17 available to the district court at the time of sentencing, the mean
18 sentence in the category of "sexual abuse" was 137 months, and the
19 median was 120 months. U.S. Sentencing Comm'n, *2013 Sourcebook of*
20 *Federal Sentencing Statistics* tbl.13, available at [http://www.ussc](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf)
21 [.gov/sites/default/files/pdf/research-and-publications/annual-reports-](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf)
22 [and-sourcebooks/2013/Table13.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf). We believe Jenkins's sentence

⁶ In the ordinary case, a court implicitly gives sufficient weight to the need to prevent unwarranted sentence disparities when it has "correctly calculated and carefully reviewed the Guidelines range." See 18 U.S.C. § 3553(a)(6); *Gall v. United States*, 552 U.S. 38, 54 (2007). However, we have held that § 2G2.2 tends to produce unreasonable results. See *Dorvee*, 616 F.3d at 184. Recognizing this difficulty, district courts have routinely imposed lower sentences for child pornography offenses, and the government even occasionally moves for a lower sentence. In 2010, 44.3% of cases of non-production child pornography offenses in 2010 involved courts' imposition of a below-Guidelines sentence, and another 10.3% involved a government motion for such a sentence. USSC Report 221, 223.

1 that is 88 months above this mean and 105 months above this median
2 is unreasonable.

3 Second, the mean federal sentence in the “child pornography”
4 category in 2013 was 136 months, and the median was 120 months.
5 *Id.* This category included several hundred individuals who *produced*
6 child pornography (333, compared to 1,609 sentenced for trafficking
7 and possession offenses). U.S. Sentencing Comm’n, *Use of Guidelines*
8 *and Specific Offense Characteristics (Offender Based), Fiscal Year 2013 39-*
9 *40*, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2013/Use_of_Guidelines_and_Specific_Offense_Characteristics_Offender_Based_Revised.pdf. The
10 presence of such individuals in the distribution is a further indication
11 that a sentence that is 89 months above the 2013 mean for child
12 pornography sentences and 105 months above the median is not
13 reasonable.
14
15
16

17 Third, the Sentencing Commission’s 2012 report analyzed
18 sentences of offenders convicted of possession without a distribution
19 enhancement, but with the run-of-the-mill enhancements previously
20 described. *See supra* at 11-12. Among these offenders, the mean
21 sentence was 52 months and the highest sentence was 97 months.
22 USSC Report 215 fig.8.3. Admittedly, these offenders, unlike Jenkins,
23 accepted responsibility and did not all engage in misconduct during
24 their criminal proceedings. Nonetheless, we see no reasonable
25 justification on the record as to why he should receive 128 months
26 above the longest sentence in this category and 173 months above the
27 mean among possessors with the four all-but-inherent enhancements.

28

IV.

29 In addition, the conditions of supervised release imposed on
30 Jenkins, including broad restrictions on his movements, his ability to
31 obtain gainful employment, and use of credit cards for 25 years upon
32 his release from prison, are not “reasonably related,” to “the nature

1 and circumstances of the offense” or Jenkins’s “history and
2 characteristics;” nor are they “reasonably necessary” to the
3 sentencing purposes set forth in § 3553(a)(2). *See* 18 U.S.C. §§ 3553
4 and 3563(b). We would reach this same conclusion about the duration
5 and terms of Jenkins’s supervised release even if the period of
6 incarceration he had received had been lower.

7 To start, the duration of the supervised release, on top of
8 nearly 19 years in prison, make the restrictions excessive and
9 unreasonable. Jenkins will be 63 years old when he is released from
10 prison. He will be under supervised release for the next 25 years until
11 he is 88 years old. While this term of supervised release does not
12 violate the Guidelines or the Policy Statement of § 5D1.2(b)(2), we
13 may not presume the reasonableness of the sentence on that basis.
14 *United States v. Hayes*, 445 F.3d 536, 537 (2d Cir. 2006). This is
15 particularly true where the district court offered no explanation that
16 might justify imposing what amounts to a lifetime of the most intense
17 post-release supervision that prevents Jenkins from ever re-engaging
18 in any community in which he might find himself. By contrast, in
19 *United States v. Bowles*, 260 F. App’x 367, 369-70 (2d Cir. 2008)
20 (summary order), we held that Bowles’s problems with sexual
21 deviance, his perception that the children enjoyed the contact, and his
22 long-term alcohol and drug abuse and mental illness formed a
23 reasonable basis for lifetime supervised release. No congruent
24 concerns are presented in the record we are reviewing. Ordinarily, a
25 district court is under no obligation to provide elaborate reasons for
26 the sentence it imposes. In many instances the reasons for a sentence
27 can be garnered from the record. That is not the case here. Where a
28 sentence is unusually harsh, meaningful appellate review is
29 frustrated where it is not possible to understand why the sentence
30 was imposed.

31 Moreover, we are troubled by specific conditions of release. For
32 example, one of them prohibits Jenkins from having direct contact
33 with anyone under the age of 18 unless supervised by a person

1 approved by the probation office. As mentioned above, Jenkins never
2 contacted or attempted to contact any minors. But under this
3 condition, Jenkins is prohibited during the 25-year period from
4 interaction with family members or friends who might have children
5 under the age of 18 unless he goes through a preapproval process
6 with the Probation Office which presumably would entail some sort
7 of investigation and finding by that office. This restriction would
8 apply with full force to all routine family interaction—for example,
9 Thanksgiving dinners or seders or christenings.

10 Another condition bars Jenkins from any “indirect contact”
11 with a person under the age of 18 “through another person or
12 through a device (including a telephone, computer, radio, or other
13 means)” unless it is supervised by a person approved by the
14 Probation Office. It is difficult to know what the boundaries of this
15 restriction might be. If, for example, members of a little league
16 baseball team were soliciting in front of a supermarket, could Jenkins
17 approach them or later call in and contribute? Common sense would
18 say “yes” but the problem for Jenkins would be that the
19 consequences of an incorrect guess would be sufficiently serious that
20 he would be ill advised to run any risks at all. That same restriction
21 required him to “reasonably avoid and remove himself . . . from
22 situations in which [he] has any other form of contact with a minor.”
23 Again it is unclear what Jenkins is expected to do for the 25 years
24 during which he must comply with this restriction. Is he required to
25 stay away from sporting events or natural history museums or street
26 fairs? The reasonable necessity for these restrictions which apply to
27 Jenkins when he is in his 70s and 80s eludes us.

28 Likewise the relationship between the restrictions on Jenkins’s
29 employment and Jenkins’s offense and circumstances is not readily
30 apparent. *See United States v. Brown*, 402 F.3d 133, 138–39 (2d Cir.
31 2005) (vacating condition where it was “seemingly unrelated to
32 [Defendant’s] offense and circumstances”). As mentioned earlier, the

1 nature of these employment restrictions mean that, as a practical
2 matter, he may never be employable.

3 Another condition prohibits Jenkins from incurring new credit
4 charges or opening additional lines of credit without approval of a
5 probation officer. Nothing in the record suggests these restrictions on
6 Jenkins's use of credit cards are "reasonably necessary," 18 U.S.C.
7 § 3563(b)(5), to protect the public or to deter Jenkins from continuing
8 to engage in the conduct for which he was convicted—possession of
9 child pornography. *Cf. United States v. Peppe*, 80 F.3d 19, 23 (1st Cir.
10 1996) (holding that a bar on incurring debt without prior approval
11 was reasonably related to defendant's offense, which involved the
12 extortionate extension of credit). This is especially true when the use
13 of credit cards or other forms of credit will likely be necessary to
14 function in the society that will exist after Jenkins's eventual release
15 from prison. *See United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001)
16 (*per curiam*) (vacating a special condition imposing restrictions on
17 computer ownership because, in part, "[c]omputers and Internet
18 access have become virtually indispensable in the modern world of
19 communications and information gathering"). Why Jenkins should
20 be prohibited from buying a drink on an airplane or taking an Uber
21 ride or making a purchase on Amazon unless the transaction is pre-
22 approved by a probation officer cannot be divined from the record
23 we are reviewing.

24 The conditions of supervised release imposed by Judge
25 Suddaby mean that Jenkins will never be able to pay his debt to
26 society. He will likely never be able to develop and maintain
27 meaningful relationships with others, to obtain employment and
28 remain employed or to ever lead anything that remotely resembles a
29 "normal" life.

30 As we review these conditions of release, what is particularly
31 depressing is that the Assistant United States Attorney and the
32 probation officer who appeared at sentencing either believed they
33 were appropriate or did not believe they were appropriate but

1 nonetheless stood mute as they were imposed. We do not doubt for a
2 moment that there are other cases in which some or all of the
3 conditions imposed by the district court would be required and
4 reasonable. But given Jenkins's personal characteristics and the
5 nature of his offense, this constellation of restrictions, compounded
6 by their 25-year duration, "inflicts a greater deprivation" on his
7 liberty than is "reasonably necessary." *United States v. Sofsky*, 287 F.3d
8 122, 126 (2d Cir. 2002).

9 CONCLUSION

10 Jenkins's sentence is substantively unreasonable. Accordingly,
11 we vacate it and remand for resentencing. This panel will retain
12 jurisdiction over any subsequent appeal. Either party may notify the
13 Clerk of a renewed appeal within fourteen days of the district court's
14 new sentence. *United States v. Tutty*, 612 F.3d 128, 133 (2d Cir. 2010)
15 (citing *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994)).⁷

⁷ On the remand of this case, the conditions of supervised release should be sufficiently explained by the district court to permit meaningful appellate review.

1 KEARSE, Circuit Judge, dissenting in part:

2 I respectfully dissent from so much of the majority's opinion as rules that the
3 imprisonment component of the sentence imposed on defendant Joseph Jenkins, within the applicable
4 Guidelines range, is substantively unreasonable.

5 As is revealed in the summary order filed contemporaneously in this case, the district
6 court in sentencing Jenkins did not commit any procedural error. Where we have determined "that
7 the district court's sentencing decision is procedurally sound," United States v. Cavera, 550 F.3d 180,
8 190 (2d Cir. 2008) (en banc) (quoting Gall v. United States, 552 U.S. 38, 51 (2007)), we reverse on
9 the basis of substantive unreasonableness only if the sentence "cannot be located within the range of
10 permissible decisions," Cavera, 550 F.3d at 189 (internal quotation marks omitted).

11 In sentencing Jenkins to imprisonment for 225 months-- within the Guidelines range
12 (which was either 210-262 months if the district court chose to impose the sentences consecutively
13 or 210-240 months if it did not (240 months being the statutory maximum on one count))--the district
14 court stated that it was imposing "a sentence that reflects the seriousness of your crime, that promotes
15 respect for the law, and that provides you with adequate deterrence from committing further crimes,
16 and that protects the public." (Sentencing Transcript ("S.Tr.") 30.) In stating that it found "this
17 sentence [to be] sufficient but not greater than necessary to comply with the purposes of sentencing"
18 (S.Tr. 29), the court was heavily influenced by its view that, without a lengthy prison term, Jenkins
19 would be likely to repeat his offenses. It said, inter alia:

20 I couldn't disagree with your attorney more when she says that you're not a
21 threat to commit this crime again. You've demonstrated that you have a total
22 lack of respect for the law and disdain for the law. That[is,] in the Court's

1 view it is without question that, if given the opportunity, you will do exactly
2 what you want to do in any situation and you are a very high risk to reoffend.

3 (S.Tr. 29-30 (emphasis added).) This view is supported by, inter alia, Jenkins' evasion of the charges
4 against him in Canada and his repeated insistence throughout this prosecution that he had done
5 nothing wrong and could not validly be prosecuted. For example, in his supplemental sentencing
6 memorandum submitted pro se, he asserted, inter alia,

- 7 ■ that "[t]here is no justification or cause legally for the proceeding";
- 8 ■ that the United States had "no jurisdiction" to try him;
- 9 ■ that the jury's verdict of guilt "was obtained through conspired fraud,
10 misrepresentation," and "perjury"; and
- 11 ■ that "the[] whole case" was "unsubstantiated garbage."

12 (Jenkins' pro se sentencing memorandum at 1-3.)

13 The district court noted that after Jenkins "attempted to transport thousands of images
14 and videos of child pornography into Canada and then later failed to appear for [his] Canadian trial"
15 and was arrested in the United States, he somehow "blamed Canada." (S.Tr. 30.) In fact, the court
16 noted that Jenkins "has blamed everybody and everyone for his criminal activity." (Id. at 29.) Indeed,
17 Jenkins even blamed the children depicted in the pornographic images and videos he transported,
18 stating that "[m]ost" of those images "are 'webcam' videos, they (victims) intentionally produced and
19 broadcast (themselves) over the internet and should be prosecuted (themselves)." (Jenkins' pro se
20 sentencing memorandum at 2 (emphases added).)

21 Given this record in which Jenkins, inter alia, disputed any justification or authority
22 for prosecuting him, and argued that instead the children who were victims of the child pornography
23 should have been prosecuted, the district court's concern for the likelihood that, without a lengthy

1 prison term, Jenkins would re-offend was not unreasonable, and I cannot conclude that the imposition
2 of the prison term that was no higher than midway between the top and bottom of the Guidelines range
3 "cannot be located within the range of permissible decisions."