

Nos. 08-6465/08-6503

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**UNITED STATES OF AMERICA,
Plaintiff/Appellee/Cross-Appellant,**

v.

**TIMOTHY RYAN RICHARDS,
Defendant/Appellant/Cross-Appellee.**

**Appeal From the United States District Court,
Middle District of Tennessee, Nashville Division
Case No.: 3:05-00185**

**RESPONSE AND REPLY BRIEF ON BEHALF OF
APPELLANT/CROSS-APPELLEE, TIMOTHY RYAN RICHARDS**

**Kimberly S. Hodde, Esq.
HODDE & ASSOCIATES
40 Music Square East
Nashville, Tennessee 37203
(615) 242-4200**

**Attorney for Timothy Ryan Richards
Appellant/Cross-Appellee**

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 18

STANDARD OF REVIEW 19

ARGUMENT:

I. THE SEARCH OF THE BLACKSUN COMPUTER SERVER EXCEEDED THE SCOPE OF PROBABLE CAUSE SET FORTH IN THE WARRANT AND WAS EXECUTED AS A GENERAL WARRANT 20

II. THE GOVERNMENT’S IDENTIFICATION OF 20,000 IMAGES TO BE USED IN ITS CASE-IN-CHIEF WAS AN OBFUSCATION OF ITS REQUIREMENT UNDER RULE 16 .. 34

III. THE ADMISSION OF VIDEO AND PHOTOGRAPHIC EXHIBITS LABELED WITH THE PURPORTED AGE OF THE VICTIM AFTER THE VICTIM WAS IMPEACHED AS TO THOSE LABELED AGES IMPROPERLY MINIMIZED THE IMPACT OF CROSS-EXAMINATION AND INVADED THE JURY DELIBERATIONS 38

IV. THE DISTRICT COURT ERRED BY DENYING RICHARDS’ RIGHT TO CONFRONT AND IMPEACH A PROSECUTION WITNESS (JEREMY MOEDER) 42

| | |
|--|----|
| V. THE DISTRICT COURT ERRED BY FAILING TO DISMISS MULTIPLICITOUS COUNTS | 43 |
| VI. THE ACCUMULATION OF ERRORS RENDERED DEFENDANT RICHARDS' TRIAL FUNDAMENTALLY UNFAIR AND DENIED HIS DUE PROCESS RIGHTS | 44 |
| VII. THE SENTENCE IMPOSED IS SUBSTANTIVELY REASONABLE | 45 |
| CONCLUSION | 58 |
| CERTIFICATE OF SERVICE | 59 |
| CERTIFICATE OF COMPLIANCE | 60 |
| DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS | 61 |

TABLE OF AUTHORITIES

| CASES: | PAGE |
|--|-------------|
| <i>Davis v. Gracey</i> , 111 F.3d 1472 (10th Cir. 1997) | 23 |
| <i>Gall v. United States</i> , 552 U.S. 38 (2007) | 19, 45-47 |
| <i>Giordenello v. United States</i> , 357 U.S. 480 (1958) | 25, 27, 31 |
| <i>Groh v. Ramirez</i> , 540 U.S. 551 (2004) | 27 |
| <i>Guest v. Leis</i> , 255 F.3d 325 (6th Cir. 2001) | 22, 23, 32 |
| <i>Kimbrough v. United States</i> , 552 U.S. 85 (2007) | 1, 3, 47 |
| <i>Lo-Ji Sales, Inc. v. New York</i> , 442 U.S. 319 (1979) | 23 |
| <i>Murray v. United States</i> , 487 U.S. 533 (1988) | 28 |
| <i>Nix v. Williams</i> , 467 U.S. 431 (1983) | 28-29 |
| <i>Quon v. Arch Wireless Operating Co</i> , 529 F.3d 892 (9th Cir. 2008) cert. granted, <i>USA Mobility Wireless, Inc. v. Quon</i> , No. 08-1472, 2009 U.S. LEXIS 9132, 2009 WL 1513112 (U.S. Dec. 14, 2009) | 32 |
| <i>Rita v. United States</i> , 551 U.S. 338 (2007) | 19, 47 |
| <i>United States v. Archibald</i> , 589 F.3d 289 (6th Cir.2009) | 25, 27, 31 |
| <i>United States v. Banks</i> , 556 F.3d 967 (9th Cir. 2009) | 22 |
| <i>United States v. Baxter</i> , 889 F.2d 731 (6 th Cir.1989) | 27 |
| <i>United States v. Beach</i> , 275 Fed. Appx. 529 (6th Cir. 2008) | 16 |
| <i>United States v. Camiscione</i> , 591 F.3d 823 (6th Cir.2010) | 46 |

United States v. Clark, 257 Fed. Appx. 991 (6th Cir. 2007) 22

United States v. Denkins, 367 F.3d 537 (6th Cir. 2004) 34

United States v. Eng, 971 F.2d 854 (2d Cir. 1992) 28

United States v. Epley, 52 F.3d 571 (6th Cir.1995) 39

United States v. Gleich, 397 F.3d 608 (8th Cir. 2005) 22

United States v. Grossman, 513 F.3d 592 (6th Cir.2008) 16, 47

United States v. Hall, 142 F.3d 988 (7th Cir. 1998) 22

United States v. Hodson, 543 F.3d 286 (6th Cir. 2008) 27

United States v. Kennedy, 61 F.3d 494 (6th Cir. 1995) 28

United States v. Lapsins, 570 F.3d 758 (6th Cir.2009) 18, 46

United States v. Laury, 985 F.2d 1293 (5th Cir.1993) 26

United States v. Leake, 998 F.2d 1359 (6th Cir.1993) 27, 29

United States v. Leon, 468 U.S. 897 (1984) 25

United States v. Mancini, 8 F.3d 104 (1st Cir. 1993) 32

United States v. Maples, 60 F.3d 244 (6th Cir.1995) 37

United States v. Phinazee, 515 F.3d 511 (6th Cir. 2008) 48

United States v. Richard, 504 F.3d 1109 (9th Cir.2007) 39

United States v. Sassani, 1998 WL 89875 (4th Cir. Mar. 4, 1998) 22

United States v. Sloman, 909 F.2d 176 (6th Cir. 1990) 35

United States v. Williams, 592 F.3d 511 (4th Cir. 2010) 22

Weeks v. United States, 232 U.S. 383 (1914) 27

STATUTES

18 U.S.C. §3553(a) 3, 11, 18, 45, 47, 53, 57

OTHER AUTHORITIES:

Fed. R. App. P. 32 60

Fed.R.Crim.P. 16 36

Fed. R. Evid. 801(d)(1)(C) 39, 40

Sixth Circuit Rule 30 61

2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*,
§ 4.6, at 97 (1978) 23

STATEMENT OF THE CASE

Richards adopts and relies upon the Statement of the Case as set forth in his First Brief with the following additions:

Because 2 years passed between trial and sentencing, on October 23, 2008, Richards filed a Trial Brief setting forth a detailed summary of the proof adduced at trial complete with citations to the record. (R. 365). On October 24, 2008, Richards filed a Sentencing Position Paper setting forth his guideline challenges, *Kimbrough* style arguments about the child pornography guidelines and his analysis of the §3553(a) factors. (R. 366). On the same date, the government filed its Sentencing Position Paper. (R. 367). On October 30, 2008, Richards filed character letters and a Wall Street Journal article in support of his Sentencing Position Paper. (R. 368). He also filed a Motion to Strike Justin Berry's victim impact statement. (R. 371).

On October 31, 2008, the government filed a Response to Richards' Sentencing Position Paper. (R. 373). On November 3, 2008, Richards filed a Response to the government's Sentencing Position Paper. (R. 374).

On November 7, 2008, the district court sentenced Richards to 16 years incarceration, 8 years of supervised release, and a special assessment of \$1,100.00. (R.386). During the Sentencing hearing, the district court granted Richards' Motion to Strike Berry's victim impact statement. (R. 382). The Judgment and Commitment

Order was entered on November 20, 2008 and amended on December 1, 2008.¹ (R. 386, 387, 392, 393). On November 26, 2008, Richards timely filed a Notice of Appeal challenging his conviction. (R. 390). On December 10, 2008, the government filed a Notice of Appeal challenging the sentence. (R. 397).

¹ The only change in the Amended Judgment and Commitment Order related to forfeiture, which is not an issue raised on appeal.

STATEMENT OF THE FACTS

Richards adopts and relies upon the Statement of the Facts as set forth in his First Brief with the following additions:

D. Sentencing:

Although the government did not brief the facts relating to its sentencing challenge, Richards believes the following facts are important to a determination of the issue.

In advance of sentencing, the parties exhaustively briefed the guideline issues, *Kimbrough*-style considerations about the child pornography guidelines and the §3553(a) factors. The parties attached exhibits in support of their relative sentencing positions. The issues and arguments were thoroughly set forth in writing well in advance of sentencing, and the district court reviewed and digested all of the filings. (R. 399, ST p. 222).

On November 7, 2008, the district court conducted a sentencing hearing. (R. 378). During the Sentencing hearing, the court (1) took proof on the contested issues; (2) ruled on the guidelines objections and performed its own guideline calculation; (3) heard Richards' allocution; (4) considered the arguments of the parties; (5) weighed and balanced all of the §3553(a) factors; and, (6) pronounced sentence and explained the reasons for the sentence imposed. (R. 399, ST pp. 1-242). In the final

analysis, the district court ordered that Richards serve a 16 year prison sentence to be followed by 8 years of supervised release. Additionally, he was required to pay a \$1,100.00 special assessment. (R. 386, 387, 392, 393). Following the sentencing, the court entered a Judgment and Commitment Order with a supporting sealed Statement of Reasons explaining and justifying the sentence imposed. (Id).

Four witnesses testified at the sentencing hearing. The government advanced Martha Finnegan as an expert in “compliant victims.” The district court was rightfully underwhelmed by Ms. Finnegan’s qualifications and her testimony, which seemed to be a back-door effort to impeach Patrick Lombardi’s trial admissions that he was in a consenting, non-abusive, non-coercive relationship with Richards and was a willing participant and business partner in the making of pornography. (R. 399, ST pp. 7-8, 16-17, 74-75). Nonetheless, the district court factored Ms. Finnegan’s testimony into its sentencing analysis.² (R. 399, ST p. 233).

² On the issue of consent, the court found:

At the very beginning of the trial, the government conceded that the consent of the victim was not a defense but that it was relevant. It was inquired into in great detail at the trial. It's been discussed here today.

The government will maintain that Lombardi was 14, and he couldn't have consented, and he was lured into all of this, but the court cannot ignore the fact that Mr. Lombardi was -- had his own web cam, had his own website, was making money from the website -- that's my

(continued...)

FBI SA Brook Donahue testified concerning Richards' jailhouse website (FreeCasey), his blog (GayBoyInJail), videos of underage performers (Taylor and Collin) - neither of whom ever had contact with Richards - and an additional video that the government claimed would demonstrate Richards' coercion of Lombardi. (R. 399, ST pp. 25-126). The government construed the blogs as admissions and used them to exemplify Richards' seeming lack of remorse for his offense conduct.

²(...continued)

memory of the proof – before he ever met Mr. Richards.

So we don't have a totally innocent victim here, and Mr. Lombardi testified at the trial that this was a committed relationship between two consenting people. The age difference was not that big. All of the proof in this case was activity was gay activity between teenage boys or teenage boy and someone a little bit older.

I see this case as very different from a normal child pornography case. I certainly do not ignore and discredit the testimony of Ms. Finnegan about compliant teens -- I have a teenager -- being curious about their sexuality, being risk takers, and being very vulnerable to flattery. I know all about those things, and I don't discount them.

But I also know that a teenager can have a certain amount of control over what they're doing, and can agree to do things in a way that perhaps is not legal consent. But when you're 14 and the other individual is only four years older, it just -- it just comes across different to the court than a normal kind -- than a normal child pornography case and certainly the case of Mr. Sells that the defense has brought to the court's attention.

(R. 399, ST pp. 233-234).

However, on cross-examination at sentencing, it became clear that virtually all of the trial fact witnesses in this case (Lombardi, Brown, Koblinska, and Moeder) maintained blogs about the case and other matters that contained a mixture of fact, fiction, spin and other forms of unreliable rumination.³ (R. 399, ST pp. 82-90). Donahue admitted that Richards' blog was a hodgepodge of fantasy, comedy, poetry, music lyrics, and creative writing. (R. 399, ST pp. 89-91). In fact, Richards repeatedly disclaimed throughout the blogs that the content was pure fiction. (Id).

Donahue's sentencing cross-examination further evidenced Richards' efforts to cooperate with the government both early in the case and after conviction. Early in the case, he provided information about 2 child predators, Dan Sweet and Alex Richards. After conviction, the defense forensic computer examination discovered and documented extremely troubling facts and electronic evidence showing Kurt Eichenwald's undisclosed dealings with Justin Berry during the time in which the underage video with Taylor was produced.⁴ The defense shared these disturbing

³ Lombardi even embarrassed SA Donahue by posting online a picture of Donahue in an embrace with Lombardi and Moeder during the trial. (R. 399, ST pp. 105-107).

⁴ Eichenwald is a former NY Times reporter who gained tremendous fame by writing about the world of child pornography through the eyes of Justin Berry in an article which led to their congressional testimony and a media tour recounting tales of Berry's alleged victimization - even though Berry was an

(continued...)

revelations with the government, which was able to independently confirm the reliability and veracity of the information. (R. 399, ST pp. 97-103, 121-125).

Donahue also conceded on cross-examination that Richards had absolutely nothing to do with the production of the Collin or Taylor videos; those underage productions were the acts of Justin Berry and Greg Mitchel. (R. 399, ST pp. 108-109).

Donahue also attempted to characterize a video of Lombardi as abusive and evidencing coercion, but when the court asked to see the video rather than having it summarized, the court found:

There was no abuse here. And I was rather struck today that the government introduced a new video for the first time, and I guess I'm glad I asked to see it. It sounded to me like the government just wanted to characterize it for me and not show it.

And the characterization that I remember coming out of the mouths of the prosecutors was basically that Mr. Lombardi was being eaten alive by bugs, being made to do something out in the woods by Mr. Richards, and Mr. Richards basically, you know, egging him on in the background. That's not what this court saw.

This court saw smiles on the faces of Mr. Lombardi in a few places in that disgusting video of masturbation out in the woods, but he certainly was not being eaten alive by bugs. He complained at one point about the heat, but I do not view that video as abuse. And if the government views

⁴(...continued)
immunized perpetrator.

that as abuse, then perhaps there's just a real difference in what the government and the court views as abuse.

(R. 399, ST pp. 234-235).

The government next called forensic computer examiner Kristy Witsman to suggest that Richards sent nude photos of himself to Doe⁵ via cell phone email. (R. 399, ST pp. 127-143). However, on cross-examination, it became clear that the government was taking liberties with the facts. Witsman admitted that she saw computer evidence of a cell phone spam file in the JustinsFriends file directory. Witsman was aware that pornography advertisers spam cell phones. She could not dispute that it would be reasonable for a test of the spam advertising for JustinsFriends to be sent to the cell phone by Richards. She did not examine the actual phone. She did know to whom the phone was registered. She could only state that at some point Doe may have used the phone, but could not say that he used the phone on the date of the spam advertisement (Richards nude) or that he ever saw those photos. (R. 399, ST pp. 139-143). This kind of overreaching by the government that became a recurring event in this case.

The defense called Russ Richards, the defendant's father, to testify about Richards' history and characteristics. Tim Richards grew up surrounded by

⁵ The government's Brief referred to this underage individual as "Doe" and for the sake of consistency, Richards will do the same.

computers since both parents were in the computer business. By age 10-11, Richards was doing basic computer programming, and by age 12, he was creating web-based bulletin boards (early websites). Richards was an intelligent and gifted child but was also difficult, suffering from Oppositional Defiant Disorder. By age 14, Richards was being preyed upon by Dan Sweet, a California man who later preyed on Lombardi as well. By age 16, Richards defiantly insisted on moving out of his parents home to live independently, and he did so. Richards was always trying to rescue people from a bad situation. Richards' father gave several examples of him helping a battered female teen and stepping in to aid a pregnant high school classmate - often to his personal detriment. While in jail, Richards recklessly blogged against the advice of his parents and counsel. He also made efforts to continue his education. Richards' father testified that Richards had a true internet addiction and struggled to separate his real life from his online persona - Casey. Russ Richards related that his son's actions and words as Casey were not indicative of the real Tim Richards. (R. 399, ST pp. 180-192).

Richards allocuted in a heartfelt and sincere effort to share his thoughts and express his remorse. He apologized to his parents for not heeding their advice and for devastating them financially - jeopardizing their retirement. He spoke about how isolated he felt by his early revelation that he was gay and how he sought out

computer companionship rather than human contact as a result. He spoke about how Dan Sweet made him feel good about himself and sent him gifts. Sweet sent him candy and pornography (eventually child pornography) on videotape. Richards was frightened at first. However, he returned to Sweet out of loneliness. Sweet eventually sent Richards his first webcam. Richards was asked to perform for the camera and did. He was one of the first victims of internet based child pornography.

By the time Richards was 16, Sweet lost interest in him, and Richards suffered a real identity crisis. He talked about how he and Aaron Brown started their first internet company when he was 18. He talked about meeting Lombardi and feeling the need to rescue him from Sweet. Lombardi was in love with Sweet - whom Lombardi believed to be 18 (not his true age of 40) and planned to run away to live with him in California. Lombardi was suicidal, and Richards intervened to tell Lombardi who Sweet really was and why he could not fly to California. Richards talked about the evolution of his relationship with Lombardi and their involvement in pornography.

He also admitted that, while in custody, he engaged in blogging against everyone's advice. He did it to escape the realities of his situation in jail by living in an alternative online world. Casey had a fan-base, a following, and Richards feared that if he was silent he would be forgotten. He admitted the blogs were crazy, stupid and ridiculous. He also suspected he had an internet addiction. He stated that he just

could not pull himself out of the virtual world and face the realities of life. He “started off as a child tricked into [pornography] and [he] became an adult trapped in it.” As a former child victim, Richards agreed that child pornography is a terrible thing. Richards even stated that adult pornography can corrupt relationships. He explained that Casey was his alter-ego who was sarcastic, vain and constantly upbeat. Casey was his escape. He admitted to now realizing that he must live life outside of the internet. Richards’ allocution was truly insightful and sincerely remorseful. (R. 399, ST pp. 192-210).

The district court calculated the guidelines. Found the total offense level to be 48 with a Criminal History Calculation of I for a guideline sentence of life imprisonment. In addition to the guideline range, the district court meticulously considered and balanced the §3553(a) factors and fashioned a sentence which was “sufficient but not greater than necessary to comply with the purposes set forth in the statute.” (R. 399, ST pp.232-233).

Consistent with its findings from the bench, the district court entered the following written statement of reasons. (R. 387).

The defendant was convicted of three counts of distributing child pornography, three counts of advertising child pornography, two counts of violating the recordkeeping requirements, one count of conspiracy to distribute child pornography, one count of production of

child pornography, and one count of possession of child pornography. He was acquitted on 10 of the 21 counts charged.

The evils of child pornography are well known, and the court can in no sense minimize the seriousness of the offenses of which the defendant has been convicted. However, this is an atypical child pornography case. All of the images charged in this case are of sexual activity between homosexual adolescent boys, aged 13-14 years old to early twenties, and all of the conduct was consensual. None of the charged pornography had images of babies, children, or girls of any age. Moreover, the images with which this defendant was charged contained no sadistic, brutal, violent, cruel, forced or abusive acts, nor was torture, bestiality, bondage or masochism depicted. The defendant was not assigned the guidelines enhancements under §2G2.2 for pre-pubescent minor images or for sadistic images. Most of the charged images were of the defendant and/or Patrick Lombardi, with whom the defendant had a 4-year relationship, described by Lombardi at trial as “a committed relationship between two consenting people.”

The defendant was primarily in the business of advertising and distributing adult pornography, and the government’s expert agreed that over 99% of the material found on the defendant’s computers and the servers utilized by him was adult pornography. When a server located in California, utilized by the defendant, was seized by the government, he called to find out when it would be back in service and gave the government agent accurate contact information for him—either the act of a naive incompetent or of someone primarily involved in legal pornography.

Many factors weigh in mitigation for this defendant. When the defendant was 12 years old and questioning his sexuality, he was already deeply into the internet. This was the early ‘90s, early in time for such activity, but he was surrounded by technological expertise. Both parents used

computers extensively in their professions—his father, a software consultant for IBM and his mother, a U.S. Defense Department analyst. At this early age, he was contacted through the internet by Dan Sweet, a man 24 years older than he, who began sending him candy, money and adult pornography in the mail. The defendant would rush home from school in order to open and secrete the packages before his parents got home from work. At first, the pornography was adult pornography; then Sweet began to send child pornography involving very young boys and older men. Eventually, Sweet sent the defendant a web cam and asked him to emulate, with a boy neighbor, what they saw on the videos that Sweet was sending them, which they did. In his allocution at sentencing, the defendant described his addiction to pornography this way: “I was tricked into it as a kid and trapped in it as an adult.” At 14, he insisted upon meeting Dan Sweet, so his mother flew with him to California to meet this individual. At this time, the defendant’s parents did not yet know that he was gay.

Although obviously gifted in some ways, the defendant never did well in school and, against his parents’ wishes, dropped out of school in the 10th grade and established a web hosting company. At 18, he established an adult pornography site, containing exclusively homosexual activity, from which he earned a substantial income. He has at various times held a real estate license, been a certified flight instructor and a helicopter pilot, in addition to his various computer endeavors. He obtained his GED in 1998 and has taken some college courses. His father testified that he is presently taking an accounting course by correspondence while he has been in jail.

The defendant met Patrick Lombardi the month that he turned 19. Lombardi was 14, and Dan Sweet, who had established contact with Lombardi, put Lombardi and the defendant in touch. The defendant met Lombardi and told him that Sweet was a predator, dissuading him from meeting Sweet, whom Lombardi thought was 18. The

defendant and Lombardi were together for four years, in a “committed,” sexual relationship. Both sets of parents knew of the relationship and had met each other, and the boys lived with both sets of parents at various times during the relationship. It was during this period that the defendant made numerous films of and/or with Lombardi, when he was a minor. Lombardi had been broadcasting with a web cam from the time he was 12 and testified at trial that he became envious during their relationship of the defendant’s making money on his own web sites. So Lombardi started his own web site before he was 18. There was much testimony at trial from Lombardi and the defendant as to the defendant’s efforts to prevent Lombardi’s publication of pornographic images of himself taken before he was 18, although the defendant was convicted of distributing those images himself.

Other factors do not weigh in favor of a variance for this defendant, and the government urges that they justify a sentence of life in prison and lifetime supervised release, if he is not sentenced to life in prison. When Lombardi was 18, the defendant befriended a woman who had an 11 or 12-year-old son. Apparently on a whim, he married this woman, and the mother and her son lived nearby in a trailer for some period of time while Lombardi was still living with the defendant. Lombardi moved out and, at the time of his arrest, the defendant was living with this boy; the mother was living elsewhere. It seems quite clear that the defendant was in a sexual relationship with this boy—again, however, with the knowledge of his mother. It must be noted that no pornography containing images of this boy, if it exists, were charged in the case.

The other aggravating factor is that, post-trial, the defendant has somehow been able to maintain a “blog” from the local jail where he has been housed since being arrested in September of 2005. On the blog, numerous printouts of which were made exhibits at the sentencing hearing, not only does he continue to maintain his

innocence and blame others for conspiring to have him arrested but, with bravado and pride, he brags of having sexual relationships and making alcohol in the jail. Indeed, the government introduced at sentencing his disciplinary record from the jail, which shows numerous infractions, including prohibited sexual relations. Although the government has insinuated that the defendant's father has been assisting him to maintain this blog, the father testified at the sentencing that he was not aware until recently that the defendant had resumed his blogging from the jail after "we cut him off" following the motion for new trial proceedings more than a year ago. The defendant's father testified that it was "insane" that the defendant was doing this blogging but that the defendant did not seem able to control his internet persona, "Casey," in whose identity the blogging is carried out.

During his allocution at sentencing, the defendant candidly admitted upon the court's inquiry an addiction to the internet, pornography and sex. He stated that pornography corrupts how you relate to people and admitted that how he is connecting with people in the jail and on the blog is not healthy. He stated that he needed "an outlet" in jail and that "Casey has always been my outlet." He described "Casey" as an almost separate personality--someone, unlike him, who is arrogant and vain. In the defendant's remarks, the court perceived remorse, regret, and hopes for his future.

In the court's view, this defendant has serious mental health issues related to his addictions and his different, identifiable internet persona, "Casey." With addiction treatment, mental health treatment, and sex offender treatment, the court has hope that this young man, "stopped in his tracks at 24" (the government's words) from engaging in illegal child pornography activity, can reform and lead a productive life after 16 years of incarceration. The defendant is a gay man who will remain a gay man, but his taste for sex with adolescents must be changed. If 16

years of sex offender, mental health and addiction treatment cannot change that pattern, certainly 30 or 40 years has no better chance of doing so. And following his period of incarceration, he will be on an extensive period of supervised release, with sex offender special conditions that put substantial limitations on his freedom and provide more opportunity for treatment and close supervision of his activities.

This sentence is sufficient but not greater than necessary to accomplish the goals of sentencing. It reflects the seriousness of the offense, will promote respect for the law and be a just punishment for the offenses of this defendant. It will provide the defendant with needed treatment for a substantial period of time, which should provide an adequate deterrence to further criminal conduct on the part of this defendant, who has no criminal record, and hopefully will protect the public from further crimes of this defendant during his 16 years in prison and 8 years of close supervision after he is released.

The guideline structure for child pornography cases often results in guideline ranges calling for defendants to serve several lifetimes in jail, as here. But because courts must sentence these defendants based on an individualized assessment of their history and characteristics as well as the nature and circumstances of the offense, this court does not believe that this 16-year sentence, to be followed by 8 years of intensive supervised release, will result in unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *See United States v. Grossman*, 513 F.3d 592 (6th Cir. 2008) (66-month sentence imposed in child pornography case, with 120-month guideline); *United States v. Beach*, 275 Fed. Appx. 529 (6th Cir. 2008) (96-month sentence imposed in child pornography case, with 210 to 240-month guideline).

The court has fully considered the kinds of sentences available under the guidelines and the guideline range for this case. Indeed, the court has denied all of the defendant's

objections to the various enhancement factors applied in this case. However, to sentence him to life in prison, as requested by the government, simply does not comply with the over-arching purpose of imposing a sentence sufficient but not greater than necessary to accomplish the goals of sentencing.

(Statement of Reasons, R. 387).

SUMMARY OF THE ARGUMENT

Richards adopts and relies upon the Summary of the Argument as set forth in his First Brief with the following addition:

POINT VII: The district court properly exercised its discretion in imposing a sentence of 16 years which was substantively reasonable given the considerations of 18 U.S.C. §3553(a), under the facts of the case and the totality of the record. The district court did not select the sentence arbitrarily, base the sentence on impermissible factors, fail to consider relevant sentencing factors, or give an unreasonable amount of weight to any pertinent factor. *United States v. Lapsins*, 570 F.3d 758, 772 (6th Cir. 2009). The sentence should be affirmed.

STANDARDS OF REVIEW

Richards adopts and relies upon the Standards of Review as set forth in his First Brief with the following addition:

POINT VII: The sentence imposed by the district court is reviewed for “reasonableness” under a deferential abuse-of-discretion standard. *Rita v. United States*, 551 U.S. 338, 361 (2007)(Stevens, J., joined by Ginsburg, J., concurring). Under that deferential standard, “[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.” *Gall*, 552 U.S. at 51.

ARGUMENT

I. THE SEARCH OF THE BLACKSUN COMPUTER SERVER EXCEEDED THE SCOPE OF PROBABLE CAUSE SET FORTH IN THE WARRANT AND WAS EXECUTED AS A GENERAL WARRANT.

A. Overbreadth and lack of particularity:

The government argues that the search warrant authorized the search of the entire computer server and was properly justified by probable cause. (Government Brief pp. 29-37). The government submits that the search warrant was not overbroad and contained sufficient particularity.

However, the government's argument ignores the uncontroverted threshold fact that the supporting affidavit failed to advise the issuing court that the server housed multiple websites - not merely the single targeted website (Justinsfriends.com/net). There was no Justinsfriends server. There was a server at the BlackSun facility that housed Justinsfriends and other websites, but it was not a dedicated server.

The affidavit also failed to suggest safeguards to protect the privacy of other website owners in the event the server housed multiple websites. Further, the affidavit failed to address the possibility that a server containing multiple websites might store the contents of those individual websites in defined compartments or locked areas of the server - making it entirely unnecessary to search other website content.

Truth in fact, the BlackSun server was set up in a neatly compartmentalized and segregated fashion rendering it entirely unnecessary to search beyond the content maintained in the Justinsfriends file directory. This fact was confirmed during government expert Fottrell's trial testimony when he discussed the "eureka moment" of discovering how each website was so neatly compartmentalized in its own separate file directory. (R.213,TTR Vol. IV, pp. 690-694).

The government's approach to the search warrant for the BlackSun server was entirely incorrect. The government should have requested a second search warrant once an initial assessment of the server set-up was made. Had the government done so, the search would have been properly limited in scope to only the Justinsfriends site and none of the other sites would have been searched. After all, Fottrell confirmed at trial that the Justinsfriends content and inner-workings were wholly separated from the other sites and divided into distinctive file directories. (R.213,TTR Vol. IV, pp. 690-694). The government elected not to seek a second search warrant narrowing the scope of the search. Rather, it executed the existing search warrant as a general warrant, rummaging through all contents of every site on the computer server regardless of association to Justinsfriends.

The government defends its actions by citing a series of cases addressing the scope of searches for contraband on a personal computer or a bulletin board service.

See *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001)(bulletin board service search - not shared web server); *United States v. Clark*, 257 Fed. Appx. 991, 992 (6th Cir. 2007)(personal computer); *United States v. Banks*, 556 F.3d 967, 973 (9th Cir. 2009)(home computer); *United States v. Gleich*, 397 F.3d 608, 612 (8th Cir. 2005)(personal computer and series of warrants justifying degree of computer searches); *United States v. Hall*, 142 F.3d 988, 996-97 (7th Cir. 1998)(personal computer); *United States v. Williams*, 592 F.3d 511, 520 (4th Cir. 2010)(personal computer); *United States v. Sassani*, 1998 WL 89875, *5 (4th Cir. Mar. 4, 1998)(personal computer). These cases are all distinguishable from the facts in the case at hand.

Clearly, when there is probable cause to believe that an individual is involved in online child pornography activities from home, a search of that person's entire personal computer within that home would be within the appropriate scope of the accompanying search warrant. However, where the probable cause relates to activities on a single website located on a computer server (not a personal computer) stored at an off-site server farm (not a perpetrator's personal residence) **and** that computer server also hosts content for 6 other websites not mentioned in the probable cause articulation **and** those unmentioned websites are neatly compartmentalized in their own respective spaces on the server, it is improper to search the entire contents

of the server. Doing so is to execute the search warrant as a general warrant. These are the undeniable facts of this case.

The government submits that “the warrant was no broader than necessary to allow the agents to locate the JustinsFriends-related content on the server.” (Government Brief p. 32). By implication, the government is tacitly conceding that the scope of probable cause only relates to a single website (Justinsfriends) on the shared web server - nothing more. An undeniably overbroad execution results when every area of a shared server is searched based on probable cause for a single website. “(A)n otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based.” 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 4.6, at 97 (1978); *See, Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979).

The government cites 2 cases involving the search of computers hosting bulletin board services for the proposition that the execution in this case was sufficiently particularized and proper in scope. (Government Brief pp. 32-33; *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001); *Davis v. Gracey*, 111 F.3d 1472, 1481 (10th Cir. 1997)). These cases are inapposite. Both *Guest* and *Davis* involve the search of a computer operating a bulletin board service. A web-based bulletin board service is

exactly what its name suggests; it allows the posting of material (often obscene material) for all onlookers to see by going to a single location. There is little expectation of privacy in a bulletin board service, and the cases say as much.

A web server is an entirely different creature. When someone rents defined space on a web server for purposes of storing all of the inner and outer workings of a website, expectations are vastly different. A tenant on a web sever may not know the identity of other sites being housed on the server and would have no control over the content of the other sites. (Fottrell, R.162, Suppression Hearing 7/24/06, pp.202-204, 216-227). Unlike a bulletin board service which operates for all to see, often a website on a shared server will maintain content that is only visible to the owner or to subscribers to the site. Individual website tenants certainly have an expectation of privacy in their content - especially in the content that is secreted from the general public. In these respects, a shared web server is vastly different from a bulletin board service.

The search warrant lacked particularity and was executed as a general warrant. The district court erred by failing to suppress the fruits of the search of the BlackSun computer server.

B. The Good -Faith Exception Does Not Apply:

As a threshold matter, the government waived this argument by not raising it in the district court. *United States v. Archibald*, 589 F.3d 289, 295-296 (6th Cir.2009)(citing *Giordenello v. United States*, 357 U.S. 480, 488 (1958)("[t]o permit the Government to inject its new theory into the case at this stage would unfairly deprive [defendant] of an adequate opportunity to respond.")).

Regardless, the good faith exception is inapplicable. In *United States v. Leon*, the Supreme Court held that evidence obtained by "officers reasonably relying on a warrant issued by a detached and neutral magistrate" is admissible. 468 U.S. 897, 913, 104 S.Ct. 3405, 3415, 82 L.Ed.2d 677 (1984). The officers--and the Court emphasized that "officers" should be read broadly to include those who obtain the warrant as well as those who conduct the search--must act based on an "objectively reasonable" reliance; "in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.* at 922-23 & n. 24, 104 S.Ct. at 3420 & n. 24. In footnote 24, the *Leon* Court noted that its opinion should not be read to suggest that "an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search." 468 U.S. at 923 n. 24, 104 S.Ct. at 3420 n. 24.

The *Leon* good-faith exception does not apply in 4 situations: (1) when the warrant is based on an affidavit containing “knowing or reckless falsity;” (2) when the magistrate has simply acted as a “rubber stamp” for the police; (3) when the affidavit does not “provide the magistrate with a substantial basis for determining the existence of probable cause;”⁶ and (4) when the warrant is so “facially deficient” that an officer could not reasonably rely on it. *Id.* at 923, 104 S.Ct. at 3420.

The good-faith exception to the exclusionary rule should not apply in this case for all of these reasons. First, the affidavit neglects to report that this web server could contain other entirely unrelated websites - affecting the probable cause calculus and scope of the search. Secondly, the affidavit plainly relates exclusively to the Justinsfriends website such that a truly neutral and detached magistrate should have limited the scope of the search to only that website. In this sense, the issuing court acted as a “rubber stamp” for the affiant. Thirdly, the affidavit lacked probable cause to justify the breadth of the search warrant. Lastly, any moderately experienced or educated law enforcement officer would have recognized that the search warrant was facially deficient for overbreadth and lack of particularity.

⁶ See, *United States v. Laury*, 985 F.2d 1293, 1311 n. 23 (5th Cir.1993) (defining “bare bones affidavit” as one that contains “wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause”).

In cases where the errors undercutting the validity of warrants are sufficiently glaring, this Court has declined to apply the good faith exception. See, *United States v. Leake*, 998 F.2d 1359, 1367 (6th Cir.1993); *United States v. Baxter*, 889 F.2d 731, 734 (6th Cir.1989); *United States v. Hodson*, 543 F.3d 286 (6th Cir. 2008). Moreover, because the FBI prepared and executed the defective search warrant, it cannot rely upon the good faith exception. See *Groh v. Ramirez*, 540 U.S. 551, 564, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004)("Moreover, because petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.").

For these reasons, the *Leon* good-faith exception to the exclusionary rule is inapplicable, and the government cannot rely thereupon.

C. The Independent-Source and Inevitable-Discovery Doctrines Do Not Apply:

The government waived this argument by not raising it or developing it in the district court. *Archibald*, 589 F.3d at 295-296 (citing *Giordenello*, 357 U.S. at 488). However, if considered, the arguments are factually incorrect and legally baseless.

The exclusionary rule bars the admissibility of items seized during an unconstitutional search. See *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58

L. Ed. 652 (1914). The “fruit of the poisonous tree” doctrine bars “introduction of derivative evidence . . . that is the product of the primary [illegally obtained] evidence [or testimony].” *Murray v. United States*, 487 U.S. 533, 536-37, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988). However, evidence obtained through unlawful means may still be admitted under the inevitable discovery doctrine. In *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1983), the Supreme Court held, “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.”

More specifically, this Court has stated that “the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or other compelling facts establishing that the disputed evidence inevitably would have been discovered.” *United States v. Kennedy*, 61 F.3d 494, 499 (6th Cir. 1995). The inevitable discovery doctrine “requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred.” *Id.* at 498 (quoting *United States v. Eng*, 971 F.2d 854, 861 (2d Cir. 1992)). The burden of

proof is “on the government to establish that the tainted evidence ‘would have been discovered by lawful means.’” *Leake*, 95 F.3d at 412 (*quoting Nix*, 467 U.S. at 444).

The government cannot carry its burden of proof by making unsupported assertions that evidence contained on the servers inevitably would have been discovered. The government incorrectly states that it identified Richards “as an operator of child pornography websites prior to September 22, 2005, based upon information and materials obtained from Berry and Mitchel (who was arrested on September 12, 2005).” (Government Brief pp. 39-40). When the government executed the search warrant for the BlackSun server, its investigation targeted Greg Mitchel and his participation in the Justinsfriends website. The government learned of Richards’ existence through the events flowing from the execution of the BlackSun search warrant.

The search warrant for the BlackSun server was executed on September 12, 2005. The government began processing the computer evidence immediately. (R.30, Detention Hearing 9/27/05, pp.11-18). By the time of Richard’s Detention Hearing on September 27, 2005, the government had viewed and conducted a preliminary analysis of several of Richards’ websites on the BlackSun server. (Id). The government even offered photographic evidence downloaded from the BlackSun server at the Detention Hearing and expressed an opinion as to Richards’ alleged

advertising and distribution of child pornography based on a preliminary forensic analysis of those websites. (Id). *After* the Detention Hearing in the afternoon of September 27, 2005, the government procured and executed a search warrant for Richards' residence. (R. 80, Exhibits C & D, Search Warrants for Residences). Those search warrants were authorized shortly after 5:00 p.m. on September 27, 2005. (Id).

The focus of the investigation shifted to Richards as a direct consequence of the overbroad search of the BlackSun server - particularly the government's discovery of Richards' other websites. Moreover, the centerpiece of the government's proof at trial came from the BlackSun server. But for the execution of the BlackSun search warrant, the Indictment would be void of all advertising, most production and all distribution charges - leaving only evidence of possession and production of a single videotape (not even computer evidence) found during the search of Defendant Richard's home - Counts 23 and 24.

The independent source and inevitable discovery doctrines are flatly inapplicable.

D. Publically Accessible Files and Standing:

Again, for the first time on appeal, the government raises arguments not presented in the district court. These arguments and challenges are waived. *Archibald*, 589 F.3d at 295-296 (citing *Giordenello*, 357 U.S. at 488). However, if considered, the government's assertions are meritless.

The government did not challenge in the district court whether Richards had a legitimate expectation of privacy in the contents of the BlackSun server because it was obvious, based on the government's own expert, Fottrell, that Richards had such an expectation. The government's forensic expert disagreed with the government's attempt to characterize Richards' websites as commercial child pornography websites. (R.209, TTR Vol. V, pp.758-759). The websites included several adult pornographic websites (owned and not owned by Richards) and several payment processors including CondoDollars and Mango Metro, a credit card payment processor for adult pornography and non-pornographic sites. Only a small fraction of some of the websites were visible to subscribers. Other sites had no public access whatsoever. For those sites that did allow public access, the majority of the website content, graphics and inner workings (such as log files, credit card data, proprietary code and other operating system data) were not visible to the public. (Fottrell, R.162, Suppression Hearing 7/24/06, pp.202-204, 216-227).

For the reasons set forth in Section A of this argument, the expectation of privacy in a password and administratively protected computer server is different than an internet bulletin board. *Compare Quon v. Arch Wireless Operating Co*, 529 F.3d 892, 906 (9th Cir. 2008)(holding that sender and recipients may have a reasonable expectation of privacy in the content of text messages sent from a pager provided by the sender's employer), cert. granted, *USA Mobility Wireless, Inc. v. Quon*, No. 08-1472, 2009 U.S. LEXIS 9132, 2009 WL 1513112 (U.S. Dec. 14, 2009) *with Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001)(observing that the sender "would lose a legitimate expectation of privacy in an e-mail that had already reached its recipient"). The issue of expectation of privacy turns on the efforts made by the defendant to secure the content and restrict access to the information and data without approval.

The BlackSun server was password protected - as was access to each website on the server. While a member of the general public could subscribe to view the content of *some* (not all) of the sites upon approval by Richards, other sections of the sites were wholly inaccessible to the public. The password protection and administrative restrictions of the BlackSun server resemble the housing of records in *United States v. Mancini*, 8 F.3d 104, 110 (1st Cir. 1993)(reasonable expectation of privacy in his work records stored in an "archive attic" because the storage area was upstairs from his office of nineteen years, the defendant took precautions to assure

that others would not have access to the records without his prior permission, and the defendant's records were labeled and segregated from the other items stored in the attic). Richards had a legitimate expectation of privacy in the server content which is why this issue was never raised by the government in the district court.

II. THE GOVERNMENT'S IDENTIFICATION OF 20,000 FILES AND IMAGES TO BE USED IN ITS CASE-IN-CHIEF WAS AN OBFUSCATION OF ITS REQUIREMENT UNDER RULE 16.

Richards did not waive his objection to the government's pretrial identification of files and images. To the contrary, the trial record is replete with continuing discussion and renewed objections to the government's sham pretrial identification of evidence to be used in its case-in-chief. (R.211, TTR Vol. II, p.134-37; R.213; TTR IV, pp.583-584, 635-39, 645-51). The record equally demonstrates that Richards articulated prejudice when the realities of the trial proof definitively showed the government's pretrial representations to be inaccurate. (R.213; TTR IV, pp.583-584).

The cases supporting the government's waiver argument are not on point. The government cites *United States v. Denkins* for the proposition that, by abandoning an objection, it is waived. 367 F.3d 537, 542-44 (6th Cir. 2004). In *Denkins*, the defendant attempted to withdraw his guilty plea based on a challenge to his competency. However, before the district court ruled on the Motion, the defendant withdrew the challenge and elected to proceed with sentencing. *Id.* Clearly, the defendant waived the issue by expressly abandoning the challenge.

Here, not only did Richards thoroughly litigate the pretrial identification issue before trial, but he persisted in reminding the Court throughout the trial of the government's pretrial misrepresentations on the issue and articulated prejudice stemming from the government's meaningless identification.

The government additionally cites *United States v. Sloman* for the proposition that “[a]n attorney cannot agree in open court with a judge’s proposed course of conduct and then charge the court with error in following that course.” 909 F.2d 176, 182 (6th Cir. 1990). In *Sloman*, defense counsel expressly agreed that the defendant should be sentenced using the conspiracy guideline. Then, on appeal, he argued that the conspiracy guideline was inappropriate. *Id.* Again, that is simply not the case here. Richards persistently challenged the adequacy of the government’s pretrial identification of files and images. During trial, counsel never stated that the identification was adequate nor did counsel withdraw the prior challenge. Rather, counsel advocated at a minimum for the enforcement of the court’s order excluding files not included in the overbroad identification. Counsel further argued for sanctions for the government’s pretrial misrepresentations and articulated prejudice from the government’s hamstringing of the court. (R.213; TTR IV, pp.583-584). The court stated it had no choice in ruling pretrial the way it did because the government

assured the court it would use all 20,000 files.⁷ The reality at trial was the government used a tiny fraction of those files. There is no waiver here.

The pretrial avalanche of 20,000 files and the government's misrepresentation that all would be introduced into evidence in the case-in-chief prevented defense counsel from focusing on the 25 or so images that were actually introduced and served to make a mockery of the district court's ruling and of Rule 16. Had the government properly narrowed the identification to those files actually used at trial (or even reasonably considered for use at trial), the defense would have had the time and investigatory ability to more effectively confront the evidence actually used.

The prejudice of the government's over-identification was particularly damaging to the defense because this case turned on the age of the performer (often Lombardi) in the particular video - frequently coming down to a matter of months on either side of his 18th birthday. Each video or image had to be scrutinized and investigated for corroboration of Lombardi's age. Because the government refused

⁷ THE COURT: So I don't know what more I can – I mean they assert that basically what they have given you is going to be used in some way.... If they assert they're going to use all 20,000, then you all just have to do the best you can. I don't know what else I can do.

(R.241, Pretrial Hearing 9/7/06, pp.14-16). Because the government assured the Court it would use all of the files and images, the district court's hands were tied and the Motion to Compel Identification was denied. (R.114).

to simply identify the images actually intended for use, the defense wasted tremendous investigatory resources investigating images never advanced thereby not having an opportunity to investigate all of the images actually advanced. The prejudice from the government's tactics was real.

The government argues that it was "generous" and provided explanation and guidance justifying its ridiculous over-identification. The truth was born out at trial. The government claimed it would make use of every identified file (all 20,000) in order to tie the district court's hands and prevent a sincere identification of evidence to be used at trial. (R.241, Pretrial Hearing 9/7/06, pp.14-16). In actuality, the government used less than 100 of the files and images identified (many of those 100 being duplicates of the same image). (R.213; TTR IV, pp.583-584). Clearly, the government mislead defense counsel and the court before trial to gain tactical advantage at trial. The government acted in bad faith and as a consequence, Richards was prejudiced in the ways set forth above. *United States v. Maples*, 60 F3d 244, 246 (6th Cir.1995).

III. THE ADMISSION OF VIDEO AND PHOTOGRAPHIC EXHIBITS LABELED WITH THE PURPORTED AGE OF THE VICTIM AFTER THE VICTIM WAS IMPEACHED AS TO THOSE LABELED AGES IMPROPERLY MINIMIZED THE IMPACT OF CROSS-EXAMINATION AND INVADED THE JURY DELIBERATIONS.

The government argues that there is no evidence that the jury relied on the age labels in its deliberations. The government further claims that the jury's acquittal of Richards on several counts directly relating to Lombardi evidences that the labels had no adverse impact. On the contrary, there is no evidence that the jury ignored the age labels or that they played no role in deliberations. Richards was convicted of several counts (Counts 1, 2, 16, 21, 23, 24) directly relating to Lombardi's claims of being underage.

The government further argues that, based on questions asked by the jury during deliberations, the jury carefully analyzed the Sydney/Xphotos and Casey@16 - both age labeled. (Government Brief pp. 57-58). In fact, both of the images being carefully scrutinized by the jury in deliberations - the Sydney/Xphotos series and Casey@16 - related to counts on which the jury resolved its difficulty in favor of conviction (Counts 1, 16, 23, 24). Contrary to the government's argument, this is perhaps the best evidence that the age labels, in fact, had a prejudicial impact.

The government cites cases for the general proposition that the district court has broad discretion in marshaling the evidence and making Rule 403 type determinations. The government takes issue with the defense's analogizing the situation to reading back testimony in deliberations. However, the government cites no case factually on point nor does it propose a better analogous situation for the issue. The cases cited in Richards' Principal Brief provide meaningful guidance to the determination of the issue. *United States v. Richard*, 504 F.3d 1109, 1114 (9th Cir.2007)(the jury should ordinarily be provided with the witness' *entire* testimony- i.e., direct *and* cross-examination, and should be admonished to weigh all the evidence and not focus on any portion of the trial); *United States v. Epley*, 52 F.3d 571, 579 (6th Cir.1995)(the danger in reading back part of a witness's testimony is that the jury may accord undue emphasis to the testimony or that it may be taken out of context).

Richards concedes that a hearsay objection to the contents of the labels was not raised below, and therefore must be reviewed for plain error. Regardless of the standard of review, the labels consisted entirely of inadmissible hearsay. The government claims that the age "labels were akin to a witness's identification under Fed. R. Evid. 801(d)(1)(C)." (Government Brief p. 58).

Federal Rule of Evidence 801(d)(1)(C) provides as follows:

(d) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person.

This Rule addresses the pretrial identification of a person - not the identification of the witness' handwriting and substantive testimony about the contents of a disc reviewed before trial and to be received in evidence at trial. The government's reliance on this non-hearsay rule is misplaced. There is no hearsay exception authorizing the admissibility of this evidence. The problem with the admission of this evidence was initially recognized by the district court:

MS. HODDE: . . . [W]e have a couple of concerns: One, a lot of these CDs are labeled with the ages of the performers.

THE COURT: They are not coming into evidence with that on them.

MS. HODDE: I wanted to make that objection as to all of the CDs that contain that information.

THE COURT: That will be taken off. Even if there is testimony about that, it's not appropriate for those to be labeled that way. Okay.

(R.211, TTR Vol. II, p.132).

After Lombardi testified and authenticated the labels, the district court reversed itself.

THE COURT: Okay. We had discussed before the notations on the disks because when they were offered before they were offered through the agent when this witness is the one who had put the notations on the disks. It seems to me that at this point those notations have been authenticated. They are his notations, and I had previously said we would strike all the ages off of there, but I'm not sure that that seems appropriate to me at this point.

STRIANSE: Your Honor, I do acknowledge that he's identified them. I do acknowledge that he's identified his initials and the dates. I just don't like the imprimatur, if you will, of seeing those ages written on there. It in some ways invades the province of the jury's recollection of the cross-examination. It's sort of like, well, I'm seeing it here in black and white, it's 16 or 17, so that resolves any conflict in favor of the exhibit. It may attach too much significance to it. That's my only fear.

THE COURT: Okay. I think I'm going to overrule your objection. He has fully testified about that. You have cross-examined him and impeached him on things, and it seems to me the jury is either going to believe these things or not, so -- because they have been -- the notations have been fully authenticated, I'm going to overrule your objection.

(R.212,TTR Vol. III, pp.394-395). The court erred in reversing its prior ruling.

The district court committed reversible error by permitting the age and location labeled exhibits into evidence and into jury deliberations.

IV. THE DISTRICT COURT ERRED BY DENYING RICHARDS' RIGHT TO CONFRONT AND IMPEACH A PROSECUTION WITNESS (JEREMY MOEDER).

Richards relies on the arguments made in his Principal Brief.

**V. THE DISTRICT COURT ERRED BY FAILING TO DISMISS
MULTIPLICITOUS COUNTS.**

Richards relies on the arguments made in his Principal Brief.

VI. THE ACCUMULATION OF ERRORS RENDERED DEFENDANT RICHARDS' TRIAL FUNDAMENTALLY UNFAIR AND DENIED HIS DUE PROCESS RIGHTS.

The government has failed to address this issue in its Principal Brief. Richards respectfully submits the government has waived any challenge to the issue.

VII. THE SENTENCE IMPOSED IS SUBSTANTIVELY REASONABLE.

A defendant's sentence is reviewed for procedural and substantive reasonableness. *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 594, 169 L. Ed. 2d 445 (2007). For any sentence, whether within or outside of the guideline range, an appellate court must first determine whether the district court committed a "significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range." *Id.*

The government does not challenge the sentence on procedural reasonableness grounds. (Government Brief p. 68). The government's failure to challenge the sentence on procedural grounds necessarily means that the government concedes that the district court properly: (1) calculated the guidelines and recognized them as advisory, (2) considered the §3553(a) factors, (3) selected the sentence based on accurate facts, and (4) adequately explained the chosen sentence and the reasons for varying downward from the Guidelines. *Id.*

Instead, the government argues that the sentence is substantively unreasonable. (Government Brief p. 68). The government's suggests there are 3 deficiencies in the district court's reasoning for the sentence - failure to reflect (1) the seriousness of the offense conduct; (2) the gravity of an uncharged alleged sexual relationship with a 13 year old boy (Doe); and, (3) Richards' post-arrest jail conduct consisting of disciplinary infractions for participating in making alcohol, consensual sexual contact with an adult inmate and for blogging on the internet about matters touching the case but largely containing fictional creative writing. (Government Brief p. 68).

“A sentence is substantively unreasonable if the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.” *United States v. Camiscione*, 591 F.3d 823, 832-833 (6th Cir.2010)(citing *United States v. Lapsins*, 570 F.3d 758, 772 (6th Cir.2009)(internal quotation marks and citation omitted)). Although *Gall* “reject[s] . . . an appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range” and disallows “the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence[,]” *see Gall*, 552 U.S. at 47, it nevertheless “permits district and

appellate courts to require some correlation between the extent of a variance and the justification for it.” *United States v. Grossman*, 513 F.3d 592, 596 (6th Cir.2008).

In this regard, *Gall* instructs the sentencing judge that: [i]f he decides . . . an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. *Gall*, 552 U.S. at 50. . . . Although *Gall* forbids an appellate court from applying a presumption of unreasonableness to an outside-Guidelines sentence, it permits reviewing courts to: take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. . . . [The court] may consider the extent of the deviation, but must give due deference to the district court’s decision that the §3553(a) factors, on a whole, justify the extent of the variance. *Gall*, 552 U.S. at 51.

Camiscione, 591 F.3d at 832-833.

“The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.” *Gall*, 552 U.S. at 51. In applying the abuse of discretion standard, “the clear, overriding import of [*Rita v. United States*, 551 U.S. 338 (2007), *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Gall v. United States*, 552 U.S. 38 (2007)] is that appellate courts must respect the role of district courts and stop substituting their

judgment for that of those courts on the front line.” *United States v. Phinazee*, 515 F.3d 511, 521 (6th Cir. 2008).

The government claims that the district court failed to give appropriate weight to the offense conduct, the defendant’s jail conduct and an uncharged alleged sexual relationship with a 13 year old boy. (Government Brief p. 68). It seems to argue that the district court did not understand its sentencing options - choosing only between “16 years or life imprisonment.” (Government Brief p. 77). Finally, the government complains that the district court’s rationale was “distorted and unsound and does not support the extraordinary variance imposed.” (Government Brief p. 78).

On the contrary, the district court was fully informed of all of the relevant considerations. After presiding over pretrial hearings challenging the evidence and the Indictment and after a 3 week long jury trial, the district court was profoundly well-versed in the offense conduct and nature of the proof. The district court recognized the case for exactly what it was - a man in his early 20’s whose primary business was adult pornography but who allowed some underage content (of himself with his consenting boyfriend 4 years younger) to appear on his otherwise adult sites. Richards was not operating a “child pornography empire” as the government claimed pretrial. He engaged in a consensual, sexual, 4-year relationship with a person 4 years his junior, and in the course of that relationship, they jointly filmed some of their

sexual escapades. After Lombardi turned 18 and with Lombardi as a business partner in the adult sites, a handful of those underage videos made it onto the otherwise adult sites. This is exactly what the trial proof showed. The district court recognized that it was a terrible error in judgment. It was a violation of the child pornography statutes, but it was far from the type of conduct in the typical “heartland” child pornography case. (R. 399, ST pp. 233-35).

The draconian child pornography guidelines failed to account for the type of conduct in this case. Typically, trial courts see sadomasochistic images depicting rape and torture often of young child victims. Frequently, what is captured on film is evidence of a far more gruesome crime - the brutalization of a terrified child at the hands of an adult. The district court appropriately recognized the differences here. Despite the government’s attempts to alter the proof (specifically Lombardi’s trial admission that there was no force, coercion, abuse or the like), the district court watched the evidence and called the government out on its misrepresentation.⁸

There was no abuse here. And I was rather struck today that the government introduced a new video for the first time, and I guess I'm glad I asked to see it. It sounded to me like the government just wanted to characterize it for me and not show it.

⁸ These types of misrepresentations became a trademark of the government in this case.

And the characterization that I remember coming out of the mouths of the prosecutors was basically that Mr. Lombardi was being eaten alive by bugs, being made to do something out in the woods by Mr. Richards, and Mr. Richards basically, you know, egging him on in the background. That's not what this court saw.

This court saw smiles on the faces of Mr. Lombardi in a few places in that disgusting video of masturbation out in the woods, but he certainly was not being eaten alive by bugs. He complained at one point about the heat, but I do not view that video as abuse. And if the government views that as abuse, then perhaps there's just a real difference in what the government and the court views as abuse.

(R. 399, ST pp. 234-235).

Notably, the government does not point to a single fact of offense conduct that the district court allegedly overlooked or misunderstood. The district court fully appreciated and appropriately weighed the offense conduct. A 16 year sentence is significant punishment given the atypical offense conduct in this case.

The government's claim that the district court did not understand its sentencing options - choosing only between "16 years or life imprisonment" - is really a procedural reasonableness attack. (Government Brief p. 77). Yet, the government has not briefed procedural reasonableness, and this argument is waived. Nonetheless, the argument is meritless. The district court clearly understood its options, and the government cites nothing in the record to support its speculation to the contrary. In

fact, the court even expressly stated that “[i]f 16 years of sex offender, mental health and addiction treatment cannot change that pattern, certainly 30 or 40 years has no better chance of doing so.” (R. 387, Statement of Reasons). The district court fully understood its sentencing options.

The government claims the sentence “does not adequately protect minors from further sexual predation by defendant.” (Government Brief p. 77). The offense conduct involving Lombardi cannot fairly be characterized as “sexual predation.” The uncharged conduct with Doe has yet to be proven in a court. Five years have passed since Richards’ arrest and he has never been criminally charged with that conduct. Moreover, 16 years of incarceration during which he will receive sex offender treatment, mental health counseling and addiction treatment to be followed by 8 years of supervised release and a lifetime of sex offender registration with all of the oppressive restrictions that go with those forms of supervision are more than adequate to “protect minors from further sexual predation by the defendant.” (R. 399, ST pp. 238-239).

The government claims that Richards’ sentence, which was 1 year above the 15 year mandatory minimum, “leaves virtually no room to make future distinctions between [defendant’s] case and the cases worthy of defendants that exhibit more compelling factual circumstances.” (Government Brief pp. 77-78). The district court

recognized that there is hardly a more atypical child pornography case than the one before the Court. Even so, the district court imposed a sentence 1 year above the mandatory minimum sentence.

Moreover, in comparison with other cases in the district, Richards' sentence seems remarkably steep. In *United States v. James S. Sells, Jr.* (MDTN Case No. 3:07-00058, Judge Echols), the defendant was charged with production, possession and receipt of child pornography. He entered a Plea Agreement with the government whereby he plead guilty to production and receipt of child pornography. According to the Plea Petition and the Plea Agreement, Sells was a 35 year old man who met with a woman and her infant daughter at a hotel in Georgia. He took sexually explicit photos of himself engaging in sexually explicit conduct with the infant and the mother. He transported those images to Tennessee. When Sells was interviewed in connection with the statutory rape of a teenage girl, he admitted engaging in sex with the girl at his comics and collectibles store. A search of Sells' computers revealed that he collected and traded over 4000 images and numerous videos of child pornography. Sells' collection of child pornographic images included infants, toddlers and prepubescent children in bondage scenes. Sells' guideline range was 210 to 262 months. Sells negotiated a Rule 11(c)(1)(C) agreement to a binding term

of imprisonment of 210 months (17.5 years). (R. 366, Richards' Sentencing Position Paper, p. 45).

The facts of the *Sells* case are strikingly more egregious than those of Richards' offense conduct, and yet the government entered a binding plea agreement to a term of 17.5 years for a defendant who filmed his own molestation of an infant, traded from a profound child pornography collection and molested a second underage child. Surely, if the government could agree in a binding plea document that 17.5 years vindicated Sells' heinous child pornography offense (certainly more of a heartland child pornography production offense) and was a just sentence given all of the §3553(a) factors, 16 years for Richards in this atypical case is more than enough time to serve all of the purposes of sentencing.

The government also alleges that the district court "erred in discounting" Richards' jail disciplinary infractions and blogging. (Government Brief p. 76). The government admits that the court considered the evidence, but asserts that the court erred by failing to give it enough weight. (Id). To be clear, the disciplinary conduct consisted of making alcohol in the jail and engaging in sexual conduct with a consenting adult inmate. The district court fully considered the conduct, asked Richards about it in his allocution, addressed it from the Bench and in written findings, finding it to be an aggravating circumstance:

I have to confess that the blogging from the jail is so totally outrageous and such total bad judgment and -- but to hear your account of the --you characterized it -- I think Ms. Hodde was struck by this as well -- you were tricked into this lifestyle as a kid and trapped in it as an adult. . . . There is no question in my mind that you are addicted to the internet, you are addicted to pornography and I think you are addicted to sex. I believe in all three addictions. I think they are all addictions, and I think you have all of them.

I think you need mental health treatment. I think you need addiction treatment, and I'm going to recommend that for you. Whether it will work, I don't know, but you developed these addictions at a very early age. And the other aspect of your mental health which is striking to me is your view of Casey as basically almost another personality, he's your -- and your father's view of that too, that you are -- you have an internet personality which is not you, it's another individual. And I feel that that is another thing that needs treatment. And the fact that I view you as in need of mental health treatment affects my view of what sentence I should give you.

To read your blogging and some of the things that you have written, you would not have any view that you have any remorse or regret about anything, but I don't see Timothy Richards as that person. I see you as having remorse and regret and hopes for the future.

There is a lot of good in your background in terms of your trying to rescue people of various sorts, the pregnant classmate, the Lombardi away from Sweet, and there's another instance that's been mentioned in this proceeding.

What is not mitigating, again, is your conduct at the jail, not just the blogging but at least your bragging about making alcohol, violating prison rules. The disciplinary report from the prison indicates that you are having sexual relations apparently nonstop in the jail. You admit that in

these blogs. You brag about it, talking about your boyfriends in the jail.

And there's no question in my mind that you are having a total disregard for the rules there, which does not bode very well for your coming out of jail and being able to live a different kind of life and follow rules of supervised release, which is one of the reasons, I'm sure, why the government wants to have you on lifetime supervised release if you're not in prison for most of your life.

But I do see mental health issues here that if treated could bring about some reform, some hope that when you get out you will do something different with your life.

.

That will have Mr. Richards being released when he's about 40 years old, hopefully having had mental health treatment which I think he's very much in need of. I think it reflects the seriousness of the offense by this individual who has no record whatsoever.

It will promote respect for the law. It's a lot of time. It will be a just punishment. It will protect the public from the crimes of this defendant until he's 40 years old. And I don't think anyone can predict what Mr. Richards will do when he comes out of prison when he's 40 years old, but the sex offender -- special conditions and his being on supervised release and the fact that he will have to report as a sex offender under any state's laws will, I think, be quite a deterrent.

(R. 399, ST pp.236-239).

The district court did not improperly discount Richards' blogging and disciplinary infractions. Rather, the district court ultimately found the conduct to be

outweighed by mitigating circumstances - the atypical nature of the crime, the defendant's own history as a victim of internet child pornography, the nature of the defendant's relationship with Lombardi including his rescue of Lombardi from Sweet, his internet, computer and sex addictions, his outstanding character letters, his sincere remorse, his need for mental health counseling and many other mitigating factors addressed by the district court.

The government summarizes its position by slighting the district court's meticulously reasoned sentence. The government wrote that the court's rationale was "distorted and unsound and does not support the extraordinary variance imposed." (Government Brief p. 78). While the government may be dissatisfied with the result, the sentence was not poorly reasoned, unsound or distorted. The district court was in the best position to know the case and fashion a sentence out of the totality of circumstances.

A 16 year sentence is a substantial period of incarceration to be followed by 8 years of intensive supervised release and lifetime sex offender registration. The district court did not select the sentence arbitrarily. The sentence was not based on impermissible factors. The court did not fail to consider relevant sentencing factors. And, the court did not give an unreasonable amount of weight to any pertinent factor. The district court was in the absolute best position to know and synthesize the totality

of the circumstances of this case and to properly weigh and balance the §3553(a) factors given the enormous history of litigation and lengthy trial. The court considered and weighed every argument advanced by the parties. In the end, it was the district court's judgment - after calculating the guidelines and addressing every 3553(a) consideration - that a 16 year sentence, followed by 8 years of supervised release and lifetime sex offender registration was "sufficient but not greater than necessary to accomplish the goals of sentencing." (Statement of Reasons, R. 387).

The sentence imposed is substantively reasonable and should be affirmed.

CONCLUSION

Based on the foregoing, Richards respectfully requests that this Court: (1) vacate his conviction on either Count 1 or 16 based upon multiplicity; (2) reverse his convictions on all counts and remand for a new trial with instruction; and/or (3) affirm the sentence imposed by the district court.

Respectfully submitted,

s/ Kimberly S. Hodde

Kimberly S. Hodde, Esq.

HODDE & ASSOCIATES

40 Music Square East

Nashville, Tennessee 37203

(615) 242-4200

Attorney for Timothy Ryan Richards
Defendant-Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via the Court's electronic filing system or, if not registered, by U.S. Mail or sent via PDF file attachment to electronic mail, postage prepaid, to:

Carrie Daughtrey
U.S. Attorney's Office
110 Ninth Ave. South
Suite A961
Nashville, Tennessee 37203-3870
Carrie.Daughtrey@usdoj.gov

John-Alex Romano
U.S. Department of Justice
P.O. Box 899, Ben Franklin Station
Washington, DC 20044
John-Alex.Romano@usdoj.gov

On this 30th day of June 2010.

s/ Kimberly S. Hodde
Kimberly S. Hodde

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,452 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in a proportionally spaced typeface using Corel WordPerfect 12 in 14 point font, Times New Roman.

s/ Kimberly S. Hodde _____

Kimberly S. Hodde

Attorney for Timothy Ryan Richards
Defendant-Appellant/Cross-Appellee

Dated: June 30, 2010

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

| | | |
|----------------------------------|---|-----------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff-Appellee, |) | |
| Cross-Appellant , |) | |
| |) | |
| v. |) | Nos. 08-6465/08-6503 |
| |) | |
| TIMOTHY RYAN RICHARDS, |) | |
| |) | |
| Defendant-Appellant, |) | |
| Cross-Appellee. |) | |

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6 Cir. R. 30, Appellant designates the following portions of the records not previously designated by either party:

| Description of Item | Date filed with District Court | Record Entry # |
|---|---------------------------------------|-----------------------|
| Motion to Strike Justin Berry’s Victim Impact Statement | 10/30/2008 | R. 371 |
| Order granting Motion to Strike Berry’s Victim Impact Statement | 11/14/2008 | R. 382 |

Respectfully submitted,

s/ Kimberly S. Hodde

Kimberly S. Hodde, Esq.

HODDE & ASSOCIATES

40 Music Square East

Nashville, Tennessee 37203

(615) 242-4200

Attorney for Timothy Ryan Richards
Defendant-Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via the Court's electronic filing system or, if not registered, by U.S. Mail, postage prepaid, to:

Carrie Daughtrey
U.S. Attorney's Office
110 Ninth Ave. South
Suite A961
Nashville, Tennessee 37203-3870
Carrie.Daughtrey@usdoj.gov

John-Alex Romano
U.S. Department of Justice
P.O. Box 899, Ben Franklin Station
Washington, DC 20044
John-Alex.Romano@usdoj.gov

On this 30th day of June 2010.

s/ Kimberly S. Hodde
Kimberly S. Hodde