NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

DAMION FAULKNER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it substantively unreasonable to impose an effective sentence of life on a 30-year-old defendant who committed a "reprehensible" sex offense that cannot be judged one of the "worst of the worst"? Is it unreasonable that this defendant received such a harsh sentence while many defendants who remorselessly committed the worst type of sex offense received sentences of 30 years or less?

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PRAYER

Petitioner Damion Faulkner prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion in petitioner's case is attached as Appendix A. A transcript of the sentencing decision of the district court is attached as Appendix B.

JURISDICTION

The Court of Appeals entered its judgment and opinion on June 7, 2019, denying relief. This petition is filed within 90 days of that judgment as required by Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Sentencing Reform Act provides:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. 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;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); (5) any pertinent policy statement—

(C) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(D) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[;]

(5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(6) the need to provide restitution to any victims of the offense.

18 USCS § 3553(a).

STATEMENT OF FACTS

In 2006, when Damion Faulkner was 23 years old, he touched his five-year-old niece's groin about six times, but was not caught. In 2013, when he was 30 years old, he did the same thing once to a five-year-old girl who was the half-sister of his niece, who was by that time 11 years old. The girl was sleeping throughout, and evidently remains unaware the abuse even took place. He took photos and a video of that act and distributed them online.

That triggered his arrest, which was the first serious charge in his life (he had a prior conviction for shoplifting and one for drunk driving). Police told him that he should confess to spare the girls any harm stemming from his prosecution, and they told him he would not be rewarded for such a confession. He confessed immediately, expressing remorse.

Likewise, he pled guilty as ultimately charged. If he had been charged and held responsible under the Sentencing Guidelines only for the sex offenses described above, the Guidelines would have recommended an offense level of 30 years to life. But the prosecutor chose to bring an additional charge: that Faulkner had once taken haphazard photos of his niece and the five-year-old girl while they were clothed in, respectively, a dress and a swimsuit, as he was trying (unsuccessfully) to happen to get a photo of them that might amount to something like child pornography. Neither girl was aware of his effort. The government never proved that this mere attempt offense caused anyone any harm. Yet because Faulkner also pled guilty to that attempt offense, the bottom of his guideline range jumped from 30 years up to 320 years.

Faulkner sought a sentence he could hope to live through, asking for a sentence of less than 30 years and emphasizing his immediate confession, his remorse, and his lack of any serious criminal record, along with the fact that his actual sex offenses were far from the worst of the worst. The district judge admitted he could not say the offense was one of the worst of the worst, and simply explained that "our society does not condone" the sexual abuse of children.

The judge imposed (after a remand to correct a multiplicitous sentencing error) a sentence of 47.5 months, which Faulkner has no real chance of outliving.

The Sixth Circuit Court of Appeals rejected Faulkner's argument that his sentence is substantively unreasonable. In his argument, he cited many cases where defendants who *did* commit the worst-of-the-worst type of sex offenses received sentences of 30 years or less, even though they did not plead guilty. He also pointed out that the charging of the attempt offense inflated his guidelines range inordinately. The Sixth Circuit said that Faulkner's behavior was "reprehensible," and that his sentence was only one-seventh as long as the guidelines recommended, and so it was substantively reasonable. It did not address the fact that Faulkner's sentence virtually doomed him to die in prison whereas defendants who had remorselessly committed much worse crimes were serving sentences of 30 years or less.

Argument

I. The Court should grant certiorari in order to correct a fundamental error.

The Sentence Reform Act requires the courts to impose sentences that are no greater than necessary to fulfill the purposes of federal sentencing. 18 U.S.C. § 3553(a). When making that determination, a court must "consider" certain factors, including the guidelines range and the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(4), (6). Appellate courts review these sentencing decisions, assessing the ultimate sentence imposed for substantive reasonableness. *Gall v. United States*, 552 U.S. 38, 51 (2007).

Here, Faulkner presented the cases of several other defendants who clearly: (1) had declined to confess, and (2) had committed sex offenses against minors that were categorically worse than his. Each of these defendants received a sentence of 30 years or less, which is the kind of sentence sought by Faulkner who was hoping to simply get a sentence that he would

have a realistic chance of outliving. The set of cases he presented was the following:

> *United States v. Sanchez*, 440 F. App'x 436 (6th Cir. 2011) (reporting 30-year sentence for defendant who molested his daughter from age 6 to 12; had prior conviction for molesting stepson; and was convicted at trial); *United States v. Price*, 2012 U.S. Dist. LEXIS 98397, *33-34 (C.D. Ill. March 21, 2012) (imposing 18-year sentence on defendant who posed daughter from age 9 to 11 for pornography; claimed he had the right to do so; and was convicted at trial); *United States v. Barry*, 634 F. App'x 407 (5th Cir. 2015) (reporting 27-year sentence for defendant who used adopted, disabled toddlers to make pornography and was convicted at trial); *United States v. Street*, 531 F.3d 703 (8th Cir. 2008) (affirming 30-year sentence for defendant who molested daughter and step-daughter for years and was convicted at trial); *United States v. Dotson*, 715 F.3d 576 (6th Cir. 2013) (reporting 22-year sentence for defendant who molested girlfriend's four-year-old daughter and was convicted at trial).

He also pointed out that, because it utterly snuffs out a life, murder is typically a worse crime than child sexual abuse, *see Graham v. Florida*, 560 U.S. 48, 69 (2010), and the average sentence for murder is 20 years. *See* U.S. Sentencing Comm'n, Quarterly Data Report, R.84-5, Page ID # 613.) And finally he pointed out that the federal system aims to in effect reward defendants for pleading guilty by reducing their sentencing range by 30% upon pleading guilty. U.S. Sentencing Comm'n, *Life Sentences in the Federal System*, at 14 (Feb. 2015).

What did the Sixth Circuit say to justify the fact that Damion Faulkner, who had virtually no criminal history, has been condemned to spend 47.5 years in prison while people who committed much worse crimes and who even refused to plead guilty have routinely received much shorter sentences? It said three things, as follows.

1. Congress authorized a sentence that long.

2. The Commission recommended a sentence seven times longer.

3. The crime was "reprehensible."

(Ex. A, Sixth Circuit Opinion at 10-11; *see id.* at 9.) Of course, the statutory maximum authorized by Congress does not explain a disparity in the actual sentences imposed amongst similarly situated offenders. Nor does the fact that Faulkner's crime is "reprehensible" explain

the disparity since the comparator offenders committed crimes that were *much more* reprehensible than his.

So the Sixth Circuit's rationale boils down to accepting the guidelines without considering the disparity issue. In other words, although the Sixth Circuit did consider, as required by § 35353(a)(4), the guideline's advice about the *sentence to impose*, it failed, in derogation of § 3553(a)(6), to consider the disparity with the *sentences that are actually imposed* on similarly-situated offenders. In short, it accepted the Commission's advice, and it ignored the Judiciary's actual practice. The Sentencing Reform Act, however, requires the courts to do both. It thereby failed in its duty to review Faulkner's sentence for substantive unreasonableness. The Court should review this case to correct this practice which results in extremely harsh and disparate sentencing for some unlucky offenders and which, consequently, undermines the public's trust in the law.

CONCLUSION

For the foregoing reasons, petitioner Damion Faulkner respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

Date: September 5, 2019

Respectfully submitted,

s/ Michael C. Holley

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