05-5810-cr

To Be Argued By:
JAMES I. GLASSER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5810-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

THEODORE W. WELLS, JR.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Alan H. Nevas, J.) had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. Defendant filed a timely notice of appeal on December 2, 2004, pursuant to Fed. R. App. P. 4(b). On June 1, 2005, this Court ordered a limited remand as a consequence of *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). On October 6, 2005, the district court conducted further proceedings on remand. Final judgment entered on October 7, 2005. Defendant filed a timely notice of appeal on October 14, 2005. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court Abused Its Discretion When It Departed Upward from the Recommended Guideline Range Based on the Inadequacy of Defendant's Criminal History Category and Based on Dismissed and Uncharged Conduct; And Whether the Sentence Imposed Was Reasonable?

II. Whether *Ex Post Facto* Principles Permitted the District Court to Adhere to the Same Sentence on a *Crosby* Remand?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5810-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

THEODORE W. WELLS, JR.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Theodore W. Wells, Jr. is a repeat sexual predator who targeted vulnerable young girls by stalking Internet chat rooms devoted to troubled teens, promising to help them, and then inveigling them to submit to him and to perform sexual acts on him.

Defendant was previously convicted of traveling interstate to engage in illicit sexual conduct with a minor. He committed the instant offense while serving his term of

supervised release. At his original sentencing, the district court properly departed upward from the calculated guideline range by three levels to account for the likelihood of recidivism, the inadequacy of his criminal history category and uncharged conduct. On *Crosby* remand, the district court properly found that, upon consideration of the factors enumerated in 18 U.S.C. § 3553, the same 120-month sentence was reasonable and appropriate. The judgment of the district court should therefore be affirmed.

Statement of the Case

Defendant Wells was arrested on May 13, 2003, pursuant to an arrest warrant and criminal complaint. On May 29, 2003, a grand jury sitting in New Haven, Connecticut returned an indictment charging defendant in two counts with violation of 18 U.S.C. § 2423(b) (interstate travel to engage in illegal sexual activity with a minor) and 18 U.S.C. § 2423(a) (transporting a minor in interstate commerce). On October 30, 2002, a superseding indictment was returned charging the same offenses and adding one count of violation of 18 U.S.C. § 2422(b) (enticement of a minor).

Following two separate competency exams which found defendant competent to stand trial, defendant and his counsel engaged in plea negotiations with the Government. During those negotiations it was determined that, owing to defendant's prior criminal record, he was subject to the enhanced penalty provisions of U.S.S.G. § 4B1.5 (Repeat and Dangerous Sex Offender Against

Minors) which subjected him to a sentencing guideline range of 168 to 210 months' imprisonment. Defendant ultimately persuaded the Government to allow him to resolve the charges pending against him by pleading guilty to a one-count substitute information charging him with kidnaping. A plea to this charge avoided the § 4B1.5 enhancement and carried a significantly lower guideline range of 70-87 months.

The resulting plea agreement between the parties specifically reserved the parties' right to argue for a departure from the sentencing guideline range. *See* JA 20.[1] The plea agreement further specifically alerted the district court that defendant's plea of guilty to the substitute information allowed defendant to avoid adjudication as a repeat sex offender (*see* U.S.S.G. § 4B1.5), which would have subjected him to the significantly higher guideline range of 168 to 210 months' imprisonment. JA 20.

On August 25, 2004, Wells entered a plea of guilty to a one-count information charging him with kidnaping, in violation of 18 U.S.C. § 1201(a)(1). A presentence investigation report was thereafter prepared by the Probation Office which calculated defendant's sentencing guideline range to be 70-87 months' imprisonment to be followed by a 3-5 year term of supervised release. *See* SA 18; PSR ¶¶ 78, 80. The presentence report also recommended that the district court consider an upward

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[1] The designation "JA __" refers to the Joint Appendix. The designation "SA __" refers to the presentence investigation report which has been submitted as a Sealed Appendix.

departure pursuant to U.S.S.G. § 5K2.21 to reflect the actual seriousness of defendant's offense. SA 19, PSR ¶ 87.

On December 2, 2004, following a sentencing hearing, the court departed upward three levels from the calculated guidelines range based both on U.S.S.G. § 5K2.21 (Dismissed and Uncharged Conduct) and § 4A1.3 (Inadequacy of Criminal History Category) and imposed a 120-month sentence to be followed by a five-year term of supervised release.

Following imposition of sentence, defendant filed a timely notice of appeal. The Government moved to stay the appeal and for a limited remand in light of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and this Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). On June 1, 2005, the Court granted the Government's motion and ordered a limited remand.

On October 6, 2005, the district court conducted a further sentencing hearing. At the conclusion of the hearing the district court adhered to the same 120-month sentence, finding that it would have "reached the same conclusion under either a guideline sentence or a non-guideline sentence . . . ." JA at 147.

On October 14, 2005, defendant filed a timely notice of appeal. On appeal, defendant alleges that the district court abused its discretion when it departed upward from the sentencing guideline range and that the court's decision to

adhere to the same sentence on remand violates *ex post facto* principles. As demonstrated below, defendant's claims are devoid of merit.

Defendant is incarcerated.

STATEMENT OF FACTS

Defendant's Prior Criminal Conduct

In Autumn 1999, defendant communicated via the Internet with a 15-year-old girl named "Amanda." Defendant convinced Amanda to run away from her home in Illinois.[2] To facilitate her leaving home, defendant purchased a bus ticket for the victim and then met her in Orlando, Florida and from there, took her to his home in Fort Lauderdale, Florida. The victim's parents reported their daughter missing to law enforcement authorities who were successful in tracking Amanda to defendant's home. Once rescued, the victim denied that any sexual contact occurred and claimed to be a willing participant in the liaison with defendant. Amanda returned home with her parents. Defendant was not charged with any crime. SA 10, 39-41.

Less than a month later, defendant once again contacted Amanda through another young girl whom defendant met on an Internet site catering to troubled

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[2] Defendant's brief mistakenly indicates this victim resided in Kentucky. Def.'s Br. at 3. She resided in Illinois. SA 10-11.

teens. SA 43. Through this intermediary, defendant arranged to travel from Florida to meet Amanda in Marion, Illinois. Defendant met the victim as planned, took her to a nearby motel, and, according to the victim, performed oral sex on the victim and then engaged in vaginal intercourse with the victim. SA 11, 41-42.

The following day, defendant took Amanda to a bus station and, in an effort to elude law enforcement, took a circuitous route back to Florida. Defendant and the victim were intercepted in Memphis, Tennessee where defendant was arrested. In a post-arrest statement, defendant admitted knowing that the victim was fifteen years of age and admitted having sex with the victim. SA 11, PSR ¶¶ 44-45.[3]

Defendant was eventually prosecuted for this offense in the Southern District of Florida and was charged with violating 18 U.S.C. § 2423(b) (travel with intent to engage in illicit sexual conduct). Defendant pleaded guilty to this charge and was sentenced to one year and one day in jail of which he served approximately 10 months.

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[3] Law enforcement authorities identified yet another fifteen-year-old girl whom defendant met in a teen Internet chat room. This girl was interviewed and acknowledged meeting defendant on-line in a chat room catering to young people suffering from depression, and then communicating with him by phone and letters, some of which were recovered. This girl recounted how defendant told her that he helped little girls run away from home and offered to send her plane tickets and to meet her at the airport so that they could be together. JA 11.

Defendant was released from federal custody on December 18, 2000, whereupon he began serving a three-year term of supervised release. Despite a judicial finding that defendant had violated the conditions of his supervised release, his supervised release was terminated early on December 31, 2002. Defendant committed the offense that is the subject of this appeal on or about October 26, 2002 – while he was under the supervision of the court serving his term of supervised release. SA 11-12.

The Instant Offense

On October 25, 2002, defendant was once again prowling the Internet in a chat room frequented by young people dealing with difficult personal issues and seeking peer support. Defendant struck up an online conversation with a minor girl, "L.F.," who indicated, *inter alia*, that she was 13 years old, unhappy, depressed, on medication, and frustrated with her home life. SA 5-6, PSR ¶¶ 14-15. Defendant told L.F. that he had helped other girls and that he wanted to help her. After the on-line chat, defendant told L.F. to call him at his home and provided L.F. with his phone number.

Thereafter, defendant engaged in a protracted telephone conversation with L.F. during which defendant advised L.F. that: he was a "counselor" who could help her; that she should run away from home; advised her how to run away from home so no one would look for her (which she tried to do by leaving a suicide note); and made plans to meet her in Connecticut to take her to his home in

New Jersey. SA 6-8, PSR ¶¶ 16-17, 25. The victim followed defendant's advice.

Defendant traveled from New Jersey to Connecticut and met the victim at the Bridgeport bus terminal. Defendant purchased a bus ticket for the victim under the name "Amanda Wells" explaining that the name was that of another girl he had "helped."[4] Defendant told the victim to call him "daddy" and provided a jacket for her to wear as a disguise. Defendant then took the victim by bus to Philadelphia, and then to his home in New Jersey. SA 6; PSR ¶ 17.

Shortly after they arrived at defendant's home, defendant instructed the victim to put on her pajamas. Defendant put on a robe and lay down on his bed with the victim. Thereafter, defendant performed various sexual acts on the victim and required that she do the same to him, including that she perform fellatio on him. SA 6, PSR ¶ 18.

The following morning, defendant instructed the victim to be quiet and told her that he was not allowed to be alone with kids and didn't want his neighbors to hear her. Defendant further advised L.F. that he had served ten months in jail for having sex with a minor. The victim

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[4] As detailed above, "Amanda" was the first name of the victim involved in the conduct leading to his federal conviction in 2000 for traveling interstate for the purpose of engaging in a sexual act with a juvenile. SA 10.

then told defendant that she wanted to leave and began to cry. SA 6, PSR ¶ 19.

Eventually, while defendant was in the bathroom, the victim called a friend's mother and asked her to help her to get home. The friend's mother agreed to help and was instructed to meet the victim at the Philadelphia bus terminal. Defendant became aware of the victim's call, engaged in additional sex acts with her, and then allowed and assisted her to meet the friend's mother. SA 6-7, PSR ¶¶ 20-21.

Defendant was ultimately identified through tracing telephone toll records of calls placed to him from the victim's home telephone. SA 7, PSR ¶ 22. Once he was identified, a criminal complaint and arrest warrant were obtained for defendant's arrest. Defendant was taken into custody on May 13, 2003. SA 7, PSR ¶ 22-23.

Following defendant's arrest, he admitted that he had traveled to Connecticut to pick up L.F. and returned with her to New Jersey. He admitted only limited physical contact with L.F. including, among other things, touching her breasts and having her touch his penis – contact he described as non-sexual in nature. SA 7, PSR ¶ 23.[5]

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[5] The victim submitted a victim impact statement in which she described being institutionalized following the incident with defendant and expressing concern that her life was inalterably impacted by her victimization. The victim wanted the district court to make certain that defendant never (continued...)

Indictment

On May 29, 2003, a grand jury sitting in New Haven, Connecticut returned an indictment charging defendant in two counts with violation of 18 U.S.C. § 2423(b) (interstate travel to engage in illegal sexual activity with a minor) and 18 U.S.C. § 2423(a) (transporting a minor in interstate commerce). On October 30, 2003, a superseding indictment was returned charging the same offenses and adding one count of violation of 18 U.S.C. § 2422(b) (enticement of a minor).

Guilty Plea

During plea discussions, it was determined that defendant qualified as a Repeat and Dangerous Sex Offender Against Minors, and was therefore subject to the enhanced penalties of U.S.S.G. § 4B1.5. The Government ultimately agreed to allow defendant to plead guilty to a substitute information charging him with one count of kidnaping in violation of 18 U.S.C. § 1201(a)(1), which allowed defendant to avoid the mandatory application of the sentencing enhancement provision and, at the same time, avoided subjecting "J.F." to the further victimization that a trial would necessarily entail. JA 30.

The plea agreement between the parties included a guidelines calculation that resulted in a guidelines

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[5] (...continued)
had the opportunity to hurt other young girls and wanted the court to ensure that defendant got the help he needed. JA 38-39.

sentencing range of 70-87 months' imprisonment. Both defendant and the Government, however, expressly reserved their right to seek a departure from this range. *See* JA at 25. Moreover, the plea agreement specifically alerted the district court that defendant's plea of guilty to the substitute information allowed defendant to avoid adjudication as a repeat sex offender. More particularly, the plea agreement provided:

> The defendant acknowledges that this plea, if accepted by the Court, will result in a significantly lower guideline range than if he were convicted of the offenses identified in the indictment, insofar as he will not be adjudicated a repeat sex offender and therefore subject to the guidelines located at U.S.S.G. § 4B1.5. This guideline if applied to the defendant will result in a Criminal History Category V, and an adjusted offense level of 29, with a commensurate guideline range of 168-210 months.
>
> The defendant expressly understands that the Court is not bound by this agreement on the Guidelines and fine ranges specified above. The defendant further expressly understands that he will not be permitted to withdraw the plea of guilty if the Court imposes a sentence outside the Guideline range or fine range set forth in this agreement.

JA 25.

On August 25, 2004, defendant entered a plea of guilty to a one-count information charging him with a violation of 18 U.S.C. § 1201(a)(1) (kidnaping).

Sentencing

A presentence investigation report was prepared by the Probation Office, which calculated defendant's relevant sentencing guideline range to be 70-87 months. The presentence investigation report also recommended that "[t]he Court may wish to consider an upward departure based on U.S.S.G. § 5K2.21 Dismissed and Uncharged Conduct." The Probation Office identified this upward departure because the "guideline calculation exposes Mr. Wells to a substantially lower imprisonment range than that of a repeat sex offender and may not fully embrace the severity of his conduct as perpetrated against a minor." SA 19, ¶ 87.

Prior to sentencing, defendant submitted a sentencing memorandum in which he objected to the district court's consideration of an upward departure pursuant to U.S.S.G. § 5K2.21, and urged the court to consider a downward departure based on alleged childhood abuse and resulting mental and emotional issues. JA 25-30.

The Government submitted a sentencing memorandum opposing defendant's request for a downward departure and supporting the Probation Office's recommendation of an upward departure pursuant to U.S.S.G. § 5K2.21. The Government also suggested, as an alternate basis for departure, U.S.S.G. § 4A1.3 which encourages a

sentencing court to depart upward "if reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that defendant will commit other crimes." *Id.* The Government posited that the inadequacy of the resulting criminal history category III was demonstrated by the fact that, pursuant to U.S.S.G. § 4B1.5, if that provision were applied, defendant would automatically qualify for criminal history category V. JA 31-36.

Following extensive argument by counsel, the district court found as follows:

> There was an incident in Florida where he enticed a 15 year old to come from Illinois to Florida. When the parents reported the girl missing, she was found in his apartment. She claimed that nothing happened and that she came voluntarily.
>
> The Florida authorities contacted the parents. They came and got her, brought her back to Illinois, and a week later he contacted her again, and then subsequently was charged.
>
> So, the first incident he was not charged with and should have been. In the Court's view, the Florida authorities dropped the ball.

JA 49. The court concluded by observing:

. . . . The Court is going to depart upward and impose a sentence of 120 months. The top of the guideline range was 87 months. The Court considers that inadequate. The upward departure is based on 5K2.21 and 4A1.3, and the Court would note that it believes that it has authority to depart upward under either of those sections, and would have departed upward under either of those sections, but also believes that it has authority to depart under – pursuant to both of those sections. So, in effect, the Court believes it has independent authority under either or both.

With respect to 4A1.3, the Court believes that Mr. Wells is a repeat sex offender. He has two incidents with minors that were uncharged. One was a teenager, the 15 year old from Illinois, who he induced to come to Florida, and was never prosecuted for that. She returned to Illinois and, within a few weeks, he traveled from Florida to Illinois, contacted her again, and then traveled with her from Illinois to Florida, although they were intercepted by authorities in Kentucky, and he was arrested at that time.

The sentence that he received in Florida for that incident, he was exposed to a guideline range sentence of 12 to 18 months. He was sentenced to a year and a day, which meant that he was eligible for release after roughly ten months.

> The Court finds that that was a very lenient sentence given the circumstances, and the fact that he was released from supervised release, that his supervised release in New Jersey was terminated early, also constitutes extreme leniency, leniency that the Court almost finds difficult to believe that any professional trained probation officer could ever have agreed to.
>
> So, he's received very lenient treatment in the past.

JA 69-70.

The court also specifically considered the application of U.S.S.G. § 4B1.5 on the dismissed counts of the superseding indictment and the impact that guideline provision would have had on both defendant's offense level and his criminal history category. JA 73-74. The court then departed upward and imposed a 120-month sentence and waived imposition of a fine. The court also sentenced defendant to a five-year term of supervised release. *See* JA 73-74,79-80.

Sentencing on Crosby Remand

Following the imposition of sentence, defendant filed a timely notice of appeal. The Government moved to stay the appeal and for a limited remand in the wake of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and this Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). The

Government's motion was granted and the case was remanded for a determination of whether re-sentencing was necessary.

Following briefing by the parties, on October 6, 2005, the district court conducted a further sentencing hearing on *Crosby* remand. JA 120-149. At that hearing, defendant argued that the district court was prohibited from altering its original sentence by *ex post facto* principles or, if the court held that *Booker* applied, that the court impose a sentence no greater than 87 months. JA 104-112, 128-141. The district court rejected defendant's *ex post facto* argument and made the following findings on re-sentencing:

> . . . . I said at the time [of the original sentencing] that it was based on 5K2.21, and that really relates to the fact that this defendant, in the Court's view, got a huge benefit, or in the vernacular, a break, when the plea agreement was renegotiated, because he would have been exposed, under the original charges, to 168-210 months.
>
> And if I remember correctly, and you can correct me, Mr. Glasser, if he'd been convicted under the original charges, he would have been compelled, if he is not already, to register as a sex offender, and all the consequences that a conviction under those statutes would have mandated. . . .
>
> And then under 4A1.3, I also covered that in my remarks at the time of the original sentencing.

> That's the adequacy of the criminal history – of his criminal history category, and I pointed out – and I'm not gonna repeat everything I said, but I basically pointed out that he was a repeat sex offender; that he'd had two incidents with minors that were uncharged. . . . And the other factor was that he was released early from supervised release in New Jersey, which I also found constituted extreme leniency. So, he had been treated very, very favorably in the past. In hindsight too favorably, and I would expect it may very well be that the Courts in those earlier cases, having been made aware of his activities subsequent to his involvement with those courts, might very well agree that they treated him too leniently.

The district court then concluded:

> . . . . I'm going to impose the same – in effect, find that I would not impose a materially different sentence, and that the original ten-year sentence was appropriate under the guideline range, and it would have – the Court would've reached the same conclusion under either a guideline sentence or a non-guideline sentence, when considering all the factors in Title 18, United States Code, Section 3553, which sets out all the factors that a Court should consider in imposing sentence . . . all of those factors set out in the statute were considered by the Court, and are being considered now . . . .

> I should add that . . . had he been sentenced – or had he plead initially to the initial charges before it was renegotiated, he would have been looking at 168 to 210 months, rather than 70 to 87 months, which is the guideline range with respect to this plea that he entered.
>
> The Second Circuit has said that the inadequacy of a defendant's criminal history is an encouraged basis for departure, and – so, for all those reasons, the Court finds that the original sentence was fair and adequate and appropriate and the sentence is reimposed.

JA 148. This appeal followed.

SUMMARY OF ARGUMENT

The 120-month sentence imposed by the district court was reasonable. First, the district court did not abuse its discretion when it departed upward pursuant to U.S.S.G. § 4A1.3 on the ground that defendant's criminal history category significantly under-represented the seriousness of his criminal past and the likelihood of recidivism. The defendant had never been prosecuted for a previous incident in which he had lured a young girl to Florida, where she was found by police. Although the defendant again lured the girl away from home, and was prosecuted for this second depredation, the first incident was not reflected in his criminal history score. Moreover, the fact that he was a repeat sexual offender, committing the same

pattern of misconduct, was not reflected by his criminal history score.

Second, the district court did not abuse its discretion when it rested its departure on the alternative ground of U.S.S.G. § 5K2.21, by considering the impact of the dismissed counts of the indictment on the Sentencing Guidelines calculation, insofar as they also would have reflected that the present conduct was by a repeat sexual offender – a fact that would have doubled his statutory maximum sentence under 18 U.S.C. § 2426, and triggered a concomitantly higher guideline under U.S.S.G. § 4B1.5.

Moreover, on *Crosby* remand the district court specifically considered the factors enumerated in 18 U.S.C. § 3553 and determined that it would have imposed the same 120-month sentence as either a guideline or non-guideline sentence. Under these circumstances, the sentence imposed should be found to be "reasonable" – particularly where the district court had explained at the original sentencing that it was authorized to impose the upward departure under either or both of the cited guideline provisions.

Finally, there was no *ex post facto* violation where the maximum penalties to which defendant was exposed remained unchanged; and where defendant was consistently made aware of those maximum penalties, as well as the fact that the district court could depart upward or downward from his calculated guideline range.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DEPARTED FROM THE GUIDELINE RANGE BASED ON UNDER-REPRESENTATION OF DEFENDANT'S CRIMINAL HISTORY CATEGORY AND ON DISMISSED AND UNCHARGED CONDUCT AND, IN ANY EVENT, THE SENTENCE IMPOSED WAS "REASONABLE"

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

Prior to *United States v. Booker*, this Court reviewed downward departures under the standard prescribed by the Feeney Amendment, which was *de novo* review. This portion of the Feeney Amendment, codified at 18 U.S.C. § 3742(e), was excised by *Booker* and replaced with "reasonableness" review. The Court recently held that "[a] defendant challenges the procedures of his sentencing proceeding or the reasonableness of the sentence imposed, he effectively claims that the sentence, whether a Guidelines sentence or a non-Guidelines sentence, was 'imposed in violation of the law,' 18 U.S.C. § 3742(a)(1). We therefore have authority to review sentences, whether Guidelines sentences or non-Guidelines sentences, for reasonableness." *United States v. Fernandez*, 2006 WL

851670 at *4 (2d Cir. Apr. 3, 2006). This Court further observed that reasonableness review involves consideration of both the sentence imposed and the procedure employed in arriving at the sentence. The Court recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Id.* at *6 (citations omitted).

In assessing the reasonableness of a particular sentence imposed, the Court cautioned that

> [a] reviewing court 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. Fairclough, 439 F.3d 76, 79-80 (2d Cir. 2006) (per curiam) (quoting *United States v. Fleming*, 397

F.3d 95, 100 (2d Cir. 2005)) (alteration omitted). In determining the reasonableness of a sentence, the primary inquiry will be on the district court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a). *Id.* (citing *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005)); *see Fernandez*, 2006 WL 851670 at *8.

C. Discussion

1. Departure Based on U.S.S.G. § 4A1.3

Defendant claims that the district court abused its discretion when it found that his criminal history category under-represented the seriousness of his criminal past and the likelihood of recidivism. Def.'s Br. at 9-12. As demonstrated below, defendant's claim is devoid of merit.

Section 4A1.3 of the Sentencing Guidelines encourages an upward departure where "reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of defendant's criminal history and the likelihood that defendant will commit other crimes . . . ." § 4A1.3(a)(1); *see United States v. Gayle*, 389 F.3d 406, 409 (2d Cir. 2004). Among other categories of information supporting an upward departure, the Guidelines invite consideration of any "[p]rior similar adult criminal conduct not resulting in a criminal conviction." U.S.S.G. § 4A1.3(a)(2)(E); s*ee United States v. Cox*, 299 F.3d 143, 147 (2d Cir. 2002) ("a sentencing court may consider information outside the five express factors of Section 4A1.3 as a basis for departure as long as

the information is reliable"); *United States v. Livoti*, 196 F.3d 322, 328 (2d Cir. 1999).

The Second Circuit has recognized that a propensity for future criminal behavior may be indicated by "uncharged criminal conduct" and has upheld an upward departure based in part on that ground. *Gayle*, 389 F.3d at 410. In addition, this Court has held that prior lenient sentences may support an upward departure in criminal history categories. *See id*. (upholding upward departure based in part on fact that Gayle had been beneficiary of light prison sentences and yet continued to "flout the laws of this country") (internal citations omitted). The frequency of prior convictions, when viewed in conjunction with lenient sentences received for those convictions, suggests a likelihood for recidivism that likewise justifies an upward departure. *See United States v. Diaz-Collado*, 981 F.2d 640, 644 (2d Cir. 1992) (departure from criminal history category IV to category V resulting in four-month sentence increase was reasonable).

When a district court departs under Section 4A1.3, it must state "the specific reason for the imposition of a sentence different" from the applicable guideline range. 18 U.S.C. § 3553(c)(2). Thus, a district court must provide "some explanation of its reasoning" such as will enable an appellate court to assess whether the departure was justified. *United States v. Thorn*, 317 F.3d 107, 131 (2d Cir. 2003).

Here, the district court provided three distinct bases to support its upward departure pursuant to U.S.S.G. § 4A1.3:

(1) uncharged conduct; (2) prior lenient treatment; and (3) the fact that defendant qualified as a Repeat and Dangerous Sex Offender Against Minors pursuant to U.S.S.G. § 4B1.5. JA 69, 73-74, 146-47.

First, the district court cited the fact that defendant was never charged with the incident where, in the fall of 1999, he communicated via the Internet with a 15-year-old girl named "Amanda" and convinced Amanda to run away from her home in Illinois to defendant's home in Ft. Lauderdale, Florida where she was ultimately rescued by law enforcement authorities.[6] Despite the fact that this child was returned to her parents, defendant nevertheless quickly found a way to communicate with her and convince her to run to him again so that he could sexually abuse her. Defendant was ultimately charged with this second incident, but not the first. As this Court recognized in *Gayle*, 389 F.3d at 410, uncharged criminal conduct can support an upward departure.[7]

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[6] The district court referred to other incidents with minors for which defendant was never charged. JA 68. The other incident referenced by the court involved a second fifteen-year-old girl with whom defendant communicated and whom he attempted to convince to run away to him. Evidence developed and made available to the district court included the fact that defendant offered to buy plane tickets for this fifteen-year-old so that she could abscond to his home to be with him. *See* JA 11. Defendant was never charged for this conduct.

[7] Defendant argues that this incident relied upon by the court was relevant conduct to his federal conviction. Def.'s Br. (continued...)

Second, the district court relied on prior lenient treatment received by defendant. Like the defendant in *Gayle*, the defendant here was the beneficiary of lenient treatment as evidence by his sentence of one year and one day – the bottom of the Guideline range – of which he served 10 months. The sentence at the bottom of the Guideline range resulted in the assignment of two, rather than three, criminal history points. U.S.S.G. § 4A1.1(a) and (b). In addition, defendant's term of supervised release was terminated early.[8] SA 52.

Finally, the district court cited the fact that defendant would otherwise qualify as a Repeat and Dangerous Sex Offender Against Minors. Here, the totality of defendant's criminal conduct demonstrates the inadequacy of the resulting criminal history category III. That category simply does not reflect the seriousness of this defendant's

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[7] (...continued)
at 10. The record discloses, however, that this incident was not factored into and did not impact defendant's Guideline calculation in any respect. Indeed, a review of the presentence report from that incident discloses that defendant's guideline level was not even increased for use of a computer to induce or entice the victim, resulting in an artificially low guideline range. *See* U.S.S.G. § 2A3.2(b)(3) (Nov. 2000) and SA 45.

[8] Although not specifically referenced by the district court, defendant committed this offense while he was serving his term of supervised release. No petition to violate and revoke defendant's term of supervised release was ever brought by authorities in New Jersey.

criminal past and the likelihood that he will reoffend. That conclusion is buttressed by the fact that, pursuant to U.S.S.G. § 4B1.5, if that provision were applied here, defendant would automatically qualify for criminal history category V. The district court properly considered the fact that the Guidelines require that a defendant with the same criminal record, who engaged in the same offense conduct, automatically qualifies for Criminal History Category V if U.S.S.G. § 4B1.5 were applied. Using the Guideline applicable to the dismissed counts of the indictment to guide its upward departure was certainly not an abuse of discretion.

Defendant argues that an upward departure based on § 4A1.3 is not appropriate because defendant's prior conviction was properly calculated and defendant received a sentence for that offense within the calculated guideline range. Def.'s Br. at 11. While this may be true, it does not address the fact that the *first* incident in which he lured "Amanda" to Florida never resulted in a criminal charge, and therefore did not result in any criminal history points that would have increased his criminal history score. Nor does it address the fact that under § 4B1.5 (which is designed precisely for the individuals who engage in a pattern of behavior like that of defendant) defendant's criminal history score would automatically be V. The court properly considered that, as a repeat sex offender, defendant's criminal history score does not reflect the seriousness of his criminal past and the likelihood of recidivism. Moreover, as this Court stated in *United States v. Weisser*, 417 F.3d 336 (2d Cir. 2005), a defendant's criminal past, even if he has already been punished for past

transgressions, can be considered by the court when determining whether a departure is appropriate under § 4A1.3. The Court noted that "Section 4A1.3 itself lists prior punishment as a factor to be considered. *See* U.S.S.G. § 4A1.3(a),(b)." *Id.* at 350.

As the Court observed in *Gayle*, inadequacy of a defendant's criminal history is an encouraged basis for departure. The Court further observed that likelihood of recidivism is properly gauged by considering the defendant's entire record to determine whether it involves factors "of a kind, or to a degree not adequately taken into account by the Sentencing Commission." 18 U.S.C. § 3553(b)(1).

Here, the district court properly considered that defendant enticed a minor to run away to him and was not charged with that offense; and that weeks later, he once again engaged in criminal conduct with the same fifteen-year-old child. The court also properly considered that defendant attempted a liaison with at least one other fifteen-year-old child. Moreover, the district court also properly considered that defendant had previously received lenient treatment from the criminal justice system inasmuch as he was previously sentenced at the bottom of the relevant Guideline range and served less than one year of imprisonment. The district court also properly considered that defendant's term of supervised release was terminated early despite a finding of violations. Finally, the court properly considered the plea agreement between the parties and that under the dismissed counts of the indictment, defendant would have been treated as a Repeat

and Dangerous Sex Offender Against Minors with a much higher sentencing guideline range. The combination of factors cited by the district court supported the court's determination to depart upward; its determination was certainly not an abuse of discretion.

Because the district court stated that it had authority to grant the upward departure based on either or both of the cited guideline sections, this ground alone provides sufficient basis alone for affirming the district court's sentence.

2. Departure Based on U.S.S.G. § 5K2.21

Defendant claims that the district court erred in holding that the upward departure could also be based on the alternative ground of U.S.S.G. § 5K2.21 because, he alleges, defendant's kidnaping guideline was already increased pursuant to U.S.S.G. § 2A4.1(b)(7) and, therefore, the conduct in the dismissed counts was already considered in the determination of the applicable guideline range. Def.'s Br. at 6-12. This argument should be rejected.

Amendment 604 to the sentencing guidelines, effective November 1, 2000, permits sentencing courts to consider as a basis for an upward departure aggravating conduct that is dismissed or not charged in connection with a plea agreement. *See* U.S.S.G. App. C, para. 604 (2001). That amendment added U.S.S.G. § 5K2.21 as an encouraged basis for departure, allowing a district court to "increase the sentence above the guideline range to reflect the actual

seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range." *Id.; see United States v. Bolden*, 368 F.3d 1032, 1035 (8th Cir. 2004); *United States v. Chesborough,* 333 F.3d 872, 874 (8th Cir. 2003) (affirming upward departure under § 5K2.21 and § 4A1.3); *United States v. Wolfe*, 309 F.3d 932 (6th Cir. 2002).

The Probation Office recommended an upward departure on this invited basis because defendant's calculated guideline range "exposed Wells to a substantially lower imprisonment range than that of a repeat sex offender . . . ." SA 19. Thereafter, the district court found that defendant's plea to the kidnaping charge allowed him to avoid the enhanced penalties of U.S.S.G. § 4B1.5, which would have exposed him to a significantly higher Guidelines range, and therefore supported an upward departure. JA 68-69, 73-74. This conclusion did not constitute an abuse of discretion.

It is undisputed that defendant's plea to the kidnaping charge allowed him to avoid treatment as a repeat sex offender. This fact was expressly recognized by the parties in the plea agreement and was brought to the district court's attention. The plea agreement advised the court that U.S.S.G. § 4B1.5 would significantly increase defendant's guideline offense level and his criminal history category subjecting him to a guideline range of 168-210

months' imprisonment rather than the 70-87 month range that resulted from his plea to kidnaping.

Thus, as recognized in the plea agreement, the fact that defendant qualified as a repeat sex offender did not factor into a determination of the applicable guideline range, and was properly considered as a basis for upward departure pursuant to U.S.S.G. § 5K2.21.

Defendant's claim on appeal focuses on the second requirement of § 5K2.21, that the "conduct" underlying the dismissed charge not have "enter[ed] into the determination of the applicable guideline range." Specifically, he points to the fact that his guidelines range was calculated using a cross-reference to U.S.S.G. § 2A3.2, due to the fact that his crime constituted a violation of 18 U.S.C. § 2423; and that his base offense level under § 2A3.2 was set at 24 because his offense involved a sexual act or sexual contact. To that extent, of course, defendant is correct: the conduct needed to make out a bare violation of § 2423 was indeed taken into account in the determination of his guidelines range. But Judge Nevas did not focus on the bare violation of § 2423 when he decided that an upward departure was appropriate. Instead, what he emphasized was the fact that defendant's conduct was the action of a *repeat sex offender* – that is, the action of someone who had previously been convicted of a § 2423 violation.

That fact sets defendant apart from other, more typical violators of § 2423. This is more than a matter of common sense; Congress itself identified repeat sex offenders as

meriting significantly increased punishment in 18 U.S.C. § 2426, the enhanced-penalty provision that serves as an adjunct to the sex-crimes provisions of Chapter 117 of Title 18, which includes § 2423. Section 2426 provides that a defendant who has a "prior sex offense conviction" shall be subject to "twice the term of imprisonment otherwise provided" – which would convert the 15-year maximum penalty of § 2423 to a 30-year maximum. In a case like the present, where defendant's conduct would have been punishable under the conjoined provisions of § 2423 and § 2426, it is certainly reasonable to conclude that the "conduct" contemplated in U.S.S.G. § 5K2.21 includes those facts which are required to trigger both of those provisions.[9]

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[9] Before the district court, the Government argued that defendant's being a repeat sex offender was the "conduct" in the dismissed § 2423 charge which was not taken into account for purposes of § 5K2.21, and emphasized that dismissal of the § 2423 charges had the consequence of sparing him the application of § 4B1.5. The Government did not cite § 2426, but respectfully submits that it is additional authority that reinforces that argument. In any event, this Court has repeatedly stated that it is "free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied." *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (citations and internal quotation marks omitted).

To be clear, the Government is not arguing that the prior-sex-offense requirement of § 2426 constitutes an "element" of the crime for purposes of the Sixth Amendment. As the Supreme Court has continued to recognize, the fact of a (continued...)

Moreover, the district court properly considered the enhanced penalty provisions of U.S.S.G. § 4B1.5 in fixing the upward departure, given the congruity between that guideline and Congress's expressed intention in 18 U.S.C. § 2426 to increase penalties for repeat sex offenders. The Background Commentary to U.S.S.G. § 4B1.5 provides that the section "is intended to provide lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors." *Id.* Given defendant's demonstrated pattern of sexual exploitation of minors, the district court's determination to depart upward on the basis of the conduct

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[9] (...continued)
defendant's prior conviction need not go to a jury or be proven beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220, 244 (2005); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *United States v. Estrada*, 428 F.3d 387, 390 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1451 (2006). Section 5K2.21 does not, however, hinge on whether only the "elements" of a crime have been factored into a guideline analysis. Instead, it asks whether the "conduct" has been so considered. The Government submits that the phrase "conduct" should most naturally be construed to include all aspects of the crime which are required to trigger the penalty at stake – whether the age of the victim (as in § 2423(a)), or the predatory nature of the aggressor (as manifested by prior convictions for sex offenses, provided in § 2426). Because the entire purpose of the Guidelines is to arrive at the appropriate *sentence*, it makes eminently good sense to construe the phrase "conduct" in § 5K2.21 as including statutorily mandated *sentencing factors* as well as *elements*.

described in the dismissed counts was properly within the district court's discretion.[10]

Finally, it cannot be said that the fact that defendant committed the present crime as a repeat sex offender "enter[ed] into the determination of the applicable guideline range" simply by virtue of his criminal history score. The fact that he had previously committed *some* sort of crime certainly was considered in totaling up his criminal history points, as was the fact that he committed the present crime shortly after having been released from imprisonment for another crime. Yet the nature of his

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[10] The sole case relied upon by defendant, *United States v. Wolfe*, 309 F.3d 932 (6th Cir. 2002), supports the upward departure in this case. In *Wolfe,* the defendant was charged with sixteen bank robberies committed in both the Northern and Southern Districts of Ohio. Defendant was also charged with attempting to escape from a magistrate's courtroom. Ultimately, defendant pleaded guilty to the attempted escape charges and to the ten of the bank robberies. When imposing sentence, the district court noted that, pursuant to the guidelines grouping rules, it was limited to a five-level enhancement for the commission of six or more robberies. The court departed upward because the five-level increase did not account for four additional robberies defendant acknowledged committing. The court also noted that defendant admitted responsibility for six additional bank robberies that were dismissed as part of the guilty plea and that these dismissed counts also supported the upward departure. *Id.* at 934. Thus, in *Wolfe,* as in this case, where the Guidelines calculation did not adequately account for uncharged conduct, the Court found an upward departure to be appropriate. *Id.* at 935.

prior crime – much less the similarity between his prior crime and his present one – was not considered in arriving at his criminal history score, and so it cannot be said to have "enter[ed] into" his guideline range here, for purposes of U.S.S.G. § 5K2.21.

3. The Sentence Imposed Was Reasonable

On *Crosby* remand, the district court received additional briefing on issues relevant to sentencing, and at the conclusion of oral argument by counsel, found that the court would have imposed the same 120-month sentence under either a Guideline or non-Guideline regime. The district court affirmatively stated that it had considered all the factors listed in 18 U.S.C. § 3553 and reviewed those factors during the sentencing proceeding, and concluded that the 120-month sentence previously imposed was reasonable. JA 147.

Where, as here, the district court complied with the statutory requirements and was fully familiar with the details of the offense and defendant's criminal past, the sentence imposed should be found to be "reasonable" and should be affirmed. *See Fernandez,* 2006 WL 851670 at *8 ("Consideration of the § 3553(a) factors is not a cut-and-dried process of factfinding and calculation; instead, a district judge must contemplate the interplay among the many facts in the record and the statutory guideposts. That context calls for us to refrain from imposing any rigorous requirement of specific articulation by the sentencing judge."); *Fairclough*, 439 F.3d at 80 (affirming non-Guideline sentence that was 21 months above the

maximum advisory guideline range of 21-27 months based on the defendant's "relatively uninterrupted string of criminal activity and arrests").

II. THE COURT'S DECISION NOT TO ALTER THE SENTENCE ON *CROSBY* REMAND DOES NOT OFFEND *EX POST FACTO* PRINCIPLES

Defendant claims that the district court's determination to impose the same sentence on *Crosby* remand violates *ex post facto* principles. More particularly, he attempts to distinguish this Court's recent decision in *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), *cert. denied,* 2006 WL 535448 (U.S. Apr. 3, 2006), and claims that *Booker* effectively creates a new sentencing system that retroactively exposes him to the potential of a "greater punishment." Def.'s Br. at 13-14. As demonstrated below, defendant's claim is foreclosed by three recent opinions of this Court and by every other Circuit Court to address this issue.[11]

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[11] Defendant's *ex post facto* argument has been rejected by ten of the eleven circuits that have issued published decisions addressing this claim; the Fourth Circuit, as of this writing, has not released a published decision addressing this issue. *See United States v. Lata*, 415 F.3d 107, 110 (1st Cir. 2005); *United States v. Veshio*, 2006 WL 637147 (3d Cir. Mar. 15, 2006); *United States v. Charon*, 2006 WL 574274 (5th Cir. Mar. 10, 2006); *United States v. Richardson*, 437 F.3d 550, 555 (6th Cir. 2006); *United States v. Jamison*, 416 F.3d 538, 539-40 (7th Cir. 2005); *United States v. Kelly*, 436 F.3d 992, 993 (8th Cir. 2006); *United States v. Dupas*, 419 F.3d 916, 919 (9th Cir. (continued...)

In *United States v. Vaughn*, 430 F.3d 518 (2d Cir 2005), the defendants claimed that the remedial holding of *Booker* violated the *Ex Post Facto* Clause by exposing them to sentencing enhancements that were not authorized by the jury's verdict and which exposed them to the imposition of sentence anywhere within the maximum authorized by statute. This Court rejected the defendants' argument, noting that while it is true that the Due Process Clause imposes some limits on *ex post facto* judicial decision making, such limits are premised on the principle of fair warning and therefore do not cabin judicial action as narrowly as the *Ex Post Facto* Clause limits legislative action.

The Court then concluded that the retroactive application of *Booker* and a determination of whether a sentence imposed was "reasonable" does not offend *ex post facto* principles because:

> [j]ust as appellants had fair warning that their conduct was criminal, they also had fair warning of the potential penalties they faced for conspiring to distribute marijuana. The relevant maximum applicable to the drug quantity found by the jury at the time the appellants committed their offense was the statutory maximum of twenty years'

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[11] (...continued)
2005); *United States v. Rhines*, 419 F.3d 1104, 1106 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 1089 (2006); *United States v. Duncan*, 400 F.3d 1297, 1306-08 (11th Cir.), *cert. denied*, 126 S. Ct. 432 (2005).

> imprisonment. Appellant also had fair notice at the time that their sentence could be based on a judicial determination of the quantity of marijuana involved in their offense as long as the sentences were below the relevant statutory maximum. The sentences imposed by the district court were below the statutory maximum and within the range prescribed by the Guidelines for the quantity of drugs the court determined to have been involved in the appellants' crime. Even under pre-*Booker* law, defendants faced the possibility of sentences anywhere within the applicable statutory range.

Id. at 524. Thus, this Court found no constitutional impediment to the application of *Booker*'s remedial holding to cases on direct review.

Next, this Court decided *United States v. Holguin*, 436 F.3d 111 (2d Cir. 2006), in which it again found no constitutional violation when *Booker*'s remedial holding was applied on direct review. The Court further found that the relevant maximum sentence for *ex post facto* analysis is the maximum authorized by the statute defining the offense, not the top of the sentencing guideline range applicable under the particular circumstances of an individual case. *Id.* at 119.

Finally, and most recently, the Court decided *United States v. Fairclough*, 439 F.3d 76 (2d Cir. 2006). In that case, the defendant entered a plea of guilty to a charge of possession of a firearm by a previously convicted felon. The defendant's relevant guideline term was computed to

call for a sentence within the range of 21 to 27 months. The district court, relying on *Booker* and the advisory nature of the guidelines, imposed a sentence of 48 months. On appeal, defendant claimed that the court violated the *ex post facto* principles when it applied *Booker* to sentence him above the guideline range for pre-*Booker* conduct.

This Court found no *ex post facto* violation when the remedial holding of *Booker* was applied at sentencing for pre-*Booker* conduct because the defendant "had fair warning that his conduct was criminal, that enhancements or upward departures could be applied to his sentence under the Guidelines based on judicial fact finding, and that he could be sentenced as high as the statutory maximum of ten (10) years." *Id.* at 78.

Similarly, here, defendant had fair warning of the sentence to which he would be exposed in light of the fact that the relevant statute criminalizing his conduct stated clearly what the maximum term of imprisonment could be. Indeed, at the time defendant committed his crimes, pleaded guilty, and was sentenced, this Circuit (like all the others) had consistently held that the maximum sentence to which defendant could be sentenced was the maximum established by *statute*, not by the Guidelines based solely on facts found by a jury. *See, e.g., United States v. Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), *cert. denied*, 540 U.S. 1167 (2004).

Here, defendant had "fair warning" as evidenced by the district court's allocution of defendant during the change of plea hearing, and as evidenced by the written plea

agreement, both of which clearly advised defendant that he was subject to a maximum statutory term of life imprisonment. *See* 18 U.S.C. § 1201(a)(1); JA 22. Moreover, as indicated above, the written plea agreement expressly reserved both parties' right to seek departures from the calculated guideline range, alerted the court to the impact on the guidelines of the sentencing enhancement provision of U.S.S.G. § 4B1.5, and specifically indicated that the district court was not bound by the agreement between the parties and that defendant would not be permitted to withdraw his plea of guilty if the ultimate sentence imposed by the court was outside the range set forth in the agreement. JA 25.

Accordingly, as in *Vaughn, Holguin* and *Fairclough*, the sentence imposed was well below the statutory maximum and there was no *ex post facto* violation when the district court imposed the same 120-month sentence on *Crosby* remand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: April 10, 2006

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,173 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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Addendum

18 U.S.C. § 1201. Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when –

> (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary if the person was alive when the transportation began;
>
> . . .

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

18 U.S.C. § 2423 (2001). Transportation of minors

(a) Transportation with intent to engage in criminal sexual activity. – A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Travel with intent to engage in sexual act with a juvenile.– A person who travels in interstate commerce,

or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. § 2426 (2001). Repeat offenders

(a) Maximum term of imprisonment.– The maximum term of imprisonment for a violation of this chapter after a prior sex offense conviction shall be twice the term of imprisonment otherwise provided by this chapter, unless section 3559(e) applies.

(b) Definitions. – In this section –

(1) the term "prior sex offense conviction" means a conviction for an offense –

(A) under this chapter, chapter 109A, or chapter 110; or

(B) under State law for an offense consisting of conduct that would have been an offense under a chapter referred to in paragraph (1) if the conduct had occurred within the special maritime and territorial jurisdiction of the United States; and

(2) the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

U.S.S.G. § 2A3.2 (2001). Criminal Sexual Abuse of a Minor under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level:

(1) 24, if the offense involved (A) a violation of chapter 117 of title 18, United States Code; and (B)(i) the commission of a sexual act; or (ii) sexual contact;

(2) 21, if the offense (A) involved a violation of chapter 117 of title 18, United States Code; but (B) did not involve (i) the commission of a sexual act; or (ii) sexual contact; or

(3) 18, otherwise.

(b) Specific Offense Characteristics

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(2) If subsection (b)(1) does not apply; and--

(A) the offense involved the knowing misrepresentation of a participant's identity to (i) persuade, induce, entice, or coerce the victim to engage in

prohibited sexual conduct; or (ii) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct; or

(B) a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct,

increase by 2 levels.

(3) If a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct, increase by 2 levels.

(4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by 6 levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the victim.

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.--For purposes of this guideline:

"Participant" has the meaning given that term in Application Note 1 of § 3B1.1 (Aggravating Role).

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).

"Sexual contact" has the meaning given that term in 18 U.S.C. § 2246(3).

"Victim" means (A) an individual who, except as provided in subdivision (B), had not attained the age of 16 years; or (B) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.

2. Custody, Care, and Supervisory Control Enhancement.--Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the

court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

3. Abuse of Position of Trust.--If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Misrepresentation of Identity.--The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to the victim or to a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the victim.

The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in

prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the victim compromised the voluntariness of the victim's behavior.

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

If the victim was threatened or placed in fear, the cross reference in subsection (c)(1) will apply.

5. Use of Computer or Internet-Access Device.--Subsection (b)(3) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce the victim to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with the victim or with a person who exercises custody, care, or

supervisory control of the victim. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the victim from an airline's Internet site.

6. Cross Reference.--Subsection (c)(1) provides a cross reference to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to § 2A3.1 shall apply if (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2242(1)).

7. Upward Departure Consideration.--There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.

Background: This section applies to offenses involving the criminal sexual abuse of an individual who had not

attained the age of 16 years. While this section applies to consensual sexual acts prosecuted under 18 U.S.C. § 2243(a) that would be lawful but for the age of the victim, it also applies to cases, prosecuted under 18 U.S.C. § 2243(a) or chapter 117 of title 18, United States Code, in which a participant took active measure(s) to unduly influence the victim to engage in prohibited sexual conduct and, thus, the voluntariness of the victim's behavior was compromised. A two-level enhancement is provided in subsection (b)(2) for such cases. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). A two-level enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor under his supervision or care. However, if the victim had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) will apply, regardless of the "consent" of the victim.

U.S.S.G. § 2A4.1 (2001). Kidnapping, Abduction, Unlawful Restraint

(a) Base Offense Level: 24

(b) Specific Offense Characteristics

(1) If a ransom demand or a demand upon government was made, increase by 6 levels.

(2) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2

levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(3) If a dangerous weapon was used, increase by 2 levels.

(4) (A) If the victim was not released before thirty days had elapsed, increase by 2 levels.

(B) If the victim was not released before seven days had elapsed, increase by 1 level.

(C) If the victim was released before twenty-four hours had elapsed, decrease by 1 level.

(5) If the victim was sexually exploited, increase by 3 levels.

(6) If the victim is a minor and, in exchange for money or other consideration, was placed in the care or custody of another person who had no legal right to such care or custody of the victim, increase by 3 levels.

(7) If the victim was kidnapped, abducted, or unlawfully restrained during the commission of, or in connection with, another offense or escape therefrom; or if another offense was committed during the kidnapping, abduction, or unlawful restraint, increase to--

(A) the offense level from the Chapter Two offense guideline applicable to that other offense if such offense

guideline includes an adjustment for kidnapping, abduction, or unlawful restraint, or otherwise takes such conduct into account; or

(B) 4 plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level 43, in any other case,

if the resulting offense level is greater than that determined above.

(c) Cross Reference

(1) If the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 115(b)(2), 351(b), (d), 1201, 1203, 1751(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline--

Definitions of "serious bodily injury" and "permanent or life-threatening bodily injury" are found in the Commentary to §1B1.1 (Application Instructions).

However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which is taken into account in the specific offense characteristic under subsection (b)(5).

2. "A dangerous weapon was used" means that a firearm was discharged, or a "firearm" or "dangerous weapon" was "otherwise used" (as defined in the Commentary to §1B1.1 (Application Instructions)).

3. For the purpose of subsection (b)(4)(C), "released" includes allowing the victim to escape or turning him over to law enforcement authorities without resistance.

4. "Sexually exploited" includes offenses set forth in 18 U.S.C. §§ 2241-2244, 2251, and 2421-2423.

5. In the case of a conspiracy, attempt, or solicitation to kidnap, §2X1.1 (Attempt, Solicitation, or Conspiracy) requires that the court apply any adjustment that can be determined with reasonable certainty. Therefore, for example, if an offense involved conspiracy to kidnap for the purpose of committing murder, subsection (b)(7) would reference first degree murder (resulting in an offense level of 43, subject to a possible 3-level reduction under §2X1.1(b)). Similarly, for example, if an offense involved a kidnapping during which a participant attempted to murder the victim under circumstances that would have constituted first degree murder had death occurred, the offense referenced under subsection (b)(7) would be the offense of first degree murder.

Background: Federal kidnapping cases generally encompass three categories of conduct: limited duration kidnapping where the victim is released unharmed; kidnapping that occurs as part of or to facilitate the commission of another offense (often, sexual assault); and kidnapping for ransom or political demand.

The guideline contains an adjustment for the length of time that the victim was detained. The adjustment recognizes the increased suffering involved in lengthy kidnappings and provides an incentive to release the victim.

An enhancement is provided when the offense is committed for ransom (subsection (b)(1)) or involves another federal, state, or local offense that results in a greater offense level (subsections (b)(7) and (c)(1)).

Section 401 of Public Law 101-647 amended 18 U.S.C. § 1201 to require that courts take into account certain specific offense characteristics in cases involving a victim under eighteen years of age and directed the Commission to include those specific offense characteristics within the guidelines. Where the guidelines did not already take into account the conduct identified by the Act, additional specific offense characteristics have been provided.

U.S.S.G. § 4A1.3 (2001). Adequacy of Criminal History Category (Policy Statement)

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

(a) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);

(b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;

(c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

(d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;

(e) prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense, or (5) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under § 4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening

period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with Criminal History Category IV, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the

range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses. On the other hand, a defendant with nine prior 60-day jail sentences for offenses such as petty larceny, prostitution, or possession of gambling slips has a higher number of criminal history points (18 points) than the typical Criminal History Category VI defendant, but not necessarily a more serious criminal history overall. Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

However, this provision is not symmetrical. The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.

Commentary

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received

what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

U.S.S.G. § 4B1.5 (2001). Repeat and Dangerous Sex Offender Against Minors

(a) In any case in which the defendant's instant offense of conviction is a covered sex crime, § 4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:

(1) The offense level shall be the greater of:

(A) the offense level determined under Chapters Two and Three; or

(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

Offense Statutory Maximum	Offense Level
(i) Life	37
(ii) 25 years or more	34
(iii) 20 years or more, but less than 25 years	32
(iv) 15 years or more, but less than 20 years	29
(v) 10 years or more, but less than 15 years	24
(vi) 5 years or more, but less than 10 years	17
(vii) More than 1 year, but less than 5 years	12.

(2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.

(b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:

(1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be level 22, decreased by the number of levels corresponding to any applicable adjustment from §3E1.1.

(2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

Commentary

Application Notes:

1. Definitions.--For purposes of this guideline:

"Minor" means an individual who had not attained the age of 18 years.

"Minor victim" includes (A) an undercover law enforcement officer who represented to the defendant that the officer was a minor; or (B) any minor the officer represented to the defendant would be involved in the prohibited sexual conduct.

2. Covered Sex Crime as Instant Offense of Conviction.--For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e.: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.

3. Application of Subsection (a).--

(A) Definitions.--For purposes of subsection (a):

(i) "Offense statutory maximum" means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in 18 U.S.C. § 2247(a) or § 2426(a)) that applies to that covered sex crime because of the defendant's prior criminal record.

(ii) "Sex offense conviction" (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.--In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).

4. Application of Subsection (b).--

(A) Definition.--For purposes of subsection (b), "prohibited sexual conduct" (i) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii)

includes the production of child pornography; (iii) includes trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography; and (iv) does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Pattern of Activity.--

(i) In General.--For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if--

(I) on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor; and

(II) there were at least two minor victims of the prohibited sexual conduct.

For example, the defendant engaged in a pattern of activity involving prohibited sexual conduct if there were two separate occasions of prohibited sexual conduct and each such occasion involved a different minor, or if there were two separate occasions of prohibited sexual conduct involving the same two minors.

(ii) Occasion of Prohibited Sexual Conduct.--An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether

the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

5. Treatment and Monitoring.--

(A) Recommended Maximum Term of Supervised Release.--The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) Recommended Conditions of Probation and Supervised Release.--Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.

Background: This guideline is intended to provide lengthy incarceration for offenders who commit sex offenses against minors and who present a continuing danger to the public. It applies to offenders whose instant offense of conviction is a sex offense committed against a minor victim. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant previously was convicted of any of several federal and state sex offenses (see 18 U.S.C. §§ 2247, 2426). In addition, section 632 of Pub. L. 102-141 and section 505 of Pub. L. 105-314 directed the Commission to ensure lengthy incarceration

for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

U.S.S.G. § 5K2.21 (2001) Dismissed and Uncharged Conduct (Policy Statement)

The court may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Wells

Docket Number: 05-5810-cr

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 4/10/2006) and found to be VIRUS FREE.

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Dated: April 10, 2006