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United States v. Lowe,
No. 24-51000, 163 F.4th 947
(5th Cir. Jan. 12, 2026) (published opinion)

APPENDIX BB1-6

U.S.S.G. § 2G2.1

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 12, 2026

Lyle W. Cayce
Clerk

No. 24-51000

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BAILEY WARREN LOWE,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:23-CR-154-1

Before SMITH, STEWART, and RAMIREZ, *Circuit Judges.*

JERRY E. SMITH, *Circuit Judge.*

Bailey Lowe, convicted of coercing and enticing a minor to engage in sexual activity, appeals a two-level enhancement for distribution of material involving sexual exploitation of a minor. Contrary to his assertion that he engaged in “mere” solicitation, Lowe became an active participant in the distribution—he threatened to expose the female child victim H.H., specified which intimate pictures he desired, demanded when he wanted the images sent, articulated the manner and means of sending them, and coerced the child victim into sending additional images when she failed to send precisely what he contemplated. Because Lowe had a sufficient degree of

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control over the child whom he coerced, the district court did not err in imposing the distribution enhancement. We affirm.

I.

Lowe repeatedly contacted H.H., who was then 13 years old, and solicited nude photographs from her using the social media application Snapchat. In fact, H.H. told “Warren” that she was 13 years old. “Warren” initially told H.H. that he was 17 years old but later disclosed his true age, which H.H. recalled was approximately 22 to 23.

“Warren” demanded that H.H. send him pictures of her nude breasts and vagina. He also “demanded” that H.H. send a video of herself inserting objects into her vagina. On at least one occasion, “Warren” demanded H.H. “send nudes now” and placed an emphasis on “now.” When H.H. was slow to respond, “Warren” threatened to “block” or “expose” her. And when H.H. sent pictures of her nude breasts to “Warren,” he demanded to see her “other part,” which H.H. took to mean her vagina. If H.H. refused to comply with his requests because she was “on her period,” “Warren” would become angry and threaten to tell H.H.’s mother unless she complied with his requests “as soon as she was off her period.” While deployed, “Warren” “instructed H.H. to record herself having sex with other people and send him the videos.” She did not comply with that demand, and he became angry, threatening to expose her.

In 2022, “Warren” drove to H.H.’s great aunt’s house in Troup, Texas, to meet H.H. in person and advised her to “sneak out” so they could “have fun” and “have sex.” After “Warren” arrived at the house, H.H. suggested parking in a nearby field, where “Warren” removed H.H.’s pajama pants and underwear and threw them onto the floorboard in the backseat. He “laid down” on top of H.H. and inserted his penis into her vagina. “While he was on top of her,” “Warren” asked H.H. how old she

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was, and she repeated that she was 13 years old. “Warren” “freaked out” and responded, “Oh shoot, well you better not tell no one because I’m 22 ... you can get me in a lot of trouble ... I’m in the Marines.” Undeterred, “Warren” continued to penetrate her and did not use a condom.

The FBI identified “Warren” as the instant defendant. When investigators reviewed electronic devices seized from Lowe’s home, they found multiple chat conversations between Lowe and H.H. as well as pornographic images and videos of H.H. They also identified multiple chat conversations between Lowe and ten other female victims ranging between 12 and 16 years old.

Lowe was charged with a single count of coercion and enticement of a minor to engage in sexual activity. 18 U.S.C. § 2422(b). He pleaded guilty without a plea agreement. The PSR calculated an offense level of 42 and recommended a two-level upward enhancement for knowingly engaging in distribution of material involving sexual exploitation of a minor. U.S.S.G. § 2G2.1(b)(3).

Lowe objected to the enhancement, contending that “distribution” does not include “mere solicitation” and that there was no evidence he had transferred H.H.’s images and videos to others or made them public. The probation officer, citing U.S.S.G. § 2G2.1 (comment n.3), said that the enhancement applied because Lowe had “aided, abetted, and induced the victim to produce child pornography” and send it to him via Snapchat.

Although Lowe reurged his objection at sentencing, the district court overruled it. Adopting the PSR, the district court indicated that the guideline range was 360 months to life. It sentenced Lowe to imprisonment for life, a lifetime of supervised release, and \$5,200 in fines and special assessments.

While imposing the sentence, the district court found Lowe’s conduct

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“reprehensible,” stating that “it’s hard to imagine how the people who created the guidelines could adequately capture what the appropriate sentence is for what Mr. Lowe did.” Noting that Lowe was in the military at the time, the court further explained “by that I mean [the guidelines] are far too low in my opinion for his conduct” and referred to Lowe as a “monster,” whose “conduct [wa]s beyond words” and “horrific.”

II.

A PSR “bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.” *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012). “[A] defendant must offer rebuttal evidence demonstrating that [facts contained in the PSR] are materially untrue, inaccurate or unreliable” where those facts “are supported by an adequate evidentiary basis with sufficient indicia of reliability.” *Id.* (internal quotation marks omitted). Mere objections are generally insufficient. *Id.*

III.

The issue is whether the district court erred by imposing an enhancement for distribution of material involving sexual exploitation of a minor. U.S.S.G. § 2G2.1(b)(3). It did not.

“[T]his court has not previously considered whether a defendant’s coercing a minor to take and send images of child pornography qualifies as ‘distribution’ under § 2G2.1(b)(3) and its relevant commentary.” *United States v. McGavitt*, 28 F.4th 571, 577 (5th Cir. 2022). That is the crux of this appeal.

Section 2G2.1(b)(3) states, “If the defendant knowingly engaged in distribution, increase by 2 levels.” To be clear, there is arguably some tension within the application notes of the guidelines. *See McGavitt*, 28 F.4th at

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577 (noting that there is “arguably some conflict between Application Note 1’s exclusion of ‘mere solicitation’ . . . and Application Note 3’s various inclusions”). We address them in turn.

Application Note 1 defines “distribution” as follows:

“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

U.S.S.G. § 2G2.1 cmt. n.1. Application Note 3 provides that a defendant knowingly engages in distribution if he “(A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.” U.S.S.G. § 2G2.1 cmt. n.3.

Lowe relies on Application Note 1 to contend that the enhancement should not apply because he merely solicited images and videos from H.H. without sharing, uploading, or downloading the materials to any file-sharing program. He also relies on cases in which courts have generally understood distribution as the sharing of images or videos with others.¹

The government, on the other hand, maintains that the enhancement applies because distribution is “broadly” defined as “any act” in Application Note 1, and Lowe induced and “demanded” that the victim produce child pornography; when H.H. was “slow to comply, Lowe would threaten to

¹ See *United States v. King*, 979 F.3d 1075, 1083 & n.3 (5th Cir. 2020) (declining to address the enhancement’s application but noting that there was no evidence that the defendant shared the images with others despite transferring images from his cell phone to computer disk).

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block or ‘expose’ her.” *See* U.S.S.G. § 2G2.1 cmt. n.3(B). The government also submits that “Lowe and H.H. agreed for her to produce and send him the child pornography,” constituting a conspiracy to distribute.” *See* U.S.S.G. § 2G2.1 cmt. n.3(C).

It strains credulity to suggest that Lowe, who demanded and coercively obtained child sexual abuse materials, had “merely” solicited them from a child victim. In fact, Lowe became an “active participant” in the distribution—he threatened to expose the female child victim, specified which intimate pictures he desired, demanded when he wanted the images sent, articulated the manner and means of sending them, and coerced the victim into sending additional images when she failed to send precisely what he contemplated. Lowe’s painstaking efforts, replete with instances of coercion and control, do not constitute mere solicitation.

Lowe’s reliance on the caselaw is inapposite. He cites *King*, where there was no evidence that the defendant shared the images with others despite transferring images from his cell phone to a computer disk. 979 F.3d at 1083 & n.3. *King* is distinguishable on at least two grounds. First, the court declined to address the enhancement’s application. *See id.* Second, the adult defendant in *King* “posed minors engaged in sexually explicit conduct and produced sexually explicit images of those minors using his cell phone.” *Id.* at 1078. Neither is the case here.

Similarly, Lowe’s reliance on out-of-circuit caselaw is mistaken. First, he cites a district court case that is distinguishable from the instant one.² Second, Lowe’s reliance on a Ninth Circuit case runs counter to his

² *See United States v. Merrill*, 578 F. Supp. 2d 1144, 1147 (N.D. Iowa 2008) (noting that the “[d]efendant *did not ask* [the child victim] to send him the fifteen photographs”) (emphasis added).

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position.³

Lowe overestimates the ramifications of this holding to the fate of Application Note 1, suggesting that “every time a defendant solicit[s] child pornography, it would be considered distribution.” That is inaccurate for at least two reasons. For one, there is not “mere” solicitation in the instant case. And second, courts can appropriately ascertain conduct, as here, that goes beyond “mere” solicitation such that the “mere” solicitation language is not rendered meaningless.

For the reasons above, “[a]s a whole, Section 2G2.1’s text and relevant commentary support the district court’s application of the enhancement.” *See McGavitt*, 28 F.4th at 576. Because the district court did not err in imposing a distribution enhancement, given that Lowe had a sufficient degree of control over the child whom he coerced, we decline to address harmless error.

AFFIRMED.

³ *See United States v. Hernandez*, 894 F.3d 1104, 1109 (9th Cir. 2018) (indicating that “*none*” of the cases that the defendant cited supported his “*narrow* reading” that a distribution enhancement “applies only if a defendant transmits illicit pornographic materials to a third party”) (emphasis added).

APPENDIX B

United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter Two. Offense Conduct (Refs & Annos)

Part G. Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity (Refs & Annos)

2. Sexual Exploitation of a Minor

This section has been updated. [Click here for the updated version.](#)

USSG, § 2G2.1, 18 U.S.C.A.

§ 2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

Effective: November 1, 2023 to October 31, 2025

(a) Base Offense Level: 32

(b) Specific Offense Characteristics

(1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels.

(2) (Apply the greater) If the offense involved--

(A) the commission of a sexual act or sexual contact, increase by 2 levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.

(3) If the defendant knowingly engaged in distribution, increase by 2 levels.

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler, increase by 4 levels.

(5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(6) If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise

solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by 2 levels.

(c) Cross Reference

(1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1996; November 1, 1997; November 1, 2000; May 1, 2001; November 1, 2001; November 1, 2003; November 1, 2004; November 1, 2009; November 1, 2016; November 1, 2023.)

COMMENTARY

<**Statutory Provisions:** 18 U.S.C. §§ 1591, 2251(a)-(c), 2251(d)(1)(B), 2260(a). For additional statutory provision(s), see Appendix A (Statutory Index).>

<**Application Notes:**>

<**1. Definitions.**--For purposes of this guideline:>

<“Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).>

<“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.>

<“Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).>

<“Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.>

<“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.>

<“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).>

<2. Application of Subsection (b)(2).--For purposes of subsection (b)(2):>

<“Conduct described in 18 U.S.C. § 2241(a) or (b)” is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.>

<“Sexual act” has the meaning given that term in 18 U.S.C. § 2246(2).>

<“Sexual contact” has the meaning given that term in 18 U.S.C. § 2246(3).>

<3. Application of Subsection (b)(3).--For purposes of subsection (b)(3), the defendant “knowingly engaged in distribution” if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.>

<4. Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§ 3A1.1(b)).--If subsection (b)(4)(B) applies, do not apply § 3A1.1(b).>

<5. Application of Subsection (b)(5).-->

<(A) **In General.**--Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, babysitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.>

<(B) **Inapplicability of Chapter Three Adjustment.**--If the enhancement in subsection (b)(5) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<6. Application of Subsection (b)(6).-->

<(A) **Misrepresentation of Participant's Identity.**--The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.>

<The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.>

<(B) **Use of a Computer or an Interactive Computer Service.**--Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live or otherwise to solicit participation by a minor in such conduct for such purposes. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.>

<7. **Application of Subsection (d)(1).**--For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.>

<8. **Upward Departure Provision.**--An upward departure may be warranted if the offense involved more than 10 minors.>

PROPOSED COMMENTARY

[Proposed Commentary effective November 1, 2025, absent contrary Congressional action.]

<**Statutory Provisions:** 18 U.S.C. §§ 1591, 2251(a)-(c), 2251(d)(1)(B), 2260(a). For additional statutory provision(s), see Appendix A (Statutory Index).>

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<“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.>

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<**2. Application of Subsection (b)(2).**--For purposes of subsection (b)(2):>

<“Conduct described in 18 U.S.C. § 2241(a) or (b)” is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.>

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<“Sexual contact” has the meaning given that term in 18 U.S.C. § 2246(3).>

<**3. Application of Subsection (b)(3).**--For purposes of subsection (b)(3), the defendant “knowingly engaged in distribution” if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.>

<**4. Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§ 3A1.1(b)).**--If subsection (b)(4)(B) applies, do not apply § 3A1.1(b).>

<**5. Application of Subsection (b)(5).**-->

<(A) **In General.**--Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.>

<(B) **Inapplicability of Chapter Three Adjustment.**--If the enhancement in subsection (b)(5) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<**6. Application of Subsection (b)(6).**-->

<(A) **Misrepresentation of Participant's Identity.**--The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.>

<The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.>

<(B) **Use of a Computer or an Interactive Computer Service.**--Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live or otherwise to solicit participation by a minor in such conduct for such purposes. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.>

<7. **Application of Subsection (d)(1).**--For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.>

Federal Sentencing Guidelines, § 2G2.1, 18 U.S.C.A., FSG § 2G2.1
As amended to 3-15-22.

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