No. 18-6092

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DION ABLES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed reversible plain error in its factual findings regarding petitioner's offense conduct for purposes of calculating his offense level under the advisory Sentencing Guidelines.

2. Whether the court of appeals erred in rejecting petitioner's claim that his within-Guidelines sentence for receiving child pornography and producing child pornography was substantively unreasonable because Section 2G2.2 of the advisory Sentencing Guidelines lacks an empirical basis.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B4) is not published in the Federal Reporter but is reprinted at 728 Fed. Appx. 394.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2018. The petition for a writ of certiorari was filed on September 24, 2018 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of receiving child pornography, in violation of 18 U.S.C. 2252(a)(2), and two counts of producing child pornography, in violation of 18 U.S.C. 2251(a). Pet. App. A1. He was sentenced to 960 months of imprisonment, to be followed by five years of supervised release. Id. at A2. The court of appeals affirmed. Id. at B1-B4.

1. For at least two years between 2014 and 2016, petitioner used Kik Messenger, a social media application for cell phones, to send and receive sexually explicit messages with more than 100 minor girls. C.A. ROA 129-130. Posing as a minor girl, petitioner convinced his victims to send him sexually explicit photographs of themselves, and once they complied, he threatened to expose the photographs to the victims' friends on social media platforms, such as Facebook, unless the victims sent petitioner more sexually explicit photographs and videos. Pet. App. C2. One minor victim reported that petitioner instructed her to call him "daddy" or "sir" and to say "please no more." C.A. ROA 132. Petitioner also told the minor victim that he had "hundreds of slaves who send [him] thousands of pictures." Id. at 133.

Again posing as a minor girl on Kik, petitioner also sent sexually explicit images of minor girls to other adult men. Pet.

App. C2. When the men responded with explicit or otherwise incriminating messages, petitioner threatened to contact the police unless the men sent petitioner money. Ibid. Petitioner successfully extorted more than $40,000 from men who had engaged in explicit conversations with him. C.A. ROA 130.

After law enforcement agents arrested petitioner, he confessed in an interview to having used Kik to target girls who were between 14 and 17 years old, and he estimated that he had received explicit images from 100 to 200 girls. Pet. App. C2-C3. Petitioner also admitted that he had extorted adult men online and estimated he had received between $40,000 and $50,000 in extortion payments. C.A. ROA 130. Agents searched petitioner's cell phone and recovered 497 images and 254 video files containing child pornography. Pet. App. C3. Some of the videos depicted sadistic or masochistic conduct or sexual abuse of an infant or toddler, such as one video depicting sexual intercourse between an adult male and a toddler female. C.A. ROA 131.

The government charged petitioner by information with one count of receiving child pornography, in violation of 18 U.S.C. 2252(a)(2), and two counts of producing child pornography, in violation of 18 U.S.C. 2251(a). C.A. ROA 25-27. The information supported the receiving-child-pornography count by identifying a particular photograph petitioner had received that depicted a minor girl exposing her genitalia. Id. at 25. It supported the

two counts of producing child pornography by identifying occasions on which petitioner had convinced separate minor victims to send him sexually explicit photographs on Kik. Id. at 26-27.

Petitioner pleaded guilty to all charges. C.A. ROA 34. He signed a factual stipulation admitting that he had used Kik to solicit explicit photographs from multiple minor girls, including "by threatening to expose the [victims'] pictures on social media." Id. at 37.

2. The probation office prepared a Presentence Investigation Report (PSR) that extensively described the offense conduct and the evidence against petitioner. C.A. ROA 129-134. The PSR applied the advisory Sentencing Guidelines and calculated an offense level of 46 on the receiving-child-pornography conviction, 38 on the first of the two producing-child-pornography convictions, and 36 on the additional producing-child-pornography conviction. Id. at 137-139. Pursuant to Section 2G2.2 of the Guidelines, petitioner's offense level on the receiving-child-pornography conviction included a six-level increase for distributing explicit material for pecuniary gain, Sentencing Guidelines §§ 2G2.2(b)(3)(A) and 2B1.1(b)(1)(D); a four-level increase for possessing images depicting sexual abuse of a toddler, id. § 2G2.2(b)(4); and a five-level increase because petitioner's offense involved more than 600 images, id. § 2G2.2(b)(7)(D). C.A. ROA 137-138.

After applying the multiple-count adjustment and grouping rules, the PSR calculated an offense level of 47, added a five-level enhancement for engaging in a pattern of prohibited sexual activity under Section 4B1.5(b), and subtracted three levels for acceptance of responsibility. C.A. ROA 140. The resulting total offense level would have been 49, but the Guidelines capped the offense level at 43. Ibid. Petitioner's offense level of 43 and criminal history category I produced an advisory Guidelines range of life imprisonment, which in turn was capped by the combined 80-year statutory maximum sentences for his counts of conviction. Id. at 103-104, 148. Petitioner did not object to the PSR and instead asked the district court for a downward variance based on a claim that the child pornography Guideline in Section 2G2.2 is not necessarily helpful in selecting an appropriate sentence. Pet. App. C4; C.A. ROA 105-109.

The district court adopted the facts and determinations in the PSR and sentenced petitioner to the statutory maximum sentence on each count. C.A. ROA 103-104, 113. The court stated that, although "there have been times when * * * a sentence below the advisory guideline range would be appropriate in child pornography cases, * * * [t]his is not one of those cases." Id. at 111. Instead, the court viewed petitioner's case as "one of the most egregious" the court had encountered, because petitioner had "engaged in an extortion scheme" for "two or three years" whereby

he "encourage[d]" girls "to give him images over the computer" and then threatened to "expose" the images if they did not give him more "pornographic images of themselves." Id. at 111-112. Considering the sentencing factors in 18 U.S.C. 3553(a), the court sentenced petitioner to 240 months of imprisonment on the receiving-child-pornography conviction, and consecutive sentences of 360 months of imprisonment on each of the two producing-child-pornography convictions, for a total term of 960 months of imprisonment, to be followed by five years of supervised release. Pet. App. A1-A2; C.A. ROA 112-114.

3. Petitioner appealed, challenging his sentence, and the court of appeals affirmed. Pet. App. B1-B4.

The court of appeals noted that, because petitioner had not preserved his claims in the district court, it would review them "only for plain error" and thus would grant appellate relief only if petitioner could show a "clear or obvious error, rather than one subject to reasonable dispute[,] that affected his substantial rights," and that also "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Id. at B2 (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)). Applying that standard, the court rejected petitioner's claim that the district court had "relied on conduct that was not 'relevant conduct' under Guideline § 1B1.3 to support enhancing his offense level under Guideline § 2G2.1." Id. at B1-B2. The court of

appeals observed that petitioner's claim raised "fact questions pertaining to the type and number of images involved [in his offense] and whether the money he received from extorting other pedophiles accurately reflected his pecuniary gains," id. at B2, and reasoned that petitioner had "fail[ed] to demonstrate the requisite plain error" because "'[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.'" Ibid. (quoting United States v. Lopez, 923 F.2d 47, 50 (5th Cir.) (per curiam), cert. denied, 500 U.S. 924 (1991)) (brackets in original).

The court of appeals also rejected, as foreclosed by circuit precedent, petitioner's claim that his sentence was substantively unreasonable "because the child-pornography Guidelines are not empirically based." Pet. App. B3-B4 (citing United States v. Miller, 665 F.3d 114 (5th Cir. 2011), cert. denied, 567 U.S. 918 (2012)). And although the court of appeals separately agreed with petitioner that the district court had misapplied the Guidelines' grouping rules in calculating his total offense level, the court found that the error would not have affected petitioner's sentence. Id. at B3.

ARGUMENT

Petitioner contends (Pet. 11-21) that the court of appeals erred in its approach to plain-error review of his challenge to the enhancements that the district court applied when calculating

his offense level under Section 2G2.2 of the advisory Sentencing Guidelines. The judgment of the court of appeals is correct, and its unpublished per curiam decision does not warrant further review. Because petitioner is not entitled to plain-error relief under any approach, his methodological objection to the decision below has no bearing on the ultimate outcome of the case. This Court has denied petitions for a writ of certiorari in other cases involving the argument that petitioner presents, see Wright v. United States, 138 S. Ct. 115 (2017) (No. 16-9348); Carlton v. United States, 135 S. Ct. 2399 (2015) (No. 14-8740); Goodley v. United States, 571 U.S. 1133 (2014) (No. 13-6415); Laver v. United States, 571 U.S. 1074 (2013) (No. 13-5996), and it should follow the same course here.

Petitioner also contends (Pet. 21-26) that the court of appeals erred by "refus[ing] to consider" the "lack of empirical foundation" for Section 2G2.2 of the Sentencing Guidelines in assessing the substantive reasonableness of his sentence, and that the courts of appeals are divided on the issue. Petitioner argues (Pet. 23-24) that the Fifth Circuit's approach "likely conflicts" with Kimbrough v. United States, 552 U.S. 85 (2007), and Pepper v. United States, 562 U.S. 476 (2011). Petitioner's arguments do not warrant this Court's review. The district court reasonably imposed a sentence within the Guidelines range; the court of appeals correctly affirmed that sentence as reasonable; and that decision

does not conflict with any decision of this Court or another court of appeals. This Court has denied petitions for a writ of certiorari in other cases raising the same arguments, see, e.g., Morales v. United States, 137 S. Ct. 1582 (2017) (No. 16-7488), and it should follow the same course here.

1. a. Petitioner does not dispute the court of appeals' threshold determination that, because he did not object to the calculation of his sentence in the district court, his claim was reviewable "only for plain error." Pet. App. B2; see Fed. R. Crim. P. 52(b). On plain-error review, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" United States v. Marcus, 560 U.S. 258, 262 (2010) (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)) (brackets in original).

Petitioner challenges (Pet. 11-12) the particular rationale on which the court of appeals denied him plain-error relief, which included a citation to a past decision indicating that a factual dispute that is not brought to the district court's attention at

sentencing does not rise to the level of "plain error." Pet. App. B2 (quoting United States v. Lopez, 923 F.2d 47, 50 (5th Cir.) (per curiam), cert. denied, 500 U.S. 924 (1991)). Petitioner contends (Pet. 13-16) that the court of appeals should instead have performed a case-specific analysis of the prerequisites for plain-error relief. But this case is an unsuitable vehicle for reviewing the court's approach to plain-error analysis, because petitioner would not be entitled to relief under any approach. Petitioner has not established any error in the district court's calculation of his sentence, much less a plain, obvious error that prejudiced him and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732 (1993) (citation omitted).

Petitioner notes (Pet. 18-19) that his sentence was enhanced based on the number of images found on his cell phone, the content of some of those images depicting sexual abuse of a toddler, and his financial extortion scheme, but he argues (Pet. 18) that "there is no evidence that the images that generated these enhancements were part of a common scheme or course of conduct with" the "particular image of child pornography" that the information identified in charging him with receiving child pornography. See Pet. 19-21 (arguing that the enhancements were improper and that, without them, petitioner would have received a lower advisory Guidelines range). Petitioner's argument lacks merit. The

district court correctly determined that, under the Guidelines, petitioner's conviction for receipt of child pornography was part of his broader child-pornography and extortion scheme. Section 1B1.3(a)(2) specifies that, for crimes like those committed by petitioner, the "Relevant Conduct" for calculating the sentence includes "all acts and omissions * * * that were part of the same course of conduct or common scheme or plan as the offense of conviction." (Emphasis omitted.) Here, the district court had ample foundation -- including petitioner's own admissions -- for finding that petitioner's conviction for receiving child pornography was "part of the same course of conduct or common scheme," Sentencing Guidelines § 1B1.3(a)(2), that he used to acquire more than 600 images of child pornography, to acquire images depicting sexual abuse of a toddler, and to distribute child pornography for financial gain of more than $40,000.

As the government observed below, "the PSR explicitly linked [petitioner's] receipt of the image in [the receiving-child-pornography count] and [ ]his other conduct" during the same time frame. Pet. App. C15. The PSR explained that petitioner "admitted he received [the] visual depictions between 2014 and December 12, 2016, while engaged in an extortion scheme wherein he received between $40,000 and $50,000." C.A. ROA 134. The PSR further explained that petitioner had extorted child pornography from minor girls through a common tactic: convincing them to send him

explicit photographs and then blackmailing them into sending additional explicit photographs and videos. Id. at 135; see also id. at 37-38. Through that scheme, petitioner "received 497 images and 254 video files of child pornography," for a total of 19,050 images for purposes of the Guidelines. Id. at 134; see Sentencing Guidelines § 2G2.2, comment. n.6(B)(ii). The number of images was confirmed by petitioner's own statements to a minor victim claiming to have "thousands of pics of thousands of real girls." C.A. ROA 134. The PSR supported the four-level increase for sexual abuse of a toddler by noting that one video recovered from petitioner's cell phone "depicted sexual intercourse between an adult male and a toddler female." Id. at 131. Given petitioner's admissions, the other facts in the record demonstrating a common scheme, and the fact that the specific image identified in the charge for receiving child pornography was similar to the other 19,000 images petitioner had received, the district court correctly considered petitioner's whole course of conduct in calculating his advisory Guidelines range.

At minimum, any error in the district court's factual assessment of the unrebutted evidence was far from "clear or obvious." Marcus, 560 U.S. at 262 (internal quotation marks and citation omitted). As the D.C. Circuit has recognized, "since the obviousness of an error is assessed from the sentencing court's perspective, factual errors in pre-sentence reports may well tend

to survive plain-error review more readily than legal errors." United States v. Saro, 24 F.3d 283, 291 (1994). Petitioner also cannot show that any error affected his "substantial rights" or "the fairness, integrity or public reputation of judicial proceedings." Marcus, 560 U.S. at 262 (citation omitted). Petitioner's bare assertion (Pet. 18) that "no evidence" supported a related-conduct finding is inconsistent with the record and does not demonstrate a "reasonable probability that [an] error affected the outcome." Id. at 263. Nor does the record provide a basis to infer unfairness, indeed, the district court found petitioner's case to be "one of the most egregious" the court had "ever dealt with" and found it appropriate to impose consecutive statutory maximum sentences on each count. C.A. ROA 111.

b. Petitioner's assertion (Pet. 11-12) that the Fifth Circuit is out of step with other circuits provides no basis for further review in this case. In light of the stringent requirements of plain-error review, unpreserved assertions of factual error will rarely warrant or result in appellate relief under any approach. See, e.g., United States v. Ahrendt, 560 F.3d 69, 76-77 (1st Cir.) ("With respect to factual determinations, an error cannot be clear or obvious unless the desired factual finding is the only one rationally supported by the record below.) (brackets and citation omitted), cert. denied, 557 U.S. 913 (2009); Saro, 24 F.3d at 291. And petitioner has identified no decision

demonstrating that another court of appeals would have reached a different result here.

Contrary to petitioner's suggestion (Pet. 12), denying the petition for a writ of certiorari in this case would be consistent with Justice Sotomayor's statement respecting the denial of certiorari in Carlton v. United States, supra. In Carlton, as in this case, the Fifth Circuit quoted its prior decision in Lopez for the proposition that "questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." Carlton, 593 Fed. Appx. 346, 349 (5th Cir. 2014) (per curiam) (quoting Lopez, 923 F.2d at 50) (brackets omitted). Justice Sotomayor, joined by Justice Breyer, noted that "no other court of appeals has adopted the per se rule outlined by the Fifth Circuit in Lopez," which she viewed to be incorrect, and cited cases from nine circuits that had applied plain-error review to an asserted factual error. Carlton, 135 S. Ct. at 2400 & n.* (respecting denial of certiorari). Justice Sotomayor nevertheless concluded that certiorari was unwarranted because the conflict among the circuits was narrow, the Fifth Circuit had not uniformly followed Lopez, and "the ordinary course of action is to allow the court of appeals the first opportunity to resolve the disagreement." Id. at 2401.

Petitioner here did not seek rehearing en banc in the court of appeals in order to give the Fifth Circuit an opportunity to

revisit the plain-error issue that he raises. Moreover, unlike Carlton, where the government "conceded" that the district court had made a factual error, 135 S. Ct. at 2399, petitioner here has not demonstrated any error in the district court's application of the three sentencing enhancements that he now challenges. See pp. 9-13, supra.

2. Petitioner separately contends (Pet. 21-26) that the court of appeals erred by refusing to consider his argument that Section 2G2.2 of the Guidelines is not empirically based and therefore produced a substantively unreasonable sentence in his case under 18 U.S.C. 3553(a). Petitioner has not shown that his sentence was substantively unreasonable, and his argument does not warrant further review. This Court has previously denied certiorari in cases presenting similar claims. See, e.g., Morales v. United States, 137 S. Ct. 1582 (2017) (No. 16-7488), Miller v. United States, 567 U.S. 918 (2012) (No. 11-9330), Garthus v. United States, 132 S. Ct. 2373 (2012) (No. 11-7811); Woida v. United States, 132 S. Ct. 122 (2011) (No. 10-9027). It should follow the same course here.

a. Under this Court's decisions in Kimbrough, 552 U.S. at 109-110, and Spears v. United States, 555 U.S. 261, 264-265 (2009) (per curiam), the district court had discretion, after considering the factors in 18 U.S.C. 3553(a), to impose a sentence based on a specific policy disagreement with the Guidelines, provided that

the court gave a sufficient explanation for its variance from the Guidelines range. The court was not, however, required to reject the child-pornography Guideline if it did not disagree with the policies that the Guideline embodies. Rather, this Court in Kimbrough held only that the district court had discretion to accept a policy-based argument as a basis for varying from the Guidelines. See 552 U.S. at 109-111; see also Spears, 555 U.S. at 264-265.

The decision of the court of appeals in this case does not conflict with Kimbrough. When petitioner requested a downward variance from the Guidelines range based on his argument that the child-pornography Guideline lacks an empirical basis, C.A. ROA 105-109, the district court rejected that argument in light of the particular facts of his case, explaining that, although "there have been times when [the court] thought a sentence below the advisory guideline range would be appropriate in child pornography cases," "[t]his is not one of those cases" because petitioner's offense was among the most "egregious" the court had encountered, id. at 111. The court of appeals correctly recognized that the district court was not required to accept petitioner's argument that Section 2G2.2 lacked an empirical basis. Pet. App. B3-B4; see also United States v. Miller, 665 F.3d 114, 121 (5th Cir. 2011) (a district court need not "reject a Guidelines provision as

'unreasonable' or 'irrational' simply because it is not based on empirical data"), cert. denied, 567 U.S. 918 (2012).

The decision of the court of appeals likewise does not conflict with Pepper, supra. In Pepper, this Court held that a district court may consider evidence of a defendant's post-sentencing rehabilitation at resentencing. 562 U.S. at 481. As relevant here, the Pepper Court rejected reliance on a Commission policy statement (related to Sentencing Guidelines § 5K2.19) providing that post-sentencing rehabilitation was not an appropriate basis for a downward departure at resentencing. 562 U.S. at 501-502. The Court explained that "a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views." Id. at 501 (citing Kimbrough, 552 U.S. at 109-110). The Court also emphasized "that district courts must still give 'respectful consideration' to the now-advisory Guidelines (and their accompanying policy statements)." Ibid. (quoting Kimbrough, 552 U.S. at 101). The court of appeals' decision fully comports with that analysis.

b. The courts of appeals broadly agree that although district courts may vary from the child-pornography Guideline, "they are certainly not required to do so." United States v. Huffstatler, 571 F.3d 620, 624 (7th Cir. 2009) (per curiam). Accord United States v. Overmyer, 663 F.3d 862, 865 (6th Cir. 2011); United States v. Henderson, 649 F.3d 955, 964 (9th Cir.

2011) (citing cases). Petitioner relies on two appellate decisions that he contends conflict with the decision below. Neither shows the existence of a conflict.

First, the Ninth Circuit's decision in United States v. Amezcua-Vasquez, 567 F.3d 1050 (2009), involved a fact-specific inquiry into whether a defendant's 16-level enhancement under Guidelines Section 2L1.2(b)(1)(A)(ii), based on 25-year-old convictions, was unreasonable. Id. at 1052, 1055. Petitioner acknowledges (Pet. 22) that Amezcua-Vasquez did not involve the Guideline at issue here, and the Ninth Circuit's factbound conclusion concerning the reasonableness of a sentence imposed under a different Guideline provision does not conflict with the decision below in this case.

The Second Circuit's decision in United States v. Dorvee, 616 F.3d 174 (2010), also does not establish any principle of law that would require the district court to impose a lower sentence in petitioner's case. In Dorvee, the Second Circuit found substantively unreasonable a sentence that was effectively at the statutory maximum of 240 months and within the advisory Guidelines range.* Id. at 176. The court of appeals first concluded that

* Because a Sentencing Guidelines range cannot exceed the statutory maximum, in Dorvee's case the Guidelines recommended imposing the statutory maximum. Dorvee, 616 F.3d at 176-177. Dorvee's sentence was actually six months and 14 days below the statutory maximum and the Guidelines recommendation, reflecting time that he had already served on related state charges. Id. at 178. Nevertheless, the Second Circuit treated Dorvee's sentence

the district court had unjustifiably assumed "that Dorvee was likely to actually sexually assault a child" if given the opportunity. Id. at 183; see also id. at 181-184 (identifying other procedural sentencing errors committed by the district court). The court then concluded that "[t]hese errors were compounded by" particular aspects of Section 2G2.2 that the court thought problematic, id. at 184, such as Congress's role in revising that Guideline, the frequency with which some of the enhancements under the Guideline apply, and the sentencing range that the Guideline recommends for "[a]n ordinary first-time offender" as compared with "the most dangerous offenders." Id. at 187; see id. at 184. Dorvee "never had any contact with an actual minor" and lacked any criminal history suggesting that he would. Id. at 1846-187. Indeed, Dorvee presented "expert record evidence" that he was unlikely to re-offend. Id. at 183; see id. at 177-178. Petitioner's case, by contrast, presented far more evidence of his dangerousness to the community, including his admission to targeting hundreds of minor girls "between the ages of 14 and 17" in order to acquire sexually explicit material (including by extortion), C.A. ROA 130 -- victims petitioner referred to as his "slaves who send thousands of pictures," id. at 133.

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as both "the maximum available sentence" and a "within-Guidelines sentence." Id. at 183-184.

Dorvee does not stand for the broad proposition that every child-pornography sentencing is tainted if the district court begins by calculating the advisory Guidelines range under Section 2G2.2. To the contrary, Dorvee opined that district courts should give weight to the child-pornography Guideline "[o]n a case-by-case basis" and apply it "with great care." 616 F.3d at 184, 188. The Second Circuit's holding in that case was driven by factors not present here, including the particular characteristics of that defendant.

Indeed, the Second Circuit has subsequently rejected arguments like petitioner's and has declined to reverse a child-pornography sentence "simply because the District Court did not conduct an empirical analysis of the statistical support underlying the Sentencing Guidelines." United States v. Swackhammer, 400 Fed. Appx. 615, 616 (2010). In Swackhammer, the Second Circuit distinguished its decision in Dorvee and affirmed a sentence within the range recommended by Section 2G2.2, noting that the sentence was "not near or exceeding the statutory maximum" and that, unlike Dorvee, Swackhammer had actually engaged in acts of child molestation. Ibid.; see also United States v. Cossey, 476 Fed. Appx. 931, 934 (2d Cir.) (affirming a within-Guidelines sentence and noting that Dorvee "is easily distinguished" as a case involving both procedural error and a sentence at the statutory maximum), cert. denied, 568 U.S. 909 (2012); United

States v. Chow, 441 Fed. Appx. 44, 45 (2d Cir. 2011) ("Nothing in Dorvee precludes application of the § 2G2.2 enhancements to the calculation of the Guidelines range from which a court may then vary. Nor does Dorvee condition application of § 2G2.2 enhancements on heightened findings."). Petitioner here thus cannot establish that the Second Circuit would find his within-Guidelines sentence to be substantively unreasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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