NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL ELLIOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a sentence imposed pursuant to the United States Sentencing Guidelines covering child pornography offenses, U.S.S.G. §§ 2G2.1 and 2G2.2, is substantively unreasonable due to flaws in those guidelines?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Samuel Elliott, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on September 9, 2019.

OPINION BELOW

The published decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Elliott*, 937 F.3d 1310 (10th Cir. 2019), is found in the Appendix at A1.

JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on September 9, 2019. Justice Sotomayor extended the time in which to petition for certiorari by 60 days, to and including February 6, 2020. (Appendix at A7.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

The relevant provisions of the United States Sentencing Guidelines, U.S.S.G. §§ 2G2.1 and 2G2.2, are included in the Appendix at A9. *See* Sup. Ct. R. 14.1(f).

STATEMENT OF THE CASE

Mr. Elliott pleaded guilty to four counts of possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), and three counts of producing child pornography, in violation of 18 U.S.C. § 2251(a). (Vol. 1 at 372-73.)[1] At sentencing, his offense level easily topped off at the maximum of 43, based in part through the application of numerous specific offense characteristics that are routinely applied under the child pornography guidelines, U.S.S.G. §§ 2G2.1 and 2G2.2.[2] (Vol. 3 at 15-19.) And at an offense level of 43, there is no advisory guideline *range*—the recommended sentence for every criminal history category is life imprisonment. *See* U.S.S.G. Ch. 5 Pt. A (Sentencing Table).

Consistent with the guidelines' recommendation, the district court imposed consecutive statutory maximum sentences on each count, for an effective life sentence of 170 years.[3] *See* U.S.S.G. § 5G1.2(d) (calling for consecutive sentencing

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[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

[2] U.S.S.G. § 2G2.1 corresponds to production counts under § 2251, and § 2G2.2 corresponds to possession counts under § 2252A.

[3] This 170-year sentence (2,040 months) represented consecutive statutory maximum sentences on each of the seven counts to which Mr. Elliott pleaded guilty:

in a multiple-count case to achieve total punishment within the guidelines range). (Vol. 1 at 395, 407; Vol. 4 at 175-76.)

On appeal to the Tenth Circuit, Mr. Elliott raised two claims. First, he argued that the four possession counts were multiplicitous. The Tenth Circuit agreed, and vacated three of those four convictions. (Appendix at A4.) Second, he argued that the child pornography sentencing guidelines, §§ 2G2.1 and 2G2.2, were so inherently flawed as to render any sentence imposed thereunder substantively unreasonable. He acknowledged, however, that this argument was foreclosed by circuit precedent. Accordingly, the circuit did not reach it.

This petition follows.

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that is, 30 years on each of the three child pornography production counts (Counts 1, 2, and 3), *see* 18 U.S.C. § 2251(e); and 20 years on each of the four child pornography possession counts (Counts 4, 5, 6, and 8) under an enhanced penalty provision, *see* § 2252A(b)(2).

REASONS FOR GRANTING THE WRIT

Over the last decade, the courts of appeals and Sentencing Commission have exhaustively catalogued the problems with the child pornography sentencing guidelines, §§ 2G2.1 and 2G2.2. The guidelines are, for example, not the product of the Sentencing Commission's usual institutional competence and expertise, but, rather, the result of numerous Congressional directives which ratcheted the guidelines upwards. *See, e.g.*, *United States v. Dorvee*, 616 F.3d 174, 184-87 (2d Cir. 2010); *United States v. Wireman*, 849 F.3d 956, 967-69 (10th Cir. 2017) (McKay J. concurring). And they are replete with enhancements that apply in most (if not nearly all) cases, eliminating the ability of the guidelines to meaningfully distinguish between conduct that typically would proportionally increase sentencing exposure. *See, e.g.*, United States Sentencing Commission, *Report to Congress: Federal Child Pornography Offenses*, at 208-09, 260-62 (2012).[4]

In the ensuing years, these guidelines have not meaningfully changed. The circuits have, however, diverged in how they treat the substantive reasonableness of sentences imposed under §§ 2G2.1 and 2G2.2.

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[4] *Available at:* https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

Some, like the Second Circuit, have criticized the guidelines, and either reversed sentences imposed thereunder as substantively unreasonable or at least countenanced district courts under their purview varying from guidelines. *See, e.g.*, *Dorvee*, 616 F.3d at 188 (describing § 2G2.2 as "an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results," and holding that the guideline sentence imposed was substantively unreasonable); *see also United States v. Jenkins*, 854 F.3d 181, 189-91 (2d Cir. 2017); *United States v. Henderson,* 649 F.3d 966, 963-64 (9th Cir. 2011); *United States v. Grober*, 624 F.3d 592, 609-11 (3d Cir. 2010); *United States v. Stone*, 575 F.3d 83, 89 (1st Cir. 2009).

Others, like the Tenth Circuit, have rejected any problem with a district court relying on these guidelines for sentencing, even while acknowledging their defects, and do not appear to have ever found a sentence imposed under either guideline unreasonable. *See, e.g.*, *United States v. Grigsby*, 749 F.3d 908, 910-11 (10th Cir. 2014) (rejecting argument that flaws with U.S.S.G. § 2G2.1 render sentences imposed thereunder unreasonable); *United States v. Franklin*, 785 F.3d 1365, 1370-71 (10th Cir. 2015) (same as to U.S.S.G. § 2G2.2); *see also United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011); *United States v. Fry*, 851 F.3d 1329, 1334 (D.C. Cir. 2017).

Further exacerbating the inconsistent sentencing under the child pornography guidelines is the fact that some district courts reject application of the guidelines under this Court's decision in *Kimbrough v. United States*, 552 U.S. 85 (2007), which permits district courts, in their discretion, to depart or vary downward from a guidelines sentence on the basis of a policy disagreement with the relevant guideline. *See Grigsby*, 749 F.3d at 911 (noting practice and including cites). Indeed, there is far from uniform application of these guidelines—over *half* of the sentences imposed under both §§ 2G2.1 and 2G2.2 in 2018 were variances. *See* United States Sentencing Commission, *2018 Sentences Under the Guidelines Manual and Variance*, Table 32 (Sentences Imposed Relative to the Guideline Range by Primary Sentencing Guideline, Fiscal Year 2018) (reporting 242 variances for 455 total sentences under § 2G2.1, and 888 variances for 1,414 total sentences under § 2G2.2).[5]

This Court's intervention, therefore, is necessary to definitively establish whether reliance on §§ 2G2.1 and 2G2.2 results in sentences entitled to the presumption of reasonableness, or whether the long-recognized flaws in those

[5] *Available at:* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table32.pdf.

guidelines makes their recommendation a flawed starting point for federal sentencing. Weighing in favor of this Court's review is that the circuits' varying levels of deference to these guidelines is well-developed, and the number of sentences imposed under these guidelines is significant (nearly 2,000 in 2018 alone). Moreover, this case, with its effective life sentence, a rarity in the federal system, *see, e.g.*, United States Sentencing Commission, *Life Sentences in the Federal System*, at 1 (Feb. 2015),[6] presents a good vehicle for the Court to engage with this question.

Finally, it bears mention that while the Sentencing Commission theoretically could address this issue at some point, that does not counsel against review here. *See generally Braxton v. United States*, 500 U.S. 344, 348 (1991) (discussing restraint in using certiorari power to primary means to resolve conflicting judicial decisions regarding the meaning of the Guidelines). The important sentencing impacts at play strongly mitigate against invoking that restraint here. Moreover, while Congress charged the Sentencing Commission with periodically reviewing and revising the Guidelines, *Braxton*, 500 U.S. at 348, it also imposed a duty on the courts "to avoid unwarranted sentence disparities among defendants with similar records who have

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[6] *Available at:* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). But as the high rate of variances among district courts as well as the differing levels of deference to the guidelines exhibited by the circuit courts show, criminal defendants in different courts across the country may face vastly different sentencing exposure when sentenced under the same guidelines. Accordingly, this Court's intervention also is necessary to ensure that sentencing courts can consistently fulfill their statutory mandate to avoid unwarranted sentencing disparities.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 6, 2020