

not suffice to justify intrusion into the victim's privileged medical records" (*Fay*, p 914). Although the court had allowed Mr. Fay to testify that the victim "was taking certain medications, including Risperdal and Librium, and that those medications were being used to treat the victim's depression," they pointed out that Mr. Fay had failed "to move to introduce expert testimony on the potential effects of those medications" (*Fay*, p 915). The court held that Mr. Fay had failed to make the required preliminary showing that he was not entitled to an *in camera* review of the victim's psychiatric records.

#### Discussion

In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the United States Supreme Court upheld the psychiatrist-patient privilege of a police officer in a wrongful-death civil action. Certainly, the right to have one's most personal information kept private has been zealously guarded by the courts. In *Fay*, the privacy right is preserved in the face of a criminal defendant's attempt to prove his innocence. The denial of *in camera* review in *Fay* appears to rest more on the putative inadequacy of his counsel than on an actual determination of whether the psychiatric records contained evidence that might have supported Mr. Fay's self-defense claim. The court dismissed the claim based on a lack of sufficient showing to justify intrusion into a patient's private psychiatric records. However, there are troubling details in this case. For instance, the victim was prescribed Risperdal and Librium (*Fay*, p 915). Treatment with an antipsychotic (Risperdal) would at least suggest fairly serious target symptoms. In addition, the Connecticut Supreme Court acknowledged that during the appeal process, Mr. Fay submitted a brief that suggested that the victim was using alcohol and marijuana, while prescribed a benzodiazepine (Librium). The potential for significant disinhibition from the admixture of these various substances would warrant concern. Possibly, the outcome in this case could be attributed to defense counsel errors, such as the failure to introduce "expert testimony on the potential effects" of Risperdal and Librium (*Fay*, p 915). However, because the defendant was facing a homicide-related charge, an independent mental health review might have better resolved problems such as those raised in this case.

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## Greatly Reduced Sentence Due to Mild Autism Spectrum Disorder Deemed Unreasonable

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### Fourth Circuit Rules a Defendant's Reduced Sentence on the Basis of Mild Autism Spectrum Disorder Is Substantively Unreasonable and Remands for Resentencing

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In *United States v. Zuk*, 874 F.3d 398 (4th 2017), the United States Court of Appeals for the Fourth Circuit considered the government's appeal that a federal district court's sentence was "substantively unreasonable" in sentencing Julian Alexander Zuk to 26 months, which was time served, despite the recommendation of 20 years imprisonment in the federal sentencing guidelines. While awaiting trial, Mr. Zuk received a diagnosis of mild autism spectrum disorder (ASD), which became the "primary driver" in the lower court's determination of his sentence. The government argued that this sentence was "substantively unreasonable" as it was too lenient to provide just punishment or adequate deterrence. The Fourth Circuit agreed and vacated and remanded his case for resentencing by the lower court.

#### Facts of the Case

While a high school sophomore in North Carolina, Mr. Zuk began to collect online nude images of minors, some with sadomasochistic themes. By his freshman year of college, he was exchanging child pornography with multiple individuals through hundreds of fake e-mail addresses. In particular, he developed an online relationship with a 16-year-old boy from Texas who was sexually abusing his 5-year-old cousin. As this relationship developed, Mr. Zuk choreographed the 16-year-old's abuse of his cousin and even planned a visit to Texas, under the facade of looking for a summer internship, so that Mr. Zuk might personally witness and participate in the abuse

of the 5-year-old. Mr. Zuk also shared nude images of his younger sister with the 16-year-old.

In April 2013, law enforcement interviewed Mr. Zuk in his college dorm room. He admitted to possessing and distributing pornographic images of minors. They found 13,844 images and 472 videos of child pornography in Mr. Zuk's possession, many with sadistic and masochistic themes.

In July 2013, Mr. Zuk was indicted by a federal grand jury on three counts of transporting child pornography, three counts of receiving child pornography, and one count of possessing child pornography. Mr. Zuk was released on bond to his parents' home and began weekly sex-offender treatment. In June 2014, Mr. Zuk returned to federal custody after his parents discovered, and reported to law enforcement, that he had been using a tablet computer to view child pornography.

Mr. Zuk pleaded guilty to a single count of possessing child pornography in exchange for the other charges being dropped. As a part of this plea agreement, Mr. Zuk explicitly waived his rights to appeal the sentence imposed (unless related to ineffective assistance or prosecutorial misconduct), while the government explicitly retained "all its rights and duties as set forth in 18 U.S.C. § 3742(b)," including the right to appeal an otherwise final sentence (*Zuk*, p 402).

Before sentencing, a report was submitted to the court recommending a sentence of 324 to 405 months imprisonment, based on of the facts of the case and the federal sentencing guidelines. The maximum sentence for one count of possessing child pornography, 240 months imprisonment, became the recommendation to the court and was supported by the government.

In June 2016, a two-day sentencing hearing was held, and several medical professionals testified. A clinical social worker who had been seeing Mr. Zuk for three years diagnosed pedophilia and sexual sadism. A psychologist and expert in autism, testified that he had diagnosed mild autism spectrum disorder (ASD, formerly known as Asperger syndrome in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). Washington, DC: American Psychiatric Association, 1994) and that this disorder had contributed to Mr. Zuk's illegal behavior. The clinical director (a psychologist) of Mr. Zuk's sex-offender program noted that Mr. Zuk's crime "was 'just as likely to have been fueled by

his pedophilia' as by his autism," that Mr. Zuk would do well in their program, and that he was a low risk for committing a contact crime, a greater risk for committing an online crime (*Zuk*, p 404). Evaluators at the Federal Correctional Institution testified that they had "diagnosed Zuk with pedophilic disorder, nonexclusive type; autism spectrum disorder; attention deficit/hyperactivity disorder; sexual sadism disorder; and fetishistic disorder" and that he was a low risk of committing a contact crime, but at a greater risk of committing an online crime (*Zuk*, p 404).

Mr. Zuk was sentenced to 26 months (time served) and a life term of supervised release and mandated to finish a residential treatment program (at his own expense) to be followed by 24-month community confinement. In discussing his ruling, the lower court judge cited Mr. Zuk's "involuntary medical condition," Asperger syndrome, as the "primary driver of this sentence" (*Zuk*, p 406). The government filed an appeal seeking to have the sentence overturned on the basis that it did not appropriately follow the federal sentencing guidelines and was "substantively unreasonable."

#### *Ruling and Reasoning*

The Fourth Circuit addressed two questions in this case: 1) was the government able to appeal a sentence, if in the plea agreement the defendant explicitly waived his right to appeal, while the government explicitly retained its right to appeal the sentence? 2) How should an appellate court decide whether a sentence is substantively unreasonable?

First, the Fourth Circuit addressed whether the government was barred from appealing the sentence as recognized under *United States v. Guevara*, 941 F.2d 1299 (4th Cir. 1991). Under *Guevara*, Mr. Zuk argued that an appellate waiver must be enforceable against the government when a plea agreement includes an appellate waiver against the defendant.

The court ruled that, since the government in *Zuk* explicitly retained the right to appeal, *Guevara* did not apply.

Second, the court turned to the question of whether the sentence was "substantively unreasonable." It examined the court record and found that there were no "procedural errors" (e.g., miscalculating the sentence via federal guidelines, using clearly erroneous facts to decide the sentence) that would give cause to have the sentence overturned.

The court then moved to assess “the substantive reasonableness” of the sentence under the “abuse-of-discretion standard.” The appellate court found that the sentencing factors the lower court used did not justify the sentence that it issued. The Fourth Circuit found the lower court to have placed excessive weight on Mr. Zuk’s ASD, its contribution to his illegal activities, and the “rehabilitation purpose for sentencing,” while minimizing other sentencing purposes such as “punishment, deterrence or respect for the law” (*Zuk*, p 410–11). The court concurred with the government’s position that Mr. Zuk’s diagnosis of ASD did not justify his sentence, that he had been “highly functioning” (e.g., obtained rank of Eagle Scout in high school and dean’s list in the first semester of college), that he had not been diagnosed with ASD until after his arrest, and that by his own endorsement, Mr. Zuk knew the actions he was taking were wrong and illegal. Moreover, Mr. Zuk’s illegal actions were egregious (e.g., the amount of pornography he had, manipulation of a minor to harm another, the sadistic nature of the content he collected, his recidivism, and Congress’s judgment that any child pornography crime deserves serious sanctions), and a harsh sentence was therefore warranted. The appellate court also agreed with the government’s argument that the district court did not properly consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” (*Zuk*, p 411). Defendants found guilty of a similar crime received an average sentence of 309 months’ imprisonment compared with Mr. Zuk’s 26-month suspended sentence.

*Discussion*

The lower court’s emphasis on Mr. Zuk’s diagnosis of ASD as a significant mitigating factor may represent a new area of “evolving standards of decency” that have informed decisions such as *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Supreme Court found the death penalty unconstitutional for “mentally retarded” individuals and juveniles, respectively. Attention to ASD by courts is a welcome development, given that many cases of mild ASD may go undiagnosed, and individuals with ASD, which is characterized by deficits in social functioning, may be more prone to becoming victims of bullying and violence in correctional settings. The Fourth Cir-

cuit’s holding in this case, however, emphasizes that a diagnosis of ASD should not be taken as exculpatory or as a mitigating factor with regard to a crime. The relationship between ASD and criminal behavior is an under-researched area. This case serves to emphasize that each individual with ASD and the relation between symptoms and the alleged crime should be considered carefully. The diagnosis of ASD should neither be ignored or given undue weight in a criminal case. Forensic mental health testimony will increasingly be relied upon to guide decision-making in these cases as awareness of ASD increases.

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## **Pornography Distribution by a Minor and First Amendment Protection**

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### **Minor’s Distribution of Sexually Explicit Self Images Not Protected Under First Amendment**

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In *State v. Gray*, 402 P.3d 254 (Wash. 2017), Eric Gray, age 17, appealed to the Supreme Court of Washington on the basis that he was improperly convicted of dealing in depictions of a minor engaged in sexually explicit conduct, as the photograph in question was of his own penis. As he was the minor in the image, he argued that his actions fell under First Amendment protection. He also alleged the Washington statute prohibiting dealings in depictions of a minor was unconstitutionally vague. The state supreme court ruled that the defendant’s actions did not qualify under First Amendment protection, nor was the statute unconstitutionally vague.

*Facts of the Case*

In 2013, a 22-year-old woman reported that Mr. Gray, a 17-year-old minor with a diagnosis of