IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	
	CRIMINAL ACTION FILE
v.	NO. 1:07-CR-196-BBM
KELLY BRENTON FARLEY	

O R D E R

This matter is before the court on the Motion to Declare a Portion of 18 U.S.C. § 2241(c) Unconstitutional [Doc. No. 91], filed by Defendant Kelly Brenton Farley ("Mr. Farley"). At the conclusion of a bench trial on April 25, 2008, the court found Mr. Farley guilty of violating 18 U.S.C. § 2241(c) and 18 U.S.C. § 2422(b).[1]

In advance of his sentencing, Mr. Farley argues that 18 U.S.C. § 2241(c)'s 30-year mandatory minimum is grossly disproportionate to his crime, and is therefore cruel and unusual punishment in violation of the Eighth Amendment. The court is certainly aware that "a district court is not authorized to sentence a defendant below the statutory mandatory minimum unless the government filed a substantial assistance motion pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 or the defendant falls

[1]As a result of having been found guilty of the 18 U.S.C. § 2422(b) charge in Count Two of the Indictment, use of a computer for coercion and enticement of a minor, Mr. Farley will be sentenced to a mandatory minimum of ten years for that crime. Because Mr. Farley's sentence for the 18 U.S.C. § 2422(b) conviction is not an issue here, it will not be discussed further.

within the safety-valve of 18 U.S.C. § 3553(f)." United States v. Castaing-Sosa, 530 F.3d 1358, 1360 (11th Cir. 2008). Thus, absent a constitutional defect in Section 2241(c) as applied to Mr. Farley, Mr. Farley is subject to the 30-year mandatory minimum term. The court will now conduct the analysis required when examining the constitutionality of a sentence.

I. Legal Standard

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). In analyzing whether a sentence is cruel and unusual punishment, a court first makes "a threshold determination that the sentence imposed is grossly disproportionate to the offense committed," United States v. Johnson, 451 F.3d 1239, 1243 (11th Cir. 2006) (citation and internal quotations omitted), and considers "the gravity of the offense and the harshness of the penalty." Solem v. Helm, 463 U.S. 277, 290-91 (1983). If the sentence is grossly disproportionate, the court then considers "the sentences imposed on other criminals in the same jurisdiction . . . and the sentences imposed for commission of the same crime in other jurisdictions." Id. at 291. "[O]utside the context of capital punishment, there are few successful

challenges to the proportionality of sentences." Johnson, 451 F.3d at 1242.

"In general, a sentence within the limits imposed by statute is neither excessive nor cruel and unusual under the Eighth Amendment." Id. at 1243 (citation and internal quotations omitted); United States v. Moriarty, 429 F.3d 1012, 1024 (11th Cir. 2005) (citation and internal quotations omitted). However, a statutorily-condoned punishment may in rare cases exceed the limits of the Constitution. See Weems, 217 U.S. at 382 ("[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. In other words, the fault is in the law . . . ."); [2] Tyree v. White, 796 F.2d 390, 393 (11th Cir. 1986) (in evaluating an Eighth Amendment challenge on federal habeas review of an Alabama sentence, "a sentence may be unconstitutional even if it is valid under state law"); Downey v. Perini, 518 F.2d 1288, 1292 (6th Cir. 1975), vacated for reconsideration in light of amendment to Ohio Revised Code, 423 U.S. 993 (1975) (issuing writ of habeas corpus where Ohio's minimum 10 and 20 year terms of imprisonment were disproportionate to crimes

[2] Weems was based on the Philippine Bill of Rights. However, "the provision of the Philippine Bill of Rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States, and must have the same meaning." Weems, 217 U.S. at 367. Furthermore, the Supreme Court repeatedly cites Weems as a leading case when interpreting the Eighth Amendment to the United States Constitution. E.g., Kennedy, 128 S. Ct. at 2649; Atkins v. Virginia, 536 U.S. 304, 311 (2002); Solem, 463 U.S. at 287.

of possession of marijuana for sale, and sale of marijuana, respectively).

II. 18 U.S.C. § 2241(c)

A. Statutory Text

Section 2241(c) punishes individuals who commit or attempt to commit one of a number of offenses. These offenses are: (1) "knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years"; (2) "knowingly engag[ing] in a sexual act" by force, threat, or other means such as the use of intoxicants "with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging)"; and (3) Mr. Farley's crime of "cross[ing] a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years." 18 U.S.C. § 2241(c). An individual convicted under Section 2241(c) as originally enacted "shall be fined under this title, imprisoned for *any term of years or life*, or both." 18 U.S.C. § 2241(c) (2005) (emphasis added). Effective July 27, 2006, Section 2241(c) was amended such that an individual convicted under that statute "shall be fined under this title and imprisoned for *not less than 30 years or for life*." 18 U.S.C. § 2241(c) (2008) (emphasis added). "Sexual act" is defined to include a number of different types of sexual conduct, including "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16

years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(2).

B. Legislative History[3]

The amendment to Section 2241(c), and the related increase in the penalty, occurred with the passage of the Adam Walsh Child Protection and Safety Act of 2006, 109th Congress, Bill Number H.R. 4472 (the "Bill"), Public Law Number 109-248 (the "Act"). The Act substantially increased the penalties for sex crimes against children. Title IV of the Bill was headed "PROTECTION AGAINST SEXUAL EXPLOITATION AGAINST CHILDREN." The first section under that title, Section 401,[4] was entitled "INCREASED PENALTIES FOR SEXUAL OFFENSES AGAINST CHILDREN." Subsection(a)(1) provided: "AGGRAVATED SEXUAL ABUSE OF CHILDREN — Section 2241(c) of title 18, United States Code, is amended by striking ', imprisoned for any term of years or life, or both.' and inserting 'and imprisoned for not less than 30 years or for life.'" 2005 Cong. U.S. H.R. 4472 § 401, 109th Cong., 1st Session (Dec. 8, 2005).

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[3]The court is aware that a review of the legislative history is not a necessary (or even a relevant) part of an Eighth Amendment analysis. However, in thinking about the issues here, the court became curious about whether there had been any discussion by the legislature of the application of a thirty-year mandatory minimum sentence to this intent crime. In the interest of completeness, the court has included its findings here.

[4]When HR 4472 became law, Section 401 of the Bill became Section 206 of the Act.

In the court's view, the drafters' use of "AGGRAVATED SEXUAL ABUSE OF CHILDREN" does not make it clear that the amendment applies to Mr. Farley's crime of "cross[ing] a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years." The court's reading of the Bill alone suggests that the 30-year minimum applies only to aggravated sexual abuse. The Committee Reports accompanying the Bill are the same. The Senate Report states that the Bill includes enhancements such as "mandatory assured penalties for *crimes of violence against children*, including . . . a mandatory 30 year penalty for *anyone who commits* aggravated sexual abuse against a child." S. Rep. No. 109-369, Dec. 8, 2006, Ex. A to Reply Br., at 2 (emphasis added). The House Report similarly provides that Section 2241 would be amended to "impose a mandatory minimum penalty of 30 years to life for *knowingly engaging in a sexual act* with either a child less than 12 years old, or a child that is 12-16 years old by using force or intoxicants if the perpetrator is at least four years older than the child." H. Rep. No. 109-218, Ex. B to Reply Br., at 1 (emphasis added).

Further, while legislators' statements indicate Congress's clear intent to raise the penalties on actual child sexual abuse, there is no such clarity with regard to any intent to require 30 years of incarceration where no sexual contact occurred. For example, Senator Orrin Hatch of Utah spoke in support of H.R. 4472 by stating:

"The Adam Walsh Act imposes tough penalties for the most serious crimes against children, including *a 30 year mandatory penalty for raping a child* . . . ." Mr. Hatch, Senate, 109th Cong., 2nd Session, 152 Cong. Rec. S. 8012 (July 20, 2006) (emphasis added). In adopting the Senate's amendments to H.R. 4472, Representative Frank James Sensenbrenner, Jr. stated:

> In addition to vital improvements to the sex offender registry, the bill increases criminal penalties to punish and deter those who prey on children. These tough new provisions include: the death penalty for the murder of a child; a mandatory minimum of 25 years in jail for kidnaping or maiming a child; and *a 30-year mandatory minimum for having sex with a child under 12 or sexually assaulting a child between 13 and 17 years old*.

Mr. Sensenbrenner, House of Representatives, 109th Congress, 2nd Session, 152 Cong. Rec. H. 5705 (July 25, 2006) (emphasis added).

The Government identified two senators who expressed regret about the Act's mandatory minimum provisions. Mr. Leahy, Senate, 152 Cong. Rec. S. 8012-02, S8028 (July 20, 2006) (lamenting the Act's application of mandatory minimums to "myriad lesser crimes"); Mr. Kennedy, Senate, 152 Cong. Rec. S. 8012-02, S8023 (July 20, 2006) (discussing concerns that mandatory minimums deprive judges of discretion to make sure the sentence fits the crime). However, those senators mainly addressed the problems of mandatory minimums generally, and did not refer to crimes of intent or attempt. Senator Patrick Leahy of Vermont referred to

child victims in his remarks on mandatory minimums. Mr. Leahy, 152 Cong. Rec. S. at S8028 ("Mandatory sentences also tie prosecutor's hands in these cases where it is most important that they have the discretion to plea bargain, especially considering how difficult it can be to prepare children emotionally and psychologically to testify against their abusers.").

It is clear that prevention of child sex offenses was the primary goal of this legislation. However, the court located nothing to indicate a meaningful discussion of the specific portion of Section 2241(c) for which Mr. Farley was convicted. Rather, much of the legislative history is devoted to crimes involving actual harm to children.

III. Analysis

The court's analysis has led it to conclude that a 30-year mandatory minimum sentence for Mr. Farley, *under the specific facts of his case*, is so grossly disproportionate to his crime as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

A. Gross Disproportionality

The court first determines whether Mr. Farley has made a threshold showing of gross disproportionality. To do so, the court compares the gravity of the offense to the harshness of the penalty. Solem, 463 U.S. at 290-91.

1. Gravity of the Offense

The court fully recognizes the serious nature of Mr. Farley's offense. He believed a ten year old[5] child to exist and took steps to engage in sexual activity with her. It is also a fact that Mr. Farley never had any contact, sexual or otherwise, with the child. No harm was suffered. Of course, it was not possible for a child to be harmed, because the child was a creation of law enforcement, and no real child exists.

Nothing in Mr. Farley's conduct prior to his commission of this crime suggests that he is a likely reoffender. There are no reports of any prior instances of impropriety with any children by Mr. Farley, and he has no criminal history. He submitted himself for a psychosexual evaluation which showed that he was not attracted to prepubescent children.[6] The evaluation also found that Mr. Farley exhibited a low risk of future sex crimes.

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[5]The fictitious child was referred to both as ten and eleven years of age by the undercover agent who was posing as the child's mother.

[6]The Summary of Evaluation of Mr. Farley conducted by Behavioral Medicine Institute of Atlanta is filed under seal as a part of the record in this case. The testing results indicate (1) that Mr. Farley meets a threshold score suggestive of sexual addiction; (2) that he has "insignificant" sexual interest in prepubescent children; (3) that Mr. Farley is in the low risk range to reoffend; and (4) that he is not a sexual predator. The Government did no psychosexual evaluation of Mr. Farley, and has not contested the findings set forth in this Evaluation.

Without citing authority, the Government suggests that Mr. Farley's personal characteristics and history are not relevant to the gravity of the offense. However, if the court were to adopt the Government's view, it would be ignoring obligations imposed upon it for sentencing. 18 U.S.C. § 3553(a)(1) affirmatively lists "the history and characteristics of the defendant" as a factor to consider in calculating a sentence. See also United States v. Polizzi, 549 F. Supp. 2d 308, 449 (E.D.N.Y. 2008) ("Based on Polizzi's lack of criminal history, a higher sentence . . . would be excessive."); United States v. Harrell, 207 F. Supp. 2d 158, 170 (S.D.N.Y. 2002) ("[A] proper sentence must reflect a fitting match between the offender and the offense."). Indeed, the principle that a defendant's prior history of violating the law should be considered in arriving at his sentence is embedded in our criminal justice system. See Ewing v. California, 538 U.S. 11, 29 (2003) (for purposes of evaluating California's three strikes law, "[i]n weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism"); see also United States v. Paton, --- F.3d ----, 2008 WL 2875941, at *6 (8th Cir. July 28, 2008) (considering defendant's criminal history when evaluating proportionality of sentence for production of child pornography under 18 U.S.C. § 2251(a)). The court is thus required to consider Mr. Farley's personal

characteristics when determining whether his sentence is grossly disproportionate to his crime. See Paton, 2008 WL 2875941, at *6.

The Government also contends that the fact that no child was harmed should not be considered in evaluating the gravity of the offense. It cites several cases that permit convictions and sentences for child sex crimes where the "victim" is an undercover agent. The court in no way questions Congress's authority to punish actors who have not fully consummated a crime. Nor does this court misunderstand the legislative objective of allowing the criminal justice system to intervene before the actual crime is committed. The question before the court relates only to punishment — and whether the punishment required by 18 U.S.C. § 2241(c) shocks the conscience as applied to the actions undertaken, and the specific crime committed by Mr. Farley here. 18 U.S.C. § 3553(a)(1) requires a sentencing court to consider "the nature and circumstances of the offense," which properly includes consideration of the harm (or no harm) done to the victim.

The fact of this offense is that the "victim" was an undercover agent and as such, Mr. Farley was in no imminent danger of harming a child. See Taylor v. Lewis, 460 F.3d 1093, 1098 (9th Cir. 2006) (in considering proportionality, court factors in "the harm caused or threatened to the victim or society, the culpability of the offender, and the absolute magnitude of the crime"); United States v. Williams,

517 F.3d 801, 810-11 (5th Cir. 2008) (district court was permitted to consider the number of victims and extent of harm to individuals in deciding whether to give a sentence outside the guideline range); United States v. Garnette, 474 F.3d 1057, 1061 (8th Cir. 2007) (upholding the district court's imposition of severe sentence "to account for the fact that [the victim] was only four years old at the time she was [sexually] exploited by Garnette").

In conclusion, the court finds it relevant that Mr. Farley committed no sexual act with a child, and that he was a first time offender with no evidence in the record that he is anything other than a low risk for repeating his crime. While Mr. Farley's crime is deplorable, it is far less grave than crimes committed by perpetual offenders that remain a demonstrated threat to the public, or crimes that result in loss of or emotional devastation to a person's life.

2. Harshness of the Penalty

The severity of the 30-year mandatory minimum is self-evident. The Eleventh Circuit has described a 30-year term as "severe" in discussing the fact that courts uphold many such severe penalties for child sex offenses. United States v. Pugh, 515 F.3d 1179, 1202 (11th Cir. 2008). Importantly, as discussed below, a 30-year term is a much longer term than that imposed for other comparable crimes. The court considers a 30-year prison term to be an extremely harsh sentence.

3. Harshness of Penalty is Disproportionate to Gravity of Crime

Mr. Farley's conduct is certainly grave enough to warrant significant jail time, and he will be sentenced to at least 10 years of incarceration for his conviction on Count Two of the Indictment. However, the court finds that 30 years in prison is a sentence grossly out of proportion to Mr. Farley's offense, which involves no actual harm, no actual child, no prior instances of impropriety, and a low risk of recidivism. See Polizzi, 549 F. Supp. 2d at 369 ("Because of Polizzi's unique circumstances, the private, passive nature of his crime, lack of criminal history, low risk of recidivism, psychological disabilities, and reasons for searching for child pornography, the mandatory minimum of five years' imprisonment is sufficiently severe so that . . . there is an inference of gross disproportionality."); United States v. Love, 449 F.3d 1154, 1158 (11th Cir. 2006) (Barkett, J., concurring) (the potential to impose a life sentence for a crime petty enough to have received a 45-day prison sentence "would raise serious proportionality concerns under the Constitution"); contra Johnson, 451 F.3d at 1243 (140-year sentence for production and distribution of child pornography for defendant with prior history was not grossly disproportionate where "Johnson's sentence is severe, but not more severe than the life long psychological injury he inflicted upon his three young victims"). Mr. Farley has raised an inference of gross disproportionality.

The Government argues that because Mr. Farley will be sentenced according to a statute, his sentence is not grossly disproportionate by definition. The Government cites Johnson, 451 F.3d at 1243, in which the Eleventh Circuit concluded that "[b]ecause the district court sentenced Johnson within the statutory limits, he has not made a threshold showing of disproportionality." However, the Johnson court was not faced with a challenge to the statute establishing the sentence. In comparing this case to Johnson, the Government appears to suggest that this court decline to exercise its duty to review the validity of a legislative enactment. This court has tremendous respect and deference for the United States Congress. However, for this court to simply assume a statute is constitutional without substantive review of that statute would violate the principle of separation of powers. The court thus rejects this approach.[7] Tyree, 796 F.2d at 393 (finding that the district court's dismissal of habeas claim based on finding that habeas petitioner's sentence was within statutory limits under Alabama law "misse[d] the point of the [proportionality] analysis," and remanding for an evidentiary hearing on whether sentence was unconstitutional). As Mr. Farley points out, Johnson and

[7]The Government also argues that Mr. Farley's conduct was not the least severe punishable by the statute. It notes that the same punishment applies if a person is convicted of *attempting* to cross a state line with intent to commit a sexual act with a child. The court is not persuaded that it can meaningfully distinguish cases in which the offender is arrested at the airport of departure from those where the offender is arrested at the airport of arrival.

the other cases cited by the Government in support of its argument that Mr. Farley's sentence is not grossly disproportionate involve repeat offenders, and are not persuasive under these circumstances. See, e.g., Ewing, 538 U.S. at 29-31 (25 year sentence not grossly disproportionate in light of long history of recidivism); Rummel v. Estelle, 445 U.S. 263, 284-85 (1980) (upholding life sentence under recidivist statute); United States v. MacEwan, 445 F.3d 237, 250 (3d Cir. 2006) (15-year mandatory minimum not unduly harsh because defendant was a recidivist).

The court now proceeds to the next steps of the proportionality analysis, which compare Mr. Farley's sentence to sentences within and outside this jurisdiction.

B. 30-Year Term Is Disproportionate to Other Federal Sentences

The Solem court noted that "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." 463 U.S. at 291. Mr. Farley's sentence is disproportionate when compared with sentences of others convicted of federal crimes.

1. Section 2241(c) Imposes Same Sentence for Different Crimes

First, the court notes that Section 2241(c) itself imposes a 30-year mandatory minimum term for multiple different offenses, including crimes much more serious than Mr. Farley's. An individual who forcibly rapes a child or a young teenager is

subject to the same minimum penalty as an individual who crosses state lines with the intent to touch the genitalia of a child. An individual who is apprehended while attempting to unclothe and assault a child is subject to the same minimum penalty as an individual who is apprehended at the airport, hours before the intended sexual act. Where such vastly different crimes yield an identical punishment, this indicates that the punishment is disproportionate to the lesser crime. Solem, 463 U.S. at 291.

2. 30-Year Sentence is Disproportionate When Compared to Other Federal Child Sex Offenses

When compared to other federal crimes punishing child-related sex offenses, Mr. Farley's sentence is disproportionate. Notably, a number of other child sex crime statutes punishing crimes like Mr. Farley's contain no mandatory minimum term. Where a mandatory minimum is imposed, either the term is significantly less than 30 years, or the crime is much more serious.

a. Sexual Contact With a Child

An individual that engages in sexual contact with a child short of a sexual act is not subject to a mandatory minimum term of imprisonment. 18 U.S.C. § 2244. "Sexual contact" means "intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual

desire of any person." 18 U.S.C. § 2246(3). Engaging in that type of contact, even by means of force, threats or administering a drug, invokes no statutory mandatory minimum. 18 U.S.C. §§ 2244(a)(1), (c); 2241(a), (b). Both offenses are quite serious. However, touching a child sexually, especially by force, is certainly more serious than crossing a state line with the intent to commit a sexual act with (and not touching) a child.

b. Murder In Connection With Child Sex Offense

There is no mandatory minimum term of imprisonment for the crime of murder, in the context of a child sex offense. 18 U.S.C. § 2245 ("A person who, in the course of an offense under this chapter [or a number of other offenses], murders an individual, shall be punished by death or imprisoned for any term of years or for life."). Although Section 2245 also carries the possibility of a death sentence, a person who kills a child in the course of raping that child is not mandated to serve a longer prison term than Mr. Farley's. This also demonstrates the disproportionate nature of Mr. Farley's punishment.

c. Other Mandatory Minimums for Comparable Sex Crimes

Child sex crimes akin to Mr. Farley's all require a shorter mandatory minimum term in prison, and many impose maximum terms. For example, a person who knowingly transports a child under 18 interstate with the intent that the

child engage in any criminal sexual activity is subject to a mandatory minimum term of 10 years. 18 U.S.C. § 2423(a). A person who entices a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct is subject to a mandatory minimum term of 15 years and a maximum term of 30 years. 18 U.S.C. § 2251(a), (e). Additionally, a person who knowingly distributes or receives a visual depiction of a minor engaging in sexually explicit conduct is subject to a mandatory minimum term of 5 years and a maximum term of 20 years. 18 U.S.C. § 2252(a)(1)-(2), (b)(1).

The Government provides examples of courts that have upheld statutory mandatory minimums for child sex offenses. However, the court's research indicates that in those cases upholding statutory mandatory minimums against Eighth Amendment challenges, the defendants' sentences were half the length of Mr. Farley's or shorter. See United States v. Butters, 267 Fed. Appx. 773, 777 (10th Cir. 2008) (evaluating 18 U.S.C. § 2422, sexual enticement of a minor, holding that ten-year mandatory minimum sentence was constitutional even where there is neither an actual victim nor a history of impropriety with children); United States v. Henry, 223 Fed. Appx. 523, 525 (8th Cir. 2007) (evaluating 18 U.S.C. § 2423(b), knowingly traveling in interstate commerce with the intent to engage in illicit sexual conduct with a minor, upholding 57-month sentence even though there was no

victim and the federal sentence was much higher than the corresponding state sentence for that conduct); MacEwan, 445 F.3d at 247-50 (evaluating 18 U.S.C. § 2252A, receiving child pornography as a repeat offender, upholding 15-year mandatory minimum); United States v. Cunningham, 191 Fed. Appx. 670, 674 (10th Cir. 2006) (evaluating 18 U.S.C. § 2251, attempting to produce child pornography, upholding 15-year mandatory minimum).

d. Other Child Sex Crimes With 30-Year Minimums

By contrast, where the mandatory minimum is 30 years, the statute usually involves recidivism. Where it does not, the offense is more serious than Mr. Farley's. One statute imposes a 30-year minimum when death of a person results in the course of enticing a minor for a sexually explicit purpose. 18 U.S.C. § 2251(e). That this crime is more severe than Mr. Farley's is obvious. Another imposes a 30-year minimum when a legal guardian offers to sell or transfers custody of a minor with knowledge that the minor will be portrayed in a visual depiction of sexually explicit conduct; or when an individual offers to buy or acquire custody of a minor with that knowledge. 18 U.S.C. § 2251A. The Government points out that this applies to an offer to sell a child and does not require the actual sale of a child. Even so, the court considers the intended transfer of custody or control of a child for the

purpose of producing child pornography significantly more serious than an intended isolated sexual act with a child.[8]

3. 30-Year Sentence is Disproportionate to Sentences for Interstate Travel With Intent to Commit a Crime

The court also looks to federal statutes penalizing traveling interstate with the intent to commit a crime other than a sex offense involving a child. One such statute provides:

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, *with intent that a murder be committed* in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for *not more than ten years*, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

[8]18 U.S.C. § 2251A(a) criminalizes a "parent, legal guardian, or other person having custody or control of a minor" for selling or transferring custody of the child. This part of the statute appears to require that a real child be a part of the commission of the crime. 18 U.S.C. § 2251A(b) criminalizes the buyer, or person otherwise taking possession of the child, and thus could be used to charge a crime where no child exists. The court looked, and was no able to locate a case in which a conviction under Section 2251A was based on the offer to buy a "child" where that "child" was an undercover law enforcement officer. Nor did the court locate a case in which a defendant challenged Section 2251A's 30-year mandatory minimum on Eighth Amendment grounds.

18 U.S.C. § 1958(a) (emphasis added). The 10-year mandatory *maximum* in the quoted statute, where the intended criminal act is murder for hire, suggests that the 30-year mandatory *minimum* in 18 U.S.C. § 2241(c), where the intended criminal act is a sexual act with a child under 12, is excessive.[9]

4. Mr. Farley's Crime Differs From Other Federal Crimes with 30-Year Mandatory Minimums

Federal crimes that impose 30-year minimum terms other than those involving child sex crimes routinely punish such serious crimes as acts of terrorism or acts accompanied by extremely dangerous weapons. For example, there is a mandatory 30-year minimum for an individual who, in the course of acquiring, producing, or transferring a radioactive weapon, uses that weapon, conspires to use it, or possesses it and threatens to use it. 18 U.S.C. § 2332h(a)(1), (c)(2). There are similar penalties where the weapon is a missile designed to destroy aircraft, 18 U.S.C. § 2332g(a)(1), (c)(2), or the smallpox virus. 18 U.S.C. § 175c(a)(1), (c)(2). Additionally, an individual who uses a machine gun or destructive device, or a gun

[9]In its Order of July 8, 2008, the court specifically requested that the Government address Section 1958(a). The Government declined to do so, arguing that no threshold showing of gross disproportionality was made. Of course, the court has now found that such a showing has been made, and therefore rejects this assertion. At the same time it is sympathetic to the Government's inability to explain or justify the vast disparity between the two statutes. The court can itself think of no argument to reconcile Section 2241(c)'s mandatory minimum sentence of 30 years with Section 1958(a)'s maximum possible sentence of ten years, and can only conclude that the former is grossly disproportionate to the crime it punishes.

equipped with a firearm silencer or firearm muffler, in the course of a federal crime of violence or drug trafficking crime, must serve a minimum 30-year term of imprisonment. 18 U.S.C. § 924(c)(1)(B). A 30-year minimum term also applies to an individual who damages a motor vehicle carrying high-level radioactive waste with at least reckless disregard for human life. 18 U.S.C. § 33. The court considers these crimes, all of which involve the potential to endanger human life on an enormous scale, far more serious than Mr. Farley's crime of interstate travel with the intent to commit a sexual act with a child.

For each of these reasons, the court concludes that Mr. Farley's sentence is out of all proportion with other crimes in this jurisdiction.

C. Section 2241(c) Imposes Penalty Higher Than Any State Jurisdiction

Finally, the court looks to "the sentences imposed for commission of the same crime in other jurisdictions." Solem, 463 U.S. at 291. Mr. Farley provided a 50-state survey that details the punishment for child sexual abuse and attempted child sexual abuse. The court is mindful that Mr. Farley was not convicted of attempting a sexual act with a child.[10] His crime was crossing the state line with *intent* to

[10]That is, for the crime that is the subject of this Order. Of course, Mr. Farley's conviction on Count Two, under 18 U.S.C. § 2422(b), was an "attempt" conviction.

Inchoate crimes are generally recognized to be conspiracy, attempt, and solicitation. See Mizrahi v. Gonzales, 492 F.3d 156, 161 (2d Cir. 2007). The Eleventh Circuit has reversed a district court which chose not to apply a sentencing enhancement to the inchoate crime of conspiracy, saying that "[w]ithout discussing how the particular facts of Mandhai's

engage in a sex act with a person under 12. One must generally come closer to committing the substantive crime than Mr. Farley did in order to have "attempted" that crime. United States v. Resendiz-Ponce, 549 U.S. 102, 127 S. Ct. 782, 787 (2007) ("[T]he mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by *significant* conduct." (emphasis added)). While state law on attempt is instructive to some extent, the court considers attempt to commit a sexual act with a child more serious than Mr. Farley's crime.

A review of the 50-state survey suggests that no state would sentence Mr. Farley to a term of 30 years for a crime similar to the one he committed. Most states impose a *maximum* term of imprisonment for attempted child sex crimes, falling within a range of between 3 and 30 years. E.g., O.C.G.A. §§ 16-6-4, 16-4-6(b) (10 year maximum); Tex. Penal Code §§ 22.011, 15.01, 12.32-.33 (20 year maximum)[11];

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offense distinguished it from others in its class, the district court attempted to carve out a categorical exception to the terrorism enhancement for crimes that are not completed." United States v. Mandhai, 375 F.3d 1243, 1249 (11th Cir. 2004). The Mandhai court was not presented with an Eighth Amendment challenge. In any event, Mandhai does not control here because, as the Government points out, Mr. Farley was not convicted of "attempting" anything. Rather, he was convicted of the substantive offense of crossing a state line with a certain criminal intent, a uniquely federal crime. Even in light of this legal distinction, for purposes of its discussion here, the court will reference state law on attempt to commit a sexual act with a child as the closest analogue.

[11]Section 22.011(a)(2) provides that a person is guilty of sexual assault if he intentionally or knowingly engages in certain sexual conduct with a child. Section 22.011(c)(1) defines "child" as a person under 17 years of age who is not the spouse of the actor. Section 22.011(f) provides that the offense is

Ala. Code §§ 13A-6-69.1, 13A-4-2, 13A-5-6 (10 year maximum); Alaska Stat. §§ 11.41.434, 12.55.125 (i)(2)(A)(i) (30 year maximum); Colo. Rev. Stat. §§ 18-3-405(2), 18-2-101(4), 18-1.3-401(1)(a)(V)(A) (3 year maximum).[12] A small minority of states do not distinguish between a substantive offense and an attempt to commit that offense, and for that reason attempts to commit a sexual act with a child are punished more harshly in these states. For example, Rhode Island imposes a 25 year mandatory minimum term for sexual *penetration* with a child under 14. R.I. Gen. Laws § 11-37-8.1 to 8.2 (emphasis added). Utah likewise imposes a 25 year

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> a felony of the second degree, except that an offense under this section is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.

Section 25.01 prohibits bigamy. Section 22.011(f) does not clearly establish whether sexual assault is a first degree felony where the perpetrator is prohibited from marrying the victim, or only where the perpetrator is prohibited from marrying the victim under the bigamy statute. Texas law prohibits a child under age 18 (or age 16 with parental consent) to marry. Tex. Family Code 2.101-2.102. Therefore, in theory, sexual assault of a child under 12 could be a first degree felony, which would make *attempted* sexual assault of a child a second degree felony, Tex. Penal Code 15.01, with a maximum punishment of 20 years. Tex. Penal Code 12.33. Otherwise, attempted sexual assault of a child would be a third degree felony with a maximum punishment of 10 years. Tex. Penal Code 12.34. The court knows of no case law resolving this issue of interpretation. Based on this analysis, the court will assume a 20-year maximum.

[12]Section 18-3-405(2) establishes that sexual assault on a child is a Class 4 felony. Section 18-2-101(4) provides that attempt to commit a Class 4 felony is a Class 5 felony. Finally, Section 18-1.3-401 provides that for felonies committed on or after July 1, 1993, Class 5 felonies may be punished by a term of imprisonment between 1 and 3 years.

mandatory minimum term where a person "has sexual *intercourse* with a child who is under the age of 14." Utah Code. Ann. § 76-5-402.1 (emphasis added). Although these minimum penalties are comparable to Section 2241(c)'s 30-year minimum, the crime of attempt to have sexual intercourse with a child generally requires steps beyond forming the intent. See, e.g., State v. Latraverse, 443 A.2d 890, 892 (R.I. 1982) ("It is generally agreed that neither the intent to commit a crime nor mere preparation in and of itself constitutes an attempt."). Furthermore, in convicting Mr. Farley, the court did not determine that he intended to engage in sexual intercourse with a child, but only that he intended to engage in a sexual *act* with a child. Attempted sexual acts with a child short of intercourse do not trigger these state mandatory minimums. See, e.g., R.I. Gen. Laws § 11-37-8.3 to 8.4 (imposing a 30 year maximum for sexual contact short of penetration with a child under 14).

Although child sex offenses are treated differently among the states, the punishments for an attempted sex offense with a child are consistently less harsh than Mr. Farley's 30-year mandatory minimum sentence. Therefore, Mr. Farley's sentence is also disproportionate when compared to other sentences for the same crime in other jurisdictions.

Mr. Farley's sentence is grossly disproportionate to his crime of traveling across state lines with intent to engage in a sexual act with a minor. Moreover, his

sentence is disproportionate to other federal sentences, including sentences for far more serious crimes, and to sentences for the state crimes most analogous to the crime he committed. Therefore, Section 2241(c) is unconstitutional insofar as it requires a court to impose a 30-year term of imprisonment upon Mr. Farley, who not only did not have any sexual contact with a child in this case, but who has no record of sexual contact with children, and has provided the court with a psychosexual evaluation which indicates that he is not a sexual predator. The court's holding regarding 18 U.S.C. § 2241 is limited to its application to Mr. Farley in this case.

IV. Summary

For the foregoing reasons, Mr. Farley's Motion to Declare a Portion of 18 U.S.C. § 2241(c) Unconstitutional [Doc. No. 91] is GRANTED insofar as that statute's requirement of a 30-year mandatory minimum sentence applies to him here. The court will proceed with Mr. Farley's sentencing as scheduled, on September 11, 2008, at 2:00 P.M.

IT IS SO ORDERED, this 2nd day of September, 2008

s/Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES DISTRICT JUDGE