NO. 17-A-1310

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

TIMOTHY WARREN VALLIER	)	FROM THE WESTERN DISTRICT
	)	
Petitioner	)	OF MICHIGAN (SOUTHERN
	)	
V	)	DIVISION)
	)	
UNITED STATES OF AMERICA	)	CASE NO: 1;16-CR-00172-GJQ
	)	
Respondent	)	APPELLATE CASE NO: 17-1642
	)	

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FOR: TIMOTHY WARREN VALLIER
REG. NO.: 21221-040
F.C.I. Elkton
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ISSUES PRESENTED

I

The 6th Circuit Court of Appeals issued it's opinion on February 20, 2018, and on June 18, 2018 this Honorable Court entered it's judgement in Rosales-Mireles, Slip op 16-9493, allowing for unpreserved guideline calculation errors to be reviewed under Plain Error standards and the petitioner at bar asserts his guidelines were calculated in error where he was not considered for a three (3) point reduction under §2X1.1.

II

The Circuit Courts are split as to the correct method for determination whether an image depicts a lascivious exhibition of a child's genitals or pubic area. The first, third, and fifth circuits make an "objective inquiry" relying on the "four corners rule," while the sixth, eighth, and nineth circuits use extrinsic evidence and includes the intent of the producer. The resulting difference leads to manifest injustice where defendants convictions are reversed in some circuits (U.S. v. Steen, 634 F3d 822 (5th Cir. 2011) or receive substantial sentences like the petitioner at bar for nearly identical conduct.

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JURISDICTIONAL STATEMENT

The district court exercised jurisdiction ove the petitioner's case pursuant to 18 U.S.C. §3231, which grants the district court exclusive original jurisdiction over offenses against the laws of The United States.

The government filed a criminal complaint against the petitioner on July 28, 2016, charging him with child pornography offenses. RE 1: Criminal Complaint, PAGEID 1.

The government filed a felony information, with the same charges, on September 20, 2016. RE 18: Felony Information, PAGEID 30. The petitioner waived the indictment. RE 22: Minutes of Arraignment, PAGEID 60; RE 25: Waiver of Indictment, PAGEID 63.

The District Court sentenced the petitioner on May 17, 2017. RE 44: Minutes of Sentencing, PAGEID 194. At sentencing the defendant qualified for a mandatory minimum sentence of 15 years (180 months). However the District Court imposed a sentence of 22 years (264 months), close to 150% above what the mandatory minimum sentence called for, the court also filed its judgement on that day. RE 45: Judgment ID 195-196.

The petitioner filed his timely notice to appeal on May 31, 2017. RE 48: Notice of Appeal,PAGEID 208. The Sixth Circuit Court of Appeals rendered it's judgment on February 20, 2018.

The petitioner filed a timely motion for extension of time with this Honorable Court on May 10, 2018. Justice Kagan granted petitioner's motion for extention of time, up to and including July 20, 2018.

This Honorable Court has Jurisdiction to hear the instant petition pursuant to 28 U.S.C. §1254 entitled "Court of Appeals Certiorari; Certified Questions," 28 U.S.C. 2101 entitled "Supreme Court; Time for Appeal of Certiorari," and the Supreme Court Rules, as well as any other applicable statues and/or rules.

It should be noted that the "Prison Mail Box Rule" requires not that the instant petition be received by the clerk of the court by July 20, 2018 to be timely, but that the petitioner turn it over to prison authorities for mailing by that date.

HISTORY OF THE CASE

This initial federal appearance came in the wake of a federal criminal complaint. The government filed this complaint on July 28, 2016, charging the petitioner with attempted production of child pornography (a violation of 18 U.S.C. §2251 (a)(e)) and possession of child pornography (a violation of 18 U.S.C. §2252A(a)(5)(B)). RE. 1: Criminal Complaint, PageID 1. On August 2, 2016, the petitioner waived his preliminary and detention hearings. RE. 11: Minutes of Preliminary and Detention hearings, PageID 22. The district court ordered the petitioner to be detained. RE. 13: Order of Dentention, PageID 24.

The government filed a felony information on September 20, 2016. RE. 18: Felony Information, PageID 30. The information continued the charges filed in the complaint (violations of 18 U.S.C. §§2251(a)(e) and 2252A(a)(5)(B)) and added a forfeiture allegation. RE. 18: Criminal Complaint, PageID 33. On the same day (September 20, 2016) the government filed a plea agreement with the petitioner; the government filed an amended plea agreement on September 28, 2016. RE. 19: Plea Agreement, PageID 35; RE. 21: Amended Plea Agreement, PageID 48. The amended plea agreement clarified a few minor points. See RE. 21: Amended Plea Agreement, PageID 52-53.

The district court conducted an an arraignment and change-of-plea hearing on September 28, 2016 (the same day the government filed the amended plea agreement). RE. 22: Minutes of Arraignment, PageID 60; RE. 25: Waiver of Indictment, PageID 63. The probation office filed the initial presentence investigation report on April 7, 2017, and the final report on May 9, 2017. RE. 31: Initial PSIR, PageID 72; RE. 33: Final PSIR, PageID 91. The petitioner filed his sentencing memorandum on May 9, 2017. RE. 34: Def. Sent. Memo., PageID 110. He moved for a downward variance to the statutory mandatory minimum sentece of 15 years. RE. 34: Def. Sent. Memo., PageID 121.

The district court sentence the petitioner on May 17, 2017. RE. 44: Minutes of Sentencing, PageID 194. The court imposed a sentence of 264 months of imprisonment, 5 years supervised

release, restitution of $1,950.03, and special assessments of $10,200.00. RE. 44: Minutes of Sentencing, PageID 194. The court filed its judgment on the same day: May 17, 2017. RE. 45: Judgment, PageID 195. Mr. Vallier filed his timely notice of appeal on May 31, 2017. RE. 48: Notice of Appeal, PageID 208.

The parties briefed the issues and arguments of the petitioner, and on February 20, 2018 The Sixth Circuit Court of Appeals affirmed Petitioner's sentence (U.S. v. Vallier 2018 U.S. APP Lexis 3919).

The petitioner did not seek either a panel rehearing nor an enbanc Review of the Sixth Circuit Decisions.

The petitioner then prepaired for the instant petition for certiorari review, but was then preceeding pro-se. As such he sought a pro-se extension of time from this Honorable Court, which was granted by Justice Kagan, who extended the time for submission of his petition upto and including July 20, 2018.

STATEMENT OF FACTS

Mr. Timothy Vallier is thirty-two years old and has struggled to find his "place" in the world. See RE. 33: Final PSIR, PageID 92 (giving birthday). The typical story of someone in the federal system not knowing their father plays out here in reverse: Tim's parents divorced when he was three years old because of his mother's alcohol, drug addictions and infidelity. RE. 33: Final PSIR, PageID 101. During Tim's childhood, his mother served several years incarcerated in state custody. RE. 33 Final PSIR, PageID 101. His time with his mother came in short, limited visits. RE. 33: Final PSIR, PageID 101.

After high school, Tim attended Grand Valley State, in Allendale, Michigan, for three years, but did not complete a degree program. RE. 33: Final PSIR, PageID 102. After Grand Valley, Tim attended ITT Technical Institute for two years. RE. 33: Final PSIR, PageID 103. Tim has spent most of his adult life working as a janitor, first for Forest Hills Public Schools and then for a private cleaning company. RE. 33: Final PSIR, PageID 103. Records from Forest Hills describe Timothy Vallier as a reliable employee who performed above expectations. RE. 33: Final PSIR, PageID 103. These records describe a positive, contributing citizen with a good attitude, someone who interacted well with others and promoted a sense of goodwill and cooperation RE. 33: Final PSIR, PageID 103.

Along with his normal duties, Tim served as an assistant rowing coach for Rockford High School. RE. 33: Final PSIR, PageID 103. He held this position for over seven years until the charges that led to this appeal. RE. 33: Final PSIR, PageID 103. Tim has no criminal history beyond the convictions at issue here. RE. 33: Final PSIR, PageID 100, 107.

In the course of assisting with coaching the Rockford High School rowing team, two recent high-school graduates had the keys to the team's vehicle on July 8, 2016. RE. 1-1: Continuation of Criminal Complaint, PageID 2. These assistants discovered in the vehicle a video camera that contained footage of girls from the team dressing and undressing in the changing room. RE. 1-1:

Continuation of Criminal Complaint, PageID 2. These assistants contacted Rockford High School, and school officials then contacted the police. RE. 1-1: Continuation of Criminal Complaint, PageID 2. Police officers visited the school and found in the changing room a hidden compartment with holes drilled in it. RE. 1-1: Continuation of Criminal Complaint, PageID 2.

Officers met with Tim and informed him of his Miranda rights RE. 1-1: Continuation of Criminal Complaint, PageID 2. Tim cooperated fully with authorities and fully admitted his conduct. See RE. 1-1: Continuation of Criminal Complaint, PageID 2. Waiving his Miranda warning he explained that he had placed a camera in the changing area, in the top of the wall, four to five times a season over the course of the past several seasons. RE. 1-1: Continuation of Criminal Complaint, PageID 2. He originally used an existing hole in the wall and then subsequently added a second hole in the same location. RE. 1-1: Continuation of Criminal Complaint, PageID 2. He admitted he saved some of the videos, along with other pornography from the internet, in his home. RE. 1-1: Continuation of Criminal Complaint, PageID 2.

Further cooperating with authorities Tim consented, in writing, to a search of his home, computer, and cellular phone. RE. 1-1: Continuation of Criminal Complaint, PageID 3. Officers also obtained search warrants for the residence and items. RE. 1-1: Continuation of Criminal Complaint, PageID 3. Initially, the petitioner face state charges. RE. 1-1: Continuation of Criminal Complaint, PageID 3. Federal authorities arrested Tim on July 28, 2016, and he had his first appearance in the district court on that day. See RE. 4: Minutes of First Appearance, PageID 9.

I

The petitioner's sentence of twenty-two (22) years is substantively unreasonable in light of petitioner's §3553(a) factors, I.E. conduct, cooperation, social history, and where in violation of Rosales-Mireles v. U.S. 2018 BL 214344 U.S. No. 16-9493 6/18/2018 petitioner did not receive the benefit of U.S.S.G §2X1.1. Such an adjustment would have resulted in a guideline range reflective of petitioner's accepted conduct and the mandatory minimum of 180 months.

Since 2007 when this Honorable Court issued it's opinion in Gall v. The United States 552 U.S. 38, 51, 128 S.Ct. 586, 591, 169 L.Ed.2d 445 (2007 a sentencing decision of the District Court has been reviewed "under a differential abuse of discretion standard" for reasonableness, which has both a procedural and a substantive component, U.S. v. Castillo 289 Fed Appx 71 (6th Cir. 2008); U.S. v. Skaggs 2018 U.S. App LEXIS 5617 (6th Cir. 2018)); United States v. Thomas 2018 U.S. App LEXIS 6078 (6th Cir. 2018 following).

A. Rosales-Mireles v. United States Slip op 16-9493

At bar, the petitioner pled guilty to ATTEMPTED production of child pornography, (RE 1: Criminal Complaint, PAGEID 1). However, neither trial counsel nor appellate counsel presented an argument that the petitioner qualified for a three (3) level reduction in his offense level based upon the United States Sentencing Commission Guideline manual (U.S.S.G.) §2X1.1.

U.S.S.G. §2X1.1 allows for the application of a three (3) level decrease to defendant's criminal offense score for incomplete attempted offenses. United States v. Martinez 342 F3d 1203 (10th Cir. 2003.

"In an introductory chapter the guidelines detail how to determine the application section for the offense. The guidelines state "if the offense involves a conspiracy, attempt, or solicitation, refer to §2X1.1.'" United States v. Martinez (id); U.S. v. Quinn 2018 U.S. LEXIS 3289 (6th Cir. 2018). "A defendant is entitled to a three (3) level reduction if the conspiracy [or

attempt] only partially completes the substantive offense."

On or about February 20, 2018 The United States Court of Appeals decided petitioner's appeal (No. 17-1642 filed 2/20/2018). Appellate counsel failed to present any argument associated with the application of U.S.S.G. §2X1.1.

On or about June 18, 2018 the Supreme Court issued it's opinion in Rosales-Mireles v. United States (Slip op. 16-9493), holding that the court of review could review unpreserved sentencing guideline errors under plain error.

Applying this court's holding, the petitioner reviewed his guideline calculation and determined that his guideline range also seemed to be in error, as he was convicted of an attempted charge. Yet no review or application pursuant to §2X1.1 was made in his case.

Further, given that Supreme Court decisions are retroactive to all cases pending on appeal, Griffin v. Kentucky 479 U.S. 314, 107 S.Ct. 708, 93 Led 2d 649 (1987); U.S. v. Conley 2017 U.S. Dist. 198922 (E.D. KY 2017). It appears that the 6th Circuit appellate court has authority to review petitioner's case under Rosales-Mireles (id) for plain error on the sentencing guidelines omission, should this Honorable Court remand it for such a consideration.

Where petitioner argues that had counsel (appellate or trial) reviewed the guidelines for the attempted production under U.S.S.G. §2X1.1, and were the trial court to apply it to the petitioner at bar; the applicable guideline range and petitioner's mandatory minimum would have met closely at 180 months (with equal defference to the §3553(a) factors). The very sentence the petitioner sought.

B. I. Substantively Unreasonable

Had the petitioner's counsels reviewed the guidelines for the attempt reduction under §2X1.1, and were the trial court to apply it to the petitioner at bar, the applicable guideline range and his mandatory minimum would have met closely at 180 months, the very sentence that the petitioner argued for during sentencing.

After the appellate court determines that the sentencing

decision is procedurally sound, the appellate court then considers if the sentence is substantively reasonable under the aforementioned "abuse of discretion standard." Gall (supera), Castillo (supera), Skaggs (supera), and Thomas (supera).

"Substantive Reasonableness Review is intended to 'provide a backstop' against sentences that are shockingly high, shockingly low or OTHERWISE UNSUPPORTED AS A MATTER OF LAW." United States v. Dorvee 616 F3d 174, 183 (2nd Cir. 2010), United States v. Lyons 675 Fed Appx 28 (6th Cir. 2017).

Sentences are also substantially unreasonable where 'the district court chooses the sentence arbitrarily, grounds the sentence on IMPERMISSIBLE FACTORS, or unreasonably weighs pertinet factors United States v. Poole 2018 U.S. App. 2268 (6th Cir. 2018)(emphasis added) with the court taking into account the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantage that the district courts enjoy United States v. Cavera 550 F3d 180, 190 (2nd Cir. 2008), United States v. Lyons (supera).

Further, "the essence of substantive reasonableness rests in the in inquiry as whether a sentence is too long to serve the purpose of sentencing in the 18 U.S.C. §3553, is whether it is greater than necessary to serve these purposes... a substantially reasonable sentence is proportionate to the serious of the circumstances of the offense and offender." United States v. Cox Slip op. No. 16-2404 at 14 (6th Cir 9/14/17); Skaggs (Supera at 6); United States v. Dixon 2018 U.S. App LEXIS 3159 at 2 (6th Cir. 2018).

At bar, the sentencing court imposed an excessive sentence, failed to fully consider a number of sentencing factors, gave unreasonable weight to the guidelines, considered factors unsupported as a matter of law, and failed to take into account the totality of the circumstances.

While the sentencing guidelines are the backstop that the district courts are required to start with; §3553(a) lists factors that a district court is mandated to consider in calculating a sentence.

According to United States v. Wilms 495 F3d 277 (6th Cir. 2007) the length of a sentence [and the circumstances of the case and

and the defendant] sits among the factors for consideration in reviewing a sentence's reasonableness (id at 280).

At bar, the petitioner Timothy Vallier's sentence of twenty-two (22) years is greater than necessary to serve §3553(a) parameters. The district court's sentencing calculations recognized a sentencing range of Fifteen (15) to Thirty (30) years on count one (1) and a mandatory maximum sentence of 20 years on count two (2) (sentencing transcript PAGEID 244-45). The district court calculated a total offense level of 43, which matched the calculation in the final presentence investigation report (RE 51: Sentencing Transcript, PAGEID 246; RE 33: Final PSIR, PAGEID 100, 109). The advisory guideline range thus reached the equivalent of life in prison; 600 months (50 years). RE 51: Sentencing Transcript, PAGEID 247; RE 33: Final PSIR, PAGEID 107-109.

The probation office recommended a downward variance to thirty (30) years, the statutory maximum for count one (1) RE 51: Sentencing Transcript, PAGEID 246-47; RE 33: Final PSIR, PAGEID 100,103.

The petitioner moved for a downward variance RE 51: Sentencing Transcript, PAGEID 249, 260. The district court granted this motion, ultimately imposing a sentence of 264 months (twenty-two (22) years) on count 1, and a concurrent sixty (60) months on count 2 RE 51: Sentencing Transcript PAGEID 285, 287, 291. The court also ordered five (5) years supervised release, $1,950.03 restitution to one victim, and a special assessment of $10,200 RE 44: Minutes of Sentencing, PAGEID 194. This special assessment arose under 18 U.S.C §3014(a)(3) which imposed an added assessment for each count. RE 51: Sentencing Transcript, PAGEID 247-48, 286.

The twenty-two (22) year sentence fails to account for the unique circumstances of Timothy's case. The petitioner never distributed any videos. RE 51: Sentencing Transcript, PAGEID 261.

The petitioner also did not upload them to the internet RE 51: Sentencing Transcript, PAGEID 283.

In United States v. Jenkins 854 F3d 181 (2nd Cir. 2017) the court, addressing another substantially unreasonable sentece, determined that Jenkins was LESS CULPABLE than "run of the mill cases" becuase the material was for personal use rather than

to sell or distribute to others (id at 191).

A significant factor at bar, is the fact that the petitioner did not commit or attempt to commit (PSIR) any sexual assault/abuse and presented a very low risk for recidivism. RE 51: Sentencing Transcript, PAGEID 264.

Further, THE CIRCUITS ARE SPLIT, as to the correct standard for reviewing whether a visual depiction of a minor constitutes a lascivious exhibition of the genitals or pubic area 18 U.S.C §2251. The First, Third, and Fifth circuits make an objective inquiry of the image. "We believe, however that it is a mistake to look at the actual effect of the photograph on the viewer, rather than the intended effect... we must therefore, look at the photograph, rather than the viewer. If we were to conclude that the photographs were lascivious merely because [the defendant] found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand - a legal analysis of the sufficiency of the evidence of lasciviousness'...'congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused.'" United States v. Goodale 831 F Supp 2d 804 2001 U.S. Dist Lexis 136306 (pg 9) (Dist of VT 2011).

However, "the Sixth and Eighth circuits examine the defendants subjective reactions to the depiction in applying the sixth dost factor...'we, like our sister circuits, have adopted a test that considers whether a visual depiction is intended or designed to elicit a sexual response in the viewer [the defendant]. The use of the 'intended' seems to establish that the subjective intent of the photographer is relevant'...'These courts evidently permit the use of extrinsic evidence in making these subjective inquires'" (id at 9).

One difference is using a strict subjective standard, as opposed to an objective standard (or more objective), in the determination of a substantive offense (as it applies to attempted offense) is that it lowers the burden of proof for the substantive offense to the point where a completed subjective offense and an ATTEMPTED objective offense are identical. As a result, both a proceduraly unreasonable and a substantively unreasonable sentence develops where the completed subjective offense will NOT receive the three

(3) point reduction under U.S.S. §2X1.1; yet an attempted objective offense will qualify.

An additional difference between the inquires is the difference between a sentence of twenty-two (22) years and one's freedom. In United States v. Steen 634 F3d 822 (5th Cir. 2011) the defendant's conviction was REVERSED for essentially the same conduct perpetrated by the petitioner at bar. In Steen the defendant would frequent a tanning salon in Texas. While there Steen would stand on a chair, hold a camera over the wall and film activity in the rooms adjacent to him. The court noted that "when a photographer selects and positions his subjects, it is quite a different matter from the peeking of a voyeur upon an unaware subject pursuing activities unrelated to sex... we have defined lascivious exhibition as a depiction which displays or brings forth to view in order to attract notice of the genitals or pubic area of children, in order to excise lustful or sexual stimulation of the viewer. Here the government's evidence can not meet that standard'" (id at 828).

In such objective cases (cases involving voyeuristic behaviors) the depictions may not even qualify as a "lascivious exhibition" and thus wouldn't warrant/justify conviction under this statue, much less a 22 year sentence. At a minimum, voyeuristic photography should be held less culpable than an individual who actively directs the victims in the poses.

Also, following that same line of logic, a defendant in an objective "voyeuristic" case would be less culpable than a defendant who modified, cropped, morphed or otherwise altered an otherwise innocent image of children to produce pornography (I.E. Cora v. Bolard 825 F Supp,905, 906 (N.D. Ohio 2011); United States v. Stewart 729 F3d 517, 528 (6th Cir. 2013). In both examples the "producer" took an active role, and objective affirmative act, to produce a lascivious exhibition" to attract notice to the genitals and pubic area of children whereas the "voyeur's" role was passive, filming innocent or otherwise routine behaviors. (Steen (supera)).

The petitioner at bar, only presents this argument in context to culpability for the purposes of sentencing and showing that

the district court's sentence is disproportionate to the seriousness of the circumstances of the offense and the character of the offender (Cox supera); Skaggs (supera); and Dixon (supera)); and petitioner's conduct as it relates to the offense of conviction, does not warrant the twenty-two (22) year sentence handed down by the district court, when the mandatory minimum sentence of fifteen (15) years was substantial in of itself and sufficient considering the §3553(a) factors that supper the petitioner to wit:

A) Petitioner's lack of criminal history
B) Petitioner did not distribute the videos
C) Petitioner did not commit or attempt to commit any physical abuse of the victims
D) Petitioner presented low risk for recidivism
E) Petitioner did not upload the videos to the internet
F) Petitioner was a productive member of society, had a job, and had excellent employee evaluations
G) Petitioner had emotional and developmental struggles as a result of his mother's drug abuse and incarceration during his youth.
H) The petitioner has no drug or alcohol abuse history
I) The petitioner has the support of his community, related to his character of being kind and hard working
J) The petitioner has the support of his family
K) The petitioner cooperated with police to recover the videos
L) The petitioner pled guilty to the governments information, and waived his right to a jury to reduce the impact of his conduct on the victims.

B. II. Sentencing Statistics

Comparing the petitioner's conduct with the sentence he received to other offenders for similar offenses, a sense of shock and despair arises in response to the sentence received by the petitioner at bar. In United States v. Studabaker 574 F3d 423, 426, 431 (6th Cir. 2009) the appellate court affirmed a sentence of 136 months for a thirty-year old, who was a marine and communicated with a eleven year old girl in England, meeting the girl in a "virtual pets" website. In that case, the defendant actually had contact with the victim, taking the girl to France and engaging in sex with her there (she was then 12 years old) (id at 426). In England, the defendant was convicted of child abduction and inciting gross indecency and receiving a sentence

of four and a half years.

In this country, the Studabaker defendant reveived a sentence of 137 months for causing the foreign travel of a minor with the intent to engage in criminal sexual activity and for possessing and attempting to possess child pornography; the sentence fell above the guideline range (id at 427-28). In addition to the conduct just described, Studabaker also had an online relationship with a ten (10) year old girl in Australia, a relationship with two girls in Michigan through a military/soldier pen pal program, an attempted relationship with the daughter of a handicapped woman (with whom he had become involved after his arrest), and a sexual relationship with his niece (as reported by police). After his arrest the defendant attempted corresponding with the victim of the offense; yet the defendant received only 13 years, 10 years less than the petitioner at bar.

In United States v. Brattain 539 F3d 445-45 (6th Cir. 2008) the appellate court for the sixth circuit vacated a sentence and remanded, based upon a procedural guideline calculation issues. The court in that case offered dicta that provides insight into the case at bar.

The appellate court went on to say: "Here, the district court correctly applied the §3553(a) factors and gave more than adequate reasoning in support of the defendant's sentence. The same detailed application of the §3553(a) factors and explicit reasoning in support of the sentence will hopefully be repeated on remand" (id at 449). This language suggests strong support for the 12-year sentence the defendant received, a sentence a decade less than the sentence the petitioner received for an offense that involved no contact or attempted contact whatsoever. (It should be noted that Mr. Brattain received the same 12 year sentence on remand (U.S. v. Brattain No 1:06-CR-293 (W.D. Mich 1/13/09))).

In another case United States v. Richards 695 F.3d 527 (6th Cir. 2012), the defendant went to trial and a jury convicted him of eleven counts of child pornography and sexual-exploitation offenses. The sixth circuit affirmed the defendant's sentence of sixteen (16) years custody for a defendant who had manufactured

pornography with a fourteen year old boy and a fifteen year old boy by committing hands on sexually abusive acts with the boys (id at 531-32). The defendant then advertised and distributed the pornography for a profit (id at 550). At the time of his arrest, the defendant had not demonstrated any remorse for his offense nor did he accept responsibility, but asserted that he was the victim who had been tricked into pornography (id).

At sentencing the defendant had an offense level of 48, a criminal-history of I and an advisory guideline range of life. Yet the district court sentenced him to only 16 years.

Richard's conduct was far more abusive and predatory than anything that the petitioner at bard did, Richard's guideline numbers were slightly higher than the petitioner's yet he received a sentence that was almost at the mandatory minimum mark.

It also bears noting that the defendant in United States v. Corp, 235 F.3d 325, 327 (6th Cir. 2000) (reversed on other grounds), received a five-month sentence. That defendant was able to plead to one count of possessing child pornography and received the five-month sentence despite the fact that his actions involved his wife engaging in sex acts with the minor victim. See Corp, 236 F.3d at 326.

Mr. Vallier understands that courts have criticized comparison of a defendant's sentence with those imposed in other "singular" cases and has described these comparisons as weak evidence to show a national sentencing disparity." See Cox, No. 16-2404, slip op. at 15 (citation omitted).

These comparison cases, however, provide a useful index for defining "reasonable" and undergird the message of statistics on the matter. In fiscal year 2016, fewer than 30% of child-pornography defendants received a within-guideline sentence. U.S. Sentencing Commission, 2016 Sourcebook of Federal Sentencing Statistics, Table 27: Sentences Relative to the Guideline Range by Each Primary Offense Category (Fiscal Year 2016), available at http://www.ussc.gov/sites/default/file/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table27.pdf. For child-pornography offenders, 41% received downward variances.

Id. Another 28% received other variations of below-guideline sentences (downward departures and related below-guideline mechanisms). Id.

Not only do federal judges recognize the child-pornography guidelines as excessive as demonstrated by almost 70% of offenders receiving below-guidelines sentences, but the "common" man and woman on the street see them as excessive as well.

In United States v. Collins, 828 F.3d 386. 387 (6th Cir. 2016), that court reviewed a 5-year sentence for receiving and distributing child pornography and for possessing child pornography. The guidelines in that case produced an advisory range of 262 to 327 months. Collins, 828 F.3d at 388. The district judge polled the trial jury to gain insight into community sentiment on sentencing. Id. Jurors recommended sentences between 0 and 60 months, with the mean sentence being 14.5 months and the median falling at 8 months. Id. With once exception, every juror recommended a sentence less than half the mandatory minimum. Id. The 6th circuit upheld the significantly-below guideline sentence. Id. at 391.

The sentencing judge from the Collins decision had studied the issues of whether the guidelines reflect community sentiment on the issue of just punishment. See Judge James S. Gwin, Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?, 4 Harvard L. & Policy Rev. 173 (2010). Based on a study of twenty-two cases, he observed that "the median juror-recommended sentence was only 19% of the median Guideline ranges and only 36% fo the bottom of the Guideline ranges." Id. at 175. His work "suggests that the Guidelines are excessive and untethered to appropriate punishments as determined by the tryer's of fact (ie. the juror's actually hearing the case)." Id.

The study did not touch on specifically, child-pornography manufacturing. See id. at 196-200. It still makes a compelling argument for finding that the Guidelines produce sentences perceived as excessive, as determined by the citizens sitting as jurors and even below-guidelines sentences may not be far enough below the guidelines to be reasonable. See, e.g., id. at 196 (noting a child-pornography receipt case where the guidelines

were some 600% (or 6 times) higher than the jury-recommended MEDIAN sentence). The cases cited above, like Brattain and Richards help bring these general statistics and sentiments into the specific realm of sexual-abuse and child-pornography-manufacturing cases and demonstrate how the sentence at bar is disproportionate to the circumstances of the instant offense and the character of the offender where the case at bar falls on the extreme low end of the gravity spectrum for these cases.

Another telling statistic that supports substantive unreasonableness is that of the average sentence for sex-abuse cases. In fiscal year 2016, the mean sentence for a fedural sexual abuse case was 144 months. U.S. Sentencing Commission, 2016 Sourcebook of Federal Sentencing Statistics, Table 13: Sentence Length in Each Primary Offense Category (Fiscal Year 2016), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table13.pdf. The median sentence for these cases was 120 months. Id. These numbers arise from 620 cases. Id. This 144-month mean is 10 years below what Mr. Vallier received, and he committed no hands-on abuse. Actual abusers, on average, received sentences just over half the duration of Mr. Vallier's sentence in 2016.

In considering the realm of sexual-abuse cases, Mr. Vallier's case does not even present an average or "mean" scenario. He committed no "hands on" abuse, and never attempted to. A sentence almost double that of the average for sexual-abuse sentences presents a problem of substantive reasonableness.

RELIEF

Wherefore, the petitioner prays that this Honorable court grants the petitioner certiorari review and all further briefing of the issues present herein.

Alternatively, the petitioner prays that this Honorable court will remand the matter back to the Sixth Circuit Appellate Court for further consideration in harmony with Rosales-Mireles v. United States Slip op. 16-9493.

Further, the petitioner prays for any additional relief that is just and equitable under the law.

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