

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term 2009

4 Argued: August 24, 2010 Decided: September 16, 2010)

5 Docket No. 09-4093-cr
6

7 UNITED STATES OF AMERICA,

8 *Appellee,*

9
10 v.

11 STEVEN AHDERS,

12 *Defendant-Appellant.*
13

14 Before: KATZMANN, HALL, and CHIN, *Circuit Judges.*

15 Appeal from a judgment of the United States District
16 Court for the Northern District of New York (Norman A. Mordue,
17 *Chief Judge*) convicting defendant-appellant of producing child
18 pornography.

19 VACATED and REMANDED.

20 ALEXANDER BUNIN, Albany, N.Y., *for*
21 *Defendant-Appellant.*

22 BRENDA K. SANNES, Assistant United
23 States Attorney (Thomas Spina, Jr.,
24 Assistant United States Attorney,

1 *on the brief*), for Richard S.
2 Hartunian, United States Attorney
3 for the Northern District of New
4 York, for Appellee.

5 *PER CURIAM:*

6 Defendant-appellant Steven Ahders appeals from a
7 judgment of the United States District Court for the Northern
8 District of New York convicting him, pursuant to a guilty plea,
9 of one count of producing child pornography, in violation of 18
10 U.S.C. §§ 2251(a), (e) and 2256(8), and sentencing him
11 principally to a term of imprisonment of 580 months. We vacate
12 the judgment and remand for the district court to clarify the
13 basis for one aspect of its sentence.

14 BACKGROUND

15 In 2005, while on supervised release for a prior
16 conviction for possession of child pornography, Ahders met a
17 woman through a personal ad. They married in September 2006, and
18 the woman and her five-year-old son, EM, moved into Ahders's home
19 in Schenectady, New York. Thereafter, Ahders began sexually
20 molesting EM and filming and photographing the abuse. The
21 molestation continued until July 2007.

22 Ahders was arrested in January 2008. In addition to
23 admitting the molestation of EM, he admitted that he had

1 purchased an "Acer" laptop computer in February or March 2007,
2 and that he used the internet to download images of both boys and
3 girls under the age of 15 years. Investigators seized, in
4 Ahders's home, an Acer laptop computer, a digital camera, and a
5 "personal digital assistant" ("PDA"), which included a storage
6 card. The laptop and PDA contained numerous images of child
7 pornography, including images of nude girls tied and bound, some
8 approximately 11 to 12 years old, one tied to a bed and another
9 tied and blindfolded. Two pornographic images of EM were found
10 on the storage card.

11 During the ensuing investigation, EM informed
12 investigators that Ahders sometimes tied EM's wrists to the
13 headboard of a bed or the handlebars of a bicycle and then
14 sexually abused him. EM described how Ahders used a video camera
15 to record the abuse. Ahders admitted to filming EM engaging in
16 sexually explicit conduct.

17 During Mother's Day weekend in 2007, Ahders sexually
18 molested two other children, BB and VB, who had joined EM at
19 Ahders's home for a sleepover. During the sleepover, Ahders made
20 EM and BB perform sexually explicit acts on each other while he
21 took pictures of them. BB's sister, VB, reported that the
22 children slept together in a tent in the attic, and that Ahders

1 approached her after the boys fell asleep and took off her pants
2 and underwear even though she slapped his hands and tried to stop
3 him. Ahders then held her legs apart and photographed her from
4 about a foot away. VB also reported that Ahders had "a laptop"
5 with him in the attic.

6 EM told investigators that a few days after the
7 sleepover, Ahders showed him a picture of Ahders's penis in VB's
8 vagina. VB, however, told investigators that Ahders never
9 touched her vagina.

10 On November 7, 2008, Ahders pleaded guilty to Count 1
11 of the indictment, which charged him with producing child
12 pornography involving "a male minor" -- EM. Ahders did not plead
13 guilty to any charges involving VB or BB or the possession of the
14 child pornography found on his laptop and PDA. Ahders and the
15 Government entered into a written plea agreement, but they did
16 not stipulate to the calculation of Ahders's sentencing range
17 under the United States Sentencing Guidelines (the "Guidelines").

18 The Probation Department prepared a presentence report
19 (the "PSR"). Although Ahders pleaded guilty only to the one
20 count involving EM, the PSR concluded that Ahders had exploited
21 three minors (EM, VB, and BB) and, pursuant to U.S.S.G. §
22 2G2.1(d)(1), treated the exploitation of each child as a separate

1 count of conviction. The offense level was calculated separately
2 for each victim. For EM, a 4-level enhancement was included for
3 Ahders's possession of material that portrayed sadistic or
4 masochistic conduct -- the images of nude minor girls bound and
5 tied. For VB, a 2-level enhancement was included for Ahders's
6 actions in removing her pants and underwear and photographing
7 her. For BB, a 2-level enhancement was included for Ahders's
8 actions in directing EM and BB to engage in sexually explicit
9 conduct while he took pictures and sexually abused BB.

10 The three calculations were grouped pursuant to
11 U.S.S.G. § 3D1.4. In the end, Ahders's offense level totaled
12 44,¹ which was then reduced to the highest offense level found in
13 the Guidelines Sentencing Table: 43. The Guidelines "range" for
14 an offense level of 43 is life imprisonment. Because the

¹ This was based on an offense level of 44 for the offense against EM and 40 for the offenses against BB and VB. The score of 44 included the 4-level enhancement for the sadistic images of the girls. Without this enhancement, the score would have been 40 and the grouping analysis would have been as follows: the highest offense level for any unit would have been 40, the combined adjusted offense level would have been 43 (instead of 47), and the total offense level would have been 40 (instead of 43). See U.S.S.G. § 3D1.4. An offense level of 40, with Ahders's Criminal History Category of III, would have yielded a Guideline range of 360 months to life. If the conduct against BB and VB were not included, the total offense level would have been reduced to 41 with the 4-level enhancement and to 37 without it.

1 statutory maximum term of imprisonment for producing child
2 pornography is fifty years, Ahders's Guidelines range was reduced
3 from life imprisonment to fifty years (600 months). 18 U.S.C. §
4 2251(a), (e); U.S.S.G. § 5G1.1(c)(1).

5 The district court adopted the facts and the Guidelines
6 calculation in the PSR, and sentenced Ahders to the statutory
7 maximum term of incarceration, fifty years, minus twenty months
8 as credit for the time Ahders served in New York State custody
9 between his arrest and federal sentencing.

10 This appeal followed.

11 DISCUSSION

12 A. Applicable Law

13 In general, we review sentences using a "deferential
14 abuse-of-discretion standard." See *United States v. Cavera*, 550
15 F.3d 180, 189 (2d Cir. 2008) (en banc). This standard applies
16 "both to 'the sentence itself' and to 'the procedures employed in
17 arriving at the sentence.'" *United States v. Verkhoglyad*, 516
18 F.3d 122, 127 (2d Cir. 2008) (quoting *United States v. Fernandez*,
19 443 F.3d 19, 26 (2d Cir. 2006)). We review the district court's
20 conclusions as to interpretations of the Guidelines de novo,
21 *United States v. Awan*, 607 F.3d 306, 312 (2d Cir. 2010), and

1 findings of fact for clear error, *United States v. Salim*, 549
2 F.3d 67, 72 (2d Cir. 2008).

3 When reviewing a sentence, we "must first ensure that
4 the district court committed no significant procedural error,
5 such as failing to calculate (or improperly calculating) the
6 Guidelines range, . . . or failing to adequately explain the
7 chosen sentence." *Gall v. United States*, 552 U.S. 38, 51 (2007).
8 We must then conduct a substantive review by evaluating "the
9 length of the sentence imposed in light of the factors enumerated
10 under 18 U.S.C. § 3553(a)." *United States v. Villafuerte*, 502
11 F.3d 204, 206 (2d Cir. 2007).

12 A district court must begin the sentencing process by
13 calculating the advisory Guidelines range before proceeding to an
14 independent, individualized consideration of the sentence to
15 impose. *Gall*, 552 U.S. at 49-50; *Cavera*, 550 F.3d at 189. A
16 district court must make "specific factual findings," by a
17 preponderance of the evidence, to support any sentencing
18 enhancement under the Guidelines. *See United States v. Espinoza*,
19 514 F.3d 209, 212 (2d Cir. 2008) (quoting *United States v.*
20 *Molina*, 356 F.3d 269, 275 (2d Cir. 2004)); *United States v.*
21 *Salazar*, 489 F.3d 555, 558 (2d Cir. 2007). A district court need
22 not specifically recite all the facts relevant to its Guidelines

1 calculation; rather, it is sufficient for the district court to
2 adopt the findings in the presentence report -- *if* those findings
3 are adequate to support the sentence imposed. *See, e.g., United*
4 *States v. Carter*, 489 F.3d 528, 540 (2d Cir. 2007) (holding that
5 "the District Court's reliance on the inadequate findings of the
6 PSR, without more, constituted plain error"); *United States v.*
7 *Eyman*, 313 F.3d 741, 745 (2d Cir. 2002). The district court is
8 required to rule on controverted matters that will affect
9 sentencing, Fed. R. Crim. P. 32(i)(3), but it may do so by
10 adopting the recommendations of the presentence report. *United*
11 *States v. Prince*, 110 F.3d 921, 924 (2d Cir. 1997).

12 B. Application

13 On appeal, Ahders does not challenge the substantive
14 reasonableness of his sentence, but argues that the district
15 court committed procedural error by improperly calculating the
16 advisory Guidelines range. He argues principally that the
17 district court erred in two respects: by including Ahders's
18 production of sexually explicit images of BB and VB and by adding
19 a 4-level enhancement for Ahders's possession of sadistic or
20 masochistic child pornography.

1 a. The Inclusion of BB and VB

2 Ahders contends that the conduct with respect to BB and
3 VB should not have been grouped and combined with the offense of
4 conviction. Ahders notes that Count 1 of the indictment charged
5 the production of pornography with respect to only one "male
6 minor." We reject the argument.

7 First, it is not dispositive that Count 1 did not cite
8 the acts against BB and VB. Section 2G2.1(d) (1) provides:

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

14 U.S.S.G. § 2G2.1(d) (1). As the commentary explains, "if the
15 relevant conduct of an offense of [producing child pornography]
16 includes more than one minor being exploited, *whether*
17 *specifically cited in the count of conviction or not*, each such
18 minor shall be treated as if contained in a separate conviction."

19 U.S.S.G. § 2G2.1(d) (1), cmt. n.5 (emphasis added). Hence, the
20 conduct involving BB and VB may be included if it was "relevant
21 conduct."
22

1 Second, the exploitation of BB and VB was relevant
2 conduct. "Relevant conduct" includes:

3 all acts and omissions committed . . . by the
4 defendant . . . that occurred during the
5 commission of the offense of conviction, in
6 preparation for that offense, or in the
7 course of attempting to avoid detection or
8 responsibility for that offense.

9 U.S.S.G. § 1B1.3(a) (1) (A). This includes "both charged and non-
10 charged conduct." *United States v. Bove*, 155 F.3d 44, 47-48 (2d
11 Cir. 1998).

12 The conduct involving BB and VB occurred "during the
13 commission of the offense of conviction," as it occurred during
14 the period that Ahders was producing pornographic images and film
15 of EM. Ahders exploited and abused all three children, including
16 abusing EM and BB together, during Mother's Day weekend in 2007
17 when VB and BB were staying with EM for a sleepover. During this
18 weekend, Ahders produced pornographic images of all three
19 children. Clearly, then, the abuse of VB and BB was "relevant
20 conduct," and it was properly considered by the district court.

21 Ahders argues that he was not given adequate notice
22 that he would be held accountable in this case for his actions
23 against VB and BB. He is incorrect. At his plea allocution, the
24 Government put Ahders on notice that it would be seeking a

1 "multiple count analysis" because "two other minors" had been
2 sexually abused and photographed by Ahders, which would result in
3 3 levels being added to the total offense level. Ahders elected
4 to plead guilty anyway.

5 Ahders also argues that the district court relied on
6 insufficient evidence of the exploitation of BB and VB, noting
7 the unreliable nature of the statements of the three young
8 children. He also contends that the district court failed to
9 make sufficient factual findings and credibility determinations.
10 We disagree.

11 As paragraphs 30-31 of the PSR relate, BB stated that
12 Ahders told him and EM to touch each other's penises and then
13 took photographs of them doing so, and VB stated that Ahders took
14 off her pants, held her legs apart, and took photographs. The
15 district court expressly overruled Ahders's objections to
16 paragraphs 29 through 32 of the PSR, found that the described
17 conduct was "relevant conduct," and concluded that the findings
18 were "supported by a preponderance of the evidence." Ahders
19 raises no colorable challenge to this evidence, and it is clearly
20 sufficient to establish that Ahders exploited VB and BB within
21 the meaning of 18 U.S.C. § 2251.

22

1 b. The Enhancement for Possession of
2 Sadomasochistic Images

3 Ahders argues that the district court erred when it
4 applied a 4-level enhancement pursuant to U.S.S.G. § 2G2.1(b) (4)
5 for possession of material portraying sadistic or masochistic
6 conduct. In the circumstances here, the district court could
7 properly apply the enhancement only if (1) the child pornography
8 Ahders was convicted of producing involved the portrayal of
9 sadomasochistic conduct or (2) Ahders engaged in conduct that was
10 "relevant" to his production of child pornography involving EM
11 and that "relevant conduct" involved sadomasochistic material.
12 See U.S.S.G. §§ 1B1.3(a) (1), 2G2.1(b) (4). Unfortunately, the
13 record lacks clarity as to the basis for the district court's
14 imposition of this enhancement.

15 The colloquy at sentencing suggests that the district
16 court considered three possible bases for imposing the
17 enhancement: (1) Ahders's conduct in filming his sexual abuse of
18 EM tied to a bed and bicycle; (2) Ahders's producing an image of
19 him sexually penetrating VB; and (3) Ahders's possession on his
20 laptop and PDA of images of young girls tied and bound. If
21 proven, all of this alleged conduct would have involved material
22 that portrayed sadistic or masochistic conduct or other

1 depictions of violence involving minors. *United States v.*
2 *Gilmore*, 599 F.3d 160, 168 n.6 (2d Cir. 2010) (images depicting
3 sexual penetration of eight-year old girl by adult male are
4 sadistic because they depict sexual act that would cause pain to
5 minor); *United States v. Freeman*, 578 F.3d 142, 147-48 (2d Cir.
6 2009) (sadism enhancement applies when "the district court makes
7 an objective determination that (1) an image depicts sexual
8 activity involving a minor and (2) the depicted activity would
9 have caused pain to the minor"); *United States v. Hoey*, 508 F.3d
10 687, 691-92 (1st Cir. 2007) (photographs depicting sexual
11 penetration of young victims by adult males represent "sadistic"
12 and "violent" materials). The issue then would be whether the
13 proven conduct was either part of the offense of conviction or
14 relevant conduct to the offense of conviction.

15 As to the first possible basis, the district court
16 merely inquired about "the handcuffing and the being tied up" of
17 EM. The district court made no findings in this respect.
18 Moreover, although the district court adopted the findings of the
19 PSR, the PSR did not rely on any images that Ahders produced for
20 imposing the 4-level enhancement. Hence, it appears that the
21 district court did not rely on the images that Ahders made of EM

1 in bondage, images that surely are sadomasochistic in nature. On
2 remand, the district court may want to undertake an analysis of
3 the enhancement under § 2G2.1(b)(4) with respect to the images
4 Ahders produced of EM and consider whether the production of
5 these images was part of the offense of conviction or,
6 alternatively, whether it was relevant conduct.

7 As to the second possible basis, the district court did
8 not resolve the conflict between EM's assertion that he saw a
9 photograph of Ahders penetrating VB and VB's assertion that
10 Ahders never touched her vagina. Fed. R. Crim. P. 32(i)(3)
11 (district court must resolve controverted matters that affect
12 sentencing). Moreover, it is not apparent from the colloquy at
13 the sentencing that the district court relied on this second
14 basis to impose the enhancement under § 2G2.1(b)(4), and the PSR
15 did not. On remand, if the district court elects to consider
16 this second basis for imposing the enhancement, it must first
17 resolve the conflict between EM's statement and VB's statement
18 and decide whether such an image was produced, and, if so, then
19 determine whether Ahders's production of the image is relevant
20 conduct to the offense of conviction -- his production of child
21 pornography involving EM.

1 As to the third possible basis, it does appear that the
2 images of the girls tied and bound found on the laptop and PDA
3 were the basis for the district court's imposition of the 4-level
4 enhancement. The colloquy at sentencing and the PSR so suggest.
5 Ahders does not dispute that these were sadistic images of child
6 pornography or that he possessed them, but he argues that they
7 are not relevant because "[t]here is no act or omission by [him]
8 that associates those images with his conviction for production
9 of child pornography." In essence, he argues that his possession
10 of the sadomasochistic images of the girls -- which he did not
11 produce -- was not "relevant conduct" to his production of child
12 pornography involving EM. The PSR and district court concluded
13 that Ahders's possession of the images of the girls was relevant
14 conduct, but they did so in wholly conclusory fashion, without
15 any analysis and without explaining the link between his
16 possession of the images of the girls and his production of
17 pornographic materials involving EM. Hence, we are unable to
18 engage in meaningful appellate review.

19 This Circuit has not previously addressed the question
20 under what circumstances the possession of sadomasochistic images
21 is "relevant conduct" to the production of child pornography.
22 Indeed, it appears that the issue has not been specifically

1 addressed by any Circuit. See, e.g., *United States v. Shuler*,
2 598 F.3d 444, 446 (8th Cir. 2010) (declining to decide issue, and
3 noting "this appears to be an issue of first impression, raising
4 difficult questions of whether sadistic or masochistic materials
5 that [the defendant] did not produce are nonetheless relevant
6 conduct to his production offense . . . under U.S.S.G.
7 1B1.3(a)(1), because they are 'acts . . . that occurred during
8 the commission of the offense of conviction'").

9 The phrase "occurred during the commission of the
10 offense of conviction" is not defined in the Guidelines, nor does
11 the commentary provide any guidance. The words "relevant
12 conduct" suggest more is required than mere temporal proximity,
13 as the other conduct must be "relevant" and it must occur "during
14 the commission of the offense of conviction, in preparation for
15 that offense, or in the course of attempting to avoid detection
16 or responsibility for that offense."

17 On remand, if the district court chooses to rely on the
18 sadomasochistic images of the girls as relevant conduct, it must
19 provide at least some analysis of the relatedness, if any,
20 between Ahders's possession of the images and his production of
21 child pornography involving EM. If the district court finds that
22 Ahders's possession of the images of the girls "occurred during

1 the commission of" his production of pornographic materials
2 involving EM, or "in preparation for that offense," it must point
3 to facts in the record to support its conclusion.

4 If the district court elects to proceed on this basis,
5 it may want to consider the following factors:

- 6 • The temporal proximity between the possession of
7 the images of the girls and the offense of
8 conviction, *i.e.*, when Ahders obtained the images
9 and whether Ahders possessed them during his abuse
10 of EM;
- 11 • The similarity between the images on the laptop
12 and PDA and the images made of EM;
- 13 • Whether Ahders used the same laptop and PDA with
14 EM as he used to download the images of the girls;
- 15 • Whether Ahders showed the images to EM and, if so,
16 for what purpose, *i.e.*, whether Ahders was using
17 the images to arouse EM or to "teach" him what to
18 do, *see* U.S.S.G. § 1B1.3(a)(1)(A) (relevant
19 conduct includes conduct "in preparation for"
20 offense of conviction);
- 21 • Whether Ahders viewed the images to assist him in
22 his production of child pornography, *i.e.*, whether
23 he used the images as samples, models, or
24 precedents; and
- 25 • As Ahders admitted that he liked looking at child
26 pornography (which he did on his laptop and PDA),
27 whether his viewing the images aroused him and was
28 a factor in his abusing EM, *see United States v.*
29 *Brand*, 467 F.3d 179, 197 (2d Cir. 2006) ("a direct
30 connection exists between child pornography and
31 pedophilia"); *see also* Fed. R. Evid. 414 (allowing
32 propensity evidence in "child molestation" cases);
33 18 U.S.C. § 2252A ("child pornography" cases

1 include both production of child pornography and
2 possession of child pornography).

3 None of these factors is dispositive, nor are any required; we
4 list them merely as factors that the district court may want to
5 take into account should it elect to consider imposing the 4-
6 level enhancement based on Ahders's possession of the bondage
7 images of the girls. See, e.g., *United States v. Nance*, 611 F.3d
8 409, 410-11, 416 (7th Cir. 2010) (where defendant was convicted
9 of receipt of child pornography involving 12-year old girl he had
10 sexually molested, holding his possession of pornographic
11 materials involving other children was relevant conduct that
12 could be used to enhance sentence); *United States v. Stulock*, 308
13 F.3d 922, 924-26 (8th Cir. 2002) (where defendant was convicted
14 of receiving video of child pornography, affirming district
15 court's holding that his possession of pornographic bondage
16 images of children on his computer was relevant conduct that
17 could be used to enhance his sentence); *United States v. Ellison*,
18 113 F.3d 77, 82-83 (7th Cir. 1997), cert. denied, 522 U.S. 893
19 (1997) (where defendant was convicted of receipt of video of
20 child pornography, holding, with little discussion, that district
21 court's inclusion of defendant's possession of magazines

1 containing sadomasochistic images of boys as "relevant conduct"
2 was "far from clear error").

3 Accordingly, we vacate and remand this case to the
4 district court so that it can clarify its basis for imposing the
5 4-level enhancement for possession of sadomasochistic materials,
6 state its factual bases for doing so, and articulate its
7 analysis. If it deems it necessary, the district court may wish
8 to hold an evidentiary hearing. By identifying the three
9 possible bases for the enhancement above, we do not intend to
10 limit the district court's consideration to only those three
11 bases. Nor do we intend to suggest that on remand the district
12 court is bound in any way to determine the facts consistently
13 with the way we have discussed them based on the present record.

14 CONCLUSION

15 For the foregoing reasons, the judgment of the district
16 court is VACATED and the case is REMANDED to the district court.