NO:

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW VAUGHN HAWKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Margaret Y. Foldes
Assistant Federal Public Defender
Counsel for Petitioner
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Eleventh Circuit Misapplied Fed. R. Crim. P. 52(b) and *United States v. Olano*, 507 U.S. 725 (1993) by Failing to Grant Relief for Plain Errors that Affected Petitioner's Substantial Rights.

II. Whether the Eleventh Circuit Misapplied *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005) and *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007), by Finding Petitioner's Sentence to Be Substantively Reasonable Notwithstanding That Petitioner's Mental Disabilities and That Unwarranted Sentencing Disparities Compelled a Lower Sentence.

A. Whether this Court Should Establish That Mental Retardation is an Organic Disability That Requires Special Heightened Consideration by the District Court Under 18 U.S.C. § 3553(a)(1).

B. Whether this Court Should Establish That Unwarranted Sentencing Disparities Require Special Heightened Consideration by the District Court Under 18 U.S.C. § 3553(a)(6).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

IN THE
SUPREME COURT OF THE UNITED STATES

No:

MATTHEW VAUGHN HAWKS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Matthew Vaughn Hawks respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-12528 on April 20, 2018, and reaffirmed on rehearing on July 6, 2018, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, and the order on rehearing which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1, A-2, respectively).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on April 20, 2018, and rehearing of the decision was denied on July 6, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following provisions:

18 U.S.C. § 3553(a)

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed--
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established . . . .
(5) any pertinent policy statement-- **(A)** issued by the Sentencing Commission . . . .
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

* * *

Fed. R. Crim. P. 32(i)(3)(B)

At sentencing, the court . . . . (B) must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that the ruling is unnecessary . . . .

Fed. R. Crim. P. 52(b).

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

This case involves a mentally retarded male petitioner who has a chronological age of 30, but a mental age of between six and nine years of age due to his mental retardation and Asperger Syndrome. Over the internet, petitioner engaged in "sexting" with five girls, all age 13, over the course of three months. During the sexting conversations, petitioner instructed the girls to send him sexually explicit pictures of themselves. Generally, the girls complied. All total, petitioner collected 14 pictures. Petitioner had no actual or anticipated physical conduct with the girls, who were all living in different states a few thousand miles away. For his actions, petitioner was convicted of three counts of production of child pornography, and one count of possession, and he received 30 years imprisonment. As explained more fully below, petitioner believes that his sentence of 30 years is procedurally and substantively unreasonable.

Matthew Hawks ("Matthew") is a 30-year-old United States citizen who at the age of 4 exhibited social and developmental disabilities. Throughout his life, Matthew has been evaluated and worked with psychologists and special needs professionals. He has been diagnosed with mental retardation and autism. Dr. James Pollack of RUSH University Medical Center stated, "because Matthew's issues do not emanate from pure emotional or behavioral disturbances but rather from misunderstanding of social information, medication will not be particularly effective for this problem." *See United States v. Hawks*, 731 Fed. Appx. 868, 871 (11th Cir. 2018). Instead of medication, the doctor recommended "an intensive

training program in social skills such that he [Matthew] [could] learn by rote how to perform in [v]arious social situations." *Id.*

When Matthew turned 18, he was able to participate in a special needs transitional program which gave him the support he needed. With that support, he was able to hold down a part-time job (with the assistance of a job coach) and he volunteered at another special needs agency called Special Camps. The special needs professionals that he worked with rated him as a kind and compassionate person who needed supervision and guidance to succeed with his disabilities. In letters to the sentencing court, these professionals stated as follows:

> It is with great pain that I write this letter of concern for Matt Hawks. I have known Matt since June, 2007 when he first became one of my campers with autism and intellectual disabilities at Special Camps. . . . He had a real passion for helping others and making others happy. . . . Asperger's autism is a tough disability for individuals and their families. . . . Those with autism struggle to build and keep friendships. . . . He volunteered at the Kane County Cougars baseball team. . . . In 2012, Matt was elevated to Assistant Staff at Special Camps. With volunteers aware of Matt's limits, ... [h]e washed tables, helped set up crafts, did dishes, and participated in camp activities feeling good about himself. . . . He desperately wanted to get a paid position somewhere, but couldn't find work, so he volunteered where he could, and loved helping others. . . . Matt was sad he had to move to Florida with his father and Grandparents, but understood their desire for retirement. He had finally made friends, and volunteer opportunities that made him feel some success in Illinois. . . . I am in agreement that Matt needs to learn right from wrong with his chosen behaviors, but I also understand that much of what might be going on may stem from a lack of opportunities, and support with his Asperger's. . . . His great desire to be a friend to others, have a job of importance (even if unpaid), and to have friends. . . . In my opinion, jail is not going to benefit him, or keep society any safer. . . . Matt needs more intensive support and supervision like a group home setting for those with intellectual disabilities and autism.

(United States v. Matthew Hawks, D.Ct. No. 16-cr-14059 (DE 55:9-11; Letter from

Colleen McDonald, President of Special Camps)). (*See* App. 4).

> My name is Joanne E. Jung. I taught school for 31 years in New Jersey and in Florida, and also worked as a Juvenile Probation Officer in Ft. Pierce, FL, for 2 years. . . . In my last office location, in Vero Beach, I had the pleasure of working with the above referenced young man and his family, for about two years. . . . . In our many interactions, I have known Matthew to be very family-oriented and faith-centered. He never once demonstrated with me or in his supervised, job coached employment experience, anything less than respect and motivation to be successful. Unfortunately, due to his disabilities, he often acted impulsively, with what appeared to be no clear understanding of any ramifications of his behaviors. As with many people with severe disabilities, he was usually isolated and without significant peer group friendships. . . . While I fully comprehend the need for punishment within the legal system, I feel that prolonged incarceration without any rehabilitation will prove to be futile for Matthew, and in fact could serve to exacerbate his symptoms. . . . Matthew will always require supervision. It is my professional opinion that he would optimally benefit from consistent mental health management, with regular therapy, private and group, where he could learn appropriate coping skills, appropriate interactions with others through role-playing, and where he can develop to the best of his ability some decision-making skills.

(United States v. Hawks, D.Ct. No. 16-cr-14059 (DE 55:14-15, Letter from Joanne E. Jung, former teacher and Juvenile Probation Officer)). (*See* App. 4).

> I am writing this letter on behalf of Matthew Hawks. I started working with Matt in 2004, when he and his family lived in Illinois. At that time, Matt was found eligible for the states Home-Base Services Program. . . . With this funding, Matt was entitled to an agency that provided Service Facilitation and an agency that advocated for him. . . . . Matt is diagnosed with Mental Retardation and Asperger's, which is on the autism spectrum. Matt has a low IQ, but attempts to compensate it with friendliness. . . . At first, Matt appears to have the ability to speak intellectually. The longer you talk to Matt, the more you will notice he does not have the intellect of a person his age. . . . He was able to get a job with the Kane County Cougars. They are a minor league baseball team. He did very well there but not without a job coach checking on him frequently. . . . During my time working as an advocate for people with disabilities and their families, I realized there is a problem with the system. When a family decides to move to another state, their family members' services do not go with them.

> Once Matt moved to Florida, all his funding in Illinois ended. Matt's father and grandmother worked on getting Matt services once their move was complete. . . . Vocational Rehab was able to get a job coach for Matt. However, the job coach was not providing the support to Matt that was needed. Matt's dad and grandmother were informed a group Home was available for Matt. They were very excited. When it came down to getting the specific details worked out, APD backed down. They informed Matt's family there was never a home for Matt. . . . He didn't understand that he was losing all the support he had for all these years. The rest of us were terrified of the loss. Matt looked at this move as a new start. He felt he was moving to a new place where no one knew of him and his disability. He would make statements such as "I don't want anyone to know I have a disability" or "I want people to think I am normal." . . . What Matt does have is something that can't be seen. Matt has an inability to process situations and information like other people. . . . I have known Matt for more than 10 years. He would never hurt another person. He is the first to volunteer to help someone. Matt would take the family snow blower out when there was a snow storm and snowblow his neighbors' driveways. Matt was very proud of the help he gave to other people. Prison is not the answer for Matt. Matt needs assistance from people who understand disabilities and can set goals with him like he had in Illinois to continue to learn.

(United States v. Hawks, D.Ct. No. 16-cr-14059 (DE 55:17-19, Letter from Michelle Lukomski, RN, from Home-Based Services Program)). (*See* App. 4).

In March 2013, Matthew moved to Florida with his family. Because of that move, Matthew lost the support of professionals who he depended upon as well as the network of friends he had established at Special Camps. He began to have trouble finding meaningful work or volunteer opportunities, and he began to have trouble with the law. During that time, Dr. Tucker from Shands Vista Hospital in Gainesville, Florida gave Matthew outpatient counseling services. When Dr. Tucker terminated those services, the family disputed the termination. In response, Dr. Tucker had a progress note prepared in Matthew's chart stating that he was a "menace to society" and possibly "an anti-social sexual predator." Hawks, 731 Fed.

Appx. at 871. These statements were placed in the chart as part of a response to the dispute with the family, and were not based on any testing or formal evaluation. In fact, it was never established that Dr. Tucker was qualified to make any opinion relating to forensic issues or sexual crimes.

Prior to sentencing, the defense provided to the court letters written by special needs and health care professionals who had worked with Matthew over the years in Illinois. These letters were contained in one composite exhibit. See App. 4. The first seven letters in that exhibit were from family, friends, and pastors. The last six letters interspersed the opinions from the special needs and health care professionals with additional letters from friends. Although the court acknowledged seeing letters from "family," it never discussed, referenced or mentioned in any way, the letters from the health care or special needs professionals. The substance of some of these letters is quoted *supra,* and the letters are attached in full to this petition. (*See* Appendix, A-4).

At some point after moving to Florida, Matthew turned to the internet for social contact. Due to his impairments, he was not able to hold meaningful conversations with people his own age. He began to correspond with younger people, and eventually, his chats degenerated into the sexting activities which form the basis for this case. Although Matthew corresponded with minors over the internet, he never made plans to meet them.

As a result of the sexting activities, Matthew was charged and pled guilty to three counts of producing visual depictions of minors engaging in sexually explicit

conduct in violation of 18 U.S.C. § 2251(a) and one count of possessing child pornography. Each production count had a 15-year mandatory minimum and a 30-year maximum. The guideline range was 1,200 months (360 months for counts 1-3 = 1080; 120 months for count 6; total = 1200 months). During sentencing, the court stated its belief that Dr. Pollack's diagnosis and Dr. Tucker's progress note established that Matthew was a dangerous individual who had no hope for improvement through treatment. *Hawks*, 731 Fed. Appx. at 871. Accordingly, the court stated that the only relevant sentencing factor was protection of the public through a lengthy term of incarceration. *Id.* Thus, the Court sentenced Mr. Hawks based on a misapprehension of the actual record evidence concerning Matthew's mental disabilities and capabilities. Due to the court's erroneous understanding of Dr. Pollock's opinion, the court was unaware of Dr. Pollack's true diagnosis (that Matthew was treatable through intensive therapy). Additionally, the sentencing court failed to discuss, reference, or mention the letters from the special needs professionals that clearly stated that Matthew was treatable and not a danger. The court further failed to consider that Matthew had actually succeeded with the proper therapy and assistance. Based on this erroneous view of the record, and in spite of Matthew's documented diminished capacity and lack of physical contact with any minor, the court sentenced him to 30 years of imprisonment, the statutory maximum for each count, which was run concurrent. *Hawks*, 731 Fed. Appx. at 870.

Matthew appealed, contesting the court's misunderstanding of Dr. Pollack's diagnosis and the court's reliance on Dr. Tucker's progress note. Matthew also argued that the court below gave disproportionate weight to Dr. Tucker's progress note while failing to be aware of or consider the opposing views of special needs and health care professionals who had worked with him. Matthew argued that the court's erroneous view of the evidence led it to improperly focus on the protection of the public as the only sentencing factor worthy of consideration.

In light of these problems, Matthew argued that his sentence was procedurally and substantively unreasonable. The Eleventh Circuit affirmed his sentence. Hawks, 731 Fed. Appx. at 873. It found there was clear error with respect to Dr. Pollack's diagnosis, but that the error failed to prejudice his substantial rights. Id. at 871. The panel opinion acknowledged that the sentencing court read Dr. Pollack's opinion to mean that Matthew was untreatable. ("Hawks is correct that the district court's conclusion was erroneous and that the error is plain."). Id. However, the court refused to correct the error because it found that "Hawks has not shown the district court's erroneous understanding of Dr. Pollack's report affected the outcome of the sentencing." Id.

The panel opinion also found that there was no plain error in considering Dr. Tucker's progress note. Id. at 871. The panel also speculated that the sentencing court had considered the opinions of other special needs professionals, even though it had failed to discuss any of those opinions. Thus, the court concluded there was no procedural unreasonableness. Id.

The Eleventh Circuit also found that Mr. Hawks' sentence was substantively reasonable even in light of Mr. Hawks' mental deficiencies and the disparities that his sentence created with respect to other similar, and even more culpable defendants. *Hawks*, 731 Fed. Appx. at 872. The court further found that the ultimate sentence of 360 months was a downward variance of 840 months, down from 1,200 months. Id. at 873. By using those guideline numbers, the Eleventh Circuit -- without addressing specifically any case that Hawks had cited in his appeal -- stated generally that the cases establishing lower sentences of other similar and more culpable defendants did not leave the court, "with a "firm conviction" that the district court clearly erred in imposing his below-guideline sentence." *Hawks*, 731 Fed. Appx. at 873.

Mr. Hawks filed a Petition for Rehearing and Rehearing *En Banc* which was summarily denied on July 6, 2018.

REASON FOR GRANTING THE WRIT

I. The Eleventh Circuit Misapplied Fed. R. Crim. P. 52(b) and *United States v. Olano*, 507 U.S. 725 (1993) by Failing to Grant Relief for Plain Errors that Affected Petitioner's Substantial Rights.

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In *United States v. Olano*, 507 U.S. 725 (1993), this Court held that, in order to secure relief under plain-error review pursuant to

Rule 52(b), a defendant must show that there was a clear or obvious error, and that the error affected the defendant's substantial rights, which usually means that the defendant must show a reasonable probability that the outcome of the proceedings would have been different without the error. *Olano*, 507 U.S. at 734. This Court has confirmed that in some instances, an error that is central to the sentencing decision can, and "most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

The Eleventh Circuit reviewed three errors which it determined were subject to the plain error standard in Mr. Hawks' case. It determined that two of these errors were not plain or obvious enough, and one error, while plain, did not affect Mr. Hawks' substantial rights. Accordingly, the Eleventh Circuit found that none of these errors warranted relief due to the plain error standard. However, the Eleventh Circuit's analysis was a misapplication of Rule 52(b), *Olano*, and *Molina-Martinez*.

The first error was Dr. Tucker's statement. As noted above, Dr. Tucker made a derogatory statement about Matthew while in a dispute with his family. This statement was not stated directly to the family, but written into a progress note in Matthew's chart at the doctor's office. This statement was not based on any test, and it was not established that Dr. Tucker had the expertise to make such a statement.

The second error was the district court's failure to be aware of or to consider

the several letters submitted by medical and special needs professionals who stated that Mr. Hawks, while having serious mental deficiencies, was not a danger to society, and was capable of contributing positively to the community with intensive therapy. As noted above, the court failed to make even passing reference to these opinions and appeared oblivious to their existence.

The court's misunderstanding of the material evidence through these previous errors was evident in the court's third error, which was its misconstruction of Dr. Pollack's medical opinion concerning petitioner. In fact, the sentencing court read Dr. Pollack's opinion exactly opposite to how the doctor intended. The court stated its belief that Dr. Pollack established Matthew as untreatable. To the contrary, Dr. Pollack's statement established that Matthew was treatable with extensive therapy addressing social situations. Matthew's treatable condition was consistent with the opinions and experiences of the other medical and special needs professionals who had submitted opinions in the record.

Taken together, the district court's errors in analyzing Dr. Tucker's and Dr. Pollack's statements, and in failing to consider the opinions of other medical and special needs professionals that were available in the record at the sentencing, constituted plain error in the court's procedural process based on flaws in the district court's decision making process, and the failure of the district court to consider available evidence at the sentencing. *Setser v. United States*, 132 S. Ct. 1463, 1472-73 (2012) (upholding sentence as reasonable when defendant "identifie[d] no flaw in the District Court's decision making process, nor anything available at the

time of sentencing that the District Court failed to consider."). Furthermore, the district court made clear that its faulty analysis of Dr. Tucker's and Dr. Pollack's statements were central to its sentencing determination in petitioner's case. In spite of the materiality of these issues, the court failed to reconcile Dr. Tucker's progress note with the opinions of Dr. Pollack and all the other medical and special needs health care professionals as it was required to do, and it failed to explain why it relied upon Dr. Tucker's progress note to the exclusion of all the other opinions. Fed. R. Crim. P. 32(i)(3)(B): "At sentencing, the court . . . . (B) must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that the ruling is unnecessary . . . ." The deafening silence of the court with respect to these other opinions, and the court's failure to make even passing reference to their existence, should have made it evident that the court had failed to consider these several other opinions, and consequently, had failed to understand the true nature of Mr. Hawks' disabilities, i.e., that he was treatable and not a danger to the community.

The sentencing court's errors were not only clear and obvious, but they were also central to the sentencing process, and thus, affected petitioner's substantial rights. The Eleventh Circuit's refusal to correct these errors by engaging in unfounded speculation about the court's review of the evidentiary record, and by declaring the court's clear misunderstanding of Dr. Pollack's opinion to be inconsequential, was diametrically opposed to this Court's standards for finding plainness, and for assessing whether a petitioner's substantial rights have been

violated. *See Molina-Martinez v. United States*, 136 S.Ct.1338 (2016). Therefore this Court should grant the writ to clarify that speculative and cursory review of the sentencing court's decision-making process cannot provide a basis for denying relief under the plain error standard. The courts plain errors resulted in a procedurally and substantively unreasonable sentence. Accordingly, this Court should grant the writ and reverse petitioner's sentence.

II. The Eleventh Circuit Misapplied *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005) and *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007), by Finding Petitioner's Sentence to Be Substantively Reasonable Notwithstanding That Petitioner's Mental Disabilities and That Unwarranted Sentencing Disparities Compelled a Lower Sentence.

The circuits are confused regarding the standards for evaluating substantive reasonableness challenges on appeal. This Court set forth the general directive in *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586 (2007): "[T]he appellate court should [] consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. . . ." *Gall*, 552 U.S. at 51, 128 S. Ct. at 597. The practical application of *Gall*'s directive, however, has been a source of confusion among the circuits. *See United States v. Feemster*, 572 F.3d 455, 462 n.4 (8th Cir. 2009) (expressing confusion of how to implement substantive reasonableness review

under *Gall*); *United States v. Tomko*, 562 F.3d 558, 591 (3d Cir. 2009) (same); *United States v. Irey*, 612 F.3d 1160, 1231 n. 14 (Tjoflat, J., concurring and dissenting) (11th Cir. 2010) (same). In light of the confusion that has developed under *Gall*, petitioner requests this Court to grant the writ to clarify the standard with respect to two recurring and important factors that were raised below and that arise in federal sentencings: mental disabilities that are recognized as reducing a defendant's criminal culpability as characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1); and (2) the prevention of unwarranted disparities prohibited under 18 U.S.C. § 3553(a)(6).

A. This Court Should Establish That Mental Retardation is an Organic Disability That Requires Special Heightened Consideration by the District Court Under 18 U.S.C. § 3553(a)(1).

The Court should grant the writ to make clear that under *Gall*, when a petitioner raises a condition of mental retardation as a mitigating factor, such condition is a special mental disability that is recognized as reducing criminal culpability, and therefore, it requires heightened attention and weight in a federal sentencing proceeding for the achievement of substantive reasonableness. In the instant case, the petitioner argued that he was mentally retarded (I.Q. range of 47-64) and had Asperger's Syndrome. The government did not dispute that petitioner had profound mental disabilities dating back to early in his childhood. As explained below, petitioner's mental disabilities have led to his reduced

functioning, reasoning, and navigating social situations without assistance.

This Court has recognized the reduced criminal culpability of mentally retarded individuals, comparing such individuals to children and youth who are also recognized as lacking foresight and mature reasoning abilities. In recognition of this lesser culpability, this Court has carved out special rules when imposing judgment on mentally retarded and youthful offenders. This Court has stated:

> [C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins v. Virginia, 122 S. Ct. 2242, 2250-51 (2002).

In light of these realities, this Court held in *Atkins* that a mentally retarded individual could not be executed for a capital crime because the retarded individual's lesser culpability rendered such a punishment cruel and unusual under the Eighth Amendment. *Accord Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986 (2014) (Florida rule limiting capital defendant's ability to show intellectual disability, i.e., mental retardation, violated Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012) (youth under 18 who committed homicide could not be sentenced to

life without parole pursuant to the Eighth Amendment due to recognized lesser culpability); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010) (youth under 18 who committed crimes that did not involve homicide could not be sentenced to life without parole pursuant to Eighth Amendment due to recognized lesser culpability); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005) (individuals who were under the age of 18 at time they committed a capital crime could not be executed pursuant to the Eighth Amendment due to recognized lesser culpability); *Cf.*, 42 U.S.C. § 12101, et. seq., Americans With Disabilities Act ("ADA"), (evidencing lesser cognitive abilities of mentally retarded individuals (currently referred to as intellectually disabled) by prohibiting discrimination, and by requiring reasonable accommodations and accessibility to public life by the federal government).

Although this case does not involve the punishment of execution or life without parole, the caselaw set forth above, and even the ADA establish the growing recognition by the federal government of the reduced capacity and culpability of mentally retarded and intellectually disabled individuals, and their need for protection and assistance rather than extreme punishment. Such concerns should have been recognized by the federal sentencing court in petitioner's case. Accordingly, petitioner's documented mental retardation should have been accorded more weight in the sentencing calculus. At a minimum, it should have resulted in a sentence that was less than the statutory maximum of 360 months for the production offenses in counts I-III of petitioner's indictment. Although the Eleventh Circuit tried to soften the error by referencing an initial guideline range of

1,200 months, and the sentencing court's downward variance of 840 months, reference to those extreme guidelines is a red herring. A sentence of 1,200 months or 840 months amounts to a life sentence without parole that would have transgressed Eighth Amendment standards similar to those announced in *Graham,* which prohibited such sentences for non-homicide offenses committed by youth.

The facts in this case show that petitioner suffered from mental retardation with IQ scores ranging from 47-64. These scores indicated that petitioner functioned at the age equivalency of children ranging between six to nine years old, and that he was in the bottom two percent of the American population. The opinions of doctors and special needs professionals that were available to the sentencing court explained in detail the resulting barriers of petitioner, confirming his limited cognitive and reasoning abilities. They prescribed medication with intensive therapy to address social skills and functioning. Given the lesser culpability inherent in petitioner's personal characteristics, a statutory maximum sentence for each offense was not substantively reasonable under *Gall.* This type of sentence reflected a *lack of consideration* given to petitioner's mental retardation and Asperger's condition. Given the confusion within the circuits regarding how to evaluate substantive reasonableness, this Court should grant the writ so it can clarify that 18 U.S.C. § 3553(a)(1) requires special and heightened attention to organic mental disabilities, like mental retardation, that reduce a defendant's criminal culpability. Since the Eleventh Circuit failed to require a proper weight for this factor in conjunction with its substantive reasonableness review, this Court should reverse petitioner's

sentence.

B. This Court Should Establish That Unwarranted Sentencing Disparities Require Special Heightened Consideration by the District Court Under 18 U.S.C. § 3553(a)(6).

Another factor that warrants special weight when raised by the defense is the factor of unwarranted sentencing disparities prohibited by 18 U.S.C. §3553(a)(6). This factor requires special weight because it implicates the underlying reason for the guidelines which was to achieve "'uniformity in sentencing . . . imposed by different federal courts for similar criminal conduct,' as well as 'proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.'" *Rita v. United States*, 551 U.S. 338, 349, 127 S.Ct. 2456 (2007). Ignoring such concerns leads to the type of unfairness and loss of confidence that served as the engine for the enactment of the guidelines. As a jurist in the Tenth Circuit stated:

> Sentencing judges are required to consider the factors set forth in 18 U.S.C. §3553(a). . . . Two of the factors, however, have real teeth, and should be a matter of concern to appellate courts that wish to effectuate congressional intent that we be a nation of equal justice under law, in which the length of time that a defendant is deprived of liberty does not depend primarily and significantly on who the sentencing judge happens to be. . . . [One such factor is] 'the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.'

United States v. Wittig, 528 F.3d 1280, 1289 (10th Cir. 2008) (Hartz, J., concurring).

In contrast is the Eleventh Circuit's approach to §3553(a)(6) disparities which

permits cursory and superficial review. As demonstrated in the instant case, such lax review allowed the court to affirm petitioner's sentence without addressing any specific case raised by the defendant, even though it left in place indefensible disparities between defendants who had committed the same or similar acts. The most glaring unwarranted disparity is between petitioner's case and the case of *United States v. Anthony Weiner*, 17-307-Cr-Cote (S.D. N.Y. 2017), where a highly intelligent and accomplished Congressman who sexted and obtained sexually explicit photos from a 15-year-old girl only received 21 months imprisonment, even though Congressman Weiner's conduct in that case was the same conduct committed by Matthew Hawks in this case. The *Weiner* case is interesting because it is acknowledged by the parties that the government gave the Congressman a "break" by charging him under 18 U.S.C. § 1470 for sending a minor obscene material, specifically so Mr. Weiner could avoid the 15-year mandatory minimum sentence under the § 2251(a) production statute. And further, even though the cross-references in the guidelines raised Mr. Weiner's guidelines to a range of 135-168 months, the government recommended as "reasonable and appropriate" a sentencing range of 21-27 months. The court acceded to this recommendation, and ultimately gave him a low-end 21-month sentence. Mr. Weiner's main arguments for such preferential treatment were that he had a sexual addiction, that he had been a compassionate Congressman, and that he had numerous letters from powerful people, including CEO's of companies and former Senators attesting to his good character. Thus Congressman Weiner was able to obtain a sentence of 21

months in a different jurisdiction, a sentence that is approximately six percent of petitioner's 360-month sentence imposed in the Southern District of Florida.

Other troubling disparities involve mentally impaired defendants in other jurisdictions who received lesser sentences for similar, and even more egregious conduct. In *United States v. Huntsman*, 2017 WL 5643122 (10th Cir. 2017), a father with Asperger's Syndrome received 22.5 years for producing and distributing sexually explicit photos of his daughter. Likewise in *Baker v. United States*, 2006 WL 3827498 (W.D. Va. 2006), a mildly retarded father received 17.5 years for producing sexually explicit photographs of his daughter. In *United States v. D.W.*, 198 F.Supp.3d 18 (E.D. N.Y. 2016), a mildly retarded defendant who photographed his sexual assault of a 14-year-old boy was given the 15-year mandatory minimum sentence, even though the defendant had a formal diagnosis of pedophilia and sexual addiction. When compared with these cases involving defendants with mental disabilities, it is clear to see that the sentences hover around 20 years (rather than the 30 years Mr. Hawks received), even though the defendants had physical or sexual contact with the minor victims.

The Sentencing Commission has recognized these trends which make Mr. Hawks' 30-year sentence an anomaly. According to the Sentencing Commission, the heartland under the production statute, 18 U.S.C. § 2251(a) was a defendant who was physically present with the minor and who was committing and/or documenting the sexual abuse of the minor. *See* United States Sentencing Commission, *2012 Report to Congress: Federal Child Pornography Offenses*

(December 2012) at 330. The Sentencing Commission also recognized, however, that the type of production case that Mr. Hawks committed of sexting, constituted a subset of a less serious production offense because it was committed remotely through a webcam, and there was no direct physical contact with the minor. *Id.* The Commission agreed that this minority of remote cases was outside the heartland, and was a less dangerous, and required a lesser sentence than the heartland cases. *Id.* The average sentence for all types of production offenses was 274 months (approximately 23 years). Id. at 330.

Moreover, the disparities continue within the Eleventh Circuit. For example, in *United States v. McDade*, 399 Fed. Appx. 520 (11th Cir. 2010) (unpublished), a mildly retarded individual was prosecuted for taking a video of a gang rape of a 14-year-old girl. The defendant, McDade, was in the room while the rape was occurring, and rather than assisting the girl, he took footage of the rape. In determining the sentence, the court took into account that his lower cognitive functioning made him less culpable than other defendants. Accordingly, even though McDade was in the room while a horrific sexual abuse of a minor was in progress, he was only sentenced to 20 years. Likewise, a comparison of production/sexting crimes of individuals who are not retarded or autistic reveals the same trend. Within this circuit in *United States v. Kohler*, 10-14077-Cr-Martinez (S.D. Fla. 2010) a defendant who had no issues with retardation or autism received a 20-year sentence for posing as a teenage boy and directing girls to send him sexually explicit photos of themselves.

In this case, petitioner sexted with teen-aged girls, but he never met with them in person and he never had plans to do so. Thus, he committed the less serious version of the production crime. Unlike Congressman Weiner, *supra*, Matthew does not have a sex addiction. Instead, he labors under a diminished capacity due to retardation and autism which places him at an age equivalency that is lower than the age of the minor victims. In comparison to the other cases referenced above, Matthew is at the lower end of culpability due to his diminished capacity and the lower level of harm and dangerousness given he never had sexual contact with a minor and never had plans to meet with any of the girls that he sexted with. Inexplicably Matthew received the highest sentence, exceeding others by about 10 years, and exceeding Anthony Weiner's sentence by approximately 28 years.

Because the Eleventh Circuit's lax review encourages unwarranted disparities to fester, petitioner's sentence is out of sync with other similarly situated, and even more culpable defendants which makes his sentence substantively unreasonable. The situation persists because the circuits are divided on how to evaluate substantive reasonableness on review. This Court should grant the writ and reverse petitioner's sentence so it can establish that 18 U.S.C. § 3553(a)(6) "has teeth," and requires closer attention than the Eleventh Circuit's current standard of perfunctory review.

CONCLUSION

Based upon the foregoing, petitioner's sentence was procedurally and substantively unreasonable, and should, therefore be reversed. Accordingly, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: _____
Margaret Y. Foldes
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
October 4, 2018