

AUG 18 2009

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BARRY LEE ARMBRISTER,

Defendant - Appellant.

No. 08-30367

D.C. No. 6:07-CR-00030-CCL

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Montana  
Charles C. Lovell, District Judge, Presiding

Argued and Submitted June 5, 2009  
Portland, Oregon

Before: GOODWIN, O'SCANNLAIN and FISHER, Circuit Judges.

Barry Armbrister appeals his conviction and sentencing for receipt of child pornography under 18 U.S.C. § 2252A(a)(2). We have jurisdiction under 28 U.S.C. § 1291, and now affirm. The facts are well-known to the parties and need not be addressed here.

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

Armbruster asserts that the district court erred by vacating his possession conviction rather than his receipt conviction under *United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008). Today, in *United States v. Hector*, No. 08-30271 (9th Cir. \_\_\_\_\_, 2009), we hold that where the defendant objects to the government's motion to vacate, the district court is required to use its discretion in determining which conviction to vacate rather than deferring to the prosecutor. However, Armbruster filed a statement of non-objection to the government's motion to vacate his possession conviction. Accordingly, even after our decision in *Hector* it was not plain error for the district court to vacate Armbruster's possession conviction under Federal Rule of Criminal Procedure 48(a). See *Rinaldi v. United States*, 434 U.S. 22 (1977) (applying Rule 48(a) post-conviction); *United States v. Gonzalez*, 58 F.3d 459 (9th Cir. 1995) (reversing a district court for denying a Rule 48(a) motion supported by both the defendant and the government); *United States v. Garcia-Valenzuela*, 232 F.3d 1003 (9th Cir. 2000) (noting that both the Supreme Court and this circuit have reserved judgment on whether a consented-to Rule 48(a) motion may *ever* be denied).

The FBI agent obtaining the search warrant did not behave recklessly or intentionally in failing to mention in the search warrant application that Armbruster was not on probation at the time of the search. In addition, the interview between

Armbrister's wife and the FBI agent is attenuated enough from the taint of any illegal search to provide an independently adequate basis for the search warrant.

**AFFIRMED.**