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States Court of Appeals  
for the Third Circuit

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2-28-2007

## USA v. McDowell

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 05-4072

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UNITED STATES OF AMERICA,

v.

JAMES E. MCDOWELL,

Appellant.

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On Appeal from the United States District Court  
for the District of Delaware  
(No. 04-cr-48)  
District Judge: Honorable Joseph J. Farnan, Jr.

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Submitted Under Third Circuit LAR 34.1(a),  
January 23, 2007

Before: SCIRICA, Chief Judge, FUENTES and CHAGARES, Circuit Judges

(Filed: February 28, 2007)

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OPINION OF THE COURT

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FUENTES, Circuit Judge.

The sole issue raised in this appeal is whether the District Court erred in refusing to grant a downward departure in imposing sentence. For the reasons set forth below, we will dismiss the appeal for lack of jurisdiction.

Appellant James McDowell pleaded guilty to one count of interstate transportation of child pornography in violation of 18 U.S.C. § 2252A(a)(1). On August 2, 2005, the District Court sentenced McDowell to 87 months' imprisonment, at the low end of a guideline range of 87 to 108 months. In imposing sentence, the District Court rejected McDowell's motion for a downward departure for post-offense rehabilitation, diminished capacity, and minimal threat to society. As the District Court stated to McDowell at the sentencing hearing:

I have, in child pornography cases, tried to always determine whether the defendant was viewing child pornography as opposed to . . . reaching out to children or engaging children in addition to viewing . . . Where there's been a reaching out, I, like the other judges of the court, have sentenced within the guidelines. The facts of your case indicate that you reached out . . . The presentence report sets forth in great detail what it was you were engaged in. So I can't find a reason to exercise my discretion and sentence you outside of the guideline.

(App. at 52.)

The foregoing quote makes plain that the District Court was well aware of its

discretionary authority to grant a downward departure, but simply chose not to based on the circumstances presented. “It is well-established in this Court that we lack jurisdiction to review the merits of a district court’s discretionary decision to refuse a downward departure under the Sentencing Guidelines once we determine that the District Court properly understood its authority to grant a departure.” United States v. Minutoli, 374 F.3d 236, 239 (3d Cir. 2004); see also United States v. Cooper, 437 F.3d 324, 332-33 (3d Cir. 2006) (holding that limitations on appellate review of district court’s discretionary decision to deny downward departure still apply post-Booker).

Accordingly, we will dismiss the appeal for lack of jurisdiction.