

No. 19-1260

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In The  
**Supreme Court of the United States**

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ANDREW DEMMA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Sixth Circuit**

—◆—  
**SUPPLEMENTAL BRIEF FOR PETITIONER**

—◆—  
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**SUPPLEMENTAL BRIEF FOR PETITIONER**

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Subsequent to the filing of Petitioner’s reply brief, the Sixth Circuit issued another opinion reversing as substantively unreasonable a noncustodial sentence for the possession of child pornography. *United States v. Schrank*, No. 19-5903, \_\_\_ F.3d \_\_\_, 2020 WL 5511980 (6th Cir. Sept. 14, 2020). In the case, (1) the Sixth Circuit (citing Petitioner’s case) held that a non-custodial sentence for the possession of child pornography is *per se* unreasonable, irrespective of any individualized determinations made by the district court, confirming Petitioner’s argument that the Sixth

Circuit fails to give meaningful deference to sentencing courts as required by this Court in *Gall v. United States*, 552 U.S. 38 (2007); (2) the Sixth Circuit substituted the district court's 18 U.S.C. § 3553(a) analysis with its own, as the district court itself expressly recognized, confirming Petitioner's argument that the Sixth Circuit performs substantive reasonableness review *de novo*; and (3) the district court determined that a custodial sentence called for by the guidelines would be senseless, joining the chorus of district courts and others who have concluded that the guidelines are disproportionate and undermine a fair and disciplined system of justice. As this case highlights the pathologies raised in the petition and the reply brief, and as the case further proves that these fundamental issues will recur absent guidance from this Court, Petitioner submits that this case both warrants the Court's attention and strengthens the need for the petition to be granted. *See* S. Ct. R. 15.8.

*First*, the district court twice imposed a noncustodial sentence, first at the initial sentencing proceeding and then on remand. Sentencing Hearing, *United States v. Schrank*, No. 2:17-cr-20129 (W.D. Tenn. Aug. 25, 2017); Resentencing Hearing, *United States v. Schrank*, No. 2:17-cr-20129 (W.D. Tenn. Aug. 7, 2019). On September 14, 2020, the Sixth Circuit once again reversed, holding candidly that, regardless of the individual circumstances of the case, a child pornography offense automatically triggers a significant custodial sentence: "sentences are substantively unreasonable in child pornography cases when they require little or no jail time." *Schrank*, 2020 WL 5511980, at \*1 (citing

*United States v. Demma*, 948 F.3d 722, 732 (6th Cir. 2020)). This categorical rule eliminates noncustodial sentencing options altogether and even in outlier cases, amounts to the introduction of new mandatory minimum sentences through judicial legislation, and restricts the authority of district courts to identify an appropriate sentence within the actual statutory minimums and maximums set by Congress. This inflexible limit on district court discretion also conflicts with this Court’s instruction in *Gall*, that circuit courts are to give due deference to the individualized decisions of district courts. 552 U.S. at 51-53. It is the exact opposite of deference to preemptively and absolutely shorten the range of sentences otherwise available to a district court.

*Second*, Petitioner has pointed out that, under the guise of substantive reasonableness review, the Sixth Circuit replaces a district court’s individualized consideration of the Section 3553(a) factors with its own independent weighing of these factors. *See* Pet. at 14-17; Reply Br. at 7-8. This substitution is precisely what occurred in *Schrank*, as the district court itself expressly observed on remand: the Sixth Circuit is not to “second-guess a district court judge’s decision on sentencing,” but “that’s exactly what they did, is they second-guessed my decision on what the sentence should be based on their *own evaluation* of the factors.” Resentencing Hearing, *Schrank*, at \*9 (emphasis added).

The vertical conflict between the district court and the Sixth Circuit in *Schrank*, highlighted by the district court’s honest assessment that the Sixth Circuit

applied substantive reasonableness review *de novo*, confirms the entrenched stand taken by the Sixth Circuit, the disagreement within the judiciary on the proper meaning of substantive reasonableness review, and the commensurate need for clarity to be provided by this Court. Indeed, the Sixth Circuit ordered that the case be reassigned to a different district judge on remand, *Schrank*, 2020 WL 5511980, at \*3, ensuring that compliance with its particular interpretation of the Section 3553(a) factors will be the product of personnel, not principle.

*Third*, the case offers further evidence of the prevailing view among district courts that the child pornography guidelines are not sound, a conclusion shared across the judicial community, including by the U.S. Sentencing Commission. *See* Pet. at 12-13, Reply Br. at 12-13. In *Schrank*, the district court considered the individual circumstances of the case to determine that a custodial sentence as recommended by the guidelines “would not accomplish anything.” Sentencing Hearing, *Schrank*, at \*27. Moreover, on remand, the district court acknowledged the Sixth Circuit’s opinion that a custodial sentence would be supported by general deterrence, but the district court emphasized that it “does not make sense” to impose a custodial sentence to advance one isolated factor when “everything else about Mr. Schrank argues for something different.” Resentencing Hearing, at \*27; *see also id.* at \*29 (“I don’t see any value in sending Mr. Schrank to prison.”). The district court therefore reimposed a noncustodial sentence, and in doing so

affirmed the great disconnect between these guidelines and reasoned sentencing, and between the Sixth Circuit and the district courts in the child pornography context. As this case shows, the void—and the absence of consistent and coherent sentencing in this area—will linger without this Court’s involvement.



### CONCLUSION

For the foregoing reasons, and those provided in the petition and the reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 2020