Docket Nos. 09-1318 & 09-2120

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,

Appellant/Cross-Appellee,

v.

DAVID GROBER,

Appellee/Cross-Appellant.

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On Cross-Appeals from Judgment in a Criminal Case
filed Dec. 8 and entered Dec. 30, 2008, in Crim. No. 06-CR-880
in the United States District Court
for the District of New Jersey (Hayden, J.)

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REPLY (FOURTH-STEP) BRIEF FOR APPELLEE/CROSS-APPELLANT DAVID GROBER

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ARGUMENT IN REPLY

The government appealed David Grober's five-year prison sentence, claiming it was insufficiently severe. Mr. Grober cross-appealed, arguing on two grounds that the district court mistakenly believed that a five-year mandatory minimum sentence was required. With the filing of its third-step (Yellow) brief, all briefing on the government's appeal is complete. This is Mr. Grober's reply in support of his cross-appeal and is limited to those issues, pursuant to Fed.R.App.P. 28.1(c)(4). The Yellow Brief does not offer convincing responses to the arguments advanced in support of Mr. Grober's cross-appeal. Accordingly, although the sentence is not unreasonable on any basis argued by the government, the judgment should be vacated and remanded for a fresh exercise of sentencing discretion by the district court, unrestricted by any mandatory minimum sentence.

1. Because the existing record demonstrates that Mr. Grober was convicted under Count 6 for possessing the same images that he was convicted under Counts 1 through 5 for receiving and transporting, his guilty plea to all charges did not waive the claim that his sentence on the six counts is multiplicitous, in violation of the Double Jeopardy Clause.

The second-step cross-appellant's (Red) brief demonstrates in meticulous detail that the particular images Mr. Grober was convicted under Counts One through Five for receiving and transporting, in violation of 18 U.S.C. § 2252A(a)(1) and (a)(2)(A), were included among the images which rendered illegal his possession of three computer hard drives and three compact disks, as charged in Count Six, in violation of id. § 2252A-

(a)(5). Mr. Grober makes this demonstration entirely from documents in the existing record. See Red Brief, at 12–15. The government cannot -- and does not attempt to -- show otherwise. Under this Court's cases, and those of the Supreme Court, Mr. Grober is therefore entitled to relief from multiple punishments for the "same offense." The district court has discretion (on remand) which count or counts to select to cure the error, including the option of sentencing on Count Six only, which pursuant to § 2252A(b)(2) carries no mandatory minimum. The Yellow Brief ("YB") fails in its attempt to find a way to evade these controlling precedents.

The government contends that "Grober cannot show that he was convicted of possessing images he also received or transported." YB 52. In fact, as already noted, he has made exactly that showing by a careful analysis of the government's own sentencing exhibits. Thus, we must assume that by this claim the government means something more subtle. Perhaps by this assertion the prosecutors simply mean that Mr. Grober was convicted under Count Six not for possessing "images" but rather for possessing computer drives and disks. Or perhaps they mean to point out that he was not convicted on that count for possessing only the particular images involved in Counts One through Five. As a third possibility, the prosecutors may be saying that the record is vague as to what images it was in particular that made illegal the possession of the computers and disks mentioned in Count Six, and that perhaps the basis for the Count Six conviction was only some of the images on those drives and

disks other than those specified at the time of the plea as the basis for Counts One through Five.[1] None of these possible alternative, hypothetical arguments holds up, even if this Court chooses to explore them.

Neither an appellate adversary nor this Court should have to guess at what position a party is taking and on what basis. Since the government's "different images" claim is made in its brief only by way of assertion, undefended with argument or authority, and in terms so general that it is impossible to know exactly what position it is taking, this Court should treat the contention as waived. See Slagle v. County of Clarion, 435 F.3d 262, 263 n.1 (3d Cir. 2006) (contentions mentioned only in passing in appellate brief may be deemed waived); Smith v. Horn, 120 F.3d 400, 409 (3d Cir. 1997) (Court of Appeals ordinarily should not reach out to advance arguments for a governmental appellee that are not made in its brief).[2]

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[1] Neither the indictment nor any bill of particulars specifically identified the images which the grand jury claimed were the basis for the charges in this case. Counts One through Five referred to files attached to e-mails, specified only by date of transmission or receipt, and failing to specify with any further particularity the basis for those charges. See VIApp. 1876-80. The issue now raised by the government, however, concerns Count Six, which does not specify at all the files contained on the hard drives and CD-ROMs which rendered the possession of them illegal and thus underlay that charge. See VIApp. 1881.

[2] See also YB 63, citing Hotel Empl. & Rest. Empl. Union v. Sage Hospitality Resources, 390 F.3d 206, 218 n.10 (3d Cir. 2004), for the proposition that contentions made on appeal but not briefed will not be addressed.

Even if the Court is willing to entertain the government's unelaborated claim, none of the three possible interpretations (that Mr. Grober has imagined) of that position holds up to scrutiny. If what the prosecutors are claiming is that Count Six did not charge possession of images at all, but only of computer drives and disks, that contention fails. A possession offense under 18 U.S.C. § 2252A(a)(5), as charged in Count Six, does not prohibit the possession of any particular illicit file or image. Rather, that subsection prohibits the possession of a computer data storage device (such as the hard drives and CDs mentioned in Count Six, VIApp. 1881) containing any child pornography, no matter how much or how little -- which is a continuing offense as long as the disk is possessed with those contents and the defendant knows it. United States v. Polouizzi, 564 F.3d 142, 155-56 (2d Cir. 2009). Yet this Court in United States v. Miller, 527 F.3d 54 (3d Cir. 2008), treated that offense, quite rightly, as prohibiting in effect the possession of the images on the disk. Receipt of those images, which necessarily entailed possession of them, therefore amounted to the "same offense."

If what the prosecutors are trying to suggest is that there is no multiplicity bar if one of two allegedly redundant counts encompasses a broader scope of misconduct than the other, the argument plainly fails as a matter of elementary Double Jeopardy law. Imagine a count charging the possession by a convicted felon of a certain firearm, plus ammunition, on a certain date. Imagine in the same indictment another count charging the

continuing possession by the same felon of several firearms, including the one already mentioned, over a period of time encompassing the date specified in the first count. No one could doubt that the two counts were multiplicitous, even though ammunition was mentioned in Count One (which is nevertheless the "same offense," under United States v. Tann, 577 F.2d 533 (3d Cir. 2009)) and other firearms and other dates were mentioned in Count Two. The same is true here.

The fact that more illicit images were contained on the drives and disks possessed in violation of subsection (a)(5), as charged in Count Six, than Counts One through Five happen to charge as having been received or "transported" in violation of subsections (a)(1) and (a)(2), in no way prevents each of those counts, under Miller, from being the "same" as the all-encompassing Count Six. Included offenses are always treated as "the same" as the more encompassing offense for these purposes. See, e.g., Rutledge v. United States, 517 U.S. 292 (1996) (analyzing relationship between drug conspiracy under 21 U.S.C. § 846 and Continuing Criminal Enterprise under id. § 848).

If -- as Mr. Grober has demonstrated -- all the counts charge the "same offense," for Double Jeopardy purposes, as this Court held in Miller with respect to receipt and possession, then it is is presumed that Congress did not intend to allow the imposition of separate sentences. See Ball v. United States, 470 U.S. 856, 861-64 (1985).

Alternatively, the government may mean to argue, by stating that Mr. Grober hasn't proved that the images for which he was

convicted under Count Six are the same as those admittedly received and transmitted under the other counts, that it is simply impossible to tell from this record what images on his computer drives and disks it is that support the conviction on Count Six. Of course, if this were so, then Count Six would not even charge an offense under the Fifth Amendment Grand Jury Clause or the Sixth Amendment's Notice Clause. As the Supreme Court stated in Hamling v. United States, 418 U.S. 87 (1974): "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prose-cutions for the same offense." Id. at 117 (emphasis added); accord, United States v. Bailey, 444 U.S. 394, 414 (1980). Since neither party below seemed to think that Count Six -- by failing the name the contraband images on which it depended -- suffered from the defect of failing to protect the defendant from Double Jeopardy, nor did the district court express any concern, this Court should now reject the implausible theory seemingly advanced by the government, which depends on arguing that its own indictment suffers a fatal constitutional defect.

In short, in the court below, everyone understood Count Six as charging Mr. Grober with the possession of the three computer hard drives and three CD-ROMs seized in the December 2005 search of his house. What made possession of those electronic data storage devices illegal was his knowledge of the presence on them of images of child pornography -- all of the prohibited

images found on those magnetic media, not just some of those images.[3] This possession constituted a single, continuing offense for whatever entire period of time encompassing December 2005 Mr. Grober had those drives and disks, knowing the nature of the images they contained. The government's attempt to defeat Mr. Grober's multiplicity claim for failure of factual basis on the existing record, a requirement in light of his guilty pleas, therefore fails.

The government next argues that there was no "plain error," because Mr. Grober, according to the prosecutors, YB 52-53, is himself to blame for not having requested an amendment of Count Six. Such an objection, they suggest, would have allowed the government to remedy its own unconstitutional overcharging of this case (apparently by narrowing the scope of that count[4]). Putting aside the patent absurdity of the contention that the

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[3] Mr. Grober was only guilty of possession of those drives and disks to the extent he knew of the character of the files saved on them. If he lacked such knowledge of any of the images on the drives, it certainly was not of the images he himself had sent and/or received by e-mail attachment a few months earlier. Thus, it is precisely the images charged as the basis for receipt and transmission under Counts One through Five which are most clearly shown by this record to give rise to guilt of the offense of possession under Count Six.

[4] Only when a count is narrowed is an amendment of the indictment without resubmission of the case to the Grand Jury constitutional under the Fifth Amendment. See United States v. Miller, 471 U.S. 130 (1985). However, in this case, where the offense is the possession of the computer drives and disks themselves, in light of their containing one or more images of child pornography, it is far from clear that Count Six could have been narrowed after the fact, for the sole purpose of evading the Double Jeopardy problem, by excluding any reference to the existence on those media of the particular computer files containing the images referenced in Counts One through Five.

defendant has a duty to facilitate his own increased punishment, there was no ambiguity at the time of Mr. Grober's plea, or at sentencing, about the scope of coverage of Count Six that needed to be clarified. Compare United States v. Irving, 554 F.3d 64, 79 (2d Cir. 2009) (where jury returned general verdict of guilt on count charging possession of computer disk containing "three or more" illicit images, verdict does not imply finding that every alleged image is child pornography; verdict therefore not necessarily redundant of receipt count, on plain error review), with 2App. 54-55 (admission of factual basis for Count Six).

The government also proposes, as to the transporting counts (that is, Counts One and Three), that there cannot be "plain" -- that is, obvious -- error, because there is no prior controlling authority applying Miller to that particular subsection of the statute. YB 52-53 n.22. This contention (again advanced without citing any authority) is contrary to settled law. This Court has often found errors (including sentencing errors) to be "plain" and reversible despite the absence of prior controlling authority. See, e.g., United States v. Tann, 577 F.2d 533, 538-42 (3d Cir. 2009) (erroneous statutory construction, leading to two convictions instead of one, was "plain error" even in absence of clear precedent and notwithstanding apparent intra-circuit conflict on remedy); United States v. Knobloch, 131 F.3d 366, 371-73 (3d Cir. 1997) (where, after analysis, it appears district court was clearly wrong in interpreting guideline, error can be "plain" even where other circuits have come to different conclusions and this Court has not previously ruled).

Just as plainly as there can be no "knowing receipt" of an illicit image without "knowing possession" of that image, so there cannot be "knowing transmission" without "knowing possession" of such an image.

More broadly, the government attempts to show that even if there was constitutional error, Mr. Grober cannot satisfy the various criteria for showing that this error was "plain." YB 52-53. Considering that this Court has repeatedly held otherwise for equivalent and similar errors, see Red Brief 22-24 (citing United States v. Tann, 577 F.2d 533 (3d Cir. 2009), and United States v. Miller, 527 F.3d 54, 73-74 (3d Cir. 2008)), that argument is far-fetched and unworthy of further response.

Finally, the government resorts to asking the assigned panel to disregard Circuit precedent and to infer the sub silentio overruling of a Supreme Court case. YB 54-55. Neither plea can be honored. The government claims that United States v. Miller, a 2008 precedential decision of this Court authored by Senior District Judge Pollak, relied on the wrong Supreme Court precedent in prescribing a remedy for the multiplicitous sentences -- the 1985 decision in Ball rather than the later decision in Jones v. Thomas, 491 U.S. 376 (1989).[5] Since both

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[5] Mr. Grober acknowledges that the Miller decision does not carry more weight than any other Circuit precedent by virtue of having been written by a judge who was formerly a professor of Constitutional law (and Dean) at two major university law schools. Judge Chagares joined the opinion (and later authored the decision in Tann vigorously reaffirming it); Judge Rendell dissented, 527 F.3d at 81-82, but only because she would have gone further and vacated the receipt charges for failure to prove guilty knowledge. While this Court has occasionally

cases predate the panel precedent in question, and neither is squarely on point,[6] the government's plea for an exception to the "first panel rule" is misplaced. Compare Tann, 577 F.2d at 540-43. The Supreme Court in Jones v. Thomas did not even cite its prior decision in Ball; obviously, it did not view the later decision as addressing the same issue, much less as modifying or limiting the earlier holding. See also Agostini v. Felton, 521 U.S. 203, 237 (1997) (lower federal courts not to infer over-ruling of Supreme Court precedent).

The defendant in Ball was convicted on two counts for receiving and possessing the same firearm. Under then-current federal statutes, one of these counts carried a two-year maximum sentence and the other a five-year maximum. 470 U.S. at 866-67. His sentence (under pre-Sentencing Reform Act law) was for three years' imprisonment on the receiving count, and a consecutive term of two years' probation (with two years' imprisonment suspended) for the possession. Id. at 858. Yet after deter-mining that those two offenses (like the receiving and posses-sing, or transporting and possessing, counts here) were the "same" for Double Jeopardy purposes and not intended by Congress to support separate sentences, the Supreme Court ruled that the remedy was vacatur of "one of" the two redundant convictions and

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recognized and corrected its own prior failure to adhere to controlling Supreme Court precedent (see, e.g., Tann, 577 F.3d at 540-43), instances are exceptionally rare.

[6] The only distinction between this case and Ball, however, is that here there was a multi-count guilty plea, while Ball involved a two-count conviction after trial.

sentences -- not necessarily the "lesser" one -- in the district court's discretion. Id. 865.[7]

Jones v. Thomas, on the other hand, did not involve federal criminal statutes. It was a habeas corpus case, which decided the narrow question whether the particular remedy selected by the Missouri courts for a related but not identical Double Jeopardy error was constitutionally intolerable. There, the state court vacated the conviction for respondent's lesser offense (robbery) after he had completed serving it, but refused to release him, requiring instead that he serve the consecutive sentence imposed for the greater offense (felony murder), with credit for time served on the since-expired lesser. The respondent did not argue in Jones v. Thomas that the sentencing judge should have exercised discretion as to which count to vacate; to the contrary, that judge had exercised discretion. Respondent Thomas's argument was that the state court's choice to vacate the lesser conviction and sentence, rather than the greater, was constitutionally impermissible once one of the sentences had been fully served. The Supreme Court, limiting the reach of certain earlier precedent from the 1870s and 1940s but not even mentioning Ball, found no constitutional error. Jones did not, and could not have, superseded the remedial holding of Ball,

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[7] Of course, subject to the bar against vindictive sentence adjustments (see United States v. Moskovits, 86 F.3d 303, 1310 (3d Cir. 1996)), the district court on remand could even modify the sentence on the preserved count pursuant to the "sentencing package" doctrine. See Pennsylvania v. Goldhammer, 474 U.S. 28 (1985); United States v. Murray, 144 F.3d 270, 273-74 n.4 (3d Cir. 1998).

which applies where Double Jeopardy requires one of two (or more) federal convictions (or sentences) to be vacated.

The government's desperate contention[8] that a remedy merely found acceptable by the Supreme Court in the unusual circumstances of Jones v. Thomas was meant to become mandatory in dissimilar cases -- like Mr. Grober's -- cannot be accepted by this Court.[9] The rule correctly articulated by this Court in Miller applies to cases involving multiplicitous federal convictions and sentences, none of which has been fully served. Miller is consistent with both pre- and post-Jones holdings. See Rutledge, 517 U.S. at 301-03, and Ball, 470 U.S. at 865. A WestLaw search reveals that not a single Circuit, in any case, has found that the habeas ruling in Jones v. Thomas limits the remedy fashioned by the Supreme Court in Ball for proceedings on remand in federal cases like Mr. Grober's. Indeed, the two Supreme Court decisions, Ball and Jones, have never even been cited in the same opinion by any Circuit, strongly suggesting that not a single judge, in over 20 years, has thought that the

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[8] This is the second time that the Department of Justice has tried to push this Court into disavowing the precedent established in Miller by attacking that decision's analysis of pertinent precedent. The first effort was rebuffed in Tann, supra.

[9] Nor would it constitute any sort of "windfall," as the government claims, YB 54 (quoting Jones, 491 U.S. at 387), for Mr. Grober to be sentenced on a single count of possessing all the images on his computers, and not separately for sending or receiving a handful of particular e-mail attachments, even if this is how Judge Hayden were to exercise her discretion on remand, which is by no means assured. Certainly, it would not be comparable to the result sought unsuccessfully by the respondent in Jones -- to escape punishment for murder because he had served a sentence for the related robbery.

two rulings deal with the same issue, as the government now claims.

In short, all of Mr. Grober's convictions are for the "same offense" as the continuing possession of computer drives and disks, containing numerous contraband images including those underlying Counts One through Five, that is charged in Count Six. Objection to the multiplicity error in Mr. Grober's sentence was not waived by his guilty plea to all counts. The error is "plain" under established precedent, and the remedy for this error is a remand for the exercise of discretion by the district court that will leave no two counts in place that violate Double Jeopardy. In exercising that discretion, Judge Hayden is not obligated to leave in place any count under § 2252A(b)(1) that expresses a mandatory minimum term.

2. Because 18 U.S.C. § 2252A does not "expressly provide" (per § 3551(a)) that the Sentencing Reform Act's provisions do not apply, the district court was not bound to impose any minimum term that it might deem "greater than necessary" to accomplish the purposes of the criminal justice process under § 3553(a).

Point B of David Grober's argument as cross-appellant explicates in detail the statutory language which shows that, after the excision of 18 U.S.C. § 3553(b) from the Sentencing Reform Act by United States v. Booker, 453 U.S. 220 (2005), there arises a conflict between the language of 18 U.S.C. § 2252A(b)(1), which seemed to require mandatory minimum sentences for the counts under (a)(1) and (2) in this case, and the language of 18 U.S.C. § 3553(a), which mandates parsimony in sentencing. The government responds by mentioning several of

this Court's non-precedential cases, YB 59 n.23, and string-citing a number of decisions from other Circuits, YB 62, not one of which addresses the arguments actually advanced in Mr. Grober's brief. Cases decided without the parties' having briefed certain arguments are not considered, in this Circuit, to be precedential refutations of those arguments. United States v. Rose, 538 F.3d 175, 180 (3d Cir. 2008). To treat any of these cases, much less all of them, as authority against Mr. Grober's careful statutory analysis has no basis in either law or reality.

Attempting to weaken the force of Mr. Grober's argument, the prosecutors' brief starts with an invented version of what "Grober essentially asserts," YB 57, rather than with a response to our actual argument. As a result, it relies on a detailed explication of United States v. Kellum, 356 F.3d 285 (3d Cir. 2004), a case where the appellant did not even mention 18 U.S.C. § 3551(a), see id. 289, which is the linchpin of Mr. Grober's argument. More important, Kellum was decided on January 23, 2004. At that time, this Court did not even have the benefit of Blakely v. Washington, 542 U.S. 296 (2004), a June 2004 case, much less was it responding to Booker.

The incompatibility between the "shall" command of 18 U.S.C. § 3553(a) (to impose no sentence which is "greater than necessary") and the "shall" found in such statutes as 18 U.S.C. § 2252A(b)(1) (to impose a sentence of "not less than" five years' imprisonment), for all intents and purposes, did not exist at the time of Kellum, given the controlling weight given

at that time to § 3553(b), which made the guidelines mandatory. The significance of Booker to Mr. Grober's argument is not that it rendered, of its own force, formerly mandatory statutes merely advisory (as it did the Guidelines) -- we have never claimed that it did -- but that it excised § 3553(b) from the Sentencing Reform Act. It was § 3553(b) that was formerly construed as preventing § 3553(a)'s parsimony clause from having controlling weight at sentencings. Thus, this Court in Kellum expressly treated the parsimony clause of § 3553(a) not as a command, which is how Congress wrote it, but merely as one of "a number of ... factors that a sentencing court must consider ...." 356 F.3d at 288. This Court in Kellum was obligated to find that the "mandatory" sentences of 21 U.S.C. § 841(b) trumped the "mandate" of § 3553(a), 356 F.3d at 288-89, since the latter obligation had been rendered toothless long since by what we now know was the erroneous decision in United States v. Denardi, 892 F.2d 269 (3d Cir. 1989). With § 3553(b) excised, Kellum loses its precedential force.

Kellum held, in the alternative, that 21 U.S.C. § 841(b)-(1)(A) and 18 U.S.C. § 924(c) are laws which "otherwise specifically provid[e]," 18 U.S.C. § 3551(a), that id. § 3553(a) does not apply. That conclusion is expressed in one sentence with a "clearly" and no discussion. 356 F.3d at 289. There is no indication in the Kellum decision that this Court was presented with the argument set forth here (in short, the key difference between a law which "otherwise provides" and one which "otherwise specifically provide[s]"). Accordingly, Kellum does not

control the present panel's decisionmaking. See Rose, 538 F.3d at 180 (weighing different precedents on basis of what parties argued in those cases).

The government also relies on Kellum's discussion of 18 U.S.C. § 3553(e) and (f) as refuting any claim that Congress intended § 3553(a) to supersede mandatory sentences. YB 61-62. But Mr. Grober has not argued that all mandatory minimums were repealed by the Sentencing Reform Act. The argument is simply that § 3551(a) provides the general rule for determining which mandatories can co-exist with the Act, and which cannot. Where a statute contains a mandatory minimum and "specifically provide[s]" that inconsistent provisions of the Sentencing Reform Act are inapplicable (such as by inclusion of an introductory "notwithstanding any other provision of law" clause), such provisions control a judge's discretion unless § 3553(e), § 3553(f), or some other "safety valve" applies. The mere existence of those subsections does not refute Mr. Grober's argument.

Nor is the post-Booker decision in United States v. Walker, 473 F.3d 71, 84-85 (3d Cir. 2007), fatal to Mr. Grober's argument, as the government contends. To avoid Mr. Grober's main point, the government resorts to rewriting the controlling statutory language. The focus under § 3551(a) is not whether a given statute "specifically provide[s]" for a minimum sentence, YB 60, but whether that other statute "specifically provide[s]" that the general provisions of the Sentencing Reform Act shall not apply. Nothing in the Walker case addresses or explains

what in 18 U.S.C. § 924(c) "specifically provides" anything to do with what § 3551(a) requires, but even if the introductory language of § 924(c) qualifies (by specifying what other provisions can trump the mandatory sentences provided in that statute[10]), there is nothing similar in § 2252A(b)). Perhaps viewing as obvious the critical difference in introductory language between § 841(b) and § 924(c), and the impact of the intervening Booker decision, this Court in Walker did not even cite Kellum as precedent. In short, Walker is distinguishable, and the Kellum decision is neither controlling nor persuasive.

The government dismisses Mr. Grober's rule-of-lenity argument by misrepresenting its focus. YB 62. It is not ambiguity in § 2252A(b) itself that triggers application of the lenity canon, but rather the potential ambiguity in what § 3551(a) means by "otherwise specifically provided." Nor has Mr. Grober waived his reliance on the canon of constitutional avoidance by failing to brief the proposition that his sentence is unconstitutional. YB 62-63. He does not claim that the five-year sentence imposed in this case is unconstitutional, because the statutory construction analysis avoids that lurking problem. He merely points to the constitutional argument made below by prior counsel, to show the context in which the statutory argument arises.

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[10] The meaning of § 924(c)'s cryptic introductory phrase is before the Supreme Court for explication in the coming Term. See United States v. Abbott, 574 F.3d 203 (3d Cir. 2009), cert. granted, No. 09-479 (Jan. 25, 2010).

For all these reasons, the government has failed to refute Mr. Grober's demonstration that the district court erred in assuming that no sentence of less than five years could be applied in this case. A remand for reconsideration of the sentence must therefore be granted.

CONCLUSION

For the reasons set forth in cross-appellant (and appellee) David Grober's opening brief and in this Reply, the judgment of sentence must be vacated and remanded for resentencing without being bound by application of a mandatory minimum sentence. Absent that relief, the judgment of sentence must be affirmed.

Dated: March 29, 2010

Respectfully submitted,

s/Peter Goldberger

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REQUIRED CERTIFICATIONS

A. Type-Volume. This brief was prepared in a 12-point Courier, nonproportional typeface, with no more than 10.5 characters per inch. Pursuant to Fed.R.App.P. 28.1(e)(3), I certify, based on the word-counting function of my word processing system (XyWrite ver. 4.07), that this brief complies with the applicable type-volume limitation, in that the brief contains fewer than the 7000 words, to wit, no more than 5030 words.

C. Electronic Filing. I certify pursuant to LAR 31.1(c) that the text of the electronically filed version of this brief is identical to the text in the paper copies of the brief as filed with the Clerk. The anti-virus program Avast! vers. 4.8, with current updates, has been run against the electronic (PDF) version of this brief before submitting it to this Court's CM/ECF system, and no virus was detected.

__/Peter Goldberger_____

CERTIFICATE OF SERVICE

On March 29, 2010, I served a copy of the foregoing brief on counsel for the appellant/cross-appellee, the United States, via this Court's CM/ECF system, addressed to:

Caroline A. Sadlowski, Esq.
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Pursuant to this Court's LAR 113.1(b), I also caused ten paper-bound copies of this Brief to be delivered within three days thereafter to the Clerk of this Court.

__s/Peter Goldberger_____