11-4206

To Be Argued By:
SANDRA S. GLOVER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-4206

UNITED STATES OF AMERICA,
Appellee,

-vs-

EUGENE C. BOISVERT,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

The district court (Vanessa L Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 12, 2011. Appendix ("A__") 18, A23-26. On October 11, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A18, A49. 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 this Court should reconsider its holding in *United States v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007), that a conviction for attempting to entice a minor to engage in sexual conduct under 18 U.S.C. § 2422(b), does not require that the enticement victim be an actual minor.

II. Whether the sentence imposed was procedurally and substantively reasonable:

1. Whether Boisvert's testimony regarding his intent—which the court found implausible given the other evidence at trial—constituted obstruction of justice, and whether the court's alleged failure to make sufficient factual findings on the enhancement amounted to plain error.

2. Whether the district court plainly erred in failing to consider the sentencing factors in 18 U.S.C. § 3553(a).

3. Whether the sentence, which was squarely in the middle of the guidelines range, was substantively reasonable.

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Preliminary Statement

In 2010, the defendant, Eugene C. Boisvert, engaged in a series of sexually explicit internet chats with an individual he thought was a 14-year old girl from Milford, Connecticut, but who was actually a police officer posing as the girl. Within a few weeks of beginning these chats, he traveled from his home in Massachusetts to Milford to meet the girl, where he was promptly arrested. At trial on charges that he (1) used the

internet to attempt to entice a minor to engage in sexual conduct and (2) traveled in interstate commerce for the purpose of engaging in illicit sexual conduct with that minor, Boisvert testified that he engaged in the chats with the "girl" in an attempt to scare her away from dangerous people on the internet. The jury rejected his defense and convicted him on both charges.

On appeal, Boisvert argues that the district court should have dismissed Count One of the indictment, which charged him with using the internet to attempt to entice a minor to engage in illegal sexual conduct, in violation of 18 U.S.C. § 2422(b), because there was no actual minor in this case. This argument fails because this Court (as well as every circuit court to have considered the question) has already rejected this "actual minor" defense.

Boisvert also argues that his 136-month, within-guideline sentence was procedurally and substantively unreasonable. On this point, he argues principally that the district court improperly enhanced his offense level by two levels for obstruction of justice based on his trial testimony. He also claims that the court failed to consider the sentencing factors in 18 U.S.C. § 3553(a) and imposed a substantively unreasonable sentence. For the reasons set forth below, these claims are all meritless. Boisvert's conviction and sentence should be affirmed.

Statement of the Case

The defendant, Eugene C. Boisvert, was arrested on August 6, 2010. A7. On January 11, 2011, a federal grand jury sitting in Hartford, Connecticut, indicted Boisvert on one count of using a means of interstate commerce to attempt to entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), and one count of traveling in interstate commerce for the purpose of engaging in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b) and (e). A2-4, A9.

On February 10, 2011, Boisvert moved to dismiss Count One of the indictment. A10, A27-38. The district court (Vanessa L. Bryant, J.) denied Boisvert's motion to dismiss in an order entered February 22, 2011. A11-12.

After a three-day trial, a jury found Boisvert guilty on both counts of the indictment on May 10, 2011. A14, A22. On October 5, 2011, the district court sentenced Boisvert to 136 months' imprisonment, to be followed by supervised release for life. A18, A23. Judgment entered October 12, 2011, A18, and Boisvert filed a timely notice of appeal on October 11, 2011, A18, A49.

Boisvert is currently serving the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal[1]

A. The initial chat with Detective Clark

In October 2009, Boisvert, a then-38-year old resident of Springfield Massachusetts, participated in an on-line chat with Hartford Police Detective P.J. Clark, who was posing as a 14-year old girl from Hartford. Pre-Sentence Report ("PSR") ¶ 11. When Boisvert learned that his chatting partner was only 14 years old, he told "her" that it was "to bad you we r not older," because "14 woudl get me in trouble if i ever wanted to date . . . ." Government Appendix ("GA__") 2 (Exh. 11). Detective Clark asked Boisvert what he meant by that statement and Boisvert replied, "law . . . if a older man have a gf [girlfriend] as young as yo uit could get him in jail." GA2 (Exh. 11).

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[1] This summary of the offense conduct is taken primarily from the Pre-Sentence Report, as amended at sentencing. *See* A177-78 (court adopting findings of fact in PSR). Where relevant, the government has quoted from exhibits introduced at trial and included those exhibits in a Government Appendix. Many of the chats quoted here contain grammatical and spelling errors; the chats are reproduced as they appear in the exhibits.

B. The chats with Detective Nash as "Jessie"

Nine months after his chat with Detective Clark, Boisvert initiated a series of chats that eventually led to the charges in this case. On June 26, 2010, in the same Connecticut Romance chat room where he had encountered Detective Clark, Boisvert met Detective Robert Nash, who was posing as a 14-year old girl from Milford, Connecticut named "Jessie." PSR ¶ 4. Using the screen name "gene_boisvert," Boisvert contacted Detective Nash, who was using the screen name "woodmont_girl." Almost immediately after they began chatting privately,[2] Boisvert asked Jessie how old she was. GA4 (Exh. 26). When "Jessie" responded that she was 14, Boisvert said that he was 39. GA4 (Exh. 26).

Eighteen minutes into this first chat with Jessie, Boisvert turned the conversation to sex. He asked Jessie what she had done with a "bf" (boyfriend) and when she said she had only kissed her boyfriend, Boisvert asked "did you

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[2] In a chat room, a group of people on-line at the same time can chat together. To speak privately with another person in that room, a participant can ask to "friend" that other person; if accepted, then the two people can chat privately. Boisvert met "Jessie" in an on-line Connecticut Romance chat room, but all of their conversations discussed here were private conversations that took place after Jessie accepted Boisvert's friend request.

want more." GA5 (Exh. 26). Jessie responded that she was "a lil shy bout the more thing," and Boisvert reassured her: "oh i will never hurt you only take care of you an dlove you." GA5 (Exh. 26). Jessie explained that she did not really know what to do, and after Boisvert suggested that she could be his girlfriend, the following exchange occurred:

gene_boisvert>i bet we would have fun teaching you cant believe you do nto knwo what else to do

woodmont_girl>i just dont kno wht 2 do ya kno bc nerv did any thyng b 4

gene_boisvert>you want to have a cock in you rhand

woodmont_girl>ner touched 1 b 4

gene_boisvert>i am kind of large i wont hurt you

woodmont_girl>like ur thyng

gene_boisvert>my what

woodmont_girl>ur thyng

gene_boisvert>my cock good you can say it

woodmont_girl>thts wht u meant rite rite

gene_boisvert>eah

gene_boisvert>yeah

woodmont_girl>like wht do i do when i touch it

gene_boisvert>stroke it

gene_boisvert>kiss it lick it

woodmont_girl>o but i dont want any 1 to c us is tht k w u

gene_boisvert>ok where would you want to go to do this

woodmont_girl>dunno i just dont want 2 get in2 troub n hav mom 2 find out

gene_boisvert>iw ill take caer of you

woodmont_girl>ya kno i trust u wudnt hurt mee

woodmont_girl>r u here

gene_boisvert>nope might jurt when we do it the first time

gene_boisvert>yeah

woodmont_girl>wht ya mean

gene_boisvert>when we had sex

GA6 (Exh. 26).

Over the next several weeks, Boisvert chatted with "Jessie" approximately 40 times in conversations that quickly assumed a familiar, informal banter. PSR ¶ 10. In at least five of these chats (including the initial chat), Boisvert and Jessie discussed the fact that she was under-age, sometimes explicitly identifying her age as 14. *See* GA4 (Exh. 26), GA21-23 (Exh. 39), GA38 (Exh. 47), GA43-44 (Exh. 54), GA50 (Exh. 59).

Although Boisvert knew that Jessie was only 14, he soon told her that he wanted her to be his girlfriend. *See* GA7 (Exh. 33). He referred to himself as her boyfriend, *see, e.g.*, GA28 (Exh. 39), referred to Jessie as "baby," *see, e.g.* GA7 (Exh. 33), GA9 (Exh. 34), GA10 (Exh. 35), GA12 (Exh. 36), GA17 (Exh. 39), and regularly told Jessie that he missed her. *See, e.g.*, GA7 (Exh. 33), GA10 (Exh. 35), GA11 (Exh. 36), GA15 (Exh. 37). And as the chats progressed, Boisvert routinely told Jessie that he loved her. *See*, *e.g.*, GA14 (Exh. 36), GA20 (Exh. 38), GA22 (Exh. 39). Boisvert told Jessie that he wanted to marry her when she turned eighteen, GA22 (Exh. 39), GA36 (Exh. 46); he even discussed buying a ring for her, GA22-23 (Exh. 39). At one point, Boisvert told Jessie that he wanted her to have his baby. GA27 (Exh. 39).

Moreover, in several of the chats, Boisvert initiated conversations with Jessie about sex or sexual topics. For example, on July 16, Boisvert asked whether Jessie had started menstruating yet, and then later "how big are your boobbs." GA12 (Exh. 36). *See also* GA25 (Exh. 39) (asking Jessie whether she is having her periods yet). In a later conversation, he asked whether Jessie had shaved her pubic area, and told her that he would "want to shave you bald down there." GA25 (Exh. 39). He told her to "shve it all then rub it you wil like it," and then queried, "wow what will you do when i do that on you for the

first time i wonder." GA25 (Exh. 39). He immediately reassured Jessie that "i would never hurt you but the first time we have sex will hurt and when i take you virginity you will bleed for a second." GA26 (Exh. 39). Boisvert continued the conversation about sex:

gene_boisvert: so when yu kissed your bf di dyou ever want to do anything else

woodmont_girl: not with him he was kinda jerkie not as cool gd lookin as u r

gene_boisvert: ty so what if i wanted to try something else before you turn 18

gene_boisvert: i will never be a jerk

woodmont_girl: like i said i trust u so much were bf n gf rite

woodmont_girl: i trust u so much

gene_boisvert: like if i asked you to placy with my cock would you

gene_boisvert: god that is important

woodmont_girl: if its so important 4 us i will 4 ya kk

gene_boisvert: no i want you to do what you want when you want i will not make you do anything

woodmont girl: but can i tell ya some thyng . . . i dont wanna get pregs yet

gene_boisvert: I would not get ou preg for a while atlease like 5 years

GA28 (Exh. 39).

Boisvert continued in this same conversation by telling Jessie that he "might touch [her] butt when i put loton on and you tits." GA28 (Exh. 39). And then he asked Jessie to imagine whether she would want to touch his "cock" if she saw it in his shorts. GA29 (Exh. 39). In return, Boisvert told Jessie that if he put lotion on her, he might "rub my fingers over your pussy an clit" and "maybe i rub your ass." GA30 (Exh. 39). Almost immediately, Boisvert told Jessie that "i am hard talking to yu right now." GA30 (Exh. 39).

In later conversations, Boisvert again initiated conversations about sex with Jessie. For example, on July 30, Boisvert told Jessie that he wanted her in his arms, and that when he hugged her, "i might touh you ass when i do." *See* GA36 (Exh. 46). The next day, Boisvert discussed "eating [Jessie's] pussy," and explained that "when you are old enough i will do that . . . ." GA38 (Exh. 47). When Jessie responded that she trusted Boisvert, he explained that "for us to play like that for me to do anything like that atlease 17." GA38 (Exh. 47).

C. Boisvert's trip from Massachusetts to Connecticut

In the course of the chats, Boisvert proposed meeting Jessie in person. He told Jessie that he wanted to take her to the beach and spend the day with her. *See* GA9 (Exh. 34). Then, a few weeks later, Boisvert made concrete plans to meet Jessie at Anchor Beach, a beach that Jessie described as being near her home in Milford. GA20 (Exh. 38), GA27 (Exh. 39).

As the date of the planned rendezvous approached, Boisvert discussed his plans for the day. He told Jessie that he wanted her to wear a bikini, and that he wanted to French kiss her the first time they met. GA26 (Exh. 39), GA28 (Exh. 39). He also told her that they would lie on the same blanket and play a game of putting lotion on each other. GA29 (Exh. 39). As Boisvert explained, "we can close our eyes and be surprise where what the other one is going ot do." GA29 (Exh. 39). Boisvert explained that he might touch her "ass," "tits," "pussy," and "clit" when he put lotion on her. GA28-29 (Exh. 39). He asked whether she would want to touch his "cock" if it was large while she put lotion on him. GA29 (Exh. 39). A few days later, after telling Jessie that he liked to hug and would touch her "ass" when they hugged, Boisvert said "i cant wait to have you laying near me on the beach." GA36 (Exh. 46).

Just days before the planned rendezvous, Boisvert asked whether it would be ok for them to have sex before Jessie turned 17. GA43-44 (Exh. 54). He told her that he would "take it slow," and that "when i take your virginity will bleed a little it happens." GA44 (Exh. 54). He also suggested that they could engage in "foreplay," such as touching and French kissing, and that Jessie could touch him wherever she wanted to. GA44-46 (Exh. 54).

Boisvert and Jessie exchanged photos before their planned meeting. *See* GA23-24 (Exh. 39). Boisvert told Jessie that he would be wearing a light blue polo shirt and white shorts when they met, and asked Jessie if there was a "special qiuite place we can go." GA50 (Exh. 59). Boisvert asked Jessie what she would be wearing that day. GA42 (Exh. 54). They planned to meet at noon; Jessie told Boisvert that she was going to be at her aunt's house and would leave from there to walk to the beach. GA50-51 (Exh. 39).

On August 6, 2010, the day of the planned rendezvous, Boisvert left his home in Springfield, Massachusetts and drove to the beach in Milford, Connecticut where he was to meet Jessie. PSR ¶ 8. Boisvert drove past the entrance to the beach, and then pulled into a driveway as if he were going to turn around. PSR ¶ 8. Boisvert was arrested at that time. PSR ¶ 8.

After Boisvert's arrest, the police searched his car, pursuant to a warrant, and found printed

directions to the meeting location, a light blue shirt, a beach towel, and swim trunks. PSR ¶ 8; A152-53. Three officers testified at trial that Boisvert said he was not wearing the blue shirt when he arrived so that if he did not like "Jessie's" physical appearance, he could leave the beach area without being recognized. PSR ¶ 8; A173-76.

Boisvert made additional *Miranda*-ized statements after his arrest. He initially told the police that he had been chatting with a female for approximately one month, but he thought she was over 18 years old. PSR ¶ 9. He subsequently acknowledged to the police that he knew she was turning 16 in December. PSR ¶ 9. Boisvert told the police that he was going to lay on the beach with the girl, and that although they were not going to have sex that day, he was going to have sex with her some time. PSR ¶ 9. Finally, Boisvert acknowledged that he might have sex with the girl that day and that he had special feelings for her. PSR ¶ 9.

D. Boisvert's testimony

At trial, after the government presented its case as summarized above, Boisvert took the stand in his own defense. Boisvert's central defense—which he repeated multiple times throughout his testimony—was that his contacts with "Jessie" were not intended to entice her into sexual conduct, but rather were intended to pro-

tect her by "scaring" her away from the chat rooms, or failing that, by contacting her parents.

According to Boisvert's testimony, his "scare" strategy began with his first chat with Jessie. He explained that during that first chat, when he learned that Jessie was 14 years old, he did not discontinue the conversation because he "was trying . . . to scare her away from that room, of what kind of chat could be in that room." A64. To accomplish this end, he told her "[s]exual things . . . ." A64. Thus, for example, he asked her what she did with boyfriends, talked about kissing her, asked her whether she wanted his "cock" in her hands, talked about her putting his penis in her mouth, told her he was "large" and would not hurt her, and discussed how sex with her the first time would hurt a little. Through all of these discussions in that first chat, Boisvert testified, his intent was to scare Jessie away from the chat room. A96-101, A102, A127.

Boisvert acknowledged that he chatted with Jessie about sex again, but claimed that these chats, like his first one, were intended to scare Jessie. *See* A76-77 ("Once again, I was just trying to scare her away, and hopefully she would just leave the chat room and not talk to me, or instant message."). Thus, for example, when Boisvert asked whether Jessie had her period, or talked about how she might bleed when she had sex, these conversations were designed to scare

her. A101. *See also* A125-26 (discussions with Jessie about losing her virginity were intended to scare her). Similarly, Boisvert claimed that his statements to Jessie that he loved her, that he would take care of her, as well as his statements that her voice sounded "hot," and that he wanted to marry her, were designed to scare her off. A96, A119, A147, A149.

In addition to these conversations about sex, Boisvert had several non-sexual conversations with Jessie that involved getting to know her. A74. He wanted to get more information about Jessie, according to his testimony, because if he could not "scare her out of the rooms, [he] could find information about her parents or guardian, and [he] could actually call them or let them know what their underage child was doing in the room." A74-75. Thus, he claimed that he asked for Jessie's telephone number in the hope that he could call that number and let her mother know what was going on. A118. Similarly, according to Boisvert, he found out where Jessie's mother worked and tried to call her there (unsuccessfully) on two or three occasions. A75-76. He denied that he had placed these phone calls to verify whether Jessie was a real person. A118. Boisvert admitted, however, that when he could not reach Jessie's mother, he did not call the police. A105. Nor did he try to find out where she went to school so he could contact the authorities

there about a student in a dangerous chat room. A108.

Boisvert repeated similar explanations about his intent in traveling to Connecticut to meet Jessie. He explained that his sexually explicit conversations about what they could do at the beach together were designed to scare Jessie off. A129-33. He also said that he planned to arrive at Anchor Beach well in advance of their planned meeting time so that he could "scope out the area where she said she was going to be coming out of," and then go knock on the door where she had come from "and let that adult know what—what their child was doing." A78-79. Boisvert testified that he did not wear the blue shirt that Jessie would be expecting because he did not want her to recognize him. A79. That way, he could "wait for her to go by me, and then go to the parents' house and let them know what was happening." A79. Boisvert further testified that if this plan to find Jessie's house was unsuccessful, he "was going to go meet her at the beach and ask her what her mom or aunt's phone number was so that I could call them at that time and tell them where she was and to come pick her up." A80-81. *See also* A108 ("I said I would meet her in a public place so I can meet her there if her parents were home, and call her mother or aunt at that point on my cell phone, there in front of the place.").

In addition to describing his intent with respect to his trip to Anchor Beach, Boisvert testified about the statements he made to the police after his arrest. He testified that he falsely told the police he did not chat with anyone under 18 because he was scared. A83. He admitted that he told the police it was a mistake to chat with Jessie, and that he knew it was wrong but kept going. A84. According to Boisvert, he made these statements because if he told them the truth (*i.e.*, that he was trying to scare Jessie and that he intended to find her parents while in Connecticut), they would not believe them. A84.

At the conclusion of his direct testimony, Boisvert expressly denied that he intended to have sex with Jessie and that he traveled to Connecticut for the purpose of having sex with Jessie. A85. His intent, rather, was to protect her:

> Once again, my intent was once I couldn't scare her online, I would look up the area where she was at, find her—wait for her to leave, go to her adult that was there and let them know what she was doing, and then turn her in at that moment.

A85-86.

Summary of Argument

I. The district court properly denied Boisvert's motion to dismiss Count One because this Court has already rejected the precise argument raised by Boisvert. Boisvert argues that the indictment did not state a legally cognizable offense because a conviction under 18 U.S.C. § 2422(b) requires that an actual minor be the victim of the attempted enticement. This Court rejected this precise argument in *United States v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007), and Boisvert identifies no reason for this Court to reconsider that holding.

II. The sentence imposed by the district court was procedurally and substantively reasonable.

1. The district court properly applied the two-level enhancement for obstruction of justice. Boisvert testified falsely regarding his intent in chatting with Jessie and his intent in traveling to Anchor Beach. The jury rejected Boisvert's implausible testimony regarding his intent, and so did the court. And although Boisvert claims that he honestly (if mistakenly) believed in the truth of his testimony, the court rejected that argument as implausible given the evidence in the case regarding Boisvert's true intent. In short, the court properly found that Boisvert intentionally testified falsely in an attempt to affect the outcome of his trial.

Moreover, the district court's factual findings were more than sufficient to support the obstruction enhancement. Any alleged deficiency in the court's findings should be reviewed for plain error, and there was no error—plain or otherwise—here. The court identified the false statements and properly found that they were designed to affect the outcome of the trial. Nothing more was required.

2. The district court fully considered the § 3553(a) factors at sentencing. The court identified the factors it considered, and there is nothing in the record to suggest that the court failed to consider the arguments of counsel or the § 3553(a) factors more generally. Because this court presumes that the court fulfilled its duty to consider those factors, Boisvert's argument, reviewed in this Court for plain error, must fail.

3. The 136-month, within guidelines sentence was substantively reasonable. The district court considered the § 3553(a) factors when selecting the sentence, and focused its attention primarily on the seriousness of the offense conduct, the potential harm to victims of the crimes, and the characteristics of Boisvert that suggested he posed a risk of recidivism. On this record, the sentence imposed was hardly an abuse of discretion.

Argument

I. The district court properly denied Boisvert's motion to dismiss Count One of the indictment because this Court has already held that a defendant may be convicted of attempting to entice a minor into sexual conduct even when there is no actual minor involved in the offense conduct.

A. Relevant facts

On February 10, 2011, Boisvert filed a motion to dismiss Count One of the indictment. A10. In this motion, Boisvert argued that Count One did not state a legally cognizable offense because there was no actual minor involved in the offense. A27.

Upon receiving Boisvert's motion to dismiss, the district court immediately issued an order to show cause directing defense counsel to explain why this Court's decision in *United States v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007) did not require denial of his motion. A10. In response, defense counsel filed a memorandum explaining his view that there was a split in the circuits on the applicability of a "legal impossibility" defense in this context. A30-38.

On February 22, 2011, the district court entered an order denying Boisvert's motion to dismiss. A11-12. The district court explained that Boisvert's motion was foreclosed by *Gagliardi*:

> This Court is bound by the decision in United States v. Gagliardi, 506 .3d 140, 145-57 (2007), where the Second Circuit held that the involvement of an actual minor is not a prerequisite to a conviction under 18 U.S.C. § 2422(b). In response to the Court's Order to Show Cause . . ., the defendant claims that his impossibility defense should nonetheless be recognized because there is a Circuit split on the issue of whether legal impossibility is a viable defense. However, the cases he cites are completely inapposite because they did not involve convictions under 18 U.S.C. § 2422(b). . . . As the Second Circuit made clear in Gagliardi, the argument that the defendant makes in this case "has been squarely rejected by the six other circuits to have considered the issue, and for sound reasons." 506 F.3d at 145 (citing cases).

A11-12.

B. Governing law and standard of review

Title 18, Section 2422(b) provides as follows:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not at-

> tained the age of 18 years, to engage in prostitution or 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 and imprisoned not less than 10 years or for life.

In *United States v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007), this Court joined seven other circuit courts to hold that the involvement of an actual minor is not a prerequisite to a conviction under § 2422(b).

This Court reviews *de novo* the district court's order denying the defendant's motion to dismiss. *United States v. Aleynikov*, 676 F.3d 71, 75-76 (2d Cir. 2012). As the *Aleynikov* Court explained, "[s]ince federal crimes are solely creatures of statute, a federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute. The sufficiency of an indictment and the interpretation of a federal statute are both matters of law that we review *de novo*." *Id.* (internal quotations and citations omitted).

C. Discussion

Boisvert argues that Count One of the indictment was legally insufficient because there was no actual minor involved in the offense. As Boisvert recognizes, however, *see* Def. Br. at 8-9, this Court rejected this precise argument in *Gagliardi*.

In facts directly analogous to the facts of this case, the defendant in *Gagliardi* engaged in sexually explicit internet chats with two adults who were posing as 13-year old girls. 506 F.3d at 143. After the defendant traveled to Manhattan to meet the "girls," he was arrested and charged with attempting to entice a minor to engage in illegal sexual activity, in violation of 18 U.S.C. § 2422(b). *Id.* at 143-44. The defendant moved to dismiss the indictment, claiming, as relevant here, that he could not be convicted under § 2422(b) because there was no actual minor involved in the offense. *Id.* at 143.

This Court rejected that argument, noting first that the argument had already been rejected by the six other circuit courts to have considered the question. *See id.* at 145 (citing *United States v. Hicks*, 457 F.3d 838, 841 (8th Cir. 2006); *United States v. Tykarsky*, 446 F.3d 458, 466 (3d Cir. 2006); *United States v. Sims*, 428 F.3d 945, 960 (10th Cir. 2005); *United States v. Meek*, 366 F.3d 705, 717-20 (9th Cir. 2004); *United States v. Root*, 296 F.3d 1222, 1227-29 (11th Cir. 2002); *United States v. Farner*, 251 F.3d 510, 513 (5th Cir. 2001)). *See also United States v. Coté*, 504 F.3d 682, 687-88 (7th Cir. 2007) (opinion issued shortly before *Gagliardi* and coming to same conclusion).

Moreover, the *Gagliardi* Court noted that the statute "explicitly proscribes *attempts* to entice a minor, which suggests that actual success is not

required for a conviction and that a defendant may thus be found guilty if he fails to entice a minor because the target whom he believes to be underage is in fact an adult." *Id.* at 145-46. And to the extent that the defendant framed his argument as one of "factual impossibility," (*i.e.*, that "extraneous circumstances unknown to him rendered completion [of the offense] impossible"), the Court rejected that defense because "'factual impossibility is not a defense to a charge of attempt in substantive criminal law.'" *Id.* at 146 (quoting *United States v. Weisser*, 417 F.3d 336, 352 (2d Cir. 2005)).

Next, the Court rejected the defendant's two arguments based on the legislative history of § 2422(b). The defendant pointed first to Congress's 1998 rejection of an amendment "that would have expanded the statute to reach a defendant who subjectively believed that the target of his enticement was a minor." *Id.* at 145 (describing rejected amendment). According to the defendant, because Congress rejected this amendment, Congress "'made clear that [§ 2422(b)] only criminalizes an attempt involving a minor.'" *Id.* (quoting appellant's brief). As this Court recognized, however, Congress could have rejected the amendment because it already believed the statute's attempt provision covered these defendants. *Id.* at 146.

Second, the defendant noted that in 2005, two legislators proposed amending § 2422(b) to "'al-

low law enforcement officers to represent themselves as minors on the Internet . . . .'" *Id.* at 145 (quoting 151 Cong. Rec. S9833 (daily ed. Sept. 8, 2005)). This proposal, according to the defendant, demonstrated that Congress did not believe the statute applied to undercover officers posing as minors. But as this Court recognized, this proposal was "hardly dispositive of the intent of Congress as a whole." *Id.* at 146. Indeed, "Congress could have been aware that several circuits had already interpreted § 2422(b) to include adults posing as minors and found no need to amend the statute." *Id.*

Finally, the *Gagliardi* Court concluded that the defendant's interpretation of the statute to require an actual minor would impede effective enforcement of the statute. Congress was aware that many defendants were convicted in "sting" operations, and thus to interpret the statute to require law enforcement to use an actual minor as "bait" would "significantly impede legitimate enforcement of the statute," a result Congress did not likely intend. *Id.* at 147; *see also id.* (quoting *Tykarsky*, 446 F.3d at 468, for proposition that it was "unlikely that Congress intended to prohibit" sting enforcement operations).

The Court's decision in *Gagliardi* fully addressed and resolved the precise argument presented by defense counsel here. Thus, this Court should reject Boisvert's argument because *Gagliardi* is binding on this Court unless and until it

is overruled by the Supreme Court or by this Court sitting *en banc*. *United States v. Thomas*, 628 F.3d 64, 69 (2d Cir. 2010); *United States v. Jass*, 569 F.3d 47, 58 (2d Cir. 2009). Boisvert does not argue—and nor could he—that any decisions from the Supreme Court or this Court sitting *en banc* require reconsideration of *Gagliardi*.

Boisvert argues instead that this Court should reject *Gagliardi*'s holding because it makes prosecutions under § 2242(b) harder to defend. Specifically, he seems to argue that because § 2422(b) turns on the intent of the defendant, if the statute is interpreted to allow "sting" operations by law enforcement, a defendant would be precluded from arguing that he lacked the intent required to establish a violation of the statute. Def. Br. at 9-10. It is unclear why the "true" identity of the defendant's intended victim would preclude any defense based on his intent, however. In this case, for example, Boisvert argued that he lacked the requisite intent to violate the statute because he intended solely to "scare" Jessie off the internet, not to attempt to entice her into sexual conduct. To be sure, the jury did not credit Boisvert's argument, but there was nothing about the fact that "Jessie" was actually a law enforcement officer that precluded Boisvert from offering this defense.

Boisvert also argues that the *Gagliardi* Court should not have based its holding on a concern

that disallowing sting operations would impede effective law enforcement. Def. Br. at 9. But the *Gagliardi* Court, and other courts, did not focus on potential impediments to law enforcement to decry these problems as a policy matter. Rather, they discussed the problems posed to law enforcement by the defendant's interpretation of the statute as a key to understanding congressional intent. Specifically, as explained by the Court, Congress knew that law enforcement used sting operations to enforce this statute, and also that these sting operations allowed law enforcement to avoid using an actual minor as "bait." Given this background, there was no reason to believe that Congress intended to foreclose the use of sting operations when to do so would "significantly impede legitimate enforcement of the statute." *Gagliardi*, 506 F.3d at 146-47. The Third Circuit made this same point succinctly in *Tykarsky*:

> [W]e are mindful of the potential damage that the defendant's position could work on law enforcement under the statute. We mention this not because of our own policy preferences, but because it is relevant to Congress's intent. It is common knowledge that law enforcement officials rely heavily on decoys and sting operations in enforcing solicitation and child predation crimes such as § 2422(b). We consider it unlikely that Congress intended to prohibit this

> method of enforcement. Indeed, if we were to adopt [the defendant's] reading of the statute, law enforcement officials would have to use actual minors in conducting sting operations. We do not believe Congress intended such a result.

446 F.3d at 468 (internal quotations and citations omitted).

Finally, Boisvert seems to suggest that this Court should reconsider *Gagliardi* because he has raised his "actual minor" defense as a defense of "legal impossibility" and some circuits still consider "legal impossibility" a valid defense. Def. Br. at 9. As described by the Third Circuit, legal impossibility occurs when "the intended acts, even if completed would not amount to a crime." *Tykarsky*, 446 F.3d at 465. But that Court also recognized that the distinction between legal impossibility and factual impossibility (*i.e.*, "when extraneous circumstances unknown to the actor or beyond his control prevent consummation of the intended crime," *id.*) "is essentially a matter of semantics, for every case of legal impossibility can reasonably be characterized as a factual impossibility." *Id.* at 465-66 (internal quotations and citations omitted). *See also Farner*, 251 F.3d at 512 ("The distinction between factual and legal impossibility is elusive at best. Most federal courts have repudiated the distinction or have at least openly questioned its usefulness."). And the *Gagliardi* Court has al-

ready rejected Boisvert's "actual minor" defense when cast as one of "factual impossibility." *See* 506 F.3d at 146; *see also Coté*, 504 F.3d at 687 (noting the "well-established principle that factual impossibility or mistake of fact is not a defense to an attempt charge").

Moreover, to the extent a court might still recognize a "pure" or "true" legal impossibility defense, it would not help Boisvert. A "pure" legal impossibility defense, is "when the actions which the defendant performs or sets in motion, even if fully carried out *as he desires*, would not constitute a crime." *Farner*, 251 F.3d at 513 (internal quotations omitted). Here, Boisvert's plan, if fully carried out as he desired, was not to engage in sexual conduct with Detective Nash. His plan was, rather, to engage in sexual conduct with a 14-year old girl, conduct which undoubtedly constituted a crime. Thus, a legal impossibility defense would not help Boisvert here.

In short, Boisvert offers neither persuasive reasons nor binding precedent that would compel this Court to reject *Gagliardi*. And for good reason. *Gagliardi* was correctly decided.

Every circuit court to consider the issue has held that a conviction for attempted violations of § 2422(b) does not require an actual minor. *See Hicks*, 457 F.3d at 841 (8th Cir.); *Tykarsky*, 446 F.3d at 464-69 (3d Cir.); *Sims*, 428 F.3d at 959-60 (10th Cir.); *Meek*, 366 F.3d at 717-20 (9th Cir.); *Root*, 296 F.3d at 1227-31 (11th Cir.);

Farner, 251 F.3d at 512-13 (5th Cir.); *Coté*, 504 F.3d at 687-88 (7th Cir.).

As these cases recognize, the availability of an "actual minor" defense as proposed by Boisvert is a question of legislative intent as revealed in the statute. *See Gagliardi*, 506 F.3d 145-47 (interpreting statute); *Tykarksy*, 446 F.3d at 466. And on this point, the fact that Congress proscribed *attempted* violations of § 2422(b) "suggests that actual success is not required for a conviction and that a defendant may thus be found guilty if he fails to entice an actual minor because the target whom he believes to be underage is in fact an adult." *Gagliardi*, 506 F.3d at 145-46; *Meek*, 366 F.3d at 718 ("The attempt provision of this statute underscores Congress's effort to impose liability regardless of whether the defendant succeeded in the commission of his intended crime."); *Tykarsky*, 466 F.3d at 466-67; *Root*, 296 F.3d at 1227. To prove an "attempt" conviction, the government need only prove that the defendant "acted with the specific intent to commit the underlying crime and that he took a substantial step towards completion of the offense." *Coté*, 504 F.3d at 687; *see also Farner*, 251 F.3d at 513; *Root*, 296 F.3d at 1227-28. The fact that a defendant's conduct "had not ripened into a completed offense is no obstacle to an attempt conviction. [The defendant's] belief that a minor was involved is sufficient to sustain

an attempt conviction under 18 U.S.C. § 2422(b)." *Root*, 296 F.3d at 1227.

II. The sentence imposed by the district was procedurally and substantively reasonable.

A. Relevant facts

In preparation for sentencing, the Probation Department prepared a Pre-Sentence Report. In the PSR, the Probation Department used a base offense level of 28, *see* U.S.S.G. § 2G1.3, and increased that by 2 levels for use of a computer under U.S.S.G. § 2G1.3(b)(3). PSR ¶¶ 24, 25. With a total offense level of 30,[3] a Criminal History Category I, and a statutory mandatory minimum 120-month term on Count One, Boisvert faced an effective final guidelines range of 120-121 months' imprisonment. PSR ¶¶ 30, 32, 69-70.

In September 2011, just before sentencing, Boisvert sent a letter to the district judge in which he stated that "*I did not seek* 'underage girls' and that "*I am not a predator*." GA53. He explained that he was merely "a lonely person who was meeting a *nonexistant* [sic] person to go to a *public beach*. *I am not a predator*." GA53.

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[3] In the initial disclosure of the PSR, the Probation Department had recommended a two-level increase for obstruction of justice, but removed it from the final disclosure of the PSR after Boisvert objected.

The district court held a sentencing hearing on October 5, 2011. A18, A155. At the hearing, the court resolved two disputes regarding the facts as presented in the PSR, and with those amendments, adopted the factual statements as presented there. A173-77.

The court turned next to the government's request that Boisvert's offense level be increased by two levels under U.S.S.G. § 3C1.1 for obstruction of justice in light of his trial testimony. The prosecutor identified numerous false statements in Boisvert's testimony, but focused the court's attention principally on Boisvert's statements about his intent in chatting with Jessie and in traveling to Milford. A186-95. Defense counsel objected to an enhancement for obstruction of justice, arguing that Boisvert's statements at trial—that he was trying to protect and save Jessie—were not intentionally false because he subjectively believed them. In other words, according to defense counsel, Boisvert did not intend to testify in a false manner. A198-204. Boisvert, rather, was a "simple" man who honestly believed that he was trying to "save" Jessie but who did not understand how implausible or unbelievable his plan was to accomplish that goal. A198-204.

The district court rejected Boisvert's argument and imposed the two-level increase for obstruction of justice. In sum, the court found that

Boisvert "intentionally testif[ied] falsely concerning numerous material facts at trial." A205.

The court began by rejecting the argument that Boisvert was "simple" or mentally impaired. As the court explained, his demonstrated capabilities—as shown by his testimony at trial, his letter to the court, his participation in internet chats and his use of other parts of the internet, his navigation to Anchor Beach, and his steady employment—belied any suggestion that he was a "simple person that lacks the ability to grasp the obvious." A205. Moreover, the court found that Boisvert had a motive to lie, namely to avoid incarceration. His own statements demonstrated that he knew chatting with Jessie was illegal and that he knew he was facing conviction based on those statements. A205-206.

And the court had little trouble concluding that Boisvert's testimony at trial was intentionally false:

> His statements are patently—His testimony, that is, was patently false in numerous respects.
>
> It is inconceivable that anyone would believe that the nature of the communication he engaged in with the undercover officer, who he believed was a 14-year-old girl, was designed to frighten her, when he offered to marry her, when he told her she

was his girlfriend, when he told her he would care for her.

It is inconceivable that he testified truthfully when he said that he went to Anchor Beach to tell an adult family member of Jesse, about her conduct on the Internet. In his communication with her, he tells her to tell her mother that she was sleeping over with a friend.

How was he to know where she was living when she was—when he was directing her to be someplace, or to go someplace, or to come from someplace other than her own home?

As the Government points out, what person, what parent would believe a perfect stranger who tells them that their child is engaging in illicit sexual communications, if that person has absolutely no documentation of such conduct? Ask yourselves, what would you do if you were a parent and someone rang your doorbell and told you that about your child? You would probably call 911.

Who would believe that that was his intent, when he knew approximately where she lived? He could've called a school. He could have called the police. He could've done any other number of things to stop her from engaging in that conduct long be-

> fore, long before he hatched the plan and executed the plan to travel to Anchor Beach.
>
> The psychologist indicates, in his report, that Mr. Boisvert's treatment should include treatment for deception.
>
> The psychologist finds Mr. Boisvert's statements incredulous, but what really establishes his willful false testimony on material facts in this trial is his letter, his ex parte communication, or attempted ex parte communication with the Court, where he admits his intention and denies that he is a predator, and admits his motivation when he states that the mandatory minimum is too long a sentence. That's why Mr. Boisvert lied, that coupled with this inability to accept the reality, to admit the truth of what he did in this case, as well as what he did when he was 14 years old.
>
> The Court finds that Mr. Boisvert committed perjury, and in so doing, obstructed justice in this court, and that the two-level enhancement is warranted.

A206-208.

With the two-level enhancement, Boisvert faced a guidelines range of 121-151 months' imprisonment. *See* Sentencing Table.

After resolving this guidelines issue, the court heard from defense counsel and Boisvert himself. Defense counsel asked the court to consider the parsimony clause, and argued that Boisvert was very unlikely to re-offend, given a number of factors, including, significantly, the fact that the instant offense was his first adult conviction. A210-17. When Boisvert spoke, he discussed an episode from his childhood that had resulted in his serving a juvenile probationary sentence. *See* PSR ¶¶ 50-53. According to Boisvert's statements about this episode, he was the victim of abuse by an elder adult male. A218, 220.

After hearing from all parties, the court imposed sentence, beginning with a discussion of the factors that the court considered in selecting an appropriate sentence. The court considered first that Boisvert's offenses were very serious, and yet also difficult to detect because they take place on the internet and thus out of public view. A221. Moreover, the court noted that these offenses could lead to serious consequences for the victims, including the type of trauma that Boisvert had described from his own history. A221.

The court also considered the history and characteristics of Boisvert, which it found "very troubling," A221, primarily because it suggested a risk of recidivism, A221-25. As a juvenile, Boisvert had been found responsible for engaging in illicit sexual conduct with two young children and had received therapy, and yet had

no present recollection of the treatment. The court found it concerning that Boisvert had no recollection of treatment for such a traumatic event in his life. A221-22. Moreover, the court noted that a psychologist's report prepared for sentencing had found no studies predicting recidivism rates for defendants convicted of the types of offenses of which Boisvert had been convicted. A222-23. This same report, however, had raised concerns about the potential for recidivism by Boisvert. Specifically, the report noted that Boisvert was going to have a hard time coming to accept responsibility for his criminal behavior and thus would face challenges in being rehabilitated. A223-25.

The court continued by identifying additional factors that it considered in the sentencing process, including the need for a sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, and to provide effective deterrence to others. A225. The court also considered the need to protect the public from other crimes that might be committed by Boisvert, pointing specifically to its concerns about Boisvert's lack of acceptance of responsibility and potential lack of responsiveness to rehabilitative treatment. A225. The court acknowledged that it must consider the sentencing guidelines, but affirmed that it was not bound by those guidelines. A226.

Considering all of these factors, the court sentenced Boisvert to 136 months' imprisonment on each offense, to be served concurrently. A226. The court also imposed a lifetime term of supervised release, with the conditions recommended by the Probation Department in the PSR. A226. At the conclusion of the hearing, the court confirmed that it had imposed a "guidelines sentence," but that it was not bound by the guidelines. A228.

B. Governing law and standard of review

1. Sentencing law generally

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id*. at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After *Booker*, at sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550

F.3d 180, 189 (2d Cir. 2008) (en banc). "The Guidelines provide the 'starting point and the initial benchmark' for sentencing, and district courts must 'remain cognizant of them throughout the sentencing process.'" *Id.* (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). Consideration of the guideline range requires a sentencing court to calculate the range and put the calculation on the record. *See United States v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006).

After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *See Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming sentence despite district judge's brief statement of reasons in refusing downward departure that the guideline range was "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), "robotic incantations"

are not required. *See, e.g. United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006).

This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors." *Fernandez*, 443 F.3d at 30. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). Furthermore, a judge need not address every "specific argument[] bearing on the implementation of those factors" in order to execute the required consideration. *See Fernandez*, 443 F.3d at 29.

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. In this context, reasonableness has both procedural and substantive dimensions. *See Cavera*, 550 F.3d at 189-90.

"A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Id.* at 190 (citations omitted). A district court also commits procedural error "if it does not consider the

§ 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *Id*. Finally, a district court "errs if it fails adequately to explain its chosen sentence," including, "'an explanation for any deviation from the Guidelines range.'" *Id*. (quoting *Gall*, 552 U.S. at 51). A district court need not specifically respond to all arguments made by a defendant at sentencing, however. *See United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010) ("[W]e never have required a District Court to make specific responses to points argued by counsel in connection with sentencing . . . ."), *cert. denied*, 131 S. Ct. 1698 (2011).

With respect to substantive reasonableness, this Court has 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.'" *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d

108, 123 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 140 (2010).

Although this Court has declined to adopt a formal presumption that a within-Guideline sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see also Rita*, 551 U.S. at 347-51 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi,* 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

2. U.S.S.G. § 3C1.1: Obstruction of justice

Section 3C1.1 of the sentencing guidelines provides for a two-level increase in a defendant's offense level for obstruction of justice:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct re-

> lated to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by **2** levels.

"Section 3C1.1 applies where a defendant, testifying under oath, 'gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory.'" *United States v. Stephens*, 369 F.3d 25, 26-27 (2d Cir. 2004) (per curiam) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)). "[T]o base a § 3C1.1 enhancement upon the giving of perjured testimony, a sentencing court must find that the defendant 1) willfully 2) and materially 3) committed perjury, which is (a) the intentional (b) giving of false testimony (c) as to a material matter." *United States v. Zagari*, 111 F.3d 307, 329 (2d Cir. 1997). "[T]he willfulness contemplated by § 3C1.1 [is] distinct from the intent required to prove perjury. The former refers to a defendant's 'specific purpose of obstructing justice,' whereas the latter refers to his 'purposeful giving of the false testimony.'" *United States v. Canova*, 412 F.3d 331, 357 (2d Cir. 2005) (quoting *Zagari*, 111 F.3d at 329 n. 20.). Therefore, the sentencing court must find based on a preponderance of the evidence not only that the defendant committed perjury, but that the perjury was "committed with the specific intent of obstructing justice." *Canova*, 412 F.3d at 357. *See*

also United States v. Salim, 549 F.3d 67, 75 (2d Cir. 2008) (preponderance is appropriate standard in evaluation of obstruction-of-justice enhancement).

This Court distilled these principles in *United States v. Lincecum*, 220 F.3d 77 (2d Cir. 2000) (per curiam). There, this Court stated:

> Where the district court finds that the defendant has clearly lied in a statement made under oath, the court need do nothing more to satisfy *Dunnigan* than point to the obvious lie and find that the defendant knowingly made a false statement on a material matter.

Id. at 80.

3. Standard of review

A sentencing court's legal application of the Guidelines is reviewed *de novo*, while the court's underlying factual findings are reviewed for clear error, acknowledging the lesser standard of proof at sentencing of preponderance of the evidence. *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011) (per curiam).

With respect to a district court's decision to enhance a defendant's sentence for obstruction of justice, this Court accepts the district court's factual findings unless they are clearly erroneous, but reviews *de novo* the ultimate conclusion that a given set of facts constitutes obstruction

of justice. *United States v. Agudelo*, 414 F.3d 345, 348 (2d Cir. 2005).

When "a defendant does not object to a district court's alleged failure to properly consider all of § 3553(a) factors," this Court reviews only for plain error. *United States v. Wagner-Dano*, __ F.3d __, 2012 WL 1660956 at *5 (2d Cir. May 14, 2012). Similarly, as set forth below, when a defendant fails to object to a district court's alleged failure to make specific findings supporting an enhancement for obstruction of justice, this Court should review only for plain error. *See* Part II.C.1.b.

Under plain error review, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Wagner-Dano*, 2012 WL 1660956 at *9. "'[T]he burden of establishing entitlement to relief for plain error is on the de-

fendant claiming it . . . .'" *Wagner-Dano*, 2012 WL 1660956 at *9 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

C. Discussion

1. The district court properly applied the two-level enhancement for obstruction of justice.

The district court properly imposed a two-point enhancement for obstruction of justice in this case. The key issue at trial—indeed the only issue in dispute at trial—was the defendant's intent. *See* A163 (defense counsel agreeing that Boisvert's intent was only issue at trial). On this issue, the court properly concluded that Boisvert's trial testimony amounted to obstruction of justice and the court issued more than adequate findings to support that conclusion.

a. Boisvert's testimony constituted obstruction of justice.

As the district court concluded, Boisvert's testimony about his intent was patently and intentionally false. Boisvert testified repeatedly that he chatted with "Jessie" and traveled to Anchor Beach to protect her—either by scaring her or by finding an adult he could notify about her risky behavior. *See* Statement of Facts, Part D. Moreover, he expressly (and repeatedly) denied that he intended to entice a 14-year old girl to engage in sexual conduct and that he traveled to Anchor

Beach with the intent to engage in sexual conduct with Jessie. *See, e.g.*, A85-86. Had the jury believed Boisvert's testimony, it would have found him not guilty, but Boisvert was convicted. In short, the jury disbelieved Boisvert's testimony and so did the court.

Significantly, the court rejected Boisvert's claim that he did not testify falsely because *he subjectively believed that he was trying to protect Jessie*. *See* A198-203. As the court noted, given the evidence in this case, it was patently inconceivable that anyone—even Boisvert—believed he was trying to scare Jessie or trying to find an adult who could protect her. To begin, the court rejected defense counsel's argument that Boisvert was "simple" or lacked the mental capacity to understand that his scheme to protect Jessie was misguided. And after rejecting this argument, the court had little trouble concluding that the very nature of the inappropriately sexual and continuing chats belied any suggestion that Boisvert was trying to scare Jessie; the more natural reading of those chats was the obvious one, *i.e.*, that he wanted to engage in sexual conduct with her. Similarly, although Boisvert claimed that he came to Anchor Beach early to watch which house Jessie came from so he could confront an adult, his actions contradicted this intent. He knew that Jessie would not be coming from her own house to the beach, *see* GA50-51, and he brought no "evidence" of Jessie's inap-

propriate behavior with him to show to an adult. Instead, he brought his swimsuit and a beach towel. A152-53. Moreover, if Boisvert's intent was to notify an adult about Jessie's inappropriate chatting, he could have called the police or attempted to call her school. He did neither. A105, A108. In short, the district court compared Boisvert's actions and words with his stated intent and concluded that he testified falsely about his intent.

And to the extent there was any question about whether Boisvert really believed that his intent was to protect Jessie, that question was resolved by the letter Boisvert sent to the district judge before sentencing. In that letter, Boisvert did not reiterate his claim that he was trying to scare Jessie or trying to find her parents to warn them. Instead, he said that he was "a lonely person who was meeting a *nonexistant* person to go to a *public beach*." GA53. In other words, in this letter, Boisvert admitted that even *he* did not believe his own trial testimony. In sum, the district court's finding that Boisvert intentionally lied about a material matter at trial was fully supported by the record.

Finally, the court also properly found that Boisvert's false testimony was intended to obstruct justice. The court noted that Boisvert was aware that his conduct was wrong and that he could go to prison, *see* A205-206, and that he had expressly noted his concern with a lengthy pris-

on term when he wrote to the court before sentencing. *See* A207-208; GA53. If the jury believed his false testimony, he could have avoided prison altogether, and thus the court properly concluded that Boisvert's false testimony was intended to obstruct justice.

On this record, this case is directly analogous to this Court's decision in *United States v. Onumonu*, 999 F.2d 43 (2d Cir. 1993). There, the defendant was arrested and charged with importing heroin after it was discovered that he had flown into this country after ingesting 85 condoms filled with heroin. *Id.* at 44. At trial, the defendant testified that he thought he had ingested condoms filled with diamonds, not heroin. *Id.* The district court found that this testimony warranted an enhancement for obstruction of justice, and this Court affirmed, specifically approving the district court's finding that the defendant's testimony was implausible when weighed against the other evidence at trial. Thus, for example, when the defendant was confronted with law enforcement's suspicion that he had ingested heroin, he refused an X-ray, which would have confirmed the presence of diamonds. *Id.* at 47. Similarly, the Court approved the district court's finding that it was "preposterous" that the defendant, an educated man, would have ingested the heroin thinking it was diamonds. *Id.*

Here, as in *Onumonu*, Boisvert's testimony was implausible when weighed against the other evidence at trial. His statements about his intent in traveling to Milford were flatly inconsistent with the evidence of his intent as demonstrated by his actions. Moreover, the district court found, similar to the finding in *Onumonu*, that Boisvert was not "simple," and thus that it was "inconceivable" that he really believed the testimony he gave at trial about his intent. Thus, just as in *Onumonu*, this Court should affirm the district court's conclusion that Boisvert's testimony amounted to obstruction of justice.

b. The district court's factual findings were more than sufficient to support the enhancement for obstruction of justice.

As a preliminary matter, Boisvert's argument that the court failed to make sufficient factual findings to support the obstruction-of-justice enhancement should be reviewed for plain error. After the court announced its conclusion on the obstruction-of-justice enhancement, counsel never objected to any alleged deficiencies in those findings. And although the government has not located any published cases from this Court applying plain error review in this context, the ap-

plication of plain error review in analogous situations counsels its application here.[4]

In *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007), this Court explained that plain error review is appropriate for alleged sentencing errors when "the sentencing issue was not particularly novel or complex." For these types of issues, raising an objection "is neither difficult nor onerous" for defense counsel, and at the same time, it allows the district court to correct the error quickly and efficiently. *Id.* Thus, this Court reviews for plain error a defendant's argument, made for the first time on appeal, that a district court erred in failing to consider the § 3553(a) factors. *Id.* Similarly, this Court recently held that it reviews for plain error an argument that the district court failed to resolve objections to the PSR. *Wagner-Dano*, 2012 WL 1660956 at *6. As this Court explained, the rule requiring a district court to resolve objections to the PSR is "neither novel nor complex," and it "should be intuitive" to bring this alleged procedural error to the attention of the district court. *Id.* at *7.

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[4] In one unpublished case, this Court applied plain error review to a claim a district court's factual findings were insufficient to support an obstruction-of-justice enhancement. *See United States v. Soto*, 234 F.3d 1263 (Table), 2000 WL 1678782 *1 (2d Cir. Nov. 7, 2000).

Here, just as with a court's failure to consider factors under § 3553(a) or to resolve objections to a PSR, the requirement that a court make findings to support an obstruction-of-justice enhancement is neither "novel nor complex." Since 1993 when the Supreme Court announced this requirement in *Dunnigan*, it has been an accepted part of the law governing this enhancement. *See, e.g.*, *Lincecum*, 220 F.3d at 80; *Zagari*, 111 F.3d at 328-29. Indeed, both defense counsel and the prosecutor specifically alerted the court to its obligation to make specific findings on this enhancement. *See* A43 (defense counsel), A188 (prosecutor). Moreover, had defense counsel objected at the time, the district court could have elaborated on its findings to correct any alleged deficiencies. Thus, just as with analogous alleged sentencing errors, this Court should review for plain error Boisvert's argument that the court's findings on the obstruction-of-justice enhancement were insufficient.

Regardless of the standard of review, however, there was no error in this case; the district court's findings were more than sufficient to support the enhancement. To be sure, the district court focused its attention on responding to the key dispute on the application of the enhancement, namely, whether Boisvert intentionally offered false testimony or whether, by contrast, he honestly believed his own testimony

about his intent. This was counsel's primary argument against application of the enhancement, and accordingly, the district court properly directed its attention to that issue.

The court's findings, however, went beyond the issue raised by Boisvert at sentencing to address all of the required findings for the enhancement. The court identified the false statements (*i.e.*, Boisvert's statements about his intent), and found that these were knowingly made with an intent to affect the trial. A205-206. The law requires nothing more. *See Lincecum*, 220 F.3d at 80.

And although it is clear that Boisvert disagrees with the court's substantive conclusion that his testimony constituted obstruction of justice, it is not entirely clear what he believes are the perceived failings in the district court's findings. More significantly, Boisvert does not explain (much less show) how the court's failure to make more explicit findings prejudiced his sentence, or how the error affected the "fairness, integrity, or public reputation of judicial proceedings." In the absence of that showing, Boisvert's argument must fail. *See Wagner-Dano*, 2012 WL 1660956 at *9 ("[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it . . . ." (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

2. The district court properly considered the sentencing factors in 18 U.S.C. § 3553(a).

Boisvert claims that the district court failed to consider pertinent sentencing factors under 18 U.S.C. § 3553(a), thus resulting in a sentence that was greater than necessary to serve the purposes of sentencing. Because Boisvert never raised this objection below, this Court reviews this issue for plain error. *See Wagner-Dano*, 2012 WL 1660956 at *5. There was no error here, much less plain error.

Boisvert contends that the court failed to adequately consider the fact that he had no prior adult convictions, and that the parsimony clause of 18 U.S.C. § 3553(a) would thus require a sentence at the mandatory minimum of 120 months' imprisonment. Def. Br. at 26-27. Defense counsel made these same arguments to the district court both in his sentencing memorandum and again at sentencing. *See* A208-16. There is nothing in the record to suggest that the court failed to consider these arguments, the § 3553(a) factors more generally, or its obligation to impose a sentence consistent with the parsimony clause.

To the contrary, the court outlined in great detail, with specific reference to the factors identified in § 3553(a), the factors that it considered relevant. *See* A221-26. And although the court did not specifically reference the fact that Boisvert had no adult criminal convictions, defense

counsel had raised this issue repeatedly as support for his argument that Boisvert was at low risk for recidivism, an argument that the district court emphatically rejected. A221-26. In any event, this Court does not require a district court "to make specific responses to points argued by counsel" at sentencing. *Bonilla*, 618 F.3d at 111. Accordingly, because this Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors [under § 3553(a)]," *Fernandez*, 443 F.3d at 30, Boisvert's argument must fail.

This is especially true here, where Boisvert's claim is reviewed for plain error. Boisvert theorizes that the court would have imposed a lower sentence had it considered his lack of a criminal history, and that a sentence at the statutory mandatory minimum would have been consistent with the parsimony clause. But these theories do not demonstrate error by the district court, much less any prejudice to Boisvert's sentence. The district court explained its consideration of multiple sentencing factors; the fact that it did not weigh those factors in the same way as Boisvert would have done does not demonstrate that the court erred.

3. The 136-month sentence, which fell squarely within the guidelines range, was substantively reasonable.

With the enhancement for obstruction of justice, Boisvert faced a guidelines range of 121-151 months' imprisonment, and the sentence imposed of 136 months fell directly within that range. Although this Court has observed that "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances," *Fernandez*, 443 F.3d at 27, Boisvert argues that his sentence was substantively unreasonable. This argument fails.

The 136-month sentence was squarely within the guidelines range calculated by the court. It reflected the court's consideration of the seriousness of the offense conduct, and potentially harmful effects on minor victims of this conduct. A221. It also reflected the court's concern for the need to avoid unwarranted sentencing disparities, A226, while at the same time protecting the public from future crimes of the defendant, A225. This last point was especially important to the court, which voiced its concern that Boisvert had not fully accepted responsibility for his conduct and thus presented a high risk of recidivism. A221-26. For a defendant who had a prior sex offense involving a child and who presented

a risk of recidivism, the 136-month sentence was imminently reasonable. At the very least, this was not that "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, . . . or otherwise unsupportable as a matter of law." *Rigas*, 583 F.3d at 123.

Boisvert counters that his sentence was substantively unreasonable by pointing to the 60-month sentence imposed on the defendant in *Gagliardi*. Def. Br. at 28-30. According to Boisvert, the defendant in *Gagliardi* was more culpable and thus Boisvert's sentence was too long by comparison. Boisvert's argument is misplaced. The mere fact that another defendant received a lower sentence does not demonstrate that Boisvert's sentence was too high.

In any event, even a cursory review of the *Gagliardi* case reveals that it does not support the conclusions that Boisvert draws from it. *First*, Gaglardi was prosecuted and sentenced under a prior version of § 2422(b) which had only a 5-year mandatory minimum; Congress's decision to increase the mandatory minimum penalty for Boisvert's offense sends a strong message that sentences under that new floor did not appropriately reflect Congress's assessment of the seriousness of the offense conduct. *Second*, there is no basis for concluding that Gagliardi's conduct was more egregious than his because Gagliardi's intent to have sex with a young girl was

more clear. Boisvert draws this conclusion from the fact that Gagliardi was found with sex toys and props when he was arrested but Boisvert had no such props at the time of his arrest.[5] Def. Br. at 29-30. The fact that Boisvert did not bring sex toys with him to Anchor Beach does not mean that his intent to have sex with Jessie was any less clear. As described above, his chats with Jessie, along with his conduct throughout his "relationship" with her demonstrated beyond question—as the jury found—that he intended to have sex with her when he met her on the beach. *See* Statement of Facts, Parts A-D.

Finally, in the absence of more information about Gagliardi, there is no basis for concluding that Gagliardi and Boisvert are similarly situated in their history and characteristics. In this case, where Boisvert had a prior sex offense involving a child, and where the district court found indications that Boisvert had failed to accept responsibility for his conduct, these potential distinctions preclude a conclusion that Boisvert's sentence should be comparable to Gagliardi's.

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[5] The fact that Boisvert, unlike Gagliardi, did not have Viagara with him when he was arrested is not a meaningful distinction either given the age differentials (and thus, presumably, the differential necessity for Viagara of the two defendants). Boisvert was 39 years old; Gagliardi was 62. *See Gagliardi*, 506 F.3d at 143.

In sum, the district court fully considered all of the § 3553(a) factors and imposed a sentence that reflected a careful balancing of those factors. On this record, the Court should decline Boisvert's invitation to substitute its judgment for that of the district court on the proper weight to be given the sentencing factors.

Conclusion

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

Dated: June 4, 2012

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,734 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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Addendum

18 U.S.C. § 2422(b):

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or 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 and imprisoned not less than 10 years or for life.

U.S.S.G. § 3C1.1:

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by **2** levels.