No. 18 - _____

In the
Supreme Court of the United States

LEONARD PERAGINE,
Petitioner

-v-

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD B. HOLCOMB
Counsel of Record
Federal Defender Program, Inc.
101 Marietta St., NW, Ste. 1500
Atlanta, Georgia 30303
404-688-7530
richard_holcomb@fd.org

QUESTION PRESENTED FOR REVIEW

Whether the district court's utilization of the child pornography guideline in Section 2G2.2 to determine the sentence for a defendant whose primary offense conduct was child enticement was due deference by the court of appeals under an abuse of discretion standard, in spite of the acknowledged infirmities in the empirically unsupported guideline, and the fact that the guideline contravened Congress' statutory determination of the relative seriousness of the two offenses?

TABLE OF CONTENTS

ATTACHED APPENDIX

TABLE OF CITATIONS

Supreme Court Opinions

Federal Court Opinions

United States Code

State Statutes

Miscellaneous Authority

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, affirming the decision of the district court, is included here as Appendix A.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on May 8, 2018, making the original deadline for this petition on or before August 6, 2015. Pursuant to Supreme Court Rule 13.5, Petitioner sought and was granted an extension of time for filing the petition for a writ of certiorari of sixty (60) days, which extension made this petition due on or before October 5, 2018. Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

18 U.S.C. § 2422(b)

18 U.S.C. § 2252(a)(2)

18 U.S.C. § 2252(a)(4)(B)

18 U.S.C. § 3553(a)

U.S.S.G. § 2G2.1

U.S.S.G. § 2G2.2

U.S.S.G. § 3D1.4

U.S.S.G. § 4B1.5

STATEMENT OF FACTS

Agents arrested Mr. Peragine as a result of a Child Exploitation Task Force operation in the Northern District of Georgia. (PSR at ¶ 9, Appendix D.) Starting in August of 2015, agents in Atlanta solicited respondents to an advertisement entitled "Taboo mom seeking like minded teacher!" (sic) on the Atlanta Craigslist website. (*See id*.) Unwittingly using his real name, Mr. Peragine responded to the advertisement, and began a conversation with an undercover agent posing as the mother of a nine-year old girl. (*Id*. at ¶ 10.)

The two exchanged messages into September, discussing the possibility of Mr. Peragine having sex with the daughter; they became more specific about their plans, and traded personal information. (*Id*. at ¶¶ 15-18.) Mr. Peragine sent four videos and one photograph depicting sex with minors, and asked the undercover agent to show them to her daughter. (*Id*. at ¶ 22.) A meeting was scheduled for a McDonalds in Suwanee for

September 29th. (*See id*. at ¶ 29.) Mr. Peragine arrived at approximately 7:15 p.m., and agents arrested him. (*Id*. at ¶ 30.)

On October 27, 2015 a grand jury serving in the Northern District of Georgia returned a three-count indictment charging Mr. Peragine with one count of enticement of a minor and possession and distribution of child pornography, violations of Sections 2422(b), 2252(a)(2), and 2252(a)(4)(B) of Title 18 respectively. (Doc. 14.) Mr. Peragine entered a non-negotiated guilty plea to all three counts of the indictment on October 25, 2016. (Doc. 62 minute entry.) The enticement count carried a mandatory minimum sentence of ten years, and the distribution of child pornography count carried a mandatory minimum sentence of five years, both with a maximum term of life imprisonment. *See* 18 U.S.C. §§ 2422(b), 2252(a)(2). The possession of child pornography count had no mandatory minimum, and a maximum of twenty years. *See* 18 U.S.C. § 2252(a)(4)(B).

Count One, the Section 2422(b) enticement charge, received Section 2G1.3(a)(3)'s base offense level of 28. (*See* PSR at ¶ 43); U.S.S.G. § 2G1.3(a)(3). Two levels were added for use of a computer or interactive computer service to entice a person to engage in prohibited sexual conduct with a minor based on the KIK messages, and eight levels were added because the fictitious

daughter of the agent was represented to be under twelve years of age, for a total adjusted offense level of 38. (PSR at ¶¶ 44-45, 50.)

Counts Two and Three, calculated as a group, started with a base offense level of 22. (PSR at ¶ 51.) Two levels were added for material depicting a minor under twelve; seven levels were added for distribution to entice the minor to engage in prohibited sexual conduct; four levels were added for material that portrayed sadistic or masochistic conduct; two levels were added for use of a computer; and four levels were added because the offense involved between 300 and 599 images, a result driven by the Guidelines' treatment of videos. (PSR at ¶¶ 52-54, 56-57); U.S.S.G. §§ 2G2.2(b)(2), (b)(3)(E), (b)(4)(A), (b)(6), and (b)(7)(C). The Report added an additional five levels pursuant to Section 2G2.2(b)(5), which applies if the defendant engaged in a pattern of activity involving the sexual abuse or sexual exploitation of a minor. (PSR at ¶ 55); U.S.S.G. § 2G2.2(b)(5). After application of the specific offense characteristics, the adjusted offense level totaled 46.

The Report added one level for the multiple count adjustment to the child pornography group. (PSR at ¶¶ 62-65.) The Report then added a five-level enhancement from Chapter Four, again for engaging in a pattern of

activity involving prohibited sexual conduct, pursuant to Section 4B1.5(b)(1). (*Id*. at 66); U.S.S.G. § 4B1.5(b)(1). After the three-level reduction for acceptance of responsibility, the final adjusted offense level was 49. (PSR at ¶¶ 68-69.)

Mr. Peragine's criminal history score summed to seven points, placing him in a category IV on the sentencing table. (*Id*. at ¶ 79.) The resulting guideline range determined by the Report, which defaulted to the higher child pornography guideline, was life imprisonment. (*Id*. at p. 27 ("Part D: Sentencing Options"); U.S.S.G. § 3D1.4.) By contrast, the enticement count's total adjusted offense level (35, after reduction for acceptance of responsibility) would have resulted in a 235-293 guideline range.

Mr. Peragine objected generally to the Guideline calculations as to Counts Two and Three, noting that they reflected an "unsound judgment" on the part of the Sentencing Commission, as that term was used in *Rita v. United States*. He also contended that the enticement count was the gravamen of the offense conduct, and that the higher child pornography guideline distorted the analysis. (*See* PSR attach D. (Objections letter dated May 18, 2017.)) These arguments were expanded in Mr. Peragine's Sentencing Memorandum:

> It is Mr. Peragine's contention that the gravamen of his offense is the enticement conduct. The violations charged in Counts Two and Three were in furtherance of and relevant conduct to his primary offense of enticement of a minor, and should not supplant that guideline range. Additionally, Mr. Peragine respectfully contends that the operation of Section 2G2.2, used to determine the adjusted offense level of Counts Two and Three, reflects "an unsound judgment" on the part of the commission, as the Supreme Court used that term in *Rita*, and should receive significantly less deference in the determination of a final sentence.

(Doc. 74 at 2 (citing *Rita v. United States*, 552 U.S. 338, 357, 127 S. Ct. 2456 (2007).)

At sentencing, utilizing the child pornography counts and the multiple count rules, the court determined a custody guideline range of life imprisonment. (Doc. 91 at 62, Appendix C.) Mr. Peragine reiterated by reference the earlier guidelines objections, and the Government did not object to the court's calculation. (Doc. 91 at 62.)

The Government argued for a sentence of 384 months, or 32 years. (Doc. 91 at 77.) The Government conceded that a life sentence was not appropriate, and that Section 2G2.2 uses specific offense characteristics that creates an unfair system by applying to so many defendants that it treats them all as the worst offenders. (Doc. 91 at 81.) The Government also conceded that the more appropriate guideline to drive sentencing

considerations was the enticement count rather than the child pornography offenses. (Doc. 91 at 84.)

After Mr. Peragine's allocution, the court noted the egregiousness of the enticement offense conduct, but then remarked "that's the reason why the guidelines are so high;" however, the court was sentencing Mr. Peragine under the child pornography guideline, not the enticement guideline. (Doc. 91 at 99.) The court sentenced Mr. Peragine to 340 months as to Count One, 240 months as to Count Two, and 240 months as to Count Three, all to run concurrently, with a life term of supervised release. (Doc. 76 minute entry, 79, 91 at 101-102.) Mr. Peragine objected on both procedural and substantive grounds. The court stated that regardless of whether the rulings were incorrect on the Guidelines, that the Court believed that "this is the appropriate sentence in this case." (Doc. 91 at 106.)

Mr. Peragine appealed to Eleventh Circuit Court of appeals, raising the errors he identified below as to the substantive and procedural unreasonableness of the sentence, and specifically the child pornography guideline's role in the derivation of that sentence. On May 8, 2018, the Eleventh Circuit issued its opinion affirming the district court. The court of appeals rejected Mr. Peragine's argument that the child pornography

guideline had warped the assessment of his offense conduct, stating that even though the Sentencing Commission itself had critiqued the guideline, that its Report on the issue did not render the guideline "invalid or illegitimate" or "alter[the court's] appellate duties in reviewing a § 2G2.2-based sentence . . . in any way." *Id.* (citing *United States v. Cubero*, 754 F.3d 888, 900 (11th Cir. 2014) (internal quotation omitted)).

The Court also rejected Mr. Peragine's argument that Section 2G2.2 hijacked Congress' determination of the relative seriousness of the offenses. Rather than addressing the difficulty of the Guidelines' elevation of a Class C over a Class A felony, the Court simply observed that this is what the multiple count rules in Section 3D1.4 told the district court to do. Finally, the court noted that any procedural error was harmless, simply because the court expressly stated that it would have imposed the same sentence regardless of the Guidelines calculation. Mr. Peragine is currently in the custody of the Bureau of Prisons, serving his sentence.

REASONS FOR GRANTING THE PETITION

The child pornography guideline – U.S.S.G. § 2G2.2 – is hopelessly broken, the product of years of upward ratcheting untethered from the Sentencing Commission's empirical methodology. *See United States v.*

Dorvee, 616 F.3d 174, 184 (2d Cir. 2010) (discussing evolution of Section 2G2.2). It is in desperate need of revision. This position has been advanced by the defense community,[1] the Department of Justice,[2] and the Sentencing Commission[3] itself. The consensus is that it is not a guideline that "embodies the § 3553(a) considerations, [either] in principle [or] in practice." *Rita v. United States*, 551 U.S. 338, 350, 127 S. Ct. 2456 (2007). But in the interim, the courts of appeal are taking divergent approaches to this problem, a patchwork effort that has failed to ameliorate the undeniable effects of the guideline's excessively punitive enhancements, with the Eleventh Circuit

---

1 *See, e.g.*, Troy Stabenow, "A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines,"24:2 Fed. Sent. Rep. 108 (2011).

2 *See* Letter from Jonathan Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 6 (June 28, 2010) ("We think the report to Congress ought to recommend legislation that permits the Sentencing Commission to revise the sentencing guidelines for child pornography offenses.").

3 U.S. Sent'g Comm'n, *Federal Child Pornography Offenses* at 322 (2013) (recommending that § 2G2.2 be updated to "account more meaningfully for the current spectrum of offense behavior," and asking Congress to enact legislation providing the Commission with express authority to amend) the current guideline provisions) (hereinafter "Report") (available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/index.cfm.).

taking the minority view. *Compare United States v. Fry*, 851 F.3d 1329, 1333-34 (D.C. Cir. 2017) (district court retains discretion to vary from guideline based on policy disagreement, but does not necessarily abuse its discretion by agreeing with it); *United States v. Grober*, 624 F.3d 592, 609 (3d Cir. 2010) (district court did not abuse its discretion in downwardly departing from 235-293 month guideline range to mandatory minimum of five years where court articulated policy disagreement with Section 2G2.2 and supported sentencing reasons under Section 3553(a)); *with United States v. Dorvee*, 616 F.3d 174, 187-188 (2d Cir. 2010) (finding within-guideline sentence substantively unreasonable and stating that Section 2G2.2 is "irrational"); *and with United States v. Pugh*, 515 F.3d 1179, 1201 n.15 (11th Cir. 2009) (child pornography guidelines "do not exhibit the deficiencies the Supreme Court identified in *Kimbrough*").

Section 2G2.2 remains in effect, with no solution in sight. It is time for this Court to provide a necessary corrective to the unreasonable sentences being imposed in district courts across the country, sentences that due to constraints placed on appellate review of guidelines' decisions in the courts of appeal, are insulated from appropriate consideration. *See, e.g., United States v. Stone*, 575 F.3d 83, 96-97 (1st Cir. 2009) (affirming on abuse of

discretion standard, and observing that "though there can be no question that the result is stern, it is defensible. Stone's high guideline range resulted from the many enhancements applied," but stating that although there is technically no error, the court, sitting in the district court's place, would "have used our *Kimbrough* power to impose a somewhat lower sentence.") Regardless of the courts of appeals' opinion of the underlying guideline's validity and the varying approaches taken to the issue, review of the guidelines' effect has been stymied by consistently deferential review standards. In the instant case, this combination of factors contributed to the district court basing its sentence on something other than his primary offense conduct, and the court of appeals from examining the nature of this error.

Child Enticement Was Mr. Peragine's Primary Offense Conduct

Law enforcement arrested Mr. Peragine as part of the "Taboo Mom" task force investigation which sought respondents to Craigslist postings "looking for someone with experience in REAL taboo to be a good teacher!" (PSR at ¶ 9.) This was the core of Mr. Peragine's offense conduct: attempting to entice a fictional child into committing a sex act. The chats between the undercover agent and Mr. Peragine made it clear that the fictional Taboo

Mom was "looking for someone to teach her daughter about sex." (*Id*. at ¶ 11.) The undercover agent represented that her daughter was nine years old. (*Id*. at ¶ 12.) Child pornography figured in Mr. Peragine's crime only as a part of the attempted enticement: he forwarded pornographic videos to explore the fictional child's interest in a sexual encounter. (PSR at ¶¶ 22.) He had no other significant connection to possession or distribution of child pornography.[4] (*See* PSR at ¶¶ 22, 36, 57.)

Section 2G2.2 Hijacked the District Court's Sentencing Analysis

Mr. Peragine's case is a shocking illustration of the mechanistic way in which Section 2G2.2 operates to disrupt the sentencing process by starting the analysis at an empirically unsupported and unduly punitive level. Sentencings in federal criminal hearings begin with the calculation of the guideline. *Kimbrough v. United States*, 552 U.S. 85, 108, 128 S. Ct. 558 (2007) ("As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the 'starting point and the initial benchmark'") (quoting *Gall v. United States*, 552 U.S. 38, 49, 128 S. Ct. 586 (2007)). But by massively inflating the

[4] The district court noted at sentencing that the number of child pornography images were a fraction of what it ordinarily sees in similar cases. (Doc. 91 at 83.)

recommended range of imprisonment at the outset of the analysis, Section 2G2.2 deprives defendants of meaningful consideration of the remaining sentencing factors under Section 3553(a).

Mr. Peragine's PSR divided his indictment into separate groups: Group One, which consisted solely of the child enticement count, and Group Two, which consisted of the distribution and possession of child pornography counts. (PSR at ¶ 42.) The former is calculated under Section 2G1.3, the latter under Section 2G2.2, and pursuant to Section § 3D1.2(d), is excluded from grouping. As described above, the child pornography guideline resulted in a significantly higher offense level, and was therefore given priority by the district court, in spite of the fact that, under any ordinary understanding, the attempted contact offense was both the core of the criminal conduct and the more serious offense.

Although the Commission typically develops guidelines utilizing an extensive and informative array of data gathered from prior sentencings in analogous cases, *see Rita,* 551 U.S. at 349, the Commission abandoned this empirical approach during the evolution of Section 2G2.2. *See United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010) (exploring history of guideline). At the behest of Congress, the Commission has amended Section 2G2.2

numerous times since 1987, with ever harsher penalties, frequently over the Commission's protest. *See id*. at 184-85 & n.7 (citing Amendments and Commission statements, including implementation of the Protect Act, the promulgation of which excluded the Commission and eschewed its empirical methodology.) The result has been an increase in the base offense from 13 to 22, and the addition of numerous enhancements that invariably apply in the mine-run case. *See United States v. Henderson*, 649 F.3d 955, 960-62 (9th Cir. 2011) (tracking evolution of each guideline change).

Congress Has Determined that Child Enticement Is More Serious than Child Pornography Possession or Distribution

Mr. Peragine's case demonstrates the extreme form that this distortion can take: his unreasonably draconian guideline actually countermanded the statutory framework established by Congress for his offenses of conviction. By operation of Section 2G2.2 and 3D1.4, the latter of which requires the sentencing judge to utilize the highest calculated range, the district court implemented a guideline that ignored Mr. Peragine's Class A felony to focus instead on two Class C felonies. The effect was to impose harsher punishment for the possession or distribution of pornography than the

commission deemed appropriate for an attempted contact offense with a nine year old.

That child enticement is a more serious offense than the possession or distribution of child pornography is arguably a matter of common sense. Child enticement, in even its least opprobrious form, is an attempt to induce sexual conduct on the part of a minor, and in its most opprobrious, a contact offense. *Compare* 18 U.S.C. § 2422(b) *with* 18 U.S.C. § 2252(a)(2) & (a)(4)(B). And this is not only intuitively the case, in the sense of an attempted contact offense compared to keeping or sending images: legally, the harm anticipated by the enticement statute is more direct than that of possession or even distribution of child pornography. *Cf. Paroline v. United States*, -- U.S. --, 134 S. Ct. 1710, 1722-28 (2014) (discussing failure of traditional but-for and proximate causation analysis in context of child pornography restitution, and relying on aggregate causation theories in support of sustaining damages awards for child pornography victims).

Congress has made this determination by way of the offenses' associated penalty provisions. Child enticement requires a ten-year mandatory minimum sentence of incarceration, and carries a maximum of life; distribution of child pornography (which is penalized more severely

than mere possession) requires only a five-year mandatory minimum, but has a statutory maximum of twenty years imprisonment. *Compare* 18 U.S.C. § 2422(b) *with* 18 U.S.C. § 2252(b)(1). Because of its higher statutory maximum, Congress has classified child enticement as a Class A felony, whereas both distribution and possession of child pornography are Class C felonies. *See* 18 U.S.C. § 3559(a)(1) & (3). The Sentencing Guidelines, however, disregard these signal differences, and by empirically unsupported increases in the form of specific offense characteristics, make the child pornography offense the primary focus.

The Abuse of Discretion Standard Generally Applicable to Guideline Calculations Prevents the Courts of Appeal from Meaningfully Reviewing Sentencing Analyses in Child Pornography Cases

Mr. Peragine's case exemplifies the typical approach of the courts of appeal in reviewing sentences imposed under the rubric of Section 2G2.2. He alleged both procedural and substantive error, but the Eleventh Circuit rejected both of these arguments. First, as to procedural error, the Court noted that the district court's guideline's calculation was not itself incorrect: the enhancements were applicable, and the arithmetic was accurate. (Appendix A at 3.) Mr. Peragine's argument that reliance on Section 2G2.2

was itself error, particularly in light of the Sentencing Commission's 2013 Report, which identified its failings, was similarly treated. *Id*. The court noted that the report did not render the non-production guideline "invalid or illegitimate" or "alter[ ] our appellate duties in reviewing a § 2G2.2-based sentence or the district court's sentencing duties or discretion in any way." *Id*. ("The sole question here is whether the district court abused its discretion when it applied the enhancements available under § 2G2.2. This Court's precedent makes clear that it did not."). And somewhat circularly, the court's only discussion of Mr. Peragine's argument that the Guideline's inappropriately utilized the pornography counts instead of the enticement counts was to note that this is how the Guidelines instructed the sentencing court to proceed. *Id*. at 4.

Built-in presumptions prevent courts of appeals from getting to the infirmities of Section 2G2.2 in procedural or substantive error review. As the Eleventh Circuit noted in its opinion below, "[a]lthough we do not formally presume that a sentence falling within the Guideline range is reasonable, we ordinarily 'expect' such a sentence to be reasonable." *Id*. at 5. (quoting *United States v. Hunt*, 526 F.3d 739, 746 (11th Cir. 2008). Such expectations are inappropriately applied to a guideline range that the

Department of Justice and the Sentencing Commission have both suggested requires revision. And with little regard given to how the guideline range is unnecessarily punitive, the court commits the weight given to this sentencing factor "to the sound discretion of the district court." *Id.* (citing *United States v. Clay*, 483 F.3d 739, 743 (11th Cir. 2007)). In the absence of any administrative or legislative action, the continued imposition of unnecessarily harsh sentences calls for an exercise of this Court's supervisory power.

Other courts of appeal struggle with the same deferential review standard and its application to guideline ranges that are nonetheless shockingly high. The logical result of such deference means that at present, it is simply a matter of luck as to whether a child pornography defendant encounters a district court judge that is sympathetic to the policies purportedly advanced by an empirically unsupported guideline, without regard to the position its court of appeals takes on the guideline's validity. *Compare United States v. Grober*, 624 F.3d 592, 595, 607 (3d Cir. 2010) (district court did not err in sentencing a defendant at the mandatory minimum, finding that § 2G2.2 "is not worthy of the weight afforded to other Guidelines" because, in part, its mechanical application caused an

"outrageously high" sentence) *with United States v. Stone*, 575 F.3d 83, 97 (1st Cir. 2009) (affirming sentence near statutory maximum, but criticizing district court for failing to use its *Kimbrough* discretion to disregard § 2G2.2, while emphasizing that "we wish to express our view that the sentencing guidelines at issue are in our judgment harsher than necessary").

It is necessary for this Court to provide instruction on review to the courts of appeal for a guideline that regularly generates unreasonably punitive sentences. *Cf. Pepper v. United States*, 562 U.S. 476, 508, 131 S. Ct. 1229 (2011) ("the laws permits the court to disregard the Guidelines only where it is 'reasonable' for a court to do so") (Breyer, J., concurring). The unfairness of the guideline is exacerbated by deferential review of sentencing guidelines issues, preserving irreconcilable disparities in the district courts.

As this Court noted in *Molina-Martinez*, "[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar. The Guidelines inform and instruct the district court's determination of an appropriate sentence. In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence."

Molina-Martinez v. United States, -- U.S. --, 136 S. Ct. 1338, 1346 (2016). Here, where the guideline range was demonstrably elevated beyond that applicable to the primary offense conduct, it is clear that the resulting sentence was affected. This Court should grant the petition to remedy the injustice in Mr. Peragine's case, and to provide guidance to the courts of appeal that struggle with a standard that prevents adequate review of Section 2G2.2's pernicious effects.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

This 3rd day of October, 2018.

Respectfully Submitted,

/s/ Richard B. Holcomb
RICHARD B. HOLCOMB
Georgia Bar No. 360333
Counsel of record
Federal Defender Program, Inc.
101 Marietta St., NW, Ste. 1500
Atlanta, Georgia 30303
404-688-7530
richard_holcomb@fd.org