NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

NOEL AQUINO-FLORENCIANI,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

REDACTED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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July 11, 2018

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(Judgment of the First Circuit Court of Appeals, Nos. 17-1178, June 25, 2018).

QUESTION PRESENTED FOR REVIEW

CONTAINED IN SEALED PETITION FOR CERTIORARI

Whether the court's imposition of a total ban of internet access as a condition of supervised release is an overly broad and restrictive and without a compelling justification

The district court abused its discretion when it used the child pornography guidelines in determining Petitioner's sentence. Because the child pornography guidelines operate so that almost all first-time offenders receive guideline sentences at, near or extending beyond the statutory maximum, use of the guidelines to fashion a just and fair sentence is unreasonable and an abuse of the sentencing court's discretion

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The Petitioner, Noel Aquino-Florenciani, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on June 25, 2018.

OPINION BELOW

On June 25, 2018, the Court of Appeals entered its Opinion affirming the Petitioner's conviction and sentence. Judgment is attached at Appendix 1.

JURISDICTION

On June 25, 2018, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's conviction and sentence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

No person shall...be deprived of life, liberty or property without due process of law...

STATEMENT OF THE FACTS

On December 15, 2015, Defendant was arrested by Homeland Security Investigation (HSI) agents, who executed a consent search of Petitioner's apartment and electronic equipment and discovered child pornography images on the equipment. (Presentence Investigation Report, dated 8/18/16, at p. 6, para. 14, [hereinafter "PSR, at ___"). On four electronic devices HSI agents discovered approximately 204 still images and 187 videos which depicted children being sexually exploited and abused. (PSR at 10, para 30). On one device, the HSI agents discovered images of Petitioner performing sexual acts on a prepubescent minor, A.F. (PSR at 6, para 14). A.F. is Petitioner's cousin's son.

Petitioner was arrested on December 16, 2015 and indicted in a two-count indictment charging Possession of Child Pornography and Production of Child Pornography on December 22, 2015.

Change of Plea Hearing

Material contained in Sealed Petition

Presentence Investigation Report

The Presentence Investigation Report (PSR) was prepared on June 6, 2016 and revised on August 18, 2016. Counsel for Petitioner filed objections

to the report on August 3, 2016 and Probation filed an Addendum to the PSR on August 19, 2016.

Probation reported that on one of the cellular phones seized from Petitioner. HSI agents found images of Petitioner "performing sexual acts on a prepubescent male minor child. (PSR at 6, para 14). The male minor, A.F. was the son of Petitioner's cousin. The male minor, A.F. and his two brothers sometimes stayed overnight at Petitioner's apartment. (PSR at 7, para 17(d)-(i)). A.F was approximately five or six years old at the time the images were recorded. (PSR at 7, para 17, (d)-(k)). HSI also found a video of

Material Contained in Sealed Petition

Sentencing Hearing

Prior to Sentencing Petitioner filed his objections to the PSR and Sentencing Memorandum in one document on August 4, 2016. Petitioner argued that the guideline calculations in this case were excessive and did not meet the standard set out in 18U.S.C. §3553(a) of a sentence "sufficient, yet not greater than necessary". (Defendant's Sentencing Memorandum, 8/4/16, at 2 [hereinafter Sentencing Memo at ___]). Petitioner argued that the child pornography guidelines after 1987 lack empirical data to support them. Moreover, all the enhancements and increases in the base offense

level for the child pornography guidelines were the result of Congressional mandate and not the result of the commission's typical role or of empirical study. (Defendant's Memo, at 6-11). Petitioner argued a guideline sentence in his case was unreasonable with many of the applied enhancements inherent to every child pornography case, and that his guideline sentence was unreasonable, because like most child pornography sentences it resulted in a sentence at or over the statutory maximum sentence. Defendant's Memo at 12-14).

On November 18, 2016, the district court held a Sentencing Hearing. At the hearing the government argued for a sentence at the highest end of the guideline range, 293 months.

Material Contained in Sealed Petition.

Defense counsel argued for the minimum mandatory sentence of 15 years. (Sentencing at 33). Counsel reiterated the arguments made in Defendant's Sentencing Memorandum. Counsel pointed out that Petitioner was a first-time offender with no prior offenses, and a respected person in the community, whose family, neighbors and friends were in the courtroom for the change of plea and for the sentencing. (Sentencing at 30). Petitioner was active in various charities and his profession, nursing, was a helping profession. Counsel acknowledged that Petitioner understands that he

needs mental health treatment which he hopefully will be provided in prison and on supervised release, which counsel argued would impose very strict conditions upon Petitioner. (Sentencing at 30-31).

Material Contained in Sealed Petition

The district court calculated the guideline sentencing range for count One and Two and grouped the two counts pursuant to §3(d)(1)(4), adding 1 offense level to the greater adjusted offense level for a combined adjusted offense level of 41. Petitioner received a three point reduction for acceptance of responsibility for a total offense level of 38 a criminal History Category of I, and a guideline sentencing range of 235-293 months imprisonment and a supervised release of at least five years. (Sentencing 36-38).

Material Contained in Sealed Petition

The court sentenced Petitioner to be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 22 years. The court sentenced Petitioner to 264 months on Count I and 240 months on Count II, to be served concurrently and a ten-year term of supervised release as to each count to be served concurrently. (Sentencing at 41).

The court imposed a number of conditions for the ten years of supervised release. Condition number twelve was that Petitioner "shall not

possess or use a computer, cellular telephone, or any other device with internet accessing capability at any time or place without prior approval from the probation officer." The court further specified that Petitioner shall permit routine inspections of his computer system, including any hard drives or media storage. (Sentencing at 45). Condition thirteen required Petitioner to consent to "the installation of systems that will enable the probation officer or designee to monitor and filter computers, telephones, or other electronic devices owned and/or controlled by the defendant." (Sentencing at 46). Condition thirteen also required Petitioner to submit to "unannounced examinations on any equipment owned or controlled by him which might result in retrieval and copying of all data from the device and any internal or external peripherals, and may involve removal of such equipment for the purpose of conduction a more thorough inspection.' (Sentencing at 46). The court found that these conditions were "reasonably related to the offense of conviction" and did not entail "a greater deprivation of liberty than what is reasonably necessary to fulfill all of the sentencing objectives, including rehabilitation, positive reintegration to the community, just punishment, and deterrence." (Sentencing at 47)

Appeal

On June 25, 2018 the First Circuit Court of Appeals issued a published decision affirming Petitioner's conviction and Sentence. (Appendix at 1).

REASON FOR GRANTING THE WRIT

Point I

MATERIAL CONTAINED IN SEALED PETITION FOR CERTIORARI

Point II

The court's imposition of a total ban of internet access as a condition of supervised release is an overly broad and restrictive and without a compelling justification.

Argument

The district court erred in imposing special condition of supervised release number 12, which bans Petitioner from essentially all internet access without the prior approval of his probation officer. (Sentencing at 45). This special condition of supervised release, while related to the factors set out in §3553, sweeps too broadly and involves a greater deprivation of liberty than is reasonably necessary to achieve the goals of supervised release. 18 U.S.C § 3583 (d)(2). United States v. Perazza-Mercado, 553 F.3d 65, 69 (1st Cir. 2009). This condition is too onerous and restrictive and makes functioning in the modern world virtually impossible. In light of multiple other conditions, not challenged here, a "more narrowly-tailored condition", would better "balance the protection of the public with the goals of sentencing". Perazza-Mercado, 553 F.3d at 73.

District courts have significant discretion to impose special conditions of supervised release, but that discretion is not unlimited. United States v. Medina, 779 F.3d 55, 60 (1st Cir.2015). Conditions of supervised release must be reasonably related to the factors set forth in 18 U.S.C. § 3553 (a)(2)(B), (a)(2)(C), and (a)(2)(D), involve no greater

deprivation of liberty than is reasonably necessary for the purposes set forth in 18 U.S.C. § 3553 (a)(2)(B), (a)(2)(C), and (a)(2)(D), and be consistent with pertinent policy statements issued by the Sentencing Commission.18 U.S.C. §3583 (d); United States v. Hinkel, 837 F.3d 111, 125 (1st Cir. 2016).

At the outset, it is important to note that the fact that probation may modify the court's total ban on the use of the internet does not affect this Court's analysis. United States v. Ramos, 763 F.3d 45, 61 (1st Cir. 2014). This Court has made clear that delegating to probation the future authority "to modify a sweeping ban on computer or internet use does not immunize the ban from an inquiry that evaluates the justification for the ban in the first instance." Id. Thus, the court's ban must be analyzed without reference to the probation officer's authority to modify it. Id.

In the present case the sentencing court imposed a ten-year total ban on Petitioner's use of the internet at home, at work or on any public or private computer. (Sentencing at 45). This total ban sweeps too broadly. In the present day, a total ban on a defendant's internet use is equivalent to banning a defendant from "normal functioning in modern society". Hinkel, 837 F.3d at 126. This Court has repeatedly emphasized the essential importance of the internet in society. Perazza-Mercado, 553 F.3d at 72

(undue restrictions on internet use renders modern life exceptionally difficult); Ramos, 763 F.3d at 60 (we are mindful that it will become harder and harder in the future for an offender to rebuild his life when disconnected from the internet); Hinkel, 837 F.3d at 126 (The observation made seven years ago that a total ban on internet use renders modern life extremely difficult, "has only more force today" where internet connectivity is "a prerequisite to normal functioning in modern society"); United States v. Jenkins, 854 F.3d 181, (2nd Cir.2017) (Internet access has become "virtually indispensable in the modern world of communication and information gathering").

It is true that the guidelines recommend limiting the use of the computer for defendant's who used the computer to commit their crimes. USSG Manual § 5D1.3(d)(7)(B) (2009). In the present case, however, there are multiple limitations in place surrounding Petitioner's internet connectivity. Petitioner does not challenge the condition that monitoring software be placed on his computer, cellular phone or other electronic devise. Nor does he challenge the condition imposing routine searches of his computer and hard drive as well as searches for probable cause. Nor does he object to the condition requiring he provide his probation officer with his pseudonyms, passwords and log-ons. (Sentencing at 42, 45-46).

Moreover, Petitioner does not challenge other conditions put in place to comprehensively protect the community against the commission of future crimes by Petitioner. Petitioner agrees to participate in approved mental health treatment and sex offender treatment, including polygraph testing, and to contribute to its cost. (Sentencing at 42-43). Petitioner agrees to an almost total ban on any contact with children under 18. These conditions are set out in conditions 7, 8, 9, 10, and 11 (Sentencing at 44-45) See Ramos, 763 F.3d at 60 (There are narrowly tailored tools for reaching an appropriate balance between monitoring the defendant to protect the public and still allowing some reasonable internet access).

At the time this condition of supervised release goes into effect, Petitioner will already have served a 22-year prison sentence for his crime. The multiple conditions of Petitioner's supervised release with deter Petitioner from further crimes. It is error to impose a further condition which all but insures that Petitioner will be unable to successfully re-enter society. This result is at odds with rehabilitative and educational goals of sentencing. Perazza-Mercado, 553 F.3d at 69 (The purpose of supervised release is the same as the purpose of sentencing, including "to provide defendant with needed educational or vocational training"); United States v. Jenkins, 854 F.3d 181, 194 (2nd Cir. 2017) (The court's ban will likely

prevent defendant from "ever re-engaging in any community he might find himself"); Ramos, 763 F.3d at 60 (a total ban on internet use is inconsistent with the vocation and education goals of supervised release).

The court offered no reason or justification for imposing these conditions, beyond the formulaic recitation of the statutory factors (Sentencing a 47). United States v. Voelker, 489 F.3d 139, 144 (3rd Cir.2007). Smart phones and internet connectivity is "a pervasive and insistent part of daily life" Hinkel, 837 F.3d at 126. Thus, even in cases like the present, where the internet was used to commit the crime, a sentencing court's imposition of absolute bans on internet use requires a more thoughtful analysis than a formulaic recitation. Hinkel, 837 F.3d at 125 (A "broad-brush, untailored approach to sculpting the conditions of supervised release imposes a greater deprivation of liberty than is reasonably necessary").

Condition 12 of supervised release sweeps too broadly and is too restrictive and was imposed without any explanation. This absolute internet ban provides too little benefit to outweigh the severe consequences it imposes, especially considering the other multiple conditions of release the court imposed.

Point III.

The district court abused its discretion when it used the child pornography guidelines in determining Petitioner's sentence. Because the child pornography guidelines operate so that almost all first-time offenders receive guideline sentences at, near or extending beyond the statutory maximum, use of the guidelines to fashion a just and fair sentence is unreasonable and an abuse of the sentencing court's discretion.

Argument

The United States Sentencing Guidelines were enacted in 1987 and rendered advisory by the Supreme Court in 2005. United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed2d 621 (2005). The purpose of the Sentencing Guidelines is to guide the exercise of a court's discretion in determining a defendant's sentence within the statutory range set by Congress, taking into consideration various sentencing factors and defendant characteristics. Booker,543 U.S. at 233; Apprendi v. New Jersey, 530 U.S. 466, 481, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). When a particular guideline operates so that it routinely calculates guideline ranges for most sentences, at, near, or over, the statutory maximum, even for first time offenders, that guideline does not perform its basic functions of guiding the court in a just and fair determination of a particularized sentence with in the statutory sentencing range authorized by the facts found by a jury or admitted by a defendant. Apprendi, 530 U.S. at 482.

When this happens, the guideline is broken. The child pornography guidelines operated so that even first-time offenders are set at or near or over the congressionally determined statutory maximum. United States v. Dorvee, 616 F.3d 174, 186 (2nd Cir.2010) (Possession of Child Pornography), United States v. Grober, 624 F.3d 592 (3rd. 2010) (Possession of Child Pornography), United States v. Henderson, 649 F.3d 955, 965 (9th Cir.2011) Berzon, J., concurring. The guidelines operate this way because they are not based on empirical data and because many of the factors which increase the sentencing guideline are all but inherent to the crime itself. United States Sentencing Commission, Report to Congress: Federal Child Pornography Offenses (Dec.2012) (Chapter 12, at 316), www.ussc.gov/Legislative_and_ Public_Affairs/Congressional_Testimony_and _Reports/Sex_Offenses [hereinafter 'Report to Congress'].

In the present case, the district court relied on the child pornography guidelines in setting Petitioner's sentence for both the production and the possession offenses. (Sentencing at 35-38). Petitioner's combined advisory guideline sentence for both counts exceed the statutory maximum for Count 2 and approaches the statutory maximum for Count 1. (The statutory sentencing range for these offenses are: for possession of child

pornography, not more than twenty years imprisonment; 18 U.S.C. § 2252(a)(4)(B) and § 2252 (b)(2), for production of child pornography; 15 to 30 years imprisonment. 18 U.S.C. §§ 2251(a) and 2251(e)). Petitioner was a first-time offender with no criminal history. Because the district court relied on the child pornography guideline sentencing range as a major factor in determining where in the statutory sentencing range to set Petitioner's sentence, Petitioner's sentence was substantively unreasonable. United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008) (The "linchpin" of this Court's review for substantive reasonableness is a determination about whether the sentence reflects "a plausible ...rational and a defensible result").

Over the past two and a half decades Congress has steadily increased the penalties for child pornography offenses, by increasing both the mandatory minimums and the statutory maximums. Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under Federal Sentencing Guidelines in the United States, Carol S. Steiker, Henry J. Friendly, Professor of Law, Harvard Law School, 76 Law and Contemporary Problems, 27-52 (2013) (In 2003 Congress passed the PROTECT Act, raising the statutory maximum for possession from five to ten years, "From the inceptions of the Guidelines in 1987, the treatment of child

pornography has been a one-way ratchet, repeatedly turned by Congress), See also, U.S. Sentencing Comm'n, The History of the Child Pornography Guidelines http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Full_Report_to_Congress.pdf [hereinafter History of Child Pornography] 54 (2009).

Concomitantly, Congress has also increased the advisory sentencing guidelines range for child pornography offenses. "In little more than two decades, the child pornography Guidelines (for possession offenses) were substantively revised nine times, with each revision either extending the scope of the offense or making the penalty harsher". Steiker, supra at 37. The child pornography guideline for production offenses has been amended 13 times. Report to Congress, Ch. 9 at 249. Ordinarily the Sentencing Commission, in formulating and implementing guidelines, typically employs "an empirical approach based on data about past sentencing practices". Rita v. United States, 551 U.S. 338, 349, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). However, in formulating the child pornography guidelines Congress, instead of allowing the Commission to amend the guidelines based on empirical data, by-passed the Sentencing Commission

entirely. Alan Vinegard, The New Federal Sentencing Law, 15 Fed. Sent. R. 310, 315 (June 2003) (the changes in the child pornography guidelines evince a "blatant" disregard for the Commission and are "the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress"). Dorvee, 616 F.3d at 184, Grober, 624 F.3d at 608 (child pornography guidelines were not an exercise of the commission's "characteristic institutional role" and were not developed based on empirical data and national experience"), United States v. Huffstatler, 561 F.3d 694, 696-97 (7th Cir.2009) (Child pornography Production guideline, (U.S.S.G. § 2G2.1) similar to the Possession guideline, was not crafted pursuant to the Sentencing Commission's nationwide empirical study of criminal sentencing but instead through a mix of mandatory minimums and directives to the Commission). In amending the child pornography guidelines Congress: (i) adopted sentencing reforms without consulting the Commission (ii) ignored the statutorily-prescribed process for creating guideline amendments, (iii) amended the Guidelines directly through legislation, (iv) required that sentencing data be furnished directly to Congress rather than to the Commission, (v) directed the Commission to reduce the frequency of downward departures regardless of the

Commission's view of the necessity of such a measure, and (vi) prohibited the Commission from promulgating any downward departure guidelines for the next two years. Dorvee, 616 F.3d at 185, Report to Congress, Ch. 9, at p. 249 (increase in offense levels and enhancements in Child pornography production guidelines were the "result of Congressional directives").

The sentencing enhancements "cobbled together through this process" resulted in multiple 'enhancements' applying to the typical offender in all child pornography possession cases and in a significant number of child pornography production cases. Id. at 186, Report to Congress, ch. 12 at 316. Of the six enhancements in contained in the Child Pornography Possession guideline, §2G2.2(b), four 'enhancements' apply to the typical offender, the enhancement for images depicting pre-pubescent minors applied in 96.1 percent of the cases; the enhancement for sado-masochistic images applied in 74.2 percent of the cases; the enhancement for use of a computer applied in 96.2 percent of the cases; and the enhancement for number of images applied in 96.6 percent of the cases. Report to Congress, ch.12 at p. 316. The Child Pornography Production guideline also contains 'enhancements' for "conduct present in nearly every case to which the guideline would apply". United States v. Jacob, 631

F.Supp. 1099, 1115 (N.D. 2009). United States v. Price, 2012 W L 966971 (C.D. Illinois 2012) (§ 2G2.1 applies enhancements present in nearly every production case). The enhancement based on the age of the minor involved was applied in 90 percent of the cases; the enhancement for defendant's status as a parent or guardian applies in over 50 percent of the cases and the enhancement for sexual conduct "has applied in the majority of production cases". Report to Congress, Ch. 9 at 261-262. If you include offenders who caused other adults to have sexual contact with their victim, almost three quarters of offenders had physical contact with their victims. Report to Congress, Ch. 9 at 261-262.[1] Although courts have not been as critical of the production guidelines as they have of the possession guidelines, in 2011, only 50.4 percent of child pornography production offenders were sentenced within the applicable guideline range. Report to Congress, ch. 9 at p. 254.

Because of the anomalous way that the child pornography guidelines were created, the guidelines operate so that almost all first-time offenders have guideline ranges at, near or exceeding the statutory maximum in the "mine-run" of cases. Dorvee, 616 F.3d 174 (2nd Cir. 2010)(under the Child

[1] The enhancement for distribution, the enhancement for sado-masochistic material, and the enhancement for use of a computer to entice a minor applied in less than half the cases. Report to Congress, Ch. 9 at 262.

pornography Possession guideline, "an ordinary first-time offender is likely to qualify for a sentence of at least 168 to 210 months, rapidly approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent to the crime of conviction"), Grober, 624 F.3d at 595 (enhancements that are "all but inherent to the crime of conviction" ensure sentences near the statutory maximum for "ordinary first-time offender[s]"), United States v. Henderson, 649 F.3d 955 (9th Cir. 2011) ("the vast majority" of "ordinary first-time offender could easily face... a guideline range at, and extending beyond, the extreme upper edge of the statutory range").

Recognizing these 'flaws' in the child pornography guidelines, many courts held that, when sentencing defendants convicted of child pornography offense, district courts have authority under Kimbrough to depart from a guideline sentencing range based on policy disagreements with a particular guideline. Kimbrough v. United States, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007); United States v. Stone, 575 F.3d 83, 89-90 (1st Cir.2009); Dorvee, 616 F.3d at 188, ("Following Kimbrough we held that 'a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses'. That analysis applies with

full force to § 2G2.2"), Grober, 624 F.3d at 608 (Kimbrough permits district court to vary from the child pornography guideline based on policy disagreement, even where a guideline is a direct reflection of congressional directive), Henderson, 649 F.3d at 966, Berzon, J., concurring (citing Kimbrough and holding that district court judges who conclude that child pornography guideline for possession offenses constitutes bad advice should be encouraged to reject it as such).

Conversely, Appeals Courts have refused to hold that district courts must always reject the child pornography guidelines. Stone, 575 F.3d at 96, United States v. Huffstatler, 571 F.3d 620, 623 (7th Cir.2009), Henderson, 649 F.3d at 964 (district courts are not obligated to vary from the child pornography guidelines on policy grounds, if they do not have, in fact, a policy disagreement with them).

In this appeal Petitioner argues that because the child pornography guidelines result in guideline ranges that place almost all defendants convicted of child pornography offenses at, near or exceeding, the statutory maximum, it is an abuse of discretion for a sentencing court not to reject the child pornography guidelines when fashioning a sentence for a defendant convicted of a child pornography offense.

Case law concerning sentencing is about "the selection of sentence in response to a differing set of facts" for an individual defendant, within a statutory range, determined by Congress. Booker, 543 U.S. 220 (We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.), Apprendi, 530 U.S. at 481 ("American judges commonly determined facts justifying a choice of a heavier sentence on account of the manner in which particular defendants acted"). Congress set statutory sentencing ranges for child pornography offenses. 18 U.S.C. § 2251(e), §2251A, (a) and (b),§2252(b), §2252A(b). In setting a punishment range Congress intended that the child pornography offenses "fall within a spectrum", where "the harsh penalties should be reserved for the worst crimes". Price, 2012 W L 966971, at 11. The Sentencing guidelines are an important tool to help courts accomplish this task. Jimenez-Beltre, 440 F.3d at 518 (The guideline sentencing range is an important factor in guiding a court's sentencing discretion. It is not "just another factor in the statutory list", it occupies an important role).

However, when Congress took it upon itself to directly amend the child pornography sentencing guidelines, by passing the Sentencing Commission, Congress did not rely on empirical data, national experience

or even extensive deliberation,[2] In doing so, Congress fashioned guidelines that that do not operate to place an individual defendant along the spectrum of the Congressionally mandated sentencing range. Instead, because the guidelines enhance sentences for conduct inherent to the offense itself, the guidelines place most first-time offenders at, near or over the statutory maximum and do not offer a calibrated scale for differential penalties within the statutory sentencing range. Therefore, the Guidelines are useless as a sentencing tool and should not be utilized when a court exercises its sentencing discretion.

In the present case, the guideline calculation resulted in a combined adjusted offense level of 41. (PSR at 21, para 64). This adjusted offense level, for a criminal history category of I, is one offense levels above the statutory maximum sentence set by Congress.[3] Likewise, the combined adjusted offense level for Petitioner's possession offense, was level 41 (PSR at 21, para 64). This combined adjusted offense level was four offense levels above Congresses' statutory maximum sentence[4]. Clearly, in this case, as in most child pornography cases, the guidelines do not operate to

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[2] See Streiker, p.41, n.7 (critics have noted how little deliberation attended Congress's interventions regarding the child pornography Guidelines).
[3] The lowest offense level for first time offenders containing the statutory maximum sentence of 360 months is level 40 (295-365 months).

place an individual defendant on a calibrated scale of differential penalties within the range set by Congress. Congress set the statutory penalty range from 15-30 years, for production of child pornography offense to which Petitioner pled. 18 U.S.C. § 2251(e). Congress set the statutory penalty range from Zero-20 years for the possession of child pornography offense to which Petitioner pled. Although Congress set the statutory range for these crimes and the guidelines, (which resulted from Congressional directives), the Sentencing guidelines place almost all first-time offenders, including Petitioner, at or outside the range that Congress mandated, necessarily always generating an unreasonable result. Dorvee, 616 F.3d at 186; United States v. Grober, 624 F.3d at 595; Henderson, 649 F.3d at 965, (Berzon, J., concurring).

Thus, the child pornography guidelines do not and cannot guide a court's discretion in determining where to sentence an individual defendant within the congressionally determined statutory range. Therefore, when a sentencing judge uses the guidelines to inform his sentencing discretion that use is per se unreasonable because there can be no "plausible rational"

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[4] The lowest offense level for first time offenders containing the statutory maximum sentence of 240 months is level 37 (210-262 months).

for using these guidelines and any sentence based even in part on such an "irrational" guideline cannot be a "defensible result". Dorvee, 616 F.3d at 187 (The irrationality in § 2G2.2 is easily illustrated, the guidelines can "easily generate unreasonable results"); United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008) (The "linchpin" of review for substantive reasonableness is a determination about whether the sentence reflects "a plausible ...rational and a defensible result").

Petitioner understands that challenging a sentence as substantively unreasonable is a burdensome task. United States v. Clogston, 662 F.3d 588 (1st Cir. 2011). This is made more burdensome by the fact that Petitioner's sentence is within a properly calculated guideline. United States v. Madera-Ortiz, 637 F.3d 26, 30 (1st Cir.2011). But because the guidelines are empirically flawed and uniformly result in sentences at", and extending beyond, the extreme upper edge of the statutory range", deductive reasoning demands that any sentencing judge who uses the child pornography guidelines "in balancing the pros and cons" of sentencing a defendant within a statutory range, behaves unreasonably. Henderson, 647 F.3d at 965, Berzon, J,. concurring, (Ordinary first-time offenders faces a guideline range at, and extending beyond the extreme upper end of the statutory range); Madera-Ortiz, 637 F.3d at 30 (a defendant "must adduce

fairly powerful mitigation reasons and persuade us that the district court was unreasonable in balancing pros and cons despite the latitude implicit in saying that a sentence must be reasonable").

The government will argue that the district court was free to exercise its discretion under Kimbrough to depart from the guidelines on policy grounds and it chose not to do so. However, using, or not using, the child pornography guidelines is not a matter of agreeing or disagreeing with Congressional policy decisions. The sentencing judge should not have discretion to use a guideline that fails to provide a calibrated measurement for placing a defendant within a statutory range. United States v. DeCologero, 530 F.3d 36, 70 (1st Cir.2008) (This Court "review[s] the substantive reasonableness of a sentence for abuse of discretion"). When the guideline operates so that it routinely places first time offenders outside the Congress' statutory sentencing range it is not only irrational, it is malfunctioning. Dorvee, 616 F.3d at 187 ("the irrationality in §2G2.2 is easily illustrated", and "can easily generates unreasonable results"). It is true that this Court has stated that "Given the function of the sentencing guidelines and the methodology that they contemplate, a frontal assault on the guidelines cannot, without more, afford a persuasive basis for a claim of sentencing disparity, much less for a claim of substantive

unreasonableness." United States v. King, 741 F.3d 305, 308 (1st Cir.2014). However, in the present case Petitioner does not "take aim at a fragment of an inchoate sentence" Id. Rather Petitioner takes aim at a broken sentencing process. No other guideline operates to place first time offenders at or near the statutory maximum. Using the guideline prevents the sentencing judge from doing his job, placing defendant within the statutory range mandated by Congress. Thus, it is an abuse of the district court's discretion to rely on or even utilize that guideline in calculating a defendant's sentence. Any sentence, based in any part, on these guidelines is an unreasonable sentence.[5] Appellate review of sentencing is subject only to the ultimate requirement of reasonableness. Gall v. United States, 552 U.S. 38, 128 S. Ct. 586, 597, 169 L.Ed.2d 445 (2007). It is not reasonable for sentencing courts to use these guidelines in exercising their sentencing discretion.

Therefore, because Petitioner's sentence was based on and relied on an illogical and unreasonable guideline, Petitioner's sentence was

[5] And it is clear from the Sentencing Hearing that the district court utilized the guideline range in setting Petitioner's sentence. (Sentencing at 35-38). The court found the applicable guideline range was 235-293 but because the guideline range was greater than the statutory maximum for Count 2, the statutory maximum of 240 months, became the guideline range. (Sentencing at 41).

inherently substantively unreasonable. United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008) (The "linchpin" of our review for substantive reasonableness is a determination about whether the sentence reflects "a plausible ...rational and a defensible result").

CONCLUSION

For the above reasons this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 11th day of July 2018.

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