No._____

IN THE SUPREME COURT OF THE UNITED STATES

_____

ROBERT WALLACE SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court's statutory maximum, 240-month sentence is substantively unreasonable for a first offender convicted of one count of receiving or distributing child pornography through the internet.

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Robert Wallace Smith, and Respondent, United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Wallace Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in case number 16-10399.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed petitioner Robert Wallace Smith's judgment of conviction and sentence in a Memorandum Decision. Appendix, App. 1-3. The Court summarily denied Smith's petition for rehearing and rehearing en banc. App. 4.

JURISDICTION

The Ninth Circuit affirmed Smith's conviction and sentence in a Memorandum Decision filed May 3, 2018. App. 1-3. Smith timely filed a petition for rehearing and rehearing en banc, which was denied June 25, 2018. App. 4. This Court has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(a) and this Court's rules 13.1 and 13.3.

RELEVANT CONSITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 3553(a) states, in relevant part:

(a) Factors to be considered in imposing a sentence.—

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available; . . .

(6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victim of the offense.

STATEMENT OF THE CASE

On May 9, 2013, the government filed an Indictment charging Smith with one count of receipt or distribution of a visual depiction of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). Docket 1. After various pretrial proceedings, a jury trial began on May 24, 2016. The jury returned a guilty verdict on May 27, 2016. Docket 105. On September 12, 2016, the district court sentenced Smith to 240 months imprisonment and $5,000 in restitution. Docket 126.

On appeal, Smith raised various challenges to his conviction and argued that his 240-month, statutory maximum sentence was substantively unreasonable. The Ninth Circuit rejected his challenges and affirmed his conviction and sentence. App. 1-3. The Court also denied his petition for rehearing and rehearing en banc. App. 4.

REASONS FOR GRANTING THE PETITION

Creating a conflict with the Second Circuit, the Ninth Circuit erred in holding that Smith's 240-month, statutory maximum sentence was not substantively unreasonable for a first offender in a run-of-the-mill child pornography case.

Under *United States v. Booker*, 543 U.S. 220 (2004), the district court "should begin all sentencing proceedings by calculating the applicable guideline range." *Gall v. United States*, 552 U.S. 38, 49 (2007). While the guideline range becomes the "initial benchmark" in determining the appropriate sentence in a given case, it is only one factor the court considers in imposing sentence. *Gall,* 552 U.S. at 49, 59. "After giving both sides the opportunity to argue for whatever sentence they deem appropriate," the sentencing court "should then consider all of the [18 U.S.C.] § 3553(a) factors to determine whether they support the sentence requested by the party." *Id.* at 49-50. Thus, in sum, the district court must consider both the § 3553(a) factors and the Guidelines when imposing sentence.

In determining the appropriate sentence, the district court "shall consider" the following factors:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .

(6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victim of the offense.

18 U.S.C. § 3553(a).

"[T]he District Court's overarching duty is to impose a sentence sufficient, but not greater than necessary to serve the purposes of

sentencing." *Pepper v. United States,* 562 U.S. 476, 493 (2011). Appellate courts must determine whether the district court committed significant procedural error and whether its sentence is "substantively unreasonable" in light of the § 3553(a) factors under an abuse-of-discretion standard. *Gall*, 552 U.S. at 51. "A substantively reasonable sentence is one that is 'sufficient, but not greater than necessary' to accomplish § 3553(a)(2)'s sentencing goals." *United States v. Crowe,* 563 F.3d 969, 977 n.16 (9th Cir. 2009) (quoting 18 U.S.C. § 3553(a)). A sentence may be unreasonable in light of all the § 3553(a) sentencing factors even if it falls within the applicable guideline range. *Gall,* 552 U.S. at 51.

Here, the probation officer calculated Smith's guideline range using the 2015 Guidelines Manual as follows:

Base Offense Level (U.S.S.G. § 2G2.2)	22
Specific Offense Characteristics (§ 2G2.2(b))	
Image of Prepubescent Minor	+2
Distribution (via P2P File Sharing)	+2
Sadistic/Masochistic Image	+4
Use of a Computer	+2

More than 600 Images	+5
Vulnerable Victim (§ 3A1.1(b)(1))	+2
Obstruction of Justice (§ 3C1.1)	+2
Total Offense Level:	41

Presentence Report (PSR), at 7-9, ¶¶ 24-41. With a criminal history category I and a total offense level of 41, Smith's guideline range would be 324-405 months, except that the 240-month statutory maximum was substituted as the guideline range under U.S.S.G. § 5G1.1(a). PSR, at 13, ¶ 70.

In a pretrial sentencing memorandum, Smith challenged a number of the sentencing guideline enhancements and argued for a below-guideline sentence of 116 months imprisonment based on all the sentencing factors set forth in 18 U.S.C. § 3553(a). Docket 116. At sentencing, the district court rejected Smith's objections to the guideline enhancements and adopted the probation officer's guideline calculations set forth above, which resulted in a guideline range of 240 months. App. 11-15, 24.

After hearing from the parties, the district court ultimately imposed a sentence of 240 months. App. 29. The judge noted that

"these are always very difficult situations," but that he felt that he had "little choice but to follow the advisory sentencing guidelines" in light of the volume of child pornography on Smith's computers, the nature of the images, and his "continued inability to accept responsibility." App. 28-29.

The district court's 240-month sentence is substantively unreasonable in this run-of-the-mill child pornography case. Smith's conduct and background did not warrant a sentence at the statutory maximum, reserved for the most egregious offenders. He had no criminal history. There was no evidence that he was involved in producing child pornography. And the only evidence of distribution was his use of peer-to-peer software to download child pornography, which made images on his computer available for others to view or download. *See United States v. Vallejos,* 742 F.3d 902, 908 (9th Cir. 2014) ("we hold that the knowing use of a file-sharing program to download child pornography involves not merely the receipt of illicit material, but also the reciprocal distribution of it").

Further, many of the enhancements that significantly increased Smith's guideline range overlapped in a way that overstated the

seriousness of the offense, even if such duplication is not prohibited by law. For example, Smith's offense level for using peer-to-peer software to download child pornography added two levels for use of a computer and two additional levels for using the software to make such images available for distribution. *See United States v. Kiefer,* 760 F.3d 926, 930-32 (9th Cir. 2014) (rejecting double-counting argument to application of enhancement for use of computer in § 2252(a)(2) case). Smith's offense level was also increased two levels for having sexually explicit images of minors under age 12 and two additional levels because a toddler qualified for the "vulnerable victim" enhancement. *See United States v. Wright,* 373 F.3d 935, 942-44 (9th Cir. 2004) (rejecting double-counting argument to enhancements for both vulnerable victim and the age of the minor).

Smith's sentencing memorandum also presented a number of mitigating factors, including that he (1) has a verifiable employment history; (2) suffers from mental health issues; (3) has a supportive family; (4) had received a pretrial plea bargain with the government recommending a 97-month sentence; and (5) had already been on

pretrial home detention in this case for approximately 26 months. Docket 116.

Smith also contended that a statutory maximum sentence would be inconsistent with the need to avoid unwarranted sentence disparities because, as the probation officer acknowledged, there have been several other defendants with similar records and similar conduct who were sentenced to lesser, below-guideline sentences. Docket 116, at 4. Recognizing the problems with the § 2G2.2 guideline, district courts routinely impose below-guideline sentences in child pornography offenses. In 2013, the mean sentence for "child pornography" cases was 136 months, and the median was 120 months. *United States v. Jenkins,* 854 F.3d 181, 193 (2d Cir. 2017).[1] Under all the circumstances, Smith's sentence, which is 104 months above the mean and 120 months above the median, is unreasonable.

The Ninth Circuit affirmed Smith's sentence without much analysis or any consideration of Smith's arguments about the problems with the § 2G2.2 guideline. App. 2-3. The Court noted that Smith's

[1] This included 333 individuals who produced child pornography along with 1,609 sentenced for trafficking and possession offenses. *Id.*

advisory guideline range would have been 324-405 months, except that the 240-month statutory maximum became the guideline range under U.S.S.G. § 5G1.1(a). App. 2. The Court also pointed out that the district court heard Smith's arguments and "considered, among other things, the Defendant's submitted letter, the Defendant's familial support, and the Defendant's lack of criminal history." App. 2. It also explained that Smith was unable to accept responsibility for his offense. App. 3. "Based on the record and the explanation given by the district court," the Court "conclude[d] that the 240-month sentence was not substantively unreasonable. App. 3.

In upholding Smith's sentence, the Ninth Circuit created a conflict with the Second Circuit. In *United States v. Dorvee,* 616 F.3d 174 (2d Cir. 2010), the Second Circuit found the same 240-month sentence imposed in a substantially similar case to be substantively unreasonable. There, officers searching the defendant's residence found "several thousand still images" and "approximately 100 to 125 computer videos depicting minors engaged in sexually explicit conduct." *Id.* at 176. The defendant also had traded these videos and images on the internet with approximately 20 persons. *Id.*

The district court determined the total offense level to be 39, which included enhancements for the depiction of prepubescent minors and sadistic, masochistic, or violent conduct. *Id.* A 7-level enhancement was also applied "because the offense involved '[d]istribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct." *Id.* Although the preliminary guideline calculation resulted in a 262-327 month guideline range, the 240-month statutory maximum became the guideline range under U.S.S.G. § 5G1.1(a). The district court imposed a sentence at this guideline range, i.e., 240 months with credit for the seven months he served in state custody.

The Second Circuit held that the 240-month guideline sentence was substantively unreasonable. In doing so, the appellate court emphasized that the guideline for child pornography offenses "is fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires." *Id.* at 184. The court noted that unlike other guidelines, the Sentencing Commission did not rely on empirical data and past sentencing practices in formulating the guideline range for

child pornography cases. Rather, the Sentencing Commission amended the § 2G2.2 guideline several times to respond to Congressional directives seeking harsher punishment, even though the Commission often opposed the changes. *Id.* at 184-86; *see also United States v. Henderson,* 649 F.3d 955, 960-62 (9th Cir. 2011) (reviewing the history of the child pornography guidelines). As a result, "many of the § 2G2.2 enhancements apply in nearly all cases." *Dorvee,* 616 F.3d. at 186. "The § 2G2.2 sentencing enhancements cobbled together through this process routinely result in Guidelines projections near or exceeding the statutory maximum, even in run-of-the-mill cases." *Id.*

As the *Dorvee* court concluded:

> Consequently, adherence to the Guidelines results in virtually no distinction between the sentences for defendants like Dorvee and the sentences for the most dangerous offenders who, for example, distribute child pornography for pecuniary gain and who fall in higher criminal history categories. This result is fundamentally incompatible with § 3553(a). By concentrating all offenders at or near the statutory maximum, § 2G2.2 eviscerates the fundamental statutory requirement in § 3553(a) that district courts consider "the nature and circumstances of the offense and the history and characteristics of the defendant" and violates the principle, reinforced in *Gall*, that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct.

Id. at 187; s*ee Jenkins,* 854 F.3d at 189-90.

The latest statistics on the application of sentencing enhancements cases confirm that the enhancements that Smith received "are all-but-inherent" in child pornography cases. *Id.* at 189. For fiscal year 2015, for example, 94.5% of defendants sentenced under § 2G2.2 received the enhancement for an image of a victim under the age of 12, 83.6% for an image of sadistic or masochistic conduct or other forms of violence, 76.2% for an offense involving 600 or more images, and 94.4% for the use of a computer.[2] S*ee also Jenkins*, 854 F.3d at 189 (citing 2014 statistics). As the Second Circuit stated in *Dorvee*, "adherence to the Guidelines results in virtually no distinction between the sentences for defendants like [Smith] and the sentences for the most dangerous offenders who, for example, distribute child pornography for pecuniary gain and who fall in higher criminal history categories." 616 F.3d at 187; *see Henderson,* 649 F.3d at 964 ("emphasiz[ing] that unjust and sometimes bizarre results will follow if § 2G2.2 is applied by district

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[2] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2015/Use_of_SOC_Guideline_Based.pdf

courts without a special awareness of the Guideline's anomalous history") (Berzon, J., concurring).

In 2012, the Sentencing Commission also produced a comprehensive report to Congress examining § 2G2.2. *Id.* at 189, citing U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses* (2012) (USSC Report). "In this report, the Commission explains that it 'believes the current non-production guideline warrants revision in view of its outdated and disproportionate enhancements related to offenders' collecting behavior as well as its failure to account fully for some offenders' involvement in child pornography communities and sexually dangerous behavior.'" *Jenkins,* 854 F.3d at 189-90, citing USSC Report, at xxi.

Thus, it is even more clear now that § 2G2.2 can lead to unreasonable sentences. "District courts should generally reserve sentences at or near the statutory maximum for the worst offenders." *Jenkins,* 854 F.3d at 193. Because the district court's statutory maximum, 240-month sentence following its inflexible adherence to an outdated sentencing guideline resulted in a substantively unreasonable sentence and conflicts with the Second Circuit's decisions in *Dorvee* and

Jenkins, the Court should grant Smith's petition for writ of certiorari and hold that Smith's 240-month sentence was substantively unreasonable under all the facts of his case.

CONCLUSION

For these reasons, the Court should grant Smith's petition for writ of certiorari.

Dated: September 17, 2018

Respectfully submitted,

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