

07-1312-cr
USA v. Irving

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -

August Term, 2007

(Argued: May 30, 2008
Final briefs submitted
November 13, 2008

Decided: January 28, 2009)

Docket No. 07-1312 - cr

UNITED STATES OF AMERICA,

Appellee,

- v. -

STEFAN IRVING,

Defendant-Appellant.

Before: KEARSE, SACK, and RAGGI, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Lewis A. Kaplan, Judge, declining to resentence defendant, following a remand from this Court pursuant to United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), on his convictions for receiving and possessing child pornography and traveling outside the United States with intent to engage in sexual acts with minors. See 18 U.S.C. §§ 2241(c), 2423(b), 2252A(a)(2)(B), 2252A(a)(5)(B).

Affirmed.

KATHERINE POLK FAILLA, Assistant United States Attorney, New York, New York (Michael J. Garcia, United States Attorney for the

26
27
28

1 Southern District of New York, Stephen A.
2 Miller, Assistant United States Attorney,
3 New York, New York, on the brief), for
4 Appellee.

5 CHERYL J. STURM, Chadds Ford, Pennsylvania, for
6 Defendant-Appellant.

7 KEARSE, Circuit Judge:

8 This case returns to us on the appeal of defendant Stefan
9 Irving from an order of the United States District Court for the
10 Southern District of New York, Lewis A. Kaplan, Judge, entered on
11 remand following a decision of this Court which (a) upheld
12 Irving's convictions, (b) postponed consideration of his
13 sentencing challenges, and (c) remanded to the district court
14 pursuant to United States v. Crosby, 397 F.3d 103 (2d Cir. 2005)
15 ("Crosby"), cert. denied, 549 U.S. 915 (2006), for consideration
16 of resentencing in light of United States v. Booker, 543 U.S. 220,
17 244 (2005). Irving was convicted, following a jury trial, on two
18 counts of traveling outside the United States with intent to
19 engage in a sexual act with a minor, in violation of 18 U.S.C.
20 § 2423(b) (counts 1 and 2); one count of aggravated sexual abuse,
21 to wit, traveling outside the United States with intent to engage
22 in a sexual act with a minor under the age of 12 years, in
23 violation of 18 U.S.C. § 2241(c) (count 3); one count of knowingly
24 receiving child pornography, in violation of 18 U.S.C.
25 § 2252A(a)(2)(B) (count 4); and one count of knowingly possessing
26 child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B)
27 (count 5). He was sentenced principally to concurrent 262-month

1 prison terms on each count, to be followed by two concurrent five-
2 year terms of supervised release on counts 3 and 4 and,
3 concurrently, three concurrent three-year terms of supervised
4 release on counts 1, 2, and 5; he was ordered to pay a \$200,000
5 fine. On the Crosby remand, the district court declined to
6 resentence Irving.

7 On this appeal, Irving contends that his sentence is
8 unreasonable, asserting that the district court (a) applied the
9 wrong sections of the United States Sentencing Guidelines (1998)
10 ("Guidelines") in calculating the base offense levels for his
11 crimes, (b) improperly increased his offense level on the ground
12 of vulnerability of his victims, and (c) failed to consider, as
13 required by 18 U.S.C. § 3553(a)(6), the need to avoid unwarranted
14 sentencing disparities. In addition, in response to a request
15 from this Court to address a double jeopardy question, Irving
16 contends that his conviction on either count 4 or count 5 should
17 be vacated on the ground that receipt of child pornography and
18 possession of child pornography are the same crime for purposes of
19 double jeopardy, and that his conviction on both counts thus
20 violates the Double Jeopardy Clause.

21 For the reasons that follow, we reject all of Irving's
22 contentions and affirm the order of the district court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

I. BACKGROUND

Irving is a formerly-licensed pediatrician who was convicted in 1983 of attempted sexual abuse of a seven-year-old boy. See generally United States v. Irving, 452 F.3d 110, 114 (2d Cir. 2006) ("Irving II"), superseding, on rehearing, United States v. Irving, 432 F.3d 401 (2d Cir. 2005) ("Irving I"). In the late 1990s, Irving became a target of a federal investigation into individuals suspected of traveling to Mexico for the purpose of engaging in sexual acts with children. The present prosecution centered on Irving's travel to Mexico in 1998 and to Honduras in 1999 and his later receipt and possession of child pornography.

A. The Evidence at Irving's Trial

The evidence presented at Irving's trial is discussed in Irving II, familiarity with which is assumed. Addressing Irving's initial appeal from the judgment of conviction, our description of the evidence with regard to his Mexico trip included the following:

In May 1998 Irving traveled to Acapulco, Mexico to visit Castillo Vista del Mar, a guest house that served as a place where men from the United States could have sexual relations with Mexican boys. When defendant visited, seven or eight boys ranging in age from eight to 20 years old were residing there. Irving learned of Castillo Vista del Mar from Robert Decker--its then manager, and a friend from the 1970s.

Decker testified that prior to visiting, Irving asked if specific boys--whom he knew from previous visits--would be there. Decker said Irving specifically asked about an eight-year-old boy.

1 Decker testified further that he saw Irving fondle
2 some of the boys who lived at the guest house while
3 swimming with them. He also stated he saw defendant
4 go upstairs to his bedroom at various times with
5 different boys. Decker said that during Irving's
6 visit the two of them discussed a previous trip to
7 Honduras that Irving had taken, trips to the beaches
8 he took while there, and the boys he met. One of the
9 boys at the guest house when Irving visited, Jesus
10 Santiago Percastegui, corroborated relevant portions
11 of Decker's testimony. Although unable to identify
12 Irving in court, this witness stated that he saw
13 "Esteban" (the name by which he knew Irving) at the
14 beach caressing two other boys that lived at the
15 guest house and twice go upstairs to his room with
16 them.

17 Decker admitted while he was in Mexico he
18 experienced financial difficulties, and that Irving
19 gave him ATM cards, connected to an account he
20 funded, up until Decker's September 2000 arrest.
21 Irving gave Decker over \$5,000 in support over the
22 years. The two men also communicated regularly.
23 Irving provided Decker with Internet web addresses of
24 sites containing child pornography and on one
25 occasion gave him images of boys engaged in sex acts
26 with each other, with men, or by themselves. Irving
27 told Decker he preferred prepubescent boys, under the
28 age of 11, and that he preferred oral sex or
29 fondling.

30 452 F.3d at 114-15 (emphases added).

31 On Irving's return to the United States from Mexico, a
32 customs search of his luggage turned up, inter alia, computer
33 diskettes containing "[i]mages of child erotica." Id. at 115. As
34 to Irving's 1999 trip to Honduras, his personal journal described,
35 inter alia, "details [of] his activities while there, particularly
36 his luring of a 12-year-old boy back to his hotel with him and the
37 sexual activities in which they engaged." Id. at 116.

38 In a search in 2003 pursuant to a warrant, agents found,
39 inter alia, 76 video files on Irving's home computer, which had
40 been downloaded on two days in July 2000. The government

1 introduced the hard drive of that computer at trial. The video
2 files "revealed 'prepubescent boys engaging in various sexual acts
3 with each other and in other cases of sexual acts by themselves.'" Id.

5 B. The Verdicts and Sentence

6 The jury found Irving guilty on all five of the counts
7 against him: (1) traveling to Mexico with the intent to engage in
8 a sexual act with a minor, in violation of 18 U.S.C. § 2423(b);
9 (2) traveling to Honduras with the intent to engage in a sexual
10 act with a minor, in violation of the same section; (3) traveling
11 to Honduras with the intent to engage in a sexual act with a minor
12 under the age of 12, in violation of 18 U.S.C. § 2241(c); (4)
13 receiving child pornography, in violation of 18 U.S.C.
14 § 2252A(a)(2)(B); and (5) possessing child pornography, in
15 violation of 18 U.S.C. § 2252A(a)(5)(B).

16 The district court sentenced Irving using the 1998 version
17 of the Guidelines, as the defense requested. As set forth in
18 greater detail in Part II.B.1. below, with respect to counts 1, 2,
19 and 3 (collectively the "travel counts"), the court used the base
20 offense level provided in § 2A3.1, which applies to crimes of
21 sexual abuse, or attempted sexual abuse, of children; and, as
22 discussed in Part II.B.3., it increased that level pursuant to
23 § 3A1.1(b)(1) on the ground that Irving knew that the children he
24 abused were homeless and without parental supervision, and hence
25 were unusually vulnerable. To determine Irving's base offense

1 level for counts 4 and 5 (collectively the "child pornography
2 counts"), the court looked to Guidelines § 2G2.2, which applies
3 to, inter alia, receiving material involving the sexual
4 exploitation of a minor. See Part II.B.2. below.

5 Applying the grouping rules for multi-count convictions,
6 the court concluded that Irving's total offense level for all
7 counts combined was 36. Given his criminal history category of
8 II, the recommended Guidelines range was 210-262 months. Denying
9 both Irving's motion for a downward departure and the government's
10 motion for an upward departure, the court sentenced Irving at the
11 top of the recommended range to 262 months' imprisonment, stating
12 that Irving was "a predator" who had "abused . . . a lot of
13 children" (Sentencing Transcript ("S.Tr.") 34); that he was "an
14 extremely dangerous individual with respect to . . . sexual abuse
15 of children" (id. at 39); and that Irving had shown himself to be
16 quite proficient at abusing children, including "providing
17 financial support, at least for a while, to keep the house in
18 Acapulco, Ca[s]tillo Vi[st]a del Mar, open so that the service of
19 providing young kids hustled off the streets of Acapulco to
20 American pedophiles could go on" (id.).

21 The court also referred to Irving's conviction some 20
22 years earlier for attempted sexual abuse of a seven-year-old boy,
23 pointing out that Irving, "as a school physician, [had taken]
24 advantage of that position to abuse the kids [he was] supposed to
25 be caring for." (Id. at 40.) Thus, Irving "ha[d] spent a

1 lifetime doing a great deal of harm to a great many extremely
2 vulnerable children." (Id. at 39-40.)

3 Further, the court noted that the record contained no
4 indication that Irving conceded that his conduct toward children
5 was in any way wrong. The court reminded Irving of

6 a letter you wrote at the end of August or
7 thereabouts, 1996, to somebody about some of your
8 activities, all of which focused on young boys, and
9 there is a handwritten postscript at the end and in
10 relevant part it reads as follows:

11 "You asked if I would be writing more explicitly
12 about Mexico. Sadly, the newest focus of the witch
13 hunt is on travel with intent to have underaged sex,
14 so that kind of journal won't be possible until the
15 government finds something more important to pay
16 attention to."

17 You may think it's a witch hunt. Your fellow
18 citizens think it is protecting the children of this
19 country. The fact that you think it's a witch hunt
20 proves to me that you have to be locked up for a very
21 long time.

22 (S.Tr. 40.)

23 C. Irving's Initial Appeal

24 Irving appealed, principally challenging the sufficiency
25 of the evidence to support his conviction on any count. He also
26 challenged the district court's calculation of his sentence. This
27 Court affirmed Irving's conviction on counts 1, 4, and 5, the
28 counts relating to Irving's travel to Mexico and to his receipt
29 and possession of child pornography; but as to counts 2 and 3, we
30 initially ruled that his convictions could not stand because there
31 was insufficient evidence as to Irving's intent in traveling to
32 Honduras. See Irving I, 432 F.3d at 404. Subsequently, however,

1 on the government's petition for rehearing, we were persuaded that
2 Irving's conduct in Mexico provided competent evidence, admissible
3 under Fed. R. Evid. 404(b), as to his intentions in traveling to
4 Honduras. Accordingly, we withdrew the decision issued in
5 Irving I, and concluded that the evidence was sufficient to
6 support Irving's convictions on all five counts. See Irving II,
7 452 F.3d at 114, 119.

8 Because Booker, which ruled that the Guidelines are not
9 mandatory but advisory, had been decided during the pendency of
10 Irving's appeal, and the district court had treated the Guidelines
11 as mandatory, we concluded that a Crosby remand was required in
12 order to allow the district court to determine whether it would
13 have imposed a nontrivially different sentence had it known that
14 the Guidelines were not mandatory. Given the need for the Crosby
15 remand, we refrained from addressing Irving's challenges to the
16 details of the court's calculation of his original sentence. See
17 Irving II, 452 F.3d at 114.

18 D. The District Court's Order on the Crosby Remand

19 On remand, the district court declined to impose a
20 different sentence. See United States v. Irving, S3 03 Crim.
21 0633, 2007 WL 831814 (S.D.N.Y. Mar. 19, 2007) ("Irving III").
22 Adhering to the original sentence, the court stated:

23 As the original sentencing minutes make clear,
24 the Court sentenced the defendant at the high end of
25 the Sentencing Guideline range because the defendant,
26 in the Court's view, "is an extremely dangerous
27 individual with respect to the sexual abuse of
28 children," that "there isn't the slightest hint that

1 [the defendant] . . . recognize[s] that there is
2 anything wrong" with his conduct, and that a sentence
3 "at the top end of the [Guideline[s]] range is
4 necessary for specific deterrence, that is to say, to
5 prevent [defendant] from abusing others in the
6 future."

7 The Court now has considered all of the factors
8 enumerated in [18] U.S.C. § 3553. It is persuaded
9 that the sentence imposed is sufficient, but no
10 greater than necessary, to serve the other factors
11 there enumerated and that all of the factors, taken
12 together, justify the sentence previously imposed.

13 Irving III, 2007 WL 831814, at *1.

14 II. DISCUSSION

15 Irving has appealed from Irving III, largely renewing the
16 challenges he made in his initial appeal with respect to the
17 district court's calculation of his sentence. He does not
18 otherwise challenge the district court's Irving III refusal to
19 resentence him in light of Booker.

20 Irving contends that the district court erred by
21 calculating his base offense level for counts 1, 2, and 3 under
22 Guidelines § 2A3.1, rather than § 2A3.2; by calculating his base
23 offense level for counts 4 and 5 under Guidelines § 2G2.2, rather
24 than § 2G2.4; by increasing his offense level on the ground that
25 his victims were vulnerable; and by failing to consider the need
26 to avoid unwarranted sentencing disparities. And in response
27 this Court's sua sponte inquiry, Irving contends that his
28 conviction on count 4 or count 5 should be vacated on the ground
29 that possession of child pornography is a lesser-included offense

1 of his count-4 offense of receipt of child pornography, and that
2 his conviction on both counts thus violates his rights under the
3 Double Jeopardy Clause. For the reasons that follow, we find no
4 merit in his contentions.

5 A. Sentencing and the Standard of Review After Booker

6 In the wake of Booker and the Supreme Court's elaborations
7 on its import, see, e.g., Gall v. United States, 128 S. Ct. 586
8 (2007), our review of sentencing decisions "is limited to
9 determining whether they are 'reasonable.'" Id. at 594. In
10 conducting reasonableness review, we apply "the familiar abuse-of-
11 discretion standard of review." Id.; see, e.g., Rita v. United
12 States, 127 S. Ct. 2456, 2465 (2007).

13 Reasonableness review has both a procedural and a
14 substantive component. See, e.g., United States v. Canova, 485
15 F.3d 674, 679 (2d Cir. 2007). Review for procedural
16 reasonableness requires us to

17 ensure that the district court committed no
18 significant procedural error, such as failing to
19 calculate (or improperly calculating) the Guidelines
20 range, treating the Guidelines as mandatory, failing
21 to consider the § 3553(a) factors, selecting a
22 sentence based on clearly erroneous facts, or failing
23 to adequately explain the chosen sentence.

24 Gall, 128 S. Ct. at 597. We review a district court's
25 interpretations of the Guidelines de novo and its factual findings
26 for clear error. See, e.g., United States v. Selioutsky, 409 F.3d
27 114, 119 (2d Cir. 2005). The burden of proving a fact relevant to
28 sentencing is on the government, which must prove the fact "by a

1 preponderance of the evidence." United States v. Proshin, 438
2 F.3d 235, 238 (2d Cir. 2006); see also United States v. Garcia,
3 413 F.3d 201, 220 n.15 (2d Cir. 2005) ("Judicial authority to find
4 facts relevant to sentencing by a preponderance of the evidence
5 survives Booker").

6 As to substantive reasonableness, Booker instructed that
7 "[s]ection 3553(a) . . . sets forth numerous factors that guide
8 sentencing. Those factors [are to] guide appellate courts . . .
9 in determining whether a sentence is unreasonable." 543 U.S. at
10 261. In the absence of record evidence suggesting otherwise, we
11 presume that the district court has faithfully discharged its duty
12 to consider the § 3553(a) factors. See, e.g., United States v.
13 Fernandez, 443 F.3d 19, 30 (2d Cir.), cert. denied, 549 U.S. 882
14 (2006).

15 The same standards of review also apply to our review of a
16 sentence after the district court has declined to resentence
17 following a Crosby remand. See United States v. Williams, 475
18 F.3d 468, 474 (2d Cir. 2007), cert. denied, 128 S. Ct. 881 (2008).

19 B. Determination of the Applicable Guidelines

20 1. The Travel Counts

21 In calculating Irving's offense level for the travel
22 counts, i.e., his travels to Mexico (count 1) and Honduras (counts
23 2 and 3), with intent to engage in sexual acts with minors, the
24 district court began with Guidelines § 2A3.1, entitled "Criminal
25 Sexual Abuse; Attempt to Commit Criminal Sexual Abuse." The 1998

1 version of that guideline provided a base offense level of 27, see
2 Guidelines § 2A3.1(a), and required a four-step enhancement "[i]f
3 the victim had not attained the age of twelve years," id.
4 § 2A3.1(b)(2)(A). Irving contends that the court should instead
5 have applied Guidelines § 2A3.2 (entitled "Criminal Sexual Abuse
6 of a Minor (Statutory Rape) or Attempt to Commit Such Acts"),
7 which provided a base offense level of 15, with no calibrations
8 based on the minor's age. He argues that "the facts do not
9 indicate anything beyond sexual contact with a minor (as opposed
10 to a sexual act or sexual abuse)." (Irving brief on appeal
11 at 23.) We see no error in the court's application of § 2A3.1 to
12 these three counts.

13 To begin with, the Statutory Index in Appendix A to the
14 Guidelines Manual ("Statutory Index") specifies which sections in
15 Guidelines "Chapter Two - Offense Conduct" are ordinarily
16 applicable to which statutes of conviction. In the 1998 version
17 of the Guidelines, for a conviction under 18 U.S.C. § 2241(c)--the
18 section under which Irving was convicted on count 3--the only
19 guideline listed in the Statutory Index was § 2A3.1, governing
20 commission of, and attempts to commit, criminal sexual abuse of
21 minors. The evidence supporting Irving's conviction on count 3
22 included his own personal journal "detail[ing] his activities
23 while [in Honduras], particularly his luring of a 12-year-old boy
24 back to his hotel with him and the sexual activities in which they
25 engaged," Irving II, 452 F.3d at 116, and the evidence that
26 "Irving told Decker he preferred prepubescent boys, under the age

1 of 11," id. at 115. Irving has not shown that his conduct was
2 atypical in any way that would warrant the calculation of his
3 offense level for count 3 under any guideline other than § 2A3.1.

4 For a conviction under 18 U.S.C. § 2423(b), the section
5 under which Irving was convicted on counts 1 and 2, the Statutory
6 Index listed Guidelines §§ 2A3.1, 2A3.2, and 2A3.3. When more
7 than one guideline is listed for a count of conviction under a
8 given statutory section, the court is to apply the guideline that
9 is most appropriate for the defendant's offense conduct in that
10 count. See Statutory Index, Introduction. Several factors
11 indicated that § 2A3.1 was the most appropriate guideline for
12 Irving's convictions on counts 1 and 2. First, even if § 2A3.2
13 would have been applicable to count 2 if it had been the only
14 count of conviction, counts 2 and 3 concerning Irving's trip to
15 Honduras involved the same transaction and the same or overlapping
16 victims and thus were required to be grouped for calculation of a
17 single combined offense level, see Guidelines § 3D1.2(a). When
18 counts of conviction governed by different guidelines are grouped,
19 the court is instructed to apply the "highest offense level of the
20 counts in the Group." Guidelines § 3D1.3(a). Hence the offense
21 level for count 2 was properly calculated, in combination with
22 that for count 3, under § 2A3.1.

23 Second, the Guidelines provided that "[a]ny criminal
24 sexual abuse with a child less than twelve years of age,
25 regardless of 'consent,' is governed by § 2A3.1 (Criminal Sexual
26 Abuse)." Guidelines § 2A3.1 Background. Thus, if, within the

1 meaning of that section, Irving sexually abused a child under the
2 age of 12 on his trip to Mexico, the court was required to apply
3 § 2A3.1 to count 1. Third, the Guidelines provided that
4 "[b]ecause of their dangerousness, attempts are treated the same
5 as completed acts of criminal sexual abuse." Id. Thus, if Irving
6 attempted sexual abuse of a child under 12 on his trips to Mexico
7 and Honduras, there was sexual abuse within the meaning of the
8 Guidelines, and again § 2A3.1 was applicable to both counts 1
9 and 2.

10 In concluding that § 2A3.1 was applicable to count 1, the
11 district court found, inter alia, that Irving

12 clearly went to Mexico to engage in sex with young
13 boys. There was ample evidence that his preferred
14 age group was in the range of roughly six years of
15 age to twelve years of age.

16 I refer to, among other things, . . . a March
17 23, 1995 document written by the defendant in which
18 he indicates a preference for boys roughly in the
19 range of age nine to puberty with a little leeway on
20 either side, and Government Exhibit 103, where he
21 speaks in terms of ages six to twelve.

22 I find that there was attempted, at least
23 attempted sexual abuse of a child under twelve in
24 Mexico.

25 (S.Tr. 5.) In concluding that § 2A3.1 was applicable to Irving's
26 trip to Honduras, the court stated that

27 [t]he same analysis applies to [counts 2 and 3].
28 I find that there was at least attempted sexual abuse
29 of one or more children under twelve during the 1999
30 trip to Honduras.

31 (Id.)

32 These findings that Irving at least attempted sexual abuse
33 of children under the age of 12 on his trips to both Mexico and

1 Honduras were amply supported by the evidence referred to by the
2 district court and by other evidence at trial--summarized in Part
3 I.A. above--which Irving II found was sufficient to support
4 Irving's convictions on the travel counts. We see no error in the
5 district court's conclusion that § 2A3.1 was the appropriate
6 guideline to apply to Irving's convictions on counts 1, 2, and 3.

7 2. The Child Pornography Counts

8 In calculating Irving's offense level for count 4,
9 receiving child pornography in violation of 18 U.S.C.
10 § 2252A(a)(2)(B), and count 5, possessing child pornography in
11 violation of id. § 2252A(a)(5)(B), the district court applied
12 Guidelines § 2G2.2, entitled "Trafficking in Material Involving
13 the Sexual Exploitation of a Minor; Receiving, Transporting,
14 Shipping, or Advertising Material Involving the Sexual
15 Exploitation of a Minor; Possessing Material Involving the Sexual
16 Exploitation of a Minor with Intent to Traffic" (italics omitted;
17 emphases added). Irving argues that the district court should
18 instead have applied Guidelines § 2G2.4, entitled "Possession of
19 Materials Depicting a Minor Engaged in Sexually Explicit Conduct"
20 (italics omitted; emphasis added), because he was not shown to
21 have received or possessed child pornography with the intent to
22 traffic in it. For several reasons, we see no error.

23 First, on count 4, the jury found Irving guilty of
24 receiving child pornography, in violation of § 2252A(a)(2)(B).
25 At the times relevant to Irving's conduct, that section applied to

1 any person who knowingly "receives or distributes . . . any
2 material that contains child pornography that has been mailed, or
3 shipped or transported in interstate or foreign commerce by any
4 means, including by computer," 18 U.S.C. § 2252A(a)(2)(B).
5 Nothing in that section or in Guidelines § 2G2.2 imposed any
6 intent-to-traffic requirement with respect to an offense of
7 receiving such material.

8 Second, the 1998 version of § 2G2.4, the guideline that
9 Irving argues should have been applied to counts 4 and 5, could
10 not have been applied to count 4 because that guideline provided
11 offense levels only for possession, not for receipt, of child
12 pornography. Further, the history of that guideline reveals that
13 its inapplicability to receipt at the time of Irving's receipt
14 offense was deliberate. When § 2G2.4 was first added to the
15 Guidelines in 1991, it was in fact entitled "Receipt or Possession
16 of Materials Depicting a Minor Engaged in Sexually Explicit
17 Conduct," Guidelines Appendix C, amend. 372 (effective Nov. 1,
18 1991) (emphasis added). Less than a month later, however, the
19 words "Receipt or" were deleted from the title of § 2G2.4, see
20 Guidelines Appendix C, amend. 436 (effective Nov. 27, 1991). The
21 deletion was made to "implement[] . . . instructions to the
22 [Sentencing] Commission" from Congress, id., to "[change
23 g]uideline 2G2.4 to provide that such guideline shall apply only
24 to offense conduct that involves the simple possession of [child
25 pornography] and [change] guideline 2G2.2 to provide that such
26 guideline shall apply to offense conduct that involves receipt or

1 trafficking," Treasury, Postal Service and General Government
2 Appropriations Act of 1992, Pub. L. No. 102-141, § 632(1)(B), 105
3 Stat. 834, 876 (Oct. 28, 1991) (emphases added). Accordingly,
4 § 2G2.4 could not properly have been applied to Irving's receipt-
5 of-child-pornography conviction on count 4.

6 Third, although Irving's offense level for his count-5
7 possession offense would have been calculated under § 2G2.4 if it
8 had been unaccompanied by any other child pornography conviction,
9 his convictions on counts 4 and 5 were for closely related
10 offenses of the same general type, and it was not unreasonable for
11 the court to group those counts for calculation of a single
12 combined offense level. In such circumstances, the court is
13 directed to "apply the offense guideline that produces the highest
14 offense level." Guidelines § 3D1.3(b). Hence, Irving's base
15 offense level for counts 4 and 5 was properly calculated under
16 § 2G2.2.

17 3. The Vulnerable Victim Adjustment

18 After calculating Irving's base offense level for counts
19 1, 2, and 3, i.e., traveling to Mexico and Honduras with intent to
20 engage in sexual acts with minors, the district court adjusted
21 Irving's offense level upward by two steps pursuant to Guidelines
22 § 3A1.1(b)(1). That guideline provides that "[i]f the defendant
23 knew or should have known that a victim of the offense [of
24 conviction] was a vulnerable victim," his offense level should be
25 increased by two steps. Guidelines § 3A1.1(b)(1). The

1 commentary with respect to subsection (b) states, inter alia, as
2 follows:

3 "vulnerable victim" means a person . . . who is
4 unusually vulnerable due to age, physical or mental
5 condition, or who is otherwise particularly
6 susceptible to the criminal conduct.

7 Subsection (b) applies to offenses involving an
8 unusually vulnerable victim in which the defendant
9 knows or should have known of the victim's unusual
10 vulnerability. . . .

11 Do not apply subsection (b) if the factor that
12 makes the person a vulnerable victim is incorporated
13 in the offense guideline. For example, if the offense
14 guideline provides an enhancement for the age of the
15 victim, this subsection would not be applied unless
16 the victim was unusually vulnerable for reasons
17 unrelated to age.

18 Guidelines § 3A1.1 Application Note 2 (emphases added).

19 Irving contends that the vulnerable victim adjustment, as
20 explicated by the Guidelines commentary, was inappropriate because
21 his victims' vulnerability was already accounted for by the
22 enhancement provided in § 2A3.1 for offenses against children
23 under the age of 12 years, and that his victims had no "unusual"
24 vulnerability. We disagree.

25 In imposing the vulnerable victim adjustment, the district
26 court stated that Irving

27 is getting bumped up not because they were kids, but
28 because they were street urchins who were especially
29 vulnerable because anybody who comes along and offers
30 the promise of a free meal has a special attraction
31 to people in that economic and social circumstance.

32 . . . [S]ome 11 year old who is living on the
33 street in Acapulco is a little bit more likely to
34 fall for a predator of a sexual nature than an 11
35 year old coming out of the Dalton School into a
36 limousine to go home.

1 (S.Tr. at 18.)

2 We see no error in this decision. The facts that Irving's
3 victims in Mexico and Honduras were children who were homeless and
4 were without parental or other appropriate guidance made them
5 unusually vulnerable, independently of their ages. The adjustment
6 was entirely appropriate.

7 C. Consideration of Possible Sentencing Disparity

8 In arguing that the district court erred in failing to
9 consider "the need to avoid unwarranted sentence disparities
10 among defendants with similar records who have been found guilty
11 of similar conduct," 18 U.S.C. § 3553(a)(6), Irving contends that
12 the district court was required to consider "statistics kept by
13 the Sentencing Commission regarding sentences imposed locally and
14 nationally on similarly situated offenders." (Irving brief on
15 appeal, at 29.) We find no merit in this contention.

16 Preliminarily, we note that Irving relies on the
17 statistics found in the United States Sentencing Commission
18 Statistical Information Packet, Fiscal Year 2004, Second Circuit,
19 Table 7. That Table, however, refers to "Sexual Abuse" crimes
20 generally and provides no assurance of comparability because it
21 does not distinguish between defendants who committed crimes of
22 sexual abuse against children and those who committed such crimes
23 against adults. And nothing reveals how many other defendants
24 went to the lengths that Irving did to secure his victims. The
25 district court was not required to consult these statistics.

1 "[A]verages of sentences that provide no details underlying the
2 sentences are unreliable to determine unwarranted disparity
3 because they do not reflect the enhancements or adjustments for
4 the aggravating or mitigating factors that distinguish individual
5 cases." United States v. Willingham, 497 F.3d 541, 544 (5th Cir.
6 2007).

7 More importantly, "a reviewing court's concern about
8 unwarranted disparities is at a minimum when a sentence is within
9 the Guidelines range," id. at 545. The "avoidance of unwarranted
10 disparities was clearly considered by the Sentencing Commission
11 when setting the Guidelines ranges." Gall, 128 S. Ct. at 599.
12 Thus, where, as here, "the District Judge correctly calculated and
13 carefully reviewed the Guidelines range, he necessarily gave
14 significant weight and consideration to the need to avoid
15 unwarranted disparities." Id.; see also United States v.
16 Boscarino, 437 F.3d 634, 638 (7th Cir. 2006) ("A sentence within a
17 properly ascertained range . . . cannot be treated as unreasonable
18 by reference to § 3553(a)(6)."), cert. denied, 127 S. Ct. 3041
19 (2007).

20 The district court here stated that it had "considered all
21 of the factors enumerated in 28 U.S.C. § 3553," Irving III, 2007
22 WL 831814, at *1, a statement that is well supported by the
23 detailed explanations given by the court in imposing sentence.

1 D. Double Jeopardy

2 The Double Jeopardy Clause provides that no person shall
3 "be subject for the same offence to be twice put in jeopardy of
4 life or limb." U.S. Const. amend. V. As to whether two
5 convictions are for the same offense where "'the same act or
6 transaction constitutes a violation of two distinct statutory
7 provisions, the test to be applied . . . is whether each provision
8 requires proof of a fact which the other does not.'" Rutledge v.
9 United States, 517 U.S. 292, 297 (1996) (quoting Blockburger v.
10 United States, 284 U.S. 299, 304 (1932)). Typically, when one
11 offense is lesser than and wholly included within another offense,
12 the two offenses are considered to be the same for double jeopardy
13 purposes. See, e.g., Rutledge, 517 U.S. at 297 & n.6. In Ball v.
14 United States, 470 U.S. 856 (1985), for example, the Court held
15 that statutes directed at "receipt" and "possession" of a firearm
16 amounted to the "same offense" for double jeopardy purposes, in
17 that proof of receipt "necessarily" included proof of possession.
18 Id. at 861-64 (emphasis in original).

19 While it is permissible to prosecute a defendant
20 simultaneously on two or more counts charging offenses that are
21 the same for double jeopardy purposes, the Double Jeopardy Clause
22 protects him against multiple punishments for the same offense.
23 When the jury returns verdicts of guilty on more than one such
24 count, the district court should enter judgment on only one. See,
25 e.g., id. at 865; Illinois v. Vitale, 447 U.S. 410, 415 (1980).

1 Two of our Sister Circuits have ruled that a defendant's
2 convictions of both "receiving and possessing the same images of
3 child pornography" violated his right to be free from double
4 jeopardy, United States v. Miller, 527 F.3d 54, 58 (3d Cir. 2008)
5 ("Miller"); see United States v. Davenport, 519 F.3d 940, 947 (9th
6 Cir. 2008) ("Davenport"), reasoning that to receive an item means
7 to take possession of it, see Miller, 527 F.3d at 71 & n.15;
8 Davenport, 519 F.3d at 943; see also United States v. Morgan, 435
9 F.3d 660, 662-63 (6th Cir. 2006) (referring briefly in dicta to
10 possession of child pornography as a lesser-included offense of
11 receipt). But see Missouri v. Hunter, 459 U.S. 359, 366-68
12 (1983) (the presumption against allowing multiple punishments for
13 the same crime may be overcome if there is a clear indication of
14 legislative intent to allow courts to impose them); id. at 368
15 ("Where Congress intended . . . to impose multiple punishments,
16 imposition of such sentences does not violate the Constitution.")
17 (quoting Albernaz v. United States, 450 U.S. 333, 344 (1981)
18 (emphasis in Hunter)); Davenport, 519 F.3d at 948-49 (Graber, J.,
19 dissenting) (expressing the "view[that] Congress clearly intended
20 to authorize cumulative punishment for receipt of child
21 pornography and possession of child pornography," as the two
22 prohibitions are directed at "distinct harms").

23 This Court in United States v. Anson, No. 07-0377, 2008 WL
24 4585338 (2d Cir. Oct. 15, 2008) ("Anson"), considered the
25 arguments of a defendant who had been convicted of receiving and
26 possessing child pornography, but we did not reach the merits of

1 the double jeopardy issue because it was possible that the jury
2 had found the defendant guilty of receiving one group of images
3 and guilty of possessing a different group. Compare Anson with
4 Miller, 527 F.3d at 58 (defendant convicted of "receiving and
5 possessing the same images"). The defendant in Anson had not
6 requested a jury charge that would have instructed the jury that
7 the same images could not support guilty verdicts on both counts.
8 We concluded, citing United States v. Washington, 861 F.2d 350,
9 352-53 (2d Cir. 1988) ("Washington"), that any objection on the
10 ground that both verdicts might have been based on the same set of
11 images was waived. See Anson, 2008 WL 4585338, at *4. In
12 Washington, we had stated that if a defendant believes that the
13 evidence on which the jury might rely in its consideration of
14 multiple counts would expose him to multiple punishments for the
15 same offense, he must request an instruction that ensures that the
16 jury not consider evidence on which a conviction on a given count
17 cannot properly be based; we ruled that in the absence of such a
18 request the objection is deemed waived. See Washington, 861 F.2d
19 at 352-53; see also id. at 353 ("it is not plain error to fail to
20 give such a[n unrequested] charge").

21 On the present appeal, although Irving had not made a
22 double jeopardy argument, this Court sua sponte requested that the
23 parties address the issue of whether Irving's right to be free
24 from double jeopardy was violated by the entry of judgment
25 convicting him on both count 4 and count 5. In response, Irving
26 contends that the entry of judgment on both convictions violated

1 the Double Jeopardy Clause because receipt of child pornography
2 and possession of child pornography are, for double jeopardy
3 purposes, "the same crime," as a person "cannot receive child
4 pornography without possessing it." (Irving Nov. 13, 2008 letter
5 brief on appeal at 4, 5.) The government, in addition to
6 contending that Irving's argument is procedurally barred, contends
7 that there was no double jeopardy violation. It argues, inter
8 alia, that Congress evidently intended to create separate and
9 distinct crimes, as the prohibition against possession of child
10 pornography was added to an existing criminal scheme that
11 prohibited receipt of such pornography and the prohibitions
12 against receipt and possession are directed toward different
13 evils. The government points out that "the receiver [of child
14 pornography] creates a market for exploitation and production,
15 whether or not he retains them," whereas "the possessor (i.e.,
16 retainer) often uses the pornography to seduce children and whet
17 his sexual appetite, and also helps create a permanent record of
18 the exploitation." (Government Nov. 13, 2008 letter brief on
19 appeal at 19.)

20 This case is similar to Anson, and although we decided
21 Anson by nonprecedential summary order, "[d]enying summary orders
22 precedential effect does not mean that the court considers itself
23 free to rule differently in similar cases," Order dated June 26,
24 2007, adopting 2d Cir. Local R. 32.1. In the district court,
25 Irving raised no double jeopardy issue with respect to the counts
26 charging him with receiving and possessing child pornography,

1 either by requesting a jury instruction or a special verdict that
2 would have required the jury to specify which of the 76 images it
3 relied on in returning verdicts of guilty on the respective child
4 pornography counts, or by requesting that the court enter judgment
5 on only count 4 or 5, but not both, on the ground that they
6 resulted in two convictions for the same offense. And in this
7 Court, Irving made no double jeopardy challenge to the district
8 court's entry of judgment on both counts, either in his initial
9 appeal or in his original briefs in the present appeal.
10 Nonetheless, "[a] plain error that affects substantial rights may
11 be considered even though it was not brought to the court's
12 attention." Fed. R. Crim. P. 52(b).

13 In order to reverse on the ground of plain error, "there
14 must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s]
15 substantial rights.'" Johnson v. United States, 520 U.S. 461,
16 467-68 (1997) (quoting United States v. Olano, 507 U.S. 725, 732
17 (1993)). An error is "plain" if the ruling was contrary to law
18 that was clearly established by the time of the appeal. See
19 Johnson, 520 U.S. at 468. "If all three conditions are met, an
20 appellate court may then exercise its discretion to notice a
21 forfeited error, but only if (4) the error '"seriously affect[s]
22 the fairness, integrity, or public reputation of judicial
23 proceedings.'" Id. (quoting Olano, 507 U.S. at 732 (quoting
24 United States v. Young, 470 U.S. 1, 15 (1985)) (other internal
25 quotation marks omitted)).

1 We conclude that Irving has not met this standard. First,
2 assuming that possessing child pornography is a lesser-included
3 offense of receiving such pornography, a question we need not
4 resolve here, it remains unclear that the entry of judgment on
5 both count 4 and count 5 in this case was error. The court had
6 instructed the jury that the statute under which Irving was
7 charged in count 4 provided that "'Any person who knowingly
8 receives or distributes any material that contains child
9 pornography that has been mailed, or shipped or transported in
10 interstate or foreign commerce by any means, including by
11 computer' commits a crime." (Trial Transcript ("T.Tr."), at 537
12 (quoting former 18 U.S.C. § 2252(a)(2)(B)) (emphases ours).) As
13 to count 5, the court instructed the jury that the government was
14 required to prove that Irving "possessed three or more images of
15 child pornography." (T.Tr. 544, 545 (emphasis added)). We note
16 that, in giving this instruction, the court apparently invoked the
17 version of § 2252A(a)(5)(B) that was in effect from September 30,
18 1996, through October 29, 1998, which prohibited possession of
19 "material that contains 3 or more images of child pornography,"
20 rather than the stricter version of that section that was in
21 effect from October 30, 1998, through November 1, 2002. The
22 latter version of § 2252A(a)(5)(B) covered most of the period from
23 in or about July 2000 through May 6, 2003--during which time
24 Irving possessed the images--and prohibited possession of
25 "material that contains an image of child pornography," setting no
26 threshold number of images. In any event, given that the

1 government introduced Irving's computer hard drive containing 76
2 images of child pornography, the effect of these instructions was
3 to allow the jury to find Irving guilty of possessing child
4 pornography based on any three of those 76 images and guilty of
5 receiving child pornography based on any one of the 76 images,
6 including 73 that were not needed for the return of a verdict of
7 guilty on the possession count. If the jury's verdicts on counts
8 4 and 5 were based on different images, there was no double
9 jeopardy violation in the entry of judgment on both counts.

10 Second, even if the jury based its verdicts on counts 4
11 and 5 on the same images, it is questionable whether we could call
12 that result a "plain" error given the lack of a clearly
13 established principle that possessing child pornography is a
14 lesser-included offense of receiving such pornography. At the
15 time of trial, no court of appeals had so held; as of the writing
16 of this opinion, this Court still has not so held; so far as we
17 are aware at the present time, only the Third and Ninth Circuits
18 have so held, with a member of the Ninth Circuit panel in
19 Davenport dissenting; and the Seventh Circuit, in the context of a
20 Guidelines challenge, has held it reasonable to impose different
21 base offense levels for receiving and possessing child
22 pornography on the ground that "possession and receipt are not the
23 same conduct and threaten distinct harms," United States v.
24 Myers, 355 F.3d 1040, 1043 (7th Cir. 2004).

25 Finally, even if the first three Olan factors were met,
26 we could not conclude that Irving's convictions on both counts 4

1 and 5 seriously affect the fairness, integrity, or public
2 reputation of judicial proceedings. It was within Irving's power
3 to request clarifying instructions or a special verdict to have
4 the jury particularize the bases of its verdicts on those counts.
5 It hardly serves the interests of fairness to overturn verdicts
6 that his inaction allowed to be ambiguous and that may be
7 substantively unflawed.

8

CONCLUSION

9 We have considered all of Irving's arguments on this
10 appeal and have found them to be without merit. The order of the
11 district court is affirmed.