NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

RICARDO MONTANEZ-QUINONES,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTION PRESENTED FOR REVIEW

What constitutes sufficient evidence of knowledge to support two level enhancement for "knowingly engaging in distribution" of child pornography under USSG §2G2.2(b)(3)(F)? In the present case the government did not prove by a preponderance of the evidence that Petitioner "knowingly" distributed child pornography as required by the 2016 amendments to USSG §2G2.2(b)(3)(F). The government did not introduce any evidence showing Petitioner knew of the file sharing properties of the application and knowingly used the application to distribute child pornography.

Whether the prosecutor breached the terms of plea agreement. Although the prosecutor requested the court impose an 87-month sentence, as specified in the plea agreement, she breached the agreement because she failed to advocate for the bargained for sentence; repeatedly and exclusively argued that the crime was "heinous" and "exceedingly grave in nature"; analogized possession of child pornography to murder, rape and child molestation; and argued Petitioner deserved a severe punishment.

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The Petitioner, Ricardo Montanez-Quinones, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on December 21, 2018.

OPINION BELOW

On December 21, 2018, the Court of Appeals entered its Opinion affirming the Petitioner's conviction and sentence. Judgment is attached at Appendix 1.

JURISDICTION

On June 25, 2018, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's conviction and sentence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

> No person shall…be deprived of life, liberty or property without due process of law…

STATEMENT OF THE CASE

This is an appeal following a conviction after plea and sentence to one count of Possession of Child Pornography, in violation of 18 U.S.C § 2252A (a)(5)(B) and (b)(2). Petitioner was charged in a three-count indictment returned on March 9, 2016. (D.E. at 2 No. 3).

On September 8, 2016, Petitioner was convicted after a plea of guilty to Count Three of the indictment (D.E. at 4, No. 28).

Introduction

On December 18, 205, Homeland Security Investigation (HSI) agents executed a search warrant at Petitioner's residence and seized various electronic equipment which was found to contain child pornography. (Presentence Investigation Report, 12/02/2016, p. 6-7, [Hereinafter "PSR at ___"]). On March 9, 2016, Petitioner was arrested by federal agents. (PSR at 7). On the same day, Petitioner was indicted in a three-count indictment.

The Plea Agreement

On September 8, 2016, at the Change of Plea Hearing, Petitioner entered into a plea agreement. (D.E at 4, No. 28). The agreement stated that Petitioner agreed to plead guilty to Count Three of the indictment and to admit to the forfeiture allegation. (Plea Agreement, 9/8/16 at 1, para 1[hereinafter Plea Agreement at___]). The terms of the Plea Agreement

established a base offense level of 18. The parties stipulated a 2-level enhancement for prepubescent minors, a 2-level enhancement for distribution, a 4-level enhancement for material that portrays sadistic or masochistic conduct, and a 2-level enhancement for use of a computer. The parties stipulated that the number of images involved was more than 150 but fewer than 300 images and agreed to a three-level enhancement. The parties agreed to a 3-level reduction for Acceptance of Responsibility. This resulted in a total adjusted offense level of 28. (Plea Agreement at 4, para 7). There was no stipulation as to Petitioner's Criminal History Category.

The parties agreed that Petitioner could argue for the lower end of the applicable guideline range and the government could argue for a sentence up to the middle of the applicable guideline range. If Petitioner's criminal history category I, the parties agreed that the middle of the range was 87 months. (Plea Agreement at 5, para 9).

The parties agreed the government would dismiss Counts One and Two of the indictment. (Plea Agreement at 5, para 10).

The Plea Agreement contained a waiver of appeal provision stating that Petitioner waived his right to appeal the judgment and sentence in this case, <u>if</u> Petitioner was sentenced in accordance with the terms and conditions of the Plea Agreement. (Plea Agreement at 7, para. 18).

The Change of Plea Hearing

The Change of Plea hearing took place on November 11, 2016, before US Magistrate Camille L. Velez Rive. (Change of Plea Hearing, 11/17/17, at p.1, [hereinafter, 'Plea at ___']).

As part of the agreed upon statement of facts, Petitioner admitted to "searching for and downloading child pornography." (Plea at 20). Petitioner also agreed that that his laptop contained:

> ...26 child sex abuse images. Additionally, it contained evidence of: a) 2578 child sex abuse files having been downloaded and then erased; b) 71 incomplete downloads of child sex abuse files; c) 74 child sex abuse files being shared on "Ares".[1] (Plea at 20-21).

Petitioner's desktop computer and hard drive were found to contain:

> ...1,046 child sex abuse images. Additionally, it contained evidence of: a) 802 child sex abuse files having been downloaded and then erased; b) 162 incomplete downloads of child sex abuse files c) 15 child sex abuse files being shared on "Ares". (Plea at 21).

Defense counsel informed the court that although the number of images in the statement of facts exceeded 600 images, the parties agreed in the plea

[1] The phrase "being shared" simply means the files were in a "Shared" file folder. Because of the way P2P applications operate it is forensically difficult, if not impossible without real time monitoring, to determine whether a particular file on a user's computer was actually transferred to another user at some point in the past through a P2P application." United States v. Handy, 2009 WL 151103 at 2 (M.D.Florida).

agreement that Petitioner would only be held responsible for between 150-300 images. (Plea at 22).

The Presentence Investigation Report

The Presentence Investigation Report (PSR) was prepared and disclosed to Petitioner on December 2, 2016. The probation officer detailed the parties' offense level calculation in the report. (Presentence Investigation Report, at p. 5, para. 6-12, [hereinafter "PSR at ___,"]). The PSR acknowledged that the parties stipulated to a total offense level of 28 based on a three-level increase for possession of 150-300 images instead of a five-level enhancement for more than 600 images. Assuming Petitioner's criminal history category was I, the government would argue for a sentence in the middle of the guideline range, or 87 months. (PSR at 5, para 9).

Probation, however, calculated Petitioner's total offense level at 30 based on a finding that Petitioner possessed 600 or more images and enhanced Petitioner's offense level by five rather than three levels. (PSR at 9, para. 36). The resulting guideline imprisonment range was 97-121 months with a five-year term of supervised release. (PSR at 14, para. 82, 85).

The PSR stated Homeland Security Investigation (HSI) agents interviewed Petitioner and Petitioner "admitted to searching for and downloading child pornography". (PSR at 7, para 20).

On December 2, 2016, Probation disclosed the PSR. On February 23, 2017 Petitioner filed his objections to the PSR (D.E. at 5, No. 36).[2] Petitioner objected to the imposition of a two-level increase for distribution. Petitioner argued that the Sentencing Commission had amended USSG § 2G2.2(b)(3) in November 2016, after Petitioner entered into his plea agreement, to provide the distribution enhancement applies only if "the defendant knowingly engaged in distribution" of the images. (D.E. at 5, No 36). Petitioner argued that the government lacked any evidence that Petitioner knowingly distributed child pornography[3] ("Objection to APSR (D.E. 33)", 2/23/17, [hereinafter "Objection at ___]). On March 7, 2017, the government filed its Response in Opposition to Objections to APSR. (D.E. at 5, No 38). The government argued Petitioner knowingly distributed child pornography because Petitioner had agreed

[2] Defense counsel was on maternity leave from November 8, 2016 until February 8, 2017 (D.E. at 5, No. 35)

[3] Prior to filing the objections to the PSR, Defendant obtained the government's agreement that Defendant's objection would not be considered a breach of the plea agreement. (Email from Melanie Carrillo-Jimenez to PO Deni Rodriguez, cc to AUSA Marshal D. Morgan, Elba Gorbea, AUSA Ginette Milanes, 2/23/17).

that his desktop computer was found to contain "15 child abuse files being shared on Ares" (Government's Response to Defendant's Objection to Amended Pretrial Sentencing Report, 3/7/17 at 2, [hereinafter "Government's Response at ___"]).

On March 27, 2017, the district court ordered the parties to further brief the issue of the amended guideline. (D.E. at 5, No. 40).
On April 11, 2017 the government filed its amended response. (Government's Amended Response to Defendant's Objection to Amended Pretrial Sentencing Report, 4/11/17 [hereinafter "Government's Amended Response at ___]). On April 17, 2017, Petitioner filed his amended response. (Motion in Compliance with Court Order, 4/17/17 [hereinafter "Def's Amended Motion at ___"]) Petitioner argued that to prove "knowing distribution" as required by the November 2016 Amendments to USSG 2G2.2 (b)(3)(F) (Federal Sentencing Guideline Manual, Vol. 2, Supplement to Appendix C, Amendment 801 at 1396) the government must introduce evidence concerning the operation of the specific file sharing program used in the present case. Petitioner pointed out each file sharing program operated differently requiring different levels of knowledge on the part of a defendant, and to meet the burden of showing "knowing distribution" the government must show how the application in question operated. (Def's

Amended Objections at 5). The government, citing a case decided four years before the relevant amendment became effective (United States v. Chiaradio, 684 F.3d 265 (1st Cir. 2012), argued mere possession of a file sharing program together with computer knowledge possessed by defendant and files in a shared folder was sufficient evidence that defendant "knowingly engaged in distribution" (Government's Amended Response at 2-3).

Sentencing Hearing

Sentencing was held on May 19, 2017 before Judge Carmen Cerezo, who was not the judge that presided at the Change of Plea Hearing. Prior to the hearing, the court issued its order overruling Petitioner's objections to the imposition of the two-level increase for distribution. The court held that what is required to prove a Petitioner knowingly engages in distribution is "a showing that the defendant knew of the file-sharing properties of the program" (Order, 5/19/17, at 3, D. E. at 6, No. 44). The court stated Petitioner had a bachelor's degree in computer science and an associate degree in computer networks and admitted he was skilled in computers. (Order at 4). The court also noted that two of Petitioner's devices had files being shared on "Ares". The court stated:

> The selection on both devices of a specific number of child sex abuse files to be shared on the "Ares" network out of the thousands

> downloaded by defendant serves as further indication that he applied his computer knowledge to pick and choose the particular contraband that he wanted to exchange through the "Ares" file-sharing program (Order at 4)

The court imposed the two-level enhancement. At the sentencing hearing Petitioner preserved his objection to the two-level increase for distribution. (Sentencing Hearing, May 19, 2017 at 20, [hereinafter "Sentencing at ___"]).

At sentencing Petitioner argued for a sentence of 78 months, the low end of the 78-97-month guideline range based upon a total offense level of 28 as agreed upon in the plea agreement. (Sentencing at 6). Petitioner argued he was 37 years old, had no prior criminal history, no history of substance abuse and had been gainfully employed since he was 18 years, working for nine years at his first job and 10 years at his next job. Petitioner is married and had been with his husband for 18 years. (Sentencing at 3-4). Petitioner had a very difficult childhood suffering physical abuse at the hands of his father and criminal neglect from his alcoholic mother. At ten years old, Petitioner was left virtually parentless and oversaw the care of his five-year-old younger brother. When Petitioner was ten, he was sexually abused by his 15-year-old neighbor. The abuse continued until Petitioner was 15 years old, at which time Child Protective Services gained custody of

Petitioner.[4] (Sentencing at 3-4). Counsel argued Petitioner's criminal behavior stemmed in part from being sexualized at the age of ten. Petitioner took responsibility for his actions and understood the need to serve a prison sentence to pay his dues to society. (Sentencing at 6-7).

The government began its argument by calling into question the accuracy of Petitioner's report that he was sexually abused as a minor. The government continued it argument by misstating the terms of the plea agreement: "[w]hile the parties have stipulated that the number of images was 300-600, those images did include prepubescent minors of both sexes and sadistic conduct." (Sentencing at 7). In fact, the parties stipulated Petitioner possessed more than 150 but less than 300 images. (Plea Agreement at 4). The government then excoriated Petitioner in the severest of terms, comparing Petitioner's conduct to encouraging torture, sex abuse and murder.

> [T]he government believes that the nature and the seriousness of the offense are important factors in this case. The defendant's conduct feeds a terrible industry. It feeds on the sexual abuse and torture of children through the distribution and collecting of child pornography.
>
> The images and video in defendant's collection vividly demonstrate that abusing children is an inherent part of providing child pornography to the consumer. The photos are not incidental to

[4] Defendant only recently revealed that he was sexually abused as a child to two people, his husband and his counsel. (Sentencing at 6).

> the acts of abuse. The rapes and molestation are the products to be filled.
>
> The children's legs are spread for the camera, and they're shot centered in the penetration. The purpose of the production is manifestly for third person's vicarious experience of the exploitation and gratification.
>
> It is difficult to imagine that if the market at issue was in videos or pictures of beheadings or snuff videos, that a serious penalty for those who search for and downloads such videos would be considered inappropriate policy choice, especially if the consumption was found to cause more murders.
>
> This is with the case with child pornography. The more that the child pornography is consumed, the more the demand for more sexual abuse is created. ...therefore, the facts of this case merit a prison term in the mid-range of the appropriate guidelines, as calculated in the plea agreement, or 87 months.
>
> The defendant chose to pursue his own sexual gratification with flagrant disregard for the welfare of thousands of minor children. [Re]warding the defendant with anything less of a sentence would mean turning a blind eye to the seriousness of his offenses, as well as cause others to have a lack of respect for the criminal justice system and the legal process.
>
> A within-guideline sentence of 87 months is warranted to adequately punish the defendant for the heinous nature of his crime. Additionally, a sentence of 87 months imprisonment reinforces to the defendant, and to other who are tempted to follow in his footsteps, that this crime is exceedingly grave in nature" (Sentencing at 7-9).

The court found the guideline as calculated in the PSR. The court found "defendant knowingly engaged in distribution" and imposed the two-level increase. The court also found Petitioner possessed for more than 600 images and imposed a five-level increase. Based on a total offense level of

30 and criminal history category of I, the court found the guideline imprisonment range was 97-121 months. (Sentencing at 10-13). The court sentenced Petitioner to the middle of the guideline range or 109 months. The court imposed a term of supervised release of 20 years. (Sentencing at 13).

When sentencing Petitioner, the court never mentioned the parties' plea agreement or the parties' recommended sentences, except when the court incorrectly informed Petitioner that under the plea agreement Petitioner had waived his right to appeal his sentence. (Sentencing at 18). Defense counsel corrected the court's misstatement of Petitioner's waiver, informing the court that Petitioner waived his right to appeal only if he was sentenced according to the terms of the plea agreement or a sentence of 78-87 months. (Sentencing at 19). Counsel also objected to Petitioner's sentence as excessive. (Sentencing at 21).

Appeals Court Decision.

In the majority opinion, Court of Appeals affirmed Petitioner's conviction and sentence. United States v. Montanez-Quinones, 911 F.3d 59 (1st Cir. 2018). Holding the district court could infer knowing distribution of child pornography based upon Petitioner's use of a peer to peer file sharing program, child pornography files located in a "shared folder", Petitioner's

possession of general computer knowledge, and evidence that child pornography files were located elsewhere on Petitioner's computer. United States v. Montanez- Quinones, 911 F.3d 59, 67 (1st Cir.2018).

The dissent disagreed with the court's conclusion that the distribution enhancement was supported by the record. The dissent found that there was insufficient evidence from which the court could infer knowledge, "When we scrutinize the district court's reasoning, it is clear that the court, in applying the enhancement, essentially relied on the bare fact that appellant was using Ares (peer to peer file sharing program)" Montanez-Quinones, 911 F.3d at 73. (Lipez, J., dissenting). The dissent would hold the district court clearly erred in applying the enhancement for distribution. Id at 68 (Lipez, J., dissenting).

ARGUMENT

Point I

The Court of Appeals erred when it held the district court could infer knowing distribution of child pornography under USSG §2G2.2(b)(3)(F) from Petitioner's use of a peer to peer file sharing network and files found in a shared folder. This evidence is insufficient to prove by a preponderance of the evidence that Petitioner knew of the file sharing properties of the peer to peer application and used the application to distribute child pornography as required by the 2016 amendments to USSG §2G2.2(b)(3)(F).

Argument

The district courts are required to begin all sentencing proceedings by properly calculating the advisory guideline sentencing range. United States v. Millan-Isaac, 749 F.3d 57, 66–67 (1st Cir. 2014), United States v. Davila-Gonzalez, 595 F.3d 42, 47 (1st Cir. 2010). A district court commits significant procedural error when it improperly calculates the guideline sentencing range. Gall, 552 U.S. at 51. In the present case the district court erred as a matter of law when it calculated Petitioner's guideline to include a two-point enhancement for distribution.

Effective November 1, 2016, the current version of § 2G2.2(b)(3)(F) expressly requires a finding that "the defendant knowingly engaged in distribution" in order to apply the two-level enhancement. U.S.S.G. § 2G2.2(b)(3)(F), 2016 U.S.S.G. Manual, Supp. To Appendix C, Amendment

801, p. 1394. The government bears the burden of proving "knowing distribution" at sentencing. United States v. Carbajal-Valdez, 874 F.3d 778 (1st Cir. 2017) (government bears the burden of proving a sentencing enhancing factor by a preponderance). To prove knowing distribution in context of a peer to peer (P2P) file sharing application the government must introduce some evidence that Petitioner affirmatively knew of the file sharing properties of the application and used the application to make his child pornography available to other users. United States v. Robinson, 741 F.3d. 466, 470 (7th Cir.2003), United States v. Handy, 2009 WL 151103 (M.D. Fla. January 21, 2009).

In the present case, the government did not introduce any evidence that Petitioner affirmatively knew of the file sharing properties of Ares. The government merely introduced evidence of Petitioner's general computer knowledge, evidence that child pornography files were in a "shared folder", and evidence that child pornography files were located elsewhere on Petitioner's computer. United States v. Montanez-Quinones, 911 F.3 59, (1st Cir. 2018). This was insufficient evidence to prove by a preponderance that Petitioner knowingly distributed child pornography. United States v. Carroll, 886 F.3d 1347, 1353-54 (11th Cir.2018), Montanez-Quinones, 911

F.3d at 72 (Lipez, J., dissenting), United States v. Monetti, 705 Fed. Appx 865 (11th Cir2017), United State v. Baldwin, 743 F.3d 357 (2nd Cir. 2014).

Prior to the November 2016 amendment, Guideline § 2G2.2(b)(3)(F), to impose a two-level enhancement for distributing child pornography, the guideline did not expressly require distribution to be 'knowing distribution'. U.S.S.G. §2G2.2(b)(3)(F), ("(F) Distribution other than distribution described in subdivisions (A) through (E) increase by two levels."). Several Courts of Appeals held §2G2.2(b)(3)(F) did not require knowledge. These Courts applied the distribution requirement whenever a defendant used a P2P application to download child pornography and the downloads were stored in a shared folder. United States v. Ray, 704 F.3d 1307 (10th Cir. 2013), United States v. Creel, 783 F.3d 1357 (11th Cir. 2015), United States v. Baker, 742 F.3d 618 (5th Cir. 2014).

Other Courts of Appeals held that to apply the two-level enhancement for distribution the government must prove a defendant knew that his use of a P2P software would make files of child pornography available to other users. Baldwin, 743 F.3d at 361 (court must make a finding of knowing distribution, it is insufficient to find that defendant had computer expertise and "should have known" that his files would be shared with other users.), Robinson, 714 F.3d at 470 (use of P2P application, together with a default

setting placing downloaded files in a shared fold is insufficient proof of knowing distribution), United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009)(Defendant knowingly distributed child pornography when using a P2P file sharing program, defendant deliberately created a shared folder entitled "My Music", with privileges that allowed others to download child pornography files he placed in the folder).

The Commission resolved this split in the Circuits with a November 2016 amendment to 2G2.2(b)(3)(F). See: U.S.S.G. Suppl. To App. C, Amend. 801 (2016). The Commission sided with the Second, Fourth, and Seventh Circuits and amended the guideline to require that the two-level enhancement applied only where the defendant knowingly distributed pornography. Id., U.S.S.G. §2G2.2(b)(3)(F) ("If the defendant *knowingly engaged in distribution*, other than distribution described in subdivisions (A) through (E), increase by **2** levels.") (emphasis added).

Currently, there exist a split in the Circuit as to what constitutes evidence of knowledge to support an enhancement under §USSG 2G2.2 (b)(3)(F). The Eleventh circuit has held that the government must prove some affirmative act to support a finding of knowing distribution, it is insufficient to merely prove defendant used a P2P application and that child pornography was in a shared folder. Carroll, 886 F.3d at 1353

(evidence that defendant used P2P file sharing and that files in a shared folder insufficient to proving knowing distribution), Montanez-Quinones, 911 F.3d at 72. The First Circuit's decision in the present case holds to the contrary. The Court of Appeals essentially held knowledge can be inferred from "the bare fact that appellant was using Ares [a peer to peer file sharing network]" and had some level of general computer proficiency, "an approach explicitly rejected by the Sentencing Commission". Montanez-Quinones, 911 F.3d at 73.

In the present case the district court found knowing distribution based on the court's conclusion that the Petitioner "picked and chose" which files he placed in the Ares shared folder:

> The selection on both devices of a specific number of child sex abuse files to be shared on the "Ares" network out of the thousands downloaded by defendant serves as further indication that he applied his computer knowledge to pick and choose the particular contraband that he wanted to exchange through the "Ares" file-sharing program (Order at 4, Appendix at **41**)

The Court of Appeals affirmed the district court's finding of knowledge, stating the district court could infer knowledge from the fact that Petitioner "selected" a limited number of files downloaded to share through the file sharing program. Montanez-Quinones, 911 F.3d at 67. However, as the dissent clearly shows, there is no evidence in the record, either direct or

circumstantial,[5] which supports the finding that Petitioner "picked and chose" certain files to place in or out of the shared folder.

The Ares peer to peer file sharing program operates by automatically downloading all files selected into a "shared" folder, "When first downloaded, Ares, the file-sharing program used by appellant, "sets up a shared folder on the computer where, by default, it automatically places all subsequent Ares downloads. Once a file is [automatically] placed in the shared folder, it is immediately available for further dissemination." Montanez-Quinones, 911 F.3d at 69 (quoting Carroll, 886 F.3d at 1350, internal quotation marks omitted). The user does not "pick and choose" which files go into the shared folder. Any file Petitioner downloaded using Ares would simultaneously and automatically appear in the shared folder. In fact, most Ares applications makes it impossible for users to turn off the sharing function and the program does not require the user to authorize file sharing or recognize that downloaded files are being shared. Montanez-Quinones, 911 F.3d at 72 (Lipez, J., dissenting) (It was uncontested on appeal that Ares P2P applications have default settings that automatically

[5] The majority opines that Petitioner "confuses a lack of direct evidence with a lack of evidence" but Petitioner does no such thing. It is true that a wet umbrella is circumstantial evidence that it is raining, but dry umbrella is not. It is the Court of Appeals that confuses circumstantial evidence with insufficient evidence.

send files downloaded by user into a "shared" folder.), Carroll, 886 F.3d at 1354 ("Ares, by default, installs a shared folder automatically places downloaded files into that folder, and distributes all contents of the shared folder to anyone else on the Ares network"), Monetti, 705 Fed. Appx at 867 (same).

The majority seems to acknowledge that Ares automatically downloads files into the shared folder. Montanez-Quinones, 911 F.3d at 72. However, the court nonetheless held the district court was entitled to infer knowledge from the fact that "a certain number child pornography files were on appellant's computers but not in the Ares folders" and therefore the district court could properly infer Petitioner "intentionally placed certain files in the Ares sharing folder or kept certain files in the folders while removing others" and "performed this allocation because he was aware of the Ares program's file-sharing properties." Montanez-Quinones, 911 F.3d at 72. But as the dissent makes clear, "there is no evidence to support this inference of allocation, however, because there is no evidence about the origin of the child pornography files on appellant's computers". Id. The Court had no record evidence of movement between the shared Ares' folder and the other folders on Petitioner's computer. Because there is no evidence of allocation, knowledge cannot be inferred. There is no

evidence that Petitioner "intentionally placed certain files in the Ares sharing folders, or kept certain files in the folders while removing others." Montanez-Quinones, 911 F.3d at 72. Additionally, it cannot be inferred that even if Petitioner moved the files, he moved them because he was aware of the Ares program's file sharing properties. Id.

As the dissent points out, the government could have easily obtained and presented evidence of movement in or out of the shared folder:

> "The district court's inference would be supported if there was any evidence that appellant moved files between the Ares folders and other locations on his computers. Yet for all we know, appellant acquired all the files outside the Ares folders from a source other than Ares. In that case, all the files in the Ares folders could have been automatically placed there when they were downloaded through Ares and appellant would not necessarily have moved any files into or out of the Ares folders." Montanez-Quinones, 911 F.3d at 72.

However, "[t]his type of evidence is completely absent from the record." Id.

Moreover, Petitioner could have removed files from the shared folder for numerous reasons that do not reflect on Petitioner's knowledge that files remaining in the shared folder were available to other users. Petitioner could have removed them from the shared folder to organize them, transfer them to a hard drive, to move to a different computer. Most probably, however, Petitioner took the files out of the shared folder to delete them after viewing. The evidence shows Petitioner deleted thousands of files. (PSR at 7, para 21 and 22). Deleting files from the folder into which they

were automatically downloaded does not support an inference that Petitioner knew the files in the shared folder were available to other users. Petitioner could have thought that the automatic appearance of the files that he downloaded in the shared folder meant the files had been 'shared' with him, "or he might simply not have thought about the question at all." Robinson, 714 F.3d at 470 (Because downloaded files automatically appeared in shared folder defendant may not have realized the files were accessible to others). Contrary to the Court of Appeal's holding, there is no evidence that Petitioner selected, picked or chose to put files into the shared folder. Montanez-Quinones, 911 F.3d at 72. Without this unsupported inference of allocation, it is clear that the district court "in applying the enhancement, essentially relied on the bare fact that appellant was using Ares". Id. at 73.

It is true that the district court found Petitioner "possessed a level of general computer proficiency." Id. at 73. However, as the dissent points out, "I am not aware of any authority in our case law for the proposition that some level of general computer proficiency on a defendant's part is enough, on its own, to support a finding of knowledge for purposes of the enhancement." Id. (emphasis in the original). Moreover, Petitioner had an associate degree in computer networks obtained in 2008. A ten-year-old

degree in the fast-changing computer industry, says almost nothing about Petitioner's knowledge of how P2P file sharing networks operate. Handy, 2009 WL 151103 at 3 (P2P applications change with the release of every new application). And computer literacy by itself cannot support an inference of knowledge. Baldwin, 743 F.3d at 360 (although defendant had a "level of expertise" a finding that defendant should have known he was sharing child pornography files with other users it did not support a finding of knowing distribution.), Robinson, 714 F.3d at 470 (conjecture is not sufficient basis to support a finding of knowing distribution).

In the present case the government, who bears the burden of proving knowing distribution by a preponderance of the evidence, failed to meet that burden. The district court had insufficient evidence to impose the enhancement under 2G2.2(b)(3)(F). Once the district court's unsupported inference of allocution is put aside "it is apparent that the district court essentially applied the enhancement because appellant was using a file-sharing program. That is precisely the approach rejected by the Sentencing Commission." Montanez-Quinones, 911 F.3d at 74. The Court of Appeals "tacitly accepted this discredited approach" when they affirmed Petitioner's sentence. Id.

Point II

The prosecutor breached the terms of plea agreement. Although the prosecutor requested the court impose an 87-month sentence, as specified in the plea agreement, she breached the agreement because she failed to advocate for the bargained for sentence; repeatedly and exclusively argued that the crime was "heinous" and "exceedingly grave in nature"; analogized possession of child pornography to murder, rape and child molestation; and argued Petitioner deserved a severe punishment.

Argument

The Supreme Court and this Court hold that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." United States v. Canada, 960 F.2d 263, 269 (1st Cir.1992), citing Santobello v. New York, 404 U.S. 257, 262 (1971). This Court holds the government to the most "meticulous standards of both promise and performance" in their plea agreement obligations. United States v. Clarke, 55 F.3d 9, 12 (1st Cir.1995). In the present case, the prosecutor's conduct at sentencing plainly breached the plea agreement. While the Assistant United States Attorney, (AUSA) ostensibly complied with the plea agreement by 'recommending' an 87-month sentence, the AUSA did not make a single comment in support of the bargained for guideline sentence and in fact advocated for a higher number of images than stipulated in the

plea agreement. (Sentencing at 7), United States v. Saxena, 229 F.3d 1,6, (1stCir. 2000) ("Satisfying this obligation requires more than lip service on the prosecutor's part."), United States v. Marin-Echeverri, 846 F.3d 473 (1st Cir.2017) (fulfilling the government's obligations under a plea agreement requires more than lip service to or technical compliance with, the terms of a plea agreement). Moreover, the AUSA's comments nullified the lip service the AUSA rendered. The AUSA excoriated Petitioner and condemned his conduct in the strongest terms. Canada, 960 F.2d at 269. (The Santobello rule "proscribe[s] not only explicit repudiation of the government's assurances but must in the interest of fairness be read to forbid end-runs around them."), United States v. Gonczy, 357 F.3d 50, 54 (1st Cir.2004). (AUSA's initial recommendation "undercut, if not eviscerated, by the AUSA's substantive argument to the district court"). The AUSA's argument was not a minor deviation from the plea agreement. Nor were the AUSA's comments based on the government's corollary duty to provide the court with the relevant facts. United States v. Almonte-Nunez, 771 F.3d 84, 86 (1st Cir.2014) (the government remains bound by their corollary duty to provide full and accurate information about the offense and offender to the sentencing court). Nor were the comments made in response to defense counsel's argument. Saxena, 229 F.3d at 7

(AUSA comments did not breach agreement where comments were in direct response to comments by defense counsel).

The AUSA's nonperformance affected the outcome of the proceedings. Petitioner bargained for the government's potential to influence the court. United States v. Velez Carrero, 77 F.3d 11. 12 (1st Cir. 1996) (In a plea agreement the defendant is bargaining for "the prestige of the government and its *potential* to influence the district court"). At sentencing it was clear, from the court's complete silence concerning the terms of plea agreement when imposing sentence, as well as the court's incorrect comment that Petitioner waived his right to appeal, that the court may not even have been aware of the terms of the plea agreement when imposing sentence. Moreover, nothing the court said revealed that the government's advocacy of the recommended sentence would have been in vain. Puckett v. United States, 556 U.S. 129, (2009) (the court's comments at sentencing reveal defendant would not have obtained the benefits of the plea agreement in any event). The breach "adversely impacts the fairness, integrity, or public reputation of judicial proceedings." Puckett, 556 U.S. at 143. ("When the government reneges on a plea deal, the integrity of the system may be called into question").

In the present case, the plea agreement specified a guideline calculation which resulted in a total offense level of 28. This level was based upon the parties stipulated agreement that Petitioner would receive a three-level enhancement for possession of "more than 150 but fewer than 300 images" rather than a five-level enhancement for possession of "more than 600 images". (Plea Agreement at 4). This was the sole benefit of Petitioner's bargain, a three, rather than five level enhancement, resulting in a total offense level of 28 not 30. (Sentencing at 6).

At sentencing, the government completely failed to recommend a sentence based on 150-300 images as required by the plea agreement. Rather, the government began its argument by stating that the government had stipulated to that the number of images Petitioner possessed was "300 to 600". (Sentencing at 7). This number of images results in a four-level increase, not a three-level increase as calculated in the guidelines. United States v. Munoz, 408 F.3d 222, 228 (5th Cir.2005) (advocating an enhancement that was not in the plea agreement and that increased the sentencing range was inconsistent with the agreement), United States v. Rivera, 375 F.3d 290, 292 (3rd. Cir.2004) (endorsing the PSR's recommendation for an offense level of 39 after agreeing to an offense level of 35 inconsistent with the plea agreement). The government never

requested a guideline range of based on a level 28, rather than the level 30 calculated by the PSR. The government never explained or advocated for its plea agreement. United States v. Voccola, 600 F.Supp. 1534 (D.R.I. 1985) (defendant has a reasonable expectancy that a recommendation would be expressed to the sentencing judge with "some degree of advocacy", a standard not met by the prosecutor's half-heartedness). The government never provided the court with any reason for requesting a three-level rather than a five-level increase or a total offense level of 28. In fact, the government only mentioned the plea agreement once, in passing in a manner that added to the confusion, rather than support its recommendation, "the facts of this case merit a prison term in the mid-range of the appropriate guidelines, as calculated in the plea agreement, or 87 months". (Sentencing at 8). Canada 960 F.3d at 270 ("It is manifest that the consideration which induced defendant's guilty pleas was not simply the prospect of a formal recitation of a possible sentence, but rather the promise that an Assistant United States Attorney would make a recommendation on sentencing"), Velez Carrero, 77 F.3d at 12 (In a plea agreement the defendant is bargaining for "the prestige of the government and its *potential* to influence the district court").

It is true that the government mentioned the words "87 months" five times. However, while ostensibly 'recommending' an 87-month sentence, the AUSA simply inserted the words "87 months" into a boilerplate argument for the highest end of the otherwise applicable guideline range based on a level 30. Marin-Echeverri, 846 F.3d at 478 (a prosecutor my not "undercut the plea agreement while paying lip service to its covenants."). The AUSA's repeated repetition of the term "87 months" four times in two paragraphs was merely "technical compliance" with her obligations under the plea agreement. United States v. Matos-Quinnones, 456 F.3d 14, 24 (1st Cir. 2006) (a defendant is entitled not only to the government's technical compliance with its stipulations but also to the benefit of the bargain struck in the plea deal and to the good faith of the prosecutor) (citations omitted).

More importantly, this technical compliance with the agreement followed multiple excoriations that completely undercut the government's request for 87-month sentence. The government argued that Petitioner's conduct "feeds a terrible industry", an industry that "feeds on the sexual abuse and torture of children", that "rapes and molestation" are an inherent part of Petitioner's possession of child pornography. (Sentencing at 7-8). Gonczy, 357 F.3d at 53 (government breached plea agreement to recommend low end of the guideline when it argued defendant was the

brains behind the operation, laughed in the face of law enforcement, and ruined the lives of his children). The AUSA analogized possession of child pornography with possession of "snuff videos" "the consumption of which was found to cause more murders". (Sentencing at 8). See United States v. Ubiles-Rosario, 867 F.3d 277, (government's emphasizing the impact of the crime on the victim, that defendant masterminded the offense, and that defendant not remorseful after events was not a breach of the plea agreement because it supported the 300-month sentence the government was recommending). AUSA gratuitously described the child pornography possessed by Petitioner, explaining "the children's legs are spread for the camera, and they're shot centered in penetration." (Sentencing at 8). Canada, 960 F.3d at 269 (the prosecutor's "overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse). The AUSA argued "defendant pursued his own sexual gratification with flagrant disregard for the welfare of thousands of minor children" and the court should not turn "a blind eye to the seriousness of his offense". She told the court it was necessary to punish Petitioner for the "heinous nature of his crime" and that the court should send a message "to others who are tempted to follow in [defendant's]footsteps", that the crime is "exceedingly grave in nature". (Sentencing at 9). Canada, 960 F.3d at 269-70 (prosecutor

breached plea agreement to recommend a 36 month sentence when she urged district court to impose a "lengthy period of incarceration", to send a "very strong message."), United States v. Clark, 53 F.3d 9, 13 (1st Cir.1995) (the government's references to the agreement were "grudging and apologetic" and the government's argument "effectively argued against" the agreement").

The AUSA's comments were not in response to arguments made by defense counsel attempting to minimize Petitioner's conduct. Saxena, 229 F.3d at 7 (AUSA's remarks were in direct response to defense counsel's attempt to put an innocent gloss on post plea activities). Nor were the AUSA's arguments in response to questions from the court seeking information about Petitioner's character or the facts of the crime. Marin-Echeverri, 846 F.3d at 478 (prosecutor does not breech the plea agreement by answering court's factual questions about the crime). Rather the AUSA's remarks were inflammatory political rhetoric designed to paint people who possessed child pornography as equal in guilt to the worst child abusers and producers of child pornography and to ensure that the court did not sentence Petitioner according to the terms of the plea agreement. See, Almonte-Nunez, 771 F.3d at 90 (AUSA's comments were confined to the facts of the crime and supported a recommendation for 137-month

sentence), United States v. Gonczy, 357 F.3d 50, 53 (1st Cir.2004) ("the substance of the prosecutor's argument at the sentencing hearing can only be understood to have emphasize [Defendant's] wrong doing" and "advocate[e] for the imposition of higher sentence then the agreed upon term").

This breach of the plea agreement was prejudicial because it affected Petitioner's substantial rights. Riggs, 287 F.3d at 224-25, citing United States v. Olano, 507 U.S. 725, 732-36 (1993). A breach of the plea agreement is prejudicial when it has "affected the outcome of the proceeding". Olano, 507 U.S. at 725. In the present case, the district court was not the judge who presided over the Rule 11 hearing. Riggs, 287 F3d at 225 (the district judge acknowledged the government's intended recommendation at the Rule 11 hearing but several months had elapsed between the Rule 11 and the sentencing). It is telling that, when imposing sentence, the court never once mentioned the parties' plea agreement. In calculating Petitioner's guideline sentencing range the court made no reference to the parties' stipulation that Petitioner possessed 150-300 images, flatly stating, "since defendant possessed 600 or more images a five-level enhancement is warranted." (Sentencing at 11). Likewise, the court said nothing to indicate it had considered and rejected the parties'

plea agreement. Puckett, 556 U.S. at 132 (no effect on substantial rights because District court stated it would not have followed the recommendation in any event, as acceptance of responsibility reductions after a defendant continued his criminal conduct were "so rare as to be unknown").

Moreover, when informing Petitioner about his right to appeal, the court affirmatively showed that it was not familiar with the terms of the plea agreement, mistakenly informing Petitioner that under its terms, Petitioner waived his right to appeal. (Sentencing at 18). When defense counsel corrected the court, informing the court that Petitioner waived his right to appeal "only if he was sentenced according to the terms of the plea agreement, which would be a sentence of 78-87 months" (Sentencing at 19-20), the court stated "*if, as you state, it was conditioned upon that guideline range*, the plea agreement, then that part of the Court's advice to him is eliminated" (Sentencing at 20).

The AUSA's breach of the plea agreement adversely impacted the fairness, integrity, or public reputation of the judicial process. Riggs, 287 F.3d at 224 (Government's breach of the plea agreement meets the fourth prong of the Olano test because "violations of plea agreements directly involve the honor of the government, public confidence in the fair

administration of justice and the effective administration of justice in a federal scheme of government."), Puckett, 556 U.S. at 142-43 (when the government reneges on a plea agreement the integrity of the system may be called into question).

The government's breach of the plea agreement makes Petitioner's waiver of his constitutional rights meaningless. Petitioner offered that waiver in exchange for the prosecutor's statements in court. United States v. Clark, 55 F.3d at 14 (1st Cir.1995). Viewed in its totality, nothing in the AUSA's argument can be understood to be supporting or recommending the sentence agreed upon in the plea agreement. United States v. Gonzy, 357 F.3d at 54 ("No fair reading of the prosecutor's argument to the court would lead an impartial observer to think that she thought [87] months was an adequate sentence.").

Therefore, this Court should vacate Petitioner's conviction and sentence and remand for resentencing. Specific performance or an opportunity to withdraw the guilty plea are both appropriate remedies. Riggs, 287 F.3d at 226. Petitioner requests specific performance and that his resentencing take place before a different judge. United States v. Clark, 55 F3d at 14 (This Court has "repeatedly expressed a preference for specific performance of the agreement by resentencing before a different judge).

CONCLUSION

For the above reasons this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 2nd day of January 22 2019.

/s/ Jane Elizabeth Lee

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ADDENDUM

United States Court of Appeals
For the First Circuit

No. 17-1577

UNITED STATES OF AMERICA,

Appellee,

v.

RICARDO MONTAÑEZ-QUIÑONES,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Carmen Consuelo Cerezo, U.S. District Judge]

Before

Thompson, Selya, and Lipez,
Circuit Judges.

Jane Elizabeth Lee for appellant.

Julia M. Meconiates, Assistant United States Attorney, with whom Rosa Emilia Rodriguez-Velez, United States Attorney and Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

December 21, 2018

SELYA, Circuit Judge. Defendant-appellant Ricardo Montañez-Quiñones seeks to set aside his 109-month sentence for possession of child pornography. In support, he both reproves the government for allegedly violating the plea agreement through its overzealous advocacy at sentencing and reproves the district court for enhancing his offense level through an allegedly erroneous finding that he knowingly distributed child pornography. Concluding, as we do, that neither claim of error withstands scrutiny, we affirm the challenged sentence.

I. BACKGROUND

We briefly rehearse the facts and travel of the case. Because this appeal follows a guilty plea, we draw our account from the plea agreement, the undisputed portions of the pre-sentence investigation report (PSI Report), and the transcripts of the change of plea and sentencing hearings. See United States v. Coleman, 884 F.3d 67, 69 (1st Cir. 2018).

On September 20, 2015, as part of an investigation of pornography sharing on Ares (a peer-to-peer file-sharing network), a computer forensic laboratory associated with the Department of Homeland Security (DHS) successfully downloaded a seven-minute video that depicted a sexual encounter between a young girl (approximately eight to ten years of age) and an adult man. DHS agents traced the file to the residence of the defendant in Gurabo, Puerto Rico, and executed a search warrant for that address. The

agents seized two devices: a laptop computer and a desktop computer.

The seized computers collectively housed 1,072 child sex abuse images. Those images showed boys and girls between four and fourteen years of age performing oral sex on adult men and being vaginally and anally penetrated by adult men. The agents' analysis also revealed an additional 3,613 child sex abuse files, which had either been downloaded and erased or were incomplete downloads, 89 child sex abuse files being shared on Ares, and at least 48 search terms related to child sex abuse.

In due course, a federal grand jury sitting in the District of Puerto Rico handed up an indictment charging the defendant with two counts of transportation of child pornography and one count of possession of child pornography (including images of prepubescent minors engaged in sexually explicit conduct). 18 U.S.C. § 2252A(a)(5)(B), (b)(2). Although the defendant originally maintained his innocence, he eventually executed a non-binding plea agreement, see Fed. R. Crim. P. 11(c)(1)(B), and entered a guilty plea to the charge of possession of child pornography. In exchange for the defendant's plea, the government agreed to dismiss the remaining two counts.

In the plea agreement (the Agreement), the parties agreed to a total offense level of 28, which included a two-level enhancement for distribution, see USSG §2G2.2(b)(3)(F), and a

three-level enhancement premised on a stipulation that the offense of conviction involved between 150 and 300 offending images, see USSG §2G2.2(b)(7)(B). These stipulations were not intended to bind the sentencing court, see Fed. R. Crim. P. 11(c)(1)(B), and the Agreement contained no stipulation as to the defendant's criminal history category (CHC). The parties nonetheless agreed that, with a CHC of I, the guideline sentencing range would be 78-97 months; that the defendant could argue for a sentence at the low end of that hypothetical range; and that the government could argue for a sentence up to 87 months (the mid-point of the hypothetical range).[1]

The probation officer offered a slightly different assessment. The PSI Report calculated the defendant's total offense level at 30 based on a finding that the defendant possessed 600 or more offending images. With a CHC of I, the applicable guideline sentencing range would be 97-121 months. In his objections to the PSI Report, the defendant took issue with its inclusion of the two-level enhancement for knowing distribution. Although the same enhancement had been contemplated by the Agreement, the defendant argued that there was a critical distinction: since executing the Agreement, USSG §2G2.2(b)(3)(F)

[1] The parties agree that the government remained bound to this ceiling even if the district court – as happened here – determined that a more onerous guideline sentencing range applied.

had been amended to include a mens rea requirement. See USSG App. C, Amend. 801 (effective Nov. 1, 2016). The defendant argued that there was too little evidence to satisfy this new requirement. Specifically, he asserted that in order to prove knowing distribution, the government was obliged to introduce "evidence concerning the operation of the specific file sharing program used in the present case" and that it had failed to do so.

The district court was not persuaded that so precise an evidentiary showing was necessary to ground the enhancement. It overruled the defendant's objection based on its determination that "the evidence on record showed that defendant knew of the file-sharing properties of the 'Ares' program." In this regard, the court noted that the defendant was a "sophisticated and long-time computer user." This background, which included the defendant's degrees in computer science and computer networks and his statements that he was skilled in computers and would like to pursue an advanced degree in computer networks, was sufficient to infer the requisite knowledge. To cinch matters, the defendant had stored a portion of his downloaded child sex abuse files to a "shared" folder, indicating that he had curated "the particular contraband that he wanted to exchange through the 'Ares' file-sharing program."

After the court upheld the propriety of the knowing distribution enhancement, the disposition hearing proceeded. In

accordance with the Agreement, the defendant argued for a sentence of 78 months (the low end of the hypothetical guideline range stipulated to by the parties). The government argued for a sentence of 87 months (the mid-point of the hypothetical range). In support of his argument, the defendant emphasized his difficult childhood and a history of abuse. The government countered that the defendant's conduct had helped to support an industry that "feeds on the sexual abuse and torture of children."

When all was said and done, the district court refused to accept the parties' stipulated guideline range. Instead, it embraced the guideline calculations contained in the PSI Report, which included a higher offense level that added five levels for possession of 600 or more offending images. Using a total offense level of 30 and a CHC of I, the court adopted a guideline sentencing range of 97-121 months. It proceeded to sentence the defendant to a mid-range 109-month term of immurement. This timely appeal ensued.

II. ANALYSIS

In this venue, the defendant attacks his sentence on two fronts. First, he contends that the government breached the terms of the Agreement by failing to advocate for the bargained-for sentence. Second, he contends that the district court's finding that he knowingly distributed child pornography was in error. We examine each contention in turn.

A. Alleged Breach of Plea Agreement.

The defendant begins by asseverating that statements made by the prosecutor during the disposition hearing, along with statements that the government failed to make, comprised a breach of the Agreement. This asseveration breaks new ground, as the defendant failed to mount this claim of error below. Consequently, our review is only for plain error – "a formidable standard of appellate review." United States v. Saxena, 229 F.3d 1, 5 (1st Cir. 2000); see United States v. Almonte-Nuñez, 771 F.3d 84, 89 (1st Cir. 2014) (citing Puckett v. United States, 556 U.S. 129, 143 (2009)). Under this standard, an appellant bears the burden of showing "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001). Within this rubric, an appellant's substantial rights are deemed to be affected only when an error "likely affected the outcome of the proceedings." Almonte-Nuñez, 771 F.3d at 89.

It cannot be gainsaid that "[a] plea agreement is a binding promise by the government and is an inducement for the guilty plea." United States v. Gonczy, 357 F.3d 50, 53 (1st Cir. 2004) (citing Santobello v. New York, 404 U.S. 257, 262 (1971)). It follows that "a failure to support that promise is a breach of

the plea agreement, whether done deliberately or not." Id. Because a defendant waives a panoply of constitutional rights by entering into a plea agreement, we hold the government to "the most meticulous standards of both promise and performance." Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973). Simply providing "lip service" to these solemn obligations will not suffice. Saxena, 229 F.3d at 6.

Before us, the defendant asserts that the government violated the Agreement because it did not assiduously advocate for the bargained-for sentence and made a bad situation worse by misrepresenting the number of offending images stipulated in the Agreement. Some further facts are needed to put the assertion into perspective.

The government had agreed to recommend an incarceration sentence of no more than 87 months. At the disposition hearing the prosecutor stated, consistent with this agreement, on no fewer than five occasions that the government was recommending a sentence of 87 months. The defendant views these repeated recommendations as hollow: he points out that the prosecutor did not mention the total offense level of 28 referenced in the Agreement but, rather, stated (incorrectly) that the parties had stipulated to 300 to 600 offending images. Furthermore, the defendant claims that the prosecutor "excoriated [him] and condemned his conduct in the strongest terms," thereby nullifying whatever "lip service" that

the prosecutor might have given to the bargained-for sentencing recommendation.

We start our consideration of the defendant's argument with first principles: "[n]o magic formula exists for a prosecutor to comply with the agreed-upon sentence recommendation." Gonczy, 357 F.3d at 54. Having repeatedly stated the government's sentencing recommendation of 87 months to the court, the prosecutor was not required to discuss any specific aspects of the government's thinking. In assessing whether the government breached its agreement to argue for the bargained-for sentence, we look instead to whether its "overall conduct" was "reasonably consistent with making such a recommendation, rather than the reverse." Id. (quoting United States v. Canada, 960 F.2d 263, 268 (1st Cir. 1992)); see Almonte-Nuñez, 771 F.3d at 91 ("We consider the totality of the circumstances in determining whether a prosecutor engaged in impermissible tactics.").

To be sure, the defendant perceives an inconsistency between the prosecutor's limited discussion of the government's sentencing recommendation and the strong language that the prosecutor used to describe the nature of the defendant's crime. We acknowledge, of course, that "it is possible for a prosecutor to undercut a plea agreement while paying lip service to its covenants." Almonte-Nuñez, 771 F.3d at 90-91. For example, we have found (albeit under a more sympathetic standard of review)

that such a breach occurred when the government never affirmatively recommended the agreed-upon sentence, see Canada, 960 F.2d at 268; when the government effectively argued against a sentencing reduction in contravention of the plea agreement, see United States v. Clark, 55 F.3d 9, 12-13 (1st Cir. 1995); and when the government's zealous advocacy belied its agreement to recommend the low end of the applicable guideline sentencing range, see Gonczy, 357 F.3d at 54. Those cases, though, are at a far remove from the case at hand.

In this instance, the prosecutor repeatedly stated the government's recommendation of 87 months in accordance with the Agreement. See Saxena, 229 F.3d at 7 (finding no breach where prosecutor "resolutely stood by the bottom-line recommendation that the government had committed to make"); United States v. Irizarry-Rosario, 903 F.3d 151, 155 (1st Cir. 2018) (finding no breach where explanation of sentencing recommendation was "interspersed with reaffirmations of the . . . sentencing recommendation"). While the prosecutor's statements to this effect were simple and straightforward, a prosecutor is not obliged to present an agreed recommendation either with ruffles and flourishes or "with any particular degree of enthusiasm." Canada, 960 F.2d at 270. Nor is the defendant entitled "to have the government sugarcoat the facts." Almonte-Nuñez, 771 F.3d at 91.

The defendant's attempt to find a breach of the plea agreement in the prosecutor's unflattering narrative about the heinous nature of the defendant's crime is unpersuasive. This argument overlooks the salient fact that, under the Agreement, the government had a right to advocate for a sentence higher than the sentence that the defendant was seeking. Thus, the prosecutor had a right (indeed, a duty) to explain to the court why the higher sentence that it was urging was more appropriate. Almonte-Nuñez illustrates this point. There, we held that where a plea agreement entitled the prosecutor to argue for the high end of a guideline range while the defendant argued for the low end of that range, the prosecutor "was within fair territory in emphasizing facts that made a sentence at the low end of that [range] inappropriate." Id.

So it is here. The prosecutor had every right to highlight the serious nature of the offense and its impact on society in order to advocate for a sentence above the sentence requested by the defendant, as well as to demonstrate the unsuitable nature of the defendant's request. To this end, the prosecutor told the court that the conduct underlying the conviction was such as to "feed[] a terrible industry" supported by "the sexual abuse and torture of children," and that "the defendant chose to pursue his own sexual gratification with flagrant disregard for the welfare of thousands of minor children."

Such language, though harsh, coheres both with the government's decision to charge the defendant with this serious crime and with its reservation of the right to argue for an 87-month sentence. We hold, therefore, that the prosecutor's statements at sentencing did not contradict any terms of the Agreement, nor did they "'gratuitously offer[] added detail garbed in implicit advocacy' that might have led the district court to rethink the government's recommendation." Irizarry-Rosario, 903 F.3d at 155 (quoting United States v. Miranda-Martinez, 790 F.3d 270, 275 (1st Cir. 2015)). When the parties agree that a defendant may argue for a particular sentence while the government may argue for a somewhat stiffer sentence, the government is not constrained to pull its punches when arguing for the stiffer sentence.

The defendant has a fallback position. He says that the government breached the Agreement when it "advocated for a higher number of images than stipulated in the plea agreement." The government concedes that the prosecutor misstated the number of images stipulated in the Agreement but maintains that this was a slip of the tongue. Everything in the record points toward a finding of inadvertence. At the disposition hearing, there was no contemporaneous objection and, indeed, none of the parties appear to have noticed the misstatement when it was made. The prosecutor proceeded to recommend a sentence of 87 months — a recommendation derived from a hypothetical guideline sentencing range determined

in accordance with the number of images stipulated in the Agreement. The bottom line, then, is that "[t]his is not a record in which the misstep conveyed a message that the ultimate recommendation was insincere." United States v. Oppenheimer-Torres, 806 F.3d 1, 4 (1st Cir. 2015).

Nor does it appear that the misstatement in any way affected the outcome of the proceedings. The record is bereft of any basis from which we might reasonably infer that the district court was misled as to the number of images stipulated to by the parties. That number was correctly described both in the Agreement and in the PSI Report — and those documents were before the district court at sentencing. And in any event, the court itself had independently determined that the offense conduct involved 600 or more images. Given the totality of the circumstances, we find no prejudice attendant to the prosecutor's lapses linguae and, thus, no merit in the defendant's claim that this misstatement heralded a breach of the plea agreement.

B. Knowing Distribution.

This brings us to the defendant's plaint that the district court erred when it included a two-level enhancement for knowing distribution in its calculation of the guideline sentencing range. This plaint has a narrow focus: while the defendant does not dispute that distribution occurred, he alleges

that the government failed to provide evidence that he knew of the file-sharing properties of the program.

It is elementary that "the government bears the burden of proving sentence-enhancing factors by a preponderance of the evidence." United States v. Nuñez, 852 F.3d 141, 144 (1st Cir. 2017). We apply a clear error standard of review to the sentencing court's factfinding — a standard that extends to any findings based on inferences drawn from discerned facts. See id. This is a demanding standard, satisfied only if, "upon whole-record-review, an inquiring court 'form[s] a strong, unyielding belief that a mistake has been made.'" United States v. Cintrón-Echautegui, 604 F.3d 1, 6 (1st Cir. 2010) (alteration in original) (quoting Cumpiano v. Banco Santander P.R., 902 F.2d 148, 152 (1st Cir. 1990)).[2]

Section 2G2.2(b)(3)(F) of the sentencing guidelines was amended, effective as of November 2016, to limit the two-level enhancement to possessors of child pornography who "knowingly

[2] The dissent suggests that deference to the district court's factual findings may be lessened here because we are assessing the district court's logic on a paper record, which invites no weighing of credibility. See post at 31. What the dissent calls "logic" is nothing more or less than the drawing of inferences from the facts of record and, thus, the dissent's suggestion lacks force. See RCI Ne. Servs. Div. v. Bos. Edison Co., 822 F.2d 199, 202 (1st Cir. 1987) ("[F]indings of fact do not forfeit 'clearly erroneous' deference merely because they stem from a paper record."); see also Limone v. United States, 579 F.3d 79, 94 (1st Cir. 2009) ("The application of clear-error review to findings drawn from a paper record has long been the practice in this circuit.").

engaged in distribution." In incorporating a mens rea requirement, the Sentencing Commission resolved a circuit split and "generally adopt[ed] the approach of the Second, Fourth, and Seventh Circuits." USSG Supp. to App. C, Amend. 801 at 145 (2016); see United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2014) (per curiam); United States v. Robinson, 714 F.3d 466, 469-70 (7th Cir. 2013); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009). Even as amended, though, the enhancement does not require proof that the defendant intended to distribute child pornography — "as long as he had knowledge that by using a peer-to-peer file-sharing program, his child pornography was made accessible to others." United States v. Cates, 897 F.3d 349, 359 (1st Cir. 2018) (emphasis in original). In all events, "the government need not prove knowledge by direct evidence, but may prove knowledge by circumstantial evidence." Id. Viewed against this backdrop, the defendant's argument that the government failed to provide "some evidence" that he affirmatively knew of the file-sharing properties of the application "confuses a lack of direct evidence with a lack of evidence." Id.

Cates is instructive. There, we determined that the district court drew a reasonable inference that the defendant knew of the file-sharing properties of a peer-to-peer network when it relied on evidence that the defendant was "relatively sophisticated in computer matters" and had demonstrated

familiarity with the program's file-sharing properties. Id. at 359-60. The findings in Cates, albeit based on a stronger evidentiary predicate, are on the same order as those of the court below, which drew an equally reasonable inference of knowledge based on uncontradicted evidence that the defendant was a "sophisticated and long-time computer user" who had selected from thousands of downloaded files a limited number to share through the file-sharing program.

On this record, the sentencing court was entitled to draw the plausible inferences that led to a finding of knowledge. Inferences based on circumstantial evidence "need not be compelled but, rather, need only be plausible." See Nuñez, 852 F.3d at 146. The court below reasonably could infer that the defendant was a sophisticated computer user based on evidence that he had acquired two degrees in computer science and computer networks. Similarly, the court reasonably could infer that the defendant selected a limited number of child sex abuse files to be shared on Ares. That conclusion was based on evidence that the defendant had downloaded thousands of child sex abuse files but that he shared only 74 and 15 child sex abuse files, respectively, on each of his two computers.

Surely, other plausible inferences could be drawn from this evidence. But that is not the test: the decisive consideration is that, on the record before it, the court below

plausibly could infer that the disparity between files downloaded and files shared was a result of the defendant's desire to share only some files. And it is apodictic that "[w]here the raw facts are susceptible to competing inferences," a district court's "choice between those inferences cannot be clearly erroneous." United States v. McCormick, 773 F.3d 357, 359 (1st Cir. 2014).

The defendant challenges the sufficiency of these findings. He submits that the government was required to furnish evidence concerning the operation of the particular file-sharing program at issue. We previously have called such an argument a "red herring," holding that the sentencing court drew a reasonable inference of knowledge without the benefit of evidence that files downloaded through the program were automatically accessible for others to download. Id. The argument has not changed its color in the short time that has elapsed since Cates was decided.

Let us be perfectly clear. We do not hold that such evidence is irrelevant to the issue of knowing distribution. Simply using a program (like Ares) that automatically steers downloaded files into a shared folder may well be insufficient, standing alone, to support an inference of knowledge, particularly if the government has not provided evidence that the defendant knew of this mechanism or otherwise possessed the technological proficiency to understand that it was in place. See, e.g., United States v. Carroll, 886 F.3d 1347, 1354 & n.4 (11th Cir. 2018)

(holding that government was required to "put forth evidence that [defendant] had some advanced technological proficiency" to support finding of knowing distribution by means of file-sharing program that did not notify users of automatic sharing); Robinson, 714 F.3d at 470 (concluding that computer novice who "had never seen a file-sharing program before might not realize" that "shared files are accessible automatically to other persons online"). Conversely, concerns about automatic file-sharing have been allayed where – as in Cates – courts have found that the defendant possessed "advanced computer knowledge" or used the program in a manner that indicated an understanding of how the program worked. See United States v. Alpizar, ___ F.3d ___, ___ (11th Cir. 2018) [No. 16-15170, slip op. at 6]; United States v. Nordin, 701 F. App'x 545, 546 (8th Cir. 2017) (per curiam).

This case is of the latter stripe. The court below reasonably inferred knowledge both from its well-supported finding that the defendant was "a sophisticated and long-time computer user" and from the defendant's storage of select files in his shared folder. No more was exigible to render the court's findings adequate as a foundation for a reasonable inference of knowledge, regardless of whether downloaded files were automatically available for distribution to others. Accordingly, we discern no clear error in the court's imposition of a two-level enhancement for knowing distribution of child pornography.

III. CONCLUSION

We need go no further. For the reasons elucidated above, the defendant's sentence is

Affirmed.

— Separate Opinion Follows —

LIPEZ, Circuit Judge, concurring in part and dissenting in part. Although I concur with the majority's conclusion regarding the government's alleged violation of the plea agreement, I respectfully disagree with its conclusion regarding the sentencing enhancement that was applied to increase appellant's sentence. That enhancement is not supported by the record before the district court. Therefore, I would hold that the court clearly erred in determining that the government proved appellant's knowledge of distribution by a preponderance of the evidence. Before explaining my reasoning, I must provide some context for my assessment of the enhancement and augment the majority's description of the factual record.

I.

A. Peer-to-Peer File-Sharing Programs

In recent years, "'peer-to-peer' . . . file-sharing via the Internet has resulted in significant changes in the manner in which [child pornography] offenses are committed." U.S. Sentencing Comm'n, Report to the Congress: Federal Child Pornography Offenses (Dec. 2012), at 5. Peer-to-peer file-sharing networks "'allow[] users to download files from the computers of other users. Unlike other means of acquiring files over the Internet, such as in a chat room or using e-mail[,] . . . no personalized contact is required between the provider and receiver.'" United States v. R.V., 157 F. Supp. 3d 207, 235

(E.D.N.Y. 2016) (quoting Maggie Meuthing, Inactive Distribution: How the Federal Sentencing Guidelines for Distribution of Child Pornography Fail to Effectively Account for Peer-to-Peer Networks, 73 Ohio St. L.J. 1485, 1488 (2012)). In addition to allowing a user to download files, file-sharing programs also make files on a user's computer accessible for download by other users. Notably,

> [a] crucial aspect of peer-to-peer file-sharing is that the default setting for these networks is that downloaded files are placed in the user's "shared" folder, which allows others in the network to access the files. A user must affirmatively change his network setting to disable this sharing feature.

Id. (quoting Audrey Rogers, From Peer-to-Peer Networks to Cloud Computing: How Technology is Redefining Child Pornography Laws, 87 St. John's L. Rev. 1013, 1031 (2013)).

When first downloaded, Ares, the file-sharing program used by appellant, "sets up a shared folder on the computer where, by default, it automatically places all subsequent [Ares] downloads. Once a file is [automatically] placed in the shared folder, it is immediately available for further dissemination." United States v. Carroll, 886 F.3d 1347, 1350 (11th Cir. 2018). That is, "[u]nless an Ares user changes the default settings or deliberately moves files out of the shared folder, downloaded files [from Ares] will remain freely accessible to anyone else on the Ares network." Id.

B. The "Knowing" Distribution Guideline Enhancement

In general, due to the pervasive use of file-sharing programs to access child pornography, the sentencing guideline enhancements for the non-commercial distribution of child pornography may be applied to the majority of non-production child pornography offenders. See U.S. Sentencing Comm'n, Report to the Congress, at 149-50, 154-55. Until the end of 2016, the sentencing guidelines provided for a two-level enhancement in child pornography cases "[i]f the offense involved . . . [d]istribution." Compare U.S. Sentencing Guidelines Manual § 2G2.2(b)(3)(F) with U.S. Sentencing Guidelines Manual § 2G2.2(b)(3)(F) (as amended Nov. 2016).[3] Courts generally agreed that a user of a peer-to-peer file-sharing network need not take affirmative steps to share files with other users in order to have "distributed" child pornography. See, e.g., United States v. Chiaradio, 684 F.3d 265, 282 (1st Cir. 2012) (accepting the analogy of a peer-to-peer file-sharing program user to a self-serve gas station owner in holding that a person may "passive[ly]" distribute files by making them available for download by other users).

However, the circuits were split on whether the enhancement required some mens rea despite the absence of language

[3] If the offense involves distribution in exchange for any type of payment or distribution to a minor, the guidelines provide for a greater enhancement. See U.S.S.G. § 2G2.2(b)(3)(A)-(E).

to that effect in the guideline. Several circuits held that the enhancement required evidence that a defendant knew about the file-sharing properties of the program he was using to obtain child pornography. See, e.g., United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2014); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009). Other circuits held that there was no knowledge requirement, or that knowledge could be presumed from a defendant's use of a file-sharing program. See, e.g., United States v. Abbring, 788 F.3d 565, 567 (6th Cir. 2015); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015); United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014); United States v. Ray, 704 F.3d 1307, 1311-12 (10th Cir. 2013); United States v. Dodd, 598 F.3d 449, 451-52 (8th Cir. 2010).

In late 2016, the guideline enhancement was amended to specify that it applied only where a defendant "knowingly engaged in distribution." U.S.S.G. § 2G2.2(b)(3)(F) (emphasis added). In amending the guideline, the Sentencing Commission noted that some file-sharing programs "employ a default file-sharing setting" and that a user has to "'opt out' of automatically sharing files by changing the default setting to limit which, if any, files are available for sharing." U.S.S.G. App. C, Amend. 801 (eff. Nov. 1, 2016). The Commission acknowledged the existing uncertainty regarding mens rea and stated that it was "generally adopt[ing]

the approach of the Second, Fourth, and Seventh Circuits," which all required evidence of a defendant's knowledge of a program's file-sharing properties. Id.

In codifying this approach, the Commission rejected both the approach of those circuits that did not require evidence of knowledge and the approach of those circuits that had held that knowledge of a program's file-sharing properties "may be inferred from the fact that a file-sharing program was used, absent 'concrete evidence' of ignorance," because "the whole point of a file-sharing program is to share." Id. (quoting Dodd, 598 F.3d at 452, and Abbring, 788 F.3d at 567). After the amendment, then, application of the enhancement requires specific evidence of a defendant's "knowledge that by using a peer-to-peer file-sharing program, his child pornography was made accessible to others." United States v. Cates, 897 F.3d 349, 359 (1st Cir. 2018). The simple fact that a defendant used a file-sharing program does not constitute evidence of knowledge.[4] In other words, it is not enough for the government to assert that a defendant "was using a peer-to-peer file sharing program and 'that is what it is.'" Carroll, 886 F.3d at 1353.

[4] To the extent knowledge can be established by evidence of recklessness, the district court did not rely on this theory, and, in any event, my analysis would not differ if the government was pressing a recklessness theory.

The question then becomes what constitutes evidence of knowledge to support the enhancement. In Cates, we described a substantial amount of evidence of knowledge. Specifically, there was evidence that the defendant (1) had used a file-sharing program to download child pornography for three years; (2) had created a "specialized configuration" "by which files downloaded from [the file-sharing program] would bypass his master hard drive and be saved automatically to the 'sharing folder' housed on a subservient drive"; and (3) had, in his interview with authorities, "demonstrated considerable familiarity with [the program]'s file-sharing properties" and acknowledged that he could turn off the program's default setting of automatic sharing. Cates, 897 F.3d at 359.

The Eleventh Circuit's recent treatment of the amended guideline in relation to the Ares program is also instructive. In Carroll, the court reversed a distribution conviction "because the government failed to put forth any evidence that [the defendant] knew downloaded files were automatically placed into a shared folder accessible to the Ares peer-to-peer network." Carroll, 886 F.3d at 1349 (emphasis added). The only proffered evidence of knowledge in Carroll was the defendant's use of the Ares program and the presence of files automatically being placed into, and shared from, the Ares-created folder. Id. at 1353. The court considered this to be no evidence at all of the defendant's

knowledge. In a subsequent case affirming an application of the knowing distribution enhancement, the Eleventh Circuit distinguished Carroll by noting, inter alia, that the defendant in the present case "admitted to knowing how file sharing programs like A[res] worked" and had continued to share child pornography after being told by the FBI "how A[res] file sharing worked." United States v. Alpizar, No. 16-15170, 2018 WL 3598624, at *6 (11th Cir. July 26, 2018).

In sum, Cates, Carroll, and Alpizar demonstrate the type of evidence needed to apply the "knowing" distribution enhancement in a case involving a program that automatically shares downloaded files -- that is, some specific evidence that the defendant used the program in a manner demonstrating his awareness of the program's file-sharing properties. Without this evidence, a court risks applying the enhancement based solely on a defendant's use of a file-sharing program, which is the approach explicitly rejected by the Sentencing Commission.

II.

Against this backdrop, I turn to the record before the district court. The government's undisputed version of the facts, which was incorporated into the plea agreement, provides the only description in evidence of appellant's collection of child pornography on his two computers. It states:

> [D]efendant's Sony VAIO laptop . . . was found to contain 26 child sex abuse images. Additionally, it contained evidence of: a) 2,578 child sex abuse files having been downloaded and then erased; b) 71 incomplete downloads of child sex abuse files; c) 74 child sex abuse files being shared on "Ares[";] and, d) 23 child sex abuse-related search terms having been entered by the defendant.
>
> [D]efendant's Compaq desktop computer . . . was found to contain 1,046 child sex abuse images. Additionally, it contained evidence of: a) 802 child sex abuse files having been downloaded and then erased; b) 162 incomplete downloads of child sex abuse files; c) 15 child sex abuse files being shared on "Ares[";] and, d) 48 child sex abuse-related search terms having been entered by the defendant.[5]

In addition to this description of the child pornography that appellant possessed, there is no dispute that (1) he searched for and downloaded child pornography; (2) he downloaded the Ares file-sharing program onto his two computers; (3) a certain number of child pornography files were "being shared on Ares," likely meaning that these files were in the Ares folders on each device; and (4) a smaller number of files in the case of his laptop, and a larger number of files in the case of his desktop, were housed elsewhere on the computers.[6] Finally, although this aspect of the Ares

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[5] I assume that there is no meaningful distinction between the government's use of "images" and "files" in this case, considering that neither my colleagues, nor the district court, nor the parties suggest any such distinction. For consistency, I refer to the child pornography on appellant's computers as "files."

[6] To the extent there is any ambiguity in the government's description of appellant's child pornography collection, I note it follows logically that the files "contain[ed]" on appellant's computers are different from the files "being shared on 'Ares.'"

program is not made explicit in the record, there is no dispute that the program, when first downloaded, "sets up a shared folder on the computer where, by default, it automatically places all subsequent downloads" from Ares and that files automatically placed in this folder are freely accessible to other users. Carroll, 886 F.3d at 1350.

On this record, the district court concluded, "[t]he selection on both devices of a specific number of child sex abuse files to be shared on the 'Ares' network out of the thousands downloaded by defendant [indicates] that he applied his computer knowledge to pick and choose the particular contraband that he wanted to exchange through the 'Ares' file-sharing program." Based on this finding, plus a finding that appellant is a "sophisticated and long-time computer user," the court concluded that "all indications are that [he] used a shared folder that he knew others could access in order to download child pornography files." Although the majority states that the court "was entitled to draw the plausible inferences that led to a finding of knowledge," appellant contends that there is no evidence to support the district court's inference that he "picked and chose" certain files

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For example, appellant's laptop was "found to contain" 26 files, but there were 74 files being shared on Ares, demonstrating that the files being shared were not a subset of the files "contain[ed]" on his computers.

to share through Ares, the inference essential to the district court's finding of knowledge. I agree.

III.

Given that a certain number of child pornography files were on appellant's computers but not in the Ares folders, the district court inferred that he intentionally placed certain files in the Ares sharing folders, or kept certain files in the folders while removing others. The court further inferred that he performed this allocation because he was aware of the Ares program's file-sharing properties. As the district court implicitly saw it, there is no reason to intentionally place or keep files in the sharing folders other than to share these files with other Ares users.

There is no evidence to support this inference of allocation, however, because there is no evidence about the origin of the child pornography files on appellant's computers. The district court's inference would be supported if there was any evidence that appellant moved files between the Ares folders and other locations on his computers. Yet for all we know, appellant acquired all the files outside the Ares folders from a source other than Ares. In that case, all the files in the Ares folders could have been automatically placed there when they were downloaded through Ares and appellant would not necessarily have moved any files into or out of the Ares folders.

To be sure, there is a plethora of evidence that could have illuminated the allocation issue: for example, computer forensic examinations can readily ascertain the origin of files or how long they have been on a computer. See Sergeant Josh Moulin, What Every Prosecutor Should Know About Peer-to-Peer Investigations, Child Sexual Exploitation Program Update Volume 5, Number 1, 2010, National District Attorneys Association, National Center for Prosecution of Child Abuse (describing the detailed evidence about a defendant's use of a file-sharing program, manipulation of default settings, and handling of files in general that can be ascertained through a computer forensic examination). If we knew that any of the files stored outside the Ares folders were downloaded through Ares, for example, this would be evidence that appellant intentionally removed certain files from the Ares folders. Similarly, if we knew that any of the files inside the Ares folders were not originally downloaded through Ares -- if these files were obtained through another source, for example, via the sharing of files on external drives or even through a different file-sharing program -- this would be evidence that he intentionally placed certain files into the Ares folders. This type of evidence, however, is completely absent from the record. Thus, the district court's foundational inference -- that appellant intentionally allocated files between the Ares folders and other locations on his computers -- is pure speculation.

Simply put, there was no evidence before the district court that appellant "used the program in a manner that indicated an understanding of how the program worked," as my colleagues contend.

We must also remember that references in our sentencing enhancement decisions to "plausible inferences" cannot obscure the requirement that the government has to prove the applicability of a sentencing enhancement by a preponderance of the evidence. See United States v. Lacouture, 835 F.3d 187, 189-90 (1st Cir. 2016). Since the inference of allocation is at the heart of the district court's finding that appellant had knowledge of the file-sharing properties of the Ares program, the absence of any evidence to support that inference is even more striking. Moreover, a traditional rationale for deference to a district court's findings -- its ability to weigh credibility -- has no relevance here. We are only evaluating the district court's logic, not any assessment of credibility. Cf. United States v. Brum, 948 F.2d 817, 819 (1st Cir. 1991) ("We review the challenged findings of fact for clear error, mindful of the deference to which the sentencing court's superior opportunity to assess witness credibility is entitled.").

The contrast between this case and cases like Cates and Carroll is telling. In Cates, we highlighted the veritable mountain of specific evidence indicating that the defendant was aware of a program's file-sharing properties. See 897 F.3d at 359-60. In Carroll, the Eleventh Circuit rejected an application

of the enhancement that was based solely on the fact that the defendant was using Ares. See 886 F.3d at 1353-54. Here, the record is devoid of the type of evidence we highlighted in Cates. And when we scrutinize the district court's reasoning, it is clear that the court, in applying the enhancement, essentially relied on the bare fact that appellant was using Ares.

Without the unsupported inference that appellant "picked and chose" files to place in the Ares folders for sharing, all that we are left with is the district court's finding that appellant possesses a level of general computer proficiency. I agree that a defendant's "advanced computer knowledge" may be relevant to the knowledge inquiry. However, I am not aware of any authority in our case law for the proposition that some level of general computer proficiency on a defendant's part is enough, on its own, to support a finding of knowledge for purposes of the enhancement. But see United States v. Ryan, 885 F.3d 449, 453 (7th Cir. 2018)(affirming a knowing distribution conviction because "[t]he government . . . presented evidence of [defendant]'s sophisticated understanding of computers and software"). Even the majority does not contend that a defendant's general computer knowledge, such as a degree in computer science, is sufficient to support the enhancement. Yet once the unsupported inference of

allocation is removed from the equation, the evidence of appellant's general computer knowledge is all that remains.[7]

IV.

The district court applied the "knowing" distribution enhancement based on an inference of allocation that is not supported by the record. Without any evidence about the origin of the various files on appellant's computers, there is no evidence that he intentionally moved files into or out of the Ares folders. The court's inference of allocation was thus pure speculation. Once this unsupported inference is put aside, it is apparent that the district court essentially applied the enhancement because appellant was using a file-sharing program. That is precisely the approach rejected by the Sentencing Commission. My colleagues tacitly accept this discredited approach. I would hold that the district court clearly erred in applying the enhancement.

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[7] Even if general computer proficiency could theoretically support application of the enhancement on its own, appellant's level of computer proficiency would fall short. He completed a bachelor's degree in computer science and an associate's degree in computer networks a decade ago. He further indicated he is "skilled in computers" and "expressed interest in completing a Master's Degree in Computer Networks." However, he also expressed interest in pursuing formal training as a hairstylist, and his most recent job before his arrest was as a "receiving supervisor" at a "produce packing company . . . earning approximately $500 weekly." In other words, there is little to no evidence that he possessed "advanced computer knowledge" or was especially proficient in current computer technology, let alone file-sharing programs such as Ares. There is also no record evidence that he had used Ares for a significant period of time and thus had an opportunity to develop familiarity with the program.