

Docket No. **06-5099-cr**

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In the  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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**UNITED STATES OF AMERICA,**

*Appellee,*

v.

**ANGELO PRAIAS,**

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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**Brief on Appeal for Defendant-Appellant**

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Angelo Praias, *Defendant-Appellant*

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## **Statement of Jurisdiction**

On March 2, 2006, Mr. Praias was charged in a one count indictment with a violation of section 2423(a) of Title 18 of the United States Code. A. 7-8.

An arrest warrant was issued and he was brought before Magistrate Judge Randolph Treece on March 23, 2006 for arraignment. Counsel was assigned and Mr. Praias entered a plea of “not guilty”. A. 4.

A plea agreement was eventually reached and executed on May 16, 2006. The agreement contained a waiver of appeal which allowed for an appeal of a sentence exceeding 63 months. A. 18, ¶ 13. Mr. Praias entered a plea of guilty to the sole count of the indictment. A. 29-33.

Mr. Praias was sentenced on October 11, 2006. He received a sentence of 87 months of imprisonment to be followed by 10 years of supervised release a number of special conditions of supervised release were also imposed. A. 42-44.

The Second Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. §1291 and 18 U.S.C § 3742(a). The judgement having been filed by the trial court on October 19, 2006 and the Notice of Appeal having been filed on October 23, 2006 pursuant to Fed.R.App.P. 4(b). A. 41, 47.

## **Statement of the Issue Presented**

- I. Whether the Sentence Imposed was Unreasonable when the Facts Adopted from the Presentence Report Did Not Support an Application of the Specific Characteristic under U.S.S.G. § 2G1.3(b)(2)(B) ?

## Statement of the Case

On March 2, 2006, Mr. Praias was charged in a one count indictment with a violation of section 2423(a) of Title 18 of the United States Code for the knowing transportation of an individual who had not yet reached the age of eighteen years with the intent that the individual engage in sexual activity. A. 7-8. Mr. Praias was charged with state offenses based upon the same acts prior to the federal offense.

A plea agreement was eventually reached and executed on May 16, 2006. Mr. Praias entered a plea of guilty to the sole count of the indictment. A. 29-33. As part of the agreement Mr. Praias admitted that he had knowingly and willfully transported an individual in interstate commerce who had not yet attained the age of 18 years at the time she was so transported with the intent that she engage in sexual activity which was a criminal offense in New York. A. 11, ¶ 4. The agreement contained a waiver of appeal which allowed for an appeal of a sentence exceeding 63 months. A. 18, ¶ 13.

A presentence report<sup>1</sup> was ordered and provided to both the defendant and the government. The base offense level of 24 was applied from U.S.S.G. § 2G1.3.

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<sup>1</sup> The Presentence Investigation Report is included under separate cover and seal due to the sensitive nature and private information contained therein.

*PSR*, pp. 6-7, ¶¶ 19-21. The first offense characteristic was for the alleged for undue influence over the victim. U.S.S.G. § 2G1.3(b)(2)(B). The second was for the use of a computer to persuade, induce, entice, coerce and facilitate the travel of the minor to engage in the prohibited sexual conduct. U.S.S.G. § 2G1.3(b)(3)(A). The offense involved the commission of a sex act between the defendant and a minor victim. U.S.S.G. § 2G1.3(b)(4)(A). The report also recommended a three-level reduction for Mr. Praias' timely acceptance of responsibility for his actions pursuant to U.S.S.G. § 3E1.1(a) and (b). *PSR*, p. 7, ¶¶ 26-27. The total offense level was 27. *PSR*, p.7, ¶ 30. A criminal history category of I combined with the total offense level resulted in a corresponding sentence range of 70 to 87 months. *PSR*, p. 12, ¶55.

Mr. Praias submitted a memorandum in support of an appropriate sentence and objected to parts of the factual content of the report as well as the application of the special offense characteristic base upon undue influence. *Defendant's Sentencing Memorandum*, p. 4.<sup>2</sup> Mr. Praias also submitted his age weighed against the guidelines sentence. *Defendant's Sentencing Memorandum*, p. 5. The government also submitted a sentencing memorandum that asserted the application

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<sup>2</sup> The Defendant's Sentencing Memorandum entitled "Sentencing Memorandum" is submitted under separate cover and seal because of the sensitive content and privacy interest of the parties.

for undue influence was not clearly supported by the facts of the case.

*Government's Sentencing Memorandum*, p. 2<sup>3</sup>

Mr. Praias was sentenced on October 11, 2006. He received a sentence of 87 months of imprisonment to be followed by 10 years of supervised release a number of special conditions of supervised release were also imposed. A. 42-44.

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<sup>3</sup> The Government's Sentencing Memorandum, a letter dated September 15, 2006, is also filed under separate cover and seal with the PSR and the Defendant's Sentencing Memorandum because of the sensitive and private information contained therein.

## Statement of Relevant Facts

After pleading guilty to a violation of 18 U.S.C. § 2423(a) the presentence report was disclosed to Mr. Praias and his counsel. *Defendant's Sentencing Memorandum*. Thereafter submissions were made contesting the guidelines calculation, presenting facts in support of sentence under 18 U.S.C. § 3553(a) and recommendations of a more appropriate sentence. The government also submitted sentencing memoranda that recognized the facts of this case did not support the application of the specific offense characteristic for undue influence and the government also concluded that the enhancement should not apply. *Government's Sentencing Memorandum*, pp. 2-3.

The probation officer submitted an addendum to the PSR outlining both parties arguments, but maintained the guidelines calculation. *See Addendum to the Presentence Report*.

Mr. Praias was sentenced on October 11, 2006. His counsel maintained his factual objections related to the inclusion of the two level increase for the use of “undue influence” over the victim pursuant to U.S.S.G. § 2G1.3(b)(2)(B). *Sentencing Transcript*, p. 3. The government relied on its submissions which had previously taken a position similar to Mr. Praias. *Sentencing Transcript*, p. 5.

After adoption of the facts in the PSR over the objection of Mr. Praias, the

District Court imposed the high end of the recommended guidelines sentence, 87 months. *Sentencing Transcript*, p. 12. A term of ten years supervised release was imposed along with a number of special conditions related to the use of a computer and interaction with minors. *Sentencing Transcript* 12-16.

## Summary of the Argument

Both Mr. Praias and the government both believed that the facts underlying the conviction and stated in the Presentence Report did not support an application of the specific offense characteristic for “undue influence” pursuant to U.S.S.G. § 2G1.3(b)(2)(B). The District Court thereafter erroneously applied the specific offense characteristic in U.S.S.G. § 2G1.3(b)(2)(B) without accounting for facts remaining in dispute which were material to the sentence and failing to make the necessary legal findings prior to applying the two level enhancement. United States v. Mitchell, 353 F.3d 552 (7th Cir. 2003).

The sentence should be vacated and remanded for resentencing after full consideration of the relevant facts and sufficient findings.

## Argument

Both Mr. Praias and the government stated that the facts underlying the conviction and stated in the Presentence Report did not support an application of the specific offense characteristic related to undue influence of a minor in U.S.S.G. § 2G1.3(b)(2)(B). *Defendant's Sentencing Memorandum, p. 4.* *Government's Sentencing Memorandum, p.2.*

The District Court should resolve sentencing factors in dispute by ruling on the controverted matter or determining that a ruling is unnecessary because the matter will not affect sentencing or because the court will not consider the matter at sentencing. Fed.R.Crim.Proc., Rule 32(i)(3)(B).

Counsel for Mr. Praias submitted the parts of the conversation that Mr. Praias and the victim had prior to her traveling with Mr. Praias to New York. *Defendant's Sentencing Memorandum, Exhibit A.* These messages taken from the chat room transcripts that were part of discovery provided by the government. The Presentence Investigation Report does not reference these communications in its assignment of the sentence enhancement under U.S.S.G. § 2G1.3(b)(2)(B). That section of the PSR does not point to any specific facts in support of the enhancement. *PSR, p. 6, ¶ 19.*

The District Court adopted the Presentence Investigation Report without

change. *See Statement of Reasons, p.1, section I, subsec. A.*

In its wholesale adoption the District Court allowed information to remain in the report that was disputed and as a result inaccurately represents the information related to the application of U.S.S.G. § 2G1.3(b)(2)(B) and relied upon for sentencing. The PSR failed to include the submissions by counsel for Mr. Praias which provided an accurate presentation of the offense and the conduct of Mr. Praias.

### ***Standard of Review***

The Second Circuit reviews sentences, including those within the applicable Guidelines range, for reasonableness. *See* United States v. Fernandez 443 F.3d 19, 25-26 (2d Cir. 2006). “Our review of a sentence is akin to review for abuse of discretion, and thus we consider whether the sentencing judge exceeded the bounds of allowable discretion[,] ... committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.” United States v. Park, 461 F.3d 245, 249 (2d Cir. 2006) (internal quotation marks omitted).

A district court’s findings of fact at sentencing are reviewed for clear error. United States v. Rubenstein, 403 F.3d 93, 99 (2d Cir. 2005). The district court's legal construction and interpretation of a Guidelines provision is reviewed *de novo*. United States v. Sloley, 464 F.3d 355, 358 (2d Cir. 2006). *See* United

States v Savin, 349 F.3d 27, 31-32 (2d Cir. 2003).

Review of a sentence for reasonableness necessarily entails consider of whether the sentencing judge exceeded the bounds of allowable discretion, committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact. Fernandez, 443 F.3d at 27 (quotations omitted)

**I. The District Court Misapplied the Specific Offense Characteristic under U.S.S.G. §2G1.3(b)(2)(B) because the Offense did not Involve “Undue Influence.”**

The Presentence Investigation Report filed in support of sentencing for Mr. Praias recommended the application of the specific offense characteristic under U.S.S.G. § 2G1.3(b)(2)(B) increasing the base offense level by two—from 24 to 26 and resulting in a total offense level of 27. *PSR*, pp. 6-7, ¶¶ 19, 30. In so doing the recommendation read, “[t]he defendant unduly influenced a minor to engage in prohibited sexual conduct in which the defendant is at least 10 years older than the minor.” *PSR*, p. 6, ¶ 19.

Counsel for Mr. Praias objected to the application of the enhancement. Counsel provided probation and the district court with excerpts of the computer contact between Mr. Praias and the victim. *Defendant’s Sentencing Memorandum*, p.2 and Exhibit A. Those excerpts were not referenced by probation in the PSR or the amendment to the PSR selectively excluding

information relevant to sentencing. The excerpts were not addressed by the district court at sentencing.

At sentencing counsel for Mr. Praias maintained his contention with the sentencing recommendations.

THE COURT: Mr. Evangelista, any objection to the factual contents?

MR. EVANGELISTA: Judge, I object to 2G1.3(b)(2)(B) and any of the facts in support of that application.

THE COURT: Yes, I saw your objections.

MR. EVANGELISTA: Other than that no factual objection.

THE COURT: Mr. Praias, do you have any objection to the factual contents of the report?

THE DEFENDANT: No, your Honor.

THE COURT: The Court adopts the report by a preponderance of the evidence.

*Sentencing Transcript*, p. 3.

Counsel for Mr. Praias further objected that the Presentence Report did not include facts in support of the enhancement. *Sentencing Transcript*, p. 4.

The difference in the sentence ranges is 57 to 71 months or 70 to 87 months.

Counsel for Mr. Praias further argued that the advanced age of Mr. Praias-over 70 years, the loss of his familial relationships due to the offense and his lack of prior criminal history militated against the proposed guidelines sentence. *Sentencing Transcript*, pp. 4-5. The Government relied upon their submissions. *Sentencing Transcript*, p. 5. Mr. Praias expressed his remorse for the offense. *Sentencing Transcript*, p. 6. The Government then read the victim's statement into the record at the request of the district court so that the defendant would hear it after he indicated his wish not to read it. *Sentencing Transcript*, pp. 6-7.

In her statement, the victim stated "My own choices have made it impossible for me to go home." *Sentencing Transcript*, p. 9.

The District Court found that the two level increase for "undue influence" applied stating,

THE COURT: As to the two-point enhancement which Mr. Evangelista addressed and after review of U.S. v. Root, which is 296 F3d. 1222 with the focus on application of the two-point enhancement on undue influence applied, the offender conduct including the following factors: Number 1, the defendant displayed an increased knowledge to influence the minor; Number 2, the defendant used persuasive binders to influence the minor; and Number 3, the defendant used superior resources to influence the minor. In this particular case further the victim did accede to the defendant's influence and actual sex acts did occur and such

success of the defendant is additional evidence of use of undue influence.

Further, all of the specific facts and circumstances of this case do support the presumption that this enhancement would apply and for these reasons the Court does find a two-point enhancement for undue influence is applicable in this case. Of course the Court does note the exception of Mr. Evangelista.

*Sentencing Transcript*, pp. 10-11.

**A. The History of “Undue Influence” and How it Has Been Defined Requires a Specific Factual Analysis Which Includes the Assessment of the Individual “Influenced”.**

Appropriate application of the sentence enhancement implicates another guidelines provision from which U.S.S.G. § 2G1.3 derives. *See United States v. Saunders*, 318 F.3d 1257, 1264 (11th Cir. 2003)(Where the same language appears in two guidelines, it is generally presumed that the language bears the same meaning in both. *See also United States v. Honked*, 184 F.3d 961, 969 (8th Cir. 1999)(“It should generally be presumed that the same word used in different parts of the guidelines has the same meaning.”).

Under U.S.S.G. § 2A3.2(b)(2)(B)(ii) and U.S.S.G. § 2G1.3(b)(2)(B) the guidelines specific offense characteristic reads: “If...,a participant otherwise

unduly influenced the [a] minor to engage in prohibited sexual conduct increase by...” Compare § U.S.S.G. § 2A3.2(b)(2)(B)(ii) with § U.S.S.G. § 2G1.3(b)(2)(B) (The participle in brackets substituted in § 2G1.3(b)(2)(B)).

The Commentary to Application Note 3(B) to § 2A3.2 and 2G1.3 state,

*Undue Influence* – In determining whether subsection (b)(2)(B)(ii) [or (b)(2)(B)] applies, the court should closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior.

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

U.S.S.G. §§ 2A3.2 and 2G1.3 Comments. (n.3(B))(The difference between the two is the reference to guidelines subsection denoted by bracketed reference).<sup>4</sup>

Section 2G1.3 was added as an individual guideline by the Sentencing Commission as part of the implementation of the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act* (the “PROTECT Act”).

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<sup>4</sup> Another difference is how “minor” is defined. In the earlier enacted guideline a non-fictitious, non-police victim is a “minor” under § 2A3.2 as an individual who has not yet attained the age of 16 years. In § 2G1.3 a “minor” is an individual who has not yet attained the age of 18 years, not fictitious and not law enforcement.

*Federal Sentencing Guidelines Manual*, Vol. 2, U.S.S.G. App. C, Amend. 664, p. 1037 (Thomson/West 2006 edition).

Under the stated “Reason for the Amendment” in Appendix C, the Commission explained that the new guideline § 2G1.3 was added to specifically address offenses related to transportation for illegal sexual activity and related crimes which included violations of 18 U.S.C. § 2423. U.S.S.G. App. C, Amend. 664, p.1037. Prior to this amendment the sentences were formulated under § 2A3.2. U.S.S.G. App. C, Amend. 664, p. 1037.

The language used in § 2G1.3 was imported from § 2A3.2. The enhancement of a sentence for undue influence was added to § 2A3.2 as part of a wholesale revision of the guideline in November 2000 which added three bases for increasing a sentence for offenses under chapter 117, title 18 of the United States Code. *Federal Sentencing Guidelines Manual*, Vol. 2, U.S.S.G. App. C, Amend. 592, p. 581 (Thomson/West 2006 edition).

Section 2A3.2 of the Guidelines applies to offenses involving the criminal sexual abuse of a person who has not reached the age of 16 years. The section applies to both consensual sexual acts prosecuted under 18 U.S.C. § 2243(a) that would be lawful but for the age of the minor and situations where the participant took measures to unduly influence the minor to engage in the prohibited conduct

compromising the voluntariness of the minor's behavior. U.S.S.G § 2A3.2, comment. (backg'd).

The *Mitchell*<sup>5</sup> case involved the application of the specific offense characteristic under U.S.S.G. § 2A3.2(b)(2)(B)(ii) the language in the application notes for the four level enhancement is identical to the language in the application note for U.S.S.G. § 2G1.3(b)(2)(B). United States v. Mitchell, 353 F.3d 552 (7th Cir. 2003). As a result of the derivation of U.S.S.G. § 2G1.3 (b)(2)(B) from U.S.S.G. § 2A3.2(b)(2)(B)(ii) the analysis of *Mitchell* is equally applicable to the present case.

In *United States v. Mitchell*, Mr. Mitchell pled guilty pursuant to a plea agreement, admitting that he traveled in interstate commerce with the intent to engage in a prohibited sexual act with an undercover agent whom he believed to be a fourteen-year-old girl, in violation of 18 U.S.C. § 2423(b). 353 F.3d 552 (7th Cir. 2003). In the plea agreement, both parties agreed that U.S.S.G. § 2A3.2 applied. The parties also agreed that the base offense level could be increased by two levels under subsection (b)(3) for the use of a computer and an Internet access device during the commission of the crime. This was the only enhancement

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<sup>5</sup> Although, *Mitchell* was addressing whether a fictitious victim could be “unduly influence” its analysis is instructive in present case since the District Court and PSR failed to address any act, thought or role the victim may have contributed or had.

mentioned in the plea agreement. Nevertheless, the probation officer who drafted the pre-sentence investigation report applied a two-level enhancement to the defendant's sentence based on a conclusion that Mitchell had unduly influenced his victim. U.S.S.G. § 2A3.2(b)(2)(B)(ii). Although the government had not sought this enhancement in the plea agreement, it supported the pre-sentence investigation report's use of the enhancement. The defendant-appellant challenged the district court's application of the enhancement arguing a "fictitious" victim could not be influenced. Mitchell, 353 F.3d at 554

In determining whether the sentence enhancement was applicable, the Circuit Court addressed the specific language of the guidelines and commentary.

Similarly, the commentary instructs courts to closely consider the particular facts of the case to determine whether a "participant's influence over the victim *compromised* the voluntariness of the victim's behavior." U.S.S.G. § 2A3.2, cmt. n.4 (emphasis supplied); *see also* U.S.S.G. § 2A3.2, cmt. background (noting that the enhancement applies where "the voluntariness of the victim's behavior was compromised"). Again, the past tense of the verb "compromised" indicates that the participant must have succeeded in compromising the voluntariness of the victim's behavior.

Mitchell, at 556-57.

The Court further looked to the previous legal definitions of "undue

influence.” Mitchell, at 556-57. The guidelines offered no definition of undue influence, but there are myriad definitions compiled by the Seventh Circuit in *Mitchell* one relevant consideration emerges from the precedents defining "undue influence" in the civil context - the state of mind of the victim who is allegedly “influenced”.<sup>6</sup> Each of the definitions contemplates a target, an act of influence and an altering of behavior in response. Mitchell, at 558.

The facts proffered in the PSR do not support an application of the sentence enhancement under U.S.S.G. § 2G1.3(b)(2)(B). In determining whether the enhancement applies, the court must *closely consider the facts of the particular case to determine whether a participant's influence over the victim compromised the voluntariness of the victim's behavior*. U.S.S.G. § 2A3.2, cmt. n.4. (Emphasis

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<sup>6</sup> Undue influence defined as "any improper urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely. Undue influence may be inferred where the power of another has been so exercised upon the mind of the testator as to have induced him to make a devise or confer a benefit contrary to his deliberate judgment and reason. Undue influence is generally defined as influence that is sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will. Undue influence is such influence or dominion as exercised at the time which destroys the free agency of the testator, and substitutes in the place the will of another. Undue influence is any improper or wrongful constraint, machination, or urgency of persuasion, whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do if left to act freely. Mitchell, at 557-58 (Listing authorities defining “undue influence”)(citations and quotations omitted)

added).

The District Court never addressed the information presented which indicated the freedom of thought and voluntariness of action maintained by the victim in its determination of whether the enhancement was applicable.

The District Court's citing to the authority of *United States v. Root* did little more than provide a facade of legitimacy to the court's actions. The District Court attempted to couch its decision in the analysis of *Root* but failed to have the facts to support the conclusion. United States v. Root, 296 F.3d 1222, 1235-36 (11th Cir. 2002). The majority in *Root*, for example, identified *specific language from the Internet conversations* which demonstrated how the defendant had used his increased knowledge, persuasive powers, and superior resources to unduly influence his victim. Root, 296 F.3d at 1235-36.

Had the District Court looked to Exhibit A of the Defendant's Sentencing Memorandum, it would have seen the two-sided nature of the exchanges between the defendant and the minor as well as her suggestions to parts of the actions to be taken. *Defendant's Sentencing Memorandum*, Exhibit A, pp. 2-3. Further, the defendant was candid about his future expectations in their conversations and the minor showed no hesitancy or unwillingness. Lastly, in the victim's own statement, she expressed that her own choices have made it impossible for her to

go home. *Sentencing Transcript*, p. 9.

A. ***The Facts Found by the District Court Failed to Support the Enhancement***

Just as the Court of Appeals found in *Mitchell* the present District Court failed to make findings related to the application of the sentence enhancement. Mitchell at 563. In its commentary, the Sentencing Commission noted its research showed that cases of both consensual and nonconsensual sexual acts with minors involved “conduct such as coercion, enticement, or other forms of undue influence by the defendant that compromised the voluntariness of the victim's behavior.” Amend. 592, cmt. These actions “increased the defendant's culpability for the crime.” *Id.* The Commission added that its research showed the rebuttable presumption was appropriate because “persons who are much older than a minor are frequently in a position to manipulate the minor due to increased knowledge, influence, and resources.” *Id.*

The use of a presumption in this type of situation is not new. It is however subject to rebuttal by a preponderance of evidence submitted by the defendant. Notions of social or economic inequities have inclined the judiciary to favor one contention over another by giving it the benefit of a presumption, and correspondingly to handicap the disfavored adversary. EVIDENCE, McCormick ,

Dean. § 343 (Thomson/West 2006)(Explaining reasons for evidentiary presumptions).

Mr. Praias rebutted the presumption that the victim was more susceptible to persuasion because of the age difference. His submissions based upon the victim's own words and the context in which they were provided as well as her later reactions to law enforcement and her general tendency to deceive overcame the presumption. Those same submissions also established that her will and independence were not compromised by the defendant. *See generally United States v. Cordoba-Murgas*, 233 F.3d 704 (2d Cir. 2000)(Proof by a "preponderance of the evidence" is the applicable burden of proof when a sentencing judge is asked to assess disputed facts relevant to sentencing).

In addition, Mr. Praias, although guilty of many horrible acts, did not exert the type of psychological pressure or manipulation associated with common law examples defining "undue influence." *Mitchell* at 557-58. The District Court in *Root* made specific factual findings related to the application of the enhancement. *Root*, 296 F.3d at 1235-36. The circuit addressed the three types of power that are associated with undue influence in assessing whether the facts supported the application of the enhancement. *Id.* at 1235-36. Aside from the District Court failing to point to the specific facts it relied upon, the facts of this case do not lend

the support the facts in *Root* did. *Id.* at 1236.

Lastly, unlike *Root* this case did not involve the “steady stream of reassuring, knowledgeable and skillful manipulation, an unwilling child of 13 would be convinced to follow along the primrose path he set out.” Rather, Mr. Praias was forthright and upfront about his intentions. The young woman chose to continue and participated in formulating the plan to leave. Her answers to the questions posed and her contributions to the conversation are indicative of a voluntary freedom of choice. *See* Defendant’s Sentencing Memorandum, Exhibit A.

**II. The Adoption of the Presentence Report Resulted in Erroneous Factual Findings Because the Report did Not Present Information Relevant to the Application of the Specific Offense Characteristic from U.S.S.G. § 2G1.3(b)(2)(B).**

The wholesale adoption of the Presentence Report without its amendment and inclusion of the factual information resulted in an erroneous factual finding, violated the Federal Rules of Criminal Procedure and quite possibly due process. *See United States v. Arefi*, 847 F.2d 1003, 1008 (2d Cir. 1988)(Remanding for redetermination of sentence where statement in presentence report about "multiple cocaine transactions," if considered by the court, may have affected the sentence imposed and was controverted by other facts). *See also United States v. Rachels*, 820 F.2d 325, 327-28 (9th Cir. 1987)(A defendant's due process rights are violated

if a sentencing judge relies on information that is false or unreliable).

The defendant must show, first, that the information before the sentencing court was false, and, second, that the court relied on the false information in passing sentence. United States v. Stevens, 851 F.2d 140, 143 (6th Cir. 1988).

In the present case, a number of statements in the PSR were refuted or in contradiction to the statements made by the victim in her instant messaging. Under the “Offense Conduct” section in the PSR a conversation was cited, “When she stated she would have to ask her mother, the defendant advised her she would have to run away and that her mother would not know where she was so she would not get into trouble. *PSR*, p. 4, ¶4. In *Exhibit A*<sup>7</sup> the victim indicated she lived with a roommate who was 37 years old. *Id.* at p. 3, 5/10/05, 04:27:50 p.m. and p. 4, 5/10/05, 04:31:09 p.m.

Further, no context of the conversations were given related to the sexual conduct discussed. This left the court with one-sided view of the defendant’s conduct. The District Court fully adopted the PSR without correction or request for amendment.

In *United States v. Brown*, 314 F.3d 1216 (10th Cir. 2003), the Tenth

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<sup>7</sup> Page references are to the fax numbered pages in upper right corner, date and time of message.

Circuit found after reviewing the factual objections that the allegations of inaccuracy were sufficient to implicate the Rule 32(c)(1) of the Federal Rules of Criminal Procedure. *Id.* at 1227. Even if the disputed facts were not relied upon by the district court in arriving at sentence the court should have so indicated. *Id.*

Further, the District Court failed to comply with Rule 32(c)(1) requiring remand. A number of matters were material to sentence and remained controverted. The District Court made no specific findings of fact in relation to those matters failing to comply with Rule 32(i)(3)(B) and undermining the ability to fully address the issues related to the sentencing enhancement on appeal.

## **Conclusion**

**WHEREFORE**, Mr. Praias respectfully requests the Second Circuit Court of Appeals vacate his sentence and remand for resentencing absent the two level increase under U.S.S.G. § 2G1.3(b)(2)(B) or in the alternative for further fact finding giving due consideration to the legal standards guiding the application of the two level increase and for compliance with the sentencing determination proscribed by Federal Rule of Criminal Procedure, Rule 32.

**DATED:** March 21, 2007

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7).

1. Exclusive of the portions exempted by 2ND CIR. R. 32, this brief contains 4941 words.
2. This brief has been prepared in proportionally spaced typeface using Corel WordPerfect 8.0 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.
3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court's striking this brief and imposing sanctions against the person using the brief.

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