IN THE SUPREME COURT OF THE UNITED STATES
October Term 2019

CASE NO. _____

Eleventh Circuit Court of Appeals No. 18-10723
(Northern District of Florida No. 5:17-cr-20-RH-1)

RALPH HERMAN FOX, Jr.

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

RALPH HERMAN FOX, JR.'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
With Incorporated Appendix

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Question Presented

Whether in affirming the imposition of the statutory maximum sentence of 360 months on Ralph Fox, where (1) Petitioner Fox entered a guilty plea and (2) the government agreed to recommend a sentence of 240 months, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that:

It violates every notion of fairness, due process, and common sense, and also violates crucial public policy considerations, for the district court to impose the statutory maximum sentence (360 months) on a defendant who entered into a plea agreement with the government, where the record shows that in exchange for the guilty plea, the experienced and highly-qualified Assistant United States Attorney agreed to, and in fact did recommend a sentence of no more than 240 months?

Table of Contents and Citations

TABLE OF CITATIONS

Cases:

Other Authorities:

PARTIES TO THE PROCEEDINGS

Petitioner Ralph Herman Fox, Jr., was the defendant in Northern District of Florida, Case No. 5:17-cr-20-RH-1. The respondent, the United States of America was the prosecution/plaintiff. Mr. Fox was the appellant in the United States Court of Appeals, Eleventh Circuit, Case No. 18-10723, and the United States of America was the appellee.

OPINION BELOW

This Petition is addressed to the published decision entered by the Eleventh Circuit Court of Appeals in *United States v. Fox,* Appeal No. 18-10723, entered on June 13, 2019, affirming the sentence imposed in the Northern District of Florida, Case No. 5:17-cr-230-RH. A copy of the Eleventh Circuit slip opinion is in the Appendix to this Petition at App. 1-16.

The appeal was taken from a final judgment of conviction and sentence entered by the Northern District of Florida, in Case No. 17-cr-20-RH, on February 22, 2018, adjudicating Ralph Herman Fox, Jr. guilty of sexual exploitation of children, and sentencing him to the statutory maximum term of 360 months in prison. The judgment is in the Appendix at pages App. 17-26.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision on June 13, 2019. A petition for rehearing was timely filed and was denied by order of July 31, 2019. See App. 27. This petition is timely filed pursuant to Supreme Court Rule 13.1. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE AND RELEVANT FACTS

According to the Bureau of Prisons website, Petitioner Ralph Fox is presently incarcerated in the custody of the United States Bureau of Prisons in the United States Penitentiary at Yazoo City, Mississippi. The BOP website indicates that Mr. Fox's presumptive release date is ***November 6, 2042***. Mr. Fox has been continuously incarcerated since his arrest in this matter in August of 2017. He was represented by the Federal Public Defender in the district court and by CJA counsel on direct appeal.

The record reflects that in August 2017 Fox was charged in a two-count indictment with (1) enticing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, and the depiction was produced using materials that were transported in interstate and foreign commerce; and (2) knowing possession of child pornography as defined in 18 U.S.C. § 2256(8)(A) that involved a minor under the age of 12, which was produced using materials that were transported in interstate commerce. There also was a criminal forfeiture allegation.

Fox entered a guilty plea on Count One pursuant to a written plea agreement, and statement of facts. In the plea agreement the Government agreed to recommend a sentence of no more than 240 months. In spite of the parties' 240-

months agreed recommendation, the district court sentenced Fox to prison for 360 months. Fox was sentenced to 360 months in prison. He took an appeal.

From the outset, Petitioner concedes that the underlying facts of the case are unpleasant and disturbing. Those facts were set forth in detail by the Eleventh Circuit in the slip opinion that is attached in the Appendix at the end of this Petition, specifically on App. pages 2-4.

On appeal the Eleventh Circuit agreed with the Government that the 360-months' sentence was reasonable, and was within the district court's discretion. Petitioner argued on appeal that a five-level upward enhancement was not appropriate, but even if it were, 360 months was neither a reasonable nor a fair sentence because the Government had agreed in writing that 240 months was a reasonable sentence. Appellant appreciates and understands that a sentencing court has broad discretion and that plea agreements contain language stating that the ultimate sentence is for the judge to decide. All of that may be true, but in a case such as this, it simply does not comport with notions of justice, due process, and fair play. Fox was denied his Fifth and Sixth Amendment Due Process rights.

As Fox argued on direct appeal, at sentencing the Government complied with its agreed sentencing recommendation. Surely the prosecutor believed and

agreed in good faith that in this case, for these charges, and for this defendant given his age and health conditions, and of course in the interest of sparing two young girls from having to appear in court to testify at a trial, that 240 months was a reasonable sentence. It could not be argued that the Government would recommend a sentence of 240 months if it did not believe that to be a reasonable sentencing recommendation based upon the facts and circumstances in the case.

Fox further argued that had this agreement been entered into by the Government, with any inkling that the agreed sentencing recommendation would be entertained with a "wink and a nod," and then disregarded or ignored and/or believing that the Court would disregard the recommendation and impose a sentence that was ***a decade (a full ten years)*** longer than the agreed 240 months, then Petitioner Fox would be the victim of an unfair, unjust, unconstitutional "bait and switch" scheme, violating all that is reasonable and conscionable.

Fox argued on appeal that as a public policy matter, affirming this sentence sets a bad precedent. Word tends to spread fast throughout the criminal justice system generally, and those incarcerated in federal prison facilities in particular. If a defendant is given a particularly harsh, draconian sentence ***in spite of a written plea agreement that contemplated a more reasonable, more lenient sentence,*** then defendants in pending and future cases will be less likely to plead guilty, and

instead will invoke their right to a jury trial. In an ideal world, more jury trials would be a good thing. That of course fails to take into consideration the burdensome time, effort, and expense visited upon the judges, the jury pool, the prosecutors, private and public defenders, and the entire federal criminal court system. Presently, most defendants take guilty pleas to avoid taking a chance of receiving a harsher sentence following a conviction at trial. When a majority of defendants decide to take their chances at trial, knowing that a guilty plea could result in the imposition of the maximum sentence anyway, then the benefits of pleading guilty are no longer a reason to avoid a trial and enter a plea.

Federal prosecutors are honorable, experienced lawyers. They know their cases better than anyone else, and if they agree to recommend a sentence in a plea agreement, then the public, the Court and everyone involved in the process should be confident that the recommendation is made in good faith for a fair and reasonable sentence in that case. Fox argued on appeal that the federal criminal justice system encourages defendants to take guilty pleas.

The Court may take notice that in recent decades there have been fewer and fewer jury trials. The conclusion is ineluctable that most federal criminal prosecutions are resolved by guilty pleas. Those accused of crimes in federal court

proceedings are informed of their constitutional right to trial by a jury of their peers; but they also are intimidated by the Government with threats of additional more and more serious charges in superseding indictments and notices of sentencing enhancements. Often they are advised by defense counsel that a conviction following a jury trial may result in a greater sentence; whereas pleading guilty likely would result in a more lenient sentence. Federal criminal jury trials are not encouraged, and are conducted only in a very small percentage of federal criminal prosecutions. This is not how the system should work in an ideal world, but it is the reality of federal criminal proceedings.

Federal criminal defendants (and their attorneys) are aware of, and fear what is referred to as the "trial tax." Having been charged by a United States Attorney and a Federal Grand Jury, most defendants agree to plead guilty based upon the fear that the court would likely impose a significantly greater sentence after a conviction following a jury trial, whereas they likely will experience at least a modest consideration of leniency for pleading guilty.

Fox argued that when the Government agrees to a sentencing recommendation in a written plea agreement it is reasonable to assume that the recommended sentence is reasonable for that particular defendant in that case in

the prosecutor's considered professional judgment. Had the Government agreed to recommend a sentence of the statutory maximum of 360 months, it is not unreasonable to assume that Mr. Fox would have taken his chances with a trial by jury.

The decision of the Eleventh Circuit addresses Petitioner's argument that a five-level enhancement was appropriate. That issue is not raised in this petition. The balance of the decision finds that being a person over 60 years of age did not render the sentence of 360 months unreasonable. That was a part, but not the crucial part of Petitioner Fox's argument on appeal.

REASONS FOR GRANTING THE WRIT

In affirming the imposition of the statutory maximum sentence of 360 months on Ralph Fox, where (1) Petitioner Fox entered a guilty plea and (2) the government agreed to recommend a sentence of 240 months, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and sanctions such a departure by the sentencing court, as to call for the exercise of this Court's supervisory powers in that: It violates every notion of fairness, due process, and common sense, and also violates sound public policy considerations, for the district court to impose the statutory maximum sentence on a defendant who entered into a plea agreement with the government, where the record shows that in exchange for the guilty plea, the experienced and highly-qualified Assistant United States Attorney agreed to, and in fact did recommend a sentence of no more than 240 months.

The conclusion is ineluctable that plea bargaining requires defendants to waive fundamental constitutional rights. A defendant is entitled to the most meticulous standards of both promise and performance. The plea bargaining process must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Thus the Eleventh Circuit ruled in *United States v. Hunter*, 835 F.3d 1320, 1330-31 (11th Cir. 2016), that a reversal and remand for resentencing were warranted for breach of a plea agreement by the Government. Nonetheless, in this case, the Eleventh Circuit affirmed Petitioner Fox's sentence.

A written plea agreement is a contract which requires a "meeting of the minds." There is consideration to be paid, and benefit to be gained by both sides. When a defendant enters a guilty plea, the Government is relieved of the burden of taking the case to trial, selecting a jury, presenting witnesses, and proving its case to the jury beyond a reasonable doubt. Juries can be unpredictable, and although a guilty verdict may be fully expected, there is always a chance, however slim, that the defense could prevail and the jury could enter a verdict of acquittal.

Guilty pleas contribute to judicial economy in that they spare the Court from having to devote time and effort to preside over a criminal jury trial. Additionally in the present matter, two young girls were spared the emotional hardship of having to be called to testify as witnesses in a federal court proceeding.

Fox entered into a plea agreement that included a provision that the government would recommend a sentence of no more than 240 months. Petitioner does not dispute that the Court had the discretion to ignore the recommendation and to impose the sentence that it deemed appropriate. But the sentence imposed just happened to be ***a decade, an additional ten years greater*** than the sentence agreed to by the parties, and that was an abuse of the district court's broad discretion.

When a sentence of this length is imposed, in spite of the lengthy but more reasonable sentence recommended in the plea agreement, then a guilty plea becomes a less desirable option for every other defendant who has a case pending in the system. It was counterproductive to public policy, and sets a dangerous precedent to allow the statutory maximum sentence imposed on Ralph Fox in this case.

Appellant is not arguing that that the charged offenses are not serious offenses, or that a lengthy sentence is not appropriate and reasonable. That said, 240 months (twenty years) in federal prison is a very long sentence, especially for a defendant who is over 60 years old and in ill health.

Counsel does not purport to be an expert in the field of life expectancy statistics. That said, plain old common sense tells us that for a man over 60 years old who has health issues, twenty years in custody may well be a life sentence. Should Mr. Fox survive twenty years of incarceration, he would be released at around age 80 to then begin serving a term of supervised release. The likelihood of this defendant reoffending is virtually nil. Mr. Fox will have been (1) treated and (2) severely punished.

Any person who has spent even a couple of hours in a visiting room of a federal prison can attest to the discomfort that accompanies hearing the door slam shut and the lock click behind him or her upon entry and exit. It is to be expected that Mr. Fox will successfully complete all of the programs that are provided by the BOP for persons convicted of such offenses. His failure to participate and successfully complete said programs and classes could result not only in loss of gain time, but also loss of institutional privileges such as family visits, telephone calls, and commissary access. A sentence of twenty years is an unimaginably long time in anyone's life. Even one more month is unreasonable in this case for this defendant.

It is well to note that the decision of June 13, 2019, indicates that on appeal, Ralph Fox's primary issue was his age, that he was a man in his 60's as the main reason for arguing that the statutory maximum sentence of 360 months was unreasonable in this case for this defendant. See App. 1-16. But that was only one aspect of the argument made.

Defendant's Age and Present Health Status

Obviously, being in one's mid-60's could be an impediment to performing some activities required for day-to-day living for some people. A term of 360 months likely would be a life sentence for anyone in his/her 60's, of course depending upon the status of a person's health. It was made known on the record and prior to sentencing that Mr. Fox suffered from diabetes.

A situation arose in May 2019 about which this Court should be aware. At best, it is second-hand hearsay because no one in the Bureau of Prisons would confirm to counsel or to Mr. Fox's family what the facts actually were. Counsel and Mr. Fox's mother and his sister were met with a total and complete information blackout over at least two months (May and June, 2019), from any person at the Federal Correctional Complex at Yazoo City, Mississippi, concerning the Mr. Fox's whereabouts or the status of his health.

On information and belief, Ralph Fox was transferred to FCC Yazoo City in 2018 following severe hurricane damage at the Federal Correctional Institution in Marianna where he was designated and began serving his sentence.

On information and belief, in mid-May 2019, around the time of the oral argument in this case on May 14, 2019, before a panel of Eleventh Circuit judges

sitting in Miami, Florida, Mr. Fox, incarcerated at Yazoo City, experienced severe shortness of breath, was taken to a hospital (location unknown), was diagnosed with a heart attack, and underwent surgery, specifically ***quintuple (5-way) open heart bypass surgery***.

On further information and belief, after surgery Mr. Fox suffered complications, specifically pneumonia. And on information and belief even as of late June, as counsel prepared the petition for rehearing to be filed before the Eleventh Circuit, Mr. Fox still was in an undisclosed location. Counsel may only speculate that he either was still hospitalized, or in a rehabilitation facility, or he even might have been back at FCC Yazoo City. His location was kept totally secret "***for the security of our people***" as counsel was told on the telephone by a BOP staff member at the BOP administrative complex in Grand Prairie, Texas.

During that phone call the staff member said that although counsel "claimed" over the telephone to be Mr. Fox's lawyer, she could be his "girlfriend" and might be "planning his escape." Counsel was taken aback and left speechless by that preposterous remark.

In any event, the family and undersigned counsel certainly could only hope that Mr. Fox was successfully recovering from the surgery complications of pneu-

monia, wherever they were holding him, based upon what we believe was a serious medical emergency; and we hoped and prayed that he received and will continue to receive good quality medical attention while in located in complete secrecy in the custody of the BOP.

With kind assistance from the United States Attorney's Office, Northern District of Florida, counsel was advised that she could arrange to have a legal telephone call with Mr. Fox through the legal office at FCC Yazoo City. After pondering that generous offer, counsel did not avail herself of the opportunity because she had reason to believe that under these highly unusual "cloak and dagger" circumstances, (1) a genuine unmonitored "attorney/client-legal telephone call" would be impossible for meaningful attorney-client communication, because (2) without a doubt someone would be monitoring the call and listening to every word, ready to disconnect the call should counsel or Mr. Fox ask or say something that did not meet with the monitor's approval, including where Mr. Fox was presently residing and/or where he had been.

Counsel remains in contact with Mr. Fox's family; but for at least two reasons Mr. Fox was not made aware that his appeal had been decided by the Eleventh Circuit. First, counsel had no idea where to mail a copy of the opinion or

the petition for rehearing to him, and second, counsel did not know if his heart health may have been too fragile for bad news.

It occurred to counsel that in reaching its decision and writing its opinion affirming the 360 months sentence, the Eleventh Circuit overlooked, misconstrued, or failed to consider the key argument in support of the unreasonableness of the imposition of the statutory maximum sentence in this case.

The Request for Oral Argument on page i of the Initial Brief for Appellant, filed in the Eleventh Circuit stated (emphasis added):

> Appellant Ralph Herman Fox, Jr., respectfully submits that an oral argument may be helpful to the panel * * * in order to determine whether or not * * * a sentence of 360 months is unreasonable for a defendant in his 60's ***when he entered into a plea agreement providing that the government's recommended sentence would be not more than 240 months***.

There were three grounds or reasons mentioned in that Request: (1) interpretation of the pattern-of-activity guidelines enhancement (not a subject of this petition); (2) the defendant's age (in his 60's); and (3) there was a written plea agreement in which the prosecutor agreed to recommend a sentence of not more than 240 months.

This third reason was mentioned the initial brief, in the reply brief, and also was argued at the oral argument: the public policy argument concerning the high percentage of guilty pleas rather than jury trials in federal criminal cases.

The Eleventh Circuit's decision seems to focus mainly on the position that Mr. Fox was in his 60's. Yes we did argue that. But the decision overlooked, misconstrued, and failed to consider the crucial aspect of the appellant's argument, that the government agreed to request no more than 240 months at sentencing, which factored into Mr. Fox's decision and agreement to plead guilty. He he was sentenced to the statutory maximum anyway.

The plea agreement contained a specific provision that the government would request no more than 240 months. The Government stood by its word and recommended 240 months. Surely the prosecutor believed in good faith that in this case, for these charges, on these facts, and for this defendant given his age and health conditions, and of course in the interest of sparing two young girls from having to testify in court, that 240 months was a reasonable recommendation. The prosecutor would not have agreed to that sentence if he did not find 240 months to be reasonable under the circumstances.

The Assistant United States Attorney was not inexperienced. According to information on The Florida Bar website, Christopher Thielemann was admitted to The Florida Bar in 2002. He graduated from The Florida State University College of Law in 2002. He earned an advanced degree, an L.L.M. in Military Law from the Judge Advocate General's School. The Florida Bar website reflects that he is no longer with the United States Attorney's Office, Northern District of Florida, but that he now is a Member of the Judiciary, at the Fort Worth Immigration Adjudication Center.

All in all, one would expect that this sentence recommendation by this prosecutor in this plea agreement was a sound and reasonable recommendation. Had the agreement been entered into by the Government with any inkling that the recommendation would be ignored, entertained with a "wink and a nod," and/or with the belief that the Court would disregard it and impose the maximum sentence, ***a decade (a full ten years)*** longer than the agreed 240 months, then Mr. Fox would be the victim of an unfair, unjust, unconstitutional, unconscionable "bait and switch" scheme. That cannot be what happened here. Defendants may expect that if they plead guilty they will receive more lenient sentencing than if they are convicted following a jury trial. Whether true or not, the belief is out there, and there are inmates who can attest to the fact that they were "launched" at

sentencing with an "astronomical" prison term, for a conviction following a jury trial.

In *United States v. Dickerson*, an unpublished decision (11th Cir. January 7, 2016), Case No. 15-12541, the defendant appealed an 84-month sentence imposed after being convicted of one count of being a felon in possession of a firearm. Dickerson argued that the district court abused its discretion by rejecting the parties' plea agreement, which stipulated that the sentence would not exceed 64 months in prison. The record showed Dickerson had a lengthy criminal history going back to his teenage years that included theft, armed robbery, false information to a police officer, and attempting to flee from a police officer. While incarcerated, Dickerson managed to accrue 15 disciplinary sanctions for offenses such as fighting, failing to obey orders, possession of contraband, and testing positive for marijuana. He also was charged with possession of oxycodone without a prescription.

On the day before Dickerson's sentencing hearing the court filed a notice of intent to reject the plea agreement, noting that under Rule 11(c)(5)(B) the court was not required to follow the plea agreement. The court informed Dickerson that he could withdraw his plea of guilty and that the court could dispose of the case

less favorably than the plea agreement contemplated. On the day of the sentencing hearing the court said it intended to reject the plea agreement and that it could not agree to be bound by the 64-month sentence recommended therein.

At sentencing the court said that it had never seen a 23 year old with such a prolific criminal history. The court sentenced Dickerson to 84 months in prison, the bottom end of the advisory range. The Eleventh Circuit held that it was not an abuse of discretion for the district court to reject the plea agreement. The district court noted that Dickerson possessed not just any firearm, but an assault rifle with a 60-round capacity magazine, he had a lengthy criminal history, disciplinary problems in prison, and said that because 64 months amounted to a 20-month downward variance from the bottom of the range, it was too lenient. On appeal the Eleventh Circuit affirmed. Of course *Dickerson* is clearly distinguishable on the facts due to the defendant's extensive criminal history.

In contrast this case was (and is) Ralph Fox's first and only involvement with the criminal justice system. In *United States v. Hunter, supra*, the Eleventh Circuit reversed and remanded Hunter's sentence to the district court for resentencing. The record showed that Hunter appealed the 60-month sentence imposed after he pleaded guilty to drug-related charges pursuant to a written plea agreement. Hunter argued on appeal that the government breached the plea agree-

ment for failing to recommend a reduction for acceptance of responsibility. The panel found that Hunter was induced to plead guilty to all charges against him based in part on the promise that the government would recommend the reduction on his behalf, but it failed to do so.

The government not only failed to recommend the reduction at Hunter's sentencing, but it also objected to and argued against Hunter receiving a reduction based on facts that were known before offering the plea deal. This conduct was held to constitute a breach of the plea agreement.

Hunter's PSR failed to recommend the reduction for acceptance of responsibility. The government not only did not recommend it, but also it argued for an enhancement for obstruction of justice based on Hunter's testimony at a motion to suppress hearing that took place before the plea deal was offered. The district court did not find that the government breached the agreement, but did express concern at 835 F.3d 1324 that:

> …the Government seems to give with one hand and take back with the other. Because a defendant … would believe if he signed this agreement, that he was going to get the acceptance of responsibility.

The district court did give Hunter the acceptance of responsibility reduction recognizing that the decision to plead guilty is an enormously important decision. The government conceded that Hunter probably was entitled to a three-level reduc-

tion, and then it argued for an upward departure or variance. The court recalculated the guidelines range to 18-24 months and then over defense objection imposed a sentence of 60 months.

In contrast, in the present case, the government did ask for the 240 month agreed sentence, but the court imposed the upward enhancement and then imposed a sentence of the statutory maximum of 360 months. In *Hunter* Judge Wilson found that the government's recommendation was a promise and a key material concession by the government in the plea agreement. In Petitioner Fox's case the plea agreement was not breached by the government but simply was ignored by the court. Fox was entitled to a remedy on appeal. As the Eleventh Circuit held in *Hunter*, there are two remedies available when a plea agreement has been breached: (1) remand for resentencing according to the terms of the agreement before a different judge, or (2) permit the withdrawal of the guilty plea. 835 F.3d at 1329.

In *Hunter*, the plea was clearly induced by a promise to recommend a sentence. Defendant was entitled to specific performance of the terms of the agreement as the defendant reasonably understood them at the time of his plea. It was within the discretion of the Eleventh Circuit to remand for resentencing according to the terms of the agreement and before a different judge. *Hunter*, 835 F.3d at 1329, and cases cited therein. 22

As in *Hunter*, Ralph Fox bargained for and was entitled to the government's recommendation on his behalf. That is what he should receive when he is resentenced. The sentence should be imposed by a different district judge. This is not for lack of trust in the judge's capacity for fairness, but rather will reestablish the trust between the defendant and the government that is essential to the plea bargaining process. 835 F.3d at 1330.

In an ideal world, more jury trials would be a very good thing, but perhaps not everyone would agree due to the time, effort, and expense that jury trials entail; particularly in these days of court funding and budgeting issues and crises.

At oral argument undersigned counsel argued that the vast majority of federal criminal cases are resolved with guilty pleas, and that if every defendant wanted to go to trial, the system would be inundated and be overburdened. At that point in the argument the Chief of the panel said that she favored more jury trials.

The undersigned agreed wholeheartedly with Her Honor, and said that the criminal defense bar also agrees. The unfortunate reality is that criminal defense lawyers are aware of what is known as "The Trial Tax," and are obliged to advise their clients accordingly. It is counterproductive to public policy and the interests of judicial economy, for the statutory maximum sentence to stand.

Well over 90 percent of federal criminal prosecutions are resolved with guilty pleas. Only a very small percentage of those cases go to trial. Prosecutors have tremendous power in determining the outcomes of cases in the first instance by their charging decisions, and then with their ability to charge additional and more serious offenses in superseding indictments to pressure defendants to plead. Prosecutors have total discretion determine whether or not they believe that a cooperating defendant has provided information that meets the subjective criteria of being "substantial" information that leads to the investigation, prosecution, and/or conviction of other people.

The "trial tax" looms over every defendant's decision whether to enter a plea or go to trial. The risk of being "launched" at sentencing following a conviction at jury trial, is very real. A defendant may be punished more severely for having expended judicial and prosecutorial time and effort.

Nonetheless, the system would be overwhelmed if even a small additional percentage of defendants decided to have trials. Yet failing to give a defendant even a modicum of leniency when he enters a guilty plea could mean that more defendants will decide to go to trial. That is especially applicable here, where the agreed sentencing recommendation was 10 years less than the sentencing actually imposed by the court.

Based upon the foregoing arguments and authorities, and those in the initial brief, in addition to compelling public policy reasons, Appellant Ralph Fox prays that this Honorable Court will find that the district court reversibly erred and abused its discretion in sentencing him to 360 months' incarceration. The sentence was unreasonably lengthy and harsh, and also was procedurally incorrect due to an erroneously-applied enhancement of five offense levels pursuant to United States Sentencing Guidelines §4B1.5(b)(1) ("… if the defendant's instant offense of conviction is a covered sex crime, . . . and the defendant engaged in a pattern of activity involving prohibited sexual conduct,") because there was no such pattern of activity on the facts of record in this case.

Generally it violates public policy for a Court to impose a sentence ten years longer than the parties' agreed recommended sentence in a written plea agreement. To impose such a sentence flies in the face of the good faith exhibited by all parties when they reached their plea agreement.

Conclusion

Accordingly, Petitioner respectfully prays that this Honorable Court will grant its most gracious writ, and will exercise its supervisory power over the Eleventh Circuit and remand the cause with instructions that it was reversible error to affirm the district court's imposition of the statutory maximum sentence of 360

months, when there was a guilty plea, a written plea agreement, and a Government recommendation for a sentence of 240 months. That sentence was unreasonable, unfair, and flies in the face of public policy and the reality of a system that encourages resolving criminal prosecutions with pleas, and not jury trials.

Additionally, this Court should remand with further instructions that in the interest of justice and fair play, in the interest of reconfirming that plea agreements mean something, and that ***all parties*** should enjoy the benefit of their bargain; and in the interest of recognizing that a government sentencing recommendation is a well-thought-out decision based upon the prosecutor's experience and sound professional judgment, that a plea agreement is not just a vehicle just to save the Government from having to try a case before a jury, the Court should not take lightly or ignore the agreed recommendation; because that is the benefit the defendant expected to receive for giving up his constitutional rights.

Respectfully submitted,

Sheryl J. Lowenthal

Sheryl J. Lowenthal
CJA Counsel on Appeal for
Petitioner Ralph Herman Fox, Jr.

October 21, 2019

APPENDIX TO THE PETITION

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10723

D.C. Docket No. 5:17-cr-00020-RH-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RALPH HERMAN FOX, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(June 13, 2019)

APP. 1

Before TJOFLAT, MARTIN, and TRAXLER,* Circuit Judges.

MARTIN, Circuit Judge:

Ralph Fox, Jr. appeals his 360-month sentence imposed after he pled guilty to one count of sexually exploiting a minor through the production of child pornography in violation of 18 U.S.C. §§ 2251(a) and (e). He argues the District Court improperly calculated his guideline range by applying a five-level upward enhancement to his base offense level. He also argues his 360-month sentence is substantively unreasonable because the District Court failed to properly consider his age when imposing his sentence. After careful consideration, and with the benefit of oral argument, we affirm.

I. FACTS

On September 12, 2016, Mr. Fox's wife reported to the police that Fox had sexually abused her two minor granddaughters, G.P., who was eleven, and J.P., who was nine. At the time, Mr. Fox was G.P. and J.P.'s step-grandfather. A Child Protection Team interviewed both G.P. and J.P. G.P. informed the interviewers that Mr. Fox had sexually abused her for about one year; had molested her "almost nightly"; had taken naked photos of her with his cell phone; had used a grey vibrator, which he kept hidden in a shed, to penetrate her vagina; and that she had

* Honorable William Traxler, Jr., Senior United States Circuit Judge for the Fourth Circuit, sitting by designation.

observed Mr. Fox abusing J.P. J.P. reported she had not been sexually abused for as long as G.P.; Mr. Fox had also molested her "almost nightly" while her grandmother was sleeping; and she had observed Mr. Fox sexually abuse G.P. Medical examinations of G.P. and J.P. were consistent with their reported abuse.

A state search warrant was executed for Mr. Fox's home, automobile, and cell phone. The State found a grey vibrator hidden in a shed at Mr. Fox's home, which corroborated G.P.'s statements to the interviewers. A forensic examination of Mr. Fox's cell phone revealed 30 deleted images, including images of G.P.'s vaginal area and of Fox sexually abusing her. Although the photos did not show Mr. Fox or G.P.'s faces, G.P. identified Fox and herself in the photos. Mrs. Fox also identified her husband in the photos. The photos were not timestamped, but they showed G.P. in different outfits and in different positions. G.P. also told the investigators the photos were taken on different days.

Pursuant to a plea agreement, Mr. Fox pled guilty to one count of sexually exploiting a minor through the production of child pornography. The PSR calculated a total offense level of 43 and a guideline range of exactly 360 months—or 30 years. Normally, an offense level of 43 would produce a guideline range of life, but the statutory maximum for Mr. Fox's offense is 30 years. See United States Sentencing Guidelines § 5G1.1(a) ("Where the statutorily authorized maximum sentence is less than the minimum applicable guideline range, the

statutorily authorized maximum sentence shall be the guideline range."). The PSR's calculation included several offense characteristic enhancements, including a five-level enhancement under guidelines § 4B1.5(b)(1) because Mr. Fox "engaged in a pattern of activity involving prohibited sexual conduct."

Mr. Fox objected to the PSR's five-level enhancement under § 4B1.5(b)(1), arguing it applied only to circumstances where there have been "two separate and distinct crimes and allegations" of prohibited sexual activity against the defendant. The District Court overruled this objection and concluded that the PSR "correctly applie[d] the increase in the offense level for a pattern of activity involving prohibited sexual conduct under § 4B1.5(b)(1)." The District Court observed that Mr. Fox had engaged in "repeated misconduct [with] two different victims" over a "substantial period of time"; his actions solely against "just one victim" would have met the enhancement under § 4B1.5(b)(1); and Mr. Fox's conduct was "the very paradigm of a situation where the increase [under § 4B1.5(b)(1) was] appropriate."

At sentencing, Mr. Fox also argued a 240-month sentence was appropriate because he was 60 years old. Mr. Fox pointed out as well that the government recommended a 240-month sentence pursuant to his plea agreement. The District Court rejected Mr. Fox and the government's recommendations and imposed a 360-month sentence. This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews de novo the District Court's interpretation of the guidelines and its application of the guidelines to the facts. United States v. Moran, 778 F.3d 942, 959 (11th Cir. 2015). We review the substantive reasonableness of a sentence under a deferential abuse-of-discretion standard. Gall v. United States, 552 U.S. 38, 41, 128 S. Ct. 586, 591 (2007).

III. DISCUSSION

In reviewing the reasonableness of a sentence, we follow a two-step process. United States v. Trailer, 827 F.3d 933, 935 (11th Cir. 2016) (per curiam). We first ensure the sentence was procedurally reasonable by reviewing whether, among other things, the District Court miscalculated the guideline range. Id. at 936. We then determine whether the sentence is substantively reasonable in light of the totality of the circumstances and the 18 U.S.C. § 3553(a) factors. Id.

Mr. Fox raises two issues on appeal. He first contends his sentence is procedurally unreasonable because the District Court improperly calculated his guideline range when it applied the five-level enhancement under § 4B1.5(b)(1). Second, he argues his 360-month sentence is substantively unreasonable because of his age. We address each of his arguments in turn, concluding that Mr. Fox cannot prevail on either of them.

A. PROCEDURAL REASONABLENESS

To interpret the guidelines, "we begin with the language of the [g]uidelines, considering both the [g]uidelines and the commentary." United States v. Fulford, 662 F.3d 1174, 1177 (11th Cir. 2011) (quotation marks omitted). The guidelines commentary is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of," the guidelines. Id. (quotation marks omitted). We first derive the meaning of a guideline from its plain language, United States v. Mandhai, 373 F.3d 1243, 1247 (11th Cir. 2004), and we may look to the amendment history behind the guidelines for guidance about their interpretation. See United States v. Gordillo, 920 F.3d 1292, 1297–98 (11th Cir. 2019).[1]

Section 4B1.5(b)(1) provides, in relevant part, that a five-level sentence enhancement should be applied when "the defendant engaged in a pattern of activity involving prohibited sexual conduct." USSG § 4B1.5(b)(1). Application

[1] Congress made part of the Commission's mission to "periodically [ ] review and revise, in consideration of comments and data coming to its attention, the guidelines." 28 U.S.C. § 994(*o*). The Commission remarked on this mission when it originally introduced the guidelines manual, where it "emphasize[d] . . . that it views the guideline-writing process as evolutionary [and] . . . [i]t expects . . . that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress."). USSG ch. 1, pt. A, subpt. 1, at 2. While this Court applies the "traditional rules of statutory construction" to the interpretation of the guidelines, Gordillo, 920 F.3d at 1298 (quotation marks omitted), the Commission's amendment of Application Note 4—and the Commission's practice of amending the guidelines generally—provide insight because they demonstrate the Commission's role in monitoring and modifying the guidelines.

Note 4(B)(i) to § 4B1.5(b)(1) defines "pattern of activity involving prohibited sexual conduct" for purposes of the five-level enhancement. It states that "a defendant [has] engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant [has] engaged in prohibited sexual conduct with a minor." USSG § 4B1.5 cmt. n.4(B)(i).

First, Mr. Fox argues the District Court was wrong to apply the § 4B1.5(b)(1) enhancement to his offense because the enhancement implicitly requires multiple victims and he pled guilty only to photographing one minor victim. This Court has not yet addressed this issue—that is, whether § 4B1.5(b)(1) requires multiple victims—in any published decision.[2] But our review shows that the Second, Sixth, and Eighth Circuits do have binding precedent on this issue. Each of those courts have concluded that Application Note 4(B)(i)'s use of "a minor" demonstrates that the § 4B1.5(b)(1) enhancement applies when the defendant engages in repeated prohibited sexual conduct with the same minor. See United States v. Pappas, 715 F.3d 225, 229 (8th Cir. 2013) (explaining that the use of "a minor" in Application Note 4(B)(i) shows that repeated sexual offenses against the same minor meet § 4B1.5(b)(1)); United States v. Brattain, 539 F.3d 445, 447–48 (6th Cir. 2008) (holding that the use of "a minor" in Application Note

[2] We have done so in an unpublished decision, see United States v. Batson, 749 F. App'x 804 (11th Cir. 2018) (per curiam) (unpublished), where we concluded that prohibited sexual conduct against one minor victim could satisfy the § 4B1.5(b)(1) enhancement. Id. at 807.

4(B)(i) demonstrates that repeated sexual offenses against the same victim also meet § 4B1.5(b)(1)); United States v. Phillips, 431 F.3d 86, 90 n.5 (2d Cir. 2005) (" Under Application Note 4 . . . the pattern [requirement] can be satisfied by the exploitation of one minor, instead of two." (quotation marks omitted)).

We now join our sister circuits. Application Note 4(B)(i) explicitly states that a defendant has engaged in "a pattern of activity" if the defendant has "on at least two separate occasions" participated in prohibited sexual conduct with "a minor." USSG § 4B1.5 cmt. n.4(B)(i) (emphasis added). The guideline's use of "a minor" shows that repeated prohibited sexual conduct with a single victim may qualify as a "pattern of activity" for purposes of § 4B1.5(b)(1). Our Court has explained in other contexts that when followed by a modifier, "a" is synonymous with "one." United States v. Warren, 820 F.3d 406, 408 (11th Cir. 2016) (per curiam) ("[I]n common terms, when 'a' or 'an' is followed by a restrictive clause or modifier, [it] typically signals that the article is being used as a synonym for . . . 'one.'" (quotation marks omitted)). Given the use of "a minor" in defining a "pattern of activity," the plain language of Application Note 4(B)(i), and thus § 4B1.5(b)(1), allows for multiple sexual offenses committed against the same minor.

Because the plain meaning of Application Note 4(B)(i) is clear, it is not imperative that we examine the amendment history for additional guidance. See

Mandhai, 375 F.3d at 1247. Yet the Sentencing Commission's actions related to this amendment also tell us the District Court reached the correct result. Before 2003, Application Note 4 required at least two minor victims for a defendant to be considered a repeat offender, with the resulting five-level enhancement. See USSG § 4B1.5 cmt. n.4(B)(i) (2002) ("[T]he defendant engaged in a pattern of activity involving prohibited sexual conduct if . . . (II) there were at least two minor victims of the prohibited sexual conduct." (emphasis added)). However, in 2003, the Commission recommended a change, and Congress amended Application Note 4 to eliminate this requirement. See USSG § 4B1.5(B)(1) cmt. n.4(B)(i) (2003). It adopted the language that a "defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions the defendant engaged in prohibited sexual conduct with a minor." See id. (emphasis added). In amending Application Note 4, Congress expressly found the previous language did not "adequately take account of the frequent occurrence of repeated sexual abuse against a single child victim, and the severity of the harm to such victims from the repeated abuse." H.R. Conf. Rep. No. 108-66, at 59 (2003) (emphasis added).

As a result, Mr. Fox's repeated sexual exploitation of G.P.—a single victim—is sufficient to meet a "pattern of sexual activity" under § 4B1.5(b)(1) as

indicated by both its plain meaning and amendment history. The District Court did not err when it applied this five-level enhancement to Mr. Fox's guideline range.

Mr. Fox next contends his conduct is not covered by § 4B1.5(1)(b) because the provision requires two unrelated instances of prohibited sexual conduct.[3] Mr. Fox cites two unpublished cases in support of his argument: (1) United States v. Syed, 616 F. App'x 973 (11th Cir. 2015) (per curiam) (unpublished), and United States v. Castleberry, 594 F. App'x 612 (11th Cir. 2015) (per curiam) (unpublished). In Syed, the panel held that a five-level enhancement was correctly applied under § 4B1.5(b)(1) because the evidence at trial showed the defendant had sexually enticed two different minors online and through text messages. 616 F. App'x at 981–83. Similarly, in Castleberry, this Court upheld a five-level enhancement where the evidence showed the defendant attempted to entice a minor online on two earlier occasions separate from the charged conduct. 594 F. App'x at 612–13. Both cases address instances in which the defendant engaged in multiple, unrelated instances of prohibited sexual conduct. But they do not support Mr. Fox's argument that two unrelated occasions of prohibited sexual conduct are

[3] Mr. Fox specifically argues that § 4B1.5(b)(1) requires "at least two separate and distinct crimes and allegations." But he does not elaborate on this point any further. Neither did he discuss it at oral argument. Given that, and given the cases he points to on appeal, we understand his argument as an assertion that § 4B1.5(b)(1) requires two unrelated instances of prohibited sexual conduct.

required for the enhancement to apply. They simply show that earlier, distinct conduct is one way sufficient to meet the requirements of § 4B1.5(b)(1).

The plain language of Application Note 4(B)(i) refutes Mr. Fox's assertion that multiple, unrelated occasions of prohibited sexual conduct are necessary to meet § 4B1.5(b)(1). As set out above, Application Note 4(B)(i) explains that a defendant engages in a pattern of prohibited sexual conduct "if [he or she acts] on at least two separate occasions." USSG § 4B1.5 cmt. n.4(B)(i) (emphasis added). An "occasion" means "an event" or "an occurrence." See Oxford English Dictionary (3d ed. 2004). And "separate" is defined as "withdrawn or divided from something else so as to have an independent existence by itself." Id.; see also Webster's New College Dictionary 1030–31 (3d ed. 2008) (defining "separate" as "[s]et apart from others" and "[e]xisting by itself"). The plain meaning of "separate occasions" does not require two events that are unrelated. It requires only events that are independent and distinguishable from each other. Multiple, distinct instances of abuse—whether ongoing, related, or random—meet the enhancement under § 4B1.5(b)(1).

Again here, the amendment history of § 4B1.5(b)(1) supports this conclusion. Congress specifically contemplated that the five-level enhancement under § 4B1.5(b)(1) should apply in circumstances where a minor victim is repeatedly abused by the same perpetrator on separate occasions. See H.R. Conf.

Rep. No. 108-66, at 59 (2003). Interpreting § 4B1.5(b)(1) as Mr. Fox describes would not apply the enhancement to circumstances where a minor is sexually abused more than once by the same person solely because each instance of ongoing abuse is considered "related" to the others. This interpretation comports with neither the plain meaning of the guideline commentary nor Congress's stated intentions in amending Application Note 4. For these reasons, we are not persuaded by Mr. Fox's second argument that unrelated instances of prohibited sexual abuse are required for an enhancement under § 4B1.5(b)(1). Mr. Fox's ongoing, repeated abuse of G.P. therefore qualifies as the basis for the enhancement under § 4B1.5(b)(1).

Last, Mr. Fox argues § 4B1.5(b)(1) does not apply because it does not allow for the conduct underlying a conviction to be used to enhance a defendant's sentence. But again here, the plain meaning of the guidelines forecloses Mr. Fox's argument. Specifically, Application Note 4(B)(ii) to § 4B1.5(b)(1) states that an "occasion" of prohibited sexual conduct may be considered "without regard to whether the occasion . . . occurred during the course of the instant offense." See USSG § 4B1.5 cmt. n.4(B)(ii) (emphasis added). The enhancement under § 4B1.5(b)(1) therefore applies regardless of whether the separate occasions of prohibited sexual conduct occurred during the course of the underlying offense of conviction.

This interpretation is not novel. In United States v. Rothenberg, 610 F.3d 621 (11th Cir. 2010), this Court upheld an enhancement imposed under § 4B1.5(b)(1) because either of the defendant's two earlier instances of prohibited sexual conduct, "when joined with the offense of conviction," amounted to a pattern of activity involving prohibited sexual conduct. Id. at 625 n.5. In that sense, this Court specifically contemplated that the underlying offense of conviction could be a basis for a § 4B1.5(b)(1) enhancement.

And other circuits that have examined this issue have reached the same result. See United States v. Evans, 782 F.3d 1115, 1117 (10th Cir. 2015) ("The plain language of the commentary makes clear that the conduct underlying the present offense of conviction . . . may provide the 'pattern of activity' covered by § 4B1.5(b)."); United States v. Broxmeyer, 699 F.3d 265, 285 (2d. Cir. 2012) ("'[S]eparate' means the two occasions must be separate from each other, not that the two occasions demonstrating a pattern must be separate from (and in addition to) the crime of conviction."); United States v. Rojas, 520 F.3d 876, 883 (8th Cir. 2008) (holding that the five-level enhancement under § 4B1.5(b)(1) can apply where "the only 'pattern of . . . conduct' is conduct involved in the present offense of conviction" under the language of Application Note 4). We now join them and hold that a defendant's underlying criminal conviction alone can serve as the basis

for an enhancement under § 4B1.5(b)(1), provided that the underlying conviction involves separate occasions of prohibited sexual conduct.

Thus, the five-level enhancement under §4B1.5(b)(1) applies to Mr. Fox's offense and the District Court did not miscalculate his guideline range during sentencing. His sentence is therefore not procedurally unreasonable. See Trailer, 827 F.3d at 936.

B. SUBSTANTIVE REASONABLENESS

Mr. Fox argues his sentence is substantively unreasonable because it is too long given his age. He says a sentence of 240 months is more appropriate. Specifically, Mr. Fox argues his sentence is "excessively harsh" and unreasonable because of the low probability he will survive his term of imprisonment.

When sentencing a defendant, a district court must consider the factors set forth in 18 U.S.C. § 3553(a), which include, in relevant part, the "nature and circumstances of the offense and the history and characteristics of the defendant" when determining a reasonable sentence. United States v. Irey, 612 F.3d 1160, 1198 (11th Cir. 2010) (en banc) (quotation marks omitted). The weight given to any specific § 3553(a) factor is left to the district court's discretion, United States v. Clay, 483 F.3d 739, 743 (11th Cir. 2007), and this Court does not substitute its judgment for that of the District Court's in weighing the relevant factors. United States v. Amedeo, 487 F.3d 823, 832 (11th Cir. 2007).

"A district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." Irey, 612 F.3d at 1189 (quotation marks omitted). As the party challenging his sentence, Mr. Fox has "the burden of showing that the sentence is unreasonable in light of the entire record, the § 3553(a) factors, and the substantial deference afforded sentencing courts." United States v. Rosales-Bruno, 789 F.3d 1249, 1256 (11th Cir. 2015).

We confronted a similar argument in United States v. Joseph, 709 F.3d 1082 (11th Cir. 2013). In Joseph, a jury found the defendant guilty of one count of unlawfully dispensing or distributing a controlled substance that caused death or serious bodily injury. Id. at 1105. His conviction carried a mandatory minimum sentence of 20-years imprisonment, a statutory maximum of life in prison, and his guideline range was 30 years to life imprisonment. Id. The District Court sentenced the defendant to 30-years imprisonment. Id. On appeal, the defendant argued his sentence was substantively unreasonable because "the purposes of sentencing [could have been] achieved with the mandatory minimum sentence . . . not a sentence of 30 years, which effectively amount[ed] to a life sentence." Id. This Court concluded the District Court did not abuse its discretion when it

sentenced Mr. Joseph to 30-years imprisonment given the nature of his crime and the fact that his sentence was within his guideline range. Id.

The same result follows here. The District Court did not abuse its discretion in imposing Mr. Fox's sentence. At sentencing, the District Court heard from Mr. Fox that he was 60 years old and would not likely outlive a 360-month sentence. Although the District Court considered Mr. Fox's age, it ultimately determined the nature of Fox's offense outweighed any age-related concerns. It is not an abuse of discretion to afford more weight to one of the § 3553(a) factors. See Clay, 483 F.3d at 743. The District Court therefore did not abuse its discretion when it sentenced Mr. Fox to 360-months imprisonment and, as a result, his sentence is substantively reasonable.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA

-vs-

Case # 5:17cr20-001

RALPH HERMAN FOX JR.

USM # 25724-017

Defendant's Attorney:
Jessica Casciola (AFPD)
30 West Government Street
Panama City, Florida 32401

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to count 1 of the indictment on December 4. 2017. Accordingly, IT IS ORDERED that the defendant is adjudged guilty of such count which involves the following offense:

Count 2 is dismissed on the motion of the United States.

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 U.S.C. §§ 2251(a) and 2251(e)	Sexual Exploitation of a Minor Through Production of Child Pornography	September 5, 2016	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence:
February 15, 2018

s/Robert L. Hinkle
United States District Judge
February 22, 2018

17

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **360 months.**

The Court recommends to the Bureau of Prisons:

The defendant should be designated to a facility as near as possible to Warrior, Alabama.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **10 years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
4. You must cooperate in the collection of DNA as directed by the probation officer.
5. You must comply with requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.)* as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. PROBATION OFFICE USE ONLY

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant's Signature_____ Date _____

SPECIAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. **Sex Offender Conditions:** Based on the offenses of conviction, the following special conditions are recommended:

   a) You must register with the state sex offender registration agency as required by state law. You must provide proof of registration to the Probation Officer within three days of release from imprisonment/placement on supervision. In any state that has adopted the requirements of the Sex Offender Registration and Notification Act (42 USC sec. 16901 et seq.), you must also comply with all such requirements as directed by the Probation Officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, is a student, or was convicted of a qualifying offense.

   b) You must participate in sex offender-specific treatment, as directed by the probation officer. You are to pay part or all of the cost of this treatment, at an amount not to exceed the cost of treatment, as deemed appropriate by the probation officer. The actual co-payment schedule must be determined by the probation officer. The probation officer must release the presentence report and all previous mental health evaluations to the treatment provider. As part of the treatment program, you must submit to polygraph or other psychological or physiological testing as recommended by the treatment provider.

   c) You must submit to periodic polygraph testing at the discretion of the probation office as a means to ensure that you are in compliance with the requirements of your supervision or treatment program.

   d) Your residence must be approved by the probation officer, and any change in residence must be pre-approved by the Probation Officer. You must submit the address of any proposed residence to the Probation Officer at least 10 days prior to any scheduled change.

   e) Your employment must be approved by the Probation Officer, and any change in employment must be pre-approved by the Probation Officer. You must submit the name and address of the proposed employer to the Probation Officer at least 10 days prior to any scheduled change.

f) You must not frequent or loiter within 100 feet of any location where children are likely to gather, or have contact with any child under the age of 18 unless otherwise approved by the probation officer. Children are likely to gather in locations including, but not limited to, playgrounds, theme parks, public swimming pools, schools, arcades, museums or other specific locations as designated by the probation officer.

g) You must not possess or use a computer without the prior approval of the probation officer. "Computer" includes any electronic device capable of processing or storing data as described at 18 U.S.C. § 1030, and all peripheral devices.

h) As directed by the probation officer, you must enroll in the probation office's Computer and Internet Monitoring Program (CIMP), and must abide by the requirements of the CIMP program and the Acceptable Use Contract.

i) You must not access the Internet or any "on-line computer service" at any location (including employment) without the prior approval of the probation officer. "On- line services" include any Internet service provider, or any other public or private computer network. As directed by the probation officer, you must warn his employer of restrictions to your computer use.

j) You must consent to the probation officer conducting periodic unannounced examinations of your computer equipment, which may include retrieval and copying of all data from his/her computer(s) and any peripheral device to ensure compliance with this condition, and/or removal of any such equipment for the purpose of conducting a more thorough inspection. You must also consent to the installation of any hardware or software as directed by the probation officer to monitor the defendant's Internet use.

k) You must not possess or use any data encryption technique or program.

l) You must not possess, in any form, materials depicting child pornography, child erotica, or nude or sexual depictions of any child; or any materials described at 18
U.S.C. § 2256(8).

m) You must refrain from accessing, via the Internet, any pornography or other materials depicting sexually explicit conduct as defined at 18 U.S.C. § 2256(2), without the prior approval of the probation officer.

2. **Drug Testing Condition:** The defendant presents a low risk of substance use, as reported in the Substance Abuse section of the report, and it is recommended that the mandatory drug testing condition be waived.

3. **Search Condition:** Based on the nature of the instant offense, the following special condition of supervision is recommended:

a. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

4. **Financial Condition:** Based on the probation office's need to monitor the defendant's activities and financial stability while on supervision, the following special condition of supervision is recommended:

n) You must provide the probation officer all requested financial information, both business and personal.

Upon a finding of a violation of probation or supervised release, I understand the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____

Defendant Date

_____ _____

U.S. Probation Officer/Designated Witness Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

ASSESSMENT	JVTA* ASSESSMENT	FINE	RESTITUTION
$100.00	-0-	-0-	-0-

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows: immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall forfeit the defendant's interest in the following property to the United States:

One Alcatel One Touch A564C Cellphone

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10723-EE

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RALPH HERMAN FOX, JR.,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

BEFORE: TJOFLAT, MARTIN and TRAXLER, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by appellant RALPH HERMAN FOX, JR., is DENIED.

ENTERED FOR THE COURT:

Beverly B. Martin

UNITED STATES CIRCUIT JUDGE

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* Honorable William Traxler, Jr., Senior United States Circuit Judge for the Fourth Circuit, sitting by designation.

ORD-41