I. OPINIONS BELOW

The reported opinion of the Court of Appeals for the Sixth Circuit is attached to this petition as Appendix A. The judgment of conviction in the United States District Court for the Northern District of Ohio is attached to this petition as Appendix B.

II. JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), the petitioner having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

III. STATUTORY PROVISIONS INVOLVED

This matter involves the sentencing provisions and the prohibitions against the possession of child pornography contained in the United States Code, specifically US.C. 18 § 2252(A).

IV. STATEMENT OF THE CASE

A. Procedural Background

On February 28th, 2018, Mr. Lynde entered pleas of guilty to Counts one and two of indictment 5:17-CR-429 to the offense of Receipt and Distribution Child Pornography in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1) and Possessing Child Pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(20). Mr. Lynde entered a plea before the Court without any agreement with the Government as to sentencing though the Government later moved to dismiss count two of the indictment at the

sentencing hearing. After a sentencing hearing held on June 13th, 2018, Mr. Lynde was sentenced by the Court to a term of 97 months for the offense of Receipt and Distribution Child Pornography and ordered a total of $20,000 to two identifiable victims (R. 27, Judgment). Mr. Lynde timely filed his notice of appeal on August 1st, 2018 (R. 29, Notice of Appeal).

The matter was briefed for the Sixth Circuit Court of Appeals and, after considering the matter on the briefs submitted, the Court issued an Opinion dated June 7th, 2019, denying all relief. Mr. Lynde now makes this timely application to this Honorable Court.

B. Statement of Facts

The Government stated, in Mr. Lynde's Change of Plea hearing, as its basis for the charges alleged in the indictment that over the course of approximately fourteen months in 2014 and 2015, Mr. Lynde, through internet access on his computer, collected and possessed images that contained child pornography. (R. 56, Change of Plea hearing transcript, Page ID# 1007). The images were transported across lines and contained minors engaged in sex as well as pre-pubescent minors engaged in intercourse and Mr. Lynde was aware of his possession of these images as well as their content. (R. 56, Change of Plea hearing transcript, Page ID# 1008). Mr. Lynde agreed that he had engaged in such conduct. (R. 56, Change of Plea hearing transcript, Page ID# 1009).

At his sentencing hearing, Mr. Lynde's counsel noted for the Court that he was an honorably discharged U.S. Air Force veteran who raised three grown children with

his wife who now suffered from a debilitating illness. (R. 57, Sentencing Hearing transcript, Page ID# 1017-1018). His counsel went on to note that, after his discharge, he had a long career as an X-ray service technician, work that led him on several charitable missions outside the United States to assist other countries with their X-ray equipment. (R. 57, Sentencing Hearing transcript, Page ID# 1018-1019). Mr. Lynde's counsel noted that he had voluntarily participated in sex offender treatment from the time of his arrest until sentencing in order to address any issues he had with attraction to child pornography, though Dr. Michael Smith, his treatment provider, noted in his report that he was a low risk to reoffend and had instituted measures that would assist him in preventing relapse. (R. 57, Sentencing Hearing transcript, Page ID# 1019-1020; R. 22, Sealed Exhibits to Defense Sentencing Memorandum, Page ID# 805). His counsel further noted that his family was present and supported him and submitted proof to the court through letters by various family members and friends. (R. 57, Sentencing Hearing transcript, Page ID# 1020-1021; R. 22, Sealed Exhibits to Defense Sentencing Memorandum, Page ID# 806-854). Mr. Lynde's conduct had put a large financial burden on their family, including the sale of their home, and they were fully aware of his offense conduct but supported him nonetheless. (R. 57, Sentencing Hearing transcript, Page ID# 1020-1021; R. 22, Sealed Exhibits to Defense Sentencing Memorandum, Page ID# 806-854). Mr. Lynde's counsel reiterated to the Court that Mr. Lynde had addressed the issues of his criminal conduct directly and effectively and that he empathizes with the victims of child pornography. (R. 57, Sentencing Hearing transcript, Page ID# 1022-1023).

Mr. Lynde stated to the Court that he did not understand the full impact of his conduct to his family and to the victims at the time of the offense, but he now does and apologized for his actions and wanted to return to his old life prior to this episode. (R. 57, Sentencing Hearing transcript, Page ID# 1023-1024).

C. Sixth Circuit Opinion

The Opinion issued by the Sixth Circuit in this matter upheld the rulings of the District court. In its Opinion, the Sixth Circuit, in reference to Mr. Lynde's assertions that the United States Sentencing Commission's own reports and recommendations as well as their underlying methodology for creating and applying certain aspects of the guidelines are being discarded in the sentencing of possessors of child pornography, notes that Mr. Lynde's citation to the U.S.S.C.'s commentary is correct, but discounts it on two points. The Sixth Circuit states that Congress holds the prerogative to ignore the recommendations of the U.S.S.C. if it so chooses despite that decision being contrary to the purported mission of the U.S.S.C. and it states that a District Court judge, during sentencing, has the authority, but not the obligation to apply recommendations of the U.S.S.C. This decision by the Sixth Circuit was erroneous because it undercuts the purpose of the U.S.S.C., it allows a District Court to ignore the clear recommendations of the U.S.S.C. and it permits the application of enhancements factors to offenders in Mr. Lynde's position that have not engaged in conduct that is either greater, different, or more egregious than the vast majority of similarly situated offenders thereby denuding the purpose of applying sentencing enhancements.

ARGUMENT

A. THE DISTRICT COURT ERRED WHEN IT FOUND ENHANCEMENT FACTORS LISTED IN U.S.S.G. §2G2.2(b)(2), (b)(4), AND (b)(7)(D) APPROPRIATE IN MR. LAFOND'S CASE

i. STANDARD OF REVIEW

A district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007). A sentence is procedurally unreasonable if the district court "failed to calculate the Guidelines range properly; treated the Guidelines as mandatory; failed to consider the factors prescribed at 18 U.S.C. § 3553(a); based the sentence on clearly erroneous facts; or failed to adequately explain the sentence." *United States v. Coppenger*, 775 F.3d 799, 803 (6th Cir. 2015). The substantive reasonableness of a sentence is reviewed under an abuse-of-discretion standard. *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008). A sentence may be substantively unreasonable if the sentencing court "imposed a sentence arbitrarily, based on impermissible factors, or unreasonably weighed a pertinent factor." *Coppenger*, 775 F.3d at 803. "Sentences within a defendant's Guidelines range are presumptively substantively reasonable[.]" *United States v. Pirosko*, 787 F.3d 358, 374 (6th Cir.

2015). The determination of whether the district court properly applied a sentence enhancement under the Guidelines is also a matter of procedural reasonableness. *United States v. Battaglia,* 624 F.3d 348, 351 (6th Cir.2010) (citing *United States v. Flack*, 392 Fed.Appx. 467, 470 (6th Cir.2010). Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *United States v. Carty*, 520 F.3d 984, 992(9th Cir. 2008) (en banc).

ii. ARGUMENT

The United States Sentencing Commission has been vested with the power to promulgate various policy statements and guidelines that Federal Courts around the country may use as a reference and guidepost when crafting a sentence for a particular defendant in a particular case. U.S.S.G. §1A3.1. *Mistretta v. United States*, 488 U.S. 361 (1989) stated that the Sentencing Commission was part of the judicial branch of government and independent of both the executive and the legislative branches of the government, neither of which should use the Sentencing Commission as a way to "cloak[ed]" their own functions in "neutral colors of judicial action". *Mistretta* at 407.

Due to this structure and apparatus, the Sentencing Commission's decisions regarding sentencing issues typically receive strong deference as long as their conclusions demonstrate the analytical and data-based approach to developing the

guidelines that the Commission espouses. However, as the current version of the guidelines relate to Child Pornography offenses and sentencing, numerous district courts in sister Circuits have concluded, specifically in reference to the creation of specific provisions of U.S.S.G. § 2G2.2, that the current version "diverges significantly from the Sentencing Commission's typical, empirical approach," frequently producing a sentence "greater than necessary to provide just punishment." *United States v Hanson*, 561 F. Supp. 2d 1004, 1008 (E.D. Wis. 2008); *United States v Stern*, 2008 U.S. Dist. LEXIS 102802 (N.D. Ohio, Dec. 19, 2008).

This Court should be aware of several critical points regarding §2G2.2(b) that are pertinent for this Court's review of the sentence imposed in Mr. Lynde's case. In response to the perceived disparities in sentencing offenders with Child Pornography related offenses, the Sentencing Commission issued a voluminous report at the end of 2012 and made several edifying conclusions regarding the guidelines, specifically §2G2.2. In reference to the guideline enhancements embedded in §2G2.2(b), the December 2012 report of Federal Child Pornography Offenses, the Commission offered significant criticism of the enhancements in the guidelines. As a general conclusion, the Commission's report states:

> Several provisions in the current sentencing guidelines for non-production offenses — in particular, the existing enhancements for the nature and volume of the images possessed, an offender's use of a computer, and distribution of images — originally were promulgated in an earlier technological era. Indeed, most of

> the enhancements, in their current or antecedent versions, were promulgated when offenders typically received and distributed child pornography in printed form using the United States mail. As a result, enhancements that were intended to apply to only certain offenders who committed aggravated child pornography offenses are now being applied routinely to most offenders. *See United States Sentencing Commission's Report to the Congress: Federal Child Pornography Offenses*. December 2012, P. 313.

More specifically, with regard specifically to §2G2.2(b)(2), (4), and (7)(D), the report by the U.S.S.C. stated that:

> The current penalty scheme in non-production cases focuses primarily on an offender's child pornography collection. Three of the six enhancements in §2G2.2 concern the content of offenders' collections: (1) a 2-level enhancement for possession of images of a pre-pubescent minor, (2) a 4-level enhancement for possession of sado-masochistic images or other depictions of violence, and (3) a 2- to 5-level enhancement for collections of a certain number of images (with increments ranging from ten or more images to 600 or more images). Because these three provisions (including the maximum 5-level enhancement for possession of 600 or more images) now apply to a majority of offenders, they add a significant 11-level cumulative enhancement based on the content of the typical offender's collection. The current guideline thus does not adequately distinguish among most offenders regarding their culpability for their collecting behaviors. Furthermore, the 11-level cumulative enhancement, in addition to base offense levels of 18 or 22, results in guideline ranges that are overly severe for some offenders in view of the nature of their collecting behavior. *Id.*, Pp. 322-323.

The Commission's Report went further in noting the other problematic enhancements in §2G2.2(b) stating:

> The existing enhancement for distribution of child pornography, §2G2.2(b)(3), indirectly punishes some offenders for their involvement with child pornography communities, insofar as Internet-based communities such as Internet chat rooms or bulletin boards dedicated to child exploitation serve as forums in which offenders often trade child pornography. However, that enhancement — in particular, its incremental 2- to 7-level enhancements for different types of distribution — was not designed to punish community involvement *per se*.

> Similarly, the 2 level enhancement for use of a computer, §2G2.2(b)(6), applies in virtually every case and, thus, fails to differentiate among offenders with respect to their involvement in communities. *Id.* Pp. 323-324.

Based on the extremely thorough analysis conducted by the Sentencing Commission in its 2012 report, it went on to recommend modifications to the existing guidelines stating:

> The Commission recommends that §2G2.2(b) be updated to account more meaningfully for the current spectrum of offense behavior regarding the nature of images, the volume of images, and other aspects of an offender's collecting behavior reflecting his culpability (e.g., the extent to which an offender catalogued his child pornography collection by topics such as age, gender, or type of sexual activity depicted; the duration of an offender's collecting behavior; the number of unique, as opposed to duplicate, images possessed by an offender). Such a revision should create more precisely calibrated enhancements that provide proportionate penalty levels based on the aggravating circumstances present in the full range of offenders' collecting behavior today. *Id.* P. 323.

To date, none of these recommendations have been accepted nor have the current guidelines actually been altered in keeping with the recommendations, but each goes to a fundamental purpose of the guidelines, which is to assist the sentencing court in differentiating between offenders based on specific characteristics of their offense and their persons. As noted by the Sentencing Commission, the enhancements in §2G2.2(b) which were applied to Mr. Lynde at sentencing, do not assist the District Court to "adequately distinguish among most offenders".

Use of these enhancements undermines the basic purpose of the guidelines themselves. The specific characteristics of Mr. Lynde's offense were no different than the vast majority of similarly situated defendants, yet they led to a sentence that was significantly out of proportion and created punishment that was "greater than necessary" to uphold the policies of 18 U.S. §3553(a)(2) in contravention of the restrictions of the statute. The District Court did grant a variance specifically related to §2G2.2(b)(6). It erred when it ignored the remaining, additional arguments of Mr. Lynde regarding the application of the other enhancement factors in §2G2.2(b) because those arguments were underscored by the U.S.S.C.'s own assessment of the enhancement factors.

In its brief discussion of its reasoning behind its sentence, the District Court stated that it was varying Mr. Lynde's guideline range two levels downward based on the fact that "I have not, in my 27 years, had a case that did not involve the use of a computer". (R. 57, Sentencing Hearing transcript, Page ID# 1040:23-25). This assertion is overwhelmingly supported by data collected and distributed by the U.S.S.C. regarding sentencing. After 2017, the U.S.S.C. distributed information regarding the use of specific guidelines and enhancement for various offenses. In this study, U.S.S.C. data underscored the District Court's assertion regarding the use of computers in child pornography cases. The Report noted that 2G2.2(b)(6), the enhancement for use of a computer during the commission of the offense, was

applied to 95.7% of cases in this category. *Use of Guidelines and Specific Offense Characteristics: Fiscal Year 2017*, P.45. The District Court, as noted above, used this as the basis to vary Mr. Lynde's range downward two levels, essentially eliminating the enhancement in its crafting of the sentence.

While Mr. Lynde agrees with the conclusion of the District Court on this specific issue, by further applying this same logic, the District Court erred when it failed to make the same adjustments for similarly frequent offense enhancements. The U.S.S.C. data also reveals that 2G2.2(b)(2), the enhancement for the victim of the offense being under 12 years of age, is applied to 94.1% of cases. *Id.* at P.45. This enhancement was used to raise Mr. Lynde's adjusted offense level by two levels in the pre-sentence report and in the District Court's calculation of the adjusted guideline range. Similarly, the District Court applied 2G2.2(b)(4)(A), the enhancement applied if the involved material sadistic or masochistic material, to Mr. Lynde's case increasing his adjusted offense level four levels. The U.S.S.C. data revealed that this enhancement was applied in 71.2% of cases. *Id*. at P. 45. The District Court also applied 2G2.2(b)(7)(D) as it determined that he possessed over 600 images in the offense material that he was responsible for, increasing his adjusted offense level one level. The U.S.S.C. data shows that this enhancement is applied in 74.7% of all cases. *Id.* at P. 46.

The application of the 2G2.2(b)(7)(D) enhancement is further complicated by the fact that Mr. Lynde was in possession of far less than 600 images, but the five videos that were in his possession, which have been arbitrarily assigned a "value" of seventy-five still images, put him over the 600 image threshold. In 2004, the U.S.S.C. amended it application notes to count "[e]ach photograph, picture, computer, or computer-generated image, or any similar visual depiction [as] one image." U.S.S.G., App. C, amend. 664 (Nov. 1, 2004); U.S.S.G. § 2G2.2 cmt. (n.4(B)(ii)). It further instructed, as the application note explains, that each "video, video-clip, movie, or similar recording shall be considered to have 75 images." *Id*. The U.S.S.C. provided no reason for this change in Amendment 664.[1] It does not appear that this formula was derived from any empirical or data based study that would indicate why a video would be equivalent to seventy-five still images, or why the harm to those victims was, essentially, seventy-five times greater than a still photograph of the same victim would be. This determination is, similarly, open to the same criticism of 2G2.2 in general that is raised in *Hanson* and *Stern*: rather than the U.S.S.C. using an approach based on research and data to formulate this guideline, it appears arbitrary and, consequently, should not receive the same deference afforded other parts of the guidelines for that reason.

[1] In its Reason for Amendment, the U.S.S.C. merely notes that it has determined that videos shall count as seventy-five images without elaborating. U.S.S.G., App. C, amend. 664 (Nov. 1, 2004), P. 59.

The data from the 2017 report regarding the use of 2G2.2 enhancements is clear and undisputed. These specific enhancements are applied in nearly all or the vast majority of child pornography cases. The District Court erred in failing to apply its own policy, by varying downward from the adjusted offense level because of the nearly universal prevalence of a certain offense characteristic, to all such characteristics related to Mr. Lynde that would have warranted such a variance. Had the Court done so, it would have resulted in an additional 7 level reduction in the adjusted offense level for Mr. Lynde, yielding at adjusted offense level of 23 and, with his Criminal History as Category I, his resulting recommended guideline range would have 46-57 months. It is reasonable to assume that the District Court would have sentenced him to the statutory minimum 60-month sentence in those circumstances. As the District Court was inconsistent with its own application of downward variances based on the nearly universal application of specific enhancements, it "imposed a sentence arbitrarily", which constitutes an abuse of its discretion under *Coppenger* and permits this Court to reversed the District Court's decisions. This Court should determine that the District Court abused its discretion, that the sentence it crafted was substantively unreasonable, and that it should have negated additional enhancements in its calculation of Mr. Lynde's sentence in order to be logically consistent. This Court should grant Mr. Lynde a resentencing based on the principles espoused herein.

B. THE DISTRICT COURT ERRED BY SENTENCING MR. LAFOND EXCESSIVELY BASED ON THE STATUTORY CONSIDERATIONS IN 18 U.S.C. §3553(a).

i. STANDARD OF REVIEW

A district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007). A sentence is procedurally unreasonable if the district court "failed to calculate the Guidelines range properly; treated the Guidelines as mandatory; failed to consider the factors prescribed at 18 U.S.C. § 3553(a); based the sentence on clearly erroneous facts; or failed to adequately explain the sentence." *United States v. Coppenger*, 775 F.3d 799, 803 (6th Cir. 2015). The substantive reasonableness of a sentence is reviewed under an abuse-of-discretion standard. *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008). "A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *United States v. Fowler*, 819 F.3d 298, 303–04 (6th Cir. 2016). A sentence may be substantively unreasonable if the sentencing court "imposed a sentence arbitrarily, based on impermissible factors, or unreasonably weighed a pertinent factor." *Coppenger*, 775 F.3d at 803. "Sentences

within a defendant's Guidelines range are presumptively substantively reasonable[.]" *United States v. Pirosko*, 787 F.3d 358, 374 (6th Cir. 2015). Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *United States v. Carty*, 520 F.3d 984, 992(9th Cir. 2008) (en banc).

ii. ARGUMENT

United States Sentencing Guidelines as well as the United States Code provide that a sentencing court may consider, without limitation unless otherwise prohibited by law, any information related to a defendant's background, character, and conduct when crafting a sentence. See U.S.S.G. §1B1.4; See 18 U.S. § 3661. Previous panels of this Court have held that a sentence that falls within the advisory Guidelines range is given "a rebuttable presumption of reasonableness." *United States v. Williams*, 436 F.3d 706, 708 (6th Cir.2006). "This rebuttable presumption does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence." *United States v. Richardson*, 437 F.3d 550, 554 (6th Cir.2006). When challenging the reasonableness of a sentence, a defendant need not object to its unreasonableness at the time the sentence is announced by the District Court. *See United States v. Penson*, 526 F.3d 331, 337 (6th Cir.2008) ("[D]efendants do not need to raise the

claim of substantive unreasonableness before the district court to preserve the claim for appeal.")

The reasonableness of a District Court's sentence "has both substantive and procedural components." *United States v. Jones*, 489 F.3d 243, 250 (6th Cir. 2007). This Court's inquiry into the reasonableness of the sentence "requires [inquiry] into both 'the length of the sentence' and 'the factors evaluated and the procedures employed by the district court in reaching its sentencing determination.'" *United States v. Liou*, 491 F.3d 334, 338 (6th Cir. 2007)(*quoting United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005)). When the Court conducts this review, it should "'first ensure that the district court committed no significant procedural error' and 'then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.'" *United States v. Smith*, 516 F.3d 473, 476 (6th Cir.2008) (*quoting Gall*, 128 S.Ct. at 597). Prior panels of this Court have concluded, when reviewing the sentencing decisions of the district court that "[a] district judge act[s] unreasonably by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors, failing to consider pertinent §3553(a) factors, or giving an unreasonable amount of weight to any pertinent factor." *Webb* at 385.

The United States Code 18 § 3553 provides the trial court with guidance when sentencing a defendant. Section 3553 outlines numerous considerations that the trial court must take into account when formulating a sentence. Specifically, §3553(a)

instructs the District Court that, when crafting a sentence, it "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection". The Code goes further in §3553 to promulgate the following factors for determining a just sentence, stating:
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.

In addition to the above considerations listed, the District Court must also take into consideration, when making its sentencing determinations pursuant to §3553, "any pertinent policy statement" that is in effect at the time of the sentencing. Further, the District Court must be aware of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" when arriving at a decision on a sentence for a particular defendant. The District Court should use the appropriate range of the offense and the appropriate category of defendant as defined by the sentencing guidelines, but the District Court may depart from the specified guidelines if and when:

> "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". §3553(a)

Once the District Court has arrived at a sentence for a particular defendant, the court must "at the time of sentencing…… state in open court the reasons for its imposition of the particular sentence" so the parties will know the court's reasoning behind the decision reached. If the District Court determines that the sentence shall be "of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months" then the Court must inform the parties of "the reason for imposing a sentence at a particular point within the range". Also important to note, if the District Court crafts a sentence that "is not of the kind, or is outside the range, described in subsection (a)(4)" the court must state "the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity".

The United States Sentencing Commission has promulgated guidelines to assist courts in formulating appropriate sentences for individual defendants based on a myriad of considerations. The District Court is no longer bound by the guidelines produced by the Sentencing Commission when making a sentencing determination.

United States v. Booker, 543 U.S. 220, 245-246 (2005). Nonetheless, the trial court must consider the sentencing guidelines and the principles outlined therein when crafting a sentence for an individual defendant even if the court then chooses to deviate from the guidelines. *Gall v. United States*, 552 U.S. 38 (2007). The guidelines should be viewed as "one factor among several" that must be considered in imposing an appropriate sentence under § 3553(a). *Nelson v United States*, 555 U.S. 350, 352 (2009). When crafting a sentence and applying the appropriate factors, the District Court must "make an individualized assessment: to explain its decision to impose a particular sentence." *Gall* at 49-50, 63-60; See also *Pepper v United States*, 131 S. Ct. 1229, 1242-43 (2011).

In the instant case, the District Court erred in the imposition of its sentence with regards to Mr. Lynde under the general principles of §3553(a) creating a sentence that was substantively unreasonable and warranting reversal. The District Court, pursuant to §3553(a)(1), did determine that it should lower Mr. Lynde's adjusted offense level by two levels based on his particular family circumstances. The District Court stated that it would "apply a two-level variance for the unusual family circumstances. You have a very ill wife, migraines haven't been alleviated over the past number of years … And your care is needed". (R. 57, Sentencing Hearing transcript, Page ID# 1041:7-10). Additionally, the District Court noted that,

in its opinion, Mr. Lynde had led "a particularly exemplary life" and that he "not only [doesn't] have a criminal record, you have a particularly exemplary life, and I think I should recognize that". (R. 57, Sentencing Hearing transcript, Page ID# 1041:15-20). While Mr. Lynde agrees that this was a proper use of the District Court's discretion in lowering his sentence, the District Court, recognizing the certain particular aspects of Mr. Lynde's character and circumstances that made him more deserving of a shorter sentence, elected to impose a 97-month sentence nonetheless.

Despite noting the specific and immediate need for family support and also pointing out the strong merits of Mr. Lynde as a citizen prior to the offense conduct, the District Court elected to ignore its own conclusions. It arbitrarily selected the sentence of 97 months as it was at the bottom of the re-calculated guideline range. Finding specific, positive characteristics under (a)(1) that merited a variance for Mr. Lynde, the District Court, nonetheless, the Court then crafted a sentence that failed to achieve the purposes set out in §3553(a)(2). Mr. Lynde's sentence did nothing under subsection (D) to provide him "with needed educational or vocational training". The sentence of the District Court did little to achieve the stated purpose under (C) to "protect the public from further crimes" of Mr. Lynde. The information from Dr. Smith as well as his age and lack of prior criminal record speaks to the fact that he is a very low risk to reoffend. As Congress mandated a sixty-month

mandatory minimum sentence for this offense, Mr. Lynde's sentence would always require a significant period of incarceration that provided the "adequate deterrence to criminal conduct" for the public in general. The additional thirty-seven months the District Court added to the mandatory minimum sentence did little to achieve the purposes of subsection (B). In a similar vein, the purposes of subsection (A) would have been adequately achieved with the mandatory minimum sentence of sixty months. Mr. Lynde already demonstrated his remorse by admitting to his conduct, pleading and testifying at his sentencing about the impact on the victims of such crimes. Sixty months incarceration as well as collateral consequences like supervised release, a felony record, and sex offender registry requirements are more than adequate to "reflect the seriousness of the offense" as well as providing the "just punishment" that subsection (A) requires. Additional time was unwarranted and arbitrary.

Mr. Lynde maintains that his sentence was substantively unreasonable and warrants reversal. While the District Court demonstrated through its commentary that it was aware of and should recognize the "exemplary life" that Mr. Lynde had led until the offense conduct, it then failed to apply that to the factors of §3553(a)(2) when crafting his sentence. The failure on the part of the District Court to apply the factors in §3553(a)(2) and to craft the sentence for Mr. Lynde in the manner outlined by statute and case law was a misapplication of the legal standard for sentencing, it

led to a sentencing being arbitrarily selected and it was an abuse of its discretion constituting reversible error. Mr. Lynde is entitled to a new sentencing hearing based on this error of the District Court and erroneous affirmation by the Circuit Court.

CONCLUSION

For the aforementioned reasons, Mr. Lynde prays that this Honorable Court will grant his request for a writ of certiorari in order to review the question of the proper application of the sentencing guidelines and statutory provisions of the sentencing act were applied in his case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing writ of certiorari and the accompanying appendix has been served via first-class mail upon counsel for the Respondent, Danielle Angeli and Justin Herdman, Assistant U.S. Attorney, Office of the United States Attorney, 801 W. Superior Ave., Suite 400, Cleveland, OH 44113, and Mr. Noel Francisco, Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530-0001, this 22nd day of August, 2019.

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Manuel B. Russ