No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MYRON GERALD . STEVENS, 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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Myron Stevens was sentenced to life imprisonment for his first conviction after entering a blind plea to an indictment charging interstate transportation of a minor with intent to engage in criminal sexual activity and receipt, possession, production and distribution of child pornography. The questions presented are:

1. Did the trial court impose a procedurally unreasonable sentence of life imprisonment upon conviction of a first offense, where it applied an incorrect legal standard which required "significant factors" to deny Stevens' request for a downward variance from the advisory guidelines, and the court failed to recognize it's discretion to vary from the guidelines based upon a disagreement with the sentencing guidelines?

2. Did the trial court unreasonably impose a life sentence where it unreasonably balanced the sentencing factors by giving undue weight to the recommended sentence and too little weight to circumstances of the offense, proportionality, and mitigation factors?

INTERESTED PARTIES

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

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PETITION FOR A WRIT OF CERTIORARI

Myron Stevens respectfully petitions this Court for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Eleventh Circuit affirming a life without parole sentence upon Myron Stevens' first conviction where a life was not taken and force was not involved, where the lower court failed to recognize its authority to disagree with the guidelines, and used the wrong standard to weigh and evaluate sentencing factors which in turn affected its ability to consider or give effect to mitigating factors separating Stevens from the "worst of the worst" of this type of offense.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit was issued on July 17, 2018. It was not selected for publication it can be found at 731 Fed. Appx. 943 (Mem). The opinion is included in the Appendix at Appendix A. There was no application for rehearing. The unpublished and unreported ruling of the district court during the sentencing proceeding is included in the Appendix at Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was issued on July 17, 2018. That judgment followed a direct appeal from the judgment and sentence in a criminal case. On October 10, 2018, Justice Thomas extended to and including November 14, 2018, the time for filing this petition for writ of certiorari. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3553 provides in pertinent part:

(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 for--
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines
(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. 1

(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.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) 2 Sentencing.--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible

ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;
(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and
(III) should result in a sentence different from that described; or
(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines nor policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

STATEMENT OF THE CASE

Petitioner Myron G. Stevens appeals his sentence of life imprisonment without parole on the ground that it is both procedurally and substantively unreasonable.

A. Myron Stevens' Background, Offense and Conviction

1. Stevens' Background

Stevens is one of five brothers raised in an intact, supportive family in St. Augustine, FL. Sealed Doc. 46 at 2-3[1]. The family moved back and forth between Florida and Alabama, where his mother's family lived, during Stevens' childhood. Id. In 1992, Stevens joined the U.S. Marine Corps. While completing an obstacle course during basic training, he suffered a back injury that ultimately resulted in an honorable medical discharge at the rank of Lance Corporal. Id. at 5. After leaving the military, Stevens worked for Publix grocery stores, managed a couple of gas stations, and delivered furniture for a furniture store until his older brother, Kip, suggested he work with him in the marine industry. Id. at 5-6. Stevens started out working as a deckhand but, after years of training and study, was promoted to towboat pilot, which was his occupation at the time of his arrest. Id. at 6. Although he kept an apartment in Mobile, AL, he was out on his towing company's boat in Tuscaloosa, AL, for several weeks at a time. Id. at7.

In 2012, Stevens' brother Kip died unexpectedly. Sealed Doc. 46 at 7. At Kip's funeral, Stevens re-connected with CK, who is Stevens' mother's goddaughter. Id. While not technically family, Stevens frequently saw CK at family gatherings when they were growing up. Id. Although Stevens had not seen much of CK as an adult, when she learned that he frequently drove through her town, Thomasville, AL, on his way to work in Tuscaloosa, CK invited Stevens to visit her family there. Id. at 7. CK's family consisted of her 12-year-old son, SK, her husband, who was SK's stepfather,

[1] Citations in this petition are to document numbers on the district court's electronic docket in the CM/ECF system.

and a pregnant relative who lived with them on and off. Id. at 7-8. Stevens accepted CK's invitation, and, when his apartment lease expired in 2013, he moved in with the family in Thomasville. Id. In the home, Stevens shared both a bedroom and a bed with SK, which CK and her husband "did not seem to view . . . as strange." Id.

Stevens realized he was sexually attracted to boys when he was 13 or 14 years old. Id. at 4. Because he lived in a conservative rural area, Stevens did not feel he could reveal the fact of his homosexuality to his deeply religious family, most of whom had disowned a male cousin after he came out as gay. Sealed Doc. 46 at 4; Sealed Docs. 36-3, 36-5. As Stevens aged, he continued to be attracted to teenaged boys – boys around SK's age – which both disgusted and deeply embarrassed him. Id. at 4. Knowing that his sexual interests were wrong, Stevens began to view, and became addicted to, child pornography. Id. at 8. He believed, wrongly, that it would keep him from acting on his inappropriate sexual impulses. Id.

2. Offense Conduct

In March 2014, an agent with the Alabama Law Enforcement Agency ("ALEA"), who was engaged in an undercover investigation, identified a specific internet protocol ("IP") address that was sharing files containing suspected child pornography. Doc. 60 at 20-21. ALEA agents subsequently discovered that the IP address was assigned to an account belonging to Stevens at an address in Thomasville, AL, and they obtained a search warrant for the residence. Doc. 60 at 21. They seized a laptop computer, a tablet, a cell phone, two hard drives, an SD memory card, a thumb drive, and other loose media. Doc. 60 at 22. During a forensic preview

conducted on site, the agents found images of child pornography including a self-produced video of Stevens performing oral sex on the male minor identified as SK. Doc. 60 at 22. The agents obtained a warrant for Stevens' arrest based on this forensic preview. Doc. 60 at 22.

No one was home when the warrant was executed, but agents learned that some

of the home's occupants, including Stevens, were *en route* from a trip to Florida. Doc. 60 at 22. A state trooper arrested Stevens at a rest stop along their route. Doc. 60 at 22.

On the day of his arrest, Stevens consented to an interview with two ALEA agents and to a search of his cell phone and tablet computer that were in his possession. Doc. 60 at 23. The interview was video-recorded. Doc. 60 at 23. During the interview, Stevens admitted that he had been viewing and downloading child pornography on his personal computer for many years and was addicted to child pornography. Doc. 60 at 23. He admitted an interest in children between the ages of 12 and 16 and admitted sharing child pornography through an electronic drop box and a peer-to-peer file-sharing program. Doc. 60 at 23. He further admitted having between 25 and 50 sexual encounters with SK, who was then 14, over the past two years. Doc. 60 at 23. The encounters involved oral and anal sex. Doc. 60 at 23. Stevens recorded some of those encounters with his cell phone or laptop computer. Doc. 60 at 24.

When interviewed, SK confirmed that the sexual encounters occurred and had

begun when he was 12. Doc. 60 at 24. He said their last encounter occurred in Florida the night before Stevens' arrest. Doc. 60 at 24. SK identified himself in some of the images seized from Stevens. Doc. 60 at 25. He also identified the image a second victim, LG, who had visited Stevens' apartment in Mobile, AL, with SK. Doc. 60 at 25. The images were of LG undressing and showering. Doc. 60 at 25. When interviewed, LG stated that he did not know he had been recorded. Doc. 60 at 25.[2]

Forensic analyses revealed 17 images and two videos on the devices possessed by Stevens' at the time of his arrest. Doc. 60 at 25. As for the devices seized from the Thomasville home, one hard drive contained 1221 image files, including 234 images of SK, and 392 video files, including 68 video files of SK. Doc. 60 at 25. A second hard drive contained 654 image files, including 57 images of SK, and 205 video files, including 51 videos of SK. Doc. 60 at 25. An SD card contained 15 video files of SK. Doc. 60 at 25. At the plea hearing, Stevens admitted the acts described and entered a guilty plea. Doc. 60 at 26. Stevens had no criminal history and zero criminal history points, which placed him in criminal history category I. His advisory guideline "range" was nonetheless, life imprisonment.

3. Pre-sentence Pleadings

Stevens, through counsel, filed a pre-sentence position pleading arguing that a life sentence was unreasonable and that the mandatory minimum sentence of 15 years in prison was a more appropriate sentence given the circumstances of the case. Sealed

[2]Although not mentioned by the prosecutor at the plea hearing, LG also said Stevens had made no sexual advances toward him and that no sexual contact occurred between them. Sealed Doc. 39 at ¶11.

Doc. 36 at 9. The pleading included objections to the reasonableness of the child pornography guidelines and to the five-level pattern-of-activity enhancement in § 4B1.5(b)(1), which counsel argued was "in conflict with the individual statutory determinations necessary under [18 U.S.C.] §3553(a)." Sealed Doc. 36 at 1-2, 4-13. Counsel relied on *Gall v. United States*, 552 U.S. 38 (2007), *Rita v. United States*, 551 U.S. 338 (2007), *Kimbrough v. United States*, 552 U.S. 85 (2007), *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), and a paper by federal public defender Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* (Jan. 1, 2009)[3] to argue that the life sentence recommended by the guidelines was not the product of "careful study, empirical research, or national experience" and therefore could and should be rejected by the court in Stevens' case. Sealed Doc. 36 at 2, 4-7; Sealed Doc. 36-1. Counsel further argued that a life sentence "for someone who had no prior convictions, where no one died, and [where] there was no specific intent to cause life-threatening physical injury" would be "inherently unfair and may constitute cruel and unusual punishment in violation of the Fifth and Eighth Amendments." Sealed Doc. 36 at 12.

To the position pleading, counsel attached a copy of the Stabenow article along with letters of support submitted by Stevens' family members. Sealed Docs. 36-1, 36-2, 36-3, 36-4, 36-5. Counsel separately submitted to the court a video recording of Stevens' confession to agents on the day of his arrest, which counsel argued was the

[3] Available on-line at http://www.lb7.uscourts.gov/documents/INND/110CR40.pdf and in the record at Sealed Doc. 36-1.

best evidence of Stevens' genuine, "wrenching" remorse despite its inculpatory nature. Sealed Doc. 36 at 10; Sealed Doc. 37.

In addition to the position pleading, Stevens' counsel submitted a memorandum to the court to which he attached a number of documents pertaining to Stevens military and work history, particularly his employment as a towboat pilot. Sealed Docs. 46, 46-1. Counsel also submitted to the court a report prepared by forensic neuro-psychologist Melissa Ogden, Ph.D., who was retained by the defense to evaluate Stevens for sentencing. Sealed Doc. 49-1.

In the memorandum, counsel told Stevens' life story, which is retold in the background section above. Defense counsel relied on Stevens' history, Dr. Ogden's report, which identified nine indicators suggesting that Stevens would have a positive response to treatment, a presentation by a second psychologist, Dr. Elizabeth Letourneau, and Stevens' videotaped confession to support his argument that Stevens is "redeemable" and therefore undeserving of a life sentence. Sealed Doc. 46 at 11-13. The government filed no pre-sentence pleading

4. The Sentencing Hearing

At the outset of the sentencing hearing, Stevens' counsel repeated his arguments that the applicable advisory guidelines were inherently unreasonable and produced an unreasonable sentence when applied to Stevens' case. Doc. 61 at 9, 79. The district court declined to consider the argument that the guidelines were inherently unreasonable, stating:

> What you're telling me may be fodder for some kind of an appeal or an attempt to convince an appellate court that the guidelines are

> unreasonable or illegal or unconstitutional, that kind of thing. But I'm not in a position and will not take the position of unwinding the statutory construction and the guideline construction that has been handed to me by the – by Congress and by the sentencing commission. At least not on the briefing that I have before me. I'm not prepared to rule that these enhancements and the application of these enhancements are in any way illegal or unconstitutional. That's not my purpose here today. I don't based on the information I have before me, I don't see that the adjustments are incorrect. They are what they are because they track certain kinds of information, certain kinds of factual information which is uncontested in this case, such as the number of videos and, you know, the number of victims or whatever it is that causes the enhancement. Or the age of the victim, that kind of thing. So I don't have sufficient information before me right now that would convince me that there's been an improper or illegal adjustment in Mr. Stevens' case.

Doc. 61 at 10.

This prompted Defense counsel to clarify that his objection was not that the child pornography guideline was illegal or unconstitutional; it was that because of the way the guideline was promulgated, it results in a sentence at the top of the statutory range in almost every case which is inconsistent with the individual determination required by § 3553(a). Doc. 61 at 11.

Following this exchange, the court adopted the conclusions of the PSR and found that the advisory guidelines had been accurately calculated. Doc. 61 at 12. Stevens' counsel then called Dr. Melissa Ogden to testify. Doc. 61 at 13. Dr. Ogden is a licensed psychologist, a board certified clinical neuro-psychologist, and a certified forensic examiner. Doc. 61 at 14. She evaluated Stevens for purposes of sentencing, and her evaluation consisted of a clinical interview with Stevens lasting several hours, a review of Stevens' videotaped confession, a review of records and interviews received from defense counsel's office, and a review of relevant psychological

research. Doc. 61 at 14-15. She diagnosed Stevens with pedophilic disorder in accordance with the DSM- V and concluded that he had no other major mental disease or defect. Doc. 61 at 14-15. During her testimony, Ogden identified a number of factors indicating that Stevens would be motivated to participate in treatment and would respond positively to treatment, including:

- a strong desire to not act on his sexual urges
- no denial of his harmful conduct
- no other mental disorder, particularly antisocial personality disorder
- a stable employment history
- a stable relationship history, and
- no history of sexual contact with multiple children, particularly children outside his home.

Doc. 61 at 15-20. In her written evaluation, Dr. Ogden also noted that Stevens had no history of other criminal conduct, legal problems, or impulsive/aggressive behavior, which was another factor indicating that he would be amenable to treatment. Sealed Doc. 49-1. Dr. Ogden did not discount the harm to the victim SK and to his mother; she said the psychological damage SK suffered would likely persist throughout his life. Doc. 61 at 36.

After Dr. Ogden's testimony, the court heard argument from counsel. Stevens' counsel asked the court to consider the whole of his life, not just the charged offenses. He argued that Stevens' case was not a life imprisonment case and contrasted Stevens' conduct from that of the defendant in *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010)(en banc), a man who raped and tortured more than 50 child victims (and filmed himself doing so) but faced a guideline "range" of 30 years, rather than life imprisonment. Doc. 61 at 53. Counsel asked the court to impose a

sentence of 15 years in prison followed by a lifetime of supervised release. Doc. 61 at56-57.

Stevens addressed the court after his counsel. Doc. 61 at 58. He apologized to his victims and their families, including the victims depicted in the many images of child pornography that he possessed. Doc. 61 at 58-59. He concluded:

> I just hope I can get whatever necessary treatment or whatever the Court sees fit. I betrayed a lot of people's trust. I know it's going to be difficult to move on from here for everybody. I did this. And I know I have to stand in front of you now, Your Honor, and be judged. But it's something I live with every day of my life. It's hard to explain how I feel every day, knowing how many people I've hurt. My family has always been a loving family. They're there for each other. And because of my actions, I've basically drawn a wedge in between them to the point I don't even know they spoke to each other in a year or more. This is my fault, my doings, and I do – I do take full responsibility for it. And, again, I'm sorry. I'm so sorry.

Doc. 61 at 59.

The government's attorney requested a guideline sentence, citing the recidivism rates of sex offenders, particularly those diagnosed as pedophiles. Doc. 61 at 68. And a representative of SK's family read a victim impact statement, including statements written by SK and SK's mother. Doc. 61 at 60-65. SK said that he spent a month in the hospital, attends therapy monthly, and suffers from "really bad" anxiety stemming from his fear of people finding out what happened to him. Doc. 61 at 61-62. SK's mother wrote about the emotional toll the crime had taken on her son and their entire family, within which rifts had developed. Doc. 61 at 65.

After hearing these statements and the argument of counsel, the district court addressed Stevens directly, summarizing for him the information it considered before

choosing his sentence, including his counsel's sentencing memorandum, his videotaped confession, his psychological evaluation, and letters submitted on his behalf. Doc. 61 at 71-72. The court also summarized the sentencing statute, 18 U.S.C. § 3553(a), and informed Stevens that it had considered the various subsections of that statute before choosing his sentence. Doc. 61 at 72. The court informed Stevens that his case was different from most federal cases because there were multiple identifiable victims in the case and reminded him that the victims in child pornography cases were repeatedly re-victimized. Doc. 61 at 72-73. And then the court balanced the nature of the offense against "the fact that [Stevens had] otherwise led a good and productive life" and showed remorse. Doc. 61 at 74. Calling the offense "horrific," the court emphasized the lengthy statutory sentencing ranges and the sentencing guidelines, which the court characterized as "off the charts" high. Doc. 61 at 74.

With respect to Stevens' request for a variance from the guidelines in the case, down to a sentence of 15 years, the court stated:

> Your attorney has asked for a variance in this case. Now, a variance would be a sentence that was below the guidelines in this case. And in order to justify that or in order to impose a sentence that would be a variance in your case, I would have to find significant factors that weigh in favor of granting a variance in your case. And I have done that in other cases. I have found there to be significant factors. And I won't go through them here, but there are a number of them that are outlined in the statute and in the case law that would allow for a sentence outside the guidelines or below the guidelines.

Doc. 61 at 74. The court then rejected Stevens' request for a variance, finding that Stevens had chosen to act on "the impulses of pedophilia" multiples times "over a

period of years." Doc. 61 at 74-76.

After noting its powerlessness to "change what you're going to go through, what kind of adjustments you're going to have to make in your life to turn things around," its powerlessness to "help the family out there," and to "make decisions that will heal individuals and especially individuals who have been victimized in a way that could cause suffering forever," the court found that a sentence of life imprisonment was "sufficient but not more than necessary to accomplish the sentencing objectives set forth in the statute." Doc. 61 at 75-76. The sentence consisted of 360 months on counts one and two, life on count three, 240 months on count four, and 120 months on count five, all to run concurrently. Doc. 61 at 76-77. The court also imposed a supervised release term of life. Doc. 61 at 77.

Following the imposition of sentence, the government's attorney asked "whether the Court would impose the same sentence regardless of its guideline calculations," to which the court responded: "And with regard to the request for clarification, again, my sentence is based on the Section 3553(a) factors in this case. Having considered all of them and the sentencing objectives, it's the judgment of this Court that the sentence imposed is appropriate." Doc. 61 at 79.

> Stevens' counsel objected to the sentence, stating:
> I believe that the sentence is unreasonable in light of the offense and the offender in this case. I do object to the statement that the Court was powerless to consider what it could do to heal. Dr. Ogden made multiple recommendations about how that could happen and why that could happen in this case. I object also on the ground that the sentence is contrary to 13 – 3553(a), contrary to the Eighth Amendment of the United States Constitution. The victim in this case was harmed. There was no death. There was no serious injury, physical injury in that sense. So on those grounds, Your Honor, I object.

Doc. 61 at 79. After sentencing, Stevens timely filed notice of appeal, and this appeal followed. Doc. 54.

REASONS FOR GRANTING THE WRIT

1. **In requiring "significant factors" to justify a variance, the district court erred by applying an incorrect legal standard to deny Stevens' motion for a variance from the advisory guidelines, and failed to recognize its discretion to vary from the guidelines based upon a disagreement with the guidelines.**

In *Rita* and *Gall*, the Supreme Court explained the standards and procedures that a district court must apply and follow when imposing sentences in the advisory guidelines world. A district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," which serves as a benchmark. *Gall*, 552 U.S. at 49. Then the court should give both parties "an opportunity to argue for whatever sentence they deem appropriate" and "consider all the § 3553(a) factors to determine whether they support the sentence requested by a party." *Id.* at 50. "In so doing," a district court "may not presume that the Guidelines range is reasonable" and must "make an individualized assessment based on the facts presented." *Id.*

A district court does not have to find that there are "extraordinary circumstances" in a case to sentence outside the guidelines range. *Id.* at 47 (rejecting "an appellate rule that requires 'extraordinary circumstances' to justify a sentence outside the Guidelines range"); *United States v. Smart*, 518 F.3d 800, 807 (10th Cir. 2008)("[A]lthough a district court must provide reasoning sufficient to support the chosen variance, it need not necessarily provide 'extraordinary' facts to justify any statutorily permissible sentencing variance, even one as large as [ ] 100% . . ."). "The

decision about how much weight to assign a particular sentencing factor," including the guidelines range, "is 'committed to the sound discretion of the district court.'" *United States v. Rosales- Bruno*, 789 F.3d 1249, 1254 (11th Cir. 2015) (quoting *United States v. Williams*, 526 F.3d 1312, 1322 (11th Cir. 2008)); *United States v. Hunt*, 459 F.3d 1180, 1184 (11th Cir. 2006)("We have not attempted to specify any particular weight that should be given to the guidelines range" and have rejected "any across-the-board prescription regarding the appropriate deference to give the Guidelines."). Instead, the district court "may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence." *Rosales-Bruno*, 789 F.3d at 1254.

In deciding what weight to give the guidelines, a district court may consider arguments that the guideline itself fails to properly reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita*, 551 U.S. at 351, 357. District courts "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough*, 552 U.S. at 101 (internal quotation marks omitted). Whatever respect a guideline may deserve depends on whether the Commission acted in "the exercise of its characteristic institutional role." *Id.* at 109. This role has two basic components: (1) reliance on empirical evidence of pre-guidelines sentencing practice, and (2) review and revision in light of judicial decisions, sentencing data, and comments from participants and

experts in the field. Rita, 551 U.S. at 348-51. "Notably, not all of the Guidelines are tied to this empirical evidence." *Gall*, 552 U.S. at 46 n.2. When a guideline is not the product of "empirical data and national experience," it is not an abuse of discretion to conclude that it fails to achieve the § 3553(a)'s purposes, even in "a mine-run case." *Kimbrough*, 552 U.S. at 109.

In Stevens' case, the district court abdicated its responsibilities under this case law. First, the district court violated *Gall* by requiring the existence of "significant factors" to justify a variance. Doc. 61 at 74. The Supreme Court rejected an equivalent test, the "extraordinary circumstances" test, in *Gall*, and this Court rejected "any across-the-board prescription regarding the appropriate deference to give the Guidelines" in *Hunt*. Indeed, it is highly "significant" that the guidelines at issue are not the product of empirical data, or careful study. So significant that the Commission itself ciritized the guidelines saying in part:

> [T]he current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior. on that basis.

U.S. Sent'g Comm'n, Federal Child Pornography Offenses 321 (2012), https://www.ussc.gov/research/congressional-reports/2012-report-congress-federal-child-pornography-offenses (hereinafter "Sentencing Commission 2012 Report")
A district court abuses its discretion and, in the sentencing context, commits procedural error when it applies the wrong legal standard as the district court did here. *United States v. Azmat*, 805 F.3d 1018, 1041 (11th Cir. 2015); *United States v. Mitchell*, 617 Fed. Appx. 976, *978 (11th Cir. 2015)(unpublished).

Second, the district court violated *Rita* and *Kimbrough* when it failed to recognize its power to vary from the guidelines range based upon its disagreement with the guidelines. Stevens' counsel argued that the child pornography guideline should be given less deference because the Sentencing Commission did not act in its "characteristic institutional role" when promulgating it and because the guideline is not based on "empirical data and national experience." Doc. 61 at 9-11; Sealed Doc. 36 at 2, 4-7; Sealed Doc. 36-1. Counsel's argument was similar to the argument in *Kimbrough* challenging the disparate treatment of crack and powder cocaine in the drug guideline. Nevertheless, the district court wrongly characterized counsel's argument as a constitutional or legal challenge to the guidelines that was better addressed to an appellate court. Doc. 61 at 9-10. In doing so, the district court failed to recognize its discretion to give the guidelines less weight under these circumstances. *Irey*, 612 F.3d at 1212 ("We do not rule out the possibility that a sentencing court could ever make a reasoned case for disagreeing with the policy judgments behind the child pornography guidelines."). A court's failure or refusal to exercise its discretion is an abuse of discretion, *see Dorszynski v. United States*, 418 U.S. 424 (1974)(sentence reversed where trial court may not have been aware of the possibility of committing youthful offender for treatment rather than sentencing him to prison term) and *United States v. Fernandez-Toledo*, 737 F.2d 912 (11th Cir. 1984)(order reversed where court believed it had no discretion with respect to release), and it is procedural error in the context of a sentencing proceeding.

Stevens' counsel preserved the *Rita/Kimbrough* argument in the district court by

specifically asking the district court to exercise its discretion under those cases. Thus, the abuse-of-discretion standard of review applies to that argument. Counsel did not object when the district court applied the incorrect standard to Stevens' request for a variance. Thus, that argument is reviewed under the "plain error" standard, meaning Stevens must show on appeal that (1) there was error; (2) the error was plain; and (3) the error affected his substantial rights. *See United States v. Cotton*, 535 U.S. 625, 631 (2002). An error affects a defendant's substantial rights when there exists a probability of a different result on remand that is "sufficient to undermine confidence in the outcome." *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005) (discussing "reasonable probability" standard). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004). If Stevens meets this burden, this court has discretion to notice the error "if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 631-32.

As established above, the district court's error is "plain" under Gall. *See United States v. Carruth*, 528 F.3d 845, 846 n.1 (11th Cir. 2008)("For a plain error to have occurred, the error must be one that is obvious and is clear under current law."). The error affected Stevens' substantial rights because it impacted the weighing of the § 3553(a) sentencing factors, which the district judge openly struggled with in this case. The judge stated: "I'm supposed to guarantee justice in this case, and it's not an easy

process for me. And it's not – and I'm never certain that any – in any case that I have achieved justice, but that's what I have to do." Doc. 61 at 76. The judge defaulted to the guidelines after setting the bar for a non-guidelines sentence so high that Stevens could not transcend it. Doc. 61 at 76. Of note, the government's attorney asked the court to make a finding that it would "impose the same sentence regardless of its guideline calculation" in the case. In response, the court did not state unequivocally that it would do so. The court stated only that it had based the sentence on the § 3553(a) factors and that "the sentence imposed is appropriate." Doc. 61 at 79.

Finally, with respect to the final prong of the plain error standard, this Court recently emphasized in a way that it had not previously that life sentences without the possibility of parole raise special constitutional concerns. *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48, 69 (2010). In connection with reviewing the proportionality of such sentences, the Court has stressed that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* Therefore, when a sentence of life imprisonment without the possibility of parole is imposed, sentencing procedures should be scrupulously followed and enforced. Because Stevens, a first offender, received the most severe prison sentence short of death, and did so in a case in which no one died and there was no violence. This Court should exercise its discretion to notice and correct the district court's error.

2. Stevens' life sentence is substantively unreasonable because the district court unreasonably balanced the sentencing factors.

The Sentencing Reform Act is unambiguous. It directs the sentencing judge to

"consider" the factors and purposes relevant to punishment and to "impose" the sentence that is "sufficient but not greater than necessary" to satisfy those purposes. *Rita*, 127 S. Ct. at 2467 (quoting § 3553(a)). The statute contains no hierarchy of factors and does not mandate that a district court give greater or controlling weight to the Guidelines or other considerations. *Booker*, 543 U.S. at 304- 05 (Scalia, J., dissenting in part) ("The statute provides no order of priority among all th[e] factors."). To the contrary, as this Court recognized in *Rita*, the modified statute contemplates – indeed, requires – that district courts have the discretion to give the relevant factors and purposes the weight they rationally deem appropriate in light of the circumstances of the case. § 3553(a); *see Rita*, 127 S. Ct. at 2465.

Before choosing a sentence, the district court must consider the factors in § 3553(a). Those factors are the nature and circumstances of the offense, the history and characteristics of the defendant, the purposes of sentencing, the kinds of sentences available, the sentencing guidelines, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to victims. 18 U.S.C. § 3553(a)(1)-(7). A district court commits a clear error of judgment (and an abuse of discretion) when it considers these factors but weighs them unreasonably. *Irey*, 612 F.3d at 1189 (stating that committing a clear error of judgment by weighing factors unreasonably is one of three ways a district court can commit an abuse of discretion in the context of choosing a sentence).

To determine if that has happened, the appellate court makes the sentencing

calculus itself and reviews each step the district court took in making it. *Id.* In doing so, the appellate court considers the totality of the facts and circumstances, giving the district court's fact-finding substantial deference. *Id.* at 1189-90. The sentence must be vacated if the appellate court is "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Id.* at 1190 (quoting *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008)).

In this case, the district court gave too much weight to the sentencing guidelines, which in child pornography cases have been widely criticized, even by the Sentencing Commission, as a reflection of political whims, as opposed to empirical data, and too little weight to other factors, especially the purposes of sentencing, the need to avoid unwarranted sentence disparities, and offense and offender characteristics indicating that Stevens can be successfully treated and would present a low likelihood of recidivism upon release from prison.

A. The Sentencing Guidelines

Stevens' guidelines sentence of life imprisonment was the product of the non-production child pornography guideline, U.S.S.G. § 2G2.2, rather than the production guideline, U.S.S.G. § 2G2.1, even though the latter guideline captured what most people would regard as Stevens' most serious conduct. Had § 2G2.1 been Stevens' primary guideline, his guideline range would have fallen somewhere between

25 and 35 years.[4] As a result, Stevens' case is an excellent vehicle for showcasing the unreasonableness of the non-production pornography guideline.

Section 2G2.2 suffers from an inherent architectural defect because the Commission's construction of the guideline was not based on empirical data or national experience, but in response to political considerations unrelated to either. Scholarly work, case law, and a Commission study trace the Congressional and Commission activities between 1991 and 2004 that resulted in an eight-level increase of the base offense level for possession of child pornography offenses and added five specific offense booster characteristics to the guideline.[5] Those five specific offense characteristics added can increase the sentence by up to 23 levels, an amount greater than the base offense level for the offense. In Stevens' case, specific offender characteristics contributed 18 levels to a base offense level of 22. Sealed Doc. 39 at ¶¶34-43. Section 2G2.2 resulted not from the "characteristic institutional role" of the Sentencing Commission, but from little-debated and unstudied Congressional directives. In a 2012 report to Congress, the Commission itself wrote:

> The current sentencing scheme in §2G2.2 places a disproportionate emphasis on outmoded measures of culpability regarding offenders'

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[4] The grouping rules and multiple count adjustment provision at § 3D1.4 make figuring out what the guideline range would be if § 2G2.2 were removed from the equation somewhat complicated. If Stevens were to receive the same increase in offense level under the multiple count adjustment provision (3 levels), his guideline range under § 2G2.1 would be 324-405 months.

[5] *See* Stabenow, *Deconstructing the Myth of Careful Study*; the Second Circuit's discussion of the issue in *Dorvee,* 616 F.3d at 184-88; and U.S. Sent'g Comm'n*, The History of the Child Pornography Guidelines* (2009), https://www.ussc.gov/sites/default/files/pdf/research-and- publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guideline s.pdf.

> collections (e.g., a 5-level enhancement under §2G2.2(b)(3)(B) for possession of 600 or more images of child pornography, which the typical offender possesses today). At the same time, the current scheme places insufficient emphases on other relevant aspects of collecting behavior as well as on offenders' involvement in child pornography communities and their sexual dangerousness. As a result, the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior.

U.S. Sent'g Comm'n, Federal Child Pornography Offenses 321 (2012), https://www.ussc.gov/research/congressional-reports/2012-report-congress-federal-child-pornography-offenses (hereinafter "Sentencing Commission 2012 Report"). As a result, § 2G2.2 provides a less than reliable approximation of the sentence that might achieve the objectives of § 3553(a).

B. Nature and Circumstances of the Offense; History and Characteristics of the Defendant

At the time of his arrest, Stevens cooperated with law enforcement authorities and

assisted in their investigation by consenting to the search of his devices and media. He voluntarily provided a statement incriminating himself. The neuro-psychologist who evaluated him for sentencing, Dr. Ogden, identified characteristics of the offense that indicated Stevens, despite being a pedophile, would benefit from treatment and present a low likelihood of recidivism. One of the factors Dr. Ogden identified was Stevens' acceptance and acknowledgment of how harmful his conduct was. Doc. 61 at 16. This factor is highly "significant" because there are many afflicted pedophiles who do not recognize the wrongfulness of their actions. Stevens complete, thorough and wrenching confession and cooperation with the authorities is

a reflection of his remorse, and a strong indicator that he is a good candidate from treatment. Another factor was a lack of "predatory-type behaviors," such as actively trolling the internet for victims, exhibited by Stevens during the offense. Doc. 61 at 16, 19. Dr. Ogden stated that offenders who exhibit predatory behaviors tend to have a less positive treatment outcome than offenders who do not exhibit that behavior. Id.

Stevens had no criminal history prior to committing the instant offenses. After a brief stint in the Marine Corps, he worked consistently throughout his adult life and eventually found career success in the marine industry as a towboat captain. Stevens was raised in a loving home and has close ties with his family. A number of his family members submitted supportive letters at sentencing. In addition to his stable employment and relationship histories, Dr. Ogden listed Stevens's strong desire not to act on his sexual urges, lack of antisocial personality disorder, lack of history of sexual contact with multiple children, lack of legal problems, and lack of impulsive/aggressive behavior as positive factors suggesting that Stevens would be motivated to participate in, and respond positively to, treatment. Doc. 61 at 15-20; Sealed Doc. 49-1.

Despite Dr. Ogden's focus on Stevens's treatment prospects, the only portion of Dr. Ogden's report and testimony that the district court explicitly noted in its findings at sentencing was a portion where Dr. Ogden cited research suggesting that pedophilia is not a choice – that it may have some neuro-biological underpinnings. Doc. 61 at 17-18, 29-30, 75. The court said, "I don't know whether that's true or not.

I'll accept her word that that's true; that becoming a pedophile is not an individual choice. But acting on the impulses of pedophilia is a choice." Doc. 61 at 75. The court further stated, "It's not an uncontrollable impulse within the definition of what we see in the law that governs insanity in federal cases." Doc. 61 at 75. In this finding, the court "straw mans" Dr. Ogden's testimony and Stevens's position. Neither Dr. Ogden nor Stevens's counsel characterized Stevens's pedophilia as an uncontrollable impulse, like insanity, that excuses criminal responsibility.

C. Unwarranted Sentence Disparities

Stevens's sentence and sentencing guidelines were heavily influenced by charging decisions by the government. The length of the resulting sentence demonstrates that the government retains an undue ability to make an unreasonable sentence appear legally reasonable. Comparing this case to the Court's en banc decision in Irey illustrates this point. In *Irey*, the government charged the defendant with one count of production of child pornography, even though the facts of the case revealed that over a number of years Irey had frequently traveled to Cambodia where he raped more than 50 girls ages four through six, filmed the rapes, and distributed the films. *Id.* at 1220. Irey ultimately received a sentence of 30 years, which was the statutory maximum sentence. *Id.* at 1225. In contrast, Stevens had one pubescent contact victim with whom he had a relationship, and Stevens did not use force in the commission of his crime. In other words, Stevens is no Irey. Yet Stevens received a life sentence and Irey a term of years because of the way the government charged the

cases.

D. The Purposes of Sentencing

The end result of the court's mis-balancing of the sentencing factors is a life sentence for a first offender that does not further the purposes of sentencing. Section 3553(a)(2) identifies the purposes of sentencing as the need for the sentence imposed to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "afford adequate deterrence to criminal conduct"; "protect the public from further crimes of the defendant"; and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(A)-(D).

Stevens's amenability to treatment and low likelihood of recidivism relate to both the need to protect the public from the defendant and to deterrence. Dr. Ogden's conclusion that Stevens could be successfully treated is consistent with the findings in a recent Sentencing Commission report which states that, in contrast to long-held belief, treatment can be effective at reducing recidivism by sex offenders:

> Many experts believe that sex offenders, including child pornography offenders, with clinical sexual disorders cannot be "cured." Nevertheless, some studies indicate that psycho-sexual treatment may be effective in reducing recidivism for many sex offenders. Emerging research on the effectiveness of psycho-sexual treatment administered as part of the "containment model" is especially promising and warrants further study.

Sentencing Commission 2012 Report at 318 (internal citations omitted). Even

contact sex offenders have a lower recidivism rate than once believed. A study conducted by the Probation and Pretrial Services Office of the Administrative Office of U.S. Courts, which Stevens's counsel introduced into evidence at sentencing as Exhibit D, examined 7416 male sex offenders under supervision in 94 federal judicial districts.

Thomas H. Cohen & Michelle C. Spidell, Probation and Pretrial Services Office, *How Dangerous Are They? An Analysis of Sex Offenders Under Federal Post-Conviction Supervision 29-30* (2016). The study concluded:

> [I]n a somewhat surprising finding, this research shows that child pornography offenders with backgrounds of contact sexual offending exhibit only slightly higher risk characteristics and recidivism rates compared to child pornography offenders with no records of contact sexual offending. This finding is at odds with some studies showing offenders who commit child pornography and contact crimes having significantly higher risk levels and recidivism rates compared to child pornography-only offenders. It is interesting to note, however, that the [Sentencing Commission] also found similar rates of general recidivism between child pornography offenders with and without histories of criminally sexual dangerous behavior.

Id. at 30 (citing Sentencing Commission 2012 Report).

Further, research generally has shown that "increases in the certainty of punishment, as opposed to the severity of punishment, are more likely to produce deterrent effects." Valerie Wright, Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment, THE SENTENCING PROJECT (Nov.2010) at 6-7, http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf (hereinafter

"Deterrence Study")(noting a study that found that longer prison sentences achieved only a three percent reduction in recidivism).[6] Several factors undermine the premise that the length of a sentence achieves deterrence. First, would-be offenders often do not act rationally when they commit a crime. They do not engage in a cost-benefit analysis of their actions before deciding whether to proceed. *Id.* at 2. Second, an offender who believes he will not be caught typically is not going to be deterred by the severity of the punishment. *Id.* Third, in situations where an offender does consider the potential sanction for his conduct, he usually underestimates its severity. *Id.* at 3.

It is important to note that although the length of Stevens's sentence likely will have no effect on general deterrence, the fact that he was sentenced at all will. According to the Deterrence Study, by arresting, prosecuting and sentencing Stevens, the goal of general deterrence has already been achieved, regardless of the length of the sentence.

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[6] *See also* Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentencing Severity: An Analysis of Recent Research* (1999)(concluding that "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance," and that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects"; Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 28-29 (2006)("[I]ncreases in severity of punishments do not yield significant (if any) marginal deterrent effects . . . Three National Academy of Science panels, all appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence); U.S. Sent'g, Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 15 (2004)(finding, "There is no correlation between recidivism and guidelines' offense level . . . While surprising at first glance, this finding should be expected. The guidelines' offense level is not intended or designed to predict recidivism.").

Finally, a life sentence is not a just punishment in this case. Life sentences are different and should be reserved for the worst offenders. The Supreme Court has stressed that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U.S. at 69 (2010). And life sentences without the possibility of parole are among the most serious and severe sentences that society imposes. They –

> share some characteristics with death sentences that are shared by no other sentences . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . [A] life without parole sentence . . . means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.

Graham, 560 U.S. at 69-70 (citations and quotations omitted).

In short, a life sentence for Stevens's first offense, which did not involve force, is unreasonable. The sentence is greater than necessary to achieve the purposes of sentencing and must be vacated. 18 U.S.C. § 3553(a)("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth [in § 3553(a)(2)].").

CONCLUSION

Because Stevens's sentence of life imprisonment is both procedurally and substantively unreasonable, the sentence should be vacated and this case remanded for resentencing.

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Respectfully submitted,

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