APPENDIX A

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JESSE DAVENPORT, AKA Draco John Flama, Defendant-Appellant.	No. 21-10108 D.C. No. 2:13-cr-00399-MCE-1 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Argued and Submitted August 10, 2022
San Francisco, California

Before: RAWLINSON, BADE, and BRESS, Circuit Judges.

Jesse Davenport appeals his conviction and sentence for Conspiracy to Sexually Exploit a Child in violation of 18 U.S.C. § 2251(a) and (e). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

We review "the district court's interpretation of the Sentencing Guidelines *de novo*, the district court's application of the Sentencing Guidelines to the facts of the case for abuse of discretion, and the district court's factual findings for clear error." *United States v. Schales*, 546 F.3d 965, 976 (9th Cir. 2008) (citation and alteration omitted). We also apply de novo review when considering the district court's compliance with Rule 32 of the Federal Rules of Criminal Procedure (Rule 32). *See United States v. Carter*, 219 F.3d 863, 866 (9th Cir. 2000).

1. Davenport argues that when the district court instructed the jury that he could be convicted for conspiring to commit any of the crimes alleged in the superseding indictment, the court constructively amended the indictment. Even if this argument is not waived for failure to pursue it in his prior appeal, *see Munoz v. Imperial Cnty.*, 667 F.2d 811, 817 (9th Cir. 1982), there was no constructive amendment of the indictment.

"A constructive amendment occurs when the defendant is charged with one crime but, in effect, is tried for another crime. . . ." *United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (citation omitted).

Davenport was charged with conspiracy to sexually exploit a child in violation of 18 U.S.C. § 2251(a) and (e). The district court instructed the jury on the elements of that charge, the government focused on that charge in its closing

argument, and the jury convicted Davenport of that offense. Under these circumstances, no constructive amendment of the indictment can be established. *See United States v. Mickey*, 897 F.3d 1173, 1183 (9th Cir. 2018) (concluding that there was no constructive amendment when the language in the indictment included multiple means of committing an offense, giving defendant notice that he would have to defend against all of them).

2. Davenport asserts that the district court violated Rule 32 by not resolving his objection to receiving two criminal history points for a prior sentence that was not at least 60 days. But any Rule 32 error was harmless because, as Davenport concedes, had the district court sustained Davenport's objection, "the category remains the same." *See United States v. Ali*, 620 F.3d 1062, 1074 (9th Cir. 2010) (clarifying that error is harmless when "there is no evidence any of the[] alleged errors, if changed, would result in a shorter sentence").

3. Davenport contends that the district court also violated Rule 32 by considering materials outside the record to make determinations about Davenport's "Gorean lifestyle." The purpose behind Rule 32 is to afford the defendant an adequate opportunity to respond to "relevant factual information" before sentencing. *United States v. Warr*, 530 F.3d 1152, 1162 (9th Cir. 2008). Here, Davenport was provided an adequate opportunity to respond to any statement that

he engaged in a "Gorean lifestyle" because the record was replete with references to that subject.[1]

4. Davenport argues that the district court abused its discretion in applying a four-level increase under U.S.S.G. § 2G2.1(b)(4). Davenport maintains that the two-year-old victim saying "ouch" and "it hurts" in reaction to being digitally penetrated by an adult does not constitute sadistic conduct. We disagree. In *United States v. Rearden*, 349 F.3d 608, 622 (9th Cir. 2003), we expressly held that "[s]ubjection of a child to a sexual act that is necessarily painful . . . is sadistic."

5. Davenport insists that "[w]ithout the four-level enhancement for sadistic conduct," the district court's imposition of consecutive sentences is a misapplication of the guidelines. In light of our decision to affirm the four-level enhancement, Davenport's argument fails.

Davenport also maintains that the district court ignored his sentencing disparity arguments and thereby imposed a sentence that was unreasonable. Even if this argument is not waived for failure to pursue it in his prior appeal, *see*

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[1] At the resentencing hearing, the district court recalled that when it informed Davenport that it had to research the "Gorean lifestyle," Davenport responded with "What'd you think?" and "Did you like it?" The government concedes that the response attributed to Davenport is not supported by the record. However the court's misstatement was harmless, as there is no basis in the record to conclude that it affected the court's sentencing decision. *See United States v. Cruz-Gramajo*, 570 F.3d 1162, 1167 (9th Cir. 2009).

Munoz, 667 F.2d at 817, it lacks merit. Davenport's co-conspirator pled guilty to production of child pornography and cooperated in the investigation against Davenport in exchange for a reduced sentence. Davenport also played a leadership role in the creation of the child sexual materials. Accordingly, the two defendants were not similarly situated. *See United States v. Carter*, 560 F.3d 1107, 1121 (9th Cir. 2009) ("[A] sentencing disparity based on cooperation is not unreasonable.").

AFFIRMED.[2]

[2] Finally, Davenport requests that any resentencing hearing "be held before a different district judge." Because we determine that there is no need to remand for resentencing, we decline to address this request.

APPENDIX B

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JESSE DAVENPORT, AKA Draco John Flama, Defendant-Appellant.	No. 21-10108 D.C. No. 2:13-cr-00399-MCE-1 Eastern District of California, Sacramento ORDER

Before: RAWLINSON, BADE, and BRESS, Circuit Judges.

Judges Rawlinson, Bade and Bress voted to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Defendant-Appellant's Petition for Rehearing En Banc, filed November 4, 2022, is DENIED.