

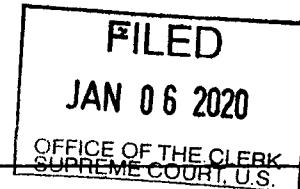
No. ~~19-7497~~

In The  
Supreme Court of the United States

RICHARD SILVESTRI,  
Petitioner,

v.  
UNITED STATES OF AMERICA,  
Respondent.

**ORIGINAL**



On Petition For Writ Of Certiorari  
To The United States Court of Appeals For The First Circuit

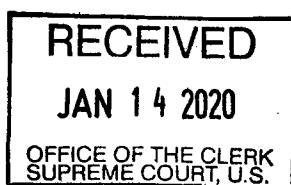
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**Petition for a Writ of Certiorari**

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Richard Silvestri, 15837-049  
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P.O. Box 24550  
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## QUESTION PRESENTED

In the second resolution in the Kentucky Resolutions of 1798, Thomas Jefferson and the State of Kentucky construed the United States Constitution insisting that the power to punish is reserved to the States of the Union except in the case of treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offenses against the law of nations. According to them, any act of Congress which assumes to punish any other crime than these is altogether void and of no force. But for over a century now, the United States has been punishing other crimes than those so enumerated in the Constitution where the power to punish is reserved to the States, apparently under the guise of regulating commerce under the Commerce Clause. Petitioner is currently being punished for extraterritorial conduct under the Commerce Clause. The federal question presented for review is:

Should the United States Constitution be construed to prohibit Congress from enacting laws that punish people for extraterritorial conduct under the Commerce Clause as Thomas Jefferson and the State of Kentucky construed the United States Constitution in the second resolution of the Kentucky Resolutions of 1798?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Silvestri respectfully petitions for a writ of certiorari to review the jurisdiction of the District Court for the District of New Hampshire in Concord and the judgment of the United States Court of Appeals for the First Circuit in affirming the sentence imposed by said district court.

OPINIONS BELOW

The First Circuit's opinion is attached as Appendix A.

JURISDICTION

The United States District Court for the District of New Hampshire in Concord lacked jurisdiction because the Plaintiff failed to allege an offense against the laws of the United States throughout the entire course of the litigation. Mr. Silvestri plead guilty to the charges specified at his change of plea hearing, was sentenced to a term of 600 months imprisonment and supervised release for a term of life and timely appealed the reasonableness of the sentence imposed to the United States Court of Appeals for the First Circuit under 28 U.S.C. § 1291. The First Circuit affirmed in an unpublished opinion on October 8, 2019 and entered its formal mandate on October 29, 2019 which is attached as Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides in relevant part:

The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, ... And To

make all Laws which shall be necessary and proper for carrying into execution the foregoing powers.

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall ... be deprived of ... liberty, ... without due process of law.

The Ninth Amendment to the United States Constitution provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

#### STATEMENT OF THE CASE

For more than a century now, the United States has been exercising a power that the framers of the Constitution and the delegates from the States whom ratified the Constitution never intended it to exercise, i.e., the power to punish under the pretext of regulating commerce with foreign nations, and among the several states, and with the Indian tribes.

The statute of conviction, 18 U.S.C. § 2251(a), punishes extraterritorial conduct under the guise of regulating commerce under the Commerce Clause. Neither the district court nor the First Circuit questioned the district court's jurisdiction to punish Mr. Silvestri's extraterritorial conduct under the statute.

## A. Legal Background

1. In the second resolution of the Kentucky Resolutions of 1798, Thomas Jefferson insisted that the power to create, define and punish crimes other than treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offenses against the law of nations is reserved to the States and any act of Congress which assumes to create, define or punish crimes other than those so enumerated are altogether void and of no force. See The Kentucky Resolutions of 1798, in The Portable Thomas Jefferson, 282 (M. Peterson ed., 1977).

2. Because the Constitution's meaning never alters, the second resolution of the Kentucky Resolutions of 1798 is dispositive proof that the Constitution should be construed to make void as ultra vires any act of Congress which assumes to create, define or punish crimes other than those so enumerated in the Constitution. See *South Carolina v. United States*, 199 U.S. 437, 448-50 (1905); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819).

3. Excluded from present consideration, of course, are the District of Columbia, federal enclaves and United States territories; places where no power can be reserved to the States. See, e.g., *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916); *Palmore v. United States*, 411 U.S. 389, 397 (1973); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736-37 (1836).

4. "[N]o sovereign can extend its process beyond its own territorial limits, to subject other persons or property to its

judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals. ... Such is the familiar, reasonable and just principle of the law of nations." *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U.S. 287, 298 (1890).

"Congress cannot by legislation, enlarge the federal jurisdiction, nor can it be enlarged by the treaty-making power. ... Special provision is made in the Constitution for cession of jurisdiction from States over places where the federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction." *New Orleans*, *supra*. "Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds which affect the peace and good order of the community, must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise [jurisdiction]." *United States v. Bowman*, 260 U.S. 94, 98 (1922).

Legislation of Congress is presumed to apply only within the territorial jurisdiction of the United States unless Congress has clearly expressed its intention to give a statute extraterritorial effect. Congressional silence means no extraterritorial application. See *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, \_\_\_ (2010).

5. The phrase "affecting interstate or foreign commerce" expresses an intent by Congress to exercise extraterritorial jurisdiction under the Commerce Clause. See *Russell v. United*

States, 471 U.S. 858, 859 (1985).

6. "Congress ... is powerless to do anything about commerce which is not regulation." *Carter v. Carter Coal Co.*, 298 U.S. 238, 297 (1936). A law is not proper for carrying into execution the power to regulate commerce with foreign Nations, among the several States and with the Indian Tribes when it violates the principle of state sovereignty reflected in the various constitutional provisions. See *Alden v. Maine*, 527 U.S. 706, 732-33 (1999).

7. An affirmative disability or restraint only amounts to "punishment," in the constitutional sense of that word, if it was imposed for the purpose of punishment as opposed to being but an incident of some other legitimate governmental purpose such as regulating commerce. See *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). "[T]he tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), are: "Whether the sanction involves an affirmative disability or restraint, whether it traditionally has been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Id.* at 168-69. Under this test, the Act of Congress is "viewed in terms of the type and severity of the burdens imposed," *Nixon v. Administrator of General Services*, 433 U.S. 425, 476 (1977), to

determine whether it is regulatory or punitive in character." See *ibid.* "Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face," *Kennedy*, 372 U.S. at 169, but "a detailed examination along such lines is unnecessary [when] the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive." *Ibid.*

8. "A motion that the court lacks jurisdiction may be made at any time while the case is pending." Fed. R. Crim. P. 12(b)(2). Additionally, "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "[C]ases are legion holding that a party may not waive a defect in subject-matter jurisdiction or invoke federal jurisdiction simply by consent." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 26 (1989).

"[T]wo things are necessary to create jurisdiction. ... The Constitution must have given the court the capacity to take it, and an act of Congress must have supplied it. ... Congress cannot exceed [the limits of the granted power]. Both [civil and criminal cases] are within [Article III's] scope." *Nashville v. Cooper*, 6 Wall. 247, 252 (1868). "Article III of the Constitution confines the jurisdiction of the federal courts to actual 'Cases' and 'Controversies.'" *Clinton v. New York City*, 524 U.S. 417, 429 (1998). "The party invoking federal jurisdiction bears the burden of establishing standing." *Susan B. Anthony List v. Driehaus*,

573 U.S. 149, 158 (2014). "A party has standing only if he shows that he has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the conduct being challenged, and that the injury will likely be 'redressed' by a favorable decision. The need to satisfy these three requirements persists throughout the life of the lawsuit." *Wittman v. Personhuballah*, 195 L. Ed. 2d 37, 41-42 (2016).

"Federal courts' ... criminal subject-matter jurisdiction comes from 18 U.S.C. § 3231, which states: 'The district courts ... shall have original jurisdiction ... of all offenses against the laws of the United States.'" *Mussachio v. United States*, 193 L. Ed. 2d 639, 650 (2015). Any provision of an Act of Congress attempting to exercise powers not granted to the United States, but reserved to the States, was never a law of the United States. See *United States v. Butler*, 297 U.S. 1, 68-69 (1936).

9. "This Court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a State or the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *United States v. Raines*, 362 U.S. 17, 21 (1960). "[A] party generally must assert his own legal rights and interests." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

"The Fifth Amendment's Due Process Clause forbids the Government to deprive any person of liberty without due process of law. Freedom from imprisonment ... lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678,

690 (2001). "Due process of law ... refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States." *Hurtado v. California*, 110 U.S. 516, 535 (1884). "[A] legally competent tribunal having jurisdiction of the cas[e] constitute[s] [a] basic elemen[t] of due process of law." *Powell v. Alabama*, 287 U.S. 45, 68 (1932). "[N]ullum crimen, nulla poena, sine lege. Unless there be a violation of law preannounced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment." *Sparf v. United States*, 156 U.S. 51, 58 (1895). "Nulla poena sine lege is not only an ancient maxim, it is a requisite of due process." *United States v. Bodiford*, 753 F.2d 380, 382 (5th Cir. 1985). "[U]nder our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." *Parr v. United States*, 363 U.S. 370, 394 (1960).

Protected liberty interests can also be created by federal statutes. See *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *Sandin v. Connor*, 515 U.S. 472, 483-84 (1995). "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a).

10. "Any person who [violates this subsection] shall be punished as provided for under subsection (e), ... if [the child pornography] was produced ... using materials that have been mailed, shipped, or transported in or affected interstate or foreign commerce by any means." 18 U.S.C. § 2251(a)(emphasis

added). "Any individual who violates ... this section shall be ... imprisoned not less than 15 years nor more than 30 years." Id. at 2251(e).

"[T]he punishment of imprisonment ... is the paradigmatic affirmative disability or restraint," Smith v. Doe, 538 U.S. 84, 100 (2003); offenses prescribing more than one year imprisonment are classified as felonies, see 18 U.S.C. § 3559(a); felony convictions impose additional affirmative disabilities and restraints, see Lewis v. United States, 445 U.S. 55, 66 (1980); imprisonment in a prison or penitentiary, with or without hard labor, has traditionally been regarded as an infamous punishment, see Mackin v. United States, 342 U.S. 246, 260 (1952); the stigma of being classified as a felon promotes retribution wherein "retributive punishment" is defined as: "Punishment intended to satisfy the community's retaliatory sense of indignation that is provoked by injustice," Black's Law Dictionary 1270 (Deluxe 8th ed), and the title of "felon" is "as bad a word as you can give to man or thing," 2 Pollock & Maitland, History of English Law 465 (2d ed 1899); a sentence of imprisonment is otherwise imposed for the purpose of retribution and deterrence, see 18 U.S.C. §§ 3551(a); 3582(a); 3553(a)(2)(A)&(B); and "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979).

#### **B. District Court Proceedings**

Petitioner Richard Silvestri was indicted on two counts of sexual exploitation of a minor under 18 U.S.C. § 2251(a). Count 1 of the indictment charged: "On a date uncertain, but not later

than December 13, 2017, in the District of New Hampshire and elsewhere, the defendant ... did knowingly employ, use, persuade, induce, entice and coerce a minor child ... to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct ... that was transported in and affecting interstate and foreign commerce and was produced using materials that had been mailed, shipped and transported in interstate commerce by any means, including by computer. ... All in violation of Title 18, United States Code, Sections 2251(a) and 2256." Doc. 8 at 1. Count 2 made the same charge as Count 1 but charged Mr. Silvestri with a different depiction. The PSI shows that the conduct occurred in the state of New Hampshire. See Doc. 20 at 4-5.

The district court never questioned its jurisdiction over the place of the offense. Despite this fact, the district court accepted Mr. Silvestri's plea of guilty to both counts and adjudged him guilty. See Change of Plea Hearing Transcript at 22. At the sentencing hearing, the court sentenced Mr. Silvestri to imprisonment for a term of 600 months (50 years) and supervised release for a term of life. See Sentencing Transcript at 42.

### **C. First Circuit Proceedings**

The First Circuit affirmed the procedural and substantive reasonableness of the sentence imposed.

## REASONS FOR GRANTING THE WRIT

1. If it is true that the United States has been punishing people it lacks the power to punish for over a century now, no issue could ever be more important. Because the Constitution is the supreme law of the land and it prohibits the government to punish under the Commerce Clause, the acts of the government amount to a violation of law and the strong public interest in the integrity of the judicial process is at its zenith when a refusal to grant certiorari would appear (to the public) to render the Supreme Court an accessory to such a heinous crime.

2. The interest in judicial integrity should also compel the Supreme Court to grant certiorari on this issue because no other court is likely to rule properly on the issue, but feel bound by Supreme Court rulings that have no precedential effect. Just as the Supreme Court has mistakenly used the word "jurisdiction" when it intended to say "failure to state a claim," it has also mistakenly used the word "punish" when it intended to say "regulate." It would arbitrarily waste valuable government resources to present this issue before the lower courts when only the Supreme Court can verify that it actually meant to say "regulate," not "punish."

3. The interest in the integrity of proceedings should also compel the Supreme Court to grant certiorari on this issue because it would be a conflict of interest for a criminal defense attorney to ever present this issue before any court. A favorable ruling on this issue would consequently put most federal criminal defense attorneys out of a job. This conflict of interest

prevented Mr. Silvestri from raising this issue sooner without waiving his right to counsel needed to protect his right to due process.

4. This case provides the ideal opportunity for resolving whether or not Congress lacks the power to punish under the Commerce Clause:

A. Petitioner has standing to challenge the constitutionality of 18 U.S.C. § 2251(a) because he is being punished for violating that statute's terms solely under Commerce Clause, not territorial, jurisdiction. The statute thus violates his right to due process of law both because the United States lacks power to punish under the Commerce Clause and the statute cannot be a law of the United States, which renders his process without law.

B. Although evidentiary facts will be in dispute that were not tested below, these facts will only bear on the intent of the framers and delegates who ratified the Constitution to determine the construction of the Constitution and all supporting evidence will come from authentic sources such as the Constitution itself, the transcripts of the Constitutional Convention, the Federalist Papers and other articles authored by the framers such as the Kentucky Resolutions of 1798, and bear on the intent of Congress in passing § 2251(a) to determine whether it imposes punishment for extraterritorial conduct under the Commerce Clause.

C. Because subject-matter jurisdiction can never be waived or forfeited, no preliminary issue of procedural default complicates this Court's consideration of the issue.

D. The inherent conflict of interest an attorney would have

in raising this issue is not present here wherein Petitioner is representing himself.

E. This petition is timely filed because the First Circuit entered its judgment affirming the sentence on October 8, 2019, this petition is accordingly due to be filed on or before January 6, 2020, and this petition was placed in the prison mail system on January 6, 2020.

#### CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,



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# United States Court of Appeals For the First Circuit

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No. 19-1022

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD SILVESTRI,

Defendant, Appellant.

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Before

Thompson, Boudin, and Kayatta,  
Circuit Judges.

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## JUDGMENT

Entered: October 8, 2019

Richard Silvestri is serving a below-guidelines sentence of 600 months in prison after pleading guilty (without a plea agreement) to two counts of sexual exploitation of children. See 18 U.S.C. § 2251(a), (e). He complains to us that his term is both procedurally and substantively unreasonable. For simplicity's sake, we assume — favorably to him — that review is for abuse of discretion. See, e.g., United States v. Caballero-Vázquez, 896 F.3d 115, 120, 122 (1st Cir. 2018). Spying none, we affirm.

Silvestri's procedural-reasonableness argument has two strands. His main one is that because USSG § 2G2.1 (sexual exploitation of a minor) is not based on "empirical data" but on congressional decree, the district judge erred by not "reject[ing]" § 2G2.1's "application." But even assuming (without granting) that he is right that § 2G2.1 is not empirically based, the problem for him is that United States v. Acquino-Florenciani rejected an argument eerily similar to the one he attempts here. See 894 F.3d 4, 8 (1st Cir. 2018) (holding — in a case involving production (covered by § 2G2.1) and distribution (covered by USSG § 2G2.2) of child pornography — that "[w]hile district courts may certainly conclude that the guidelines sentencing range in child

Appendix A

pornography cases is harsher than necessary in many cases, there is no requirement that a district court must categorically reject the child pornography guidelines based on their provenance"), cert. denied, 139 S. Ct. 443 (2018); see generally United States v. Grigsby, 749 F.3d 908, 911 (10th Cir. 2014) (explaining that while the "[d]efendant *may* be correct when he says the child pornography production guideline, § 2G2.1," is, like § 2G2.2, not empirically-based, "this does not mean a within-guideline-range sentence" involving § 2G2.1 "is necessarily unreasonable, and none of our sister circuits have ever so held" (emphasis added)).

Silvestri also claims that the judge erred by not "explicitly reject[ing], discuss[ing], or even acknowledg[ing]" his § 2G2.1-based argument. But as he insists, his sentencing memo hyped how district judges have the discretion to depart or vary from the guidelines because of policy disagreements with the guidelines. And under our caselaw, we can infer from this that the judge considered and rejected his plea to exercise that discretion in his favor. See United States v. Ruiz-Huertas, 792 F.3d 223, 227 (1st Cir. 2015) (relying on United States v. Jiménez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006) (en banc)).

With Silvestri's procedural-reasonableness claims out of the way, we turn to his substantive-reasonableness arguments.

A sentence is substantively reasonable if it reflects a plausible rationale and a defensible outcome. See, e.g., United States v. Tanco-Pizarro, 892 F.3d 472, 483 (1st Cir. 2018). Convinced that his sentence flunks that standard, Silvestri accuses the judge of "fail[ing] to appropriately weigh" the sentencing factors, insisting that she "count[ed] his own childhood sexual abuse against him as aggravating" and that she "believe[d] that the offense of conviction mandated an effective life sentence regardless of any other sentencing factors." Call us unpersuaded.

Within wide limits, it is up to the judge to decide how much weight to give each relevant sentencing factor in a particular case. See, e.g., United States v. Maguire, 752 F.3d 1, 7 (1st Cir. 2014); United States v. Clogston, 662 F.3d 588, 592-93 (1st Cir. 2011). And our judge was up to the task. Noting that she sometimes finds a defendant's own sexual abuse to be a mitigating factor if he "possess[es] the pornography and is not acting on any impulses," the judge stressed that Silvestri had committed "hands-on crimes." As the judge pointed out, he admitted to an undercover agent that he had sexually abused his two daughters — one ten years earlier when she was five (the subject of a state prosecution); the other more recently when she was eight (a child with autism so severe that she cannot speak), and had distributed videos of himself doing unspeakable things to her (the subject of the federal prosecution). He even told the undercover officer that his youngest daughter "enjoy[ed]" the sexual abuse. Given what the judge called the "unique facts" of Silvestri's, we think it not unreasonable for her to conclude that his abusing his own children after personally suffering abuse was not an especially mitigating factor. See Clogston, 662 F.3d at 593 (emphasizing that a judge's decision "not to attach to certain of the mitigating factors the significance that the [defendant] thinks they deserved does not make the sentence unreasonable").

What is more, we see no sign that the judge thought she had to sentence Silvestri based solely on the vileness of his crimes, without pondering "any other sentencing factors" — indeed, whole-record review convinces us that she appropriately considered the pertinent factors (including his age and cooperation, for instance), showing an awareness of her discretion in imposing the below-guidelines sentence. See United States v. Dávila-González, 595 F.3d 42, 49 (1st Cir. 2010) (explaining that even a judge's silence about a sentencing theory hawked by the defendant is not fatal, because "we may infer" from the parties' arguments and the judge's sentence that she "found the[] circumstances insufficient" to give the defendant the sentence he requested (quoting Rita v. United States, 551 U.S. 338, 358 (2007)); see also United States v. Arsenault, 833 F.3d 24, 32 (1st Cir. 2016) (making that same point, and adding that while a judge can consider the elderly-prisoner problem — *e.g.*, the appropriateness of jailing someone so long that he will be elderly when released, even though he might have long since "'ag[ed] out of . . . risky' . . . criminal behavior" — she commits no "plain[] err[or] by not expressly considering th[is] concern[]" (quoting United States v. Presley, 790 F.3d 699, 702 (7th Cir. 2015)). "A criminal defendant is entitled to a weighing" of relevant factors — which happened here — "not to a particular result." See United States v. Carrasco-De-Jesús, 589 F.3d 22, 29 (1st Cir. 2009).

The bottom line is Silvestri's below-guidelines sentence comes "within the universe of reasonable sentences," see United States v. de Jesús, 831 F.3d 39, 43 (1st Cir. 2016) — which means his substantive-reasonableness theories (like his procedural-reasonableness ones) fail because we see no abuse of discretion, see Ruiz-Huertas, 792 F.3d at 225, 229 (upholding a 600-month sentence as substantively reasonable, given the defendant's egregious sexual misconduct, "the victims' tender ages, and the defendant's begrudging expression of remorse").

*Affirmed.*

By the Court:

Maria R. Hamilton, Clerk

cc:

Donald A. Feith  
Seth R. Aframe  
Helen White Fitzgibbon  
Elizabeth A. Billowitz  
Richard Silvestri