

SUPREME COURT OF THE UNITED STATES

Term Commencing October 2018

ANTHONY STEVEN YOUNG, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

File No. _____

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

PETITION FOR WRIT OF CERTIORARI

Dated: December 12, 2018

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QUESTION PRESENTED

1. What standard of review applies to the district court's decision to use the guideline for receiving or distributing child pornography to sentence a child pornography offender convicted of accessing the Internet with intent to view images of child pornography—abuse of discretion or close scrutiny?

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PETITION FOR CERTIORARI

Anthony Steven Young respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was unpublished. It is found at United States v. Young, No. 17-2399, 2018 U.S. App. LEXIS 30217 (6th Cir. October 26, 2018) (Pt. App. 1a).

JURISDICTION

The Sixth Circuit's opinion was filed on October 26, 2018. The Sixth Circuit's mandate issued on November 20, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sentencing statute, 18 U.S.C. § 3553(a), and the child pornography guideline, U.S. Sentencing Guidelines Manual § 2G2.2 (2016)¹

Section 3553(a) tells district courts to “impose a sentence sufficient, but not greater than necessary” to carry out the goals of sentencing, including “to reflect the seriousness of the offense,” “to promote respect for the law,” “to promote just punishment for the offense,” “to afford adequate deterrence to criminal conduct,” and “to protect the public from further crimes of the

¹The Manual is referred to hereafter as USSG.

defendant.” Id. The statute tells the district courts to consider sentencing factors that include “the nature and circumstances of the offense,” the history and characteristics of the defendant,” the Guidelines sentencing range, “any pertinent policy statement issued by the Sentencing Commission,” and “the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. Id.

The guideline covers a variety of offenses involving trafficking in material involving the sexual exploitation of a minor and receiving, transporting, shipping, and possessing this material. It provides for enhancements to the base offense level tied to the age of the minor depicted, the type and number of images, the use of a computer, and the number of images, among other things. USSG § 2G2.2(b)(2)–(7).

STATEMENT OF THE CASE

The government charged Young with distributing child pornography using a peer-to-peer file sharing program on the internet and with using a cellular telephone to access a website with intent to view images of child pornography. Young pled guilty to the access count in exchange for the government’s agreement to dismiss the distribution count. He agreed that district court could consider the dismissed count in determining his sentence.

When sentenced Young was 40 years old. He was born April 2, 1977. He

was homeless. PSR ¶ 24. His crime was uncovered when officers found child pornography on a computer in the household of a woman that Young was dating. PSR ¶¶ 23–24. The computer had shared approximately 1200 child pornography files using a peer-to-peer file programming known as Bit Torrent. PSR ¶¶ 20–21.

A consent search of Young's cell phone uncovered proof that Young had accessed a child pornography website using his cell phone. PSR ¶¶ 48–50.

Young had a 2010 conviction for viewing images of nude children in the Grand Rapids, Michigan Public Library. He was convicted of possession of child sexually abusive material, a felony under Michigan law and sentenced to serve four days in jail and placed on probation for two years. PSR ¶ 81.

According to a report prepared for the district court, Young has a diagnosis of general anxiety disorder and pedophilic disorder, provisional. PSR ¶ 97. The report also said that individuals with his diagnosis “often demonstrate a stable pattern of deviant sexual arousal which can improve with treatment.” PSR ¶ 97. Young was taking prescription medications for depression and anxiety at the time of his sentencing. PSR ¶ 98.

Young was arrested in Florida and did not have a permanent residence when arrested. PSR ¶ 95. He disclosed limited family contacts and a checkered employment history, but he had graduated from high school.

PSR ¶¶ 100–104.

The PSR calculated Young’s sentencing guideline range at 120–135 months. But before sentencing the district court gave the parties notice that it was considering an upward departure or variance because the base offense level for Young’s offense of conviction was 18 but his relevant conduct involved receiving or distributing child pornography, an offense with a base offense level of 22.

At sentencing, over Young’s objection, the district court sentenced Young to 168 months of imprisonment, “what the low end of the guidelines would have been if he started at base offense level 22 instead of 18.”

Young appealed.

The United States Court of Appeals for the Sixth Circuit affirmed his sentence. The Sixth Circuit said that it was applying the standard of review from *Gall v. United States*, 552 U.S. 38, 51–52 (2007)—a deferential abuse-of-discretion standard of review. The court rejected Young’s argument that it should apply closer scrutiny to the district court’s decision to impose a sentence above the guidelines range. *United States v. Young*, 2018 U.S. App. LEXIS 30217 at *5, n.1.

REASONS FOR GRANTING THE WRIT

1. The Court should grant the petition in order to settle an important question of federal law about the correct standard of review to apply when a district court rejects a sentencing guideline.

This case presents an important question of federal law that has not been, but should be, settled by the Court. Sup. Ct. R. 10(c). The Court should explain how appeals courts should review sentencing decisions of the district court that fall outside the guideline range. The Court's previous efforts to explain have fallen short and this case presents an excellent vehicle for addressing the issue.

In *Gall v. United States*, the Court discussed the standard of review for sentencing decisions under the United States Sentencing Guidelines:

If he decides that an outside-Guidelines sentence is warranted, he [the direct judge] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.

...

[T]he appellate court must review the sentence 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 v. United States, 552 U.S. 38 at 50–51.

The Court has also said:

[W]hile the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case.

Kimbrough v. United States, 552 U.S. 85, 109 (2007). (quotation omitted).

Here, the Sixth Circuit did not apply these precepts correctly.

The Court of Appeals misunderstood its review function. In his reply brief Young argued that the court should give closer scrutiny to his non-guideline sentence because “obviously the discretion Booker² grants sentencing judges to impose non-guideline sentences cannot be an escalator that only goes up.” (Reply Brief, Document 27, Page 4, quoting *Pepper v. United States*, 562 U.S. 476, 504 (2011)). He argued that the appeals courts should require sufficient justification before affirming above-guidelines sentences, particularly in child pornography cases. However the Sixth Circuit said that it only closely scrutinizes district court decisions to reject the applicable guideline and not decisions to impose a non-guideline sentence.

This ruling is inconsistent with *Gall* and *Kimbrough*.

In addition, compounding the error, the district court’s rationale for the 168-month sentence was suspect. Courts have acknowledged problems with

²*United States v. Booker*, 543 U.S. 220 (2005).

the child pornography guideline. Unlike most other guidelines it is driven by a hodgepodge of Congressional directives that put most offenders at or near the statutory maximum penalty. It is not the product of study by the Sentencing Commission. It uses outdated enhancements promulgated in an earlier era when offenders used the postal system to receive and distribute child pornography. As a result some courts have rejected the guideline while others have decided to give it less weight. See *United States v. Abraham*, 944 F. Supp. 2d 723, 727–731 (D. Nebraska 2013) *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010) (noting that the child pornography guideline “is fundamentally different than most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires” and vacating a 20-year within-Guidelines sentence).³

The Sentencing Commission concluded that “the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior.” *United States Sentencing Commission: Report to Congress; Federal Child Pornography Offenses* (Dec. 2012) at 321 (“2012 Report”).

The district court thought that Young’s relevant conduct was the same

³See *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011) (following *Dorvee*), but see *contra United States v. Pugh*, 515 F.3d 1179, 1201, n. 15 (11th Cir. 2008).

as the conduct for other offenders convicted of distributing child pornography. The court said that Young was “engaging in the kind of distribution that is typical in a child pornography case ... “ But the district court did not cite any such cases of offenders who were sentenced as distributors, even though they were convicted of a possessory or access offense. If anything, the district court’s reasoning ignored what other courts do: For example, in fiscal year 2013, district courts imposed a sentence below the Guidelines range in 718 of 1626 non-production child pornography cases. *United States v. Helton*, 782 F.3d 148, 158–59 (4th Cir. 2015).

In fact, many reported cases involving distribution of child pornography cover far more serious behavior than Young’s in terms of number of images and types of images. To cite just two cases, in *Abraham* the district court sentenced the defendant to serve 72 months in prison in a distribution case when the defendant possessed videos of child pornography and over 50,000 images of child pornography and child erotica. *United States v. Abraham*, 944 F. Supp. 2d at 725. In *Dorvee*, the defendant possessed several thousand still images and approximately 125 computer videos. *United States v. Dorvee*, 616 F.3d at 176.⁴ Here, the district court’s sentence created an unwarranted

⁴Compare with *United States v. Price*, 775 F.3d 828, 830 (7th Cir. 2014) (affirming a below-Guidelines sentence of 18 years for a child pornography producer, with a history of abusing children, who possessed 934 images and

similarity between Young and other child pornography offenders. The Court should conclude that the sentence was an abuse of discretion and it should grant certiorari in order to make clear that the child pornography guideline is unusual and that above-Guidelines sentences based on it do not deserve deference on appeal but require closer scrutiny in the absence of a carefully thought out and individualized rationale for the sentence.

2. The Court should grant the petition in order to make clear that relevant conduct concepts do not apply to USSG § 2G2.2.

On appeal, Young argued that the district court erred in considering relevant conduct—namely Young’s distribution of child pornography—to justify the above-Guidelines sentence. The Court of Appeals said the district court could consider the conduct. *United States v. Young*, 2018 U.S. App. LEXIS at * 6.

But relevant conduct concepts do not apply to USSG § 2G2.2. The relevant conduct guideline, USSG § 1B1.3, tells the district court to consider “all acts and omissions” that the defendant committed during the course of the offense of conviction or that were part of the same course of conduct or common scheme or plan as the offense of conviction “unless otherwise

17 videos of child pornography on one laptop and an unspecified amount of child pornography on a desktop computer. See also *United States v. Huyck*, No. 8:13-CR-107, 2015 U.S. Dist. LEXIS 141905 at *28, 29 (D. Nebraska, October 19, 2015) (“in this court’s experience, the number of images possessed or distributed usually measures in the thousands.”).

specified.” USSG § 1B1.3. USSG § 2G2.2 is one guideline that specifies otherwise. And Young received a two-level enhancement for distribution under the guideline. PSR ¶ 64. USSG § 2G2.2(b)(3)(F).

The guideline contains several enhancements that Congress mandated. Because of this, the Sentencing Commission has explained that a defendant’s base offense level under USSG § 2G2.2 depends solely on the most serious offense of conviction, regardless of the defendant’s actual conduct. 2012 Report, pp. 32, 208, n. 13.

When an offender is convicted only of simple possession, his relevant conduct does not play a role in increasing his base offense level..., even if the Court finds that the defendant in fact knowingly received or distributed child pornography. A court’s findings concerning a defendant’s relevant conduct does play a role in increasing a defendant’s offense level based on the specific offense characteristics set forth in USSG § 2G2.2(b)(2)-(7).

(Id., at 32).

Here, Young’s guideline range accounted for his distribution. So, to say as the district court did and as the Court of Appeals affirmed, that Young’s guideline sentence range was too low because it did not reflect his distribution is not correct. It did.

The district court also ignored the Sentencing Commission’s rationale for setting differing base offense levels for different child pornography offenses. In 2003 in the PROTECT Act Congress increased statutory penalties

for child pornography offenses and told the Commission to change the child pornography guideline. In response, the Commission amended the child pornography guideline. It selected 22 as the base offense level for child pornography trafficking to make sure that after adding typical enhancements the offender's sentencing range would reach or exceed the new statutory mandatory minimum sentence. The Commission selected 18 for the base offense level for possession cases to reflect an increase in the statutory maximum penalty and to maintain proportionality with receipt and trafficking cases. USSG App. C., amend. 664, p. 926 (Nov. 1, 2004).

Thus, the guideline is not connected to the § 3553(a) factors. It only reflects the Commission following Congressional directives. The directives are not mandatory; that is they do not bind the district courts, unlike a statutory maximum or mandatory minimum sentence. Given the oft-discussed problems with the child pornography guideline, the appeals courts should give the sentences the guideline advises little weight when reviewing a sentence.

Young pled guilty to possession, not to trafficking. It is unfair for the district court to have varied upward in his sentence to sentence him like a trafficker.

CONCLUSION

The Court should grant the petition to reiterate what it said in Gall, Kimbrough, and Pepper — that the review sentences should receive on appeal must take into account the extent of the variation from the advisory guideline range and that sentencing review is not an escalator that only goes up.

Appeals courts must give outside-Guidelines sentences in child pornography cases closer scrutiny when they are based on policy disagreements, not on the particular circumstances of the case. Here, the district court's rationale for the sentence does not withstand closer scrutiny, even under an abuse-of-discretion standard. The Court should grant the petition, vacate Young's sentence, and remand the case for re-sentencing.

Dated: December 12, 2018

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APPENDIX CONTENTS

Sixth Circuit Court of Appeals decision dated October 26, 2018. 1a