

Number \_\_

IN THE SUPREME COURT OF THE  
UNITED STATES

OCTOBER TERM, 2019

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MICHAEL LEE,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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

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### QUESTION PRESENTED

1. Should certiorari be granted to address whether a circuit court is presented with a substantial question, hence warranting full appellate review, rather than summary disposition, when a petitioner, with no prior criminal record, receives an effective life sentence, for sex crimes, when he never met the victim?

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OPINION BELOW

There was one unpublished decision below, which is attached to  
this petition.

JURISDICTION

The order of the Court of Appeals was decided on May 12, 2020, and the petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

18 U.S.C. §3553(a).

### STATEMENT OF THE CASE

Petitioner, Michael Lee, pleaded guilty to Sexual Exploitation of Children, in violation of 18 U.S.C. § 2251(a) and (e), Distribution of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1), Receipt of Child Pornography, in violation of 18 U.S.C. § 2252A (a)(2)(A) and (b)(1), and Possession of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(1). He was sentenced to 20 years' imprisonment. Lee appealed. On May 12, 2020, the First Circuit Court of Appeals granted the Government's motion for summary disposition.

## STATEMENT OF FACTS

Petitioner, Michael Lee, a 53-year-old master plumber for 24 years, with no prior criminal record, who was sexually abused by his older brother as a youth, was charged with, and pleaded guilty, on June 3, 2019, to various sex crimes. Lee never actually met the child in this, or in any other case. When referred to Dr. Laurie L. Guidry, Psy. D., for a psychosexual risk assessment, she concluded, in a 20-page report, that Lee, who suffered from “PTSD and depression,” presented a “... low risk for recidivating....” because he never seeks to “engage in actual sexual contact,” but, instead, engages in “fantasies” that “... do not appear to have had any basis in reality ....”

Lee requested a sentence of 15-years’ imprisonment. He argued that, based on life expectancy, a longer sentence was “essentially a life sentence.” The District Court sentenced Lee to 20 years’ imprisonment, because, it believed, this was not “a victimless crime,” but rather had a “real live person” “... with a victim with a “vulnerability”--even though the Court already imposed two enhancements, for both the age (less than

12-years-old) and disability of the vulnerable victim (a non-verbal child with autism).<sup>1</sup>

### SUMMARY OF ARGUMENT

Certiorari should be granted to address whether a circuit court is presented with a substantial question, hence warranting full appellate review, rather than summary disposition, when a petitioner, with no prior criminal record, receives an effective life sentence, for sex crimes, when he has never met the victim.

## ARGUMENT

### POINT I

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER A CIRCUIT COURT IS PRESENTED WITH A SUBSTANTIAL QUESTION WHEN A PETITIONER, WITH NO PRIOR CRIMINAL RECORD, RECEIVES AN EFFECTIVE LIFE SENTENCE, FOR SEX CRIMES, WHEN HE HAS NEVER MET THE VICTIM.

On appeal to the First Circuit Court of Appeals, Petitioner argued that his 20 year sentence--for sex crimes in which he never even met the victim to have sex--was unreasonable because, as a lifelong master plumber, with no criminal record, it could, based on his age, of 53 at the time, function as a life sentence. The First Circuit granted the Government's motion for summary disposition, under its Local Rule 27.0(c), on the ground that it “... clearly appear[ed] that no substantial question [was] presented.” Certiorari should now be granted to define the limits and contours of the local rules of the Circuit Courts, and find that, when a defendant faces an effective life sentence, a substantial question is, in fact, presented, for which summary affirmance is inappropriate, and, instead, warrants full review on appeal.

Here such review is especially warranted based on the unusual facts of this case. The District Court believed that the “vulnerability” of the victim was a “... factor that differentiates [this case] from many other cases,” and ultimately imposed a 20 instead of 15-year sentence--even though Lee never met the victim.

The District Court’s own findings regarding Lee’s personal characteristics and criminal history underscore the unreasonableness of a 20-year sentence. As the Court observed:

[b]y all accounts[,] you’ve had a stable marriage. You raised a child who[,] by all accounts[,] is proceeding well. You have family with whom you have connections. You have held a job for all of these years. I think you supported your family. By all measures[,] you seem to have engaged in a productive and reasonable life. And I understand the personal trauma [of being orally and anally sodomized by your older brother], and that it may well have driven some of how you got here, and I’m sure that it is something you do have to grapple with (Sentence: 50).

Even Lee’s actual criminal conduct--communicating with a father who sexually abused his child--did not warrant a 20-year sentence. This is because his actions were limited to “fantasies” that “... do not appear to have had any basis in reality,” according to Dr. Laurie L. Guidry, the psychologist who conducted the psychosexual risk assessment.

The District Court, which imposed two enhancements for this victim, based on both age and vulnerability, then relied on the identical rationale in its 18 U.S.C. §3553(a) analysis, to increase the sentence to 20 years from 15 years' imprisonment.

This was improper, because the District Court thus engaged in double counting, and double punishment for the same crime. It was not a plausible rationale or a defensible result to punish the defendant twice because the victim was autistic and could not speak-- especially when Lee never met or had any contact with the child.

While the District Court may consider a factor in its § 3553(a) analysis that is also reflected in a Guideline enhancement, it may not also upwardly vary on that basis, as here. *See, generally, United States v. Hernández-Ramos*, 906 F.3d 213, 215 (1<sup>st</sup> Cir. 2018); *United States v. Torres-Rivera*, 874 F.3d 40, 44 (1<sup>st</sup> Cir. 2017); *United States v. Sepúlveda-Hernández*, 817 F.3d 30, 34-35 (1<sup>st</sup> Cir. 2016); *United States v. Maisonet-Gonzalez*, 785 F.3d 757, 763-64 (1<sup>st</sup> Cir. 2015); *United States v. Scherrer*, 444 F.3d 91, 94 (1<sup>st</sup> Cir. 2006)(en banc). Here, the Court specifically considered the age and vulnerability of the victim in its § 3553(a) analysis, when it focused on the “vulnerability” of the

victim, which it said was a “ ... factor that differentiates [this case] from many other cases,” and then upwardly varied on that basis because the victim was autistic.

Certiorari should thus be granted to find that to find that, where, as here, a first-time offender receives an effective life sentence for sex crimes, when he has never even had any personal contact with the victim, that raises a substantial question that is not amenable to summary disposition.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE  
GRANTED.

Dated: May 15, 2020  
Manhasset, New York

Respectfully Submitted,

*Steven A. Feldman*  
Steven A. Feldman

UNITED STATES  
SUPREME COURT

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I affirm, under penalties of perjury, that on May 15, 2020, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney for the District of Massachusetts, John Joseph Moakley United States Federal Courthouse, 1 Courthouse Way, Suite 9200, Boston, MA 02210, on the Solicitor General, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001, and on Michael Lee, 00646-138, FMC Devens, 42 Patton Road, Ayer, MA 01432. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court.

Steven A. Feldman  
Steven A. Feldman