No. _____

IN THE

Supreme Court of the United States

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PAUL LIGHT,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether a sentence imposed pursuant to the child pornography Sentencing Guidelines, on a man whose crime was viewing pornography alone in his home, can be deemed reasonable because it is a "Guideline sentence," when the Sentencing Commission has deemed child pornography Guidelines flawed and Courts have questioned the basis on which non-contact offenders are put in the same categories as producers and manufacturers, and where the Second Circuit allowed the use of Guideline enhancements which, the Second Circuit wrote, serve "no end of the criminal justice system."

II. Whether the sentencing judge should have disqualified himself under 28 U.S.C. § 455 because, in a similar "run of the mill" child pornography-viewing case, the judge, rejecting expert suggestions that the defendant was educable, expressed the belief that pornography-viewing behavior is genetically-based and cannot be controlled by

the offender, and whether trial counsel was ineffective for failing to discover the published case in which the judge had stated his belief about the nature of child pornography- defendants and moving for recusal.

List of parties

Petitioner-Defendant Paul Light

Respondent, United States of America

The parties were the same in the district court.

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OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit, dated November 27, 2018, affirming the judgment of the district court is unpublished; it is reproduced in Addendum A. The Second Circuit's ruling of January 18, 2019 denying rehearing and rehearing *en banc* is reproduced at Addendum B.

STATEMENT OF JURISDICTION AND TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals upholding the conviction and sentence under 28 U.S.C. §1254. This Petition is timely filed, as Justice Ginsburg granted an application to extend the time to file the Petition until May 20, 2019, and the Second Circuit denied rehearing and rehearing *en banc* on January 18, 2019 (Appendix B.)

RELEVANT PROVISIONS INVOLVED

Sentencing Guideline USSG §2G2.2, applicable to most federal child pornography charges -- at least those involving the possession, receipt, or distribution of child pornography -- provides:

> §2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor
>
> (a) Base Offense Level:
>
> (1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).
>
> (2) 22, otherwise.
>
> (b) Specific Offense Characteristics
>
> (1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.
>
> (2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.
>
> (3) (Apply the greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.

(C) Distribution to a minor, increase by 5 levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.

(F) Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or

for accessing with intent to view the material, increase by 2 levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by 2 levels;

(B) at least 150 images, but fewer than 300, increase by 3 levels;

(C) at least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.

***

28 U.S.C. § 455, the judicial disqualification statute, provides, in pertinent part:

28 U.S. Code § 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; ….

STATEMENT OF THE CASE

Petitioner Paul Light seeks a writ of *certiorari* to review the decision and order of the United States Court of Appeals for the Second Circuit entered on November 27, 2018 (Addendum A). The Court of Appeals held that, though Judge Gary L. Sharpe had, in an earlier case, expressed his personal belief that child pornography offenders could not control behavior because of a yet undiscovered gene, it was not necessary that he disqualify himself, and counsel was not ineffective for failing to challenge Judge Sharpe for recusal, because Judge Sharpe did not make the same statement of belief about how child pornography viewing defendants "tick" in this case. The Court of Appeals then upheld a Guideline sentence imposed on Light, together with conditions of supervised release that the Court itself observed were not related to any legitimate objective.

The Child Pornography Viewing Sentencing

Petitioner was arrested in 2015 following an investigation of people sharing child pornography by peer-to-peer sharing groups. Petitioner had some difficulty of finding a lawyer to represent him. District Judge Gary Sharpe appointed Robert J. Knightly to represent the defendant.

After Petitioner pled guilty to all 17 counts of the indictment, the Court asked counsel Knightly to state his background and experience "in handling cases of this kind." Knightly said that he had practiced mostly in State court, tried 50-60 felony trials in New York City primarily, and that this was the fifth federal case, including one trial before Judge Sharpe in the summer. This was "the first time [counsel had] handled a child pornography case."

The prosecutor estimated that the based offense level would be 22, with a 2-level enhancement because the offense depicted a prepubescent minor; an additional 5 levels because the "offense involved the distribution for the receipt of a thing of value", which the prosecutor characterized as the "trading [of] files to receive

files" (the government would later agree that this 5-level enhancement was unjustified, but a 2-level enhancement would replace it); 4 levels for "sadomasochism and/or violence"; an additional 2 points because of the use of a computer; and an additional 5-level enhancement for "over 600 images." (Plea proceeding p.20).

On July 24, 2017, Judge Sharpe conducted an almost *pro forma* sentencing proceeding. Judge Sharpe did not comment about defendant's illness which keeps him housebound, or the fact that defendant had acted alone and in a "secret" fantasy, but had now been exposed to defendant's family who yet supported Petitioner entirely.

Nor did Judge Sharpe even mention the expert report submitted by the defendant mention the fact that an expert thought that the "moderate risk" to re-offend would be "markedly reduced" by Petitioner's completion of a Sex-Offender program, and also thought that especially because Petitioner is homebound, he is a "low risk" to the community. (Defense Sentence Mem. ECF 57 p.4).

Judge Sharpe indeed noted no personal characteristics or past history of the defendant in adopting the low-end-of-the-Guideline 151-month sentence (plus restitution, supervised release with conditions, and a lifetime of sex offender reporting.)

Judge Sharpe stated he knew "the defendant is seeking a variance for reasons that they articulate in their papers, seeking a sentence of 60 months plus supervised release, the minimum available under the mandatory minimums." (Sentence Tr. 7-24-17 p. 6). Judge Sharpe also noted his "awareness" of the Second Circuit's position in *United States v. Dorvee,* 616 F.3d 174 (2d Cir. 2010) -- in which the Second Circuit had "raised concerns about the perfunctory application of the Guidelines in child pornography cases where the defendant is not involved in a production offense." (Panel opinion, p.4 n.1 (Addendum A hereto)).

Making no comment about the grounds for criticism of the Guidelines or their "perfunctory" use, nor considering separately supervised release conditions or hearing argument about any such condition, Judge Sharpe stated he did not *dis*agree with the

Guidelines' method of "scoring" the severity of the offense. He stated he had "often said [he] underst[oo]d the way in which the commission scores the number of photographs, the sadomasochistic conduct, all of the individual factors… And while one might argue about the value of each of those factors in terms of its numeric score, [he] certainly agree[d] with the sentencing commission about the underlying factors themselves as a basis for the Court's consideration of what's an appropriate sentence in any case."

Judge Sharpe then mentioned the "extensive nature and length of time within which this conduct occurred" as well as what he "perceive[d] to be extraordinary damage to an extraordinary number of victims" in the presentence report.

That, Judge Sharpe said, "in my view supports a guideline sentence." Judge Sharpe then sentenced Petitioner to 151 months, which was the bottom of the Guideline range achieved through enhancements (use of a computer, and 600 or more images) that the Second Circuit specifically would find to further "no end of the criminal justice system …." (Panel opinion, p.5, Addendum A).

Judge Sharpe's Previous Expression of Belief that by nature, a child pornography offender (including a viewer) cannot help himself, implicating bias in consideration of prospects of recidivism

Judge Sharpe neither disqualified himself, nor made known an expressed bias, and unfortunately appointed counsel was not aware of Judge Sharpe's prior expressions of belief in an immutable "nature" of child pornography viewing defendants. In *United States v. Cossey*, 632 F.3d 82 (2d Cir. 2011), Judge Sharpe had sentenced a child pornography viewing/possessing defendant to a Guideline sentence, and had ignored the opinion of an expert that that defendant was unlikely to re-offend. Judge Sharpe had stated that he believed that the conduct "is likely to be found to have been caused by a gene."

In that case, the Second Circuit vacated the 6½-year sentence, holding that it was improperly based on the unsupported theory espoused by Judge Sharpe that the defendant was genetically predisposed to recidivism. Judge Sharpe had said -- to quote the *New York Times* coverage of the Second Circuit's vacatur of the sentence -- : "I'm not sure there's any answer for what I see here beyond what I'm about to tell ya," and predicting that in 50 years,

Mr. Cossey's conduct is likely to be found to have been caused by a gene. `You are what you're born with. And that's the only explanation for what I see here,' the judge said." In *Cossey*, the Second Circuit vacated the sentence and remanded to a different judge.

Trial counsel had ineffectively failed to learn of Judge Sharpe's previous expression of belief about the "nature" of child pornography viewing defendants. He had thus not moved for disqualification.

Appellate counsel argued that trial counsel should have found out about this bias on the part of the judge and should have moved for Judge Sharpe's recusal – and that Judge Sharpe should have recused himself, because of his bent against according the opinion of experts who predict non-recidivism on the part of child pornography defendants. Appellate counsel argued that, even if Judge Sharpe denied disqualification, the fact of bringing his bias out in the open would have illuminated the sentencing proceeding and either exposed bias or perhaps prompted a different sentence.

Appellate counsel noted that, in a 2015 civil case, a party before Judge Sharpe had argued for Judge Sharpe's recusal because of the bias uncovered in *Cossey,* 632 F.3d 82 (2d Cir. 2011). In that case, Judge Sharpe did not disclaim his bias, but denied recusal because, he said, the context of the cases was different.

Judge Sharpe had then described *Cossey* as a case involving possession of child pornography, and noted that in *Cossey* the Court of Appeals had held that he had "improperly based the sentence on an unsupported theory that the defendant was genetically predisposed to recidivism. See 632 F.3d 82." Judge Sharpe distinguished the civil case at bar, in which the party had argued his bias precluded a fair judgment, stating that the civil case was a contest over whether a mother or father was a better caregiver.

Judge Sharpe thus stated in 2015 *not* that he eschewed his belief about genetic predisposition to re-offend, but rather that *Cossey* and the case at bar "could not be any more different," *Koziol v. King*, 2015 U.S. Dist. LEXIS 66840, *14-17, 2015 WL 2453481 (N.D.N.Y. 2015).

Counsel argued to the Second Circuit that, unlike that 2015 civil case, *this* case presented the same circumstance as in *Cossey*. Judge Sharpe had not changed his basic view of the nature of this type of defendant; the mere fact that his sentence had been vacated in 2010 in *Cossey* does not mean he changed that belief.

There was a bias that should have prompted recusal, and should have been known to the trial attorney and used as a basis for a motion for disqualification.

Second Circuit decision

By summary Order (Addendum A), the Second Circuit upheld the sentence and declined to order recusal or fault trial counsel for failing to move for disqualification.

As to the sentence, the panel did not address the conditions of supervised release. Though Petitioner's offense did not involve contact with children, and though he did have family with children, he is barred from being with children without authority from a supervised release officer.

Though the panel wrote that there was "particular concern" with enhancements that were "all but inherent" to the offense, and though the panel believed that the use of enhancements for use of a computer and for "number of images" did not serve any goal of justice, the panel upheld the sentence using the concededly flawed child pornography Guidelines.

Though the panel "concurred" with earlier statements in the Second Circuit's prior cases that the United States Sentencing Commission's determination that "the current non-production guideline warrants revision, *Jenkins*, 854 F.3d at 189–90 (*citing* U.S. Sentencing Comm'n, Report to the Congress: Federal Child Pornography Offenses (2012))" (Decision p.6), the panel nonetheless affirmed the sentence as "reasonable."

Instead of reversing for reconsideration of enhancements that did not serve justice, the panel stated it would "take this opportunity to reiterate the concerns we raised with the child pornography Sentencing Guidelines in *Dorvee* and *Jenkins*."

Second Circuit Comments as to Judge Sharpe's bias:

As to Judge Sharpe's prior expression of belief in the "genetic" character of child pornography viewing defendants, the panel wrote that Judge Sharpe did not in this case refer specifically to his belief in genetics, and it noted that Judge Sharpe, since that 2010 *Cossey* decision, had sentenced other child pornography defendants and that the Second Circuit had upheld such sentences. On rehearing counsel argued that, the fact that other defendants may not have sought relief or pressed Judge Sharpe on the issue of his expressed bias, those failures should not affect, much less foreclose, a sentencing claim by Petitioner Light.

The Second Circuit panel rejected the argument that Judge Sharpe should have disqualified himself, or at least been asked to respond to a motion for disqualification, because his expressed view in *Cossey* that child pornography offenders did not concern a fact in evidence or a conclusion drawn in the legal case. The panel rejected the argument that what Judge Sharpe had expressed was his view of human nature, of what makes a child porn offender "tick" – and

demonstrated a bias not so amenable to change merely because of the prior Second Circuit panel's reversal of the sentence in a child pornography case. Judge Sharpe's bias should have been challenged and the Second Circuit panel's failure to recognize the bias and reverse, warrants a grant of certiorari and a summary vacatur.

While the panel wrote that it "cannot be said … that the judge currently holds [the same] views" as to predisposition that he held when he decided *Cossey* (Decision p.6), counsel argued on rehearing that, to the contrary, it cannot be said that Judge Sharpe had abandoned those views. Judge Sharpe may have learned from *Cossey* to keep his reasoning to himself, but in this case, he refrained from mentioning the recidivism factor completely. Asking the judge to disqualify himself would have at least illuminated the reason.

REASONS TO GRANT *CERTIORARI*

I. The Court should grant *certiorari* to determine whether a judge who, in a previous child pornography case, expressed his view

that child pornography viewers were genetically predisposed to reoffend, should be disqualified from sentencing another child pornography viewer, under 28 U.S.C. §455.

This Court has rarely written on grounds for disqualification for bias under 28 U.S.C. §455. The Court should grant *certiorari* to further explicate the standard, because – as in *Rippo v.* Baker, 137 S.Ct. 905, 907 (2017), the Second Circuit "did not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable."

In *Rippo* this Court summarily vacated a judgment of the Nevada Supreme Court because it applied the wrong legal standard. The Court noted that, "[u]nder our precedents, the Due Process Clause may sometimes demand recusal even when a judge "'ha[s] no actual bias.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U. S. 813, 825 (1986)." The Court instructed to use an "objective" test, and require recusal "when, objectively speaking, `the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id. citing Withrow v. Larkin*, 421

U.S. 35, 47 (1975) and *Williams v. Pennsylvania*, 579 U. S. ___, ___, (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias" (internal quotation marks omitted)).

The Court should grant *certiorari*, vacate and remand, to hold the Second Circuit to an objective standard, instead of making excuses for the district court judge whose expressed bias quite possibly was the basis for rejecting an expert who opined that Petitioner was not a high risk for recidivism. Merely having vacated his sentence ten years earlier is not a sufficient remedy.

That trial counsel did not know of the prior decision of Judge Sharpe that called his fairness into question, should have been deemed ineffective in these circumstances. Had counsel moved for recusal, the bias – or the basis of the Court's sentencing decision – would have been illuminated to make sure that sentence was not the product of a biased state of mind.

II. The Court should grant *certiorari* to consider whether a sentence based on flawed Sentencing Guidelines with enhancements that do not serve justice can be deemed "reasonable" and to overrule *Rita v. United States* to the extent *Rita* directs that a Court of Appeals can "presume" a sentence falling within the child pornography Guidelines' sentencing range to be "reasonable". The Court should take the case to give guidance to the lower courts that regularly hear child pornography cases.

In *Rita v. United States*, 551 U.S. 338 (2007), the Supreme Court clarified that the circuit courts may presume an imposed sentence falling within the Guidelines' sentencing range to be reasonable. This Court should overrule *Rita* as to child pornography Guidelines, because – as the Sentencing Commission has recognized – the child pornography Guidelines are not themselves reasonable. The Guidelines are too punitive as to non-contact child pornography viewers and do not reflect the principles to which Congress required the Sentencing Commission to hear when it delegated sentencing authority to the Commission. 28 U.S.C. § 994.

Congress charged the Commission with three goals: to "assure the meeting of the purposes of sentencing as set forth" in

the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility to permit individualized sentences," where appropriate; and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1). *Mistretta v. United States,* 488 U.S. 361 (1989) (upholding the Guidelines under a separation of powers / delegation analysis, and stating: "Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.")

The Sentencing Commission itself recognizes that the child pornography guidelines do not provide "fairness" in sentencing nor have been changed to "reflect … advancement in knowledge of human behavior as it relates to the criminal justice process."

The Guidelines in place now do not provide for fairness in sentencing because they do not reflect advancements in knowledge

of human bioscience and behavior. The penalties for child pornography viewers are disproportionate and should not be presumed reasonable by an appellate court.

As stated in a recent opinions by the venerated Eastern District of New York Judge Jack B. Weinstein, who collected and reported exhaustively on data, child pornography Guidelines, written before the internet made searches too easy, fail to comprehend differences between child pornography viewers who get images from the internet, from offenders of a different "ilk." Judge Weinstein wrote in *United States v. R.V.*, 157 F. Supp. 3d 207, 235-237 (E.D.N.Y. 2016):

> According to one scholar, the ease of the technology has meant that "[i]ndividuals who might not have become [child pornography] traffickers may do so after encountering the material in [peer-to-peer] networks. Easy access to child pornography in [peer-to-peer] networks also may foster the proliferation of child pornography. Every time a … file is downloaded, a new copy of the image is created." Janis Wolak, et al., Measuring a Year of Child Pornography Trafficking by U.S. Computers on a Peer-to-Peer Network, 38 Child Abuse & Neglect 347, 348-49 (2014).

> Some online users may happen upon child pornography by chance. For example, in one study, some participants exhibited a "curiosity without a fixated interest." Krueger, et al., Sexual and Other Axis I Diagnoses of 60 Males Arrested for Crimes Against Children Involving the Internet, supra, at 630. "[M]any individuals would tend to search for all sorts of atypical pornographic images and 'drift' from one site to another, selecting child pornography as one of many new types of images or activities to explore." *Id.* One scholar summarized the different theories for why people start to view child pornography, stating that for some men use starts with no *mens rea*….

Judge Weinstein further wrote that, since "educational" warnings have been posted on internet search engine sites, the incidence of child pornography viewing has receded. He wrote that a "recent finding lends support to this mistaken sense of privacy, and also to the deterrent value of some forms of monitoring", stating that Google and Microsoft had informed the searching public that child sexual abuse imagery is "illegal":

> In November 2013, both Google and Microsoft announced that they were removing child pornographic content from their indices, filtering search results, and returning warnings when specific searches were used. Users searching for child pornography on Google in the United States are provided a Google Ad warning:

> **Protecting children from sexual abuse**
>
> **Child sexual abuse imagery is illegal.**
>
> At Google we work with child protection experts to find, remove and report this material because we never want it to appear anywhere on our products, including our search results. To report child sexual abuse content or to find help for a child in the US, please contact the National Center for Missing & Exploited Children.
>
> Similarly, Bing returns an ad with the following warning:
>
> **Child porn, exploitative, or abusive content is illegal. Get help now. . . .**

As Judge Weinstein wrote, "[t]he data show a precipitous drop in child pornography searches starting in July 2013, commensurate with the announcements noted above. *Id.* at 235-37, *quoting and citing* Chad M.S. Steel, Web-based Child Pornography: The Global Impact of Deterrence Efforts and its Consumption on Mobile Platforms, 44 Child Abuse & Neglect 150, 154 (2015) (citations omitted; emphasis added).

Judge Weinstein criticized the Court of Appeals for the Second Circuit in that it "sometimes seems to have assumed that `child pornography shares a strong nexus with pedophilia' and that

pedophiles use child pornography as `a model for sexual acting out with children.' *U.S. v. Brand*, 467 F.3d 179, 198 (2d Cir. 2006) (internal quotation mark and citation omitted)." He criticized that the equation between the two subsets of offenders was at least "misleading": "Automatically equating non-production child pornography offenders—people who possess, acquire or distribute images of child sexual exploitation—with pedophiles or child molesters is misleading. Some `research has suggested that the motivation to collect child pornography exists along a continuum, ranging from individuals who are solely collectors, to those who collect and actively seek validation for their interests, to those who swap/trade/sell child pornography, to those who produce child pornography, to those who both collect child pornography and abduct children.`" [*Id.* at 238].

Even normal 'straight' people can fall into child pornography viewing, and they are not people who will slide into pedophilia. Current research has shown this.[1]

Unfortunately, the Guidelines still make the improper and research-disproven assumption, and as the Court below apparently did, some courts believe that child-pornography viewing is a precursor and stepping-stone for genetically unmodifiable sex offense misconduct. That is empirically not true, but the Guidelines

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[1] See August 2015 *ABA Journal*, "Minors Sentence: Courts are giving reduced terms to many child-porn defendants." Professor Douglas Berman, who writes the blog *Sentencing Law & Policy*, wrote about a child pornography viewer who at the time of his arrest was dean of students at a high school. He "focused his therapy to understand why his crime was harmful." Berman explained that there were increasing prosecutions of viewers who might deserve a sentencing break, but because of the Guidelines, courts generally saw no "plausible basis for probation on a child pornography download case."

Criminal Law Scholar Melissa Hamilton commented that the Guidelines "were written before the uptick in prosecutions involving child pornography from P2P [peer computer-sharing] programs, and that "`Going to a physical location and buying child pornography off the shelf or sending away money to get it by mail' involves more culpability than searching for it online. But the Guidelines do not reflect the realities.

have not caught up with the science. The Guidelines, in this respect, are themselves not reasonable.

But here, the Second Circuit expressly stated it "concurred" with the Sentencing Commission's determination that the "current non-production guideline warrants revision." (Second Circuit Opinion p.6, Addendum A). And it stated that it was particularly concerned with the all-but-inherent application of enhancement for use of a computer and the involvement of numerous images, stating that it was "aware of no end of the criminal justice system that is furthered by increasing the sentence for the use of a computer—an increase that applies even when the defendant does not utilize the internet in the course of committing the crime." *Id.* p.5*).*

Seemingly, if the sentence does not serve any end of justice, it should not be deemed reasonable. But perhaps because of *Rita*, the Second Circuit nevertheless affirmed.

Prior to accepting the Guideline sentence here, where the sentence served "no end of the criminal justice system", in a previous case, United *States v. Sawyer*, 907 F.3d 121 (2d Cir. 2018),

cert. denied, 18-7646 (March 4, 2019), the Second Circuit had sustained a Guideline sentence for a child pornography defendant that the Second Circuit itself had deemed "barbaric." Petitioner respectfully submits that a sentence that does not serve justice should not be upheld, as reasonable.

As this petition is being finalized, the Second Circuit itself decided another child pornography sentencing case emanating from the same Court, the Northern District of New York. As is typical, the Circuit ruled by summary order, *United States v. Jenkins*, 14-4295 (2d Cir. May 10, 2019) (**Addendum C hereto**). A different Second Circuit panel rejected a sentence based on unsupported notions about "deviant behavior."

In *Jenkins*, a sentencing judge had re-imposed a lengthy sentence on a non-contact child pornography viewer. In so doing he rejected arguments that defendant was unlikely to reoffend.

The Second Circuit panel held that he (the sentence judge) had wrongly assumed, without evidence, that defendant (probably) committed undetected deviant behavior in the past (or was likely to

do so in the future). The panel found it error for the district judge to rely "exclusively on studies and statistics about sexually deviant behaviors among child pornography offenders" and remanded to a different judge.

The "largesse" accorded to Jenkins in this new decision was not given to Petitioner, who was likewise sentenced by a Northern District of New York judge who (not this time but in the recent past) had also expressed views about "sexually deviant behaviors among child pornography offenders" being gene-based. In Petitioner's case Judge Sharpe failed to even mention Petitioner's health condition, his personal circumstances, or the expert report opining that with education, Petitioner was at a low risk to re-offend.

These two cases are penologically irreconcilable, but suggest that courts (like the Northern District of New York) that have sat on child pornography cases for a long time, are hardened by the images that disgust them. To the extent that the Second Circuit – and other courts – can easily affirm such disparate and behaviorally

baseless sentences under *Rita*, this Court should overrule *Rita* and at least require real appellate assessments in every case.

Respectfully, it is time to address the child pornography Sentencing Guidelines. They produce "barbaric" penalties that serve no end of the criminal justice system. This Court should accept this case, and overrule *Rita v. United States,* as it is used by appellate courts to uphold child pornography Guideline sentences.[2]

CONCLUSION

The petition should be granted.

Respectfully submitted,

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May 16, 2019

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[2] E.g., United States v. Miller, 2019 WL 1989239, 2019 U.S. App. LEXIS 13473, *1, __ Fed. Appx. __, (10th Cir. 2019).("For sex-offense convictions, the sentencing guidelines recommend a life term of supervised release. Given this recommendation, we presume that Mr. Miller's life term of supervised release was reasonable.")