No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK HARRIS,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

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

APPENDIX

United States v. Harris, ____ F. 3d _____ (6th Cir. 2019)
(opinion affirming district court judgment)

United States v. Harris, No. 2:17-20268-1 (W.D. Tennessee May 14, 2018)

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QUESTIONS PRESENTED

Mr. Patrick Harris pled guilty in this case to the offense of Possession of Child Pornography in the United States District Court for the Western District of Tennessee. At a sentencing hearing for Mr. Harris, the District Court heard testimony regarding his offensive conduct in possessing child pornography. The District Court also heard testimony regarding his prior lack of criminal conduct, the financial and personal strain that his absence would place on his family particularly in light of his gainful employment as well as about his lifelong history of good citizenship other than the instant offense.

After hearing this as well as the legal arguments related to his sentencing, the District Court sentenced Mr. Harris to a term of Eighty months. Mr. Harris deems this to be an excessive sentence in light of the evidence presented at sentencing and he deems it to have been improperly calculated based on the United States Sentencing Guidelines in light of all the commentary contained in the Sentencing Commission's comments related to his conduct.

I. DID THE DISTRICT COURT ERR WHEN IT FOUND ENHANCEMENT FACTORS LISTED IN U.S.S.G. §2G2.2(b)(2), (b)(3), (b)(4), (b)(6) AND (b)(7)(D) APPROPRIATE IN MR. HARRIS' CASE?

II. DID THE DISTRICT COURT ERRED BY SENTENCING MR. HARRIS EXCESSIVELY IN LIGHT OF THE STATUTORY CONSIDERATIONS IN 18 U.S.C. §3553(a)?

TABLE OF AUTHORITIES

I. OPINIONS BELOW

The non-reported opinion of the Court of Appeals for the Sixth Circuit and the judgment of conviction in the United States District Court for the Western District of Tennessee are attached to this petition as the Appendix.

II. JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 11, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), the petitioner having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

III. STATUTORY PROVISIONS INVOLVED

This matter involves the sentencing provisions and the prohibitions against the possession of child pornography contained in the United States Code, specifically US.C. 18 § 2252(A).

IV. STATEMENT OF THE CASE

A. Procedural Background

On December 18th, 2017, Mr. Harris entered a plea of guilty to Count one of indictment 2:17-CR-20268 to the offense of Possessing Child Pornography in violation of 18 U.S.C. § 2252A(a)(4)(B). Mr. Harris entered his plea before the Court without any agreement with the Government as to sentencing. After a separate sentencing hearing was held on May 14th, 2018, Mr. Harris was sentenced by the Court to a term of imprisonment of 80 months for the offense of Possessing Child Pornography followed by a five-year term of supervised release upon completion of his sentence.

Additionally, Mr. Harris was ordered to pay a total of $33,700 to identifiable victims in this matter. (R. 62, Judgment) Mr. Harris was granted an appeal on September 12, 2018. (R. 75, Order of Appeal)

The matter was briefed for the Sixth Circuit Court of Appeals and, after considering the matter on the briefs submitted, the Court issued an Opinion dated October 11th, 2019, denying all relief. Mr. Harris now makes this timely application to this Honorable Court.

B. Statement of Facts

At the hearing wherein Mr. Harris changed his plea and entered a plea of guilt to the charge of Possession of Child Pornography in violation of 18 U.S. 2252(a)(4)(B), the attorney for the Government provided the Court with certain facts to which the defense stipulated. The Government described that an Agent Robert Earley was working in an undercover capacity in Pennsylvania attempting to locate and identify specific internet users that had downloaded known child pornography by the unique IP address for the user's account. (R. 85, Change of Plea Hearing transcript, Page ID# 377) After consulting with AT&T about a specific, identified IP address, one such user was determined to be Patrick Harris and a search warrant was obtained for his residence in the Collierville, Tennessee, which is located in the Western District of Tennessee. (R. 85, Change of Plea Hearing transcript, Page ID# 377) Upon the execution of the search warrant at Mr. Harris' residence, agents seized his various devices from Mr. Harris which, after analysis, were determined to contain over 1,000 images that were in violation of the statute as well as interviewing Mr. Harris who

admitted to using the internet to obtain and view such images. (R. 85, Change of Plea Hearing transcript, Page ID# 377-378)

C. Sixth Circuit Opinion

The Opinion issued by the Sixth Circuit in this matter upheld the rulings of the District court. In its Opinion, the Sixth Circuit, in reference to Mr. Harris' argument relating to the application of a sentencing enhancement under U.S.S.G. § 2G2.2(b)(3)(F), noted that Mr. Harris did not object to the pre-sentence report wherein admission to this conduct was attributed to him. Mr. Harris asserted before the Circuit Court and again here that this was error and the statement of facts presented at the change of plea hearing and his own lawyer's statements neither agree to the conduct, nor acquiesce in its applicability. This error in the applicability of the enhancement warrants review by this Honorable Court

The Circuit Court also erred by its affirmation of the District Court's erroneous application of several other enhancement factors that may be applied to child pornography possession and/or distribution.

The Circuit Court furthered erred by affirming both the procedural and substantive reasonableness of his sentence.

ARGUMENT

A. THE DISTRICT COURT ERRED WHEN IT FOUND ENHANCEMENT FACTORS LISTED IN U.S.S.G. §2G2.2(b)(2), (b)(3), (b)(4), (b)(6) AND (b)(7)(D) APPROPRIATE IN MR. HARRIS' CASE

i. STANDARD OF REVIEW

A district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007). A sentence is procedurally unreasonable if the district court "failed to calculate the Guidelines range properly; treated the Guidelines as mandatory; failed to consider the factors prescribed at 18 U.S.C. § 3553(a); based the sentence on clearly erroneous facts; or failed to adequately explain the sentence." *United States v. Coppenger*, 775 F.3d 799, 803 (6th Cir. 2015). The substantive reasonableness of a sentence is reviewed under an abuse-of-discretion standard. *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008).

ii. ARGUMENT

a. ERROR IN APPLICATION OF U.S.S.G. § 2G2.2(b)(3)(F)

As defined in U.S.S.G. 2G2.2, Application note 1 of the United States Sentencing Guidelines:

> "Distribution" means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor

on a website for public viewing but does not include the mere solicitation of such material by a defendant.

In the instant case, Mr. Harris objected to the application of the enhancement for distribution specified in §2G2.2(b)(3). His attorney argued that neither §2G2.2(b)(3)(A), as the Government requested, nor §2G2.2(b)(3)(F), which the District Court ultimately applied, was triggered by Mr. Harris' conduct, though his lawyer did advocate for the lesser enhancement under §2G2.2(b)(3)(F) of two levels if the Court was inclined to apply either portion. (R. 56, Sentencing Hearing transcript, Page ID# 196).

While this Court has noted that "[k]nowing use of a file-sharing program is sufficient to warrant the two-point increase under U.S.S.G. § 2G2.2(b)(3)(F)", the key wording is that the sharing must be "knowing" when it is done to trigger the enhancement. *United States v. Conner*, 521 Fed.Appx. 493, 499–500 (6th Cir.2013). The United States Sentencing Commission comments on this exact issue when explaining amendments to the guideline provision stating:

> Enhancements for distribution may only be imposed upon a showing of *mens rea*. Specifically, the 2-level enhancement set forth in §2G2.2(b)(3)(F) provides that the enhancement applies only if "the defendant knowingly engaged in distribution." Application Note 2 states that the 2-level distribution enhancement applies only if the defendant knowingly "committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute." The intent of the commentary is to avoid the imposition of enhancement where a defendant unwittingly makes child pornography available to others through use of a peer-to-peer file-sharing program.

Appendix C, Amendment 801, Reasons for Amendment.

During the Change of Plea Hearing, the Government's attorney recited certain facts that the Government asserted could be proven at trial and these facts served as the

basis for the offense conduct. Specifically, as it related to Mr. Harris' use of various file sharing programs to procure child pornography, the Government's attorney stated that, after the execution of the search warrant for his home and upon speaking with the agents, "Mr. Harris was home at the time and admitted to using the Internet and peer-to-peer file sharing programs to look for and obtain child pornography." (R. 85, Change of Plea Hearing transcript, Page ID# 379:1-4). When asked, Mr. Harris' attorney stated that the defense agreed with the facts as recited. (R. 85, Change of Plea Hearing transcript, Page ID# 379:12-14). This is an insufficient factual basis to support the assertion that Mr. Harris was engaged in the knowing distribution of child pornography and the two-level enhancement under §2G2.2(b)(3)(F) is not applicable.

Mr. Harris would note for the Court that, in the presentence report, which was made an exhibit to his sentencing hearing, the pre-sentence writer asserted that he made statements to the agent that indicated he had knowingly exchanged images with other persons via the internet. (R. 40, Pre-sentence Report, Page ID# 108). The presentence report was accepted by the District Court without amendment to that particular factual assertion.

Clearly, these two statements are contradictory to one another. Further, there is no other factual basis in the record upon which the Court may rely to apply the enhancement factor for distributing child pornography. Mr. Harris asserts to this Court that his sworn answer to the Government's recitation of facts in his change of plea hearing is accurate and binding whereas the unsworn, second hand information

contained in the presentence report should not be considered as a basis for the application of the enhancement as it is inferior in quality to the sworn statement that makes no mention of knowingly sharing files with other users.

Evidence of Mr. Harris' "knowing" exchange or sharing of material with other users is absent from the record. The district court committed procedure err when applying § 2G2.2(b)(3)(F) to Mr. Harris' guideline calculation and the resultant change would give Mr. Harris an adjusted offense level of 28 notwithstanding any other argument as to the guidelines covered below. This adjustment creates a recommended range of 78-97 months for the conviction offense and the District Court should have based its further analysis of the §3553(a) factors from this starting point.

b. ERRORS IN THE APPLICATION OF U.S.S.G. §2G2.2(b)(2), (b)(3), (b)(4), (b)(6) AND (b)(7)(D) IN MR. HARRIS' CASE

In response to the perceived disparities in sentencing offenders with Child Pornography related offenses, the United States Sentencing Commission prepared and issued a voluminous report at the end of 2012 and which reached several edifying conclusions regarding the guidelines, specifically the application of enhancement factors embedded in §2G2.2(b). In its report from December 2012 regarding Federal Child Pornography Offenses, the Commission offered significant criticism of the enhancements in the guidelines. More specifically, with regard specifically to the enhancements contained in §2G2.2(b)(2), (4), and (7)(D), the report by the U.S.S.C. stated that:

> The current penalty scheme in non-production cases focuses primarily on an offender's child pornography collection. Three of the six enhancements in §2G2.2

> concern the content of offenders' collections: (1) a 2-level enhancement for possession of images of a pre-pubescent minor, (2) a 4-level enhancement for possession of sado-masochistic images or other depictions of violence, and (3) a 2- to 5-level enhancement for collections of a certain number of images (with increments ranging from ten or more images to 600 or more images). Because these three provisions (including the maximum 5-level enhancement for possession of 600 or more images) now apply to a majority of offenders, they add a significant 11-level cumulative enhancement based on the content of the typical offender's collection. The current guideline thus does not adequately distinguish among most offenders regarding their culpability for their collecting behaviors. Furthermore, the 11-level cumulative enhancement, in addition to base offense levels of 18 or 22, results in guideline ranges that are overly severe for some offenders in view of the nature of their collecting behavior. *Id.*, Pp. 322-323.

At the conclusion of this extremely thorough analysis conducted by the Sentencing Commission in its 2012 report, the U.S.S.C. went on to recommend modifications to the existing guidelines stating:

> The Commission recommends that §2G2.2(b) be updated to account more meaningfully for the current spectrum of offense behavior regarding the nature of images, the volume of images, and other aspects of an offender's collecting behavior reflecting his culpability (e.g., the extent to which an offender catalogued his child pornography collection by topics such as age, gender, or type of sexual activity depicted; the duration of an offender's collecting behavior; the number of unique, as opposed to duplicate, images possessed by an offender). Such a revision should create more precisely calibrated enhancements that provide proportionate penalty levels based on the aggravating circumstances present in the full range of offenders' collecting behavior today. *Id.* P. 323.

To date, none of these recommendations have been accepted nor have the current guidelines actually been altered in keeping with the recommendations. However, each recommendation and criticism of the current scheme of enhancements as applied goes to a fundamental purpose of the guidelines, which is to assist the sentencing court in differentiating between offenders based on specific characteristics of their offense and their persons. As noted in the conclusions of the report prepared by the Sentencing Commission, the enhancements in §2G2.2(b), which were applied

to Mr. Harris at sentencing, do not assist the District Court to "adequately distinguish among most offenders".

Mr. Harris asserts that this data demonstrates that the rote application of the enhancement factors in §2G2.2(b) not only serves to drastically increase sentences of even first time offenders with non-contact offenses, it consequently fails to comport with the overarching sentencing principle of 18 U.S. §3553(a) which requires that the Court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing that Congress has detailed in that section. Furthermore, application of these enhancement factors in upwards of 96% of all cases in some instances undermines the purpose of the enhancements at all. Enhancements are outlined and recommended as a way to distinguish particular aspects of an offender's conduct that are more severe or egregious than most other offenders in that same category. If certain aspects of the offense of Possession of Child Pornography are so prevalent that, in the commission of the offense, 75-95% of all offenders engage in that aspect of the conduct, the enhancements fail in their main purpose which is to mark the most serious offenders for additional punishment. In the current structure, almost all offenders receive these enhancements and they fail to set the more serious offenders apart from the standard offenders. Their application is illogical on this basis.

Clearly, the application of these factors prejudiced Mr. Harris as, even without the application of the distribution enhancement, they served to increase his base offense level by 11 levels. Had he been sentenced with the base offense level of 18,

his recommended sentence would have been 27-33 months. The application of these enhancements, independent of the previously discussed distribution enhancement, rendered a base offense level of 29 and recommended guideline range 87-108 months, no less a recommendation than at least five additional years on his sentence from his base offense level range of 27-33 months. He was clearly prejudiced by the application of these enhancements.

B. THE DISTRICT COURT ERRED BY SENTENCING MR. HARRIS EXCESSIVELY BASED ON THE STATUTORY CONSIDERATIONS IN 18 U.S.C. §3553(a).

i. STANDARD OF REVIEW

A district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007). A sentence is procedurally unreasonable if the district court "failed to calculate the Guidelines range properly; treated the Guidelines as mandatory; failed to consider the factors prescribed at 18 U.S.C. § 3553(a); based the sentence on clearly erroneous facts; or failed to adequately explain the sentence." *United States v. Coppenger*, 775 F.3d 799, 803 (6th Cir. 2015). The substantive reasonableness of a sentence is reviewed under an abuse-of-discretion standard. *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008). "A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies

upon clearly erroneous findings of fact." *United States v. Fowler*, 819 F.3d 298, 303–04 (6th Cir. 2016).

ii. ARGUMENT

United States Sentencing Guidelines as well as the United States Code provide that a sentencing court may consider, without limitation unless otherwise prohibited by law, any information related to a defendant's background, character, and conduct when crafting a sentence. See U.S.S.G. §1B1.4; See 18 U.S. § 3661. A sentence that falls within the advisory Guidelines range is given "a rebuttable presumption of reasonableness." *United States v. Williams*, 436 F.3d 706, 708 (6th Cir.2006). "This rebuttable presumption does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence." *United States v. Richardson*, 437 F.3d 550, 554 (6th Cir.2006).

The reasonableness of a District Court's sentence "has both substantive and procedural components." *United States v. Jones*, 489 F.3d 243, 250 (6th Cir. 2007). A Court's inquiry into the reasonableness of the sentence "requires [inquiry] into both 'the length of the sentence' and 'the factors evaluated and the procedures employed by the district court in reaching its sentencing determination.'" *United States v. Liou*, 491 F.3d 334, 338 (6th Cir. 2007)(*quoting United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005)). When the Court conducts this review, it should "'first ensure that the district court committed no significant procedural error' and 'then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion

standard.'" *United States v. Smith*, 516 F.3d 473, 476 (6th Cir.2008) (*quoting Gall*, 128 S.Ct. at 597).

The United States Code 18 § 3553(a) instructs the District Court that, when crafting a sentence, it "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection". The Code goes further in §3553 to promulgate additional factors for determining a just sentence. The sections most relevant to Mr. Harris' particular sentencing are cited below:

> The court, in determining the particular sentence to be imposed, shall consider-
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed-
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner……
>
> (5) any pertinent policy statement—
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense. 18 U.S. §3553(a)

The above statutory language makes clear that the District Court should not rely on the nature of the offense and the character of the defendant alone when crafting his/her sentence. With these final considerations listed above, the District Court is instructed that it must also take into consideration, when making its sentencing determinations pursuant to §3553, "any pertinent policy statement" that is in effect at the time of the sentencing and must be aware of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" when arriving at a decision on a sentence for a particular defendant. The District Court should use the appropriate range of the offense and the appropriate category of defendant as defined by the sentencing guidelines, but the District Court may depart from the specified guidelines if and when:

> "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission". §3553(a)

Once the District Court has arrived at a sentence for a particular defendant, the court must "at the time of sentencing…… state in open court the reasons for its imposition of the particular sentence" so the parties will know the court's reasoning behind the decision reached". Also important to note, if the District Court crafts a sentence that "is not of the kind, or is outside the range, described in subsection (a)(4)" the court must state "the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity".

The District Court is no longer bound by the guidelines produced by the Sentencing Commission when making a sentencing determination. *United States v. Booker*, 543 U.S. 220, 245-246 (2005). Nonetheless, the trial court must consider the sentencing guidelines and the principles outlined therein when crafting a sentence for an individual defendant even if the court then chooses to deviate from the guidelines. *Gall v. United States*, 552 U.S. 38 (2007). The guidelines should be viewed as "one factor among several" that must be considered in imposing an appropriate sentence under § 3553(a). *Nelson v United States*, 555 U.S. 350, 352 (2009). When crafting a sentence and applying the appropriate factors, the District Court must "make an individualized assessment: to explain its decision to impose a particular sentence." *Gall* at 49-50, 63-60; See also *Pepper v United States*, 131 S. Ct. 1229, 1242-43 (2011).

In the instant case, the District Court erred in the imposition of its sentence with regards to Mr. Harris under the general principles of §3553(a) creating a sentence that was substantively unreasonable and warranting reversal. Mr. Harris presented considerable evidence including his sentencing memorandum and various recommendations and letters of support from friends and family, but the District Court arbitrarily selected the sentence of 80 months. The sentence crafted for Mr. Harris by the District Court failed to achieve the purposes set out in §3553(a)(2). In the case of Mr. Harris, it is true that the District Court elected to grant him a downward variance in his sentence from the guideline range as it was calculated. Notwithstanding the previous arguments about the correctness of that calculation,

the District Court still erred in failing to sufficiently apply the §3553 factors when crafting his sentence.

The sentence handed down by the District Court does not comply with the purposes of §3553(a)(2). Looking at the deterrence aspects, both general and specific, the sentence is disproportionate with those aims. The 80-month sentence of the District Court may serve to "protect the public from further crimes" of Mr. Harris, but it was out of proportion with what is necessary to achieve that goal. At the time of sentencing, Mr. Harris was a sixty-four year old man with no prior criminal record and a productive job in the airline industry. A custodial sentence of close to seven years for this offense may deter him, but a much shorter sentence would have been equally effective for Mr. Harris.

Similarly, while the sentence must "afford adequate deterrence to criminal conduct" for the public in general, and it is certainly true that the offense of possessing child pornography is a serious one that merits serious punishment, Mr. Harris' punishment is disproportionate with that aim. A sentence of nearly seven years in custody for a non-contact offense does not serve to deter the public as it appears out of proportion with the offense conduct and does not deter the public in any cognizable way. The direct attributable impact of sentences as severe as Mr. Harris' to the decrease in other offenders is absent. This gap in the evidence shows that there is little justification that sentences like his 80-month sentence "promote respect for the law" or that they "provide just punishment for the offense" of conviction.

In addition to these specific considerations, the District Court also erred when it failed to assess and to weigh the history and characteristics of Mr. Harris properly pursuant to §3553(a)(1). Due to these errors of fact and law, the District Court has reached a sentence that is unreasonable and Mr. Harris is entitled to relief. This Court should remand this matter to the District Court for resentencing with the proper application of the §3553(a) factors.

CONCLUSION

For the aforementioned reasons, Mr. Harris prays that this Honorable Court will grant his request for a writ of certiorari in order to review the question of the proper application of the sentencing guidelines and statutory provisions of the sentencing act were applied in his case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing writ of certiorari and the accompanying appendix has been served via electronic mail upon counsel for the Respondent, Ms. Kasey Weiland and Mr. Kevin Ritz, Assistant U.S. Attorneys, Office of the United States Attorney, 167 Main Street, Suite 800, Memphis, TN 38103, and Mr. Noel Francisco, Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530-0001, this 3rd day of January, 2020.

/s/Manuel B. Russ
Manuel B. Russ