

APPENDIX A

United States v. Cuddington

United States Court of Appeals for the Fifth Circuit

July 9, 2020, Filed

No. 19-10354

Reporter

812 Fed. Appx. 241 *; 2020 U.S. App. LEXIS 21366 **; 2020 WL 3885087

UNITED STATES OF AMERICA, Plaintiff-Appellee v.
JEFFREY NEAL CUDDINGTON, Defendant-Appellant

Outcome

Judgment affirmed.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [****1**] Appeal from the United States District Court for the Northern District of Texas. USDC No. 6:16-CR-28-1.

Cuddington v. United States, 2019 U.S. Dist. LEXIS 50693 (N.D. Tex., Feb. 14, 2019)

Counsel: For United States of America, Plaintiff - Appellee: Brian W. Portugal, Assistant U.S. Attorney, Leigha Amy Simonton, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX.

For Jeffrey Neal Cuddington, Defendant - Appellant: Brandon Elliott Beck, Federal Public Defender's Office, Northern District of Texas, Lubbock, TX; Kevin Joel Page, Federal Public Defender's Office, Northern District of Texas, Dallas, TX.

Judges: Before DENNIS, SOUTHWICK, and HO, Circuit Judges.

Case Summary

Overview

HOLDINGS: [1]-In a conviction for a sexual crime, the defendant failed to rebut the presumption of reasonableness attached to his within-Guidelines sentence because the district court had before it and adopted the presentence report which included a detailed discussion of both the defendant's personal military history and a description of the nature of his offense. Moreover, his counsel presented his personal history arguments to the district court at sentencing. Accordingly, despite its brevity, the district court's statement was sufficient when combined with its adoption of the PSR in imposing a within-Guidelines sentence, as the record made clear that the district court simply found the circumstances insufficient to warrant a sentence lower than the Guidelines range.

Opinion

[*241] PER CURIAM:*

Jeffrey Neal Cuddington pleaded guilty to the receipt and distribution of visual depictions of minors engaging in sexually [*242] explicit conduct and aiding and abetting. He timely appealed and now challenges his within-Sentencing Guidelines prison sentence of 188 months as being both procedurally and substantively unreasonable.

* Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*.

Brandon Beck

Procedurally, Cuddington contends that the district court's explanation for its choice of sentence was inadequate in light of evidence he presented on his positive history and characteristics. We review this argument under the plain-error standard since Cuddington did not [**2] raise this issue in the district court.¹ See *United States v. Mondragon-Santiago*, 564 F.3d 357, 360-61 (5th Cir. 2009). A sentencing court must provide "a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007). "The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* But context and the record can make clear that the judge's decision rests upon the Commission's reasoning that the Guidelines sentence is proper in the typical case and his own finding that the case before him is typical. *Id.* at 359. Although a sentencing judge "will normally go further and explain why he has rejected" a nonfrivolous reason for a different sentence, *id.* at 357, the judge need not do so where the matter is "conceptually simple . . . and the record makes clear that the sentencing judge considered the evidence and arguments," *id.* at 359.

Here, the district court cited only the sentencing factors of punishment and deterrence, but also adopted the Presentence Investigation Report (PSR) in sentencing Cuddington within the applicable Guidelines range. We have held that a statement of reasons citing only deterrence [**3] and punishment was sufficient where it was evident the district court considered the defendant's arguments for a lower sentence and rejected them, in part by adopted the PSR's reasoning over the defendant's objections. *United States v. Rodriguez*, 523 F.3d 519, 525-26 (5th Cir. 2008). Although Cuddington did not object to the PSR, it is nonetheless clear

that the district court considered his arguments for a lesser sentence based on Cuddington's personal history. First, the PSR—which the district court adopted—contained a detailed recitation of that history, along with a detailed description of the nature of Cuddington's offense, including that his hard drive contained 4,501 child pornography images and 183 videos containing child pornography, as well as several victim impact statements discussing the trauma experienced by victims of child pornography. Second, Cuddington's counsel presented those arguments in his sentencing memorandum and at the sentencing hearing before the district [**243] court announced its sentence. Accordingly, despite its brevity, the district court's statement was sufficient when combined with its adoption of the PSR in imposing a within-Guidelines sentence, as the record makes clear that the district court "simply found [the] circumstances [**4] [here] insufficient to warrant a sentence lower than the Guidelines range." *Rita*, 551 U.S. at 358.

Substantively, Cuddington asserts that the fact that the district court sentenced him at the top of the applicable Guidelines range demonstrates that the district court effectively ignored his arguments and evidence on his history and characteristics, which he describes as exemplary. This, he maintains, is enough to rebut the presumption of reasonableness afforded his within-Guidelines sentence. See *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006). Cuddington's request for a probationary sentence, a sentence at the low end of the statutory range, or a sentence at the bottom of the Guidelines range is sufficient to preserve this argument for appellate review under an abuse-of discretion standard. *Holguin-Hernandez*, 140 S. Ct. at 766; see *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). In light of the record before us, Cuddington has not shown "that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors." *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). Although Cuddington argues that his history and characteristics received effectively no weight because the district court did not refer to them explicitly, the absence [**5] of an explicit reference to these arguments does not require a conclusion that the court failed to consider them or accord them appropriate weight. See, e.g., *United States v. Washington*, 480 F.3d 309, 314 (5th Cir. 2007) (concluding that where defendant's history, characteristics and the nature of the offense were discussed at sentencing, the record supported the inference that the district court considered the relevant factors in imposing a sentence at the high end of the Guidelines range). Here, again, the district court had before it and adopted the PSR, which included a detailed discussion of both Cuddington's personal military history and a description of the nature of his offense.

¹ Under the Supreme Court's recent decision in *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 206 L. Ed. 2d 95 (2020), Cuddington's substantive reasonableness arguments are reviewed for abuse of discretion rather than plain error because he sought a lower sentence than what the court ultimately imposed. But the Supreme Court in *Holguin-Hernandez* explicitly declined to address whether its reasoning applied to procedural reasonableness. 140 S. Ct. at 767 (declining to consider "what is sufficient to preserve a claim that a trial court used improper procedures in arriving at its chosen sentence" (emphasis in original)). Accordingly, our case law requiring a specific objection to preserve procedural error remains undisturbed, as we have previously held in at least one unpublished decision. *United States v. Gonzalez-Cortez*, 801 F. App'x 311, 312 n.1 (5th Cir. 2020); see also *United States v. Dominguez-Alvarado*, 695 F.3d 324, 327 (5th Cir. 2012) ("If a defendant fails to properly object to an alleged error at sentencing, however, the procedural reasonableness of his sentence is reviewed for plain error.").

Moreover, Cuddington's counsel presented his personal history arguments to the district court at sentencing. *See Washington, 480 F.3d at 314*. Cuddington has therefore failed to rebut the presumption of reasonableness attached to his within-Guidelines sentence. *See id.*; *Cooks, 589 F.3d at 186*.

For these reasons, the judgment of the district court is AFFIRMED.

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APPENDIX B

United States District Court**Northern District of Texas**
San Angelo DivisionCLERK US DISTRICT COURT
NORTHERN DIST. OF TX
FILED

UNITED STATES OF AMERICA

2017 APR 21 PM 1:44

v.

JEFFREY NEAL CUDDINGTON
Defendant.Case Number: 6:16-CR-00028-C(01)
USM No. 62565-037DEPUTY CLERK *cf***JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

The defendant, JEFFREY NEAL CUDDINGTON, was represented by Christopher W. Lewis.

The defendant pleaded guilty to count 1 of the indictment filed October 12, 2016. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
18 U.S.C. §§ 2252(a)(2) and (2)	Receipt and Distribution Of Visual Depictions Of Minors Engaging In Sexually Explicit Conduct, and Aiding and Abetting.	10/11/2012	1

As pronounced on April 21, 2017, the defendant is sentenced as provided in pages 1 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00, for count 1 of the indictment, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in the defendant's economic circumstances.

Signed this the 21st day of April, 2017.


 SENIOR DISTRICT JUDGE SAM R. CUMMINGS
 UNITED STATES DISTRICT COURT

DEFENDANT: JEFFREY NEAL CUDDINGTON
CASE NUMBER: 6:16-CR-00028-C(01)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 188 months as to count 1.

The defendant is remanded to the custody of the U.S. Marshal Service.

The Court recommends placement at FCI Petersburg, Hopewell, Virginia.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JEFFREY NEAL CUDDINGTON
CASE NUMBER: 6:16-CR-00028-C(01)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 20 years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☒ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
- ☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JEFFREY NEAL CUDDINGTON
CASE NUMBER: 6:16-CR-00028-C(01)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall abstain from the use of alcohol and all other intoxicants during the term of supervision.
2. The defendant shall participate in sex offender treatment services as directed by the probation officer until successfully discharged. These services may include psycho-physiological testing (i.e. clinical polygraph, plethysmograph, and the ABEL screen) to monitor the defendant's compliance, treatment progress, and risk to the community. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$20.00 per month.
3. The defendant shall submit to a search of his person, property, house, vehicle, papers, computer, and other electronic communication or data storage devices or media at any time, with or without a warrant, by any law enforcement officer or probation officer who has reasonable suspicion concerning unlawful conduct or a violation of a condition of supervised release. Any such items found may be seized by the probation officer.
4. The defendant shall neither possess nor have under his control any sexually oriented, or sexually stimulating materials of adults or children. The defendant shall not patronize any place where such material is available.
5. The defendant shall have no unsupervised contact with persons under the age of 18, nor shall the defendant loiter near places where children may frequently congregate. The defendant shall neither seek nor maintain employment or volunteer work at any location and/or activity where persons under the age of 18 congregate and the defendant shall not date or befriend anyone who has children under the age of 18, without prior permission of the probation officer.
6. The defendant shall not possess, have access to, or utilize a computer or internet connection device without permission of the Court.

CRIMINAL FORFEITURE

Pursuant to 21 U.S.C. § 853, it is hereby ordered that defendant's interest in the following property is condemned and forfeited to the United States: one Seagate 160GB 2.5" hard disk drive, serial number 5MA1PN8P, contained in an iMicro external enclosure; one Thor tower computer; one Intel SSD 520 Series, 240GB internal storage drive, serial number CVCV303605AZ240CGN, which was contained in the Thor computer; one Dell laptop computer containing a Western Digital WD3200BEVT-75ZCT2 320GB internal hard disk drive, serial number WXE309E73334; and one PNY Attaché 4GB thumb drive, which were seized by HSI agents on or about June 3, 2015.