

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 -----X  
4 UNITED STATES OF AMERICA,

5 : 04-CR-860  
6 : (SJF)  
7 : United States Courthouse  
8 : Central Islip, New York

9 MICHAEL McGOWAN,  
10 : July 20, 2006  
11 Defendant.

12 -----X

13 TRANSCRIPT OF SENTENCING  
14 BEFORE THE HONORABLE SANDRA J. FEUERSTEIN  
15 UNITED STATES DISTRICT COURT JUDGE

16 APPEARANCES:

17 For the Government: ROSLYNN R. MAUSKOPF  
18 UNITED STATES ATTORNEY  
19 BY: ALLEN L. BODE, AUSA  
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Proceedings recorded by computerized stenography.  
Transcript produced by CAT.

1 THE CLERK: United States against Michael  
2 McGowan.

3 MR. BODE: Allen Bode for the government.

4 MR. WEISS: Joel R. Weiss for the defendant.

5 MR. BODE: With the Court's permission, my  
6 intern is here.

7 MS. TESTA: Andrea Testa from Probation.

8 THE COURT: As an initial matter I accepted the  
9 guilty plea offered before Judge Wexler.

10 By order dated July 14, defense counsel and the  
11 government were notified that I am considering a sentence  
12 outside the guideline range.

13 Counsel, Mr. Weiss, is your client prepared to  
14 proceed with sentencing at this time?

15 MR. WEISS: Yes, we are, your Honor.

16 THE COURT: Mr. McGowan, you read the  
17 presentence report?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Have you gone over the report with  
20 Mr. Weiss?

21 THE DEFENDANT: Yes, I have, your Honor.

22 THE COURT: Is there any dispute over the  
23 guideline calculations which have been set forth in the  
24 Presentence Report and its addendum?

25 MR. WEISS: No, your Honor. We have written

1 specifically to the Court we do not dispute the guideline  
2 calculation and I reaffirm we do not dispute it and we do  
3 not controvert the initial report and addendums  
4 specifically and explicitly.

5 THE COURT: I presume you have no objections  
6 either?

7 MR. BODE: I have no objections, your Honor.

8 THE COURT: Then is it agreed that the total  
9 offense level is 29 with a criminal history category of I?

10 MR. WEISS: Your Honor, I don't have the report.  
11 What I know is that the language there I understood to be  
12 is 87 to 108 months. If that correlates, then we do not  
13 dispute that's the range and that's the score.

14 THE COURT: You agree as well, Mr. Bode?

15 MR. BODE: Yes, Judge. And specifically on page  
16 1 of the third addendum it sets that forth, I agree.

17 THE COURT: Anything else in dispute?

18 MR. WEISS: There are things I want to say but  
19 nothing in dispute.

20 THE COURT: Of course.

21 Mr. Bode, anything in dispute?

22 MR. BODE: No, Judge.

23 THE COURT: Before we get to any statement  
24 regarding the sentencing, I believe that we should have  
25 the hearing on anything that might be taken into

1 consideration for the Fatico hearing that I advised you of  
2 in the order.

3 MR. BODE: Yes, Judge. The government is  
4 prepared -- I will let Mr. Weiss address this as well but  
5 the government is prepared to --

6 THE COURT: I will let Mr. Weiss.

7 MR. BODE: Thank you, Judge. I'm sorry. The  
8 government is prepared to play the tapes. There are  
9 transcripts attached to the government's letter. I don't  
10 have the agent who prepared them, he is in Texas, I  
11 couldn't get him on this notice, however, I can play them  
12 myself.

13 MR. WEISS: Your Honor, my position is I'm  
14 candidly a little puzzled and I don't downplay that the  
15 Court can order whatever hearing the Court wants to order  
16 but your Honor is in a position wherein we do not dispute  
17 the second addendum, the third addendum. We have not  
18 answered or disputed Mr. Bode's submission of the  
19 transcripts.

20 Your Honor asked last week whether or not we  
21 dispute the authenticity of the tapes. They are Mr.  
22 McGowan and have not been altered. We do not dispute the  
23 authenticity and controvert the addendums or the tape  
24 which is why we have acquiesced in the guideline score  
25 which takes full account of a five-point upward adjustment

1 for a pattern of sexual conduct.

2 And parenthetically, the tapes and affidavit  
3 accompanying them that is before the Court and part of the  
4 record minimally make out that adjustment, that is, that  
5 adjustment requires two sexual acts. The affidavit makes  
6 out I believe three. But we are not contesting the  
7 adjustment.

8 In that light, if what your Honor means by a  
9 Fatico hearing, we discussed and/or argued where the Court  
10 should go, whether the Court should upwardly depart for  
11 what reason or not, I would like to do that. If your  
12 Honor is seeking a hearing wherein we need to play tapes  
13 or admit transcripts, I'm not objecting to the transcript  
14 before the Court and part of the court file.

15 THE COURT: I understand. I feel, however, it  
16 is my obligation to establish that these tapes are  
17 accurate, that they are authentic when they were created  
18 because they are going to be a part of the sentence that I  
19 impose and, therefore, I think that is my obligation. So  
20 while I appreciate what you have stated, I think that we  
21 have to go forward so I can make an assessment.

22 MR. WEISS: In going forward, let me be clear we  
23 are stipulating to their authenticity, origin and my  
24 client is the speaker.

25 THE COURT: And all the statements there within?

1 MR. WEISS: Yes.

2 THE COURT: I appreciate that but I think it's  
3 something that I have to consider because a sentence is a  
4 very important thing and everything that goes into it must  
5 be carefully considered.

6 MR. BODE: Let me say, Judge, for the record,  
7 the two transcripts attached, since I don't have an agent  
8 here, he is in Texas, I don't have him to testify, they  
9 were made at the Queens treatment facility, Queens private  
10 facility, which is in the recording at the beginning of  
11 the tapes. I don't have the exact dates, however, I can  
12 say based upon the agent's investigation of the defendants  
13 when he went into that facility --

14 THE COURT: Excuse me. If there are going to be  
15 any discussions from anyone in the back of the courtroom,  
16 please take it outside, the acoustics in this room are  
17 terrible.

18 MR. BODE: So what I was saying, Judge, I can  
19 state that these two tapes were made after the defendant's  
20 plea in the Queens facility, however, I don't have the  
21 exact dates they were made. Should that be required, I  
22 would have to bring the agent in for that. But since the  
23 defense isn't disputing the accuracy of the tapes...

24 THE COURT: Do you know when the tapes were  
25 made?

1 MR. WEISS: I do not. I was confronted with  
2 them post plea and pre sentence.

3 THE COURT: That's a pretty big span.

4 The plea was taken when, Mr. Bode?

5 MR. BODE: July 11 of last year, Judge. My  
6 information from the agent, the defendant was transferred  
7 into that Queens facility after that date, after the plea.

8 There are many, many tapes but there were two  
9 that the government found persuasive to the point where we  
10 needed to have them transcribed and thought they were  
11 important for sentencing. There were a number of other  
12 tapes and they had tapes from the Nassau County facility.

13 THE COURT: We are talking about these tapes.  
14 Were they made before December 31 of '05?

15 MR. BODE: I can't say for certain. Prior to  
16 the day of the search in the Queens facility.

17 Hold on one minute.

18 THE COURT: I will hold.

19 (Pause)

20 MR. BODE: The defendant was transferred into  
21 that Queens facility on August 5, 2005 so a little less  
22 than a month after his guilty plea. I subpoenaed these  
23 tapes from the Queens facility on February 22.

24 THE COURT: Of '06?

25 MR. BODE: '06. I was notified on February 15,

1 '06 this defendant sent a letter to the boy in Texas and  
2 within that week we got the subpoena to the jail for jail  
3 calls.

4 THE COURT: So they followed the letters? The  
5 tapes followed the letters?

6 MR. BODE: No, the tapes followed the discovery  
7 of the letters. Once we discovered the letters -- in  
8 short, the defendant was speaking with the boy and he sent  
9 letters to the boy. In fact, on the tapes he refers to  
10 sending letters to the boy. The boy -- either the boy or  
11 the boy came forward for the mother or the mother  
12 discovered the letter. The mother took the boy and  
13 letters to the police in Corpus Christi and that's how it  
14 came to light.

15 THE COURT: I am aware of that. So would you  
16 both agree than these calls took place between August of  
17 '05 and February of '06?

18 MR. WEISS: Yes, your Honor.

19 THE COURT: Go ahead, Mr. Bode.

20 MR. BODE: So that being said, Judge, that's the  
21 best I can give you without getting the agent from Texas  
22 regarding the time frame. In any event, it's post plea.

23 That being said, I will play the tapes for your  
24 Honor.

25 MR. WEISS: May I have a moment to speak with

1 Mr. Bode?

2 THE COURT: Absolutely.

3 (Pause)

4 MR. BODE: Judge, I leave it up to your Honor's  
5 determination.

6 THE COURT: Thank you.

7 MR. BODE: There is media here. I have spoken  
8 with the gentleman from the media regarding -- he has  
9 indicated he is not going to, of course, put any names of  
10 boys mentioned in the tapes into the record but I think it  
11 might be good practice for us, your Honor, to play these  
12 in camera for your Honor as opposed to the general public  
13 since this is a boy being --

14 THE COURT: Minor. Absolutely.

15 MR. WEISS: I would join in that request.

16 THE COURT: Two, perhaps three, am I correct,  
17 involved?

18 MR. BODE: At least two boys speaking.

19 MR. WEISS: Speaking, not involved sexually.

20 THE COURT: There is reference to a third.

21 MR. BODE: Reference to three different boys.

22 MR. WEISS: And their sexual conduct together.

23 MR. BODE: Maybe I can bring the tapes into the  
24 jury room.

25 THE COURT: Or we can clear the courtroom.

1 MR. BODE: If we clear the courtroom, there is a  
2 danger of reversible error. I have to get permission from  
3 the Justice Department.

4 THE COURT: We don't want that.

5 MR. WEISS: We consent to that and join in  
6 requesting that.

7 I assume the defendant is coming along; he needs  
8 to.

9 (Whereupon, the following occurred in the jury  
10 room.)

11 MR. BODE: I'm starting with the transcript  
12 which starts -- labeled page 1 in the government -- of the  
13 two transcripts here.

14 THE COURT: Mr. Weiss, you and your client may  
15 be seated. Everybody may be seated. I actually prefer to  
16 stand but you can sit.

17 (Tape played)

18 (Tape stopped)

19 MR. BODE: For the record, I don't have a way of  
20 skipping to specific portions, I would have to find it so  
21 I will play it from the beginning so it can be followed by  
22 counsel.

23 (Tape played)

24 (Tape stopped)

25 MR. BODE: I'm going to stop and skip to page 6

1 in the transcript.

2 (Tape played)

3 (Tape stopped)

4 MR. BODE: That was page 4. Let me skip  
5 further.

6 (Tape played)

7 (Tape stopped)

8 MR. BODE: I'm going to try to skip forward, try  
9 to skip to 7 if I can.

10 (Tape played)

11 (Tape stopped)

12 MR. BODE: It's still page 6. Let's go further.

13 (Tape played)

14 (Tape stopped)

15 MR. BODE: I'm going to try to skip to page 9.

16 We are on page 8.

17 (Tape played)

18 (Tape stopped)

19 MR. BODE: I'm going to try to skip two pages to  
20 page 11.

21 (Tape played)

22 (Tape stopped)

23 MR. BODE: That's page 10. I will try to go one  
24 more.

25 (Tape played)

1 (Tape stopped)

2 THE COURT: Mr. Bode, I think we are almost at  
3 the end?

4 MR. BODE: We are on page 12 of the first  
5 transcript. The first transcript ends on page 18.

6 I'm going to try to skip to page 14 of this  
7 first transcript.

8 I'm going to skip to page 15 or 16.

9 (Tape played)

10 (Tape stopped)

11 MR. BODE: With the Court's permission, I will  
12 skip to the next tape now. I'm going to skip to page 31  
13 on the top right. For the record, it's page 11 we are on.

14 THE COURT: Of the second transcript.

15 MR. BODE: Of the second transcript. It's  
16 numbered page 29.

17 (Tape played)

18 (Tape stopped)

19 THE COURT: Mr. Bode, please stop for a second.  
20 Unless there is a particular point that you --  
21 something in particular you want me to hear.

22 MR. BODE: There was, Judge, on page 11 in the  
23 transcript.

24 THE COURT: That's where we are now.

25 MR. BODE: I will skip the next page.

1 (Tape played)

2 (Tape stopped)

3 MR. BODE: Now I'm going to skip over page 12 to  
4 13 and it's also numbered page 31 on the top right corner.

5 (Tape played)

6 (Tape stopped)

7 MR. BODE: Let me skip a little further. I will  
8 try and skip to the bottom of page 14 which is the top  
9 right on my page 32.

10 (Tape played)

11 (Tape stopped)

12 THE COURT: Mr. Bode, I think that's adequate.

13 (Whereupon, the following occurred in open  
14 court.)

15 THE CLERK: Second call McGowan. Back on the  
16 record in open court.

17 THE COURT: Based upon the evidentiary hearing  
18 which was held in camera this morning, I find that the  
19 government has proven by a preponderance of the evidence  
20 that the defendant while incarcerated after his plea of  
21 guilty made phone calls to a minor child in Texas and that  
22 these phone calls were explicit and sexual in nature. And  
23 as well, that the government has proven by a preponderance  
24 of the evidence that the defendant engaged in the conduct  
25 outlined in addendum two which was referred to in those

1 telephone calls which we heard this morning.

2 Now, all of that being said, I will first hear  
3 from defense counsel on the issue of sentence, then the  
4 government and Mr. McGowan will have an opportunity to  
5 make a statement.

6 MR. WEISS: Thank you, your Honor.

7 There are a few different things I would like to  
8 address. First, I would like to address your Honor's  
9 order in regard to what amounts to essentially a sua  
10 sponte upward departure consideration. And the short  
11 order relates to two different items for an upward  
12 departure, the second addendum conduct and third addendum  
13 conduct.

14 Starting with the second addendum conduct, I  
15 would urge upon your Honor that the federal sentencing  
16 guidelines take full account of that contact, we haven't  
17 controverted it. The Court made the ruling.  
18 Specifically, the guidelines have a five-point upward  
19 adjustment for sexual conduct such is satisfied by two  
20 sexual acts not related to the underlying crime, the  
21 allegations of three specific sexual acts. There is a  
22 five-point upward adjustment for that. What that has done  
23 in substance is taken the top of the sentencing range and  
24 changed it from 57 months to 108 months. That is taking  
25 it from a hair less than five years to nine years and I

1 suggest to your Honor not defending that kind of conduct,  
2 no one could but what I'm suggesting to your Honor is the  
3 appropriate measure of the conduct.

4 And the Sentencing Commission and the Courts  
5 have been utterly clear that an upward adjustment is  
6 intended for conduct not taken into account appropriately  
7 by the guidelines and however angry or revolted one might  
8 be appropriately, however one might want to factor it in,  
9 the guidelines take an account of that conduct.

10 Now, putting that aside, there is another point  
11 that I made briefly --

12 THE COURT: We are in agreement the guidelines  
13 are advisory only?

14 MR. WEISS: We are in agreement the guidelines  
15 are advisory. But I suggest the guidelines have an  
16 important place in the schemata of sentencing and you  
17 don't need me to tell you that the Supreme Court said it  
18 and the Second Circuit court says it and the guidelines  
19 say it but in this case what is important is the  
20 following: A civilized, enlightened individual, you, me  
21 or Mr. Bode or anyone in this courtroom, could be angered  
22 and revolted by this kind of conduct which is before the  
23 Court, all of the conduct. The underlying crime, the  
24 conduct being considered for upward adjustment is the  
25 conduct being considered for upward departures and I think

1 that the role the guidelines play in situations like this  
2 is to give us a measure of what has been considered to be  
3 an appropriate upward range for this kind of thing so as  
4 to kind of fuel a rationality in a situation where we  
5 could have an visceral reaction.

6 THE COURT: Speak for yourself.

7 MR. WEISS: I am. I think I'm speaking for the  
8 human condition. Let's say I'm speaking for myself.

9 I think the guidelines play an important and  
10 appropriate role in measuring something rationally that  
11 might impact us in other ways as humans.

12 The third addendum is making contact post plea.  
13 Your Honor has taken the position that is an appropriate  
14 subject for the consideration of an upward departure. I  
15 can't disagree. You're obviously entitle to do that.

16 I will argue in a moment there are counter  
17 veiling considerations that balance the scales here. But  
18 I think your Honor has taken a course by cutting your  
19 order by this hearing wherein you are suggesting very  
20 strongly that you are giving serious consideration at  
21 least to an upward departure and I understand that and  
22 want to address it.

23 One is what might be an appropriate measure  
24 upward and the other is what might be some counter veiling  
25 considerations and here are the things I want to impress

1 upon the Court. First of all, the contact by telephone  
2 was wrongful conduct inarguable by my client and he  
3 doesn't argue otherwise, inarguable by me.

4 Having said that, the contacts by words alone,  
5 my client was incarcerated, he was going to be  
6 incarcerated for a long time, he is going to be  
7 incarcerated for a long time. It was the kind of contact  
8 that could be shut off readily. I'm not arguing about the  
9 victim, it's not in person in your face immediate conduct  
10 or conduct that could occur in the near future under any  
11 circumstances.

12 Second, when we came here last week I addressed  
13 your Honor on Mr. McGowan's letter and my letter. Michael  
14 McGowan admits he is sick and "sick" is an easy label,  
15 sounds like somebody should get treated. He will get  
16 punished and very substantially. But what I want to  
17 suggest is and I think Mr. Bode knows this from his  
18 experience at this point in handling sex crimes, there  
19 seem to be two categories of people falling into this  
20 rubric, one is members of NAMBLA who I prosecuted.

21 THE COURT: Members of?

22 MR. WEISS: North American Man Boy Lovers  
23 Association, who take the philosophical position the  
24 conduct isn't wrong and never admit a wrong, I'm sick, mea  
25 culpa. Mr. McGowan may be very late but at least now

18  
1 takes that posture, what he has done is wrong, he is sick  
2 and asking your Honor when your Honor sentences him to  
3 designate him to a facility that treats sex offenders and  
4 will ask for FMC Devons in Massachusetts and Butner in  
5 North Carolina which treats sex offenders. But he is  
6 taking the position I have a serious problem, I'm sick, I  
7 have done something very wrong, I admit it and want  
8 treatment. I think that should be taken into account.

9 In terms of his dangerousness, as a general  
10 category under 3553(a), there are two hedges against that.  
11 One is a substantial sentence which your Honor is  
12 certainly going to mete out and the guidelines allow for  
13 up to nine years without a departure. Number 2, his  
14 request for prison treatment. And I'm recommending to  
15 your Honor you recommend that to the Bureau of Prisons.  
16 Number 3 is that supervised release can be extended for  
17 many years up to life as a hammer over an individual's  
18 head saying you better be rehabilitated because you can go  
19 back for a long time.

20 In terms of dealing with dangerousness, there  
21 are those hedges. 3553(a) dictates to a Court that a  
22 Court should mete out the shortest imprisonment sentence  
23 that it can to address the entire situation and I suggest  
24 to your Honor the guidelines provide enough.

25 Here are what the counter veiling considerations

1 are, I have put them in my letter and like to reiterate  
2 them because this is my chance to speak.

3 First of all, the things I have already said --

4 THE COURT: Excuse me. Would you like water?

5 MR. WEISS: No. That's kind of you. If you  
6 can't understand me, tell me.

7 The first aspect of sentencing, treatment in  
8 sentencing, long supervised release, conditions and  
9 undoubtedly the category as a sex offender. The second is  
10 I have argued to your Honor it's easy to pass it by  
11 particularly if we are revolted by this kind of crime but  
12 if we are revolted or not, the prison population is a  
13 pretty low common denominator of society and doesn't act  
14 generally in a noble, principled, civilized manner and Mr.  
15 McGowan lives with that. He has the double stigma in the  
16 federal system. And told me the results from pretty much  
17 day one, not something he is making up for a letter at the  
18 time of sentencing, he told me about it week by week and  
19 he has put it into his letter.

20 He has generally been in solitary for 23 hours a  
21 day. He has no contact with family during visits. He is  
22 generally denied going outside. There are relentless  
23 insults and slanders from other inmates as well as  
24 officers, numerous threats against his well-being, life  
25 and son's and wife's lives, threats to rape and murder and

1 commit drive-by shootings against his family, spray  
2 through the food slot with unknown liquids, various items  
3 thrown at me in my cell through my food slot.

4 THE COURT: Is it his son?

5 MR. WEISS: Stepson.

6 Inmates paraded by myself by officers parading  
7 by my cell and spitting at me, et cetera. He has informed  
8 me of these kinds of things throughout his incarceration.

9 When a Court gets a sentencing letter from a  
10 defendant looking for a result, an interested party if  
11 ever there was one, it's a temptation. Is this letter  
12 fiction or partly fiction? We know it isn't because as a  
13 matter of common sense, if you put a former federal law  
14 enforcement officer on child sex charges into a prison  
15 that is what happens.

16 What is my point? My point isn't your Honor  
17 should cry for him. If your Honor is looking for  
18 substantial punishment, the quality of his incarceration  
19 is abysmal and the quality of his incarceration is below  
20 what incarceration is for the average criminal defendant.  
21 I suggest to you were that this can be put in the scale  
22 and should be a hedge against the impulse to impose an  
23 off-the-chart sentence, every day involves threats.

24 So I suggest to your Honor based on all of the  
25 above that the sentencing range of 87 to 108 months is an

1 adequate range to impose a very significant punishment  
2 against this individual and long-term supervised release  
3 is enough of a hedge in terms of dangerousness and I thank  
4 you.

5 THE COURT: Thank you, Mr. Weiss.

6 Mr. Bode.

7 MR. BODE: Yes, your Honor.

8 I would note first at the outset in light of the  
9 defendant's conduct in jail and the allegation which is  
10 undisputed by the child who came forward regarding the  
11 molestation incidents previously, the government is not  
12 bound by the plea agreement and that's why we agreed on  
13 the guidelines. The government refused to give the  
14 defendant that third point for acceptance.

15 And also I would point out on the tape when the  
16 defendant talks about just how people are out to get him,  
17 it's inconsistent with his accepting responsibility.

18 That being said, I will not request a specific  
19 sentence, however, I would like to discuss some of the  
20 3553(a) factors I feel are important for the Court to  
21 consider.

22 Based upon I think a fair reading of the letter  
23 of this boy who was molested by Mr. McGowan and the tapes  
24 which we all listened to, the defendant is a predatory  
25 child molester. Reading through the victim's statement as

1 set forth in the PSR, the defendant used common grooming  
2 techniques to approach this boy. He targeted this boy  
3 under the age of 12 which is consistent with the child  
4 pornography found in his computer in terms of his sexual  
5 preference, a boy with a single mother.

6 The defendant, as the boy states in the bottom  
7 of the second page or first page of the addendum, the  
8 defendant took his mother out a few times. I would submit  
9 based upon the child pornography recovered, defendant is  
10 not interested in females. The only interest he had in  
11 the boy's mother was to get to this boy.

12 His child pornography wasn't generic, it was  
13 little boys. There is a classic start to the abuse where  
14 the defendant barges in on the boy while he is changing to  
15 go swimming. It's a classic predator technique. I will  
16 speak in a moment about the defendant's law enforcement  
17 history and counsel in his previous letter had stated that  
18 in fact that was a counter veiling factor. I would say  
19 why your Honor shouldn't punish the defendant more severe  
20 or -- the letter asked for a downward departure. Since he  
21 hasn't addressed that now, I won't address it.

22 He used the fact he was an Air Marshal to  
23 further his abuse of this boy. He stated at one of the  
24 incidents of abuse the defendant told him he was at the  
25 hotel because he was an Air Marshal. Now, that was the

1 second incident the boy recounts. So I will speak about  
2 that in a moment but another classic thing he did is using  
3 authority which is a classic predator technique. As the  
4 boy recounts in the letter on page 2 of the second  
5 addendum, the defendant showed him pictures on floppy disk  
6 of child pornography and took pictures of the boy while he  
7 was naked. So he is using child pornography as a lure  
8 which is another classic predator technique.

9 And I submit all those things should be taken  
10 into account. This wasn't a one-time thing, it was a  
11 pattern as to this boy.

12 And although as counsel notes there is a  
13 five-point guideline upward adjustment, the guidelines  
14 don't take into account the fact that the defendant used  
15 his position as an Air Marshal to try and do this. The  
16 guidelines don't take into account the fact he used child  
17 pornography to lure the boy. And the guidelines don't  
18 take into account to really compound the abuse of this  
19 boy. While he is in jail awaiting sentencing, after he  
20 has supposedly accepted responsibility for his actions, he  
21 continues to victimize this boy by the sexually explicit  
22 letters and phone calls.

23 When we listened to the calls this morning, you  
24 can hear the uncomfortable pauses from this boy and how  
25 the defendant is trying to drag details out from this boy.

1 The defendant in the transcript in these calls -- the boy  
2 is now 14 -- he is discussing oral sex with the boy,  
3 asking this boy to take pictures of him with another boy  
4 and he says: You know which kind of pictures I mean; I  
5 think we all know what he meant by that.

6 He acknowledges his abuse with the boy's penis  
7 size and: You probably enjoyed being with me more than  
8 the other boy. That post plea conduct is important to the  
9 tactics of this defendant and not taken into account in  
10 the guidelines. And even more outrageously, the  
11 defendant -- along with the letter he sends to the boy  
12 which is recounted in the addendum -- he sends a letter to  
13 the boy's mother at the same time asking for a character  
14 reference from her at the same time he is talking sexually  
15 explicitly with her son. It's outrageous behavior on his  
16 part.

17 Regarding the defendant's claims of his prison  
18 treatment, I note two things. It's defendant's  
19 unsubstantiated statements -- actually two other things.  
20 One, the defendant has requested and it's my understanding  
21 from the Bureau of Prisons he will receive treatment in  
22 the Bureau of Prisons so he will be in a population of  
23 inmates like himself. And regarding the defendant's law  
24 enforcement history, I submit that that is an aggravating  
25 factor which calls for a more serious sentence than a

1 shorter sentence. He used his position to try and get him  
2 in close to this boy as a predator would. And he also has  
3 noted in the I believe first addendum, he was also  
4 creating false CIA and FBI identifications.

5 I would also note the Air Marshals had already  
6 begun proceedings to fire him before this arrest. He was  
7 not a model law enforcement agent. Although the New  
8 Jersey gun charge, the road rage incident, has not been  
9 adjudicated and is not proper for you to consider in the  
10 criminal history, I think it is in terms of his law  
11 enforcement history. The Air Marshals had already started  
12 actions to fire him because of that incident as well as  
13 other factors.

14 When the postal inspectors initially went in to  
15 the defendant's residence, he was -- when he was  
16 committing the crime, he was planning his defense and  
17 using law enforcement; he had a folder set up for  
18 operation predator; operation predator being a legitimate  
19 operation targeting child predators and the number for the  
20 United States Attorney's office in Denver where the  
21 undercover was working out of. He was trying to use the  
22 fact that he was an Air Marshal and supposedly conducting  
23 an investigation on his own to try and defend himself;  
24 that defense obviously didn't work.

25 He had child pornography on his computer before

1 the undercover sent him anything. But the fact that he  
2 was already using his position to try and defend himself  
3 in case this was an undercover agent I think shows how his  
4 law enforcement history is an aggravating factor and he  
5 should be held to a higher degree not lesser because of  
6 his law enforcement history.

7 Next, Judge, as to protection of the public  
8 under 3553(a)(2), I won't state what sentence I think your  
9 Honor should impose. I will, however, ask the that public  
10 be protected by a substantial sentence. The fact he  
11 couldn't control himself while in jail awaiting sentence  
12 shows his lack of control and recklessness, that's makes  
13 him dangerous out on the street.

14 I would recommend that any period of  
15 incarceration be followed by lifetime supervised release,  
16 I think it's appropriate and pursuant to the guidelines  
17 recommend a life term of supervised release under  
18 5(d)(1).2(c) and the Second Circuit recently upheld  
19 lifetime supervised release in cases where there is an  
20 abuse history.

21 As conditions of that lifetime supervised  
22 release, the government would request no unsupervised  
23 contact with minors, sex offender registration as a  
24 condition of supervised release and monitoring of the  
25 defendant's computer and internet use by the Probation

1 Department and otherwise just the standard conditions of  
2 probation, search conditions.

3 Thank you.

4 THE COURT: Mr. McGowan, do you wish to address  
5 the Court prior to your sentence?

6 THE DEFENDANT: Yes, your Honor.

7 I understand my actions have caused a lot of the  
8 harm and pain. I never intended for any harm to come from  
9 my actions.

10 THE COURT: Beg your pardon?

11 THE DEFENDANT: I never intended to harm anyone.  
12 I apologize profusely, mortified, embarrassed. And I'm  
13 really very remorseful.

14 I could never -- I will never get over it and I  
15 understand it's probably going to be the same for  
16 everybody else involved.

17 Your Honor, I have had a very rough time,  
18 excruciating time, over the last two years during my  
19 incarceration. I ask, beg, for the lightest sentence you  
20 can give me, your Honor.

21 I want to get help. I want to change things. I  
22 want things -- I'm sure -- I'm certain at this point  
23 nothing like this will ever happen again in my life. I  
24 want to get help to make sure it doesn't, to make  
25 everybody else sure it won't as well.

1 But your Honor, I beg of you for my family more  
2 for me the lightest sentence you can give me. I'm willing  
3 to do anything and abide by whatever regulations you  
4 impose on me; more than willing.

5 Once again, I'm very, very sorry for everything  
6 that has happened. I understand now that my actions have  
7 caused harm and pain. I don't know what else to say  
8 besides I am very sorry.

9 THE COURT: As we have noted the guidelines  
10 calculation is 87 to 108 months. And in light of the  
11 Booker decision and recent Second Circuit case in United  
12 States v. Saleofski (ph), although I am required to  
13 consult and I certainly have consulted the guidelines,  
14 they are only advisory.

15 I am required as both counsel have indicated to  
16 consult with Section 3553(a) in fashioning the sentence.  
17 And in light of the considerations which are listed there,  
18 I find a non-guideline sentence to be appropriate in this  
19 case.

20 The reprehensible crimes which you have  
21 committed warrant, I believe, a message which will send a  
22 message of deterrence to others which is also one of the  
23 considerations in 3553 as well as the deterrence of any  
24 further conduct from you. All indications are that you  
25 are a serious threat to any community, the children of any

1 community to which you would be released.

2 Taking all of the things that were discussed  
3 this morning in camera and all of the statements that were  
4 made this morning, considering the likelihood of  
5 rehabilitation, deterrence, punishment, all the things in  
6 3553 and particularly the protection of the community, I  
7 find that a sentence which is substantially higher than  
8 that outlined in the guidelines is appropriate.

9 Therefore Mr. McGowan, I sentence you to the  
10 custody of the Attorney General for a period of 240  
11 months, the maximum provided by the statute to which you  
12 have pleaded guilty to be followed by lifetime supervised  
13 release, subject to the following special conditions: An  
14 order of forfeiture as specified in the indictment and  
15 plea agreement, compliance with the forfeiture order,  
16 participation in a mental health treatment program which  
17 may include treatment for sexual disorders with a  
18 treatment provider selected by the Probation Department.  
19 You shall contribute to the cost of any services rendered  
20 by a co-payment as approved by the Probation Department.

21 And as part of a treatment program for sexual  
22 disorders, you shall participate in a polygraph  
23 examination or examinations to obtain any information  
24 necessary for risk management and correctional treatment.

25 You are not to use a computer to access

1 pornographic web sites including web sites depicting  
2 images of nude adults or minors or communicate with any  
3 individual or group which promotes the sexual abuse of  
4 children.

5           You should cooperate with the United States  
6 Probation Department monitoring and compliance with this  
7 condition and cooperation shall include but not be limited  
8 to identifying any computers to which you may have access,  
9 allowing the installation of monitoring software and  
10 permitting random inspections of computer hard drives and  
11 related computer peripherals such as disks or CDs and  
12 contribute to the cost of that as well. You are not to  
13 view, access, possess and or download any images of nude  
14 minors and this includes but is not limited to nudest web  
15 sites.

16           You shall participate in substance abuse  
17 treatment with any provider selected by Probation and it  
18 may include inpatient and or outpatient treatment. You  
19 shall abstain from the use of any illegal substance and or  
20 alcohol and contribute again to the cost of any services  
21 by a co-payment or full payment to be determined by the  
22 Probation Department based upon your ability to pay and  
23 the availability of third-party co-payment.

24           There is a \$100 special assessment. And you are  
25 not permitted to possess any type of a firearm.

1 MR. BODE: If I might, I would also ask as part  
2 of supervised release, no unsupervised contact with  
3 minors. I would ask for a search condition by the  
4 Probation Department to allow for the monitoring and  
5 search of the defendant's computer equipment to ensure the  
6 pornography conditions you indicated.

7 THE COURT: I believe I outlined that in the  
8 conditions.

9 MR. BODE: I apologize, your Honor. Probation  
10 agrees you did do that. What I'm asking, the search  
11 condition on his car and residence so they be able to look  
12 in his car and residence to find any computer equipment or  
13 things such as that, anything prohibited.

14 MR. WEISS: We do not object.

15 THE COURT: That will be a special condition as  
16 well.

17 MR. WEISS: We have an additional request.

18 MR. BODE: Your Honor needs to rule on my  
19 request for no unsupervised contact with minors.

20 THE COURT: Do you wish to address that?

21 MR. WEISS: Your Honor, he said the words  
22 outside my own family. He has a stepson 15 or 16. Were  
23 he to visit them in a prison setting --

24 MR. BODE: That would be supervised. I'm  
25 talking about supervised release after the sentence.

1 THE COURT: Why not make it specific that  
2 supervision by a parent of any minor, no contact with any  
3 minor.

4 MR. WEISS: My client asks that you recommend he  
5 be designated to FMC Devons, a medical/psychiatric  
6 treatment facility in the prison system that treats sex  
7 offenders.

8 THE COURT: Do you wish to address that?

9 MR. BODE: I know there are other BOP facilities  
10 as well, specifically FMC Butner. I agree with the  
11 recommendation that he receive that treatment. I leave it  
12 up to the BOP where specifically that would be. I thought  
13 Devons was for females, I may be incorrect.

14 THE COURT: In any event, I leave it to the  
15 judgment of the Bureau of Prisons as to where to  
16 incarcerate and the treatment that will be appropriate.  
17 Any registrations that have to take place upon his release  
18 are to comply with state laws regarding registration of  
19 sex offenders, must be complied with as a condition of the  
20 release.

21 Anything further?

22 MR. WEISS: No. Thank you.

23 MR. BODE: No, your Honor. Thank you.

24 THE COURT: You have your right to appeal, Mr.  
25 Weiss, the sentence.

1 MR. BODE: I wanted to make sure Mr. Weiss would  
2 speak with the defendant regarding that today and should  
3 the defendant wish to file a notice of appeal, Mr. Weiss  
4 would take care of that.

5 MR. WEISS: We have spoken about it among other  
6 things. The defendant actually has a pro se notice of  
7 appeal form in the event that he decides to go that route  
8 on his own unrelated to me and the Second Circuit will  
9 deal with me as they decide to.

10 MR. BODE: The government moves to dismiss the  
11 open counts, your Honor.

12 THE COURT: I presume you join in that?

13 MR. WEISS: Of course.

14 THE COURT: That's granted.

15 MR. WEISS: May I have a moment?

16 THE COURT: Of course.

17 (Pause)

18 MR. WEISS: Thank you, your Honor.

19 (The matter was concluded.)  
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