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To be argued by ALLEN L. BODE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 06-4864-cr

UNITED STATES OF AMERICA,
Appellee,
- against -
MICHAEL McGOWAN,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES

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PRELIMINARY STATEMENT

Michael J. McGowan appeals from an August 19, 2006 judgment of the United States District Court for the Eastern District of New York (Feuerstein, J.), convicting him, upon a plea of guilty, of attempted receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1). The district court sentenced McGowan to 240 months' imprisonment, lifetime supervised release and a $100 special assessment. McGowan is currently incarcerated.

On appeal, McGowan contends that the district court (1) relied on the wrong Guideline in calculating his sentencing range under the United States Sentencing

Guidelines ("Guidelines"), (2) improperly failed to give notice of its intention to sentence him to a non-Guidelines sentence and otherwise failed to follow proper procedural rules in setting sentence, and (3) failed to justify the extent of any upward departure and, otherwise, sentenced him unreasonably under 18 U.S.C. § 3553(a). As shown below, the district court properly imposed a reasonable sentence. As such, the court's sentence should be upheld.

STATEMENT OF FACTS

1. The Instant Offense

In April 2004, a United States Postal Inspector established an undercover e-mail account offering to trade or sell videotapes containing images of child pornography. His advertisement, which was included on several Internet newsgroups, read:

GREAT Quality NEW MATERIAL PT HC [FN1] VHS and DVDs for sale or trade - email for details serious inquiries Only. Videoandpics@yahoo.com.

(PSR ¶ 7). [FN2]

On April 17, 2004, Michael McGowan responded to the advertisement by e-mail, stating, "do you have movies on cd for sale? prices? do u ship to USA?" (PSR ¶ 8). Two days later, on April 19, 2004, the Inspector e-mailed back, stating, "Please let me know what age and sex you are interested and if you want vhs or dvd." (PSR ¶ 8). The next day, McGowan replied by e-mail, stating, "I am looking for boys ages 10-12 with same or boys/girls 10-12yo, or boys/women, no anal. what is the cost diff for vhs or dvd?" (PSR ¶ 9).

On April 26, 2004, the Inspector responded to McGowan's message by providing a list of three videos with the following descriptions:

#1 Paired up- two boys and two girls all about ten years old get it on-great oral and all around hot sex- This is my best seller.

#2 Sleeping Beauty- 12 year old boy is woke up by 12 year old girl great close ups and sucking and sex scenes- Top Notch Quality

#3 Brother/Sister- 8 year old girl teaches her 7 year old brother all there is to know about sucking and f-king HOT HOT Film!

(PSR ¶ 10).

The e-mail also stated:

The price is $30.00 for VHS or $40.00 fr DVD- if you want all three I'll sell them for $70.00 vhs or $100 on DVD. If your [sic] interested in a trade Ill work out a discount or a straight up trade depending on what you have. Please send your order and payment to:

***4** MRV
P.O. Box 353

Denver, CO 80202
If you are not interested please delete my message.
(PSR ¶ 11).

On April 26, 2004, McGowan responded to the Inspector's e-mail as follows:
I'LL GO 4 ALL 3. CAN U SEND ME A FEW SAMPLE PICS... AND CONFIRM TO ME THAT U R IN NO WAY SHAPE OR FORM RELATED TO OR WORKING FOR ANY LAW ENFORCEMENT AGANCY [sic]
(PSR ¶ 12).

Subsequently, on April 28, 2004, McGowan sent the Inspector another e-mail, stating, in part, "[I]'ll be sending you out a check today.....please send as fast as possible." (PSR ¶ 13). A fifth e-mail followed on May 6, 2004:
I sent out a check to you, did you get it yet? 70-us just wanted to make sure you mail to my NY address not my TX one[.]
(PSR ¶ 14).

As promised by McGowan, on May 11, 2004, the Inspector received a business-sized envelope, postmarked May 4, 2004, from Hicksville, New York, with a return address of "Johnny, 47 Haverford, Hicksville, NY 11801." (PSR ¶ 15). The envelope contained a preprinted personal check, No. 2063, in the amount of $70.00 from the Navy Army Federal Credit Union, account No. 0000118993, with a pre-printed heading of Michael J. McGowan, 5500 Saratoga, Corpus Christi, TX 78413. (PSR ¶ 15). The envelope also contained a hand-written note, which stated, "Mail To Mike McGowan 47 Haverford Hicksville, NY 11801." (PSR ¶ 15). Upon receipt of these materials, the Inspector sent an e-mail to McGowan confirming that he would be sending the videos as requested. (PSR ¶ 16).

On June 30, 2004, inspectors of the United States Postal Inspection Service executed a search of McGowan's 47 Haverford Road, Hicksville, New York residence. There they seized, among other items, computer equipment and two fraudulent identification cards with McGowan's name and photograph purporting to be issued by the Federal Bureau of Investigation ("FBI") and the Central Intelligence Agency ("CIA"). (PSR ¶ 18).

McGowan, who was present during the search because of a suspension from his employment as an armed federal Air Marshal with the Transportation and Safety Administration ("TSA"), [FN3] admitted that the seized computer belonged to him and further stated that he had been using the computer to "investigate" child pornography internet newsgroups. [FN4] (PSR ¶ 18). When the inspectors contacted McGowan's immediate supervisor at the TSA, however, he indicated that McGowan was not authorized to conduct investigations of child pornography as part of his duties. (PSR ¶ 19).

A search of McGowan's computer hard drive revealed in excess of 1,300 files containing pornographic images of children. These included still photographs and video clips depicting prepubescent children (ranging in ages from six to sixteen) engaged in sexually explicit conduct with adults and/or other prepubescent children. (PSR ¶¶ 20-21).

II. The Arrest And Indictment

On July 21, 2004, McGowan was arrested pursuant to a federal arrest warrant and remained in custody prior to sentencing. (PSR ¶ 23).

***5** On September 22, 2004, a federal grand jury sitting in the Eastern District of New York returned a 22-count indictment against McGowan. Count Six charged McGowan with attempted receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A); Counts Nine through Twenty-Two charged him with possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). [FN5]

III. The Guilty Plea

On July 11, 2005, McGowan pleaded guilty before United States District Judge Leonard D. Wexler to Count Six of the indictment pursuant to a plea agreement. (A 9-24; GA 1-9). The advisory Sentencing Guidelines range of 60 months set forth in the agreement was estimated by employing U.S.S.G. § 2G2.2 (2003 ed.) and U.S.S.G. § 5G1.1(b), the latter of which required a statutory minimum term of five years' imprisonment. (GA 2-3).

IV. Presentence Matters

A. The Initial PSR

The Presentence Investigation Report ("PSR") prepared by the United States Probation Department calculated McGowan's initial sentencing Guidelines range at 60 months. Specifically, the PSR established an applicable base offense level of 17, pursuant to U.S.S.G. § 2G2.2(a) (2003 ed.), [FN6] with upward adjustments for material involving minors under the age of twelve years (U.S.S.G. § 2G2.2(b)(1)), possession resulting from use of a computer (U.S.S.G. § 2G2.2(5)), and the involvement of more than 1,300 images of child pornography (U.S.S.G. § 2G2.2(6)(D)). (PSR ¶¶ 30-32). This adjusted offense level of 26 was reduced by three levels for acceptance of responsibility (U.S.S.G. § 3E1.1(a) and (b)), resulting in a final adjusted offense level of 23 (PSR ¶¶ 36-38), and a sentencing range of 46 to 57

months, assuming a criminal history category of I. [FN7] (PSR ¶ 104). This sentencing range, however, was raised to 60 months to reflect the mandatory statutory minimum of five years. (First Addendum).

Despite McGowan's criminal history category of I, the PSR noted that McGowan was facing pending charges in connection with a June 2, 2004 arrest for Aggravated Assault With a Weapon, Official Misconduct and Possession of a Firearm For Unlawful Purpose in Wall, New Jersey. (PSR ¶ 49). Specifically, on May 21, 2004, the occupants of a car driving on the Garden State complained that McGowan attempted to pull them over, using a truck with "police like" lights, a badge/credentials and a firearm, the latter of which McGowan pointed at them through the window of his vehicle. (PSR ¶ 50). This information was corroborated by another witness. (PSR ¶¶ 52-53). [FN8]

The PSR also noted that, in light of the recovery of the fraudulent FBI and CIA identification cards and McGowan's admission that he had manufactured these false identifications, pursuant to U.S.S.G. § 4A1.3, the district court could consider this additional criminal conduct in determining sentence. (PSR ¶¶ 55, 113).

B. The Disclosure Of Sexual Activity With A Youth And Resulting PSR Addendum

While McGowan was in custody awaiting resolution of his case, he contacted a young boy, John Doe 1, by telephone and mail, as reported by the boy's mother to Corpus Christi, Texas law enforcement personnel. (Second Addendum at 1). Additional investigation disclosed that, on several occasions, McGowan had engaged in sexual activities with the boy. (Second Addendum at 1). Specifically, on February 2, 2006, John Doe 1, advised a detective of the Corpus Christi Police Department that he was introduced to McGowan by one of his friends, the son of a woman who was acquainted with McGowan. [FN9] John Doe 1 would play video games at McGowan's apartment, where he also used a pool. About three or four months after first meeting McGowan, John Doe 1 visited McGowan's apartment looking for his young friend after going for a swim in the pool. McGowan invited him to enter and wait for his friend. While the boy was changing in a bedroom of the apartment, McGowan entered, wearing only a pair of shorts. McGowan threw a blanket at the boy, who was naked, causing the boy to trip over a mattress. McGowan then began to touch the boy's penis and perform oral sex on him. (Second Addendum at 1-2).

***6** Similar incidents occurred at hotels in Corpus Christi, where McGowan told the boy he stayed in connection with his employment as an Air Marshal. On one occasion, McGowan began fondling the boy in his sleep; on another occasion, McGowan grabbed the boy's hand while the boy was on the way to the shower, moving it up and down his penis. (Second Addendum at 2).

John Doe 1 also advised that McGowan showed him pornographic pictures of children that were contained on a floppy disc and also took pictures of the boy while the boy was naked. (Second Addendum at 1-2).

The Second Addendum revised McGowan's Guidelines calculations to include an additional five-level increase, pursuant to U.S.S.G. § 2G2.2(b)(4), to reflect a pattern of activity involving sexual abuse of a minor. (Second Addendum at 3). The resulting total offense level of 28, with a criminal history category of I, provided a Guidelines sentencing range of 78 to 97 months. (Second Addendum at 3).

C. McGowan's Post-Plea Criminal Conduct And Resulting PSR Addendum

On May 4, 2006, the government provided under seal transcripts of conversations of two telephone calls made by McGowan to John Doe 1 from jail after his guilty plea. [FN10] Among other things, McGowan engaged in sexually explicit conversations with his victim, including a discussion of oral sex (T 26-33), requested that the victim take photographs of himself with another boy (T 12-13), and encouraged the victim to engage in specific sexual activity with another boy (T 28-29, 33). During these conversations, McGowan also acknowledged his abuse of the boy, asking his victim whether another boy's penis size was "like me and you" (T 14-15) and stating "you probably enjoy being with me better than [the other boy], right?" (T 16).

The government requested that the district court consider this post-plea conduct as it related to McGowan's history and characteristics (18 U.S.C. § 3553(a)(1)) and the need to protect the public (18 U.S.C. § 3553(a)(2)). (Government's May 4, 2006 Sentencing Letter at 1). Moreover, the government advised that it would no longer advocate a three-, as opposed to two-point, reduction in McGowan's Guidelines calculation for acceptance of responsibility in light of the significant resources expended in investigating this new conduct. (Id.).

The Probation Department agreed with the government's assessment, advocating a sentencing range of 87 to 108 months to reflect a two-level acceptance of responsibility reduction. (Third Addendum). The Third Addendum to the PSR also noted that McGowan's ongoing victimization of John Doe 1 was an aggravating factor for the district court to consider in determining the sentence. (Third Addendum at 2).

In a letter dated June 14, 2006, McGowan's counsel did not contest "the advisory range of 87 to 108 months," but urged the district court to impose a lower non-Guidelines sentence. (A 25). In support of that position, McGowan claimed in an attached letter that he had been abused as a youth, had been subjected to harsh treatment during incarceration and possessed a significant record of civil service. (A 27-29).

V. The Sentencing

***7** On July 13, the parties appeared before United States District Judge Sandra J. Feurstein, to whom the case had been reassigned, in anticipation of sentencing. The district court inquired whether a hearing would be necessary concerning the accuracy of the transcripts of the two telephone calls that formed the basis of one of the recent addendums to the PSR. (GA 11).

McGowan's counsel requested that the sentence be adjourned to the following week to permit the court to review McGowan's letter, attached to counsel's June 14, 2006 submission, a request the court granted. (GA 13-14). In response to the court's inquiries concerning the accuracy of the transcripts, among other things, counsel advised, "[m]y letter generally addresses the concept that we are not contesting the advisory Guidelines calculation which per se indicates, given that there's a five level upward adjustment based upon these tapes it makes the point of being explicit that we're not contesting these allegations." (GA 14). Later, counsel reiterated that McGowan was not contesting the allegations in the PSR regarding the Texas victim. (GA 15-16).

On July 14, 2006, the district court issued an order directing the parties to appear for a Fatico hearing the following week, on July 20, 2006. (A 36). The order also provided notice that:

> Pursuant to Fed. R. Crim. P. 32(h) and United States Sentencing Guideline § 6A1.4, the parties are hereby notified that the Court is considering a departure from the applicable sentencing guideline range based upon the Defendant's conduct alleged in the second addendum to the Presentence Report and the post-plea conduct alleged in the third addendum to the Presentence Report.

(A 36).

McGowan's counsel's subsequent request to adjourn the hearing was denied. (A 38).

On July 20, 2006, the parties again appeared for sentencing, and McGowan's counsel indicated that he was prepared to proceed. (A 40). Counsel also reiterated that, "[w]e have written specifically to the Court we do not dispute the guideline calculation and I reaffirm we do not dispute it and we do not controvert the initial report and addendums specifically and explicitly." (A 40-41). Indeed, the parties agreed that the proper advisory Guidelines range was 87 to 108 months. (A 41).

When the court indicated that it wished to proceed with the Fatico hearing (A 41-42), McGowan's counsel reiterated that McGowan did not dispute the PSR and the

various addenda and thus had "acquiesced in the guideline score which takes into full account a five-point upward adjustment for a pattern of sexual conduct." (Id.). Counsel stipulated to the authenticity of the tapes and the accuracy of the statements in the transcripts. (A 43-44). The court responded that "I appreciate that but I think it's something that I have to consider because a sentence is a very important thing and everything that goes into it must be carefully considered." (A 44).

In response to a request from the court, the government played the tapes in camera. (A 47-51). Subsequently, the court found that the government had proven that "[McGowan] while incarcerated after his plea of guilty made phone calls to a minor child in Texas and that these phone calls were explicit and sexual in nature." (A 51). The court also found that the government had proven that McGowan had engaged in the conduct outlined in the second addendum to the PSR based upon the court's review of the tape-recorded conversations. (A 51-52).

***8** Concerning a potential upward departure, McGowan's counsel argued that the sexual conduct with a minor outlined in the second addendum had already been taken into account by a five-level upward adjustment, which was not being contested. (A 52). While counsel agreed that the post-guilty plea conduct outlined in the third addendum was "an appropriate subject for the consideration of an upward departure," which the court was "obviously entitle [d]" to consider (A 54), counsel nevertheless contended that this non-physical conduct could be "shut off readily" in prison (A 55). Counsel also contended that McGowan's acknowledgment that he was "sick" and his agreement to be assigned to a facility equipped to treat sex offenders argued against "dangerousness." (A 56). Finally, counsel contended that McGowan had suffered some abuse in jail, which, combined with all the other factors, demonstrated that a Guideline sentence of 87 to 108 months was adequate punishment for the offense. (A5 57-59).

Although the government did not affirmatively seek an upward departure or a non-Guideline sentence, [FN11] the government argued that McGowan's post-plea conduct called into question his acceptance of responsibility. (A 59). It characterized McGowan as a classic predatory child molester, who had targeted a boy under the age of 12, whose mother he used as a ruse to get to the boy. (A 59-60). The government further argued that even the revised Guidelines calculations failed to take into account McGovern's having taken pictures of the victim when the victim was naked and his showing of child pornographic images to the victim. Nor did they reflect the fact that McGowan had used his position as an Air Marshal to further his abuse of the boy. (A 60-61).

The government argued also that, in addition to its impact on McGowan's entitlement to an acceptance of responsibility reduction, the Guidelines failed to properly account for McGowan's post-plea conduct, which involved his continued

victimization of the boy by the use of "sexually explicit letters and phone calls." (A 61). The government noted that during the calls, McGowan attempted to coax sexually explicit details from the boy, who was clearly reluctant to talk. (Id.). Further, at the same time that he was engaging in sexually explicit talk with the boy, McGowan had written to the boy's mother seeking a character reference. (Id.).

In terms of the arguments that McGowan had made in support of a lesser sentence, the government argued that McGowan's abuse of his civil service and/or quasi-law enforcement positions called for a harsher, not less severe sentence. It pointed out that McGowan had used his position in the Air Marshal Service to lure his victim and had falsely claimed to be conducting a child pornography investigation as part of his official duties when confronted by agents about pornographic material discovered on his computer during the search. (A 62-64). Moreover, McGowan purportedly relied on his authority as an Air Marshal, including flashing his credentials and a gun, to harass two occupants of a car on the Garden State Parkway in a road rage incident. [FN12]

***9** Finally, the government noted that McGowan's claims of prison mistreatment were completely unsubstantiated and that, in any event, the Bureau of Prisons ("BOP") could and would provide treatment for McGowan in a population of similar inmates. [FN13] (A 62). Indeed, the government argued a substantial sentence was warranted in terms of danger to the community in light of McGowan's complete failure to abide by the law even while incarcerated. (A 64).

The district court provided McGowan an opportunity to address it, at which time McGowan stated that he understood his actions had caused harm and pain and that he was remorseful. He also claimed to have had a difficult time during incarceration and requested the "lightest sentence you can give me." (A 65-66).

Prior to imposing sentence, the district court acknowledged that it had considered the uncontested advisory Guidelines range of 87 to 108 months. (A 66). However, the court noted that, in light of the considerations listed in Section 3553(a), "I find a non-guideline sentence to be appropriate in this case." (Id.). Specifically, the court stated:

> The reprehensible crimes which you have committed warrant, I believe, a message which will send a message of deterrence to others which is also one of the considerations in 3553 as well as the deterrence of any further conduct from you. All indications are that you are a serious threat to any community, the children of any community to which you would be released.
>
> Taking all of the things that were discussed this morning in camera and all the statements that were made this morning, considering the likelihood of rehabilitation, deterrence, punishment, all the things in 3553 and particularly the protection of the community, I find that a sentence which is substantially higher than outlined in the guidelines is appropriate.

(A 66-67).

The district court then sentenced McGowan to 240 months' incarceration, lifetime supervised release with conditions, and a $100 special assessment. (A 67-70).

VI. The Written Judgment

The Statement of Reasons [FN14] accompanying the district court's written judgment adopted the PSR without change (Statement of Reasons, section I), noting that the court had determined the advisory Guidelines range to be 87 to 108 months (Statement of Reasons, section III). The Statement of Reasons also noted that the court had "imposed a sentence outside the advisory sentencing guideline system," "above the advisory guideline range," based upon "the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)," "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," "to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))" and "to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))." (Statement of Reasons, sections IV, V and VI(C)).

***10** Moreover, according to the court, additional facts justified the sentence in this case:

Based on the evidentiary hearing held prior to sentence on July 20, 2006 I found that the government had proven that the defendant, after his plea of guilty and while incarcerated, made two phone calls to a minor child in Texas. I further found that the government had proven that these phone calls were explicit and sexual in nature. I also found that the government proved that the defendant engaged in the conduct outlined in the Probation Department's second addendum to the Presentence Report, specifically defendant's sexual activity with a minor in approximately 2002, which was alluded to in the subsequent conversations with the minor child. (Statement of Reasons, section VIII).

ARGUMENT

POINT ONE

THE DEFENDANT WAIVED ANY OBJECTION TO THE GUIDELINES AND, IN ANY EVENT, THE DISTRICT COURT PROPERLY APPLIED ADVISORY GUIDELINE SECTION 2G2.2 TO MCGOWAN'S OFFENSE

Despite failing to challenge the application of U.S.S.G. § 2G2.2 and, in fact, repeatedly acknowledging its applicability to the facts of this case, McGowan now objects to the employment of that Guidelines section here. [FN15] Specifically,

McGowan contends that since he was convicted of only the receipt of child pornography, the district court should have applied U.S.S.G. § 2G2.4, which would have resulted in a significantly lower adjusted offense level. (Br. 12-16). As set forth below, this claim is procedurally barred and lacking in merit.

I. McGowan Has Waived His Right To Challenge The District Court's Application Of Section 2G2.2

In order to preserve a sentencing issue for appeal, a defendant generally must either object to the pre-sentence report or raise the objection at the time of sentencing. United States v. Rodriguez, 943 F.2d 215, 217 (2d Cir. 1991) (court "will be hesitant to consider on appeal sentencing issues not raised in the district court"); see also United States v. Rizzo 349 F.3d 94, 99 (2d Cir. 2003) (holding that, if a defendant fails to challenge factual matters contained in the PSR at the time of sentencing, he has waived the right to contest them on appeal); United States v. Keppler, 2 F.3d 21, 22-23 (2d Cir. 1993) (holding that failure of district court to apply particular Guideline waived on appeal because not objected to below); United States v. Howard, 998 F.2d 42, 49-50 (2d Cir. 1993) (objection to application of narcotics Guidelines "probably waived" where defendant failed to challenge in district court); United States v. Caba, 955 F.2d 182, 186 (2d Cir. 1992) (holding that, in cases in which the court asked counsel if any issues in the PSR were in dispute, and counsel replied "no," defendants had waived their right to challenge drug quantity).

Here, McGowan's failure to challenge the PSR was not inadvertent or an oversight; it was an intentional waiver on his part. Indeed, on several occasions, McGowan affirmatively acknowledged the correctness of the Guidelines calculations. First, in writing, counsel claimed that "we do not contest that [Guidelines] calculation." (A 25). Subsequently, at a pre-sentence proceeding held in the case, counsel again acknowledged that "we are not contesting the advisory Guidelines calculation which per se indicates, given that there's a five level upward adjustment..." (GA 30). Finally, at sentencing, McGowan's counsel advised, in response to a question from the district court as to whether there were any challenges to the PSR, that "[w]e have written specifically to the Court we do not dispute the guideline calculation and I reaffirm we do not dispute it and we do not controvert the initial report and addendums specifically and explicitly." (A 40-41). In light of these affirmative statements by counsel, this Court should hold that any objection to the advisory Guidelines employed here was waived by McGowan.

II. The District Court's Reliance On U.S.S.G. § 2G2.2 Was Correct

***11** In any event, even if this Court chooses to review the district court's application of U.S.S.G. § 2G2.2 despite McGowan's acquiescence below, in order to

prevail, McGowan must show that application of the Guideline was "plain error." See United States v. Gordon, 291 F.3d 181, 190-91 (2d Cir. 2002) (where there has been prior notice of the possible application of the sentence imposed, Court employs plain error analysis in cases involving claims of sentencing errors); Fed. R. Crim. Pro. 52(b); but see United States v. Pereira, 465 F.3d 515, 520 (2d Cir. 2006) (unresolved whether this court "review[s] sentencing challenges that are made for the first time on appeal under the traditional, stringent plain error standard or under a less rigorous one."). Under traditional review, plain error has been defined as:

"error," or deviation from a legal rule which has not been waived. Second, the error must be "plain," which at a minimum means "clear under current law." Third, the plain error must, as the text of Rule 52(b) indicates, "affect[ ] substantial rights," which normally requires a showing of prejudice.

United States v. Feliciano, 223 F.3d 102, 115 (2d Cir. 2000) (citing United States v. Bayless, 201 F.3d 116, 127-28 (2d Cir. 2000)) (quoting United States v. Viola, 35 F.3d 37, 41 (2d Cir. 1994)). Indeed, "[a] plain error is an error so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." United States v. Gore, 154 F.3d 34, 43 (2d Cir. 1998) (internal quotation marks omitted). Here, McGowan cannot demonstrate plain error.

McGowan pled guilty to a violation of 18 U.S.C. § 2252A(a)(2), which, according to the statutory index included in Appendix A of the 2003 version of the Sentencing Guidelines Manual, is governed by either U.S.S.G. § 2G2.2 or U.S.S.G. § 2G2.4, depending on which "guideline [is] most appropriate for the offense conduct charged in the count of which the defendant [is] convicted."

U.S. Sentencing Commission Manual, Appendix A at 492, 504 (2003).

Here, the former U.S.S.G. § 2G2.4 advocated now by McGowan, which employs a base offense level of 15, applied solely to "Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct." U.S.S.G. § 2G2.4. Moreover, the Commentary following Section 2G2.4 provided that Section 2G2.4 applied to the child pornography "possession" offense made criminal in 18 U.S.C. § 2252(a)(4). [FN16] U.S.S.G. § 2G2.4, Commentary.

By contrast, former Section 2G2.2, which employed a base offense level of 17 and was used in this case, applied to, among other offenses, "Receiving... Material Involving the Sexual Exploitation of a Minor." U.S.S.G. § 2G2.2. Although the Commentary to that section does not make explicit reference to 18 U.S.C. § 2252A, 18 U.S.C. § 2252(a)(1)-(3), which is explicitly referenced, is nearly identical to Section 2252A in terms of its "receiving" [FN17] component. [FN18] U.S.S.G. § 2G2.2, Commentary. Indeed, this Court has upheld sentences in which Section 2G2.2 has been applied to the receipt of child pornography under both statutory provisions. See,

e.g., United States v. Sofsky, 287 F.3d 122 (2d Cir. 2002)(§ 2252A(a)(2)) (sentence vacated on other grounds); United States v. Barton, 76 F.3d 499 (2d Cir. 1996) (§ 2252(a)(2)) (sentence vacated on other grounds). See also United States v. Harrison, 357 F.3d 314, 317 (3d Cir. 2004)("sentencing guidelines... apply the same penalties for receiving pornography as for sending it... § 2G2.2 appl[ies] equally to defendants guilty of 'receiving, transporting or shipping' child pornography"), certiorari granted, judgment vacated on other grounds, 543 U.S. 1102 (2005); United States v. Stulock, 308 F.3d 922, 925 (8th Cir. 2002) (Section 2G2.2 applies to a defendant who receives child pornography regardless of whether he received a notice or used computer to advertise child pornography); United States v. Stevens, 197 F.3d 1263, 1269 n.7 (9th Cir. 1999) (conviction for receiving child pornography, and not merely possessing it, leaves defendant vulnerable to offense-level increases pursuant to Section 2G2.2) (emphasis in original).

***12** Given the similarities between the "receiving" offenses outlawed by 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252A(a)(2), common sense dictates that the same Guideline, U.S.S.G. § 2G2.2, should apply. Moreover, although McGowan relies on Sixth and Eleventh Circuit precedent, see, e.g., United States v. Williams, 411 F.3d 675, 677 (6th Cir. 2005); United States v. Farrelly, 389 F.3d 649, 657-61 (6th Cir. 2004); United States v. Davidson, 360 F.3d 1374, 1375-77 (11th Cir. 2004) (per curiam), in support of his argument that receivers of child pornography should be punished as possessors pursuant to Section 2G2.4, he neglects to mention that the Seventh Circuit has consistently held to the contrary. Specifically, that court has stated that "a defendant who receives child pornography through interstate commerce must be sentenced under the trafficking guideline [i.e., Section 2G2.2] rather than the possession guideline, even in the absence of evidence of distribution or intent to distribute." United States v. McCaffrey, 437 F.3d 684, 689 (7th Cir. 2006) (citing United States v. Myers, 355 F.3d 1040 (7th Cir. 2004), and United States v. Malik, 385 F.3d 758 (7th Cir. 2004)); see also United States v. Sromalski, 318 F.3d 748, 753 (7th Cir. 2003) (where "the government has charged and proven receipt as described in § 2252A(a)(2), the Guidelines themselves dictate that... § 2G2.2 is appropriate"). Indeed, as the McCaffrey court noted, "the November 2004 revision of the Guidelines Manual, which deleted § 2G2.4 by consolidation with § 2G2.2, may have affected the precedential value of [Farrelly and Davidson]." Id. at 689. [FN19]

As the court in United States v. Ellison, 113 F.3d 77, 80 (7th Cir. 1997), explained, Section 2G2.2 applies to the receipt of child pornography because it is intended to punish more severely conduct that creates or strengthens the market for the material and, as a result, "keeps producers and distributors of this filth in business." Similarly, here, McGowan was not a passive recipient of images obtained on the Internet but, instead, solicited and paid for what he believed to be original child pornography. Moreover, he used his child pornography collection to entice his child victim into sexual activity and to create his own pornographic images. Thus, even as an "end user," McGowan was trafficking in child pornography. [FN20]

In any event, even if the district court had employed Section 2G2.4, the cross-reference included in that section would have directed the court to apply Section 2G2.2. That reference read, in relevant part, as follows:

If the offense involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

***13** U.S.S.G. § 2G2.4(c)(2). Here, the uncontested facts demonstrated that McGowan (1) paid for child pornography to be shipped to him in interstate commerce (PSR ¶ 12-15), (2) showed child pornography to the child victim (Second Addendum at 2), and (3) caused pictures of his victim to be taken when the victim was naked (Id.). [FN21]

In sum, because McGowan failed to contest the application of U.S.S.C. § 2252A(a)(2)(A), he is precluded from challenging it now; in any event, because McGowan stands convicted of receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A), the district court was correct in applying U.S.S.G. § 2G2.2.

POINT TWO

THE SENTENCE WAS PROCEDURALLY PROPER

McGowan alleges various procedural defects which he claims require remand for resentencing. Specifically, McGowan contends that he received defective notice of the district court's intention to impose a non-Guidelines sentence. (Br. 17). McGowan also argues that the district court failed to specify the nature and extent of its "upward departure" (Br. 17-18), failed to use procedures required under U.S.S.G. § 4A1.3 in determining that his criminal history category under-represented the seriousness of his criminal history or the likelihood of his committing additional crimes (Br. 18-22), and further failed to specify why or how the pattern of sexual abuse at issue in the case warranted an upward departure (Br. 22-24). Because the court properly imposed a non-Guidelines sentence, McGowan's arguments are all unavailing.

I. The District Court's Pre-Sentence Notice

McGowan concedes that the district court served written notice that it was "considering a departure from the applicable sentencing guideline range." (A 36). Nevertheless, McGowan contends that this notice was defective because it did not specifically state that the departure the court was considering was a "non-guidelines sentence." (Br. at 17). This argument is unavailing.

In United States v. Anati, 457 F.3d 233 (2d Cir. 2006), this Court made clear that the notice requirement of Fed. R. Crim. P. 32(h) was intended to apply to non-Guidelines sentences as well as Guidelines departures. Here, the district court's notice of a possible departure from the Guidelines range specifically referenced Fed. R. Crim. P. 32(h), identifying "the grounds for such a sentence" as required under Anati. (Id. at 237). Specifically, the court identified the "conduct alleged in the second addendum to the Presentence Report and the post-plea conduct alleged in the third addendum to the Presentence Report" (A 36) as the bases for a possible departure. Moreover, at both the pre-sentencing and sentencing proceedings, McGowan was given the "opportunity to contest the factual premises of the sentencing judge's view," as required under Anati. See Id. at 238.

McGowan cites no case setting forth a precise invocation that must be uttered by a district court prior to imposing a non-Guidelines sentence, as opposed to a sentence employing a Guidelines departure. In fact, as Anati notes, "there is a significant similarity between an intent to depart and an intent to impose a non-Guidelines sentence." Id. at 236. Here, unlike the case in Anati, the district court made clear that it was considering a sentence above the range set forth in the PSR and addendums and precisely identified the conduct it was considering as a basis for such departure. As such, the notice was sufficient.

II. The District Court Was Not Required To Upwardly Depart Prior To Imposing A Non-Guidelines Sentence

***14** McGowan also contends the district court erred in failing to "determine the basis and extent of any appropriate upward departure" prior to imposing a non-Guidelines sentence above the advisory Guideline range. (Br. at 17-18). This argument is also without merit.

Although district courts must review "a contested departure, even post-Booker [v. United States, 543 U.S. 220 (2005)]" (United States v. Fuller, 426 F.3d 556, 562 (2d Cir. 2005)), there is no authority for McGowan's position that, prior to imposing any non-Guidelines sentence in excess of the advisory Guidelines range, district courts must sua sponte raise and consider any upward departures. Rather, a sentencing judge must consider the "applicable Guidelines range and available departure authority," among other 18 U.S.C. § 3553(a) factors. United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005) (citing United States v. Crosby, 397 F.3d 103, 111-12 (2d Cir. 2005)). Having done so, "[t]he sentencing judge may then impose either a Guidelines sentence or a non-Guidelines sentence." Id. (emphasis added).

Moreover, as Crosby noted, "close questions may sometimes arise as to the precise meaning or application of a policy statement authorizing a departure, and a judge who has considered policy statements concerning departures need not definitively resolve such questions if the judge has fairly decided to impose a non-Guidelines sentence." Crosby, 397 F.3d at 112. Indeed, "additional situations may arise where the sentencing judge would not need to resolve every factual issue and calculate the precise Guidelines range, because the resolution of those issues might not affect a non-Guidelines sentence if the sentencing judge chooses to impose it." Id. at n.12.

Here, there is nothing to suggest that the district court believed that it lacked authority to upwardly depart pursuant to the Guidelines. Rather, the written notice provided by the district court explicitly cited to both "Fed. R. Crim. P. 32(h) and United States Sentencing Guideline § 6A1.4." (A 36). As the district court was obviously aware of its authority to depart under the Guidelines, it was entitled, instead, to impose a non-Guidelines sentence.

In any event, as set forth below, the sentence imposed was reasonable under 18 U.S.C. § 3553(a). As such, any error in this regard is harmless. See Selioutsky, 409 F.3d at 118, n.7 ("we do not preclude the possibility of applying the harmless error doctrine" where the district court erroneously applied the Guidelines but "would have imposed [the same] sentence as a non-Guidelines sentence under the post-Booker regime").

III. The District Court's Imposition Of A Non-Guidelines Sentence In This Case Moots The Remainder Of McGowan's Procedural Objections

McGovern's remaining procedural objections (Br. 18-24) concern hypothetical applications of the Guidelines. As the district court stated that it was imposing "a non-guideline sentence" (A 66), these arguments are not relevant here.

POINT THREE

THE SENTENCE WAS REASONABLE

***15** McGowan claims that the 240-month sentence imposed by the district court was unreasonable either as a Guidelines upward departure (Br. 25-49) or a non-Guidelines sentence (Br. 50-58). However, as the district court did not impose any of the objected-to upward departures, they cannot form the basis of an appellate challenge here. Moreover, the non-Guidelines sentence imposed by the court was reasonable. Thus, this claim too is unavailing.

I. The "Reasonableness" Standard

This Court reviews sentences for reasonableness, see Booker, 543 U.S. at 261; United States v. Rattoballi, 452 F.3d 127, 131 (2d Cir. 2006), both as to "the sentence itself" and "the procedures employed in arriving at the sentence," United States v. Fernandez, 443 F.3d 19, 26 (2d Cir.), cert. denied, 127 S. Ct. 192 (2006); see Crosby, 397 F.3d at 114-15. In reviewing for reasonableness, however, the Court does not substitute its judgment for that of the sentencing judge; rather, its review "is akin to review for abuse of discretion." Fernandez, 443 F.3d at 27; United States v. Ministro-Tapia, 470 F.3d 137, 141 (2d Cir. 2006).

"Reasonableness" is a deferential standard that focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." United States v. Canova, 412 F.3d 331, 350 (2d Cir. 2005). A sentence can be found to be "unreasonable" if a judge committed a procedural error by "selecting a sentence in violation of applicable law." Crosby, 397 F.3d at 114. This would occur, for example, if a judge failed to consider the applicable Guidelines range and the other factors listed in Section 3553(a) and arbitrarily selected a sentence without the requisite consideration. Id. at 115. Further, if a court were to make a legal error in its Guidelines calculation that had an "appreciable influence" on its sentencing decision, this could render the final sentence unreasonable. United States v. Rubenstein, 403 F.3d 93, 98 (2d Cir. 2005); Canova, 412 F.3d at 355-56.

In considering whether a sentence is reasonable, this Court has cautioned:

> "[R]easonableness" in the context of review of sentences is a flexible concept. The appellate function in this context should exhibit restraint, not micromanagement. In addition to their familiarity with the record, including the presentence report, district judges have discussed sentencing with a probation officer and gained an impression of a defendant from the entirety of the proceedings, including the defendant's opportunity for sentencing allocution. The appellate court proceeds only with the record. Although the brevity or length of a sentence can exceed the bounds of "reasonableness," we anticipate encountering such circumstances infrequently.

United States v. Fleming, 397 F.3d 95, 100 (2d Cir. 2005) (citation omitted).

II. The District Court Properly Explained Its Sentence In Light Of The Requisite Section 3553(a) Factors

***16** "A district court is statutorily required to 'state in open court the reasons for its imposition of [a] particular sentence."' United States v. Sindima, 488 F.3d 81, 2007 WL 1462390, *3 (2d Cir. May 21, 2007) (citing 18 U.S.C. § 3553(c)). For sentences outside the Guidelines range, "the court must also state with specificity

in the written order the specific reason for the sentence imposed," id. (citations omitted), with due regard toward the factors set forth in 18 U.S.C. § 3553(a), Canova, 412 F.3d at 350. Nevertheless, "robotic incantations" are not required. Crosby, 397 F.3d at 113. Rather, the district court's statement of reasons must simply "explain... why the considerations used as justifications for the sentence are 'sufficiently compelling []or present to the degree necessary to support the sentence imposed."' Id. at *4 (quoting Rattoballi, 452 F.3d at 137). Moreover, there is no presumption that a sentence outside the advisory range is unreasonable. See United States v. Rita, S. Ct., 2007 WL 1772146, *11 (June 21, 2007) ("The fact that we permit courts of appeals to adopt a presumption of reasonableness [when evaluating a Guidelines sentence] does not mean that courts may adopt a presumption of unreasonableness."); Crosby, 397 F.3d at 115.

Here, the district court properly considered the factors identified in Section 3553(a), both at sentencing and in its written statement of reasons setting forth the basis of its non-Guidelines sentence. Among other factors identified by the court were the nature and circumstances of the offense and the history and characteristics of the defendant. See 18 U.S.C. § 3553(a)(1). For example, the court emphasized that the phone calls made by McGowan to the child victim during his incarceration "were explicit and sexual in nature." (A 51). The court also noted that McGowan was "a serious threat to any community, the children of any community to which [he] would be released." (A 66-67).

In addition to taking into account the nature of the crime and the defendant's characteristics, in imposing sentence, the court also considered the seriousness of the offense and the need for the sentence to promote respect for the law and to provide just punishment. (See 18 U.S.C. § 3553(a)(2)(A)). Indeed, the court described McGowan's crimes as "reprehensible" and cited the need to "punish[]" McGowan. (A 66-67). The court also specifically referred to the need to deter future like crimes (U.S.S.G. § 3553(a)(2)(B)), the need to protect the community (U.S.S.G. § 3553(a)(2)(C)), and the possibility of rehabilitation (U.S.S.G. § 3553(a)(2)(D)), as reasons for its sentence. (A 66-67).

Finally, in choosing to impose a non-Guidelines sentence, the district court not only considered the applicable and uncontested Guidelines range, but also found it wanting. (See 18 U.S.C. § 3553(a)(4)). The court noted that it had considered all the Section 3553 factors and had concluded that a sentence substantially higher than that outlined in the Guidelines was called for. (A 66-67).

***17** The district court reiterated these reasons in its written statement of reasons accompanying the judgment (Statement of Reasons, sections IV, V and VI(C)), and further articulated the basis for its non-Guidelines sentence as follows:

Based on the evidentiary hearing held prior to sentence on July 20, 2006 I found that the government had proven that the defendant, after his plea of guilty and

while incarcerated, made two phone calls to a minor child in Texas. I further found that the government had proven that these phone calls were explicit and sexual in nature. I also found that the government proved that the defendant engaged in the conduct outlined in the Probation Department's second addendum to the Presentence Report, specifically defendant's sexual activity with a minor in approximately 2002, which was alluded to in the subsequent conversations with the minor child. (Statement of Reasons, section VIII).

III. The Sentence Imposed By The Court Was Reasonable

More broadly, nothing in the record suggests that McGowan's sentence was unreasonable. As the government noted at sentencing, based upon the addendums and recorded calls, McGowan was a predatory child molester who had targeted a boy under the age of 12 with a single mother. (A 59-60). Moreover, he continued to victimize the boy with sexually explicit telephone calls and letters even after "supposedly accept[ing] responsibility for his actions" (A 61), a factor not taken into account by the Guidelines (see Third Addendum).

Indeed, in this case the Guidelines failed to account for much of McGowan's criminal conduct. For example, they did not take into account the fact that McGowan had showed child pornography to his victim and also had taken pictures of the boy naked. (See Second Addendum at 1-2). Nor did they take into account the fact that McGowan had asked the boy to engage in specific sex acts and to send photographs to him in jail, i.e., to create child pornography for McGowan. (See T 12-13, 28-29, 33). Finally, the Guidelines also failed to account for the fact that McGowan had used his position of authority as an Air Marshal to further the abuse of his victim and to falsely claim that he was conducting an investigation when confronted by law enforcement personnel about his child pornography collection. (See PSR ¶ 18; Second Addendum at 1-2). [FN22]

Given this egregious and unaccounted-for criminal conduct and history, the statutory maximum sentence imposed was reasonable. Although McGowan argues that his sentence is more severe than if he had been convicted of the Texas incidents (Br. 40-44), this contention ignores the obvious consequence of such a conviction: had McGowan been convicted of those crimes, he would have faced a statutory range of between 15 and 40 years' imprisonment. See 18 U.S.C. § 2252A(b)(1).

Finally, although McGowan contends that his law enforcement background and claimed abuse in custody amount to "mitigating factors" (Br. 57-58), as the government noted at sentencing, McGowan used his law enforcement position to further his crimes; not only did he use his employment as an Air Marshal to justify his use of a hotel room in which he molested the child victim, but he was also already planning his defense against possible child pornography charges by installing a folder for "operation

predator" on his computer, a legitimate operation targeting child predators. (A 63). Indeed, McGowan's abuse of his service positions weighed in favor of a longer sentence, not a shorter one. Moreover, McGowan provided no evidence whatsoever to corroborate his claims of abuse (A 57-58) in prison.

***18** In sum, the district court's sentence at the statutory maximum was both appropriate and reasonable, especially given the deferential standard which this Court applies to review of sentence length.

CONCLUSION

For the foregoing reasons, McGowan's sentence should be affirmed.

Dated: Brooklyn, New York

August 3, 2007

Respectfully submitted,

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Docket No. 06-4864-cr

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

USA v. McGowan

DECLARATION REGARDING FILING AND SERVICE

I, ___, hereby declare that, on August 3, 2007, the following documents were filed with the United States Court of Appeals for the Second Circuit by hand delivery: Amended Brief for the United States and the Government's Amended Appendix, the Amended Brief for the United States in Portable Document Format was submitted as an email attachment to <briefs@ca2.uscourts.gov>, and two copies of the Amended Brief for the United States and the Government's Amended Appendix were served by regular mail and the Amended Brief for the United States was served by email on:

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In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: New York, New York

August 3, 2007

Record Press

Docket No. 06-4864-cr

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
- against -
MICHAEL McGOWAN,
Defendant-Appellant.

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 9,164 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: Brooklyn, New York

August 3, 2007

Jo Ann M. Navickas Assistant U.S. Attorney

FN1. "PTHC" is a common acronym employed on the Internet to designate "pre-teen hardcore" child pornography.

FN2. Parenthetical references to "PSR," "First Addendum," "Second Addendum" and "Third Addendum" are to the presentence investigation report prepared by the United States Probation Department and subsequent addendums, copies of which have been sent to the Court by McGowan. References to "A" and "Br." are to the joint appendix and McGowan's brief, respectively. References to "GA" are to the government's appendix.

FN3. McGowan was suspended from work following his involvement in a driving incident on the Garden State Parkway, in which it was alleged that he had attempted to pull two occupants of a vehicle over to the side of the road by brandishing his credentials and a gun.

FN4. McGowan also admitted that he had manufactured the two identification cards seized and that he did not work for the FBI or the CIA. (PSR ¶ 18).

FN5. On May 16, 2005, the district court dismissed the other counts of the indictment on venue grounds. (A 5).

FN6. The PSR noted that the Probation Department determined that use of the advisory Guidelines in effect as of November 1, 2004, would create an ex post facto issue as the base offense level had been raised. (PSR ¶ 28).

FN7. The initial PSR did not take into account McGowan's 1990 youthful-offender-based adjudication for arson in the second degree, for which he was sentenced to five years' probation. (PSR ¶ 40). Nor did it take into account McGowan's conviction for disorderly conduct while on probation. (PSR ¶ 45).

FN8. These charges are still pending, and a detainer is lodged against McGowan.

FN9. John Doe 1 also stated that McGowan had dated his mother a few times. (Second Addendum at 1).

FN10. The transcripts of these telephone conversations, as well as the government's May 4, 2006 sentencing letter, are being provided to the Court under seal. Parenthetical references to "T" are to the transcript pages, which are numbered 1 to 37. Recordings of the calls will also be provided upon request.

FN11. Nevertheless, the government made clear its position that McGowan's post-plea conduct eliminated its obligation to abide by the terms of the plea agreement. (A 59).

FN12. McGowan also was in possession of counterfeit CIA and FBI identifications at the time his home was searched. (PSR ¶ 18).

FN13. Indeed, McGowan is currently housed at the BOP medical facility with other sex offenders in Butner, North Carolina.

FN14. A copy of the written judgment's Statement of Reasons is being provided to the Court under seal.

FN15. All references to U.S.S.G. §§ 2G2.2 and 2G2.4 are to the 2003 version of the

Sentencing Guidelines.

FN16. 18 U.S.C. § 2252(a)(4) reads in relevant part:

(a) Any person who -

(4) either -

(B) knowingly possesses one or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if -

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct.

FN17. The "receiving" offenses described in the statutes are indistinguishable. In pertinent part, § 2252(a)(2) makes it a crime to:

knowingly receive[], or distribute[], any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer,... if --

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

Similarly, 18 U.S.C. § 2252A(a)(2) makes it a crime to

knowingly receive[] or distribute[] --

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer....

FN18. This fact is not surprising in that these mirror offenses resulted from the enactment by Congress of Section 2252A in 1996 as part of the Child Pornography Prevention Act of 1996 (CPPA) with the intent of criminalizing virtual child pornography. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241 (2002). In that case, the Supreme Court invalidated the portions the CPPA dealing with "virtual" child pornography and left standing the remaining sections. Id. at 258.

FN19. At the very least, any split among the circuits argues against a finding that the law is "plain" in this area and thus strongly counsels against finding plain error.

FN20. Nor is the more severe Guidelines treatment for recipients at odds with the criminal statutes themselves, which treat the receipt of pornographic materials much more harshly than the mere possession of those materials. Compare §§ 2252(a)(1) and 2252A(a)(2)(A) (five to twenty years' imprisonment under § 2252(b)(1) and

2252A(b)(1)) with §§ 2252(a)(4)(B) and 2252A(a)(5) (zero to ten years' imprisonment under §§ 2252(b)(2) and 2252A(b)(2)).

FN21. In fact, it is arguable that the district court's application of Section 2G2.2 led to an advisory Guidelines level that was more lenient than the Guidelines called for. Indeed, the cross-reference at Section 2G2.4(c)(1) can be read to require the court to employ U.S.S.G. § 2G2.1, as the relevant conduct here included "causing... a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct...." U.S.S.G. § 2G2.4(c)(1); (Second Addendum at 2). Moreover, based upon the uncontested allegations of the child victim, McGowan should have received an additional seven-level upward departure pursuant to U.S.S.G. § 2G2.2(b)(2)(D) for "[d]istribution to a minor that was intended to persuade, induce, entice, coerce... a minor to engage in prohibited sexual conduct."

FN22. The Guidelines also failed to take into account the fact that McGowan created false FBI and CIA identifications. (See PSR ¶ 18).

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