

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

JAN 29 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL WAYNE GRAY,

Defendant - Appellant.

No. 08-30101

D.C. No. 4:07-cr-00106-SEH

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Montana  
Samuel E. Haddon, District Judge, Presiding

Argued and Submitted January 20, 2009  
Seattle, Washington

Before: REAVLEY,\*\* Senior Circuit Judge, TALLMAN and M. SMITH, Circuit  
Judges.

Michael Wayne Gray appeals his sentence of sixteen months following his  
guilty plea to Providing Ammunition to a Known Convicted Felon, in violation of

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

\*\* The Honorable Thomas M. Reavley, Senior United States Circuit  
Judge for the Fifth Circuit, sitting by designation.

18 U.S.C. § 922(d)(1) (hereinafter Ammunition Charge). We have jurisdiction to hear this appeal under 28 U.S.C. § 1291. Because the parties are familiar with the facts, we do not recount them here except as necessary to explain our decision.

Gray argues that his Ammunition Charge and his earlier charges for both Conspiracy to Possess Marijuana with Intent to Distribute (21 U.S.C. § 846) and Possession of Marijuana with Intent to Distribute (21 U.S.C. § 841(a)) should have been grouped by the District Court pursuant to the Sentencing Guidelines Section 3D1.2. The Sentencing Guidelines Manual provides that “[a]ll counts involving substantially the same harm shall be grouped together into a single Group.” U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (2007); *see also United States v. Smith*, 424 F.3d 992, 1015 (9th Cir. 2005). The Commentary to the Guidelines Grouping Chapter notes that counts can be grouped when they are contained in the same indictment or when sentences are to be imposed at the same time or in a consolidated proceeding. U.S. SENTENCING GUIDELINES MANUAL ch. 3, pt. D, introductory cmt. (2007). Here, the counts that Gray claims should have been grouped were contained in separate indictments and sentenced at different hearings. While we are sympathetic to Gray’s predicament, the Guidelines do not contemplate the ability to group his charges under Section 3D1.2.

Gray also argues that the sentence he was given for his Ammunition Charge was substantively unreasonable. We evaluate a sentence for its substantive reasonableness under an abuse of discretion standard. *See United States v. Pham*, 545 F.3d 712, 716 (9th Cir. 2008). As the only evidence of substantive unreasonableness Gray asserts is the same argument that is made and rejected above—*i.e.*, that the sentence was in error because the charges should have been grouped— we do not find that the District Court’s imposition of a sixteen month sentence is substantively unreasonable.

AFFIRMED.