IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-1115

LEONARD T. D'ANDREA.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE APPELLANT

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SUMMARY OF THE CASE

Leonard D'Andrea pleaded guilty to one count of attempted enticement of a minor in violation of 18 U.S.C. § 2422 (b) and one count of possession of child pornography in violation of 18 U.S.C. § 2252 (a) (4) (ii). The advisory guideline range for his offense, after reductions for acceptance of responsibility, was 78-97 months. The district court granted the government's motion for upward departure and sentenced D'Andrea to 180 months (fifteen years) on count 1 and 120 months (ten years) on count 2, to run concurrently. D'Andrea argues that the trial court erroneously granted the government's request for upward departure and that the sentence imposed by the district court was unreasonable.

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JURISDICTIONAL STATEMENT

This is an appeal from a sentence entered by the United States District Court, Eastern District of Arkansas on January 6, 2006, following a plea of guilty. Mr. D'Andrea's notice of appeal was filed in this Court on January 11, 2006, and the Clerk appointed the undersigned counsel under the terms of the amended Criminal Justice Act to represent Mr. D'Andrea on his appeal. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291, and this appeal is timely.

STATEMENT OF ISSUES ON REVIEW

I. THE DISTRICT COURT ERRED IN ITS DECISION TO UPWARDLY DEPART UNDER U.S.S.G. § 5K2.21.

United States v. Hawkman, 438 F.3d 879 (8th Cir. 2006)

Rule 32 of the Federal Rules of Criminal Procedure

U.S.S.G § 5K2.21

II. THE DISTRICT COURT ERRED BY IMPOSING AN UNREASONABLE SENTENCE IN VIOLATION OF 18 U.S.C. § 3553.

United States v. Booker, 543 U.S. 220 (2005)

United States v. Mickelson, 433 F.3d 1050 (8th Cir. 2006)

United States v. Haack, 403 F.3d 997 (8th Cir. 2005)

STATEMENT OF THE CASE

This is an appeal from judgment following the entry of a guilty plea. On September 26, 2005, Leonard D'Andrea waived indictment and pleaded guilty to one count of attempted enticement of a minor in violation of 18 U.S.C. § 2422 (b) and one count of possession of child pornography in violation of 18 U.S.C. § 2252 (a) (4) (ii). The advisory guideline range for his offense, based on a total offense level of 29 and a criminal history category of I, was 87 to 108 months. Additionally, because his total offense level exceeded 16, D'Andrea was eligible for a third-point reduction for acceptance of responsibility, at the district court's discretion. After considering the matter, the trial court granted the third-point reduction, bringing D'Andrea's suggested sentencing range to 78-97 months.

The presentence investigation report (PSR) prepared in this case, without objection from the government, noted that the government reserved the right to seek an upward departure at the time of sentencing based on the inadequacy of D'Andrea's criminal history pursuant to U.S.S.G. § 4A1.3. The PSR states, "Specifically the Government will argue that the defendant's prior conviction of crimes against children is not countable due to the age of the case." As promised the government did seek an upward departure based on the fact that a crime committed by D'Andrea almost thirty years ago (1977) was not calculated in his criminal history. However, the district court rejected the government's request for upward departure based on the inadequacy of

D'Andrea's criminal history, noting that the prior crime is reflected in the PSR but was not counted because of its age—just as the guidelines intended temporally remote criminal activity to be treated.

However, on January 4, 2006, only two days before D'Andrea's sentencing hearing, the government filed a motion for upward departure that outlined an additional ground for upward departure—U.S.S.G. § 5K2.21 similar uncharged conduct (in the government's motion and in the transcript of the hearing there is reference made § 2K2.21, however, this appears to me a typographical error as the substance of both the government and the district court's dialogue refer to § 5K2.21). The motion and accompanying argument at the sentencing hearing went on to set out a variety of alleged conduct that was neither charged nor mentioned in D'Andrea's PSR. The conduct alleged was not of the variety anticipated by the guideline provision invoked—conduct that would have been chargeable conduct but that had been merged into a greater offense or dropped due to a guilty plea. Instead, the conduct described was merely alleged, uncharged conduct.

Further, the government made no attempt to amend the PSR to include this conduct and instead waited until two days before sentence was to commence to put D'Andrea on notice that it would seek an upward departure on an entirely different ground than reflected in the PSR. The trial court granted the government's motion for upward departure based on § 5K2.21 and sentenced D'Andrea above his suggested

sentence range of 78-97 months to a sentence of 180 months (fifteen years) on count 1 and 120 months (ten years) on count 2, to run concurrently. It is from this decision that D'Andrea appeals.

Appellant requests the opportunity to present oral argument on this case.

STATEMENT OF THE FACTS

This case is a result of an investigation undertaken by the Federal Bureau of Investigation (FBI) and the Arkansas State Police, whereby the Internet Crimes Against Children Task Force (ICAC)was created to target the online solicitation of minors. On or about December 20, 2004, Arkansas State Police Task Force Officer Dorothy Plumb was working in an undercover capacity in a Yahoo! chat room using the screen name jennifer-smith956. The profile created for jennifer-smith956 stated that the individual using the account was thirteen years old. During this chat, Officer Plumb's Jennifer persona was approached by an individual using the screen name camdatehughe (later identified an alias for Leonard D'Andrea). During the chat, D'Andrea invited Plumb to accept his web camera. When the web camera was accepted, D'Andrea was observed masturbating to the point of ejaculation. During the same chat, D'Andrea discussed his interest in engaging in sexual activity with the Jennifer persona. He noted that he would be in Little Rock, Arkansas in the spring and that, if all went well, he and the Jennifer persona could meet while he was in town.

On January 4, 2005, D'Andrea (using his camdatehughe screen name) once again approached Officer Plumb in a Yahoo! Chat room. However, this time she was using the screen name gracciebabby, which was linked to the profile of a thirteen-year-old female. During this chat, D'Andrea indicated he would be traveling to Arkansas in the spring and would like to meet in person. D'Andrea requested that he be allowed to place both the

Jennifer and Gracie personas in his "Friend's List." Both personas granted the requisite permission, which allowed D'Andrea to know when either persona was online. During the next two months, the chats outlined the sexual activity that D'Andrea desired to engage in with the two personas. He also invited them to view his web camera, where D'Andrea was seen masturbating on at least two occasions. On January 28, 2005, after identifying himself to the two personas as Hughe Richards, D'Andrea made travel arrangements to fly from Denver, Colorado, to Little Rock, Arkansas on March 14, 2005. He reserved a room at the LaQuinta Inn located at Otter Creek and Interstate 30 in Little Rock.

On February 17, 2005, Special Agent Jill Newton of the FBI, assumed the identity of the Jennifer persona and continued chatting with D'Andrea. On this date, D'Andrea contacted both personas and discussed meeting both of them. He planned to meet the Jennifer persona at the Target store on Chenal Parkway in Little Rock on March 15, 2005, and the Gracie persona at a gas station located near his reserved hotel. He continued to express his desire to engage in sexual activity with these two (presumably) thirteen-year-old girls. On March 14, 2005, D'Andrea arrived as scheduled in Little Rock. He drove to the location that he had planned to meet the Gracie persona and was arrested.

Subsequently, D'Andrea admitted that he planned to have sexual intercourse with one of the personas with which he had been chatting. A search of his luggage revealed a nightgown, a box of condoms, and a lubricant. He also traveled to Little Rock with a

laptop computer, which showed chats with a number of other girls allegedly under the age of eighteen. A search warrant obtained for his home computer in Wyoming revealed other chats with allegedly underage girls, at least ten, but fewer than 150 pornographic images, and details of a sexual encounter that he had in his twenties with a young girl. It was also discovered that D'Andrea used another perosna, that of another young girl with the screen name desireeegeewhiz, to serve as a "pen pal" and friend to the other young women.

D'Andrea admitted his involvement in the charged offenses. Specifically, he admitted visiting a Yahoo! Chat room to chat with underage girls and that he made arrangements to meet two of these *presumed* young girls in Little Rock, Arkansas.

SUMMARY OF ARGUMENTS

I. Mr. D'Andrea first argues that the district court erred in its decision to upwardly depart based on § 5K2.21, the advisory guideline provision setting out the standards for consideration of similar uncharged conduct. Specifically, the district court accepted government testimony during the sentencing hearing detailing activity that was not included in the PSR—the PSR that the government acknowledged receipt of and stated that it had no objections to—then used this testimony as the basis for its decision to sentence Mr. D'Andrea to nearly double the guideline range. In fact Mr. D'Andrea learned of the government's new sentencing theory only forty-eight hours prior to his hearing. Further, the alleged conduct was not the type anticipated by § 5K2.21.

II. Mr. D'Andrea also argues that the district court unreasonably sentenced him to 180 months and 120 months imprisonment (to run concurrently) considering that after the entry of his guilty plea that his guideline range was only 78-97 months, that there was not an "actual" victim, that his family (including his two minor-age daughters and foreign-national wife) relies on him as its breadwinner, and that he suffers from several physical maladies—including high blood pressure, joint pain, and knee problems.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS DECISION TO UPWARDLY DEPART UNDER U.S.S.G. § 5K2.21.

A. Standard of Review.

The Court reviews the district court's decision to depart upward for abuse of discretion. *United States v. Hawkman*, 438 F.3d 879 (8th Cir. 2006).

B. The government failed to properly identify the ground upon which it was planning to seek an upward departure.

At the sentencing hearing, and by motion only forty-eight hours prior to the hearing, the government moved for an upward departure alleging two grounds—an under-representation of Mr. D'Andrea's criminal history (§ 4A1.3), and similar uncharged conduct (§ 5K2.21). The government had the opportunity to review and make any objections to Mr. D'Andrea's PSR prior to sentencing. The government specifically noted that it had no objections to the PSR as prepared.

The PSR did put Mr. D'Andrea on notice that the government might seek an upward departure for under-representation of his criminal history based on the fact that he was given no points for a crime that he had committed almost thirty years ago. This did not concern Mr. D'Andrea, as he was advised that the guidelines properly awarded zero points to such remote criminal activity and that it was unlikely that the trial court

would allow such a departure, if requested. Indeed, as anticipated by his counsel, the government's motion for upward departure based on § 4A1.3 was defeated at trial.

However, over Mr. D'Andrea's objection the district court did grant the government's upward departure motion based on § 5K2.21. The purpose of the PSR, from Mr. D'Andrea's understanding of the guidelines, is to limit the scope of the issues to be addressed at the sentencing hearing. Rule 32 of the Federal Rules of Criminal Procedure governs PSRs and specifically states that the parties shall communicate in writing to the probation officer and to each other any objections to material information contained in the report or any omissions from the PSR. Here, the government failed to object to the PSR. The government neither requested the inclusion of additional information regarding similar uncharged conduct nor stated that it might seek a departure based on § 5K2.21. By stating no objection to the PSR, the government in essence waived its right to pursue an upward departure based on conduct that was known at the time of the PSR, yet the government chose to exclude from the PSR.

In its decision to upwardly depart on a ground that was never implicated in the PSR and that was not revealed to Mr. D'Andrea until only forty-eight hours prior to the sentencing hearing, the district court abused its discretion and Mr. D'Andrea's sentence should be set aside.

C. The conduct described at the sentencing hearing was not similar uncharged conduct as described in § 5K2.21.

Section 5K2.21 provides that the court may depart upward to reflect the actual seriousness of the offense based on conduct underlying a potential charge that was not pursued in the case as part of a plea agreement or for any other reason and that did not enter into the determination of the applicable guidelines range. Specifically, § 5K2.21 states:

> The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

In this case, the district court considered testimony of alleged activity that was not dismissed conduct, potential chargeable conduct not pursued in conjunction with Mr. D'Andrea's plea in this case—the activity was not reflected in the PSR in any way. The activity—evidence of other chats with several allegedly underage girls, video equipment, and an unsubstantiated (and uncharged) potential act of sexual misconduct involving a next door neighbor's child—was merely alleged conduct, mentioned for the first time in relation to the current matter by an officer testifying at the sentencing hearing following the government's motion for upward departure. The government did not agree to forego the pursuit of criminal charges based on the conduct in exchange for a plea or for any other reason. There was no testimony that the conduct was ever being pursued or that

it ever would be pursued. Indeed, the conduct was only presumptively criminal. Therefore, the conduct described was not an appropriate basis for a § 5K2.21 departure.

D. The district court's decision to upwardly depart violates the notice requirement in Rule 32 of the Federal Rules of Criminal Procedure.

Rule 32(h) of the Federal Rules of Criminal Procedure states the following:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Mr. D'Andrea was not on notice of the government's intention to seek an upward departure for similar uncharged conduct in violation of Rule 32's notice requirement because the PSR made no mention of the conduct or the desire to depart for undescribed conduct and the only "notice" he received was tendered only forty-eight hours prior to sentencing, which is in reality no notice at all.

In cases following *Burns v. United States*, 501 U.S. 129 (1991), the Eighth Circuit has addressed when the district court must provide formal notice to the parties of its intent to depart upward. In *United States v. Andrews*, 948 F.2d 448 (8th Cir. 1991), the PSR "identified two factors that might warrant an upward departure." *Id.* at 449. Recognizing that the PSR "expressly noted the presence of factors which might warrant departure," this Court held that the district court did not have to give formal notice of its intent to

depart. *Id.* In addition to *Andrews*, this Court has found that grounds for a departure existed where the PSR included a section entitled "Factors That May Warrant Departure," which listed specific factors that could justify an upward departure. *United States v. Beatty*, 9 F.3d 686, 688 (8th Cir. 1993).

Thus, when notice of departure is "sufficiently provided" in the PSR, the district court is not required to give the parties notice of upward departure. *United States v. Hill*, 951 F.2d 867, 867 (8th Cir.1991). Even if the PSR does not affirmatively recommend an upward departure, if it includes "specific grounds that may form the basis for an upward departure," then Rule 32's notice requirement is satisfied. *United States v. Sample*, 213 F.3d at 1031–32 (holding that because the "district court's departure decision directly correlate[d] with the PSR's plain language," the defendant received adequate notice).

In contrast to the preceding cases, the Court has held that where a PSR "explicitly stated" that there were no factors warranting an upward departure, the defendant failed to receive proper notice. *United States v. Johnson*, 121 F.3d 1141, 1145 (8th Cir. 1997). In *Johnson*, because the PSR did not give the defendant proper notice of the potential upward departure, the district court itself should have provided the defendant with notice that it was considering departure. *Id.*

The facts of this case are similar to those in *Johnson*. According to his PSR, Mr. D'Andrea was not on notice that he would be subjected to an upward departure for any reason other than an underrespresented criminal history. Further, he only learned of the

government's contrary intention forty-eight hours prior to trial. Because he was not given adequate notice that the government would seek an upward departure on a ground not identified in his PSR, Mr. D'Andrea urges this Court to find a violation of Rule 32's notice requirement and remand his case for resentencing.

II. THE DISTRICT COURT ERRED BY IMPOSING AN UNREASONABLE SENTENCE IN VIOLATION OF 18 U.S.C. § 3553.

A. Standard of Review.

Under the advisory sentencing guidelines, the Court engages in a two-step inquiry on review. *United States v. Mashek*, 406 F.3d 1012, 1016–17 (8th Cir. 2005). First the Court must "examine de novo whether the district court correctly interpreted and applied the guidelines." *Id.* at 1017. Then, the Court reviews the sentence imposed for unreasonableness, taking into account the factors present in 18 U.S.C. § 3553 (a). *United States v. Booker*, 543 U.S. 220, 261 (2005).

The Court has determined that a sentence imposed within the guidelines range is presumptively reasonable. *United States v. Cawthorn*, 429 F.3d 793, 802 (8th Cir. 2005). However, a sentence outside the guidelines range does not benefit from a reasonableness presumption. *Id.* Instead, the Court reviews a district court's decision to depart from the appropriate guidelines range for abuse of discretion. *United States v. Haack*, 403 F.3d 997, 1003 (8th Cir.), *cert. denied*, --- U.S. ----, (2005). Thus, "[a] discretionary sentencing ruling ... may be unreasonable if a sentencing court fails to consider a relevant factor that should

have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." *Id.* at 1004.

Moreover, the Eighth Circuit has encouraged district courts to follow a procedure whereby they first determine the advisory guidelines range and then consider the factors set forth in § 3553(a) to determine whether to impose a sentence under the guidelines or a non-guidelines sentence. *United States v. Haack*, 403 F.3d 997, 1002–03 (8th Cir. 2005). Although the Court does not require district courts to make "robotic incantations" that each § 3553 (a) factor has been considered, *United States v. Lamoreaux,* 422 F.3d 750, 756 (8th Cir. 2005) (quoting *United States v. Crosby*, 397 F.3d 103, 113 (2d. Cir. 2005)), the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be. *See* 18 U.S.C. § 3553 (c) (2) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence ... is outside the [guidelines] range ..., the specific reason for the imposition of a sentence different from that described."); *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005).

B. The district court erred in imposing an unreasonable sentence of 180 months and 120 months (to be served concurrently) on Mr. D'Andrea.

This Court determines the reasonableness of a sentence by examining whether the district court (1) determined the appropriate guideline range, (2) analyzed whether a departure would be appropriate, and (3) examined other statutory factors in § 3553(a). *See Haack,* 403 F.3d at 1002-03. Here, the district court failed to analyze the § 3553(a) factors sufficiently and only made a perfunctory reference to them.

In this case, the district court sentenced Mr. D'Andrea to almost twice the guideline range for a victimless crime based on a suspect ground for departure of which Mr. D'Andrea failed to receive proper notice. As stated by this Court "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be." *Dalton*, 404 F.3d at 1033. This sentence was not reasonable in light of the § 3553(a) factors because the district court failed to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" discussed under § 3553(a)(1). Second, the district court failed to consider if Mr.D'Andrea's sentence reflected "the seriousness of the offense, promote[d] respect for the law, and [provided] just punishment for the offense" under § 3553(a)(2)(A) and the need for the sentence "to afford adequate deterrence to criminal conduct" under § 3553(a)(2)(B). Finally, the district court failed to consider whether the sentence imposed would "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" under § 3553(a)(2)(D).

Instead, the district court chose to impose a sentence so far beyond the guideline range that it should be considered presumptively unreasonable. This coupled with the reality that Mr. D'Andrea is in poor health, is the breadwinner for his family, has two young children, exercised a great deal of remorse, cooperated at every stage of the investigation, and committed a victimless crime supports his assertion that the sentence imposed on him by the district court is unreasonable and ignores the standards set out in § 3553.

CONCLUSION

Wherefore, based upon all of the above reasons, appellant Leonard T. D'Andrea requests that his unreasonable sentence be reversed, and that his case be remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 32(a)(7)(C)of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the applicable type-volume limitation. Specifically, the countable sections contain no more than 14,000 words, and the brief has been prepared using WordPerfect 10.0. The enclosed computer diskette contains one file (No. 06-1115) and has been scanned for computer viruses. It has been determined to be virus-free in compliance with Eighth Circuit Rule 28A(c).

_____
Timothy J. Cullen

CERTIFICATE OF SERVICE

I hereby certify that two copies of appellant's brief and addendum were mailed this ____ day of April, 2006, to:

Karen Whatley
Assistant United States Attorney
P.O. Box 1229
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In addition, I certify that I have mailed ten copies of the foregoing and a three and a half inch computer diskette containing the full document on this day to:

Mr. Michael Gans
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_____
Timothy J. Cullen

APPELLANT'S ADDENDUM

I. Plea Agreement filed September 26, 2005

II. Motion for Upward Departure (Filed January 4, 2006)

III. Excerpts from transcript of sentencing hearing (January 6, 2006) Court's comments at 57-59, 64-66, 69

IV. Judgment filed January 10, 2006