No. _____

In the Supreme Court of the United States

_____

JOEL AUGUTUK MAYOKOK,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Mark D. Nyvold
Counsel of Record
Mark Nyvold, Attorney at Law
7671 Central Ave. NE
Suite 207
Fridley, MN 55432
(763) 276-9173
mark@marknyvoldlaw.com

Counsel for Petitioner
Member of the Bar of this Court

QUESTION PRESENTED

I. Did the District Court's decision at re-sentencing to re-impose the same 240-month sentence it initially imposed, where the Court had erred in its initial sentencing by applying an unsupported five-level enhancement, result in a substantively unreasonable sentence, constituting an abuse of discretion?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Joel Mayokok, petitions for a Writ of *Certiorari* to review his sentence, as affirmed by the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The unpublished Court of Appeals' opinion (Appendix ("App." 1a) is *United States v. Mayokok*, 747 Fed.Appx. 441 (8th Cir. 2019), filed January 9, 2019. The District Court did not publish an opinion.

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment January 9, 2019, the same date as the filing of its above-referenced opinion.

Petitioner on February 6, 2019 timely petitioned the Eighth Circuit for re-hearing to the panel, which that Court denied in an order entered February 27, 2019. App. 4a.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) to review a circuit court's decision on a writ of *certiorari*.

CONSTITUTIONAL PROVISION INVOLVED

Not applicable.

STATUTORY PROVISION INVOLVED

18 U.S.C. 3553(a), reproduced at Petitioner's Appendix, 5a.

STATEMENT OF THE CASE

I. Proceedings Below

This case arises from a judgment and sentence of the United States District Court for the District of Minnesota, the Honorable Susan Richard Nelson, presiding. The Government invoked jurisdiction in the District Court by indictment under 18 U.S.C. 3231. Jurisdiction in the Eighth Circuit Court of Appeals was proper under 18 U.S.C. 1291.

Petitioner Mayokok pled guilty on November 23, 2015 to Count II of a three-count indictment that charged him in Count I with distribution of child pornography (18 U.S.C. 2252(a)(2) and 2252(b)(1)), in Count II with receipt of child pornography (18 U.S.C. 2252(a)(2) and 2252(b)(1)), and in Count III with possession of child pornography (18 U.S.C. 2252(a)(4)(B) and 2252(b)(2)).

The Court sentenced Mayokok on February 26, 2016 to 240 months confinement on Count II, imposed a 15-year supervised release term, and ordered a $100 special assessment. The Court dismissed Counts I and III on the Government's motion.

The relevant case and offense-related facts are as follows:

Mayokok before his initial sentencing objected to a five-level enhancement under Guideline 2G2.2(b)(3)(B) that the PSR recommended for distribution of child pornography for receipt of, or with the expectation of receiving, a thing of value. (Position of Defendant with Respect to Sentencing Factors, (District Court Docket ("DCD") 50). The PSR premised this enhancement on Mayokok having allegedly uploaded a suspected child-pornography image to his Google Picasa account, and on two emails allegedly showing distribution. (PSR, DCD 40, para. 27, p. 28.)

Mayokok objected, citing the absence of evidence to support this enhancement. And at sentencing the Government offered none, as discussed in this Court's decision in *United States v. Mayokok*, 854 F.3d 987, 989-90 (8th Cir. 2017).

The District Court at the initial sentencing denied Mayokok's objection to the five-level increase, and then determined that his offense level was 40, minus three levels for acceptance of responsibility, which yielded a total offense level of 37. At criminal history category VI, Mayokok's Guideline range was 360 to 480 months (Feb. 26, 2016 Sent. trans., DCD 75, pp. 15, 24). The District Court varied downward from that Guideline range to 240 months (Sent. trans., 15, 24).

Mayokok appealed his sentence, asserting that the District Court committed procedural error when it imposed the five-level increase without any evidence to support it. The Government agreed that the five-level increase had no support, and

requested the case be remanded for resentencing without the increase. The Eighth Circuit Court of Appeals also agreed, and remanded the case to the District Court for re-sentencing. *United States v. Mayokok, id*., 854 F.3d at 990-91.

The District Court re-sentenced Mayokok on August 11, 2017. It determined the total offense level without the five-level enhancement, and subtracted three levels for acceptance of responsibility, to arrive at a total offense-level of 32, and determined the criminal history category to be VI (Aug. 11, 2017 Sent. trans., DCD 98, p. 6). The applicable Guideline range was therefore 210-262 months (*Id*.).

Mayokok at the re-sentencing told the Court, in support of a variance to a sentence lower than the previous one of 240 months, that he had sent the Court a letter describing his efforts to do better, address things while incarcerated, help fellow inmates with Native American culture (in which he had accomplished himself), get back to his family, and make better choices in the future (Sent. trans., DCD 98, 8).

Mayokok also presented a friend to speak on his behalf, Tony Frank (Sent. trans., *id*., 9). Mr. Frank said he had known Mayokok for over 20 years (*Id*.). When he, Frank, was a tutor in the St. Paul schools, he met Mayokok, who was then teaching singing as a volunteer (*Id*.). For the last 22 years, Frank has been working in the community with children, currently at a shelter for youth, Ain Deh

Yung, and also works at Anishinabe Academy and Bdote schools (*Id*.). He teaches singing and culture, and works with at-risk children (*Id*.).

Frank has also worked for the last eight years with MIWSAC, which is Minnesota Indian Women's Sexual Assault Coalition, to help men and boys stop sexual and non-sexual violence in the Native American community (*Id*., 10). He also told the District Court that a strong need exists to bring to light what has historically been kept hidden concerning this problem (*Id*.).

Frank told the Court Mayokok cares about people, and would give a person his last dollar (*Id*., 10). Frank said that four years ago, when he broke his ankle, Mayokok came every day to help him do basic things (*Id*.). Culturally, Mayokok knows a lot, and helps a lot of people (*Id*.,). The community is better with him because of what he can bring (*Id*.,).

And Frank said that Mayokok shares the problem many Native American males have, which is the inability to get help with their problems because they ashamed of what is going on inside them, and don't know how to talk about it (*Id*., 11). Frank said this problem is what his work with youth involves (*Id*.,). He believes in Mayokok, and said he deserves an opportunity before he is too old (*Id*.).

The Government then spoke, stating that the previous sentence had not in its view been based on the mechanics of the Guidelines, but instead on a careful

assessment of who the Defendant was, the nature of his crime, and the 18 U.S.C. 3553(a) factors courts are required to consider in arriving at a fair and adequate sentence (*Id*., 12).

The Government said that in light of this, and the decision in *Molina-Martinez v. United States,*136 S.Ct. 1338 (2016), the previously-imposed 240–month sentence had adequately captured all the factors important to a fair and just sentence, so that 240 months again would be the appropriate sentence to protect the public and children, and to ensure that Mayokok receives treatment, as well as address the other 3553(a) factors (*Id*., 12).

The District Court again imposed 240 months, which in light of the corrected Guidelines range was no longer a variance, and thus did not vary from the applicable 210-262 months Guideline range, but fell approximately in the middle of it (Sent. trans., *id*., 13). The Court also ordered a 15-year supervised release term. (*Id*., 13).

As to the 240-month sentence duration, the Court said that even though Mayokok would be in his late 60's when released, it would still be possible for him to have a productive life (*Id*., 13). The Court explained its sentencing decision by saying "the law tells me that I start with the Guideline range. It's just a starting point. It's sort of like an initial benchmark. . . . . It does not anchor the

sentence. . . . In fact I don't have to assume it to be reasonable" (*Id*., 16). The Court then said it considers the 3553(a) factors, so that it can impose a sentence sufficient but not greater than necessary to accomplish the goals of sentencing (*Id*., 16).

The Court also discussed those goals (*Id*., 16). The Court said it accepted that owing to the five-level enhancement no longer applying, the Guideline range was now 210-262 months, which again it saw as a starting point (*Id*., 17). The Court then said "But the remainder of my analysis doesn't change because there was nothing about my previous analysis that considered that five-level enhancement or the thing of value you were alleged to receive. That's not what the basis of my sentence was. So let me go through the basis of my sentence. It's the same today as it was then" (*Id*., 17).

The Court then explained that previously the Guideline range was very high, and it knew immediately that the range was greater than necessary to accomplish the goals of sentencing, so the Court immediately considered a lower sentence, owing to the requirement it had earlier mentioned, that a sentence must be sufficient but not greater than necessary (*Id*., 17). The Court said "But as I sit here today looking at this Guideline range, the Court concludes that the Guideline range does fairly represent the range in which a sentence should be imposed. And my

sentence is within that range and . . . is not greater than necessary to accomplish the goals of sentencing" (*Id*., 17).

The Court next addressed *Molina-Martinez*, *id*., cited in the parties' position papers and "some suggestion that that case requires that in re-sentencing I apply the same percentage of a downward variance from the low end of the Guidelines and that that's what has to anchor the sentence. And that makes no sense to me. I don't think the case holds that, and that's not what sentencing means" (*Id*., 18).

The Court said that what sentencing means is looking at the circumstances in the case and determine what a fair sentence is, and that since the Court did not consider the five-level enhancement in the sentence it was now imposing, its reasoning doesn't change today (*Id*., 18). The Court noted that *Molina* recognizes that despite the application of an erroneous Guideline range, the same sentence can still be imposed if done so based on factors independent of the Guideline's mechanics, and that this is the case here (*Id*., 18).

The Court next reviewed those factors: Mayokok's very serious, lengthy, troubling, and violent criminal history, which included domestic violence, terroristic threats, and the like, and his current offense being extraordinarily serious (*Id*., 18). The Court said this calls for this kind of punishment, and the need to protect the public (*Id*., 18). The Court said Mayokok's child pornography offense

repeatedly victimizes children, including those who have been raped and brutalized for the sexual pleasure of adults, and that every time someone looks at these pictures or videos, these real children are re-victimized (*Id*., 19).

The Court also described Mayokok's offense as keeping up the demand for child pornography, and preventing the victimized children from healing and moving on with their lives (*Id*., 19).

The Court indicated that at the initial sentencing it had recognized the need to break the cycle of violence, which had begun when Mayokok was victimized as a child, and which had made his child pornography offense not surprising, and therefore sex-offender and mental health treatment were critically important for him (*Id*., 20). The Court told Mayokok that if he dedicated himself to that treatment, he would have many happy years with his family after he gets out of treatment, and he hopefully would be healed then (*Id*.).

The Court lastly said Mayokok's promotion and understanding of Native American culture is a blessing for him and the community, and anybody who hears it, and that he should be encouraged and rewarded for that, because it has been his life-long purpose (*Id*., 20).

REASONS FOR GRANTING THE WRIT

The District Court made a clear error of judgment in its application of the 18

U.S.C. 3353(a)(1) sentencing factor, namely, Mayokok's history and characteristics, a factor directly relevant to whether the Court should have varied downward below the corrected Guideline range, because this factor involved highly mitigating facts concerning Mayokok's personal development and the abuse he suffered as a child, and relevant to why he would later get involved in child pornography.

The clear error in judgment in not varying at all below the Guideline range thus made the sentence substantively unreasonable and an abuse of discretion, requiring this Court's review.

A sentencing court abuses its discretion when it 1) fails to consider a relevant 18 U.S.C. 3553(a) sentencing factor, 2) when it gives significant weight to an irrelevant or improper factor, or 3) when it considers only appropriate factors but nevertheless commits a clear error of judgment. *Gall v. United States*, 552 U.S. 38, 51 (2007).

A court may in its discretion weigh the 3553(a) factors so as to give greater weight to some factors than others. *Gall*, *id*., 552 U.S. at 57-59. Mayokok's re-imposed 240-month sentence being within the correctly-determined Guideline range the Court applied at the re-sentencing means this Court may view that sentence as presumptively reasonable. *Gall*, *id*., at 51. But this presumption can be

overcome if the Court abused its discretion, as by making a clear error of judgment concerning a 3553(a) factor or factors, and on that basis here denied Mayokok's renewed downward-variance motion. *Gall*, *id*., at 57-59.

And substantive-reasonableness review can take into account any 3553(a) factor or factors. *Gall*, *id*, at 51. Mayokok requested a variance from the low end of the 210-262 month range, to 180 months. See Mayokok's renewed variance motion, DCD 85, and his Position of Defendant Regarding Sentencing and Sentencing Memorandum, DCD 86, p. 3.

One-hundred-eighty months was the mandatory minimum sentence under 28 U.S.C. 2252(b)(1), applicable because Mayokok had a prior conviction that related to the receipt of child pornography. A substantive review of Mayokok's sentence — a review applicable whether the Court sentenced inside or outside the Guideline range, *Gall*, *id*., 552 U.S. at 51 — shows that the District Court, even though it considered the 3553(a) factors, made a clear error of judgment as to the 3553(a) history-and-characteristics factor in not varying downward.

Mayokok does not premise this judgment-error here on the Court not granting the full variance requested, down to 180 months, but on the Court not varying *at all*, despite the very strong support in the record for a variance below the applicable Guideline range, owing to Mayokok's history and characteristics.

Mayokok in his variance motion (DCD 44) filed in connection with his first sentencing asked for a variance, and cited his supporting sealed Memorandum of Law, DCD 45, and its discussion of the 3553(a) factors, at pages 9-19. At his resentencing, Mayokok in his Sentencing Position and Memorandum asked the Court to rely on the reasons he provided in his DCD 45 Memorandum (DCD 86, p. 6).

Mayokok in his appeal of the re-imposed 240-month sentence relied on the reasons given in that Memorandum to support his argument here that the District Court made a clear error of judgment. Because the DCD 45 Memorandum discusses the results of a psychosexual examination, and the specific abuse Mayokok suffered as a child, he referred the Court to the sealed Memorandum, and also the PSR report (DCD 40), also of record, which at paras. 78-83 and 95-102 describe Mayokok's upbringing and adult life, which were unquestionably a major factor in Mayokok becoming involved with child pornography.

His Memorandum also indicated he had practically no contact with his biological father, his mother essentially abandoned him, he struggled with alcohol since he was a teenager, has depression, and has never had counseling or any sort of mental health care. And the worst aspects of his upbringing he could not quote from the Memorandum for the District Court, and so referred the Court to the

above-cited PSR paragraphs. The details set out in those paragraphs are what the Court at Mayokok's re-sentencing referred to when it said:

> Now, at the time of the last sentencing, I told you and I tell you again that this sentence also considers the horrors you suffered in your childhood and the fact that it's not entirely surprising that the violence that was done to you would be repeated in your own adulthood.

Aug. 11, 2017 Sent. trans., DCD 98, p. 20.

However, the Court's sentence does not reflect, in a realistic and meaningful way, consideration of Mayokok's childhood and upbringing. In Mayokok's case, the District Court, in declining to vary to any extent below the applicable 210-262 month Guideline range, made a clear error of judgment in its application and resolution of this same 3553(a)(1) factor concerning history and characteristics.

This is because this factor was one of the most important and the most highly mitigating of the 3553(a) factors relevant to imposing a reasonable sentence, owing to the great impact the abuse Mayokok suffered growing up had on him, and his consequential problems of depression and alcoholism, all of which, as the District Court recognized, put Mayokok on a path that made it predictable he would become involved with child pornography. Sent. trans., DCD 98, p. 20.

In light of this, Mayokok overcame the presumption of reasonableness that could be accorded the Court's sentence on appeal. Again, the issue here is not that

the Court did not vary to the extent Mayokok wanted. Mayokok made clear in his Sentencing Position and Memorandum submitted for the re-sentencing that caselaw "does not compel in Mr. Mayokok's case a one-third downward variance from the low end of 210-262 month range" (DCD 86, p. 5).

And Mayokok's counsel again said, in response to the Government's written sentencing arguments: "Mr. Mayokok recognizes that nothing requires this Court at resentencing to impose a 1/3 downward variance from the low end of the correctly-determined Guideline range" (DCD 88, p. 3).

CONCLUSION

For the District Court not to vary at all in the face of highly compelling mitigating facts relating to Mayokok's personal development, as described in the PSR paragraphs cited above, established a clear error of judgment, making the Court's sentence substantively unreasonable, and an abuse of discretion. Mayokok requests that this Court grant the Writ, so this Court can review the case, vacate Mayokok's sentence, and remand for re-sentencing with directions to reconsider the 3553(a) factors, and all the supporting facts Mayokok cited pertinent to those factors.

Dated this 23rd day of April, 2019.

Mark D. Nyvold
Counsel of Record
Mark Nyvold, Attorney at Law
7671 Central Ave. NE
Suite 207
Fridley, MN 55432
(763) 276-9173
mark@marknyvoldlaw.com

Counsel for Petitioner

Member of the Bar of this Court