

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 - - - - -  
4 August Term, 2010

5 (Argued: October 13, 2010 Decided: June 16, 2011)

6 Docket Nos. 08-5968-cr, -6092-cr  
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8 UNITED STATES OF AMERICA,

9 Appellee,

10 - v. -

11 LINDA O'CONNOR, DEAN SACCO,

12 Defendants-Appellants.  
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14 Before: KEARSE, POOLER, and HALL, Circuit Judges.

15 Appeal from a judgment of the United States District Court  
16 for the Northern District of New York, Thomas J. McAvoy, Judge,  
17 convicting defendants of sex trafficking of a child, see 18 U.S.C.  
18 §§ 1591(a) and (b); convicting defendant O'Connor of selling a  
19 child for the purpose of producing child pornography, see id.  
20 § 2251A(a), and producing child pornography, see id. § 2251(b);  
21 and convicting defendant Sacco of buying a child for the purpose  
22 of producing child pornography, see id. § 2251A(b), producing and  
23 possessing child pornography, see id. §§ 2251(a), 2252A(a)(5)(B)  
24 and 2256, and interstate travel with intent to engage in illicit  
25 sexual conduct with a minor, see id. § 2423(b).

26 Affirmed.

1 SCOTT MEISLER, Criminal Division, United  
2 States Department of Justice,  
3 Washington, D.C. (Richard S.  
4 Hartunian, United States Attorney for  
5 the Northern District of New York,  
6 Miroslav Lovric, Brenda K. Sannes,  
7 Assistant United States Attorneys,  
8 Syracuse, New York, Lanny A. Breuer,  
9 Assistant Attorney General, Greg D.  
10 Andres, Acting Deputy Assistant  
11 Attorney General, Richard M. Re,  
12 Appellate Section, Criminal Division,  
13 United States Department of Justice,  
14 Washington, D.C., on the brief), for  
15 Appellee.

16 LISA A. PEEBLES, First Assistant Federal  
17 Public Defender, Syracuse, New York  
18 (Alexander Bunin, Federal Public  
19 Defender, James P. Egan, Syracuse, New  
20 York, on the brief), for Defendant-  
21 Appellant O'Connor.

22 BRENDAN WHITE, New York, New York (White &  
23 White, New York, New York, on the  
24 brief), for Defendant-Appellant  
25 Sacco.

26 KEARSE, Circuit Judge:

27 Defendants Linda O'Connor and Dean Sacco appeal from final  
28 judgments entered in the United States District Court for the  
29 Northern District of New York following a jury trial before Thomas  
30 J. McAvoy, Judge, convicting them of sex trafficking of a child,  
31 in violation of 18 U.S.C. § 1591; convicting O'Connor of selling a  
32 child for the purpose of producing child pornography, in violation  
33 of 18 U.S.C. § 2251A(a), and permitting her child to be used for  
34 the production of child pornography, in violation of 18 U.S.C.  
35 § 2251(b); and convicting Sacco of buying a child for the purpose

1 of producing child pornography, in violation of 18 U.S.C.  
2 § 2251A(b), coercing a child to engage in sexually explicit  
3 conduct for the production of child pornography, in violation of  
4 18 U.S.C. § 2251(a), travel in interstate commerce with intent to  
5 engage in illicit sexual conduct with a minor, in violation of 18  
6 U.S.C. § 2423(b), and possession of child pornography, in  
7 violation of § 2252A(a)(5)(B). O'Connor was sentenced principally  
8 to 30 years' imprisonment. Sacco was sentenced principally to  
9 imprisonment for life.

10 On appeal, O'Connor contends, inter alia, that the  
11 evidence was insufficient to support her conviction on any count  
12 and that the district court deprived her of a fair trial by  
13 denying her motions for severance of her trial from that of  
14 Sacco. She also challenges certain evidentiary rulings. Sacco  
15 contends chiefly that the district court deprived him of a fair  
16 trial by denying his attorney's request to withdraw from the case,  
17 by admitting in evidence portions of his self-titled autobiography  
18 that give an account of his past thoughts and conduct, and by  
19 denying his request for a continuance following unexpected  
20 testimony from a government witness. Finding no merit in any of  
21 defendants' contentions, we affirm the judgments of conviction.

22 I. BACKGROUND

23 The present prosecution focused on the sexual abuse of  
24 O'Connor's daughter--identified in the briefs before us as

1 "S.O."--from 2004 into February 2007. The government's evidence  
2 at trial, conducted in May 2008, was presented principally through  
3 the testimony of S.O. and numerous other witnesses including  
4 social workers, law enforcement agents, and former friends or  
5 acquaintances of S.O., O'Connor, or Sacco. Viewed in the light  
6 most favorable to the government, the evidence reveals the  
7 following.

8 A. Evidence as to the Abuse of S.O.

9 S.O. testified that she was sexually abused by her mother,  
10 by her mother's sex partner, George Lang (or "George" or "Lang"),  
11 by Sacco, and by two strangers in encounters arranged by her  
12 mother.

13 1. Abuse by O'Connor and George Lang in 2004-2005

14 O'Connor began abusing S.O. in the bathroom of their home  
15 in Deposit, New York, in 2004, when S.O. was 10 years of age. In  
16 the guise of helping S.O. wash and dry herself, O'Connor started  
17 touching S.O. inappropriately, such as by rubbing her vagina.  
18 (See Trial Transcript ("Tr.") 1458-59.) S.O., who by then had  
19 been bathing herself for two years, asked her mother to stop; but  
20 the abuse escalated; approximately twice a month, O'Connor would  
21 lead S.O., naked, from the bathroom to O'Connor's bedroom, where  
22 O'Connor, naked, would kiss and touch S.O.'s genitalia and  
23 require S.O. to reciprocate. (See id. at 1459-61.) S.O.  
24 testified that pleading with her mother to stop was "useless"

1 (id. at 1461) because O'Connor's response was "that she was my  
2 mother and I was supposed to do what she said" (id. at 1460).  
3 Thus, S.O. ceased to protest. (See id. at 1461.)

4 In 2004, O'Connor and S.O. were spending substantial  
5 amounts of time with George and Renee Lang, a married couple whom  
6 S.O. sometimes called "Grandpa" and "Grandma" (id. at 1306).  
7 During this period, O'Connor was sometimes late in paying the  
8 rent and was threatened with eviction (see id. at 1500-01); Lang  
9 would sometimes help O'Connor with the rent (see id. at 1457,  
10 1501).

11 O'Connor and George Lang communicated frequently online  
12 (see id. at 1465), often sending each other pornographic images  
13 (see id. at 1237). In 2004, O'Connor and S.O. spent many weekends  
14 at the Langs' home in nearby Nineveh, New York; O'Connor and Lang  
15 were sex partners, engaging in sexual activities in the Langs'  
16 living room after Renee Lang (or "Renee") had gone to sleep and  
17 could be heard snoring in the Langs' bedroom. After S.O. walked  
18 in on O'Connor and George one night and saw them having  
19 intercourse, O'Connor required S.O. to participate in sexual  
20 activities with them: George kissed and touched S.O.; O'Connor  
21 kissed and touched George; O'Connor kissed and touched S.O. (Tr.  
22 1476-79.)

23 In the ensuing months, George Lang continued to abuse  
24 S.O., sometimes with O'Connor and sometimes individually. George  
25 and O'Connor would ply S.O. with liquor before molesting her.  
26 One adult would sometimes take photographs of S.O. as she



1 performed sex acts on the other, and George would later show S.O.  
2 the photos on his computer. George engaged in oral and manual sex  
3 with S.O. but not intercourse. (See id. at 1481-88.)

4 In late 2004, George Lang was diagnosed with cancer, and  
5 his abuse of S.O., although continuing, became less frequent (see  
6 id. at 1496). O'Connor and S.O. stopped going to the Langs' home  
7 in early 2006 after arguments between O'Connor and Renee or  
8 George. (See id. at 1263-65, 1497-98.) In July 2006, Lang  
9 succumbed to his cancer. (See id. at 1320.)

10 2. Abuse by O'Connor and Sacco in 2006-2007

11 In June 2006, a flood forced O'Connor and S.O. out of  
12 their home in Deposit, and at the beginning of August they moved  
13 into the downstairs apartment of a house at 45 Fair Street in  
14 Norwich, New York ("45 Fair"), where their new landlord was Sacco.  
15 (See Tr. 1453, 1470, 1502-04.) On the day they moved in, Sacco  
16 told them he lived in New Jersey but that since he had to be back  
17 in Norwich the next day, he planned to spend the night in his car;  
18 O'Connor invited him to sleep in the apartment instead. (See id.  
19 at 1507, 1622-23.) During the night, S.O. woke up to find Sacco  
20 kissing her; he had removed her clothing and soon was having  
21 intercourse with her. Sacco told S.O. to be quiet, and S.O.,  
22 terrified, obeyed. Sacco eventually stopped, dressed, and left  
23 the room, leaving S.O. crying into her pillow. S.O. did not tell  
24 O'Connor. (See id. at 1507-09.)

1 Little more than a week later, S.O. ingested and injected  
2 herself with some of her mother's medicines in an attempt to  
3 commit suicide. She was hospitalized, and the Chenango County  
4 Department of Social Services ("DSS") was notified. (See Tr.  
5 804-05, 1510-11.) Later in August 2006, DSS learned that O'Connor  
6 herself had gone to the hospital seeking treatment for kidney  
7 stones and had left S.O. at home unsupervised. A DSS caseworker,  
8 finding S.O. home alone, with nothing in the kitchen except rotten  
9 food and frozen items that S.O. did not know how to prepare,  
10 determined that S.O. could not care for herself and arranged to  
11 have her transferred to the temporary custody of Renee Lang.  
12 (See id. at 815-18.) During the period in which she was living  
13 with Renee, S.O. told social workers that Sacco "trie[d] to hug  
14 her a lot" and that he "creep[ed] her out" and "scare[d] her."  
15 (Id. at 827; see id. at 1521.)

16 O'Connor, once out of the hospital, showered S.O. with  
17 gifts and promised that their relationship would improve; and both  
18 of them wanted to resume living together. (See id. at 821-22,  
19 1516-20.) In October, the Family Court held a hearing at which  
20 DSS recommended that S.O. instead be placed in foster care. The  
21 court rejected that recommendation and returned S.O. to O'Connor's  
22 custody. However, in light of DSS's report of S.O.'s prior  
23 statements about Sacco's repeated "creep[y]" hugging, the court  
24 ordered O'Connor not to allow S.O. to have unsupervised contact  
25 with Sacco. (Id. at 826-27.)

1 O'Connor ignored that condition, and a few weeks later,  
2 Sacco sexually abused S.O. again. In late October, the upstairs  
3 apartment at 45 Fair had become vacant. Sacco soon arrived  
4 at 45 Fair and spoke with O'Connor at the door. After a  
5 conversation that S.O. could not hear, O'Connor came in and got  
6 S.O., and Sacco instructed S.O. to join him upstairs. (See id.  
7 at 1522-23, 1527.)

8 Upstairs, Sacco had intercourse with S.O. He then used a  
9 camera with a zoom lens to take pornographic photographs of her.  
10 (See id. at 1523-25.) When she initially refused to pose as  
11 instructed, Sacco hit her. (See id. at 1525.) When Sacco  
12 finally allowed S.O. to leave, she ran downstairs to her mother,  
13 who was in the kitchen. Crying, S.O. told O'Connor, "[M]om, Dean  
14 is doing stuff that's hurting me." (Id. at 1526.) O'Connor  
15 responded, "[I]t's better than being homeless," and left the room.  
16 (Id.)

17 The next time Sacco abused S.O., on Thanksgiving in 2006,  
18 he was joined by O'Connor. After serving S.O. alcohol at dinner  
19 (see Tr. 1531), Sacco and O'Connor took S.O. into her bedroom,  
20 where, first, Sacco had intercourse with S.O. Then Sacco had  
21 intercourse with O'Connor. S.O. was then ordered to perform oral  
22 sex on Sacco and to kiss her mother. (See id. at 1528.) Sacco  
23 had again brought a camera, which appeared to S.O. to be the same  
24 one he had used to take pornographic pictures of S.O. previously;  
25 and he and O'Connor took turns taking pictures of each other as  
26 they abused S.O. (See id. at 1529.) At one point, after O'Connor



1 and Sacco had ignored S.O.'s pleas to stop, S.O. threatened to  
2 tell someone about the abuse. Sacco responded, "[I]f you tell[,]  
3 then I'll stab you and rape you as you die." (Id. at 1530.) S.O.  
4 believed him. (See id.)

5 Sacco had intercourse with S.O. twice in December 2006 in  
6 the upstairs apartment, including on S.O.'s thirteenth birthday  
7 (see Tr. 1540, 1546). On the first occasion, O'Connor remained  
8 downstairs after she had spoken with Sacco at the door and ordered  
9 S.O. to join Sacco upstairs. (See id. at 1541-42.) Sacco's abuse  
10 of S.O. on that occasion was interrupted by O'Connor's knock at  
11 the upstairs door to announce--through the door, without opening  
12 it--that the family of one of S.O.'s schoolmates had arrived to  
13 see S.O. (See id. at 1543.) On the second occasion, O'Connor  
14 joined Sacco and S.O. in the upstairs apartment and participated  
15 in the abuse of S.O. (See id. at 1547-48.)

16 Sacco last abused S.O. in February 2007. In the meantime,  
17 he and O'Connor had begun to have frequent arguments about money,  
18 with Sacco telling O'Connor that she owed him rent and needed to  
19 pay him soon. (See id. at 1555-56; see also id. at 2009-11  
20 (testimony of a former Sacco employer (called as a witness by  
21 Sacco) that Sacco complained to him that the downstairs tenant  
22 at 45 Fair was not paying rent on time).)

23 There was no evidence that the government found any of  
24 the photographs that S.O. testified were taken, and no such  
25 photographs were presented at trial. However, the government  
26 presented evidence that, in a search of a locked storage unit

1 containing property belonging to Sacco, law enforcement agents had  
2 found a used condom. (See id. at 309-10, 327-28.) Forensic  
3 analysis revealed that the outside of the condom bore S.O.'s DNA.  
4 (See id. at 334-35, 1940-41.)

5 The government also introduced evidence of Sacco's prior  
6 sexual abuse of other young girls, calling as witnesses one of  
7 those victims, as well as a police detective who had investigated  
8 those events and to whom Sacco had admitted being attracted to  
9 girls in the age range of 8-11 years. (See Tr. 438-67, 677-78,  
10 686.) And, as discussed in Part II.B.1. below, the government  
11 introduced published writings by Sacco in which he had described  
12 his pedophilic sexual appetites.

13 3. Abuse by Strangers, Arranged by O'Connor

14 In December 2006, O'Connor and S.O. rode a bus to  
15 Binghamton, New York, and checked into a Best Western hotel in  
16 nearby Johnson City. That night, a man S.O. had never seen  
17 arrived at their hotel room, and O'Connor told S.O. to "do what  
18 the man wants." The man proceeded to undress and to have  
19 intercourse and oral sex with S.O. O'Connor sat nearby, speaking  
20 only to remind S.O. to follow the man's orders. (See Tr.  
21 1533-37.) S.O. testified that when they arrived in Binghamton  
22 O'Connor had "some money but not a lot," and that when the man  
23 left the hotel room O'Connor "had a lot more money." (Id.  
24 at 1539.)

1           In January 2007, O'Connor again took S.O. to the Best  
2 Western, where they went into a room in which a man S.O. had never  
3 seen was waiting. O'Connor told S.O. to follow the man's orders,  
4 and the man had intercourse with S.O. and forced her to perform  
5 oral sex. Meanwhile, O'Connor sat in the room eating donuts and  
6 watching television. (See id. at 1550-53.) S.O. went to the  
7 bathroom after the man had finished with her; when she emerged,  
8 the man was gone and there was money on the table. (See id.  
9 at 1554.)

10    B. The Arrests of O'Connor and Sacco and the Proceedings Below

11           In late February 2007, O'Connor, after dining with S.O. at  
12 a Pizza Hut, was arrested when she attempted to leave without  
13 paying the bill. (See Tr. 892-93, 1628-29.) That arrest, along  
14 with O'Connor's violation of the Family Court's order not to allow  
15 S.O. to have unsupervised visits with Sacco, led to O'Connor's  
16 incarceration; at the urging of DSS caseworker Elizabeth  
17 Chesebro, O'Connor agreed to let S.O. be placed in foster care.  
18 (See id. at 896, 926.) Shortly thereafter, S.O. began to disclose  
19 the abuse she had suffered from Sacco--but did not disclose the  
20 abuse by her mother--telling a teacher, then Chesebro, and then  
21 Patrick Blenis, a Norwich police detective, that Sacco had raped  
22 her. (See id. at 1566-68.) On March 14 and 15, with Blenis, his  
23 supervisor, and Chesebro at her side, S.O. made controlled  
24 telephone calls to Sacco. (See id. at 138-42, 145-52.) Days  
25 later, Sacco was arrested on state-law charges, including rape.

1 (See id. at 152-53.) In the meantime, on March 18, as discussed  
2 in Part II.B.2. below, Sacco told his friend and landlord, Gerardo  
3 DiFiori, about a call he received from S.O., which Sacco had  
4 sensed was being monitored. Sacco said he was "in trouble" for  
5 doing "something wrong," and "if they get me, they're going to  
6 give me 30 years." (Id. at 527.) Pressed for details, Sacco  
7 said, "I had sex with a minor," "a prostitute"; "she's 12." (Id.  
8 at 528-29.)

9 In September 2007, fearing that S.O. was suicidal,  
10 Chesebro had her admitted to a psychiatric health center. (See  
11 Tr. 933-34.) During a conversation at that center the following  
12 month, S.O. disclosed to Chesebro that when she was abused by  
13 Sacco, O'Connor had acquiesced and had on one occasion taken  
14 photographs. (See id. at 937-46.) That disclosure prompted an  
15 investigation by state and federal officials, which ultimately led  
16 to the arrests of O'Connor and Sacco on federal charges. (See id.  
17 at 175-84, 192-94, 947.) In December 2007, S.O. disclosed  
18 O'Connor's incestuous conduct, as well as O'Connor's forcing her  
19 to have oral and manual sex with George Lang, and intercourse and  
20 oral sex with the strangers at the Best Western. (See id.  
21 at 959-61.)

22 In the seven-count indictment initiating the present  
23 prosecution, O'Connor and Sacco were charged with selling and  
24 buying, respectively, a child for the purpose of producing child  
25 pornography, in violation of 18 U.S.C. §§ 2251A(a) and (b),  
26 respectively, and 18 U.S.C. § 2 (Counts 1 and 2); and each was

1 charged with sex trafficking of a child, in violation of 18 U.S.C.  
2 §§ 1591(a) and (b) and 2 (Count 3), with coercing a minor to  
3 engage in sexually explicit conduct for the purpose of producing  
4 child pornography, in violation of 18 U.S.C. §§ 2251(a) and 2  
5 (Count 4), and with possession of child pornography, in violation  
6 of 18 U.S.C. §§ 2252A(a)(5)(B) and 2 (Count 7). In addition,  
7 O'Connor was charged, as the child's parent and custodian, with  
8 knowingly permitting her child to engage in sexually explicit  
9 conduct for the purpose of producing child pornography, in  
10 violation of 18 U.S.C. §§ 2251(b) and 2 (Count 5); and Sacco was  
11 charged with travel in interstate commerce for the purpose of  
12 engaging in illicit sexual conduct with a minor under the age of  
13 18, in violation of 18 U.S.C. §§ 2423(b) and 2 (Count 6).

14 As discussed in Part II.D. below, O'Connor, prior to  
15 trial, moved for severance of her trial from that of Sacco,  
16 arguing principally that her defense and that of Sacco were  
17 irreconcilable and that the overwhelming evidence against Sacco  
18 would likely result in spillover prejudicial to O'Connor. The  
19 district court denied severance.

20 As discussed in Part II.A. below, two business days before  
21 the scheduled start of trial, Sacco's attorney, in a motion filed  
22 under seal, requested permission to withdraw as his counsel. The  
23 court denied that motion as well.

24 After an 18-day trial, the jury found O'Connor guilty on  
25 three of the five counts against her: Count 1 (selling a child  
26 for the purpose of producing child pornography), Count 3 (sex



1 trafficking of a child), and Count 5 (permitting her child to be  
2 used by Sacco in the production of child pornography). She was  
3 found not guilty on Count 4, which charged her with coercing S.O.  
4 to engage in sexual conduct for the purpose of producing child  
5 pornography, and Count 7, which charged her with possession of  
6 child pornography. Sacco was convicted on all five of the counts  
7 against him. O'Connor was sentenced principally to 30 years'  
8 imprisonment, to be followed by a life term of supervised release.  
9 Sacco was sentenced principally to prison for life.

10

## II. DISCUSSION

11 On appeal, Sacco contends principally that the district  
12 court deprived him of a fair trial by denying his attorney's  
13 request to withdraw from the case, by admitting in evidence  
14 excerpts from his self-titled autobiography, and by refusing to  
15 grant a continuance after DiFiori's testimony as to Sacco's  
16 admission, which had been unanticipated. O'Connor contends  
17 principally that the evidence was insufficient to convict her on  
18 any count and that she was deprived of a fair trial by being tried  
19 jointly with Sacco. We find no merit in any of defendants'  
20 contentions.

### 21 A. Sacco's Attorney's Motion To Withdraw

22 Kelly E. Fischer Esq. had been appointed by the court to  
23 represent Sacco in this case in February 2008. On March 20, the

1 court scheduled the trial to begin on Monday, April 28, 2008. On  
2 Thursday April 24, Fischer asked the court to allow him to  
3 withdraw from the case. His motion, accompanied by his  
4 affirmation, was filed ex parte and under seal.

5 In a hearing in open court on April 25, Fischer directed  
6 the court's attention to the contents of his sealed affirmation  
7 and stated generally that the intensity of his personal feelings  
8 with regard to the case against Sacco might affect his ability to  
9 effectively represent his client. Citing an Ethical Consideration  
10 ("EC") set out in the New York Lawyer's Code of Professional  
11 Responsibility (the "Code"), reprinted in N.Y. Jud. Law App.  
12 (McKinney 2008), which was applicable at the time of Sacco's trial  
13 (but which has since been superseded by N.Y. Rules of Professional  
14 Conduct), Fischer stated as follows:

15 Basically, your Honor, I would cite the ethical  
16 consideration under Professional Code of Professional  
17 Responsibility EC2-30 which basically says that if  
18 the intensity of an attorney's personal feelings  
19 might affect--may affect that attorney's ability to  
20 effectively represent his client, then the attorney  
21 should seek to withdraw. Based on the paperwork that  
22 I submitted which basically sets out my position  
23 personally, that raises a real concern for me in this  
24 case.

25 THE COURT: All right.

26 MR. FISCHER: Particularly with respect to the  
27 primary witness, almost the exclusive witness against  
28 Mr. Sacco, [S.O.].

29 (Transcript of Proceedings as to Dean Sacco, April 25, 2008  
30 ("Sacco April 25 Tr."), at 3.)

31 Fischer's affirmation--which is hereby deemed unsealed to  
32 the extent that it is described in this opinion (and we leave it

1 to the district court to decide whether the motion should be  
2 unsealed in toto)--specified that in preparation for trial,  
3 Fischer had performed hours of research, had spoken with a variety  
4 of investigators and other sources, and had reviewed every page of  
5 the approximately 100 pounds of discovery materials that had been  
6 supplied by the government or obtained from other sources.  
7 However, Fischer stated that in the past two weeks he had received  
8 materials from the government that included the evidence as to  
9 Sacco's possession of the used condom bearing S.O.'s DNA. Fischer  
10 stated that until that time, he had been confident that he could  
11 vigorously defend Sacco's position at trial; but that "single bit  
12 of evidence" caused an immediate, involuntary, and substantial  
13 shift in his "moral and technical perspective on this case."  
14 Stating that his past successes in defending criminal cases were  
15 largely due to "the strength of my moral conviction[] and my  
16 ability to convey that moral conviction" to juries, Fischer stated  
17 that "while I could probably go through the motions to defend Mr.  
18 Sacco, my conviction would not be behind that representation."  
19 Fischer's affirmation did not cite any provision of the Code that  
20 imposed an Ethical Consideration or a Disciplinary Rule ("DR").

21 The government opposed Fischer's motion to withdraw. It  
22 noted that a substitution of counsel would substantially delay the  
23 start of trial. It stated that it had been "preparing [S.O.] to  
24 testify now for the last month, in addition to preparing all the  
25 other witnesses," and S.O. was "ready to walk into this Court and

1 testify about everything that happened to her." (Sacco April 25  
2 Tr. at 6.)

3 O'Connor's attorney (who had stated in her severance  
4 motion that the defense positions of O'Connor and Sacco were  
5 irreconcilable) supported Fischer's motion to withdraw on the  
6 ground that it would hurt O'Connor's case "if [Fischer] cannot  
7 effectively represent Mr. Sacco" (id. at 8). Expressing her doubt  
8 as to Fischer's ability to represent Sacco zealously, she stated  
9 that "it's only fair for both defendants that they have attorneys  
10 that can be zealous advocates on their behalf and I think that's  
11 what the law requires, your Honor." (Id. at 9.) As to the latter  
12 point, the court stated, "I don't think the law requires  
13 zealousness on [the] part of the attorney. I think it requires  
14 adequacy on [the] part of the attorney. I know Mr. Fischer is  
15 more than adequate." (Id.)

16 Sacco himself took no firm position on Fischer's motion to  
17 withdraw. He expressed both admiration for and frustration with  
18 Fischer, saying he had "found Mr. Fischer to be sincere, genuine,  
19 intelligent, articulate," but had been "disappointed that our  
20 communication has not been continual in the last eight weeks."  
21 (Id. at 3.) However, Sacco also said he had an

22 interest[] in going to trial as quickly as possible  
23 . . . . I want to get it behind me but I have no  
24 indication whatsoever that Mr. Fischer is actually  
25 ready at this time. I haven't discussed anything. I  
26 haven't seen any motions that he's put forth. I  
27 haven't received any replies from any of the letters  
28 that I sent him in the last eight weeks. When I read  
29 in the newspaper that a trial was taking place on the  
30 28 of April, I was--it couldn't be true. I hadn't  
31 spoken to Mr. Fischer so I think there is a little

1 bit of an issue that he may not be ready, although  
2 I'd like to go, you know.

3 (Id. at 17.)

4 In a written order entered later on April 25, the court  
5 denied Fischer's motion to withdraw:

6 Based upon the information contained in Defense  
7 counsel's ex parte motion, and the information  
8 obtained at the hearing held on April 25, 2008, the  
9 Court finds that there are insufficient grounds to  
10 warrant granting the application to withdraw. No  
11 actual conflict has been identified and the Court is  
12 confident, and expects, that Attorney Fischer will  
13 continue to provide Defendant Sacco with appropriate  
14 representation. Moreover, aside from some concerns  
15 about Attorney Fischer's preparation for trial,  
16 Defendant Sacco articulated that he was satisfied  
17 with Attorney Fischer's abilities. Without more, the  
18 information before the Court is insufficient to  
19 demonstrate an actual conflict warranting withdrawal.  
20 The motion to withdraw is, therefore, DENIED.

21 Order dated April 25, 2008 ("Order Denying Withdrawal"), at 1  
22 (emphases added). The court gave the parties an extra week to  
23 prepare for trial, scheduling jury selection for May 5, 2008.

24 (See id. at 1-2.)

25 On April 30, O'Connor, who previously had moved  
26 unsuccessfully for severance of her trial from that of Sacco (see  
27 Part II.D. below), renewed her motion for severance, stating that  
28 Fischer had an "internal conflict with representing his client,"  
29 which would cause him to provide ineffective assistance to Sacco  
30 at trial (O'Connor Memorandum of Law dated April 30, 2008, at 2)  
31 and thereby prejudice O'Connor's case (see id. at 5). O'Connor  
32 also argued, based on statements by Sacco at the April 25 hearing,  
33 that "Fischer's assistance thus far [has] been objectively  
34 unreasonable"; that Fischer "ha[d], by his own admission, stated



1 that his assistance w[ould] continue to be inadequate"; and that  
2 "Fischer ha[d] expressed an unequivocal unwillingness and  
3 inability to conduct a cross-examination of the alleged victim,"  
4 (Id.) O'Connor stated that "it would appear that Mr. Fischer has  
5 done almost nothing to prepare for trial," that he was guilty of  
6 an "utter failure to prepare," and that it was "highly unlikely"  
7 that Fischer would be prepared for trial on May 5. (Id.)

8 Fischer, in response to O'Connor's motion, did not take a  
9 position on severance but disputed all of her characterizations of  
10 his preparedness and his willingness to represent Sacco properly.  
11 With respect to preparedness, Fischer stated that except for three  
12 specified tasks, "I believe we are prepared to go to trial in this  
13 matter." (Letter from Kelly E. Fischer to Judge McAvoy dated  
14 April 30, 2008 ("April 30 Letter"), at 2.) With respect to  
15 O'Connor's ethics challenge, Fischer stated:

16 I wish to make it clear that, while my personal,  
17 moral and religious beliefs do create some issues for  
18 me in the defense of this action, I do not now  
19 believe, and do not recall ever[] expressing, in  
20 words or substance, "an unequivocal unwillingness and  
21 inability to conduct a cross-examination of the  
22 alleged victim."

23 (Id., at 1.)

24 On this appeal, Sacco, represented by new counsel,  
25 contends that the district court's denial of Fischer's motion to  
26 withdraw "was necessarily colored by its view, expressed during  
27 the conference on the motion to withdraw, that the law does not  
28 require an attorney to act as a zealous advocate for his client,"

1 and was thus improper. (Sacco brief on appeal at 46.) He argues  
2 that

3 Code of Professional Responsibility Canon 7, entitled  
4 "A Lawyer Should Represent a Client Zealously Within  
5 the Bounds of the Law," contains Ethical  
6 Consideration 7-1, stating "the duty of a lawyer,  
7 both to the client and to the legal system, is to  
8 represent the client zealously within the bounds of  
9 the law, which includes Disciplinary Rules and  
10 enforceable professional regulations," id., and  
11 Disciplinary Rule 7-101, expressly governing  
12 "Representing a Client Zealously." Id.

13 (Sacco brief on appeal at 47.) We see no basis for reversal--  
14 either in the arguments made by Fischer in the district court or  
15 in the arguments made by Sacco's new attorney on this appeal.

16 A ruling denying a motion to withdraw is reviewable for  
17 abuse of discretion. See United States v. Oberoi, 331 F.3d 44, 47  
18 (2d Cir. 2003).

19 We must grant considerable deference to the district  
20 court's decision especially when the prosecution of  
21 the suit is likely to be disrupted by the withdrawal  
22 of counsel. However, if forcing an attorney to  
23 continue representation will cause a violation of the  
24 Code of Professional Responsibility and possibly  
25 subject the attorney to sanctions, it will be an  
26 abuse of discretion not to grant the motion to  
27 withdraw.

28 Id. at 47-48 (internal quotation marks and citation omitted).

29 In the present case, Fischer did not argue, either in his  
30 sealed affirmation or in his statements in open court, that there  
31 was any Disciplinary Rule that would be violated if he continued  
32 to represent Sacco or that his continued representation of Sacco  
33 might possibly expose him to sanctions. As noted above, Fischer  
34 cited at the hearing former EC 2-30, which he characterized as  
35 dealing with whether an "attorney should seek to withdraw" because

1 of the "intensity of [his] personal feelings." (Sacco April 25  
2 Tr. at 3.) That statement actually conflated EC 2-30, which  
3 concerned whether an attorney should accept an appointment, with  
4 former EC 2-29, which dealt with whether an attorney, having  
5 accepted an appointment, should seek to withdraw. The provision  
6 most relevant to Fischer's motion to withdraw was EC 2-29, which  
7 provided in pertinent part as follows:

8 When a lawyer is appointed by a court . . . to  
9 undertake representation of a person unable to  
10 obtain counsel, whether for financial or other  
11 reasons, the lawyer should not seek to be excused  
12 from undertaking the representation except for  
13 compelling reasons. Compelling reasons do not  
14 include such factors as the repugnance of the subject  
15 matter of the proceeding[ or] . . . the belief of  
16 the lawyer that the defendant in a criminal  
17 proceeding is guilty . . . .

18 Code, EC 2-29 (emphases added). See also Fiumara v. United  
19 States, 727 F.2d 209, 212 (2d Cir.) ("A trial counsel worthy of  
20 the name should be capable of subordinating his personal  
21 predilections to his professional duty." (internal quotation marks  
22 omitted)), cert. denied, 466 U.S. 951 (1984).

23 Fischer's affirmation made clear that he had accepted  
24 appointment by the court to defend Sacco knowing the nature of the  
25 charges. He stated that he had proceeded industriously to prepare  
26 for trial, conducting interviews, doing research, and examining  
27 "100 pounds" of documents. The affirmation quite plainly stated  
28 that Fischer wished to withdraw because of his abhorrence of a  
29 "single bit" of evidence in the case. Ethical Consideration 2-29  
30 provided that he should not seek to withdraw except for compelling  
31 reasons; and if, as EC 2-29 specified, repugnance of the subject

1 matter of the case does not fit into that category, Fischer's  
2 revulsion at a single item of evidence in the case surely did not  
3 constitute a compelling reason. Finally, Fischer's affirmation's  
4 reference to the change in his "technical perspective" (emphasis  
5 added) suggests that the condom evidence caused Fischer to believe  
6 that his client was guilty. Under the express terms of EC 2-29,  
7 such a belief is not a sufficient reason to withdraw.

8           We thus see no abuse of discretion in the district court's  
9 denial of Fischer's motion based on the presentations to the  
10 district court. Implicit in the court's statement that it  
11 "expect[ed] that Attorney Fischer w[ould] continue to provide  
12 Defendant Sacco with appropriate representation," Order Denying  
13 Withdrawal at 1 (emphasis added), was the expectation that Fischer  
14 would represent Sacco as vigorously as required by the Code. That  
15 expectation was entirely reasonable in light of the absence of any  
16 suggestion by Fischer in his motion that he would be unable to  
17 comply with any of the Code's Disciplinary Rules or any suggestion  
18 that his continued representation of Sacco might possibly expose  
19 him to a sanction. Further, Fischer made clear in the motion  
20 itself that he had done most of the work necessary to prepare for  
21 trial. And he indicated in his April 30 Letter that he was ready,  
22 able, and willing to proceed to trial and to cross-examine S.O. on  
23 Sacco's behalf.

24           Nor does Sacco's brief on appeal provide any basis for  
25 concluding that the district court should have granted Fischer's  
26 motion. Although it cites the title of DR 7-101 ("Representing a

1 Client Zealously"), it does not quote or describe any provision of  
2 that Rule and does not suggest that Fischer failed to comply with  
3 any of the Rule's commands. Further, while Sacco's brief quotes  
4 EC 7-1's provision that an attorney should "represent the client  
5 zealously," it provides no basis for a conclusion that Fischer did  
6 not represent Sacco zealously. His objections to Fischer's  
7 performance are to strategic decisions such as the timing of  
8 Fischer's objection to the admission of Sacco's self-styled  
9 autobiography and the timing of a request for a bench trial. The  
10 record makes plain that Fischer competently cross-examined S.O. at  
11 trial, and Sacco's brief on appeal does not contend to the  
12 contrary.

13 In sum, the record provides no basis for a conclusion that  
14 the denial of Fischer's motion to withdraw deprived Sacco of a  
15 fair trial.

## 16 B. Sacco's Other Challenges

### 17 1. The Admission of Excerpts From Sacco's Autobiography

18 At trial, the government offered in evidence eight  
19 passages from Sacco's autobiography, in which Sacco had written of  
20 his sexual attraction to children and described, inter alia, his  
21 sexual acts against "[his] little sister" and her girlfriends  
22 while they were asleep. The district court admitted four of the  
23 proffered excerpts in full, excluded three, and admitted only part  
24 of another. Sacco does not challenge the admissibility of the  
25 excerpts under Fed. R. Evid. 413 (authorizing the admission, in a



1 criminal case in which the defendant is accused of sexual assault,  
2 of relevant evidence of the defendant's commission of another  
3 offense or offenses of sexual assault), and Fed. R. Evid. 414  
4 (authorizing the admission, in a criminal case in which the  
5 defendant is accused of child molestation, of relevant evidence of  
6 the defendant's commission of another offense or offenses of child  
7 molestation). Rather, Sacco contends that all of the passages  
8 should have been excluded pursuant to Fed. R. Evid. 403 on the  
9 ground that their potential for unfair prejudice substantially  
10 outweighed their probative value. Sacco, age 48 when he abused  
11 S.O., argues that the autobiography, written shortly before 2000,  
12 at most described his thoughts and conduct as a teenager, and thus  
13 that they lacked probative value because they were too remote in  
14 time. We reject this conclusion.

15 The trial court's decision not to exclude evidence  
16 pursuant to Rule 403 is reviewed only for abuse of discretion.  
17 See, e.g., United States v. Larson, 112 F.3d 600, 604-05 (2d Cir.  
18 1997) ("Larson"). Courts confronted with remote-in-time evidence  
19 offered under Rule 413 or Rule 414 should conduct a fact-specific  
20 and case-specific analysis:

21 Exclusion of proof of other acts that are too remote  
22 in time caters principally to the dual concerns for  
23 relevance and reliability. The evaluation of the  
24 proffered evidence in light of these concerns must be  
25 made on a case-by-case basis to determine whether the  
26 significance of the prior acts has become too  
27 attenuated and whether the memories of the witnesses  
28 has likely become too frail. Neither Rule 403 nor  
29 any analogous Rule provides any bright-line rule as  
30 to how old is too old.

1 Larson, 112 F.3d at 605. In Larson, we found no abuse of  
2 discretion in the admission of testimony about acts that occurred  
3 16 to 20 years before the trial where "[t]he similarity of the  
4 events clearly demonstrated the . . . testimony's relevance."  
5 Id.; see also United States v. Davis, 624 F.3d 508, 512 (2d Cir.  
6 2010) (no abuse of discretion in the admission of testimony about  
7 conduct occurring some 19 years earlier).

8 In the present case, the district court plainly conducted  
9 a Rule 403 balancing analysis; it excluded some of the proffered  
10 excerpts on the ground that they were cumulative or that their  
11 probative value was outweighed by the potential for unfair  
12 prejudice. (See Tr. 696.) The excerpts that were admitted  
13 plainly had high probative value that outweighed any potential for  
14 unfair prejudice; they included descriptions of Sacco entering  
15 rooms in which young girls were asleep and sexually molesting  
16 them--conduct that partially paralleled S.O.'s description of  
17 Sacco's first molestation of her. And an excerpt describing an  
18 interest in child pornography was consistent with S.O.'s testimony  
19 that Sacco forced her to pose for pornographic photographs.

20 Further, the present case does not involve the usual  
21 concerns as to memory or reliability; the passages had been  
22 written by Sacco himself. And although Sacco suggests that his  
23 predilections as a teenager should be discounted, pointing out  
24 that the acts described in his autobiography occurred more than 30  
25 years before his conduct with S.O. and thus were more remote in  
26 time than the conduct at issue in the above cases, that argument

1 rings hollow in light of the evident relish with which he wrote  
2 the passages just seven years before his molestation of S.O. We  
3 see no abuse of discretion in the admission of this evidence.

4 2. The Denial of a Continuance

5 As indicated in Part I.B. above, Sacco's friend DiFiori  
6 testified at trial that Sacco had admitted having sex with a  
7 12-year-old girl. Although DiFiori had been included in the  
8 government's list of planned witnesses, this aspect of his  
9 testimony had not been anticipated, as DiFiori did not inform the  
10 government of Sacco's statement until Friday May 9, 2008, the day  
11 DiFiori began his testimony. In light of the surprise testimony,  
12 Sacco asked the court to grant a mistrial, or, in the alternative,  
13 to strike that testimony from the record or adjourn the trial for  
14 at least a week in order to allow Sacco to conduct further  
15 investigation into DiFiori's background. O'Connor's attorney  
16 preferred not to have a mistrial and requested a curative  
17 instruction or a continuance of at least two weeks.

18 The trial court, accepting the representation of the  
19 Assistant United States Attorney that the government had had no  
20 prior indication that DiFiori would give this testimony, denied  
21 the defense motions. However, "want[ing] to make sure the witness  
22 is adequately cross-examined by everybody" (Tr. 548), the court  
23 did not require defendants to proceed with their cross-  
24 examinations and instead adjourned the trial early that Friday  
25 afternoon in order to give them the remainder of that day plus the

1 weekend to prepare to cross-examine DiFiori as to Sacco's  
2 statement. On appeal, Sacco contends principally that the denial  
3 of a week-long continuance violated his due process and  
4 confrontation rights. We are unpersuaded.

5           The decision whether to grant a continuance is a matter  
6 "traditionally within the discretion of the trial judge." Ungar  
7 v. Sarafite, 376 U.S. 575, 589 (1964). We review an order  
8 denying a continuance for abuse of discretion, and we will find no  
9 such abuse unless the denial was an "arbitrary action that  
10 substantially impaired the defense." United States v. Beverly, 5  
11 F.3d 633, 641 (2d Cir. 1993). The burden of showing such an  
12 impairment is on the party complaining of the lack of a sufficient  
13 continuance. See, e.g., United States v. Tin Yat Chin, 476 F.3d  
14 144, 146 (2d Cir. 2007) (new trial not required where defendant  
15 was "unable to specify with any particularity how he was  
16 prejudiced by not receiving a longer [than one-day] continuance").

17           We see no arbitrary action or substantial impairment here.  
18 The surprise testimony was quite succinct and entirely  
19 straightforward. Sacco offers no explanation as to why the extra  
20 time on that Friday plus the weekend recess were not sufficient to  
21 permit him to prepare an adequate cross-examination, except to  
22 state that he needed more time to investigate DiFiori's  
23 background. But the fact that DiFiori was to testify at trial had  
24 been known to the defendants in advance; presumably they would  
25 have conducted at least some investigation into his background in  
26 preparation for his expected testimony. And although Sacco

1 contends that further investigation was warranted in light of the  
2 unexpectedly damaging testimony, he provides no inkling of what  
3 helpful information might have been found.

4 We also reject Sacco's contention that "DiFiori's  
5 testimony was essential to proving . . . that [Sacco] had engaged  
6 in sexual intercourse with S.O. when she was twelve years old"  
7 (Sacco brief on appeal at 61). Although a direct admission is  
8 virtually always damaging, we have no doubt that Sacco would have  
9 been convicted without his statement to DiFiori, given S.O.'s  
10 explicit testimony and the used condom bearing S.O.'s DNA, which  
11 was found among Sacco's stored possessions.

12 C. O'Connor's Challenges to the Sufficiency of the Evidence

13 At trial, defendants cross-examined S.O. at length,  
14 emphasizing that when Sacco first began abusing her, S.O. did not  
15 tell her mother; that when S.O. first told Chesebro and Detective  
16 Blenis about Sacco, she did not tell them she had also been abused  
17 by her mother or by George Lang; and that some details of her  
18 testimony--such as the months in which various incidents  
19 occurred--differed from statements she had previously given to DSS  
20 caseworkers or to Blenis. O'Connor challenges the sufficiency of  
21 the evidence to convict her on any count, arguing generally that  
22 S.O.'s testimony was inconsistent, contradictory, and not  
23 credible, and that the jury's verdict was against the weight of  
24 the evidence. She also contends, inter alia, that particular  
25 elements of the three offenses of which she was found guilty were



1 not supported by sufficient evidence. We find no merit in her  
2 sufficiency challenges.

3 O'Connor's general contentions are contrary to well  
4 established principles governing review of challenges to the  
5 sufficiency of the evidence. In considering such a challenge, we  
6 must credit every reasonable inference that the jury could have  
7 drawn in the government's favor, see, e.g., United States v.  
8 Carson, 702 F.2d 351, 361 (2d Cir.) ("Carson"), cert. denied, 462  
9 U.S. 1108 (1983), and we must affirm the conviction so long as,  
10 from the inferences reasonably drawn, the jury might fairly have  
11 concluded guilt beyond a reasonable doubt, see, e.g., United  
12 States v. Buck, 804 F.2d 239, 242 (2d Cir. 1986); United States v.  
13 Taylor, 464 F.2d 240, 244-45 (2d Cir. 1972). The weight of the  
14 evidence is a matter for argument to the jury, not a ground for  
15 reversal on appeal. See, e.g., United States v. Roman, 870 F.2d  
16 65, 71 (2d Cir.), cert. denied, 490 U.S. 1109 (1989).

17 "Where there are conflicts in the testimony, we must defer  
18 to the jury's resolution of the weight of the evidence and the  
19 credibility of the witnesses." United States v. Persico, No.  
20 08-5266, 2011 WL 1661420, at \*16 (2d Cir. May 3, 2011); see, e.g.,  
21 United States v. Morrison, 153 F.3d 34, 49 (2d Cir. 1998).  
22 "[W]hen testimonial inconsistencies are revealed on cross-  
23 examination, the jury [i]s entitled to weigh the evidence and  
24 decide the credibility issues for itself . . ." United States  
25 v. Josephberg, 562 F.3d 478, 494 (2d Cir.) (internal quotation  
26 marks omitted), cert denied, 130 S. Ct. 397 (2009). "It is the

1 province of the jury and not of the court" to determine whether a  
2 witness who may have been "inaccurate, contradictory and even  
3 untruthful in some respects" was nonetheless "entirely credible in  
4 the essentials of his testimony." United States v. Tropiano, 418  
5 F.2d 1069, 1074 (2d Cir. 1969), cert. denied, 397 U.S. 1021  
6 (1970); see, e.g., United States v. Coté, 544 F.3d 88, 99 (2d Cir.  
7 2008) ("court must give full play to the right of the jury to  
8 determine credibility").

9 In the present case, S.O. testified that she did not  
10 mention O'Connor in her early disclosures with regard to Sacco  
11 because she feared that, upon her return to O'Connor's custody,  
12 there would be repercussions if she had disclosed the abuse by  
13 O'Connor. She also explained that for the same reason, in her  
14 early disclosures, she had not mentioned being abused by George  
15 Lang because to do so would implicate her mother. She testified,  
16 "It's not that I wasn't truthful. I was scared to say  
17 everything." (Tr. 1636 (emphasis added).) It was well within the  
18 province of the jury to consider all of the evidence, and to  
19 conclude that S.O.'s early disclosures were merely incomplete and  
20 that her trial testimony was truthful. In light of the above  
21 principles, O'Connor's overarching contentions that her  
22 convictions should be reversed on the grounds that S.O.'s  
23 testimony was not credible or was contrary to testimony of other  
24 witnesses, or that the guilty verdicts against her were against  
25 the weight of the evidence, provide no basis for reversal.

1 Nor, as discussed below, is there merit in O'Connor's more  
2 particularized sufficiency challenges focusing on specific counts.

3 1. Count 1

4 With respect to Count 1, O'Connor contends that the  
5 government failed to prove that she acted with the knowledge or  
6 intent required to support a conviction for selling a child for  
7 the purpose of producing child pornography, in violation of 18  
8 U.S.C. § 2251A(a). That section, as it read in 2006-2007,  
9 applied, to the extent pertinent here, to

10 [a]ny parent . . . of a minor who sells or otherwise  
11 transfers custody or control of such minor, or offers  
12 to sell or otherwise transfer custody of such minor  
13 either--

14 (1) with knowledge that, as a consequence  
15 of the sale or transfer, the minor will be  
16 portrayed in a visual depiction engaging in, or  
17 assisting another person to engage in, sexually  
18 explicit conduct; or

19 (2) with intent to promote either--

20 (A) the engaging in of sexually  
21 explicit conduct by such minor for the  
22 purpose of producing any visual depiction  
23 of such conduct; or

24 (B) the rendering of assistance by the  
25 minor to any other person to engage in  
26 sexually explicit conduct for the purpose  
27 of producing any visual depiction of such  
28 conduct . . . .

29 18 U.S.C. § 2251A(a) (2006).

30 As set out in Part I.A.2. above, S.O. testified that  
31 O'Connor, inter alia, helped Sacco take pornographic photographs  
32 of S.O in November 2006, and that in the months that followed,

1 O'Connor continued to send S.O. to the upstairs apartment with  
2 Sacco. Although O'Connor seizes on various alleged discrepancies  
3 in S.O.'s testimony--asserting, for example, that whereas S.O.  
4 testified at trial that O'Connor helped Sacco take pornographic  
5 photographs of S.O. in November 2006, she had earlier suggested  
6 that the incident occurred in October--it plainly was within the  
7 province of the jury to find that the event described by S.O. did  
8 occur. The contention that the evidence was insufficient to  
9 permit the jury to infer that O'Connor had the knowledge or intent  
10 envisioned by the statute is meritless.

11 O'Connor also argues that the jury's verdict of guilty on  
12 Count 1 was inconsistent with its verdict finding her not guilty  
13 on Count 7, which charged her with possession of child  
14 pornography. This argument is doubly flawed. First, inconsistent  
15 verdicts are not a ground for reversal; our review of whether  
16 evidence was sufficient to support a conviction on one count is  
17 "independent of the jury's determination that evidence on another  
18 count was insufficient." United States v. Powell, 469 U.S. 57, 67  
19 (1984). Second, there was no inconsistency, as possession of  
20 child pornography is not an element of a § 2251A(a) offense.

21 2. Count 3

22 O'Connor contends that there was insufficient evidence to  
23 support her Count 3 conviction of sex trafficking of a minor, in  
24 violation of 18 U.S.C. § 1591. That section applied, in pertinent  
25 part, to anyone who knowingly,

1 in or affecting interstate or foreign commerce,  
2 . . . recruits, entices, harbors, transports,  
3 provides, or obtains by any means a person[,]

4 . . . .

5 knowing . . . that the person has not attained the  
6 age of 18 years and will be caused to engage in a  
7 commercial sex act,

8 18 U.S.C. § 1591(a) (Supp. III 2003), and provided enhanced  
9 penalties if, at the time of the offense, the minor was under the  
10 age of 14 years, see id. § 1591(b)(1). As the indictment charged  
11 that this offense was committed "[b]etween in and about January of  
12 2004 through March of 2007," this count encompassed any of the  
13 abuse of S.O. described in Part I.A. countenanced, supported, or  
14 arranged by O'Connor. O'Connor contends that there was no proof  
15 that S.O.'s sex acts had any commercial aspect.

16 Without considering the evidence as to the sexual abuse by  
17 George Lang, who sometimes helped O'Connor to pay her rent, or as  
18 to the two strangers with whom O'Connor caused S.O. to have sex at  
19 the Best Western in exchange for money, we think it clear that the  
20 evidence of O'Connor's collaboration with Sacco was sufficient to  
21 support her conviction under § 1591(a). There is no dispute that  
22 during much of the period in question O'Connor was behind in  
23 paying rent (see O'Connor brief on appeal at 76-77; see also Tr.  
24 2010-11); S.O. testified that when Sacco, who lived in New Jersey,  
25 came to 45 Fair in Norwich, New York, O'Connor, inter alia,  
26 repeatedly sent her upstairs with Sacco to the vacant apartment  
27 where Sacco abused S.O.; and when S.O. complained after the first  
28 such abuse in that apartment, O'Connor's response was that it



1 "[wa]s better than being homeless." From this evidence the jury  
2 could easily find that O'Connor provided the 12-year-old S.O. to  
3 Sacco, arriving from out of state, to have her engage in sex acts  
4 in exchange for his forbearance with respect to her nonpayment or  
5 deferred payments of rent or discounted rent.

6 3. Count 5

7 With respect to her Count 5 conviction for permitting  
8 S.O. to be used in the production of child pornography, O'Connor  
9 contends that the government failed to present sufficient evidence  
10 of the interstate commerce element of 18 U.S.C. § 2251(b). That  
11 section applied, in pertinent part, to

12 [a]ny parent . . . having custody or control of a  
13 minor who knowingly permits such minor to engage in,  
14 or to assist any other person to engage in, sexually  
15 explicit conduct for the purpose of producing any  
16 visual depiction of such conduct . . . if that visual  
17 depiction was produced using materials that have been  
18 mailed, shipped, or transported in interstate . . .  
19 commerce.

20 18 U.S.C. § 2251(b) (2006) (emphases added).

21 S.O. testified that in late October 2006, on the first  
22 occasion on which Sacco abused her in the vacant upstairs  
23 apartment, he took pornographic pictures of her with a camera that  
24 had a zoom lens. When Sacco thereafter abused her on  
25 Thanksgiving, O'Connor photographed them, using a camera that S.O.  
26 believed was the same one Sacco had used previously. S.O. had  
27 never seen her mother with such a camera and did not believe it  
28 belonged to O'Connor. (See Tr. 1529-30.) The government  
29 introduced evidence that Sacco had bought a camera with zoom

1 capability on eBay in May of that year and had had it shipped to  
2 him in New Jersey. (See id. at 1852-53.) This evidence was ample  
3 to permit the jury to find that the camera O'Connor used was one  
4 that Sacco had brought to New York from New Jersey.

5 D. O'Connor's Challenge to the Denial of Severance

6 Prior to trial, O'Connor moved pursuant to Fed. R. Crim.  
7 P. 14(a) for an order of severance, allowing her to be tried  
8 separately from Sacco on the ground, principally, that the proof  
9 against Sacco, including evidence of his pedophilic past, was  
10 overwhelming and extremely disturbing, making it likely to cause  
11 prejudicial spillover into the jury's consideration of the  
12 evidence against O'Connor. She also argued, without specificity,  
13 that her defense was unreconcilable with that of Sacco. The  
14 district court denied the motion, noting that the case was not  
15 unduly complicated and that most of the witnesses, including S.O.,  
16 would be testifying against both Sacco and O'Connor. The court  
17 concluded that, given proper instructions, "[t]he likelihood of a  
18 jury confusing the evidence against O'Connor with the evidence  
19 against Sacco [wa]s minimal . . . ." (Transcript of Proceedings  
20 as to Linda O'Connor, April 25, 2008, at 15.)

21 O'Connor again moved for severance after the district  
22 court's refusal to allow Sacco's attorney to withdraw, see Part  
23 II.A. above. She predicted that because Fischer preferred not to  
24 proceed, his performance in representing Sacco would be poor; and  
25 she argued that his poor performance in representing Sacco would

1 prejudice her. The district court denied this motion without  
2 comment.

3 On appeal, O'Connor contends that the denial of her  
4 severance motions raising the above grounds deprived her of a  
5 fair trial. She also contends that she was unfairly prejudiced  
6 by her inability to question Sacco about DiFiori's testimony as to  
7 Sacco's admission of having had sex with a 12-year-old  
8 prostitute--an argument that was not made in the severance motions  
9 because when those motions were made, neither the defendants nor  
10 the government were aware that DiFiori would so testify. We  
11 conclude that each of O'Connor's contentions lacks merit in light  
12 of the relevant legal principles.

13 "There is a preference in the federal system for joint  
14 trials of defendants who are indicted together." Zafiro v. United  
15 States, 506 U.S. 534, 537 (1993). "Joint trials 'play a vital  
16 role in the criminal justice system,'" as "[t]hey promote  
17 efficiency and 'serve the interests of justice by avoiding the  
18 scandal and inequity of inconsistent verdicts,'" id. (quoting  
19 Richardson v. Marsh, 481 U.S. 200, 209, 210 (1987)), and they  
20 avoid "requiring victims and witnesses to repeat the inconvenience  
21 (and sometimes trauma) of testifying," Richardson, 481 U.S.  
22 at 210.

23 The possibility that codefendants may mount mutually  
24 antagonistic defenses is not itself a ground for severance where  
25 the risk of prejudice can be offset by "less drastic measures"  
26 devised by the district court, "such as limiting instructions,"

1 Zafiro, 506 U.S. at 539; see, e.g., United States v. Losada, 674  
2 F.2d 167, 171 (2d Cir.) ("Losada"), cert. denied, 457 U.S. 1125  
3 (1982). Nor is severance necessarily required by "the fact that  
4 evidence may be admissible against one defendant but not  
5 another," Carson, 702 F.2d at 367; see, e.g., Losada, 674 F.2d  
6 at 171, especially where the charges against the defendants are  
7 straightforward and the jury is properly instructed to consider  
8 the evidence against each defendant separately, see, e.g., Carson,  
9 702 F.2d at 367; Losada, 674 F.2d at 171. There is a strong  
10 indication that there has been no prejudicial spillover "where the  
11 jury has convicted a defendant on some counts but not on others."  
12 United States v. Hamilton, 334 F.3d 170, 183 (2d Cir.), cert.  
13 denied, 540 U.S. 985 (2003); see, e.g., Carson, 702 F.2d at 367.

14 Further, given the interests of judicial economy, a  
15 defendant's professed desire to elicit trial testimony from a  
16 codefendant does not require a severance where there is no showing  
17 of a likelihood that the codefendant would waive his Fifth  
18 Amendment privilege and testify at a severed trial or where, if  
19 the codefendant testified, it is likely that his testimony would  
20 be subject to damaging impeachment. See generally United States  
21 v. Wilson, 11 F.3d 346, 354 (2d Cir. 1993), cert. denied, 511 U.S.  
22 1025 (1994); United States v. Taylor, 562 F.2d 1345, 1362-63 (2d  
23 Cir.), cert. denied, 432 U.S. 909 (1977); see also United States  
24 v. Bari, 750 F.2d 1169, 1177 (2d Cir. 1984) ("Bari") (the fact  
25 that the defendant had not pleaded guilty "indicat[ed] that he was]  
26 unlikely to waive the privilege against self-incrimination at a

1 separate trial unless [he] had already been acquitted"), cert.  
2 denied, 472 U.S. 1019 (1985).

3 We review the denial of a severance motion under an abuse-  
4 of-discretion standard. See, e.g., Zafiro, 506 U.S. at 538-39;  
5 Carson, 702 F.2d at 366; Losada, 674 F.2d at 169, 171. We will  
6 find such an abuse only where the denial caused the defendant  
7 "substantial prejudice . . . amounting to a miscarriage of  
8 justice." Bari, 750 F.2d at 1177 (internal quotation marks  
9 omitted); see, e.g., United States v. Rivera, 546 F.3d 245, 253  
10 (2d Cir. 2008), cert. denied, 129 S. Ct. 1395 (2009); United  
11 States v. Blakney, 941 F.2d 114, 116 (2d Cir. 1991).

12 We see no abuse of discretion or miscarriage of justice  
13 here. The nature of the charges in the present case made the  
14 joint trial of O'Connor and Sacco particularly appropriate.  
15 O'Connor was charged with selling S.O. to Sacco for the purpose of  
16 producing child pornography; Sacco was charged with buying S.O.  
17 from O'Connor for that purpose. With respect to the sex  
18 trafficking of S.O., and with respect to using her to produce  
19 child pornography, each defendant was charged with committing each  
20 of those crimes and with aiding and abetting their commission.  
21 Thus, much of the evidence, including virtually all of the  
22 disturbing testimony given by S.O. about being abused and  
23 photographed by Sacco, would have been admissible at a trial of  
24 O'Connor alone. And given the sordid nature of the case, it was  
25 appropriate to avoid unnecessarily subjecting S.O. to the trauma  
26 of having to give her trial testimony more than once.



1           Although one of O'Connor's arguments is that a joint trial  
2 was unfair on the ground that her defense and the defense  
3 presented by Sacco were mutually antagonistic, we reject her  
4 factual premise. Both O'Connor and Sacco defended principally by  
5 attempting to show flaws or inconsistencies in S.O.'s statements  
6 and by arguing that her testimony simply was, as Sacco's attorney  
7 "put it very kindly, unreliable" (Tr. 2239), or, as he put it less  
8 kindly, "fabricated" (id. at 2240) and "false" (id. at 2241).  
9 O'Connor's attorney in her summation termed S.O.'s testimony a  
10 "masterpiece" (id. at 2340) of consciously devious, attention-  
11 seeking, autobiographical fiction (see id. at 2316-40) that should  
12 be "entitled American Dream Girl" (id. at 2316). O'Connor's  
13 attorney stated that "[t]he government's case can be summed up in  
14 five words. Sex, lies, and no videotape." (Id. at 129.)

15           To explain why S.O. would testify falsely, O'Connor's  
16 attorney, in her opening and her summation, argued in part that  
17 S.O. sought attention. (See, e.g., Tr. 102 ("[S.O.] has said in  
18 desperation what she thought those around her wanted to hear in  
19 order to give her the attention that she was seeking . . . .");  
20 id. at 105 ("Clearly [S.O.] is starving for attention."); id.  
21 at 2319 (S.O. enjoyed "all the attention" she received after  
22 telling camp counselors that she had taken her mother's  
23 medication); id. at 2332 (arguing that S.O. was thinking, "Every  
24 time I said something I'd get a lot of attention. For a 13-year-  
25 old kid that was pretty cool."); id. at 2337 (arguing that S.O.

1 was excited to testify because she had "an entire entourage"  
2 including a bodyguard and "really felt like a celebrity").)

3 In his summation, Sacco's attorney too argued that S.O.  
4 had perhaps intentionally fabricated her testimony because she  
5 wanted attention. (See Tr. 2241 ("Why would she make a false  
6 claim if it in fact is false? Why would she do that? There are  
7 rewards to it. There is an upside to it. You get a bodyguard;  
8 that's one reward. You get a lot of people who really, really  
9 genuinely care.")) He also offered the alternative that S.O.'s  
10 testimony might have been the product of confusion, either because  
11 she conflated a variety of events (see id. at 2284 ("She is  
12 confused[,] . . . tak[ing] bits and pieces from events and  
13 mix[ing] them up and they come out in some sort of story")); or  
14 because she had viewed pornography while living at Renee Lang's  
15 home in mid-August to mid-October of 2006 and had "fantas[ized]"  
16 events (id. at 2245); or because she was under the influence of  
17 mind-altering medications (see, e.g., id. (arguing that S.O.'s  
18 statement to the authorities in December 2007--the first instance  
19 of her accusing O'Connor of incest and of prostituting S.O. at the  
20 Best Western--"[wa]s made at a time when she is at the very least  
21 confused and at the most severely mentally ill, psychotic,  
22 hallucinating and under the influence of not Zoloft or Benadryl  
23 but Thorazine, Risperdal, which are . . . some very seriously  
24 heavy-duty antipsychotic medications"))).

25 The defense positions argued by O'Connor and Sacco thus  
26 were not mutually antagonistic. The arguments plainly overlapped,

1 and the jury's acceptance of any of them would have benefited both  
2 defendants.

3           As to O'Connor's concern for the possibility of spillover  
4 from the evidence against Sacco, it is true that the proof as to  
5 his past pedophilic conduct and appetites--presented through the  
6 testimony of one of his victims, the testimony of a police officer  
7 to whom Sacco made admissions, and the descriptions in Sacco's own  
8 autobiography--might well have been excluded in a trial of  
9 O'Connor alone. But the district court gave the jury appropriate  
10 instructions to minimize any possibility of prejudicial spillover.  
11 For example, before the attorneys made their opening statements,  
12 the court instructed the jury that although O'Connor and Sacco  
13 were being tried together, the jury would be required to consider  
14 "each charge separately" with respect to "each defendant  
15 separately" (Tr. 26, 44). In its final charge to the jury, the  
16 court repeatedly reiterated these instructions. (See, e.g., id.  
17 at 2396 (reminding the jurors to analyze the evidence "as to the  
18 particular defendant you're considering . . . without regard to  
19 the guilt or innocence of other people"); see also id. at 2397,  
20 2411, 2427.) We see no reason to believe that the jury did not  
21 follow these instructions. The fact that it found O'Connor not  
22 guilty on two of the counts against her strongly indicates that  
23 she was not unfairly prejudiced by the evidence that had been  
24 introduced only against Sacco. Indeed, the evidence as to Sacco's  
25 past conduct was hardly more inflammatory than the evidence of the

1 fact that, and of the manner in which, O'Connor herself repeatedly  
2 committed incest against and prostituted her young daughter.

3 Nor are we persuaded that O'Connor is entitled to a new  
4 trial on the ground that being tried jointly with Sacco prevented  
5 her from examining Sacco with respect to DiFiori's testimony that  
6 Sacco had admitted having sex with a 12-year-old prostitute.  
7 Sacco here chose to stand trial and not to testify in his own  
8 behalf; O'Connor has proffered no reason to believe that he would  
9 waive his Fifth Amendment privilege in order to testify at a  
10 trial of O'Connor alone. Further, O'Connor's brief on appeal is  
11 silent as to what testimony she would have hoped to elicit from  
12 Sacco if she had been able to examine him about the statement  
13 attributed to him--and it offers no basis for assuming that  
14 whatever responses she might elicit would not be entirely overcome  
15 by the evidence that O'Connor herself repeatedly caused S.O. to  
16 have sex with Sacco, that O'Connor herself sometimes participated  
17 with Sacco in the sexual abuse of S.O., and that Sacco had in his  
18 possession a used condom bearing S.O.'s DNA.

19 Finally, we find no merit in O'Connor's additional  
20 contention that the denial of her severance motions deprived her  
21 of a fair trial because of allegedly nonzealous performance by  
22 Sacco's attorney. Poor trial performance by one defendant's  
23 attorney does not cause a codefendant substantial prejudice where  
24 the jury was instructed properly, where no evidence suggested that  
25 the lawyer's behavior caused juror animus toward the codefendant,  
26 and where each defendant "received ample opportunity to present

1 his claims to the jury unobstructed by any conduct on the part of"  
2 the allegedly poor attorney. United States v. Bubar, 567 F.2d  
3 192, 205 (2d Cir.), cert. denied, 434 U.S. 872 (1977). On the  
4 record before us, we cannot conclude that Fischer's performance in  
5 representing Sacco was poor. And we see no indication that  
6 Fischer distracted or alienated jurors, or that he in any way  
7 prejudiced the defense of O'Connor, who was independently  
8 represented--and who was acquitted on two of the counts against  
9 her.

10 E. O'Connor's Evidentiary Contentions

11 O'Connor also contends that the district court erred in  
12 certain of its evidentiary rulings, principally (1) in excluding  
13 evidence that, in being interviewed by the police, she asked to be  
14 given a polygraph test, and (2) in admitting testimony by Renee  
15 Lang about a note written by S.O. The trial court's evidentiary  
16 rulings are reviewed for abuse of discretion, see, e.g., Old Chief  
17 v. United States, 519 U.S. 172, 174 n.1 (1997), and we are to  
18 disregard "[a]ny error, defect, irregularity, or variance that  
19 does not affect substantial rights," Fed. R. Crim. P. 52(a); see  
20 also, United States v. Garcia, 413 F.3d 201, 210 (2d Cir. 2005);  
21 Fed. R. Evid. 103(a). We find no basis for reversal in either  
22 ruling.

23 The first contention does not warrant extended  
24 discussion. O'Connor sought to present evidence that in a  
25 November 2007 interview with Detective Blenis she had stated that



1 she did not want to speak to him again without taking a "lie[-  
2 ]detector test"; O'Connor offered that statement to show her  
3 "state of mind." (Tr. 250-53.) The district court excluded it on  
4 the ground of relevance. We agree that O'Connor's state of mind  
5 at the time of her interview with Blenis--many months after the  
6 allegedly unlawful conduct--was not relevant.

7 O'Connor's second contention is that the court should have  
8 excluded testimony by Renee Lang that she found, while cleaning  
9 out the room in which S.O. had slept during her two-month stay  
10 with Renee in 2006, a note in S.O.'s handwriting stating, "'I hate  
11 my mother. She used me'" (Tr. 1307). Renee testified that the  
12 note itself had since been "misplaced" or "thr[own] out." (Id.  
13 at 1301.) Over O'Connor's objections on the ground that the note  
14 itself was not offered and that the statements it contained were  
15 hearsay, the court admitted the testimony as (1) the "best  
16 evidence," in light of the loss of the note, and (2) an exception  
17 to the hearsay rule as evidence of S.O.'s state of mind. We find  
18 no basis for reversal.

19 We see no error in the first part of the court's ruling.  
20 Where all originals of a writing have been lost or destroyed,  
21 other than as a result of bad faith on the part of the proponent  
22 of the evidence, the trial court may allow the introduction of  
23 secondary evidence. See, e.g., Fed. R. Evid. 1004(1); United  
24 States v. Ross, 321 F.2d 61, 70 (2d Cir.), cert. denied, 375 U.S.  
25 894 (1963). There was no showing of bad faith on the part of the  
26 government (or of Renee) in this case.

1 Nor do we see error in the rejection of O'Connor's  
2 hearsay objection, although our reasoning only partially parallels  
3 that of the district court. The district court relied on the  
4 principle that a hearsay statement is not excludable under the  
5 hearsay rule if it is

6 [a] statement of the declarant's then existing state  
7 of mind[ or] emotion, . . . but not including a  
8 statement of memory or belief to prove the fact  
9 remembered or believed,

10 Fed. R. Evid. 803(3). We agree that the portion of S.O.'s note  
11 stating that S.O. hated O'Connor--to the extent it was offered for  
12 its truth--was hearsay and was within this exception. The Rule  
13 803(3) exception did not, however, cover the portion of the note  
14 stating that O'Connor had "'used'" S.O., for that part was not a  
15 statement of S.O.'s state of mind. Nonetheless, admission of the  
16 "'She used me'" portion of the note was not error because that  
17 part was not hearsay. Rule 801(d) provides in part as follows:

18 A statement is not hearsay if . . . [t]he declarant  
19 testifies at the trial or hearing and is subject to  
20 cross-examination concerning the statement, and the  
21 statement is . . . consistent with the declarant's  
22 testimony and is offered to rebut an express or  
23 implied charge against the declarant of recent  
24 fabrication . . . .

25 Fed. R. Evid. 801(d)(1)(B). See, e.g., United States v. Gonzalez,  
26 700 F.2d 196, 202 (5th Cir. 1983) (ruling that it was error for  
27 the trial court to exclude the defendant's out-of-court statement,  
28 offered by the defendant under Rule 801(d)(1)(B) "in anticipation  
29 of the government's inevitable attack on [the defendant's] own  
30 testimony"); see also id. at 202-03 (finding the error harmless).

1           Here, O'Connor and Sacco had begun their attacks on the  
2 credibility of S.O.'s expected testimony in their opening  
3 statements and accused her of belatedly fashioning the allegations  
4 of sexual abuse by O'Connor. For example, O'Connor's attorney in  
5 her opening statement argued that during more than a year of  
6 complaining about Sacco, S.O. made no allegations of sexual abuse  
7 by O'Connor. She argued that it was not until "October 25[, 2007,  
8 that S.O.] starts saying I have more to tell. I have more to tell  
9 about my mother, it's going to get her in trouble" (Tr. 120  
10 (emphases added)), and not until October 29, 2007, that S.O. says  
11 O'Connor "was having sex with me. She was taking pictures. . . .  
12 It's at this point in time where she brings up this notion that  
13 her mom was taking photographs of her while she's having sex with  
14 [Sacco]" (*id.* at 121 (emphasis added)); and that on November 30,  
15 2007, S.O. is "claiming now . . . I have more to tell about my  
16 mom. . . . And during that interview [S.O. says George Lang]  
17 sexually abused me. My mother sexually abused me" (*id.* at 122-23  
18 (emphases added)).

19           Plainly, defendants contended that S.O.'s trial testimony  
20 about O'Connor represented fabrications originating in late 2007,  
21 and they argued that her statements to social workers and/or  
22 Detective Blenis from October 2006 to late October 2007, which  
23 omitted any charge of incest or sex trafficking by O'Connor, were  
24 the more accurate and truthful. Equally plainly, a statement made  
25 by S.O. not later than mid-October 2006 that O'Connor had "'used'"  
26 her was consistent with S.O.'s trial testimony that George Lang

1 had helped O'Connor to pay the rent and that O'Connor had required  
2 S.O. to engage in sexual activities with Lang in 2004. Although  
3 Renee's testimony about the note was admitted before S.O. was  
4 called to testify, it was clear that S.O. was to be--and was--the  
5 principal witness at trial and could be cross-examined by the  
6 defense about the statement in her note. Accordingly, in light of  
7 Rule 801(d)(1)(B), we see no error in the trial court's admission  
8 of Renee's testimony that S.O., in a note written in 2006, stated  
9 that O'Connor "'used'" her.

10

#### CONCLUSION

11 We have considered all of defendants' contentions on these  
12 appeals and have found them to be without merit. The judgments of  
13 conviction are affirmed.