IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 18-14225-AA

UNITED STATES OF AMERICA

Appellee,

v.

DAVID HARDMAN

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT FILED PURSUANT TO *ANDERS v. CALIFORNIA*, 386 U.S. 738 (1967)

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Appeal No. 18-14225-AA

United States of America v. David Hardman

CERTIFICATE OF INTERESTED PERSONS

The persons listed below have an interest in the outcome of this case:

Andrejko, Nicole M.

Baker, The Honorable David A.

Bloom, Aliza Hochman

Cakmis, Rosemary

Elm, Donna Lee

Gable, Karen L.

Grandy, Todd B.

Greenlee, Andrew Brooks

Hardman, David

Irick, The Honorable Daniel C.

Kelly, The Honorable Gregory J.

Lopez, Maria Chapa

Mendoza, The Honorable Carlos E.

Minor victims whose identities are protected

Muldrow, Stephen

Reyes, Karla Mariel

Appeal No. 18-14225-AA

United States of America v. David Hardman

CERTIFICATE OF INTERESTED PERSONS - *continued*

Rhodes, David P.

Ryan, Michael Shay

Scheller, Fritz J.

No publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Counsel files this brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and is moving to withdraw. Therefore, counsel does not request oral argument and takes no position regarding whether oral argument is appropriate.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is a direct appeal from the final judgment in a criminal case, entered by the United States District Court, Middle District of Florida, Orlando Division, on March 6, 2018. Doc. 63. The district court had original jurisdiction over this criminal case pursuant to 18 U.S.C. §3231.

Appellant David Hardman timely filed a notice of appeal on October 2, 2018. Doc. 65. This Court has jurisdiction under 18 U.S.C. §3742 and 28 U.S.C. §§1291, 1294.

STATEMENT OF THE ISSUES

I. Did the district court sufficiently review the appellate waiver contained in Mr. Hardman's plea agreement, such that he is permitted to appeal his sentence, even though it is a sentence within the sentencing guidelines as calculated by the district court?

II. Did the district court abuse its discretion in applying a 2-level enhancement under United States Sentencing Guideline § 2G2.1(b)(6) for conduct that involves "the use of a computer or an interactive computer service," based upon an email exchange three years after the count at issue with an unrelated individual?

III. Did the district court err in applying the 5-level enhancement, pursuant to U.S.S.G. § 4B1.5, for engaging in a "pattern of activity involving prohibited sexual conduct" based upon conduct within the same indictment at issue?

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

On January 10, 2018, a federal grand jury in the Middle District of Florida returned a five-count Superseding Indictment against David Hardman, charging him with three counts of enticement of a minor for the production of a visual depiction of sexually explicit conduct, in violation of 18 U.S.C. § 2251(a) and (e); one count of knowing possession of child pornography. in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2); and one count of forcible assault of a federal officer, in violation of 18 U.S.C. §§ 111(a)(1) and (b). Doc. 34.

On April 26, 2016, Mr. Hardman pled guilty, pursuant to a written plea agreement, to one count of production of child pornography (Count One), and one count of assault on a federal police officer (Count Five).[1] Docs. 45, 46. With that guilty plea, Mr. Hardman, who was 56 years old at sentencing, faced a mandatory minimum sentence of 15 years imprisonment and a maximum of 30 years. *See* 18

[1] As part of his plea agreement, Mr. Hardman agreed to waive his right to appeal any sentence imposed by the district court that falls within "the applicable guideline range, as determined by the court." Doc. 45 at 20-21, ¶ 7. The district court did not sufficiently address this appeal waiver during Mr. Hardman's change of plea hearing. *See* Doc. 92 at 8 ("Finally, you've also expressly waived your right to appeal your sentence in accordance with the limitations set forth in your plea agreement. Again, sir, does all of that sound familiar?"). The district court did not review the appeal waiver in the plea agreement, or discuss the scope of its exceptions. Accordingly, the appeal waiver is unenforceable and this Court may consider the merits of this appeal. *United States v. Bushert*, 997 F.2d 1343, 1352-54 (11th Cir. 1993).

U.S.C. § 2251. On September 19, 2018, he was sentenced to the statutory maximum, 360 months' imprisonment for Count One, and 240 months for Count Five, to be served concurrently, and to be followed by 10 years of supervised release. Docs. 58, 63. This appeal follows. Doc. 65.

Mr. Hardman is currently incarcerated pursuant to this sentence.

Statement of the Facts

A. Mr. Hardman's plea agreement and change of plea hearing

On April 26, 2018, Mr. Hardman appeared before U.S. District Judge Mendoza and pled guilty to one count of the enticement of a minor for the production of a visual depiction of sexually explicit conduct (Count One), and one count of forcible assault of a federal officer with a deadly and dangerous weapon (Count Five), pursuant to a written plea agreement. Doc. 45; Docs. 92 (Change of Plea transcript), 45 (Plea Agreement). The parties recognized that the enticement count carries a mandatory minimum term of 15 years imprisonment. *Id.* at 2; *see* 18 U.S.C. § 2251. Following the hearing, the district court adjudicated Mr. Hardman guilty of those two counts. Doc. 46.

After Mr. Hardman was sworn in, the district court stated that it had been informed of the plea agreement, wherein he would be pleading guilty to Counts One and Five of the Superseding Indictment. Doc. 92 at 3. The court reviewed the

elements of the production charge, 18 U.S.C. § 2251(a), informing Mr. Hardman that it carries a mandatory penalty of 15 to 30 years imprisonment. *Id.* at 4.

Next, the district court discussed Mr. Hardman's plea agreement, confirming that Mr. Hardman read the agreement, reviewed it with his attorney,[2] initialed every page, and the agreement. Doc. 92 at 6. The district court noted some "bullet points" from the plea agreement, including the government's agreement to ask for a guidelines sentence, discussion of the property Mr. Hardman needed to forfeit immediately to the United States, and Mr. Hardman confirmed that he had reviewed all of the administrative forfeitures that would be required with his trial attorney. *Id.* at 6-8. The district court asked Mr. Hardman personal questions, and determined that he was entering into the plea agreement freely and voluntarily. The court asked Mr. Hardman if he understood that the federal sentencing guidelines were advisory on the court. *Id.* at 8-10.

Mr. Hardman's plea agreement contains a standard appeal waiver of sentences falling within "the applicable guideline range, as determined by the court." Doc. 45 at 20-21, ¶ 7. Here, however, the district court did not sufficiently address this appeal waiver with Mr. Hardman at his change of plea hearing. *See* Doc. 92 at 8 ("Finally, you've also expressly waived your right to appeal your sentence in

[2] Mr. Hardman's trial attorney was Fritz Scheller, privately retained by Mr. Hardman for the district court proceedings. Doc. 14.

accordance with the limitations set forth in your plea agreement. Again, sir, does all of that sound familiar?"). The district court did not sufficiently review the appeal waiver contained in Mr. Hardman's plea agreement, or discuss its exceptions. Accordingly, the appeal waiver is unenforceable and this Court may consider the merits of this appeal. *See United States v. Buchanan*, 131 F.3d 1005, 10087 (11th Cir. 1997) ("[W]e require that the district court specifically question the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, unless it is otherwise clear from the record that the defendant understood the significance of the waiver."); *see United States v. Bushert*, 997 F.2d 1343, 1352-54 (11th Cir. 1993).[3]

The district court asked the government for a "brief proffer" of facts, and the government relied on the facts set forth in Mr. Hardman's plea agreement, Doc. 45, at pages 23-30. Doc. 92 at 12. Defense counsel stated that he reviewed the factual basis with Mr. Hardman, and when the government asked to read the factual basis, the district court said it would not be necessary, stating:

> THE COURT: I don't particularly want to hear them again. So that's fine.
>
> Just to make sure, there's a factual basis in your plea agreement that specifies what the Government would prove if this case proceeded to trial.

[3] Although undersigned counsel believes that the district court did not sufficiently review the appeal waiver contained in Mr. Hardman's plea agreement, and thus he has the ability to appeal, she does not believe he has any meritorious legal arguments, and is therefore constrained to file this *Anders* brief, and a Motion to Withdraw.

> Presumably, you've gone over that because I asked you about your plea agreement, but I just want to make sure so the record is clear, did you read that factual basis that the Government proffered in your plea agreement?

Id. at 13. Mr. Hardman did not object to the representation of the facts and indicated that he wanted to plead guilty.

The district court concluded that Mr. Hardman was "intelligently, freely, and voluntarily" waiving his rights when deciding to enter the plea of guilty and adjudicated him guilty. Doc. 92 at 14.

B. The Presentence Investigation Report (PSR)

Probation calculated Mr. Hardman's total offense level to be 40, and in light of the fact that the instant case is his first criminal conviction, he has a criminal history category of I. PSR, Doc. 54, ¶¶46, 50.[4] The base offense level for the production was higher than for the Forcible Assault, Count Five, and thus controlled the calculation of Mr. Hardman's guidelines. *See id.* at ¶¶ 42, 43-49.

Specifically, probation began with a base offense level of 32 for the production count, 18 U.S.C. § 2251(a)), adding enhancements for the following:

(1) two levels because the offense involves a minor between 12 and 16 (U.S.S.G. § 2G2.1(b)(1)(B));

(2) two levels for knowingly engaging in distribution (U.S.S.G. § 2G2.1(b)(3));

[4] The 2016 Guidelines Manual was used to determine Mr. Hardman's total offenses level. PSR ¶33; *see* U.S.S.G. § 1B1.11.

(3) two levels because the offense involved "the use of a computer or an interactive computer service" (U.S.S.G. § 2G2.1(b)(6)).

In addition, probation added 5 levels to the total base offense level of 38 because Mr. Hardman committed a sex crime and "engaged in a pattern of activity involving prohibited sexual conduct" and thus adjudged to be "a repeat and dangerous sex offender against minors." U.S.S.G. § 4B1.5(b)(1); PSR ¶54.

From a 43 total offense level, 3 points were taken off for Mr. Hardman's acceptance of responsibility and assistance with authorities in the investigation of his own misconduct, leading to the overall conduct level of 38. *See* PSR ¶¶55, 56.

Mr. Hardman submitted written objections to the guidelines calculation in the initial PSR. Doc. 54 at 21-22. First, he objected to an enhancement, pursuant to U.S.S.G. § 2G2.1(b)(5), that was ultimately removed. Second, Mr. Hardman objected to the enhancement for use of a computer, arguing that he "did not use a computer to persuade, entice, induce, coerce or facilitate the travel of the minor," and thus the 2-level enhancement under U.S.S.G. § 2G2.1 was inapplicable. *See* PSR ¶ 39. He also objected to the 5-level enhancement for being a "repeat and dangerous sex offender," pursuant to U.S.S.G. § 4B1.5(b)(1). PSR ¶54. Accordingly, Mr. Hardman's counsel argued that he should have a total offense level of 33, and with his criminal history Category I, he should be facing an applicable guidelines sentence of 135 to 168 months of imprisonment. PSR at 22. In light of

the statutory mandatory minimum of 180 months, his guideline sentence would become 180 months. *Id.*

The government disagreed, arguing that both the computer enhancement and "repeat" pattern enhancement should apply to Mr. Hardman's base offense level. *See* Doc. 54 at 23.

C. The Sentencing Hearing

The district court sentenced Mr. Hardman on September 19, 2018. Docs. 58, 100.[5] First, the court confirmed that Mr. Hardman had reviewed his PSR with counsel, and then asked counsel for objections to the guidelines range. Doc. 100 at 4-5.

1. Enhancement for the use of a computer pursuant to U.S.S.G. § 2G2.1(b)(6).

Mr. Hardman reiterated his objection to the enhancement for use of a computer to persuade, entice, induce, coerce or facilitate the travel of the minor, pursuant to U.S.S.G. § 2G2.1(b). PSR at 21-22. Counsel explained that Mr. Hardman pled guilty to conduct that occurred in April 2014, and his plea agreement "had no facts supporting an enhancement for the use of a computer." Doc. 100 at 5; *see* PSR ¶ 38. The government's basis for the enhancement, counsel explained, was

[5] Defense counsel arrived late to the sentencing hearing, apologized to the district court, and the court indicated that counsel's apology was accepted. Doc. 100 at 3.

an email between Mr. Hardman and the guardian of a different girl in June of 2017, three years after the offense to which he pled guilty. *Id.* at 6. Second, the email was between Mr. Hardman and a woman named Michelle, from whom there was no actual evidence that she brought any minors to photo shoots at his home. *Id.* In short, the factual basis to which Mr. Hardman pled guilty did not support an email from three years later, with a woman about whom nothing had been proved or admitted, as the sole basis of an additional 2-level enhancement to his onerous sentence. *Id.* at 7.

In response, the government asked to admit into evidence the email string from May 2017 between Mr. Hardman and Nicole Smith, making arrangements for the travel of some minors. The government explained that these emails came off of Mr. Hardman's phone, which was seized during execution of the search warrant and was disclosed during discovery. *Id.* at 9. The government responded to this timing argument, explaining that Mr. Hardman's written plea agreement describes offensive conduct "[f]rom at least 2002 through August 2017," and therefore this email coincides with the offense conduct contained in the factual basis of the guilty plea. *Id.* The email shows that Mr. Hardman communicated with women by text and email to facilitate the travel of these minors to his home to produce child pornography.

In response, Mr. Hardman's counsel stated that although discovery was around 5,000 pages, he pled guilty to one count of production of child pornography, which occurred in April 2014, and involved communications with a different woman than the one with whom he communicated in the 2017 email. Doc. 100 at 10. Counsel insisted that there was no nexus between the email communication that the government was using to support the enhancement and the conduct to which Mr. Hardman had pled guilty, because the email was sent three years after the offense conduct.

After hearing argument from each party, the district court stated that it "understood" why "in focusing on the substance within the plea agreement this is something that would not have been plainly obvious," but asked Mr. Hardman why this email was not "plainly within the realm of relevant conduct for the purposes of sentence." Doc. 100 at 11. Counsel explained that in this case, there were many of Mr. Hardman's photo shoots that did not rise to the level of child pornography, and that the burden was on the government to establish that this email communication in 2017 "facilitates the travel for the production of that specific child pornography." *Id.* In short, the argument was that there was no nexus between the production of child pornography at issue, even the dismissed counts from 2014 and 2015, and an email from 2017. Counsel argued that the relevant conduct provision in the guidelines should not be broadly interpreted. *Id.* at 12.

The district court said that while Mr. Hardman's position was "a fair position to take," "the Government is taking a broader view of how this applies to the overall offenses that we're here for." *Id.* at 12. Therefore, the district court overruled Mr. Hardman's objection to the computer enhancement. Doc. 100 at 13-16. Moreover, the district court printed "the relevant portions of the plea agreement anticipating that this might become an issue," and noted that the first paragraph in the factual basis referenced conduct occurring "[f]rom at least in or about 2010 through at least in or about 2017," continuing to read from the factual basis of the plea agreement. *Id.* at 13; *see* Doc. 45 at 23. The district court explained "that this falls squarely within what was appropriately deemed relevant conduct for the purposes of sentencing." *Id.* at 14.

2. The district court's calculation of Mr. Hardman's guidelines.

The district court then stated that Mr. Hardman had withdrawn his objection to the 5-level enhancement for pattern of conduct. Doc. 100 at 14. Accordingly, the district court calculated Mr. Hardman's guidelines to be a total offense level of 40, criminal history category of I, and the resulting applicable guidelines range to be 292 to 365 months of imprisonment. *Id.*

The district court acknowledged the letter that it received from the defense in mitigation, dated September 18, 2018, but did not identify the author. *Id.* at 15.

Defense counsel spoke on Mr. Hardman's behalf. First, counsel informed the court that the parties had agreed to an amount of restitution. Doc. 100 at 15.

The district court discussed Mr. Hardman's right to allocate with him, explaining as follows:

> Mr. Hardman, there's a very important decision that you need to make at this time, and the decision is yours and yours alone, but I need to make sure that whatever decision you make is knowing, voluntary, and intelligent with the advice of your attorney, and that's whether or not you're going to make a statement to the Court prior to sentencing.

Id. at 16. Mr. Hardman spoke briefly to the court, apologizing for his actions and admitting they were a "terrible crime," and asking only "to die outside of prison." *Id.* at 17.

3. The government's presentation of victim testimony.

The government presented evidence in aggravation, noting that it would be using only the initials of the minors involved in the case. Doc. 100 at 17. Ms. Denise Fellows, H.C.'s foster mother, discussed the impact that Mr. Hardman's videos had on H.C. *Id.* at 18-21. Although H.C. did not feel comfortable speaking in the courtroom, the government asked if her appointed "special needs attorney" could represent her position to the court, and the court consented, over Mr. Hardman's objection, to the attorney making an unsworn statement.

When Ms. McAllister, the special needs attorney for the Department of Children and Families in Florida, began to speak, Mr. Hardman's counsel objected

to any testimony outside of the charges, and the district court sustained that objection. Doc. 100 at 22-23. As Ms. McAllister described her perception of the impact of Mr. Hardman's conduct on H.C., Mr. Hardman again objected to "commentary by counsel," and the district court said that, compared to making the victim herself testify, "this is the lesser of two evils." *Id.* at 23. The district court provided Mr. Hardman with the option to force H.C. to testify instead, as follows:

> If you want, I will have her sit down and tell the Government that the only way the victim can make a statement is if that victim gets up here horrified, probably in tears, and makes a statement to the Court. Is that what you want?

Id. at 24. Mr. Hardman's counsel stated that it was not, and the district court reiterated that it was doing its best in "an impossible situation." *Id.* Ms. McAllister continued with a dramatic account of her perception of Mr. Hardman's conduct, asking that "the defendant be put away for life so he can't do this to other young girls and take advantage of them and repeatedly do this over and over for years and years, trying to mask his criminal behavior as normalized behavior, which is just sick and twisted in her perspective." *Id.* at 25-27.

When Ms. McAllister finished her statement, the district court stated that while "I certainly appreciate the passion exhibited by the statement, I'm going to reconsider [defense counsel's] objection and sustain it in part. That was a secondary - - it's not fair to the defendant to allow two closing arguments. And I think it morphed from a victim statement to a closing arguments, and I don't know that's

fair to the defendant. So your objection is sustained." *Id.* at 27. The district court emphasized that it "underst[oo]d the reason for her passion, but we're still trying to achieve a level of fairness in here. And for that reason, the objection [by defendant] is sustained."

Subsequently, Mr. Hardman's counsel argued for the mandatory minimum sentence to be imposed, based upon 18 U.S.C. § 3553 and the Supreme Court's direction to consider the factors of every individual case. Doc. 100 at 27. First, counsel noted that Mr. Hardman accepts and understands the egregiousness of his conduct, and he agreed to the government's accounting in restitution of the costs and future costs of any treatment for the victim. *Id.* at 28-29.

Mr. Hardman's counsel further noted that although the conduct was "egregious," the images are "at one end of the spectrum" within the context of child pornography. *Id.* at 29. The district court agreed that "there is a spectrum of these types of photos, and this is very far removed from the worst that comes through here. I know that's a tough argument to make, but I think it's a fair point to bring to the Court's attention." *Id.*

Next, Mr. Hardman's counsel discussed the other conduct to which he pled guilty, the attempted assault on the FBI agents, stating that he believed on that day Mr. Hardman wanted to be killed by law enforcement. *Id.* at 31. Mr. Hardman

apologized to the agents personally for that conduct, admitting to being in a very dark place and that he did not want to go to prison for the remainder of his life. *Id*.

Counsel argued that at 56 years old and with a heart condition, having forfeited all of his assets, Mr. Hardman was asking the court to impose the mandatory 15 years of imprisonment. Counsel noted that Mr. Hardman confessed to the agents who arrested him, proffered to the government, and poses an extremely low risk of recidivism. *Id.* at 32-33. Further, counsel noted that as a non-contact offender, Mr. Hardman's guideline range was disproportionately high, higher than if had he actually had sexual contact with a minors.

Counsel also raised the issue of disparity, citing a recent case before Judge Byron where the defendant faced multiple production counts and had actually himself sexually violated the minors involved in his filming, but was sentenced to only 293 months' imprisonment. *Id.* at 34-35. The district court questioned Mr. Hardman's comparison with another child production case of Judge Byron's, given "I have to make an independent decision based on my view of the record and not simply try to copy another judge." *Id.* The district court further explained:

> No, I understand, but it's just always my curiosity about that. I mean, [Judge Byron]'s a fine person and a fine judge, but his philosophy or his thought on sentencing isn't something that enters my mind when I'm trying to evaluate this individual case, and I've heard a very smart person tell me one time, Discretion means limited disparity. I mean, discretion invites disparity.

> If you're going to ask judges to exercise their own independent discretion, which oftentimes is the argument made against mandatory minimums and other such requirements, then you're going to have to deal with the problem that there's going to be disparity.

Doc. 100 at 35-36. Mr. Hardman's counsel noted that he was arguing not just about the *Dyer* case, which had been his case, but also as he argued in the Sentencing Memorandum, the median sentence nationally from the Sentencing Commission. *Id.* at 36. In short, Mr. Hardman's counsel argued that the guideline sentence in this case was greater than necessary in light of the appropriate factors, and would give Mr. Hardman no opportunity to die outside of prison. Counsel therefore asked for the 15-year mandatory sentence to be imposed. *Id.* at 37.

Next, prior to the government's closing argument, the district court asked the government to clarify the facts on page 28 of Mr. Hardman's plea agreement, that when the FBI agents came to arrest Mr. Hardman, he attempted to pull the trigger on a gun but it got jammed, and he never got the round chambered. The government added that the agents perceived that and tackled Mr. Hardman to the ground and the firearm fell out of his arm. Defense counsel clarified that he was trying to chamber a round, unsuccessfully, when the agents tackled him. *Id.* at 39 ("He was chambering a round as they were coming. That's true.").

Subsequent to this clarification, the government asked the district court to sentence Mr. Hardman in the guideline range, 30 years imprisonment, pursuant to the plea agreement. *Id.* at 39-44. The government detailed its impression of Mr.

Hardman's egregious conduct and argued that he poses a continued danger to the community.

The district court pronounced a sentence of 360 months' imprisonment for Count One and 240 months for Count 5, to run concurrently. Doc. 100 at 45-49. The court provided this explanation for its sentence:

> There are certain components of a case, small details sometimes that are overlooked or not argued as aggressively as others, that give you a window into the defendant's soul. You don't always have that window, but when you do, you have to look through it.
>
> And Count 5 for the Court is a very significant count on this indictment. It's a significant count because, as I needed clarification, he was chambering a round, and I don't think it's a far stretch to conclude that he was about to engage in a gunfight with the two law enforcement officers, but extrapolating from that complete lack of fear on armed law enforcement agents, one of which is sitting here in the courtroom today, that makes me wonder and I have to, what would have happened to those foster parents had they confronted him about what he was doing to those children and then threatened to contact law enforcement.
>
> He sure didn't hesitate to begin the process of chambering a round for the potential of a gunfight that could have resulted in death or serious bodily injury with law enforcement officers. I shudder to think what would have happened to the foster parents or the guardians of those juveniles had they attempted to confront him about what he was doing.
>
> That for me was a significant component in this case. It makes it a lot different than a lot of the cases that are argued in terms of parallels to sex abuse or child production cases or possession of child porn, et cetera. Count 5 makes him an extremely dangerous person in my view.

But I have to balance that with the fact that he accepted responsibility. He did honorably serve and was honorable discharged in the military. He is of an advanced age, 56 years old, and has no prior criminal history. But I can't help but take issue - - maybe that's too strong a term - - with the idea that if he doesn't put his hands on them that that creates a chasm between this conduct and physically touching the minor. And I think the analogy that I always think of is, if you grab someone's purse and push them to the ground, it's called a robbery, and there are very few people that would argue that that's not going to result, even with limited to no prior criminal history, in a prison sentence.

But if that same person never meets the individual, scams them online and steals their entire nest egg, then that is always viewed differently. That's a white collar crime. That's an entirely different situation. That doesn't involve violence. Although the immediate impact of a robbery is more significant, the overall long-term impact of that white collar crime is more significant.

Likewise, if he would have put his hands on her and not videotaped it, it is a crime and it is deplorable; however, that would have been an incident that occurred between two people. This on the other hand, is a circumstance where while he didn't put his hands on her, she's going to, as has been described to the Court, carry the baggage of worrying who has seen this, how many copies have been made, who has them, are online. This never goes away potentially, whereas, the physical contact fact to fact, without the use of video recording devices ends right there.

So they're both horrible, but this one has more of a long-term impact and I think is as damaging.

. . . .

But I can't help but conclude that notwithstanding the fact that this case was expertly presented by the defendant, I don't think you could have done anything more to give your client an opportunity to have the best possible result here, but the problem is that the facts are just so awful. And I think you would be in a different situation if they'd have broken into the – if they on the search warrant had gone in to arrest

> him and he would have given himself up. The fact that he had a firearm where he was trying to chamber a round, I can't over estimate how dangerous that makes him in my view, and that changes everything.
>
> I appreciate the information you've provided to the Court in terms of sentencing disparity. I think this one variable changes the entire circumstance for me. And I just can't look past it.
>
> So if you would be kind enough to stand with your client, we're going to proceed with sentencing at this time. Pursuant to Title 18, U.S. Code, Sections 3551 and 3553, it is the judgment of the Court that the defendant David Hardman is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 360 months. This term consists of 360 months as to Count 1 and 240 months as to Count 5 to run concurrently.

Doc. 100 at 44-49. After the court reviewed some restitution issues with the parties, it reiterated that it had considered the sentencing factors in 18 U.S.C. § 3553(a)(1) through (7) and concluded that the sentence imposed was sufficient but not greater than necessary to comply with the statutory purposes of sentencing. *Id.* at 55.

Following the imposition of sentence, Mr. Hardman reiterated his objection to the computer enhancement in the guidelines calculation, and also that, based on 3553, the sentence was substantively unreasonable. *Id.* at 56.

This appeal ensued. Doc. 65.

Standard of Review

Regarding Sentencing Guidelines issues, this Court reviews "purely legal questions *de novo*, a district court's factual findings for clear error, and, in most cases, a district court's application of the guidelines to the facts with 'due

deference.'" *United States v. Rothenberg*, 610 F.3d 621, 624 (11th Cir. 2010) (internal quotation marks and citations omitted).

SUMMARY OF THE ARGUMENT

A frivolous appeal, according to *Anders v. California*, 386 U.S. 738 (1967), is one without arguable merit. If, after a "conscientious examination" of the entire record on appeal, counsel concludes that an appeal would be frivolous, then counsel's duty is to prepare a brief that sets out any irregularities in the trial process or other potential error which, in the judgment of the client, another attorney, or the Court, might be arguably meritorious. *Penson v. Ohio*, 488 U.S. 75, 80 (1988); *United States v. Blackwell*, 767 F.2d 1486, 1487-88 (11th Cir. 1985). Upon the filing of an *Anders* brief, a reviewing court is required to conduct a full examination of the record to decide whether the case is wholly frivolous, and only after that inquiry is complete may it consider the appeal on the merits. *See United States v. Gholston*, 932 F.2d 904, 904 (11th Cir. 1991).

Here, after diligent review of the entire record on appeal, undersigned counsel has been unable to find any non-frivolous argument that could in good faith be presented on direct appeal. Although counsel believes that Mr. Hardman's appeal waiver in the plea agreement would not apply, because it was not sufficiently explained at his change of plea hearing, there are no non-frivolous legal issues to raise. Consequently, counsel has not presented any argument, but rather has merely

stated the possible issues that Mr. Hardman may be interested in presenting, along with the relevant facts and law.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. The Appeal Waiver Contained in Mr. Hardman's Plea Agreement Is Not Enforceable.

Rule 11 of the Federal Rules of Criminal Procedure requires that a district court "determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. R. Crim. P. 11(b)(N). Critically, appeal waivers are valid only if they are made knowingly and voluntarily, a matter that this Court reviews *de novo*. *United States v. Bushert*, 997 F.2d 1343, 1350, 1352 (11th Cir. 1993). Specifically, "[t]he [appeal] waiver is valid if the government shows either that: (1) the district court specifically questioned the defendant about the waiver; or (2) the record makes clear that the defendant otherwise understood the full significance of the waiver." *United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008). The district court must explain to the defendant, with specificity, the nature and extent of the appeal waiver. *United States v. Buchanan*, 131 F.3d 1005, 1008 (11th Cir. 1997).[6]

[6] *See also Rivers v. United States*, 416 F.3d 1319, 1323 (11th Cir. 2005) (Barkett, J., specially concurring)(rejecting Government's contention that appeal should be dismissed based on the presence of an appeal waiver, as Defendant "did not expressly and knowingly waive his rights to collaterally attack his sentence.").

Here, while the district court questioned Mr. Hardman about the waiver generally, it did not sufficiently address this appeal waiver with Mr. Hardman at his change of plea hearing. *See* Doc. 92 at 8. The district court did not review the scope of the appeal waiver, exceptions to the waiver, or the practical implications of contracting away the right to appeal prior to the court's determination of an applicable guideline range. *See id.* ("Finally, you've also expressly waived your right to appeal your sentence in accordance with the limitations set forth in your plea agreement. Again, sir, does all of that sound familiar?").

The district court's limited inquiry does not demonstrate that it "determine[d] that [Mr. Hardman] understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. R. Crim. P. 11(b)(N). The district court did not specifically explain the nature and extent of the appeal waiver any more than was apparent from reading it alone. *See Johnson*, 541 F.3d at 1066; *Buchanan*, 131 F.3d at 1008.

Therefore, the question becomes whether "it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver." *Bushert*, 997 F.2d at 1351. In other words, could Mr. Hardman have understood that he would be waiving his right to appeal even if, for example, the district court

miscalculated the applicable guideline range?[7] Mr. Hardman maintains that is not "manifestly clear" from the district court's short discussion that he understood the "full significance of the waiver." *Id.*; *see* Doc. 92 at 8.

Accordingly, the appeal waiver is unenforceable and this Court may consider the merits of an appeal. *See Buchanan*, 131 F.3d at 1008 ("[W]e require that the district court specifically question the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, unless it is otherwise clear from the record that the defendant understood the significance of the waiver."); *see Bushert*, 997 F.2d at 1352-54.

Here, although undersigned counsel believes that the district court did not sufficiently review the appeal waiver contained in Mr. Hardman's plea agreement, and thus his appeal is not procedurally barred, she nonetheless does not find any non-frivolous legal arguments, and is therefore constrained to file this *Anders* brief and the accompanying Motion to Withdraw.

II. Did the District Court Err in Overruling Mr. Hardman's Objection to the 2-level Computer Enhancement?

The district court overruled Mr. Hardman's preserved objection to the 2-level enhancement in U.S.S.G. § 2G2.1(b)(6). *See* PSR at 21-22; Doc. 100 at 13-17. Counsel explained that Mr. Hardman pled guilty to conduct that occurred in April

[7] Indeed, Mr. Hardman could arguably say that the district court miscalculated his applicable guideline range by applying erroneous enhancements.

2014, his plea agreement "had no facts supporting an enhancement for the use of a computer," and the email message relied upon by the government for this enhancement was from three years after the events of the production count to which he had pled guilty. Doc. 100 at 5-14.

In response to Mr. Hardman's objection, the district court said that while Mr. Hardman's position was "a fair position to take," "the Government is taking a broader view of how this applies to the overall offenses that we're here for." *Id.* at 12. Therefore, the district court overruled Mr. Hardman's objection to the computer enhancement. Doc. 100 at 13-16. Moreover, the district court printed "the relevant portions of the plea agreement anticipating that this might become an issue," noting that the first paragraph in the factual basis referenced conduct occurring "[f]rom at least in or about 2010 through at least in or about 2017," continuing to read from the factual basis of the plea agreement. *Id.* at 13; *see* Doc. 45 at 23. The district court overruled Mr. Hardman's objection to the email as support for the enhancement, explaining "that this falls squarely within what was appropriately deemed relevant conduct for the purposes of sentencing." *Id.* at 14.

Under U.S.S.G. § 2G2.1(b)(6), a defendant receives a two-level enhancement if he:

> for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved ... the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in

> sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct.

U.S.S.G. § 2G2.1(b)(6)(B). As the government noted in response to Mr. Hardman's objection, the application note for this enhancement "is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor" or someone with supervisory control of the minor. U.S.S.G. § 2G2.1, comment. (n.6(B)); *see* PSR at 26.

Mr. Hardman could potentially argue that the emails upon which the district court relied to sustain this enhancement were not "relevant conduct" for the purposes of the sentence enhancement because they are not the same discovery used as the basis of his conviction for Count One. However, under the sentencing guidelines, "the offense" for which a defendant can be sentenced includes "the offense of conviction and all relevant conduct." U.S.S.G. § 1B1.1, application note 1(k). Relevant conduct" includes "all acts and omissions committed ... by the defendant ... that occurred *during the commission of the offense of conviction. ...*" U.S.S.G. § 1B1.3(a)(1) (emphasis added). Relevant conduct under U.S.S.G. § 1B1.3 is not limited to the conduct charged in the indictment. *United States v. Ignancio Munio,* 909 F.2d 436, 438 (11th Cir. 1990). Relevant conduct includes all acts committed by the defendant during the commission of the offense of conviction, in preparation

for the offense or in the course of attempting to avoid detection or responsibility for the offense. U.S.S.G. § 1B1.3(a)(1).

Here, the emails relied upon were between Mr. Hardman and one of the guardians of another minor that he wanted her to bring to a photoshoot, confirming that she had made the hotel reservations for the girls and confirming other travel arrangements. Given the scope of the factual basis contained in Mr. Hardman's plea agreement, undersigned cannot argue that the district court erred in applying the 2-level enhancement in U.S.S.G. § 2G2.1(b)(6) for using a computer to induce or facilitate the travel of a minor to produce sexually-explicit material. *See* Doc. 45 at 23-28 (factual basis in Mr. Hardman's plea agreement); Doc. 100 at 10-14.

III. Did the District Court Err in Applying the 5-level Increase Pursuant to U.S.S.G. § 4B1.5, For Engaging in a "Pattern of Activity Involving Prohibited Sexual Conduct," Based Upon Conduct Within the Same Indictment at Issue?

Prior to sentencing, Mr. Hardman objected to probation's recommendation that his total offense level be enhanced by 5-levels for being a repeat and dangerous sex offender under U.S.S.G. § 4B1.5, arguing that it did not apply in his case. *See* PSR ¶ 58; PSR at 25. The government disagreed, arguing that it was properly applied because Mr. Hardman pled guilty to one of the covered sex crimes, and according to the facts set forth in the plea agreement, on at least two separate occasions, Mr. Hardman produced child pornography. *See* PSR at 26; Doc. 45 at 24-29; U.S.S.G. § 4B1.5, Application Note 4(A), 4(B).

At Mr. Hardman's sentencing hearing on September 19, 2018, the district court confirmed with Mr. Hardman that, following probation's resolution in favor of the government's view, he had withdrawn his objection to the 5-level enhancement for pattern of conduct. Doc. 100 at 14.

Here, even if Mr. Hardman had not withdrawn his objection to the 5-level increase in U.S.S.G. § 4B1.5 at sentencing, the case law as it presently stands supports its application. In determining whether offenses are part of the same course of conduct, the sentencing court should consider certain factors, including "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." *United States v. Cote*, 482 Fed. App'x 373, 375 (11th Cir. 2011); *United States v. Blanc*, 146 F.3d 847, 852 (11th Cir. 1998) (quotation marks omitted). Here, the factual basis contained in Mr. Hardman's plea agreement details the same type of offenses over a period of time, similar in degree to the charged offense. *Cote*, 482 F. App'x at 375.

Mr. Hardman could potentially argue that the district court plainly erred when applying the 5-level increase. He would have to argue that the factual basis to which he admitted in the plea agreement is insufficient evidence to sustain the pattern enhancement, because he only actually pled guilty to the one count of production. Under the sentencing guidelines and the current Eleventh Circuit precedent on the

issue, undersigned counsel does not believe that the district court plainly erred. *See* U.S.S.G. § 4B1.5, Application Note 4(A), 4(B).

CONCLUSION

Wherefore, pursuant to *Anders v. California*, 386 U.S. 738 (1967), undersigned counsel requests that this Court grant her and the Federal Defender's Office permission to withdraw as counsel of record and asks that the Court afford Mr. Hardman the opportunity, if he so desires, to supplement this appeal raising any issues that he contends have merit. Counsel certifies that she is today forwarding to Mr. Hardman a copy of the appendix, this brief, and a letter advising him of his right to supplement this brief, if he so chooses.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,986 words, according to Microsoft Word's word count, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

CERTIFICATE OF SERVICE

I certify that on February 13, 2019, a copy of the foregoing Brief of Appellant was furnished by CM/ECF to Todd B. Grandy, Assistant U.S. Attorney; and by United States Mail to David Hardman, BOP Reg. #69235-018, FCI Jesup, Federal Correctional Institution, 2680 Hwy. 301 South, Jesup, Georgia 31599.

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