

JAN 06 2010

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff - Appellee,</p> <p>v.</p> <p>DAVID LEE SAVAGE,</p> <p>Defendant - Appellant.</p>
--

No. 08-30336

D.C. No. 9:07-cr-00060-DWM

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Submitted December 15, 2009**

Before: GOODWIN, WALLACE, and FISHER, Circuit Judges.

David Lee Savage appeals from his guilty-plea conviction and 60-month sentence for receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2).

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we vacate and remand.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Savage contends the district court failed to properly exercise its discretion to determine whether to vacate his receipt conviction or possession conviction because it incorrectly found that the choice was in the hands of the government. *See United States v. Davenport*, 519 F.3d 940, 947 (9th Cir. 2008) (holding that the “offense of possessing child pornography is a lesser included offense of the receipt of child pornography”). We recently held in an intervening case that “the decision to vacate must lie in the discretion of the district court.” *United States v. Hector*, 577 F.3d 1099, 1103 (9th Cir. 2009). Because the district court did not have the benefit of *Hector* at the time of its decision, we vacate and remand for further proceedings consistent with *Hector*.

VACATED and REMANDED.