

No.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

APPELLANT,

Defendant-Appellant.

On Appeal From the United States District Court
for the Eastern District of Washington
District Court No.

The Honorable
Chief United States District Court Judge

DEFENDANT-APPELLANT'S
OPENING BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	U.S.C.A. No.
)	
Plaintiff-Appellee,)	D.C. No.
v.)	
)	
APPELLANT,)	
)	
Defendant-Appellant.)	
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ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in computing Appellant’s adjusted offense level by applying the following enhancements:
 - a. a five-level enhancement for more than 600 images;
 - b. a two-level enhancement for depicting minors under age twelve; and
 - c. a four-level enhancement for sadistic or masochistic conduct?

2. Whether appellant’s 60-month sentence was unreasonable?

II. STATEMENT OF THE CASE

A. Nature of the Case, Statement of Jurisdiction & Bail Status

[REDACTED]

B. Proceedings and Disposition in District Court

[REDACTED]

C. Statement of Facts

[REDACTED]

An investigation into child pornography began in Buffalo, NY in 2005. FBI agents located a source advertising child pornography for trade under the mIRC name "DAND1111". [PSR 5; E.R. 26]. The agents verified that DAND1111, who was utilizing an fserve on his computer, was in possession of child pornography. [PSR 6; E.R. 25-26].

DAND1111 was eventually identified as Appellant. The address listed for Appellant was in California. A federal search warrant was executed. Agents found that the home was occupied by Appellant's

parents, who informed the agents that Appellant had moved to Washington. [PSR 6; E.R. 26].

Agents contacted Appellant in Washington, and he willingly agreed to meet with them. They met at a hotel. He waived his right to remain silent and agreed to allow the agents to search his computer. He admitted that he installed mIRC chat software on his computer for IRC (Internet Relay Communication) purposes. He installed a Panzer file server (fserve) in order to allow for automated collection of child pornography. He said that he had it up and running for approximately one week. [PSR 6; E.R. 26-28].

A forensic analysis of the computer found 8,000 images and 260 videos, numerous of which constituted child pornography. Some images included children under twelve, and images which court precedent would label sadomasochistic. [PSR 7; E.R. 37].

The Base Offense Level for this offense is 18. [U.S.S.G. § 2G2.2(a); PSR 7]. Two points were added because the material involved a prepubescent minor or a minor less than twelve years old. [U.S.S.G. § 2G2.2(b)(2); PSR 7]. Four points were added because the portions of

the material included what is defined by case law as sadistic or masochistic conduct. [U.S.S.G. § 2G2.2(b)(4); PSR 7]. Two points were added because the offense involved the use of a computer. [U.S.S.G. § 2G2.2(b)(6); PSR 7]. Five points were added because the offense involved more than 600 images. [U.S.S.G. § 2G2.2(b)(7)(D); PSR 7]. After subtracting three points for acceptance of responsibility, the final adjusted offense level was 28. [PSR 8]. In Criminal History Category I, Appellant's range was 78 to 97 months in prison. [PSR 14]. Appellant was sentenced to 60 months in prison. [E.R. 83, 87-92].

Before addressing the specific objections to each enhancement, it is first necessary to have some understanding of the facts which led to the images being loaded onto appellant's computer.

The images were apparently traded by way of Internet Relay Chat (hereinafter "IRC"), which is an unregulated series of chat rooms where users can meet to discuss whatever topics they would like, and even trade images, movies or music about those topics. [E.R. 15, 24-25, 32, 52]. A party needs mIRC software in order to utilize IRC chatrooms. [E.R. 51]. Downloading mIRC software is not necessarily an indication

of illicit activity, since it can be used to share information about any topic. [E.R. 58-59].

Appellant's computer was utilizing an fserve, which allowed part of his computer to be accessed by the public to download images. [E.R. 13]. An fserve is an automated program, which does not require anyone to be at the computer as files are shared, uploaded or downloaded. [E.R. 32-33]. In fact, there was no way to tell whether a person was sitting at the computer as images were traded. [E.R. 36].

The fserve was operating in 2005, but had only operated for approximately one week while the computer was located in California. [E.R. 15, 25, 27, 36]. Through IRC, appellant's computer was advertising "1000%PRETEENGIRLSEXPICS" and "100%PRETEENGIRLSSEXMOVIES". [E.R. 16].

In order to access appellant's computer a chat user would have to use the trigger "!youngones". [E.R. 17, 21-22]. According to the rules of the fserve on appellant's computer, in order to get images from appellant's computer, one had to trade their own images of girls up to age twelve. [E.R. 19]. While the fserve established rules including the

need to provide these images, sophisticated users could get around the rules [E.R. 19], as evidenced by the fact that the FBI agents were able to access the images without trading any child pornography. [E.R. 35]. The rules are not really enforceable by the automated program. [E.R. 35].

Initially, the investigation into these matters began in Buffalo, New York. [E.R. 25]. Child pornography was advertised from mIRC “DAND1111”. That address was tracked to California, to appellant’s mother’s internet service. [E.R. 26]. After contacting his parents, they learned that appellant had moved to the Spokane area, and contacted appellant there. Appellant cooperated with the investigation. [E.R.26-28]. Subsequently, images were located on appellant’s computer, which he willingly surrendered. [E.R. 26-27].

No evidence was established to show that appellant actually wrote the rules which were found on his computer, that he implemented those rules into the software, or even was present when they were written. [See E.R. 20, 33]. Similarly, there was no evidence regarding the author or implementor of the trigger “!youngones”. [E.R.

22].

When asked, appellant told agents that he thought that he had about “a hundred images.” [E.R. 29]. Since the fserve runs automatically, if the computer is not checked, there would be no way to know how many images had been uploaded or downloaded. [E.R. 36].

There were approximately 216 videos on the computer. About 170 of those videos contained child pornography. [E.R. 37]. There were approximately 8,000 pictures on the hard drive, with about 3,500 constituting child pornography. [E.R. 50]. Out of the videos, approximately 113 had been moved from “the new folder” to the “checked download ” folder. [E.R. 37, 42]. While moving a file to the “checked downloaded” folder, the file does not have to be opened. Instead, it can simply be dragged into the “checked downloaded” folder. [E.R. 42-43]. There was no forensic evidence that appellant had opened any files prior to any files being moved, or even after they were moved. [E.R. 43, 48]. While some of the files had descriptive titles, it was not possible to know what was depicted in those files without opening them. [E.R. 43-44].

ARGUMENT

A. Summary of Argument

The District Court erred in computing appellant's adjusted offense level. The District Court erroneously applied a number of enhancements in addition to the base offense level, despite a lack of evidence that appellant knew of the number or content of the images located on his computer. The specific enhancements were:

1. a five-level enhancement for more than 600 images;
2. a two-level enhancement for depicting minors under age twelve; and
3. a four-level enhancement for sadistic or masochistic conduct.

These enhancements can only be applied after knowledge of the contents of the computer are shown. Here, the evidence was insufficient to show that appellant knew what images were on his computer. Instead, the images were collected automatically via computer, without the need for appellant to even be at his computer.

Absent proof of knowledge of the images possessed, these images do not apply.

Appellant's sixty-month sentence was procedurally unreasonable. The District Court failed to take into account numerous arguments and facts, and failed to adequately set forth its reasons for rejecting those arguments and facts. The sentence was also substantively unreasonable, as it was longer than required under the applicable sentencing factors.

B. The District Court Erred in Computing Appellant's Guideline Range

Standard of Review

A district court's interpretation of the Guidelines is reviewed de novo. *United States v. Rivera-Sanchez*, 247 F.3d 905, 907 (9th Cir. 2001)(en banc).

Application of the Guidelines is reviewed for abuse of discretion, factual findings are reviewed for clear error and the ultimate sentence is reviewed for reasonableness in light of the sentencing factors in 18

U.S.C. § 3553(a). *United States v. Freeman*, 498 F.3d 893, 908 (9th Cir. 2007). A guideline sentence is not entitled to a presumption of reasonableness. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc).

Argument

“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guideline range.” *Gall v. United States*, __ U.S. __, 128 S. Ct. 586, 596 (2007). “As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Id.* The court “should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *Id.* (emphasis added). *See also United States v. Carty*, 462 F.3d 1066 (9th Cir. 2008) (en banc) (citing *Kimbrough v. United States*, 128 S.Ct. 558, 574 (2007), quoting *Gall*, 128 S.Ct. At 596).

Here, the District Court imposed a series of enhancements, which greatly increased Appellant’s sentencing range. Appellant objected to

several of those enhancements. The District Court erred in overruling those objections.

1. More than 600 Images

The Presentence Investigation Report, as adopted by the Court [E.R. 65] added a five-level enhancement because there were more than 600 images located on appellant's computer, pursuant to U.S.S.G. § G2.2(b)(7)(D). [PSR 7]. Appellant objected to the application of that enhancement on the ground that he did not know that there were more than 600 images on his computer since he was unaware of the number of images which had been automatically downloaded. [C.R. 53; E.R. 3-6, 63-64]. Appellant did not dispute that there were more than 600 images, but did dispute whether he knew that such images were present. [E.R. 11]. As discussed above, there was no evidence that the files had been opened, so there was a lack of evidence that appellant knew what was contained in the files which had been uploaded to his server. Nonetheless, the Court found that all the enhancements applied. [E.R. 65].

“Generally, federal statutes criminalizing the receipt of contraband require a knowing acceptance or taking of possession of the prohibited item.” (internal quotation marks omitted). *United States v. Romm*, 455 F.3d 990, 1001 (9th Cir. 2006). A person does knowingly receive and possess child pornography images when he seeks them out over the internet and then downloads them to his computer. This Court declared that, “[i]n the electronic context, a person can receive and possess child pornography without downloading it, if he or she seeks it out and exercises dominion and control over it.” *United States v. Romm*, 455 F.3d 990, 998 (9th Cir. 2006). Thus, it is the exercise of dominion and control over the image which is determinative. Here, dominion and control is lacking, since there is no evidence that appellant ever opened the files. There is no evidence that he knew.

In *Romm*, 455 F.3d at 995-96, the evidence demonstrated that the defendant knew about the cache files and had actually taken steps to access and delete them. On appeal, Romm conceded knowledge, and contested dominion and control. The Court rejected his arguments. *Id.* at 997-98, opining that “to possess the images in the cache, the

defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession.” *Id.* at 1000.

The Court relied on a case wherein the Tenth Circuit Court of Appeals had declared that the defendant was properly found guilty where he knew that child pornography images would be sent to his “browser cache file and thus saved on his hard drive.” *United States v. Tucker*, 305 F.3d 1193, 1204 (10th Cir. 2002). As the court put it: “Tucker, however, intentionally sought out and viewed child pornography knowing that the images would be saved on his computer. Tucker may have wished that his Web browser did not automatically cache viewed images on his computer’s hard drive, but he concedes he knew the web browser was doing so.” *Id.* at 1205.

The Court distinguished Romm’s situation from one where it could be argued that “the cache is an area of memory and disk space available to the browser software, not to the computer user.” *United States v. Gourde*, 440 F.3d 1065, 1082 (9th Cir.2006) (en banc) (Kleinfeld, J., dissenting). In *Romm*, 455 F.3d at 1001, the Court noted

that it was confronting a different situation because Romm did have both knowledge of and access to his cache files.

In *United States v. Kuchinski*, 469 F.3d 853 (9th Cir. 2006), this Court addressed a case where pornographic images were found on Kuchinski's computer. Sixteen of those images were located in the computer's downloaded files and 94 were located in its deleted files (recycle bin). Kuchinski did not argue that he is not responsible for the possession of those images. However, 1,106 images were in the Active Temporary Internet Files and another 13,904 to 17,784 images were in the Deleted Temporary Internet Files ("cache files"). *Id.* at 856. One of the issues on appeal was whether the enhancement for more than 600 images could be applied, since only 110 files were located in areas of the computer where Kuchinski had clearly accessed the files, while the remainder were temporary files which were not necessarily accessed by Kuchinski, or even known about by him.

According to the evidence before the district court, when a person accesses a web page, his web browser will automatically download that page into his Active Temporary Internet Files, so that when the site is revisited the information will come up much more quickly than it would have if it had not been stored on the

computer's own hard drive. When the Active Temporary Internet Files get too full, they spill excess saved information into the Deleted Temporary Internet Files. All of this goes on without any action (or even knowledge) of the computer user. A sophisticated user might know all of that, and might even access the files. But, "most sophisticated-or unsophisticated users don't even know they're on their computer.

Id. at 862. The Court continued:

"the cache is a 'system-protected' area, which the operating system tries to prevent users from accessing by displaying a warning that access involves an 'unsafe' system-command." *Id.* at 998. We also noted that a user, who knows what he is doing, can go forward and get access to the cache files anyway. *Id.* In the case at hand, there was no evidence that Kuchinski was sophisticated, that he tried to get access to the cache files, or that he even knew of the existence of the cache files.

There is no question that the child pornography images were found on the computer's hard drive and that Kuchinski possessed the computer itself. Also, there is no doubt that he had accessed the web page that had those images somewhere upon it, whether he actually saw the images or not. What is in question is whether it makes a difference that, as far as this record shows, Kuchinski had no knowledge of the images that were simply in the cache files. It does.

Id.

In distinguishing *Romm*, the *Kuchinski* Court explained:

Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other

indication of dominion and control over the images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control.

Therefore, on this record it was not proper to consider the cache file images when Kuchinski's offense level for Guideline purposes was calculated. As a result, the Guideline range was miscalculated, and we must vacate the sentence and remand. *See United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir.2006).

Id.

An identical result is called for here. The evidence did not show that appellant was aware that he had more than 600 images, and thus it was error to apply this enhancement.

2. Minor Under Age Twelve

The Presentence Investigation report added a two-level enhancement because the images involved minors who were under the age of twelve, pursuant to U.S.S.G. § 2G2.2(b)(2). [PSR 7]. Appellant objected to the application of that enhancement on the ground that he did not know that the images depicted minors under the age of twelve since he was unaware of the contents of the images. [C.R. 53; E.R. 4]. Appellant did not dispute that the images contained depictions of

individuals under twelve, but did dispute whether appellant knew that such images were present. [E.R. 10]. The Court found that all the enhancements applied. [E.R. 65].

In order to support this enhancement, there must be sufficient evidence to demonstrate that the defendant intended to possess materials depicting minors under the age of twelve. *United States v. Cole*, 61 F.3d 24, 24 (11th Cir.1995) (quoting *United States v. Saylor*, 959 F.2d 198, 200 (11th Cir.1992)).

This enhancement should not have been employed here, where it amounted to double-counting. “Impermissible double counting occurs when one part of the Guidelines is applied to increase a defendant’s punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines.” *United States v. Nagra*, 147 F.3d 875, 883 (9th Cir.1998) (internal quotation marks omitted). As noted below, a four-level enhancement was employed for sadistic or masochistic conduct solely because the material included images of penetration of a minor under twelve. Thus, Appellant was subjected to two separate enhancements because

the materials depicted a minor under twelve.

3. Sadistic or Masochistic Conduct

The Presentence Investigation report added a four-level enhancement because the images involved sadistic or masochistic conduct, pursuant to U.S.S.G. § 2G2.2(b)(4). [PSR 7]. Appellant objected to the application of that enhancement on the ground that he did not know that the images depicted such conduct since he was unaware of the contents of the images. [C.R. 53; E.R. 4]. Appellant did not dispute that the images contained depictions of sadistic or masochistic conduct, but did dispute whether appellant knew that such images were present. [E.R. 10-11]. The Court found that all the enhancements applied. [E.R. 65]. The Court found that all the enhancements applied. [E.R. 65].

In order to support this enhancement, there must be sufficient evidence to demonstrate that the defendant intended to possess materials depicting sadistic or masochistic conduct. *United States v.*

Tucker, 136 F.3d 763 (11th Cir. 1998). As discussed above, there is insufficient evidence to conclude that appellant knew what images were present on his computer, due to the use of automated software. *See, e.g., United States v. Kuchinski*, 469 F.3d 853 (9th Cir. 2006).

Additionally, there is no evidence that appellant specifically sought out sadistic or masochistic images. *See, e.g., United States v. Cole*, 61 F.3d 24, 24 (11th Cir.1995) (*quoting United States v. Saylor*, 959 F.2d 198, 200 (11th Cir.1992)). While the software on his computer advertised that it was seeking to trade images of young girls, there was no language which indicated that sadomasochistic images were being sought.

C. Reasonableness of Sentence

Standard of Review

A district court's interpretation of the Guidelines is reviewed *de novo*. *United States v. Rivera-Sanchez*, 247 F.3d 905, 907 (9th Cir. 2001)(en banc).

Application of the Guidelines is reviewed for abuse of

discretion, factual findings are reviewed for clear error and the ultimate sentence is reviewed for reasonableness in light of the sentencing factors in 18 U.S.C. § 3553(a). *United States v. Freeman*, 498 F.3d 893, 908 (9th Cir. 2007). A guideline sentence is not entitled to a presumption of reasonableness. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (*en banc*).

Argument

The 60-month sentence was unreasonable in light of the sentencing factors set forth in 18 U.S.C. § 3553(a). A district court is required to impose a sentence sufficient, but not greater than necessary to meet the sentencing goals set forth in § 3553(a)(2). In determining the appropriate sentence, the court is directed to consider several factors under 18 U.S.C. § 3553(a):

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;

- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the advisory guideline range;
- (5) any pertinent policy statements issued by the Sentencing Commission;
- (6) the need to avoid unwarranted sentencing disparities;
- (7) the need to provide restitution.

1. The Nature of the Offense

Appellant recognizes the serious nature of the offense.

Nevertheless, the circumstances surrounding the offense demonstrate that Appellant's conduct was not as severe as it might appear on paper.

The fserve was only utilized for approximately one week.

While that is unquestionably one week too long, it nevertheless demonstrates that this offense was not carried out over a lengthy period of time, but was instead an aberrant incident. The testimony was clear that there was no evidence that similar conduct had occurred after Appellant moved to Washington. Thus,

it appears that it was a one-time incident which, on his own accord and before being contacted by law enforcement, Appellant ceased.

There is no evidence that the files were ever opened by Appellant. It appears that he did not even know how many images were present on his computer. Absent such evidence, it does not appear that Appellant presents the risk of re-offending as might another individual who clearly showed a lengthy and chronic prurient interest in children.

Once the fserve was operating, the collection of the images was largely passive. The computer itself conducted the trading of images without anyone having to be present at appellant's computer, or having to take any steps to trade images.

The District Court does not appear to have adequately considered this factor in determining the sentence. When discussing the images received, the court made no mention of the fact that the images were received as part of an automatic process, and that appellant had no control over what images were actually received, or how many images were received. [E.R. 79-80]. In light

of the fact that a considerable amount of testimony was received regarding the technical manner in which images were received, the fact that the Court failed to mention that testimony is telling. “The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” *Rita v. United States*, 127 S.Ct. 2456, 2468 (2007). *See also United States v. Taylor*, 487 U.S. 326, 336-337 (1988).

The failure to set forth reasons is procedural error requiring remand. This error is particularly noteworthy in the Court’s discussion of the number of images. [E.R. 82-83]. The Court noted that the number of images was significant because appellant was advertising for them, without even addressing the fact that there was no evidence that appellant knew how many images were present.

2. The Nature and Characteristics of the Defendant.

[REDACTED]

3. The Need for Deterrence

There is no question as to the seriousness of the offense. It is important to note, however, that Appellant has learned a hard lesson already and has changed his behavior since these events occurred.

Appellant has been humiliated by his own behavior. He was cooperative in every aspect when approached in December 2005 and questioned about his behavior. He gave the agents his computer. He answered the questions of the agents. He did not try to marginalize his behavior, not try to shuffle blame onto anyone else. He was told that day he wasn't under arrest, but further investigation into his illegal activity would be conducted.

And then he waited. The year passed without any word from the agents. *[REDACTED]*

Almost all of 2007 passed without incident until late December 2007 when he was finally arrested on this indictment. During the two years he waited, he committed no criminal activity.

There is absolutely no suggestion that he collected or attempted to collect child porn. He did nothing other than act as a completely law abiding person.

The Court mentioned the delay in prosecution, but failed to address the fact that appellant had been completely law abiding during that time. [E.R. 81]. The Court also failed to mention that appellant had been cooperative with law enforcement once contacted, including turning his computer over to agents without a warrant.

“The hideous nature of an offender’s conduct must not drive us to forget that it is not *severe* punishment that promotes respect for the law, it is *appropriate* punishment. Although there are clearly times when anything less than severe punishment undermines respect for the law, it is just as certain that unduly severe punishment can negatively affect the public’s attitude toward the law and toward the criminal justice system.” *United States v. Olhovsaky*, 562 F.3d 530 (3rd Cir. 2009) (recognizing appropriateness of downward departure in child pornography case).

A prison sentence of any length will be significant enough to deter Appellant from repeating his actions. It will also be sufficient to deter others from engaging in similar conduct. Sending Appellant to prison for five years for one week's aberrant behavior is more severe than necessary, and thus is unreasonable.

4. The Need for the Sentence Imposed to Provide the Defendant with Training, Care, or Treatment in the Most Effective Manner

As noted above, Appellant appears unlikely to repeat this, or any related, conduct. Nevertheless, it appears unquestionable that a prison environment is unlikely to provide treatment opportunities which would not be similarly available in an out-of-custody setting.

[REDACTED]

5. The Sentencing Guidelines are Only Advisory

The Supreme Court held in *United States v. Booker* that the mandatory nature of the sentencing guidelines system violated the

Sixth Amendment of the United States Constitution. 543 U.S. 200, 226-27 (2005). To remedy this, the Supreme Court modified the federal sentencing statute to make the sentencing guidelines truly guidelines—advisory, but not binding on the sentencing court. *Id.* at 245. Subsequent litigation has affirmed the authority of the sentencing court to sentence within the range of choice dictated by the facts and applicable law of the case before it. *See Gall v. United States*, 128 S.Ct. 586, 602 (2007) (upholding a sentence outside the advisory guideline range as reasonable); *Kimbrough v. United States*, 128 S.Ct. 558, 570 (2007) (noting that sentencing courts may vary from the advisory guideline range based solely on policy considerations, including disagreement with the policy underlying the guidelines in a case); *Rita v. United States*, 127 S.Ct. 2456, 2465 (2007) (stating that a district court may consider arguments that “the Guidelines sentence itself fails to properly reflect [18 U.S.C.] § 3553(a) considerations”). The result of this development in sentencing law is that sentencing courts must “take account of” the advisory guideline range as part of all the sentencing goals and

factors enumerated in 18 U.S.C. § 3553(a), but are no longer bound by the sentencing range indicated by the applicable guideline in the case. *Cunningham v. California*, 549 U.S. 270, ___, 127 S.Ct. 856, 867 (2007); *Booker*, 543 U.S. at 261.

Although the Court did sentence Appellant below the guidelines range, that fact does not end the inquiry. This Court must nevertheless determine if the sentence was both procedurally and substantively reasonable. “Regardless of whether the sentence imposed is inside or outside the Guidelines range, [we] must review the sentence under an abuse-of-discretion standard. [We] must first ensure that the district court committed no significant procedural error, such as ... failing to consider [each of] the § 3553(a) factors ...” *Gall v. United States*, ---U.S. ----, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007).

The advisory guidelines are, therefore, “the starting point and the initial benchmark” in determining a sentence. *Gall*, 128 S.Ct. at 596 (stating that “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines

range”). While district courts must “give respectful consideration to the Guidelines,” they are permitted “to tailor the sentence in light of other statutory concerns as well.” *Kimbrough*, 128 S.Ct. at 570 (quoting *Booker*, 543 U.S. at 245-46). “[T]he Guidelines are not the only consideration, [and] the district judge should consider all of the § 3553(a) factors” to fashion the appropriate sentence. *Gall*, 128 S.Ct. at 596. As required by the Sentencing Reform Act, the “overarching provision instruct[s][the] district courts to ‘impose a sentence sufficient, but not greater than necessary to accomplish the goals of sentencing, including ‘to reflect the seriousness of the offense,’ ‘to promote respect for the law,’ ‘to provide just punishment for the offense,’ ‘to afford adequate deterrence to criminal conduct,’ and ‘to protect the public from further crimes of the defendant.’” *Kimbrough*, 128 S.Ct. at 570 (quoting 18 U.S.C. § 3553(a)).

The guideline range was only a starting point. As detailed herein, there were many reasons why a sentence far below the guideline range was appropriate. “[R]evulsion over these crimes

can not blind us ... to the individual circumstances of the offenders who commit them.” Appellant was entitled to the same consideration of factors as is any defendant convicted of less inflammatory offenses. “Child pornography is so odious, so obviously at odds with common decency, that there is a real risk that offenders will be subjected to indiscriminate punishment based solely on the repugnance of the crime and in disregard of other Congressionally mandated sentencing considerations.”

United States v. Goff, 501 F.3d 250, 258 n. 13 & 259 (3d Cir.2007).

As discussed below, the District Court had the discretion to give Appellant any sentence it felt appropriate, including a sentence of probation. Appellant was not a typical offender, since he had no criminal record, had been gainfully employed and had honorably served his country. His criminal activity was isolated and short-lived. Perhaps most importantly, Appellant ceased that activity himself, without intervention from law enforcement. These circumstances warranted a significant reduction as requested by counsel for defendant, who requested a sentence of less than 18

months. [E.R. 77].

6. The Kinds of Sentences Available

The District Court had the discretion to impose any sentence it believed fit these circumstances. The Sentencing Guidelines do not enjoy a presumption of reasonableness. *United States v. Rita*, 127 S.Ct. 2456 (2007). A district court judge has an obligation to make an independent assessment of what sentence meets the criteria of 18 U.S.C. § 3553(a), separate from any assessment made by the U.S. Sentencing Commission. *Id.* at 2463-65.

18 U.S.C. § 3553(a) makes the Guideline sentencing range a required consideration but permits the court to tailor the sentence in light of other statutory concerns as well. *United States v. Menyweather*, 447 F.3d 625 (9th Cir. 2005) (quoting *United States v. Booker*, 125 S.Ct. 738, 757 (2005)).

There are no statutory minimum penalties applicable to the offenses. A lesser sentence of was reasonable and sufficient in this

case to achieve the policy and goals set forth in the 18 U.S.C. §3553(a) factors as discussed above. Those factors command a sentencing court to sentence a defendant to no greater term than is necessary. A sentence far less than sixty months would have sufficed. At sentencing, counsel for appellant requested a prison sentence of less than 18 months, which would have sufficed to punish and deter, under these particular circumstances.

CONCLUSION

The District Court erroneously applied numerous enhancements, which led to an erroneous determination of appellant's adjusted offense level, and corresponding sentencing range. Appellant's sentence was both procedurally and substantively unreasonable.

Appellant respectfully requests that his sentence be reversed for the reasons set forth above, and his case be remanded to the District Court for resentencing.

Dated: May 22, 2009

Respectfully Submitted,

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Certificate of Compliance

Pursuant to Circuit Rule 32-1, I certify that the foregoing brief uses a proportionately-spaced font with a 14-point typeface, and contains 6,702 words. (Opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words.)

s/Matthew Campbell
Attorney for Appellant

Certificate of Related Cases

Counsel for Appellant, U.S.C.A. No. , is not aware of any cases that raise the same issues, currently pending in this Court.

Respectfully submitted June 22, 2009.

s/Matthew Campbell
Attorney for Appellant

Certificate of Service

I, the undersigned, declare:

On June 22, 2009, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service of the brief will be accomplished by the appellate CM/ECF system.

I certify that the foregoing is true and correct. Executed on June 22, 2009, at Spokane, Washington.

s/Matthew Campbell
Attorney for Appellant