No. ____

October Term, 2019

IN THE
Supreme Court of the United States

PATRICK KILLEN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Court has established that a criminal sentence may be so grossly disproportionate to the gravity of the offense of conviction that the sentence violates the Eighth Amendment's prohibition against cruel and unusual punishments. *See Graham v. Florida*, 130 S. Ct. 2011, 2021-22 (2010). In analyzing a claim of an Eighth Amendment violation based on gross disproportionality, a court must first conduct an initial comparison of the gravity of the criminal offense and the severity of the corresponding sentence to determine whether there is a threshold inference of gross disproportionality. This petition presents the following questions:

I. **What is the proper analysis to determine whether there is a threshold showing of an inference of gross disproportionality on an Eighth Amendment claim?**

II. **Is the Court of Appeals for the Eleventh Circuit correct in holding that "a defendant whose sentence falls within the limits imposed by statute cannot make the threshold showing of gross disproportionality" on an Eighth Amendment claim?**

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

United States v. Killen, 729 Fed. App'x 703 (11th Cir. March 29, 2018) (unpublished), *cert. denied* 139 S. Ct. 611 (2018).

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PETITION FOR WRIT OF CERTIORARI

Mr. Patrick Killen, Jr., respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-13761 in that court on June 10, 2019, *United States v. Patrick Killen, Jr.*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 10, 2019. This Court granted an extension of time to file the petition. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const., amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

A federal grand jury in the Southern District of Florida returned a superseding indictment charging Mr. Patrick Killen, Jr. with three counts of coercing a minor into engaging in sexually explicit conduct for the purpose of producing a visual depiction of the conduct in violation of 18 U.S.C. § 2251(a), (c) (Counts One, Three, Five); two counts of distribution of a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2), (b)(1) (Counts Two, Seven); two counts of extortion by transmitting a threat in interstate commerce in violation of 18 U.S.C. § 875(d) (Counts Four, Six); four counts of receipt of a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2), (b)(1) (Counts Eight, Nine, Ten, Eleven); two counts of possession of a visual depiction of a prepubescent minor and a minor under the age of twelve engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(B), (b)(2) (Counts Twelve, Fifteen); two counts of possession of a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(B), (b)(2) (Counts Thirteen, Sixteen); and one count of altering, destroying or concealing an Apple iPhone and a messaging app with the intent to impede, obstruct or influence an FBI investigation (Count Fourteen). (DE 31). The superseding indictment also contained a forfeiture allegation. *Id.* Following a jury trial, Mr. Killen was found guilty on all counts against him except Count Fourteen, on which the jury found him not guilty. (DE

102). The district court sentenced Mr. Killen to a combined sentence of 1,668 months' imprisonment. (DE 125).

On appeal, the Eleventh Circuit vacated the sentence imposed as being substantially unreasonable and remanded the case to a different district court judge for resentencing. On resentencing, the district court imposed a fifty-year term of imprisonment. Mr. Killen, a first-time offender, appealed his sentence. On appeal, the Eleventh Circuit affirmed the sentence imposed.

STATEMENT OF FACTS

Mr. Patrick John Killen, Jr., is a twenty-five year-old United States citizen. Patrick's life started out under horrific circumstances. Patrick was actually born Valentin Marandu in Iasi, Romania. Presentence Report (PSR) ¶ 114. For the first three and a half years of his life, Patrick lived in a Romanian orphanage under horrific conditions. PSR ¶ 115. Due to overcrowding in the orphanage, Mr. Killen spent most of his life as a baby strapped down in a crib. *Id.* In fact, due to the strapping-down, Mr. Killen had indentations down to the bone on both arms and legs. *Id.* He was thankfully adopted by Mr. Patrick Killen, Sr. and Dr. Karen Killen. Patrick's rough start to life resulted in emotional and developmental issues. Although he completed high school, Patrick had some trouble with school and was very immature for his age. He also suffered from serious health issues. PSR ¶¶ 128-130. However, he had never before been in trouble with the law.

In the early morning hours of February 11, 2014, two F.B.I. agents came to the Killen home without a warrant. The Agents interrogated Patrick Killen Jr., and during the interrogation, Patrick "admitted that, using his cell phone, he posed on

the Internet as a 15-year old girl named Rebecca Til, with the username rebeccaetill05, identified young boys around the ages of 14 or 15, and persuaded them to take nude photos of themselves and send them to him via Kik." (DE 63:7). Patrick admitted he had communicated with 100 to 200 boys on line and obtained nude pictures from about 50. (DE 57:44). Patrick also turned over his laptop and iPhone to the agents and provided them with the passwords to those devices. The district court denied a pre-trial motion to suppress the evidence obtained by the agents. (DE 78).

Mr. Killen proceeded to trial. At trial, the government relied on evidence it obtained during the initial interrogation of Mr. Killen and the search and seizure of his electronic devices from that same day. The government's case against Mr. Killen was that, starting when he was a teenager, Mr. Killen created an account on the mobile app Kik pretending to be a teenage girl. Under that identity, he got teenage boys to take nude pictures of themselves and send them to Mr. Killen thinking that they were sending the pictures to a teenage girl.

The government presented evidence from Mr. Killen's laptop which contained data from the Kik app on his iPhone that had been backed up to the lap top. (DE 140: 219-234). The government, over defense objection, also presented data from Mr. Killen's Kik app account which had been prepared by Canadian authorities pursuant to a request from the F.B.I. since Kik is a Canadian company. (DE 140:238). This evidence included nude images of teenage boys purportedly taken by the teenage boys and sent to Mr. Killen via the Kik app. It also included purported text dialogues

between Mr. Killen and the teenage boys. (DE 140:117-141). None of the teenage boys testified at trial. The government also introduced Mr. Killen's confession obtained from the initial interrogation by the agents. (DE 143:149-153).

The government also introduced data from the laptop showing an interaction between Mr. Killen and an individual known only as Karucem, an adult collector of child pornography living in Europe, through a peer-to-peer software called gigatribe. (DE 141:8-114). The government's expert testified that, through the gigatribe software, Karucem transmitted images and videos containing graphic child pornography to Mr. Killen's lap top. (DE 141:54-64). The data also showed extensive dialogues between Mr. Killen and Karucem. (DE 141:66-114). The government also presented evidence that another laptop taken from Mr. Killen when he was arrested also contained gigatribe software and child pornography videos transmitted from Karucem's account. (DE 143: 5-60). Karucem's identity was never disclosed and Karucem never testified at trial.

Patrick Killen Jr., testified at trial on his own behalf. (DE 144:110-190). Following trial, the jury returned a guilty verdict as to all counts except Count Fourteen, the obstruction of justice count. (DE 102).

Prior to sentencing, Mr. Killen filed objections to the presentence report. At sentencing, the district court overruled the objections and adopted the calculation that the correct advisory sentencing range was 3,288 months (274 years). The 3,288 months was the aggregate of the maximum statutory sentence for all of the counts of

convictions. The district court varied downward to a sentence of 1,668 months (139 years). (DE 125); (DE 148:61).

On appeal, the Eleventh Circuit Court of Appeals issued an unpublished decision affirming Mr. Killen's convictions and vacating his sentence. *United States v. Killen*, 729 Fed. App'x 703 (11th Cir. March 29, 2018) (unpublished). Specifically, the Court held that the district court committed no procedural error in determining that Mr. Killen's offense level was a level 43 with a criminal history of one, corresponding to a sentencing range of Life imprisonment. However, this Court also held that the sentence of 139 years' imprisonment, the equivalent of life imprisonment without the possibility of parole, was substantially unreasonable. *Id.* at 717.

The Court of Appeals then cited a specific case from this Court, *United States v. Kapordelis*, 569 F.3d 1291 (11th Cir. 2009), to compare with Mr. Killen's case and to provide clear guidance as to what a proper sentence for Mr. Killen would be relative to the defendant in *Kapordelis* given the conduct of the two defendants. Specifically, this Court compared the two cases as follows:

> In Kapordelis, we affirmed Mr. Kapordelis's 35-year sentence, which was a variance above his guideline range, where he possessed more than 500 videos and 2.000 images of child pornography, had a 20-year history of drugging and molesting minors, and had traveled abroad to have sex with minor boys. Mr. Killen possessed a similar number of child pornography images. However, in contrast to Mr. Kapordelis, Mr. Killen had no hands-on contact with a minor during the less than 2-year period of his criminal conduct, let alone a 20-year history of drugging and molesting them or traveling for the express purpose of having sex with a child.

Id. The Court also pointed to several mitigating factors that were present in Mr. Killen's case including his immaturity, the fact that Mr. Killen was a "special needs" child and Mr. Killen's "horrific childhood in a Romanian orphanage." *Id.* at 718. The Court vacated the sentence and remanded the case to a different district court judge for resentencing. *Id.*

On resentencing, the district court rejected the government's call to once again impose a Life sentence despite a clear holding from this Court that such a sentence was substantively unreasonable. The district court, over defense objection, imposed a fifty-year term of imprisonment. (DE 187).

On appeal, Mr. Killen challenged the imposition of a fifty-year term of imprisonment on a young, emotionally immature, first-time offender convicted of a non-violent offense arguing, *inter alia*, that the sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. The Court of Appeals rejected the argument and affirmed the fifty-year sentence.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Eleventh Circuit held that "a defendant whose sentence falls within the limits imposed by statute cannot make the threshold showing of gross disproportionality" on an Eighth Amendment claim. The Eleventh Circuit's bright-line test is unworkable and conflicts with this Court's decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010). This Court must grant the petition in order to clarify the proper analysis to be conducted when determining whether a defendant has made a showing of gross disproportionality under *Graham*.

Patrick Killen, a young, first-time offender with emotional and maturity issues, was sentenced to a fifty-year term of imprisonment following his convictions on non-violent offenses. His most serious offenses, coercing a minor for purposes of producing child pornography, carried s statutory maximum sentence of thirty years' imprisonment. Rather than preventing Patrick Killen from demonstrating gross disproportionality, the fact that his sentence, fifty years, almost doubled the statutory maximum for his most serious offense, thirty years, coupled with statistical comparisons, clearly demonstrate that this fifty-year sentenced was grossly disproportionate to his offense and that the gross disproportionality demonstrated a violation of the Eighth Amendment.

The Eighth Amendment prohibits the imposition of cruel and unusual punishment. U.S. Const., amend VIII. And, "[t]he Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 132 S. Ct. 2485, 2463 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183 (2005)). "That right [] flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544 (1910)). "The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010). "[T]he Eighth Amendment is not a static prohibition that proscribes the same things that it proscribed in the 18th century. Rather, it forbids punishment that would be considered cruel and unusual today." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1144 (April 1, 2019) (J. Breyer, dissent.)

This Court has identified two general classifications of cases addressing the proportionality of sentences under the Eighth Amendment. *Graham*, 130 S. Ct. 2021. In the first classification, the court looks at the specific circumstances of the particular case to determine whether the sentence imposed is unconstitutionally disproportionate. *Id.* In the second classification, the court employs a categorical approach focusing on two subsets – the nature of the offense and the characteristics of the offender. *Id.* at 2021, 2022.

As to the first classification, the Court "must begin by comparing the gravity of the offense and the severity of the sentence." *Id.* at 2022 (citing *Harmelin v.*

Michigan, 501 U.S. 957, 1005, 111 S. Ct. 2680 (1991) (opinion of Kennedy, J.)). If that initial comparison leads to "'an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions." *Id.* "If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.*

Here, the Court of Appeals held that Mr. Killen failed to make a threshold showing of gross disproportionality in his sentence. Its decision was based on its legal holding that "a defendant whose sentence **falls within the limits imposed by statute cannot make a threshold showing** of gross disproportionality." That holding is legally erroneous and inconsistent with this Court's holding in *Graham*.

The district court sentenced Patrick to a fifty-year term of imprisonment. Patrick's most serious convictions, for production of child pornography, carried a statutory maximum sentence of thirty years. Patrick, a young, immature, first-time offender, was convicted of non-violent offenses. None of the offenses involved violence or the threat of violence. Patrick never touched any of the victims involved, and in fact, he was never in the same room with or anywhere near any of the victims. Patrick's convictions stem from his actions on social media. Patrick established an account on a mobile phone app called Kik that allowed him to instant message and share pictures with other Kik users. On Kik, Patrick pretended to be a teenage girl and he coerced teenage boys into sending him nude pictures of themselves. In

addition, he downloaded child porn videos from an adult in Europe. None of the conduct was violent.

Patrick was just a teenager when he began his conduct and his maturity level was even lower than that. (DE 148:55). There was testimony that he was just sixteen when he started the offense. (DE 143:33,34). Prior to sentencing, counsel for Mr. Killen presented the court with pre-sentence evaluation by Dr. DiTomasso who opined that Patrick is not a psychopath, not likely to recidivate, and not a risk to commit a hands-on offense. An initial comparison of the severity of the offense, a non-violent offense committed by a youthful, immature first-time offender, with the severity of the sentence, a fifty-year sentence, presents an extraordinary case and leads to a clear inference of gross disproportionality especially given the recent statistical data compiled by the United States Sentencing Commission.

First, on the most serious offense, Patrick was convicted of three counts of coercing or employing a minor for the purpose of production of child pornography in violation of 18 U.S.C. § 2251(a), (Counts One, Three and Five). That offense has a statutory maximum sentence of thirty years. 18 U.S.C. § 2251(e). The district court reached a total sentence of fifty years by having the twenty-year sentence on Count Three run consecutive to thirty year concurrent sentences on Counts One and Five. All other lesser sentences were run concurrently to the sentences on Counts One and Five.

The Eleventh Circuit held that Patrick Killen could not make a threshold showing of gross disproportionality on his Eighth Amendment claim because his

sentence "**falls within the limits imposed by statute.**" But his fifty year sentence is almost double the statutory maximum sentence, thirty years, for his most serious offense so the Court of Appeals' holding does not make sense with regard to the thirty year maximum. In addition, by definition, every sentence has to fall within the limits imposed by statute. The Court of Appeals could have meant that Patrick Killen was barred from demonstrating gross disproportionality because his sentence was less than the maximum statutory sentence assuming all his offenses were run consecutively. But that would essentially prohibit anyone with more than one count of conviction from claiming an Eighth Amendment violation. Here, running all the maximum statutory sentences consecutively would have resulted in a sentence of 274 years, which was the sentence requested by the government at sentencing. The holding of the Court of Appeals would thus mean that Patrick Killen would have been barred from claiming an Eighth Amendment violation for any sentence up to and including the absurd sentence of 274 years' imprisonment.

The Eleventh Circuit's bright-line rule tying a threshold showing of gross disproportionality with the statutory maximum thus cannot be squared in any way that makes sense with this Court's mandate in *Graham* that the Court "must begin by comparing the gravity of the offense and the severity of the sentence." Rather, that analysis must be carried out more holistically and not in the hyper-technical way that the Eleventh Circuit sought to do with its bright-line rule. *See Graham*, 130 S. Ct. at 2021, 2022. Here, Patrick Killen was engaged in a scheme where, while in the online persona of a teenage girl, he went online and coerced and threatened teenage

boys into posing nude with an erection and sending those images to him. That more general view of his offense must be compared to his sentence of fifty years to see if there is a threshold showing of gross proportionality.

In addition to pointing out that the sentence of fifty years was nearly double the statutory maximum for the offense of coercing a minor for the purpose of producing child pornography, Patrick Killen demonstrated that his offense was far less culpable than most defendants convicted of coercing a minor for the purpose of producing child pornography. Both in the district court and on appeal, Patrick Killen cited to the Sentencing Commission's special report to Congress focusing on the sentencing of child pornography defendants. *See* United States Sentencing Commission, ***2012 Report to Congress: Federal Child Pornography Offenses*** (December 2012). Although the report mainly dealt with non-production guidelines, U.S.S.G. § 2G2.2, the Commission did touch briefly on production cases, § 2G2.1, as well. *Id.* at 330. The Commission noted that most production defendants "had sexual contact with a prepubescent minor." *Id.* The Commission further noted that a "minority of offenders, however, did not engage in any physical contact with their victims, and a subset of those offenders were never physically present with their victims because they caused the production of child pornography remotely (e.g., via webcam or through email)." *Id.* Patrick was convicted of production, but he did so remotely and with teenagers and not with any prepubescent children. Patrick thus belongs to a subset of a subset that encompasses the least culpable of production defendants. Yet the Commission notes that the average sentence for **all** production

defendants, most of which are substantially more culpable than Patrick, was 274 months, half of the sentence imposed on Patrick. *See id.* Under this Court's decision in *Graham*, that satisfies the threshold requirement of demonstrating gross disproportionality.

That initial inference of gross disproportionality is confirmed by a comparison of sentences in the Southern District of Florida and sentences for similar offenses nationally as required by this Court's decision in *Graham*. Both in the district court and on appeal, Patrick Killen cited the statistics maintained by the Sentencing Commission to make that point clear. The Sentencing Commission studies the length of imprisonment by primary offense category for each fiscal year. For fiscal year 2015, it reviewed a total of 1,971 sentences in the Southern District of Florida for defendants sentenced to a term of imprisonment. For those 1,971 sentences, the mean sentence was 56 months' imprisonment and the median sentence was 33 months' imprisonment. For the 34 child pornography sentences, the mean sentence was 114 months' imprisonment and the median sentence was 94 months' imprisonment. For the 25 extortion sentences, the mean sentence was 129 months' imprisonment and the median sentence was 90 months' imprisonment. Nationally, the 1,858 sentences for child pornography had a mean sentence of 157 months' imprisonment and a median sentence of 97 months' imprisonment. Nationally, the 915 sentences for extortion had a mean sentence of 86 months' imprisonment and a median sentence of 60 months' imprisonment. U.S.S.C. Statistical Information Packet, Fiscal Year 2015, Southern District of Florida, Table 7, available at

www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/fls15.pdf (last visited Nov. 9, 2018).

By contrast, Mr. Killen's sentence of 50 years (600 months) imprisonment, when compared to all sentences in the Southern District of Florida, sentences for child pornography and extortion in the Southern District of Florida, sentences for child pornography and extortion nationally, even in the aggregate, is grossly disproportional. Mr. Killen's sentence is 10 times higher (a 1,000 % increase) over the mean sentence in the district, 4 time higher (a 400% increase) over the mean sentence for child porn cases nationally and almost 7 times higher (a 700% increase) over the mean sentence for extortion cases nationally. Mr. Killen was not convicted of sexual abuse and his offenses do not rise to the level of sexual abuse, but even when compared to sentences for sexual abuse, a crime substantially more severe than Mr. Killen's crimes, his sentence is more than three times higher (300% increase) over the mean sentence for sexual abuse in the Southern District of Florida (188 months) and more than 4 and a half times higher (a 465 % increase) than sexual abuse sentences nationally (129 months) for fiscal year 2015. Even comparing the sentence to sentences for murder, Mr. Killen's sentence is more than double the mean sentence for murder nationally (287 months). Because this comparison demonstrates that Mr. Killen's sentence is grossly disproportionate, his sentence is cruel and unusual in violation of the Eighth Amendment. *See Graham*, 130 S. Ct. at 2022.

The Eleventh Circuit's bright line rule is an unworkable rule that is inconsistent with this Court's decision in *Graham*. This Court should grant the

petition for a writ of certiorari to clarify the proper analysis to be conducted when determining whether a defendant has made a showing of gross disproportionality.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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