

2012

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Recommended Citation

Mary Graw Leary, *Judicial Challenges to Mandatory Minimum Sentences: A New Frontier in Debate over Child Pornography Sentencing?*, 13 SEX OFFENDER L. REP. 3 (2012).

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Judicial Challenges to Mandatory Minimum Sentences: A New Frontier in the Debate over Child Pornography Sentencing?

A version of this piece was published in Sex Offender Law Report, Vol. 13, No. 1 (2012).

Mary G. Leary

Over the past decade, federal sentencing issues concerning child pornography have produced considerable legal debate, much of it focused on the application of federal sentencing guidelines as set forth by the United States Sentencing Commission (U.S.S.C.). Many judges have opined that the factors used to calculate the adjusted offense level for some child pornography offenses may be out of date, impracticable, and/or in conflict with 18 U.S.C. 3553(a), which requires, among other things, “just punishments.” Particular concerns have been expressed that strict application of the sentencing guidelines can produce results in which possessors of child pornography (i.e. those who commit less serious child pornography offenses as compared to producers or distributors) may be sentenced near the statutory maximum. This has caused some judges to inquire into the rationality of guidelines which they argue place even the less culpable offenders at the level of punishment reserved for the most serious of offenders. *E.g.*, **U.S. v. Ontiveros**, No. 09-CR-333, 2008 WL 2937539 (E.D. Wisc. July 24, 2008); **U.S. v. Grober**, 595 F. Supp. 2d 382, 393 (D.N.J. 2008), *aff’d* 624 F3d. 592 (3d Cir. 2010).

Recognizing these concerns, the Department of Justice has asked the United States Sentencing Commission to re-evaluate and update the current guidelines to “better calibrate the severity and culpability of defendants’ criminal conduct” and “ensure that the sentences for certain child exploitation offenses adequately reflect the seriousness of the crimes ...[and] changes in the use of technology and in the way these crimes are regularly carried out today....” (Letter from Department of Justice to Sentencing Commission at 6 (June 28, 2010))

As the Sentencing Commission works to assess and resolve some of these concerns, some remain dissatisfied with the sentencing options for child pornography crimes. In response, some judges have attempted to wage a challenge on a new frontier: not the advisory sentencing guidelines, but the legislated mandatory minimum sentences. This article will examine this phenomenon and explore its potential vulnerabilities through an analysis of several recent cases, most notably the U.S. District Court opinion in **United States v. C.R.**, issued in May 2011 from the Eastern District of New York.

Standards for Child Pornography Sentencing

Sentencing options in federal child pornography cases are guided by at least three regimes. The first, the advisory Sentencing Guidelines drafted by the Sentencing Commission, direct federal trial courts as to the sentencing range for a given defendant based on his offense gravity score and prior criminal history. These guidelines seek to assist courts in achieving accurate and uniform sentencing. **United States v. Booker** 543 U.S. 220 (2005). Courts have the discretion to

reject the no longer mandatory guidelines range on the basis of policy disagreement with them. **Spears v. United States**, 555 U.S. 261 (2008).

As a second consideration, courts should sentence consistent with the factors laid out by Congress in 18 U.S.C. 3553(a) which include, but are not limited to, the need for the sentence to provide a “just punishment” for the offense. **Booker**, 543 U.S. at 261.

Third, courts are bound by legislated parameters, which can include maximum penalties and *statutory* mandatory minimum sentences for some crimes. As the name suggests, such boundaries are not advisory, but mandatory, on sentencing courts. For child pornography offenses, there are no mandatory minimum sentences for first time offenders for possession, but there are for some repeat offenders as well as for other offenses including receipt, distribution, and production of child pornography. *E.g.* **18 U.S.C. 2252A(b)(1)**.

Judicial challenges to child pornography sentences have typically focused on the first of these three factors – the operation of the sentencing guidelines. Most such challenges have typically been in the context of sentences for possession or receipt for first time offenders with no criminal histories. Recently, however, at least three district courts have directed their challenges toward a new target: mandatory minimum sentences. Two rulings have concerned sentences for receipt. **United States v. Dillingham**, 10-CR0002-DW (W. Dist Mo. March 17, 2011); **United States v. Brines**, 10-1094-R (May 24, 2011 C.D. Ca), *appeal pending* 11-50240 (9th Cir.), while one has refused to apply the applicable mandatory minimum in a case of distribution. **United States v. C.R.** No. 09-CR-155, 2011 WL 1901645, *1 (E.D.N.Y. May 16, 2004). .

United States v. Dillingham and United States v. Brines

In **Dillingham**, after the defendant was convicted of receipt of child pornography, the court initially rejected the sentencing guideline § 2G2.2 on policy grounds and sentenced the defendant well below the guideline range of 210-240 months and the mandatory minimum sentence of 60 months. After a motion by the government to reconsider, the court recognized the distinction between the guidelines and the mandatory minimum sentences and resented the defendant to the statutory minimum of 60 months. In so doing, the court stated its belief that the mandatory minimum exceeded what was fair and just for the facts of that case and separately repeated its categorical rejection of § 2G2.2.

The focus of the court’s disagreement with the minimum sentence for child pornography receipt was its view that no meaningful distinction exists between possession (a charge carrying no mandatory minimum) and receipt (a charge carrying a five year mandatory minimum). As with previous cases that had voiced concern over the mandatory minimum, **Dillingham** recognized that, while **Booker** declared the guidelines effectively advisory, it “[did] not expand the district court’s authority to impose a sentence below the statutory minimum.” *Id.*, citing **United States v. Sutton**, 625 F.3d 526, 528 (8th Cir. 2010).

Similar to **Dillingham** in an order without an opinion, one trial judge in the Central District of California has sentenced a defendant to 24 months incarceration for receipt of child pornography. **Brines Order, May 23, 2011.** The Government has appealed said sentence.

These two cases represent a criticism of the lack of a meaningful distinction within federal law between possession and receipt. Some previous opinions have criticized this as effectively transferring the sentencing power to the prosecution by allowing prosecutors to decide whether to charge receipt or possession, and thus removing the trial court's discretion to sentence below the statutory mandatory minimum sentence.

The cases which articulate these criticisms, usually possession or receipt cases, often include the two characteristics of an offender with no criminal history as well as the lack of any evidence that the offender harmed other children. *See e.g. United States v. Gellatly*, No. 8:08CR50, 2009 WL 35166 (D.Neb. Jan. 5, 2009); **United States v. Szymanski**, No. 3:08CR417, 2009 WL 1212252 (N.D. Ohio April 30, 2009). However, unlike the initial sentence in **Dillingham** and the actual **Brines** sentence, these previous opinions tempered their disagreement with the guidelines by recognizing that the statutory mandatory minimum met the requirements of 18 U.S.C. §3553 or, at a minimum, that "the mandatory minimum does not violate the 8th Amendment...[and is not] cruel and unusual under the 8th Amendment simply because it is mandatory." **Szymanski at *5.**

United States v. C.R.

In May, 2011, a judge in the Eastern District of New York sentenced a defendant who plead guilty to distribution of child pornography, admitted to hands on sexually offending an 8-year-old child, and had numerous bail violations, to 30 months incarceration (among other requirements). The sentence was below the mandatory minimum of 60 months for distribution. (**C.R. at *1, 60**).

The trial judge, who had previously publicly stated his disagreement with the mandatory minimum sentences for some child pornography offenses, (*E.g., U.S. v. Polouizzi*, 760 F. Supp. 2d 284, 285-286 (E.D.N.Y. 2011); **U.S. v. Hernandez**, No.09-CR-703,*2 2010 WL 2522417 (E.D.N.Y. May 28, 2010); A.G. Sulzberger, Defiant Judge Takes on Child Pornography Law, *The New York Times* (May 21, 2010)) sentenced the defendant to below the mandatory minimum after declaring said minimum unconstitutional as applied to the defendant in this case. (**C.R. at *1.**) Although several circuits had clearly found mandatory minimum sentences of even greater lengths not violative of the 8th Amendment, *e.g. U.S. v. Gross*, 437 F.3d 691 (7th Cir.); **U.S. v. MacEwan**, 445 F.3d 237 (3d Cir. 2006); **U.S. v. McIntosh**, 414 Fed. Appx 840 (6th Cir. 2011). **CR** held that a five year mandatory minimum sentence was unconstitutional as it applied to this particular defendant. The trial court attempted to overcome these clear circuit rulings by invoking the recent Supreme Court case of **Graham v. Florida**, 130 S. Ct. 2011 (2010).

Factual Background

On September 16, 2009, the 20 year-old defendant plead guilty to distribution of child pornography, the first count of a five count indictment. (**C.R.**, 09-CR-155, Doc. 24) Counts 1-4 pertained to different child pornography files allegedly distributed by the defendant on November 17, 2008, when the defendant was 19 years old. (**C.R.**, 09-CR-155, Doc. 11.) The defendant was also charged with possession of child pornography between November 17, 2008 and January 15, 2009 and admitted to trading in child pornography for several years. (**C.R.**, 09-CR-155, Doc. 11)

C.R.'s actions had been noticed by federal agents when he self-identified through his screen name "Boysuck0416" in a private file sharing program, Gigatribe. An agent joined the defendant's buddy list and downloaded several files made available by the defendant, including "!!boysSUCK bf.mpg," "Gay Pthc Dad Pops His 8yo Boys Butt Cherry – preteen pedo gay kiddy incest.avi," 3boys, and !NEW! (pthc)2007 Tara 8yr-Tara kutje)(pedo)(ptsc).mpg. The defendant later admitted to not only downloading and viewing child pornography but accessing the child pornography files of other Gigatribe members, sharing his files with others, and trading additional images through other peer to peer programs. **C.R.** at *6.

Beyond the child pornography offenses, the defendant also admitted to molesting his half-sister beginning when the victim was 8 years old and he was 15 years old, and continuing this behavior with escalating severity on two other occasions most recently when the defendant was 18 years old and the victim was 11. These included taking her hand, demonstrating having her stimulate his penis when she was 8 years old, and escalating to manually rubbing her vagina, and molesting her involving oral-genital contact when he was 18 years old and his victim was 11 years old. (**C.R.** at 4-5; **Transcript for 10/7/10 Hearing at 19-21.**) The FBI also testified that the defendant stated he "coached" her on how to perform oral sex on him. (**C.R. Docket No. 138 at 3-4 citing PSR ¶. 11-12; Transcript for 10/7/10 Hearing at 20.**) Additionally, the defendant also committed numerous violations of his conditions of release including positive drug testing, contacting his victim, and hosting minors in his home where they consumed alcohol. **C.R.** at *60-61; Docket No. 138 at 4 (citing Transcript for 10/7/10 Hearing at 43))

Although the defendant pleaded guilty to distribution of child pornography, the trial court sua sponte stated that it did not believe the defendant committed the crime and only accepted the guilty plea at the "urging of defendant and his counsel." **C.R.** at *1. The court's concern centered around the use of peer to peer networks and suggested that perhaps the defendant did not knowingly distribute the child pornography because he made his child pornography available to others to obtain more child pornography. **C.R.** at *9. The court then proposed a sentence below the mandatory minimum of five years.

United States vs. C.R. – Issues and Considerations

In a lengthy sentencing memorandum, the trial court supported its position by invoking the 2010 Supreme Court ruling in **Graham v. Florida**, and by setting forth a range of assertions regarding such matters as juvenile culpability, the nature of peer-to-peer file networks, and treatment amenability. In interpreting **Graham**, the court correctly recognized that **Graham** clarified that a proportionality of punishment analysis can apply to non-capital cases, but did not apparently acknowledge that this expansion was limited to only categorical challenges. **C.R.** at *145 Similarly, **C.R.** noted that **Graham** accepted juvenile brain research in the context of examining a categorical challenge by juveniles but then sought to analogize this research to the different context of an individual adult (whom **C.R.** describes as “immature”) waging a challenge particular to him. Without analysis, **C.R.** then maintained that **Graham** “opens the door” to an “as applied” challenge to a five year sentence for a particular adult defendant. **C.R.** at *161-62.

The Reasoning Utilized in **C.R.** Pulls Graham From Its Moorings.

Graham v. Florida has the potential to do much for juveniles, including sparing them from an initial sentence of life in prison without a meaningful opportunity for parole. It may as well mark a sea change in how juveniles are perceived by the criminal justice system. Indeed, the Supreme Court will address this term whether life without parole for juveniles convicted of homicide also violates the 8th Amendment. **Miller v. Alabama**, 10-9646 (2011); **Jackson v. Hobbs**, 10-9647 (2011). What more it does is a matter of debate. Transferring its reasoning, as the court in **C.R.** attempts to do, to a particular adult’s challenge to his own five year sentence for distribution of child pornography seems to be a more expansive reading of **Graham** than other courts have been willing to venture. An argument can be made that such a direction takes **Graham** on a path that seems to exceed the internal legal and factual limits of **Graham**.

Legal Limits of Graham

This term is whether **Graham** means that.

Graham established that two classifications of cases addressing the proportionality of punishment remain: (1) cases challenging the “length of term of years sentences given all the circumstances in a particular case” and (2) “cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.” **Graham**, 130 S. Ct. at 2021. In other words, the Court distinguishes between an individual challenging his own sentence and one challenging an entire category of punishments based on the nature of a category of crimes or the nature of a category of defendants.

For the first category, where the particular defendant challenges his particular sentence, the Court gave direction. Notably, it set forth a “narrow proportionality principle” in these term of years challenges, indicating that the 8th Amendment did “not require strict proportionality

between the crime and sentence but rather forbids only extreme sentences that are ‘grossly disproportionate to the crime.’” **Graham**, 130 S.Ct. at 2021, citing **Harmelin v. Michigan**, 957, 997, 1000-1001 (1991). The Court explicitly directed this as the approach for courts to take for “determining whether a sentence for a term of years is grossly disproportionate for a particular defendant’s crime.” **Graham**, 130 S.Ct. at 2021. Indeed, this approach “is suited for considering a gross proportionality challenge to a particular defendant’s sentence....” **Graham**, 130 S.Ct. at 2022. Courts, therefore, still must first compare the gravity the offense with the severity of the sentence, and it is only the rare case that this will suggest an inference of gross disproportionality. Only after this threshold is met should a court compare the defendant’s sentence with that received by others in the same and other jurisdictions. If that comparison “validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual.” **Graham**, 130 S.Ct. at 2021.

The second category of cases uses “categorical rules to define an Eighth Amendment standard.” **Graham**, 130 S.Ct. at 2021. **Graham** recognized these cases have two subsets: those which developed a categorical rule based on the category of the nature of the offense and those that developed a categorical rule based on the category of the defendant. For example, because of the category of the nature of the crime, such as the nature of rape of a woman (**Coker v. Georgia**, 433 U.S. 584 (1977)), the nature of the rape of a child (**Kennedy v. Louisiana**, 554 U.S. 407 (2008)), and the nature of certain types of felony murder (**Enmund v. Florida**, 458 U.S. 782 (1982)), the punishing of these crimes with the severe penalty of death is now cruel and unusual. This applies to all defendants charged with these crimes and, as such, they are categorical rules. Similarly, the Court has found a categorical rule against the death penalty because of the nature of the defendant. Because of the nature of being a juvenile (**Roper v. Simmons**, 543 U.S. 551(2005)) or having a low range intelligence, (**Atkins v. Virginia**, 536 US 304 (2000)) these categories of defendants also cannot receive the death penalty, regardless of the crime.

Throughout the **C.R.** opinion the court made clear that it proposed a challenge to the constitutionality of the mandatory minimum sentence as applied to the defendant, not as a categorical challenge. **C.R.** at *1, *141, *145, *150, *151, *165, *166, *167. The trial court acknowledged the mandatory minimum sentences for distribution of child pornography have been found rational and constitutional, but asserted that, because of the defendant’s age, history, youthful appearance, immaturity, and family history the five year mandatory minimum sentence was cruel and unusual. **C.R.** at *144-45. Therefore, the trial court’s reliance on the test reserved for categorical challenges and applied in **Graham** and **Roper** was misplaced. It is true that **Graham** expanded **Roper** from applying only to capital cases to also applying to life without parole cases by eliminating the “death is different” rubric. It did so because this challenge to life without parole for juveniles was a “categorical challenge to a term of year sentence” which thereby “implicates a particular type of sentence as it applies to an entire class of offenders.” **Graham**, 130 S.Ct. at 2122-2123. **C.R.** was not such a challenge. **C.R.**’s claim was an individual term of years challenge which, even under **Graham**, applies a different test than that

applied in **Graham**. Such a challenge still applies the gross disproportionality test reserved for particular challenges.

C.R.'s approach was novel. Courts that have addressed individual term of years claims after **Graham** have understood that **Graham** continued to recognize the gross disproportionality test and principles for individual term of year challenges earlier outlined in **Harmelin v. Michigan**, 501 U.S. 957 (1991) and reiterated in **Graham. United States v. Farley**, 607 F.3d 1294, 1343-1344 (2010); **United States v. McIntosh**, 2001 WL 924537 (6th Cir. Mar 2011); **United States v. Marshall**, 2011 WL 693254 (Feb. 28, 2011); **United States v. Repogle**, 395 Fed. Appx 620 (11th Cir. Sept 9, 2010). This approach insists on judicial restraint and deference to the legislature. **Farley**, 607 F.3d at 1344. As the 11th Circuit noted,

The **Graham** decision did not undermine **Harmelin** insofar as adult offenders are concerned but recognized instead that **Harmelin** is still 'suited for considering a gross proportionality challenge to a particular defendant's sentence.

Farley, 607 F. 3d at 1342, n. 34.

Furthermore, circuits have rejected proposed extensions of **Graham** explicitly stating "the Court's analysis in **Graham** was limited to defendants sentenced to life in prison without parole for crimes committed as juveniles." **United States v. Scott**, 610 F.3d 1009, 1017 (2010). **C.R.** therefore, proposed a novel interpretation of **Graham** not echoed by its contemporaries

Juveniles, Culpability, and Proportionality

Beyond the issues related to the application of **Graham**'s standards regarding proportionality, **C.R.** also drew upon **Graham** to establish **C.R.**'s diminished culpability for this offense. The court discussed at length **Graham**'s recitation of juvenile brain research as well as the testimony of one of the defense experts on the subject. However, it severed this from the context in which **Graham** invoked this research. **Graham** did so because death and life without parole are sentences reserved for the "worst offenders," yet the research established that juveniles, because of their lack of fully formed brains and character, may indeed not be the worst offenders, thus undermining the applicability of the most severe sentences. Similarly, the Court recognized the need for hope of release in the context of juveniles and life without parole, a matter not at issue with significantly lesser sentences.

The trial court cited the brain research discussion in **Graham** and concluded from it that "at the time of the crime [the defendant] was and should be characterized for sentencing as a developmentally immature young adult with limited ability to appreciate the legal limits on contacts with child pornography and to control his viewing of easily accessible internet programs." **C.R.** at *161.

At its core, therefore, the trial court attempted to apply this **Graham** reliance on juvenile brain research to claim that an adult defendant facing a five-year sentence should be treated like a juvenile facing life without parole. A theory that immature adults should be regarded as less culpable individuals, thereby precluding the application of five-year mandatory minimum sentences to them would mark a sea change in individual challenges to sentences under the 8th Amendment. This pulls **Graham** off its moorings. It is taking a test for categorical challenges and applying it to a defendant challenging his particular term of years sentence. It is also severing **Graham**'s invocation of brain research from its **Graham**'s reasoning. **C.R.** does not involve the most severe of penalties. Rather, it involves a five-year term of year sentence, for which there is no such requirement it be reserved for the worst of offenders. Indeed it is the minimum sentence.

Further Concerns

The concerning aspects of **CR** include not only this expansion of **Graham** to a particular term of years challenge, thus dissolving **Graham**'s distinction between the strict proportionality test for categorical challenges and the gross disproportionality test for particular challenges; or the expansion of the legal reasoning of **Graham** well beyond the category of juveniles with life sentences to a particular adult defendant's sentence of 5 years' incarceration. There are also factual assertions that weaken the opinion.

Among these is the trial court's description of the defendant's activity as "mere peer to peer file sharing" and ensuing suggestion that the defendant may not have distributed child pornography when he advertised and made available to download child pornography through several peer to peer networks. **C.R.** at *1, *165. This is curious as several circuits that have addressed the role of peer to peer networks in child pornography trading and rejected such a blanket absolute claim both with respect to 18 U.S.C. 2252A and U.S.S.C. § 2G2.2(b)(3)F). *E.g.*, **United States v. Shaffer** (472 F.3d 1219, 1223 (10th Cir. 2007); **United States v. Layton**, 564 F.3d 330 (4th Cir. 2009); **United States v. Darway**, 2007 WL 3353216 **2-3 (6th Cir. 2007); **United States v. Carani**, 492 F3d 867, 876 (7th Cir. 2007); **United States v. Dufran**, 2011 WL 2419481 *2 (11th Cir. 2011).

This is all the more curious given the defendant's collection of several hundred child pornography pictures and videos, the contents of which were not limited to peers, but included adult molestation of prepubescent children as young as 4 and 6. (**C.R.** at *4, 12-15; Transcript from 10/7/10 Hearing at 21)

Conclusion

The three cases discussed here may represent a new front on the assault on child pornography sentences. While they share the intended outcome of undermining the mandatory minimum sentences, they also vary in content. **Dillingham** and likely **Brines** focus on the sentences for

receipt of child pornography and the lack of a meaningful distinction between that and possession. **C.R.** more radically challenges a mandatory minimum sentence for a defendant who pled guilty to distribution of child pornography, a sentence which has specifically been excluded or de-emphasized by several judges' more general criticisms of sentencing guidelines. The decisions in the first two cases are flawed by confusing the sentencing guideline issues with the mandatory minimum sentence issues. The **C.R.** decision misinterprets **Graham** and pulls it from its moorings.

Legitimate concerns regarding the sentencing guidelines should not be lost in attacks on mandatory minimum sentences. As discussed, several trial courts have voiced concerns with the application of the sentencing guidelines, specifically § 2G2.2. However, these cases frequently are characterized by two common hallmarks. First, they are specifically focused on the guidelines' effect on defendants convicted of possession or receipt with little or no other criminal history and no history abusing children. *E.g. Ontiveros*, 2008 WL 2937539. These courts assert that the enhancing factors present in § 2G2.2 are present in nearly all child pornography cases and "operate[] to increase the guidelines range significantly above the mandatory minimum even for first offenders with no history of sexually exploiting or abusing minors, or producing, marketing, or selling child pornography." *Ontiveros* at *8.; *see also Grober*, 595 F.Supp. 2D at 393, *aff'd* 624 F.3d 592 (3d Cir. 2010).

Yet these cases draw a clear distinction between concerns around the sentencing guidelines and existence of mandatory minimum sentences. As noted by one court which found less deference to the guidelines, "[a] sentence of 60 months (5 years) will satisfy the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense, to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant and to provide the defendant with needed treatment." *Gellatly*, 2009 WL 35166.

C.R. lacks these hallmarks. **C.R.** is not a solely a possessor, as he pled guilty to *distribution* of child pornography. **C.R.** is not someone with no history of acting out toward children. He confessed to a history of molesting his half-sister as well as sexual contact with older minors when he was an adult. While the court characterizes all this as a "sexual encounter" (**C.R.** at *5) of a confused adolescent, the record is clear that the defendant began sexually touching his half-sister when she was 8 years old and he was fifteen, and this escalated to penetration. While the cases cited in **CR** document much criticism of child pornography sentences, the concerns references are aimed primarily at guidelines problems that are not transferable to this defendant.

Although the limits of **Graham** have yet to be determined, the use of it to eliminate the five year mandatory minimum sentence of an adult child pornography distributor who pled guilty, admitted to consuming and trading the material for 3-4 years, and admitted to sexually molesting his half-sister multiple times beginning when she was 8 years old may be more of a stretch of

this precedent than it can bear. While **C.R.** and **Dillingham** raise important awareness of thorny issues in child pornography sentencing, applicable to guidelines, they may ask too much of **Graham** and represent an untenable extension of it both legally and factually.

Well after **Booker**, sentencing concerns remain as courts seek to achieve appropriate and consistent sentences. In this effort, legitimate concerns exist regarding sentencing guidelines for the less severe child pornography offenders. These concerns, however, are not advanced by blurring them with attacks on congressionally mandated minimum statutory sentences for distribution of child pornography. Similarly, it is an open debate as to how far **Graham** will be taken. The **C.R.** opinion represents one court's application of **Graham**. The utilization of **Graham** to support a challenge to a five year mandatory minimum sentence for an adult contact offender is likely more than **Graham** can bear. It appears legally beyond what was likely intended by the Court and factually inconsistent with **Graham**. While these approaches generate attention, if history is any lesson, they likely will go by way of previous attempts by one of these same courts to circumvent the mandatory minimum sentence and be reversed. **United States v. Polouizzi**, 564 F.3d 142, 160-163 (2d Cir. 2009). However, the climate surrounding the guidelines for child pornography offenses may affect this direction.