

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	Case No. 2:11-CR-239
PLAINTIFF,)	
)	JUDGE EDMUND A. SARGUS JR.
v.)	
)	
CARLOS A. AVENDANO,)	SENTENCING MEMORANDUM
)	
DEFENDANT.)	

Defendant, Carlos A. Avendano, through undersigned counsel, respectfully submits the following sentencing memorandum for the Court's consideration.

Respectfully submitted,

/s/ Samuel H. Shamansky
SAMUEL H. SHAMANSKY
Ohio Supreme Court No. 0030772
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Columbus, Ohio 43215
(614) 242-3939

Counsel for Defendant

MEMORANDUM

Defendant submits that Probation Officer Walden has provided a thorough and accurate rendition of the factual and procedural background of his case and takes no issue with the same.

Defendant further appreciates Officer Walden's recommendation for a downward deviation from the Sentencing Guidelines, but disagrees that a prison sentence is appropriate. Defendant urges this Court to consider the following in determining a reasonable sentence.

REASONS IN SUPPORT OF A PERIOD OF PROBATION

Defendant respectfully submits that neither a fifty month term of imprisonment, nor the length term of incarceration sought by the Government, is necessary to satisfy the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). A period of probation would be consistent with the factors set forth in § 3553 and, in consideration of the now-advisory Sentencing Guidelines, would also be reasonable based upon the particular facts and circumstances in this case.

**The United States Sentencing Guidelines after *Booker v. United States*
and *Gall v. United States*: Application of 18 U.S.C. 3553**

On January 21, 2005, the United States Supreme Court dramatically changed the landscape of federal sentencing in *United States v. Booker*, 543 U.S. 220 (2005). By separate 5-4 majorities, the Court held (1) that the Sixth Amendment as construed in *Blakely v. Washington*, 542 U.S. 296 (2004), applies to the federal sentencing guidelines and (2) that, in order to avoid Sixth Amendment concerns raised by the guidelines, it is necessary to invalidate two provisions of the Sentencing Reform Act of 1984 that make the guidelines mandatory in federal court sentencing. Sentencing courts were instructed to consider the guidelines as advisory and appellate courts were ordered to review such sentences for "reasonableness" under the standards set forth in 18 U.S.C. § 3553(a). Thus, the Court established a system whereby a sentence within

the otherwise applicable guideline range is constrained by “reasonableness” pursuant to the felony sentencing provisions established in § 3553. More recently, in *Gall v. United States*, 128 S.Ct. 586 (2007), the Supreme Court confirmed that District Courts should receive substantial deference in the imposition of a sentence, even if it is outside the guideline range, so long as that sentence is reasonable under § 3553.

In defining “reasonableness,” Congress has directed that criminal sentences must achieve four purposes: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, (2) to afford adequate deterrence to criminal conduct, (3) to protect the public from further crimes of the defendant, and (4) to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in an effective manner. *See* 18 U.S.C. § 3553(a)(2). In addition, § 3553 requires a sentencing court to consider “the need to avoid unwanted sentence disparity among defendants with similar records who have been found guilty of similar conduct.” *See* 18 U.S.C. § 3553(a)(6). Moreover, section 3553 provides that the sentence shall be “no greater than necessary . . . to comply with the purposes of punishment” *See* 18 U.S.C. § 3553(a).

In the case *sub judice* and pursuant to the foregoing analysis under *Booker* and § 3553, three considerations warrant imposition of a prison term less than the guideline recommendation in this case: (1) Defendant’s history and personal characteristics, §3553(a)(1), (2) need for the sentence imposed to reflect the seriousness of the crime and to promote just punishment to the office, §3553(a)(2)(A), and (3) need for the sentence imposed to afford adequate deterrence and protect the public from future crimes committed by the defendant, §3553(a)(2)(B) and (C).

DEFENDANT’S HISTORY AND PERSONAL CHARACTERISTICS - 3553(a)(1)

As this Court is aware, Carlos A. Avendano is thirty-one years of age and has no prior criminal convictions. Moreover, he has faced many challenges over the course of his life. Mr. Avendano’s parents divorced when he was 4 years old. During the two years following that separation, Defendant’s father abused him on numerous occasions. As a result, starting when he was 15 years old, Mr. Avendano proactively sought out appropriate psychological counseling. He currently meets with both a licensed social worker and a psychiatrist, and is prescribed medications to treat depression and anxiety.

In addition to the physical abuse Mr. Avendano suffered, he has also struggled with Arnold-Chiari Malformation, a birth defect that causes compression of the brain stem and spine, resulting in migraines and paralysis. Defendant also suffers from double vision and insomnia.

Despite these difficulties, Mr. Avendano has partially completed his undergraduate education, having attended The Ohio State University and Ohio Dominican University from 1998 through 2001. In 2011, Mr. Avendano returned to the classroom, taking further courses at The Ohio State University with the intention of earning a degree in English, as well as minors in Business Professional Writing and Creative Writing. As a result of his hard work, Mr. Avendano was recently placed on the dean’s list for the last academic quarter.

With the exception of the criminal behavior underlying this matter, Mr. Avendano has led a law-abiding adult life. He has been employed as a counselor at the Days of Creation Art Camp, and performed odd jobs including babysitting for Elizabeth Renker. In those capacities, Mr. Avendano interacted with children on a regular basis, and never displayed any inappropriate behavior. Moreover, he has maintained a long-term romantic relationship with an age appropriate

partner, Heather Saunders. She, like many others, has observed Mr. Avendano over the course of many years and written this Court in his support.

Those close to Defendant know that he is a devoted son who has always provided emotional support to his 69 year old mother, which whom he resides. Furthermore, Mr. Avendano provides personal care for her when she is unable to take care of herself due to complications arising from two strokes.

Finally, Mr. Avendano has cooperated with the Government in its prosecution of this case. He has accepted complete responsibility for his actions with full awareness of the legal consequences, culminating in a plea of guilty to the offense of possession of child pornography.

**NEED FOR THE SENTENCE TO REFLECT THE SERIOUSNESS OF THE CRIME AND
TO PROMOTE JUST PUNISHMENT- 3553(a)(2)(A)**

Mr. Avendano recognizes that possession of child pornography is an extremely serious offense which contributes to the exploitation of children, but submits that a period of probation reflects the seriousness of the crime to which he pleaded guilty and promote just punishment. Defendant's offense was non-violent in nature. There is no indication that Mr. Avendano ever used pornography to entice children into sexual activity, or that he ever initiated any inappropriate behavior with a minor. Similarly, there is no indication that Mr. Avendano has come to view sexual activity with minors as acceptable behavior. To the contrary, defendant appreciates that possession of child pornography contributes to the abuse of children and recognizes the gravity of his conduct.

Mr. Avendano makes no excuses for his behavior. He admits to having a prurient interest in pornography and that he illegally possessed child pornography as part of that interest.

However, Mr. Avendano has also demonstrated a commitment to dealing with these issues through professional counseling in an effort to avoid this behavior in the future.

**NEED FOR THE SENTENCE TO DETER CARLOS A. AVENDANO AND
PROTECT THE PUBLIC FROM FUTURE CRIMES- 3553(a)(2)(B) & (C)**

Mr. Avendano does not require a prison sentence to deter him from engaging in future criminal behavior. Defendant has admitted to his wrongdoing, cooperated with the Government, and is committed to returning to a law-abiding life. Moreover, he understands the severity of the offense to which he has pleaded guilty and is determined that such behavior will never be repeated.

Mr. Avendano submits that his likelihood of recidivism is extremely low given his age, educational achievements and goals, and family responsibilities. Furthermore, his own actions demonstrate that Mr. Avendano has been, with the exception of this offense, a law-abiding individual who strives to help, not harm, others. Accordingly, a prison sentence is not necessary either to deter Defendant or protect the public.

CONCLUSION

In light of the foregoing, Defendant respectfully requests that this Court impose a period of probation pursuant to 18 U.S.C. § 3553. However, Defendant is aware that the Court may find a period of incarceration to be necessary in this case. In that event, Defendant respectfully urges that the Court make a downward deviation from the guideline provisions and, furthermore, that he be placed in a Bureau of Prisons institution that provides sex offender treatment.

Respectfully submitted,

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Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the Clerk of Court for the United States District Court for the Southern District of Ohio using the CM/ECF system, which will send notification of the filing to Assistant U.S. Attorney, Michael J. Hunter, 303 Marconi Boulevard, Suite 200, Columbus, Ohio 43215 on February 28, 2012.

/s/ Samuel H. Shamansky
SAMUEL H. SHAMANSKY