No. 3:07-CR-00082-VEH-JEO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

Case No. 3:07-CR-00082-VEH-JEO

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN PILATI,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES MAGISTRATE COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

BRIEF FOR THE UNITED STATES AS APPELLEE

ALICE H. MARTIN
United States Attorney

GRACE CHUNG BECKER
Acting Assistant Attorney General

MARK L. GROSS
CONOR B. DUGAN
Attorneys
United States Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
Telephone: (202) 616-7429
Fax: (202) 514-8490
E-mail: Conor.Dugan@usdoj.gov

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons may have an interest in the outcome of this case:

A. Stephen J. Curran, Attorney for the United States, United States Department of Justice, Civil Rights Division, Criminal Section, Washington, D.C.

B. Conor B. Dugan, Attorney for the United States, United States Department of Justice, Civil Rights Division, Appellate Section, Washington, D.C.

C. Bruce A. Gardner, Esq., Counsel for defendant-appellant John Pilati, Huntsville, Alabama.

D. Mark L. Gross, Attorney for Respondent, Deputy Chief, United States Department of Justice, Civil Rights Division, Appellate Section, Washington, D.C.

E. Matthew Hart, Assistant United States Attorney, United States Attorney's Office for the Northern District of Alabama, Birmingham, Alabama.

F. Alice H. Martin, United States Attorney for the Northern District of Alabama, Birmingham, Alabama.

G. The Honorable John E. Ott, United States Magistrate Judge for the Northern District of Alabama.

H. John Pilati, Defendant.

STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose defendant's request for oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULE:

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STATEMENT OF JURISDICTION

The magistrate court had jurisdiction under 18 U.S.C. 3401. After a jury verdict of guilty, the magistrate judge sentenced John Pilati on March 6, 2008, and entered final judgment against Pilati on March 7, 2008. Doc. 75.[1] Pilati filed a timely notice of appeal on March 10, 2008. Doc. 76. This Court's jurisdiction arises under Federal Rule of Criminal Procedure 58(g) and Local Rule 73.1(c).

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[1] This brief uses the following abbreviations: "Tr.__" refers to the page number of the trial transcript. "S. Tr.__" refers to the page number of the sentencing transcript. "Doc. __ at __" refers to the document number on the district court docket sheet, followed by a page number of the document, if applicable. "Br. ___" refers to defendant John Pilati's opening brief.

STATEMENT OF THE ISSUES

1. Whether the jury was required to make a specific finding as to victim A.Y.'s age.

2. Whether the magistrate court erred when it found that victim A.Y. was 17 at the time Pilati fondled A.Y.'s genitals and that, therefore, Pilati was required to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA).

STATEMENT OF THE CASE

On March 2, 2007, a four-count indictment was filed against defendant John Pilati. On May 3, 2007, a five-count superseding indictment was filed against Pilati, alleging various civil rights violations. At the time of the offenses, Pilati was the District Attorney of Franklin County, Alabama.

Count 1 charged that in or about March 2001 through June 2001, Pilati, while acting under color of law, fondled the scrotum and penis of S.T., willfully depriving S.T. of his right to be free from unreasonable search in violation of 18 U.S.C. 242. Doc. 21 at 1. Count 2 charged that in or about May 2001, Pilati, while acting under color of law, fondled the testicles, penis, and buttocks of J.H., willfully depriving J.H. of his right to be free from unreasonable search, in violation of 18 U.S.C. 242. Doc. 21 at 2. Count 3 charged that in or about April 2002, Pilati, while acting under color of law, forced A.M. to disrobe until he was completely naked and then fondled A.M.'s scrotum and buttocks, willfully depriving A.M. of his right to be free from unreasonable search

in violation of 18 U.S.C. 242. Doc. 21 at 2. Count 4 charged that on or about December 16, 2002, Pilati, while acting under color of law, stroked the testicles of A.Y., willfully depriving A.Y. of his right to be free from unreasonable search in violation of 18 U.S.C. 242. Doc. 21 at 3. Count 5 charged that on or about February 2004, Pilati, while acting under color of law, forced D.M. to disrobe until he was completely naked and then touched D.M.'s genitals, willfully depriving D.M. of his right to be free from unreasonable search in violation of 18 U.S.C. 242. Doc. 21 at 3.

On November 1, 2007, the jury returned a guilty verdict on all counts. Tr. 603; Doc. 62; Doc. 75 at 1. On March 6, 2008, the magistrate court sentenced Pilati to a term of imprisonment of 42 months – consecutive terms of 8 months on Counts 1-3 and Count 5, and a consecutive term of 10 months on Count 4, and 12 months of supervised release. S. Tr. 36-377; Doc. 75 at 2-3. As a special condition of supervised release, the magistrate required that the defendant register as a sex offender under the notification provisions (Sexual Offender Registration and Notification Act or SORNA) of the Adam Walsh Child Protection Act of 2006, 42 U.S.C. 16901, *et seq*. S. Tr. 37; Doc. 75 at 5.

STATEMENT OF FACTS

1. Overview[2]

John Pilati was elected District Attorney of Franklin County, Alabama, in 1998, and served from January 1999 through April 2004. Tr. 198-199. In 2000, Pilati

[2] Because Pilati's brief focuses on a discrete legal issue, this factual recitation is abbreviated.

established a misdemeanor drug testing program under which, as a part of plea bargains, defendants agreed to submit to drug testing. Tr. 201-203, 205. Pilati maintained the list of the individuals in the program, Tr. 206; he decided when someone was called in for a drug test, and he performed a majority of the drug tests himself. Tr. 207, 209.

The drug tests were urinalysis screens. Tr. 77, 93, 171, 423. The evidence at trial established that, on a number of occasions, Pilati used the drug tests as a pretense to touch and fondle the genitals of young men.[3] Tr. 110, 246, 323, 395-396, 428. Typically, Pilati would call the individual into the District Attorney's Office and require him to take a urine test either in Pilati's private bathroom or in the public bathroom. Tr. 214. Pilati also required at least one young man to report to his house for tests. See Tr. 52.

Pilati would make these young men fully or partially undress and then would fondle their genitalia under the pretense of making sure they were not attempting to cheat on their tests. See, *e.g.*, Tr. 79, 95, 130, 166, 174-175, 246, 270, 394. All told, in addition to the conduct underlying Count 4 at issue in this appeal, the jury heard evidence that Pilati fondled the genitalia of five other young men (S.T., J.H., A.M., D.M., and G.P.) approximately 13-15 times. Tr. 77-80, 94-96, 101-102, 105, 110-111 (A.M.); 162-163, 166-168, 169, 170, 172, 174-175 (S.T.); 246-247 (G.P.); 394-396 (J.H.); 423, 427-429 (D.M.). The jury also heard testimony about two other incidents in

[3] Contrary to Pilati's description of these incidents as allegations, see Br. 3 & 5, the jury, by its verdict, found that these incidents actually occurred.

which Pilati made a young man (D.M.) strip, but had D.M. lift his own genitals. Tr. 429. Numerous witnesses testified that these drug tests were like no others they ever took. See Tr. 93-94, 178, 242, 398-399, 434.

2. Facts Related To Count 4

Count 4 is the count that involved the abuse of a minor. Victim A.Y. was 22 years old on October 30, 2007, at the time of trial. He testified that he first met Pilati when Pilati was his recreational league basketball coach. Tr. 314. When A.Y. was 16 years old, he was arrested for armed robbery. Tr. 315-316, 330. A.Y. pled guilty and was sentenced to 10 years with all but 20 months suspended. Tr. 316. A.Y. entered his plea in December 2002 and was to report for his sentence on January 1, 2003. Tr. 317, 332.

On December 16, 2002, A.Y. was in a car with friends when Pilati pulled up with the police lights on his car operating. Tr. 318. Pilati specifically asked for A.Y., and A.Y. got out of the car. Tr. 318. Police arrived, arrested and handcuffed A.Y., and took him to the police station. Tr. 318-319. There, Pilati told A.Y. to take a drug test. Tr. 319. A.Y. refused, but Pilati told him that if he refused, Pilati would write him up and the write-up would go on A.Y.'s Department of Corrections record. Tr. 319, 321. A.Y. then relented, and Pilati took A.Y., still handcuffed, to the restroom for a drug test. Tr. 321, 324-325. The two were alone in the bathroom. Tr. 322. Pilati patted A.Y. down and then unbuttoned A.Y.'s pants, unzipped A.Y.'s zipper, and put his "hand down

[A.Y.'s] pants and started moving it around in [his] crotch area." Tr. 322-323. Pilati also "slowly stroked [A.Y.'s] testicles." Tr. 323. Pilati then told A.Y. to urinate into a cup and held A.Y's penis for about 15 seconds. Tr. 324.

3. Sentencing

At sentencing, the government argued that, as a special condition of supervised release, Pilati be ordered to register as a sex offender for his commission of a sex offense against the minor A.Y. S. Tr. 8. Pilati argued that registration under SORNA required "a specific finding that the defendant committed a sexual offense and that it must be . . . pled and proved, for the registration aspect" of the statute to be "triggered." S. Tr. 7-8. The magistrate court disagreed and held that "[b]ased upon the evidence * * * in Count Four dealing with the minor A.Y., it is a sex offense as the court considered under the guidelines as well under 18 U.S.C. 2244. Therefore the court finds that the defendant will be required to register." S. Tr. 9; see also S. Tr. 37.

SUMMARY OF ARGUMENT

This Court should affirm the magistrate court's order that Pilati register as a sex offender under the Sex Offender Registration and Notification Act (SORNA).

1. It was proper for the magistrate court to impose this condition without the jury making a specific finding as to the victim's age. SORNA is a civil remedy and, therefore, the jury was not required to find that A.Y. was a minor at the time of the sexual offense in order for the court to impose the registration requirement.

2. At sentencing, it was undisputed that A.Y. was a minor (under age 18) when Pilati molested him, and ample proof supports that finding. Not only did Pilati fail to argue at sentencing that A.Y. was not a minor, but the evidence before the court and in the Presentence Investigation Report (PSR) indicated that A.Y. was a minor at the time of the offense.

Defendant Pilati's arguments concerning the age of majority in other provisions of the United States Code is irrelevant to SORNA's definition of minor, and irrelevant to the sentencing issue here. Pilati's fondling of A.Y. was a sex offense under SORNA. SORNA defines a minor as an individual under 18. Thus, because A.Y. was under 18 at the time of the offense, Pilati is required to register as a sex offender under SORNA. Thus, the magistrate court properly required such registration.

ARGUMENT

I

THE JURY WAS NOT REQUIRED TO MAKE A SPECIFIC FINDING AS TO A.Y.'S AGE

Pilati argues that the jury was required to make a specific finding as to A.Y.'s age at the time of the offense. Br. 5. This argument is without merit.

A. Standard Of Review

This Court's review in this case is as an appellate court under the Federal Rules of Appellate Procedure. Fed. R. Crim. P. 58(g)(2)(D) ("The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to

the court of appeals from a judgment entered by a district judge."); see also *United States* v. *Bursey*, 416 F.3d 301, 305-306 (4th Cir. 2005) ("An appellate review conducted by a district court after a bench trial before a magistrate judge is not a trial *de novo*; rather, the district court utilizes the same standards of review applied by a court of appeals in assessing a district court conviction."), cert. denied, 546 U.S. 1139 (2006). This Court, therefore, must review "the terms of a supervised release for abuse of discretion." *United States* v. *Nash*, 438 F.3d 1302, 1304 (11th Cir. 2006).

"[I]f a defendant fails to *clearly* articulate a specific objection during sentencing, the objection is waived on appeal" and this court must "confine" its review to "plain error." *United States* v. *Zinn*, 321 F.3d 1084, 1088 (11th Cir. 2003), cert. denied, 540 U.S. 839 (2003); *Nash*, 438 F.3d at 1304. A defendant must "raise that point in such clear and simple language that the trial court may not misunderstand it." *United States* v. *Massey*, 443 F.3d 814, 819 (11th Cir. 2006) (quoting *United States* v. *Riggs*, 967 F.2d 561, 565 (11th Cir. 1992)).

Under plain error review, an appellant must "establish (1) that there was error (2) that was plain; (3) that affected his substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceeding." *United States* v. *Straub*, 508 F.3d 1003, 1008 (11th Cir. 2007), cert. denied, 129 S. Ct. 40 (2008). Error is plain only if it is "clear or obvious." *Ibid*. (internal citations and quotations omitted). Where "the explicit language of a statute or rule does not specifically resolve an issue,

there can be no plain error where there is no precedent from the Supreme Court or [11th Circuit] directly resolving it." *United States* v. *Chau*, 426 F.3d 1318, 1322 (11th Cir. 2005) (internal citations and quotations omitted).

B. The Jury Did Not Need To Make A Specific Finding As To A.Y.'s Age

Pilati argues that the jury was required to make a specific factual finding as to A.Y.'s age. Br. 5. Pilati failed to raise this argument with the magistrate court, and therefore this Court should review it under a "plain error" standard. Moreover, Pilati's argument, for which he cites no authority, is incorrect.

In *United States* v. *Booker*, 543 U.S. 220, 244 (2005), the Supreme Court held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." This requirement does not apply when a court imposes a civil requirement or civil remedy on a criminal defendant, however. See, *e.g.*, *United States* v. *Swanson*, 483 F.3d 509, 516 (7th Cir.) (holding in the context of restitution that because "restitution is a civil remedy, rather than a criminal punishment, it may be determined by a judge using a preponderance of the evidence standard and remains unaffected by *Booker*."), cert. denied, 128 S. Ct. 455 (2007); *United States* v. *Danford*, 435 F.3d 682, 689 (7th Cir. 2006) ("A *civil remedy* included with a criminal judgment does not make it a penalty of

a crime that must be established by a jury beyond a reasonable doubt.") (emphasis added and internal quotation marks omitted).

SORNA's registration requirement is not a criminal sentence. SORNA, 42 U.S.C. 16901 *et seq*., requires jurisdictions to maintain sex offender registries, 42 U.S.C. 16912, establishes a national registry, 42 U.S.C. 16919 & 16920, and mandates that a sex offender register and keep such registration current in each jurisdiction where he lives, 42 U.S.C. 16913. While there is a related criminal statute that punishes those who fail to register, 18 U.S.C. 2250, that action is punishment for failure to comply with the civil registration requirements, not the requirement of registration itself.

Numerous courts have held that SORNA's registration requirements are a civil remedy or requirement. In *United States* v. *Byun*, 539 F.3d 982 (9th Cir. 2008), petition for cert. pending, No. 08-7254 (filed Nov. 12, 2008), the defendant appealed the district court's requirement that she register as a sex offender under SORNA after pleading guilty to transporting an alien for the purpose of prostitution. The defendant's plea revealed that the alien was a minor, but the underlying crime did not require that the victim be a minor. *Id*. at 984. The court stated that "[w]ere we interpreting a *criminal statute*, we would be considerably more hesitant to conclude that an element, such as the age of a victim, can be determined by a judge after examining the underlying facts of a crime. * * * Here, however, we are faced not with a statute that imposes *criminal punishment*, but rather with a *civil statute* creating registration requirements." *Id*. at 993

n.14 (emphasis added); see also, *United States* v. *May*, 535 F.3d 912, 919-920 (8th Cir. 2008); *United States* v. *Reeder*, 2008 WL 4790114, at *8 (W.D. Tex. Oct. 31, 2008); *United States* v. *Vasquez*, 576 F. Supp. 2d 928, 942-944 (N.D. Ill. 2008); *United States* v. *Torres*, 573 F. Supp. 2d 925, 946 (W.D. Tex. 2008).

That SORNA is a civil measure is further evidenced by the fact that it is codified at 42 U.S.C. 16901 *et seq*., rather than in a criminal title of the United States Code. See, *e.g.*, *Torres*, 573 F. Supp. 2d at 946 ("Indeed, the entire SORNA regulatory scheme other than its enforcement provision is found in Title 42 of the United States Code, yet another indication that Congress believed it was creating a civil, nonpunitive regime for the purposes of public safety.") (internal quotations and citations omitted). Thus, the jury was not required to find A.Y.'s age.[4]

Even if this Court finds that the magistrate court erred by not asking the jury to find A.Y.'s age at the time of the fondling incident, such error certainly was not plain. There is no clear precedent requiring a jury to find that fact as a precondition to registration of a sex offender under SORNA, and the balance of case law supports the magistrate court's approach. At the very least, the statute does not explicitly require such a jury finding and there is no clear Supreme Court or the Eleventh Circuit precedent requiring it either. Finally, as shown below, A.Y. *was* a minor at the time of

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[4] Additionally, as explained further below, 18 U.S.C. 3583(d) required that, as special condition of supervised release, the magistrate court impose registration under SORNA. None of the mandatory special conditions of supervised release in 3583(d) requires specific jury findings.

the crime. Thus, any failure of a jury to find this fact did not affect Pilati's substantial rights.

II

THE MAGISTRATE COURT DID NOT ERR WHEN IT FOUND THAT A.Y. WAS A MINOR AND REQUIRED PILATI TO REGISTER AS A SEX OFFENDER UNDER SORNA

Pilati argues that there was no proof that A.Y. was less than 18 years of age at the time of the fondling incident. Br. 5. Furthermore, Pilati argues, based on a statute irrelevant to this case, that the magistrate court erred as a matter of law when it required him to register under SORNA. Br. 5-6. His argument runs as follows: (1) the magistrate court, in imposing registration under SORNA, likened Pilati's crime to 18 U.S.C. 2244; (2) 18 U.S.C. 2244, in turn, references 18 U.S.C. 2243(a), which describes a minor as being ages 12 through 15; (3) SORNA defines a minor as being under 18 years of age; (4) 18 U.S.C. 2244 and SORNA conflict and, therefore the magistrate court erred as a matter of law in imposing registration under SORNA. Pilati's arguments fail.

A. Standard Of Review

"Facts considered at sentencing need to be proved by only a preponderance of the evidence." *United States* v. *Alred*, 144 F.3d 1405, 1417 (11th Cir. 1998). Typically, a trial court's factual findings are reviewed for clear error. *United States* v. *Harness*, 180 F.3d 1232, 1234 (11th Cir. 1999). When, however, a defendant fails to object to a trial

court's "findings of fact and sentencing calculations," review is limited to plain error. *Ibid*. Questions of law, typically, are reviewed *de novo*. See, *e.g.*, *United States* v. *Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005) ("This is a legal question that we review de novo."). Where, as here, the defendant failed to object at sentencing on the grounds asserted on appeal, this Court reviews under a plain error standard. See *e.g.*, *United States* v. *Smith*, 532 F.3d 1125, 1126 (11th Cir. 2008), cert. denied, 129 S. Ct. 517 (2008); *United States* v. *De La Garza*, 516 F.3d 1266, 1269 (11th Cir. 2008), petition for cert. pending, No. 07-11001 (filed May 15, 2008). See also supra pp. 8-9.

B. The Record Supports The Conclusion That A.Y. Was 17 When Pilati Fondled His Genitals

First, Pilati did not contest A.Y.'s age at sentencing. The Pre-Sentence Investigation Report (PSR) that was before the magistrate court at sentencing stated that "A.Y. was seventeen years old" in December 2002 when "he was sentenced to twenty months in jail for armed robbery." PSR at ¶ 17. Pilati did not object at his sentencing to the PSR's description of A.Y.'s age in December 2002 as 17, or the fact that A.Y. was a minor when Pilati fondled him. In fact, in his first set of objections to the PSR, Pilati appears to concede that A.Y. was a minor at the time of the fondling incident. Doc. 65 at 1. Notably, Pilati did not say then and does not say now that anyone testified to the

contrary. The only objection to the PSR Pilati made about A.Y. concerned the PSR's finding that A.Y. was handcuffed at the time of fondling. Doc. 71 at 2.[5]

In short, both the government and Pilati *agreed* at the time of sentencing that A.Y. was a minor at the time Pilati fondled his genitals. See S. Tr. at 8 (government attorney saying, without objection from Pilati's attorney, that the registration requirement applies only to Count 4 because A.Y. was "the only minor"). Thus, the only contested issue in front of the magistrate court concerning Count 4 was whether the underlying conduct was sufficiently sexual in nature to require registration under SORNA. See Addendum to PSR at 2 (stating that the Probation Office defers to the Court on the question of whether registration under SORNA required).[6] The fact that A.Y. was a minor was not in dispute.

Based on this undisputed nature of A.Y.'s age, the magistrate simply noted that A.Y. was a minor at the time of the incident. A reading of the transcript makes clear that the magistrate court was focusing on the contested issue – the underlying conduct of the 18 U.S.C. 242 violation and whether it constituted a sex offense. The magistrate court stated: "Based upon the evidence before this court, in Count Four dealing with

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[5] At trial, contrary to Pilati's suggestion, Br. 5, A.Y. testified that he was *16*, not 17, at the time of his original arrest for armed robbery, Tr. 315-316, 330. He also testified that he was 22 at the time of Pilati's trial on October 30, 2007. Tr. 314. This means that on October 30, 2002, A.Y. was 17 years old.

[6] This further indicates that A.Y.'s age was not in dispute. Had A.Y. been over 18 at the time of the incident, the Addendum would have indicated that Pilati was not subject to registration rather than deferring to the court.

the minor A.Y., it is a sex offense as the court considered under the guidelines as well under 18 U.S.C. 2244. Therefore the court finds that the defendant will be required to register." S. Tr. 9.

The Eleventh Circuit has held that the "failure to object to allegations of fact in a PSI admits those facts for sentencing purposes." *United States* v. *Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006), cert. denied, 127 S. Ct. 2096 (2007). In addition, it has held that "the failure to object to a district court's factual findings precludes the argument that there was error in them." *Ibid*. In light of this case law and Pilati's failure to object to PSR's description of A.Y. as a minor as well as the magistrate court's finding that A.Y. was a minor, his argument fails. Moreover, in the absence of any other evidence, the magistrate court's finding that A.Y. was a minor certainly is not plain error.

Finally, in the interest of clarifying the record, and to avoid spending judicial resources unnecessarily on a remand on this question, in a separate filing, the United States is moving to supplement the record with two documents under seal that confirm A.Y.'s age beyond any doubt. See Government's Motion to Supplement Record With Documents Under Seal. If accepted, these documents, A.Y.'s arrest records obtained by the FBI during its investigation of this case, would show that A.Y. was arrested for armed robbery in January 2002 when he was 16 and that he was arrested again in December 2002 when he was 17. Both show a birth date in 1985. For A.Y. to have been 18 at the time of the fondling, in December 2002, he would have had to have been

born in 1984 at the latest. Thus, as the evidence and the PSR indicated, as both parties agreed at sentencing, and as the magistrate court found, A.Y. was 17 when Pilati fondled him. The magistrate court committed no error, let alone plain error in so finding.

C. The Magistrate Judge Correctly Imposed The Condition of Registration Under SORNA

Pilati argues that there is a conflict between SORNA and 18 U.S.C. 2243(a), a statute prohibiting abusive sexual contact, regarding the definition of minor. Br. 5-6. This argument was not raised below and this Court reviews under a plain error standard. Under either standard – *de novo* or plain error – Pilati's argument fails. There is no doubt that the magistrate court's application of SORNA was proper.

First, it not clear why 18 U.S.C. 2244 should govern anything in this appeal. At sentencing, the magistrate court referenced 18 U.S.C. 2244 in passing, stating that the conduct in "Count Four dealing with the minor A.Y. * * * is a sex offense as the court considered under the guidelines as well under 18 U.S.C. 2244." S. Tr. 9. The magistrate court was merely analogizing Pilati's conduct to 18 U.S.C. 2244, which prohibits anyone, in certain federal jurisdictions, from "knowingly engag[ing] in or caus[ing] sexual contact with or by another person." See S. Tr. 9. Sexual contact is defined as "the 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). Pilati was never charged under 18 U.S.C. 2244, nor was registration under SORNA imposed because of anything to do with 18 U.S.C. 2244. The magistrate court was stating that Pilati's conduct was akin to the kind of sexual conduct prohibited by 18 U.S.C. 2244.[7]

The "conflict" between 18 U.S.C. 2244 and SORNA that Pilati attempts to raise here has no relevance for SORNA's registration requirements. SORNA specifically defines a minor as any "individual who has not attained the age of 18 years." 42 U.S.C. 16911(14). A.Y. was under 18 at the time of incident. The magistrate court's reference to 18 U.S.C. 2244 is no different than if it had compared Pilati's conduct charged under 18 U.S.C. 242 to other sexual offense statutes that defined minority differently from SORNA. That another statute has a different definition of minor is irrelevant to the question of whether Pilati is required to register under SORNA, which defines a minor as being under 18.

Moreover, as a matter of law, the magistrate court was required to impose registration under SORNA as a special condition of supervised release. 18 U.S.C. 3583(d) states that the court "shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act."

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[7] In addition to cross-referencing 18 U.S.C. 2243(a), which limits liability to victims ages 12 through 15, 18 U.S.C. 2244 also cross-references 18 U.S.C. 2241, 18 U.S.C. 2242, and 18 U.S.C. 2243(b), none of which defines minor or is limited to a specific age. See 18 U.S.C. 2244(a)(1)(2) & (4).

SORNA requires initial registration "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 42 U.S.C. 16913(b)(1). SORNA defines a "sex offender" as "an individual who was convicted of a sex offense." 42 U.S.C. 16911(1). Sex offense is defined as among other things as "a criminal offense that has an element involving a sexual act or sexual contact with another" or "a criminal offense that is a specified offense against a minor." 42 U.S.C. 16911(5)(A)(i) & (ii). A specified offense against a minor includes "[a]ny conduct that *by its nature* is a sex offense against a minor." 42 U.S.C. 16911(7)(I) (emphasis added).

When analyzing whether a particular offense against a minor constitutes a sex offense under SORNA, the court looks beyond the charged conduct – in this case 18 U.S.C. 242 – and examines the underlying conduct. Indeed, the Ninth Circuit employed this non-categorical approach to SORNA in its recent decision in *United States* v. *Byun*, 539 F.3d 982 (9th Cir. 2008). There, the defendant was convicted of three counts of alien smuggling in violation of 8 U.S.C. 1324 and 1328. Her plea agreement stated that she had induced a minor to come to Guam to work at a club and perform sexual acts for money and her probation officer required her to register under SORNA. *Id*. at 983-984.

The issue before the Ninth Circuit was whether "Byun's conviction for importation of an alien for purposes of prostitution [made] her a 'sex offender' for purposes of SORNA and thus subject to its registration requirements." *Byun*, 539 F.3d

at 986 (citation omitted). The court of appeals examined the question under 42 U.S.C. 16911(5)(A)(ii)'s definition of sex offense, namely, a "specified offense against a minor," and focused its analysis on 42 U.S.C. 16911(7)(I), which defines a "specified offense against a minor" as any "conduct that by its nature is a sex offense against a minor." *Id*. at 988. The Ninth Circuit rejected a categorical approach, stating that it could look to the "underlying facts of Byun's crime," to determine whether she had committed a sex offense. *Id*. at 990. The court held that "for the category of 'specified offense[s] against a minor,' it is the underlying 'conduct,' not the elements of the crime of conviction, that matter." *Id*. at 992. "[T]he underlying facts of a defendant's offense are pertinent in determining whether she has committed a 'specified offense against a minor' and is thus a sex offender." *Id*. at 993-994. In other words, the sexual nature of the crime against the minor required registration under SORNA.

Applying this approach to this case, the underlying facts show undeniably that Pilati's offense against A.Y. was "by its nature" a sex offense against a minor. A.Y. was a minor, as defined by SORNA, on December 16, 2002, and there is no dispute that Pilati's actions directed at A.Y. were sexual in nature. The magistrate court's order that Pilati register under SORNA was not error.[8]

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[8] Even if one conceded, for the sake of argument, that the magistrate court erred in its interpretation of SORNA, it certainly was not plain error, as Pilati directs this Court to no contrary Supreme Court or Eleventh Circuit precedent. Accordingly, even assuming *arguendo* some error, such error was not plain.

CONCLUSION

The Court should affirm the magistrate court's imposition of the special condition to register under SORNA.

Respectfully submitted,

ALICE H. MARTIN
United States Attorney

GRACE CHUNG BECKER
Acting Assistant Attorney General

s/ Conor B. Dugan

MARK L. GROSS
CONOR B. DUGAN
Attorneys
United States Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
Telephone: (202) 616-7429
Fax: (202) 514-8490
E-mail: Conor.Dugan@usdoj.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 5,135 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

In addition, I hereby certify that I have signed the original of the foregoing document and will retain the original signed document for a period not less than the maximum allowable time to complete the appellate process.

s/ Conor B. Dugan
CONOR B. DUGAN
Attorney

December 19, 2008

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that a copy of the foregoing will be provided to the defendant's attorney of record, via the CM/ECF system, this the 19th day of December, 2008.

I further certify that, on the same date, one copy of the United States' brief was sent by Overnight Federal Express Delivery to the Clerk of the United States District Court for the Northern District of Alabama and one copy of the United States' brief was sent by First Class Mail to the following:

Bruce A. Gardner, Esq.
125 Holmes Ave. N.W.
Hunstville, AL 35804-8636

s/ Conor B. Dugan
CONOR B. DUGAN
Attorney