NO. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2019

COURTLAND BARNES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Whether the district court's reliance on the child pornography guideline and the mitigating evidence Petitioner offered to the court require the vacating of the court's system as substantively unreasonable.

LIST OF PARTIES TO PROCEEDING BELOW

United States of America

Courtland Barnes

LIST OF PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS

1. United States District Court for the Eastern District of North Carolina, No. 5:18-CR-170, *United States v. Courtland Barnes*. Original criminal judgment entered February 7, 2019.

2. United States Court of Appeals for the Fourth Circuit, No. 19-4091, *United States v. Courtland Barnes*. Judgment affirming district court entered February 25, 2020.

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Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit rendered in this case on February 25, 2020.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence is found at 795 Fed. Appx. 191 (4th Cir. 2020) (unpublished) and is attached at Pet. App. 1a. The original judgment of the United States District Court for the Eastern District of North Carolina sentencing Petitioner to 168 months in prison is attached hereto as Pet. App. 2a.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence issued on February 25, 2020. Pet. App. 1a. The jurisdiction of this Court is

invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides in pertinent part as follows:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 3553(a) provides in pertinent part as follows:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
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> * * * * *
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines 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
>
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced[.]

STATEMENT OF THE CASE

In September 2017, investigators with the Cary, North Carolina, Police Department found

an internet protocol address offering to share images of child pornography.[1] (J.A. 48, 92 ¶6). The investigators connected to the address and downloaded pornographic images from it. (J.A. 48 92 ¶6). Police subpoenaed the internet service provider and learned the computer in question belonged to Petitioner. (J.A. 48, 92 ¶6). In October 2017, Homeland Security agents searched Petitioner's home and took several electronic devices that held a total of 3,839 image files and 896 video files; these files depicted minors engaged in sexually explicit conduct. (J.A. 49, 93 ¶¶7- 8).

Authorities arrested Petitioner in May 2018. (J.A. 93 ¶10). He admitted possessing child pornography and said he wanted to plead guilty. (J.A. 93 ¶10). Petitioner told one of the arresting officers he had nothing to live for, and he asked the officer to shoot him. (J.A. 93 ¶10).

A federal grand jury subsequently indicted Petitioner, charging him with ten counts of receiving and one count of possessing child pornography. 18 U.S.C. §§ 2252(a)(2) and (a)(4)(B). (J.A. 11-12). He pled guilty to the indictment in United States District Court on October 18, 2018. (J.A. 16, 47-48, 81).

Following the plea, a probation officer calculated Petitioner's imprisonment range under the sentencing guidelines. Under U.S.S.G. § 2G2.2(a)(2), Petitioner had a base-offense level of 22. (J.A. 99 ¶49). A score of specific offense characteristics then piled atop that number: Petitioner received a two-level increase because the material involved a prepubescent minor or

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[1] "[F]or the Internet to function, each computer connected to the Internet . . . must have a unique identity, so that other computers may identify it." *America Online, Inc. v. Huang*, 106 F. Supp. 2d 848, 851 (E.D.V.A. 2000). "[A] computer's identity on the Internet is its Internet Protocol address ("IP address"). *Id.* An IP address can identify an individual account and also the location of the computer using that address. *See* (J.A. 92 ¶6).

one who had not attained the age of 12, U.S.S.G. § 2G2.2(b)(2); he received a two-level increase for distribution of pornographic material, U.S.S.G. § 2G2.2(b)(3)(F); he received an increase of four more levels for possessing material that "portrayed sadistic or masochistic conduct or other depictions of violence or sexual abuse or exploitation of an infant or toddler," U.S.S.G. § 2G2.2(b)(4); he received two additional levels because his offense involved the use of a computer, U.S.S.G. § 2G2.2(b)(6); and he received a five-level increase because the offense involved 600 or more images, U.S.S.G. § 2G2.2(b)(7)(D). (J.A. 99 ¶¶50-54). The 15 additional points left Petitioner with an adjusted offense level of 37. (J.A. 99 ¶58). With a three-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1, his total offense level became 34; that, combined with his criminal history category of II, produced an imprisonment range of 168 to 210 months. (J.A. 100 ¶64).

Prior to the sentencing hearing, Petitioner filed a memorandum that included a request for a downward variance from the guideline range pursuant to 18 U.S.C. § 3553(a). (J.A. 104). His memorandum discussed background and mitigating factors that never figured into and were never reflected in the guideline calculation of his punishment. (J.A. 49-50).

For example, under the guideline his history and characteristics, § 3553(a)(1), effectively began and ended with his criminal record and the particulars of his crime. In contrast to the guideline's mechanical application, Petitioner offered a discussion of his life that put his criminal conduct into a meaningful and understandable context the guideline computation could not offer. The child of two unmarried military parents, Petitioner essentially lost contact with his father when he was five years old; for the remainder of his youth, he saw that parent only once or twice each year. (J.A. 108). Petitioner's mother provided a good home, but necessity required that she

work outside of it. When he was in elementary school, his mother took a factory job, working the swing shift. (J.A. 108-09). Petitioner, still a child himself, became responsible for caring for his younger siblings; this included cooking dinner for them and seeing that they did their homework. (J.A. 109). Petitioner wrote in his memorandum that he still enjoyed the support of his family. (J.A. 109).

Although Petitioner remembered his childhood as a happy one, it was shadowed by sexual abuse. When he was but eight years old, Petitioner was sexually assaulted. (J.A. 110). His assailants were two boys, aged ten and 13. (J.A. 110). Because the perpetrators were themselves children, Petitioner did not understand until he reached adulthood that he had been sexually victimized.[2] (J.A. 110).

When he was eleven years old, Petitioner an adult friend of one of his aunts abused him. (J.A. 110-111). Petitioner would spend weekends with his aunt, and the friend at times would stay there as well. (J.A. 111). After everyone was asleep, Petitioner and the man would stay up to watch television. (J.A. 111). The man would change the channel to a station broadcasting sexually-explicit material, and he would have Petitioner watch it with him. (J.A. 111). Through this adult, the eleven-year-old Petitioner received his first contact with pornography, a poison to which he would later become addicted. Once again, it was not until he reached adulthood that Petitioner understood he had again been the victim of sexual abuse.[3] (J.A. 111). At the time of his arrest, Petitioner was in the process of finding treatment for his pornography addiction. (J.A.

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[2]As Petitioner noted in his memorandum, at least one third of all child abuse is committed by individuals who have not yet reached the age of 18. *See* (J.A. 110 n.3).

[3]In his memorandum, Petitioner wrote that abuse includes showing pornography to a child as well as exposing one's self to a child (something this man also did). *See* (J.A. 111).

113).

At the age of 15, Petitioner impregnated his 15 year old girlfriend and became the father of a son. (J.A. 111). He was caring for his child at the time of his arrest. (J.A. 109). The boy, who has special needs, had begun living with Petitioner in 2014. (J.A. 109). Petitioner taught his son to read, to care for himself, and to prepare basic meals. (J.A. 109). He also moved the child into a mainstream public school classroom and secured an Individualized Education Plan ("IEP") for him, one of the most difficult accommodations to obtain from a public school. (J.A. 109).

At around the time he became a teenaged father, Petitioner formed a friendship with a 22 year old woman who would eventually become his wife. (J.A. 111). This woman flirted with Petitioner, and when he was 16 the two began a sexual relationship. (J.A. 112). As a result of this, Petitioner lost interest in school. (J.A. 112). When he was 18 years old, he and the woman married, and she persuaded him to join the military. (J.A. 112). She also talked him into moving to Texas, where she had family. (J.A. 112). Far away from his own family, Petitioner fell into a depression and began harming himself by cutting his arms. (J.A. 112). On one occasion, when he was 19 years old, Petitioner was hospitalized after his wife and sister-in-law came home one day to find him bleeding. (J.A. 112).

In his memorandum, Petitioner also discussed the failings of the child pornography guideline, and he highlighted one such shortcoming in his guideline calculation. Petitioner argued that he assisted the government in his *own prosecution* by providing unprotected, incriminating statements about his possession of child pornography and by telling the authorities about the material that could be found on his computer. (J.A. 106). Petitioner wrote that

because he did not have the kind of information that might have qualified him for a downward departure motion pursuant to U.S.S.G. § 5K1.1–a departure that rewards cooperation against *others*–a variance, by going beyond the mere three-level reduction he received for acceptance of responsibility, would recognize the assistance he had rendered toward the prosecution of his own case. (J.A. 106).

Petitioner's case came on for sentencing on January 29, 2019. (J.A. 53). At the hearing, defense counsel began by telling the court that he understood "the wrongfulness of child pornography [and] . . . [t]he abuse to the victims by the continued viewing of it, even if the person had nothing to do with [creating] it." (J.A. 59). Counsel said that what he did *not* understand were "the huge, long custodial sentences for first-time, non-contact, no hands-on possession and receipt of child pornography offenders[.]" (J.A. 59). "[T]hat's what we have here," counsel told the court. (J.A. 59).

Counsel observed that possession of child pornography had no mandatory-minimum imprisonment term and that it had a base offense level of 18 under the guidelines. *See* 18 U.S.C. § 2252(a)(4)(B) and (b)(2); U.S.S.G. § 2G2.2(a)(1). (J.A. 60). Receipt of the material, by contrast, carried a five-year mandatory minimum sentence, and it yielded a base offense level of 22. 18 U.S.C. §§ 2252(a)(2) and (b)(1); U.S.S.G. § 2G2.2(a)(2). (J.A. 60). Counsel said that "from a culpability standpoint" for Petitioner and similarly situated defendants, receipt was not any more egregious an activity than was possession. The act of receiving, counsel argued, was a "logical prerequisite" to possessing something. (J.A. 60).

Counsel compared the harshness of the child-pornography guideline, under which Petitioner faced an imprisonment range of 14 to 17-and-one-half years, to punishments for other

offenses. For example, the statutory maximum sentence for giving material support to a foreign terrorist organization was 15 years. *See* 18 U.S.C. § 2339(B)(a)(1). (J.A. 61). The base offense level for second degree murder was 38; Petitioner's adjusted offense level was 37. *See* U.S.S.G. 2A1.2. (J.A. 61). Ninety kilograms of heroin, 45 kilograms of methamphetamine, 36 kilograms of Fentanyl, and 450 kilos of cocaine–"astronomical cartel-level drug numbers"–had offense levels of 36 or 38, counsel said.[4] (J.A. 61).

Petitioner was a "good and decent guy," counsel told the court. (J.A. 62). Among other things, he had enrolled in ROTC in high school and had enlisted in the Army Reserves. (J.A. 62). He also had a good work history. (J.A. 62). Counsel emphasized that Petitioner had been a "good husband, a good father, a good nephew, a kind person." (J.A. 62-63). Especially, Petitioner had taken an active role in his son's life, teaching him life skills and getting him–fter "a lot of work"–into an IEP. (J.A. 63).

Petitioner's use of child pornography, moreover, was an "isolated issue" in his life. (J.A. 63). Counsel said the "root cause" of what had brought Petitioner to federal court was the abuse Petitioner had experienced as a child. (J.A. 63). If, in child pornography cases, the government and the guidelines focused on the victims, counsel said "the fact that Petitioner may have been a victim too" could not be ignored or discounted. (J.A. 63). It should not be pretended, counsel continued, that Petitioner was not an abuse victim, but was simply someone who "did something wrong . . .and he's no longer a victim and we're mad at him." (J.A. 63).

Counsel characterized Petitioner's case as "a fairly typical child pornography case." (J.A.

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[4]In fact, each of the drug quantities mentioned carries an offense level of 38. *See* U.S.S.C. §§ 2D1.1(c)(1).

64). There was "no real distinguishing bad factor," such as a hands-on offense, or the use of a chat room to arrange a "rendevous with other adults making kids available[.]" (J.A. 64). Recognizing the wrongfulness of what his client had done, counsel said the crime was nonetheless "a relatively standard child pornography offense where Petitioner . . .was looking at the pictures of someone else's crimes." (J.A. 64).

Counsel told the court that as of 2015, 70 per cent of child pornography cases had received below-guideline sentences in the federal courts. (J.A. 64). "The heartland of these cases," counsel said "receive a below guideline sentence." (J.A. 64-65). In this vein, counsel asked rhetorically what Petitioner would learn "in year 13 or 14 [of an imprisonment] that he won't possibly [learn] in year five or six?" (J.A. 65). Counsel said Petitioner's risk of recidivism was low, and he asked the court to sentence Petitioner "significantly below" the guideline range and to balance the downward variance with an "appropriate level of supervised release." (J.A. 65).

After his attorney had finished speaking, Petitioner himself told the court he was "very remorseful" for his crime. (J.A. 66). He was ashamed, he said, that he had "left his son out there[.]" (J.A. 66). Petitioner recounted that he had told his son that his father had done "something wrong" and that he "had to be a man and take responsibility" for it. (J.A. 66). He went on to apologize to his family for what he had put them through. (J.A. 66). Petitioner told the court he wanted "nothing but help in this situation," that he wanted "to get better and past this" and to be a better person. (J.A. 66).

The government, in turn, asked the court to impose a within-guideline sentence. (J.A. 66). The government said Petitioner had possessed a "very large amount" of child

pornography–almost 4,000 images and almost 900 videos, some involving girls as young as two and four years old. (J.A. 67). The government told the court that four of the videos were "entirely new," meaning they had not been seen before by the National Center for Missing and Exploited Children. (J.A. 67). According to the government, it was "unusual to find new, never-seen videos and not have them made [be material made] by the individual," although it did not have "sufficient evidence to say it was Petitioner" who had created them. (J.A. 67). The government said the new videos also demonstrated that "the individual is . . . trading at a higher level or higher pace[.]" (J.A. 67).

Addressing the defense arguments, the government told the court it was "not sure what the average [child-pornography] case is," and that all such offenses deserved to be punished at guideline levels. (J.A. 68). It said receipt offenses indicated "a step beyond" mere possession, as they involved "interacting with the internet or with someone else in the world to get that child pornography." (J.A. 68). Petitioner had done that, the government argued. (J.A. 68). The government characterized Petitioner as someone who had not simply possessed the material; rather, he "was active in the trade of child pornography on the internet, which is a recurring and continuous damage to the victims who are present in [the] images." (J.A. 69).

The government noted that Petitioner had attempted, in the past, "to stop" his conduct by deleting his pornography collection. (J.A. 69). He would then download the material all over again, however, saying he was unable to cease doing it. (J.A. 69). Petitioner had a problem and could not stop victimizing the children depicted in the pornographic material, and this, the government contended, contradicted the defense's assertion that he was at low risk to recidivate. (J.A. 69).

The government urged that it was not "appropriate for the Court to depart just for the sake of departure," as to do so would undermine the intent of Congress. (J.A. 70). The Child Protection Act of 2002 and 2003 had set the minimum guidelines, the government said, and the Child Protection Act of 2012 had raised them with respect to receipt and possession offenses. (J.A. 70). Congress wanted these crimes to be "strongly punished," the government told the court. And, as recently as 2018, Congress again "recognized the horrible and recurring victimization of children who are present in images that are traded on the internet." (J.A. 71).

The government concluded by reading a statement from "Vicky," the pseudonym for "one of the most notorious victims of child pornography" whose images were "widely traded" and who was a victim in Petitioner's case. (J.A. 71). Among other things, Vicky wrote that users of child pornography "are trading around my trauma like treats at a party and it feels like I am being raped all over again by every one of them." (J.A. 72). The government said Vicky was representative of all of the victims in the images that had been found on Petitioner's computer. (J.A. 72). For these reasons, the government told the court, it was asking for a "strong sentence within the guideline range[.]" (J.A. 72).

The district court said Petitioner had committed a serious crime that involved "real people, every one of them." (J.A. 74). "Abuse of a child changes that child forever," the court observed. (J.A. 74). The court told the parties it had "read the issues" and "read the cases" and that it understood the "abstract of the statistics associated with the Guidelines." (J.A. 75). But in Petitioner's case, the court continued, it had looked at "the prolonged nature of this conduct and . . . the volume of receipt and possession[.]" (J.A. 75). It had also looked at "the scope of the victims." (J.A. 75). The court said it had balanced those considerations against the issues raised

in the sentencing memorandum: Petitioner's abuse, his commendable service in the military, his employment history, his family upbringing, and the fact that no evidence showed he had committed a hands-on offense. (J.A. 75). The court told Petitioner it had also given him credit for the "challenging process" of getting his son into and IEP. (J.A. 76).

The court then repeated that the offense conduct had taken place over a long period of time. (J.A. 76). It also repeated that the offense had involved a large volume of images and that every image depicted "a real human being." (J.A. 76). The court commented that it sentenced "individual cases" and that it did not think a downward variance was appropriate in Petitioner's case because of "the serious nature of the crimes, the prolonged nature of [them], the volume of images, the need to promote respect for the law, and the need to justly punish." (J.A. 76).

The court sentenced Petitioner to concurrent terms of imprisonment of 168 months on each of the receipt counts of conviction and to a concurrent 120 month term for the possession count. (J.A. 77, 82). The court said that if it had miscalculated the guideline range, it would impose the same sentence as an alternative variant sentence were the case to be remanded. (J.A. 78, *citing United States. v. Gomez-Jimenez,* 750 F.3d 370 (4th Cir. 2014); *United States v. Hargrove,* 701 F.3d 156 (4th Cir. 2012)).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 88). In that forum, Petitioner argued that the flaws inherent in the child-pornography guideline, coupled with the mitigating evidence he had presented at the sentencing hearing, rendered his sentence substantively unreasonable. In a decision handed down on February 25,2020, the Fourth Circuit affirmed Petitioner's sentence.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question whether the district court imposed a substantively unreasonable sentence by relying on the child pornography guideline was presented to the Fourth Circuit. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration. *See generally, Mullaney v. Wilbur*, 421 U.S. 684 (1975).

REASON FOR GRANTING THE WRIT

BY AFFIRMING PETITIONER'S SENTENCE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Petitioner's sentence must be vacated. It is substantively unreasonable because it exceeds the imprisonment term necessary to carry out the purposes of 18 U.S.C. § 3553(a) and because it does not properly account for the mitigating factors that are prominent here. Fundamentally, this sentence is the result of a flawed guideline, U.S.S.G. § 2G2.2, that over-punishes the kind of receipt and possession offenses Petitioner committed.

A presumption of reasonableness is not a presumption of infallibility.

For decades, the guidelines prescribed significantly greater-than-necessary sanctions for crack-cocaine offenses by incorporating Congress's infamous "100 to 1" ratio, a misguided enactment that, three decades on, is still being straightened out. *See* First Step Act,, Pub. L. No. 115-391, 132 Stat. 5194 (2018). Section 2G2.2, which governs convictions for possession and receipt of child pornography offenses, is similarly dysfunctional. Like the crack guidelines, § 2G2.2 is not the product of the Sentencing Commission's special expertise. It is not based on empirical data, and it is not based on sentencing experience. It fails to distinguish the more culpable from the

less culpable defendant, and disturbingly so. It dramatically enhances sentences based on factors which are essentially inherent in the offense and which therefore apply in virtually every case falling under § 2G2.2. As a consequence, it is distressingly common that the imprisonment range under this guideline recommends, even in a mine-run case, exceeds the statutory maximum for the offence of conviction.[5] As a result of its manifold flaws, § 2G2.2 fails in the performance of its most basic function, which is to prescribe a punishment that is "sufficient but not greater than necessary" to serve the sentencing factors set out in 18 U.S.C. § 3553(a).

The child pornography guideline is defective because it is the result of Congress's interference with the expertise of the Sentencing Commission. As Chief Judge Gregory of the Fourth Circuit has noted, "The child pornography Guideline has been recognized as an 'eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.'" *United States v. Helton*, 782 F.3d 148, 157 (4th Cir. 2015)(Gregory, J., concurring) (quoting *United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010)). Similar to othe crack-cocaine guidelines, § 2G2.2 was "developed largely pursuant to congressional directives," and "[t]o say that [it] is the result of Commission data, study, and expertise simply ignores the facts." *United States v. Grober*, 624 F.3d at 592, 608 (3d Cir. 2010) (citation and internal punctuation omitted).

Congressional directives have driven the child pornography guideline in one direction: toward higher and ever-higher sentences. The average guideline minimum for non-production child pornography offenses in fiscal year 2004–the last full fiscal year when the guidelines were

[5]For his possession conviction under 18 U.S.C. § 2252(a)(4)(B), Petitioner's statutory maximum sentence was ten years. *See* 18 U.S.C. § 2252(b)(2). Section 2G2.2 produced a guideline range that was 14 years *at its low end*. (J.A. 100 ¶ 64).

mandatory and the first full fiscal year after the enactment of the PROTECT Act–was 50.1 months of imprisonment, and the average sentence imposed was 53.7 months. By fiscal year 2010, as a larger percentage of cases was affected by the provisions of the PROTECT Act that increased penalty levels, the average guideline minimum was 117.5 months of imprisonment, and the average sentence imposed was 95.0 months. United States Sentencing Commission, *Report to the Congress: Federal Child Pornography Offenses*, Chapter 12: Findings, Conclusions and Recommendations to Congress at 315 (2012) ("*Commission Report to Congress*") (available at https://www.ussc.gov/research/congressional-reports/2012-report-congress-federal-child-pornography-offenses(as visited May 22, 2020). In other words, in one five-year period, sentences for child pornography possession-type offenses effectively doubled.

For its part, the Commission has consistently opposed the upward ratcheting of these sentences. In 1991, as Congress was contemplating a directive to increase the base offense level for receipt and possession offenses, the Chair of the Commission informed Congress that such action "would negate the Commission's carefully structured efforts to treat similar conduct similarly and to provide proportionality among different grades of seriousness" and would instead "require the Commission to rewrite the guidelines for these offenses in a manner that reintroduce sentencing disparity among similar defendants." *Dorvee*, 616 F.3d at 185 (citation and internal punctuation omitted). Later, in 1996, the Commission criticized the two-level computer enhancement because it failed to distinguish serious commercial distributors of online pornography from run-of-the-mill users. *Id*. at 186.

Commendably, the federal courts have criticized and rejected the child pornography guideline with increasing unanimity. *See, e.g*. *Grober*, 624 F.3d at 603 (collecting cases).

Indeed, today, courts are far more likely to impose a sentence below the range called for by § 2G2.2 than to impose a sentence within it. *See* United States Sentencing Commission, *2015 Interactive Sourcebook of Federal Statistics* (available at https://www.ussc.gov/research/sourcebook/archive/sourcebook-2015)(as visited May 22, 2020) at Table 28-4 (2015) (reflecting that almost 70% of sentences under §2G2.2 are below the guideline range). In the Fourth Circuit, 67% of defendants received below guideline sentences. *Id*. Simply put, in more than two-thirds of cases, courts have determined that the sentencing range prescribed by § 2G2.2 is too high.

Most tellingly, though, is that the Sentencing Commission itself believes the child pornography guideline does not work correctly. After conducting a thorough study, it found, among other things, that the guideline fails to provide proportional punishment, that it produces unwarranted disparities among offenders, and that many of its enhancements are outmoded and counterproductive. *Commission Report to Congress* at 311-331. Thus, it has concluded that the child pornography guideline requires massive revision and restructuring and has asked Congress for permission to do so. *Id*.

The most immediately notable fact about § 2G2.2–and it is a fact that is readily apparent when looking at Petitioner's guideline calculation in this case–is the swarm of specific offense characteristic adjustments it attracts and, more important, how often these apply in even the most mundane cases of possession or receipt. According to the Commission, "four of the six enhancements in §2G2.2(b)–together accounting for 13 offense levels–now apply to the typical non-production offender[:] . . . § 2G2.2(b)(2) (images depicting pre-pubescent minors) applied in

96.1 percent of cases;[6] § 2G2.2(b)(4) (sadomasochistic images) applied in 74.2 percent of cases[7]; § 2G2.2(b)(6) (use of a computer) applied in 96.2 percent of cases[8]; and §2G2.2(b)(7) (images table) applied in 96.9 percent of cases."[9] *Commission Report to Congress* at 316. As the Third Circuit has noted, however, "most of [these] enhancements are essentially inherent in the crime." *Grober*, 624 F.3d at 597. They therefore fail to accomplish what specific-offense characteristics are meant to do: distinguish between offenders of differing culpability. In the words of the Commission, "[S]entencing enhancements that originally were intended to provide additional proportional punishment for aggravating conduct now *routinely* apply to the vast majority of offenders." *Commission Report to Congress* at 316 (emphasis added). Not suprisingly, "[s]everal provisions in the current sentencing guidelines for non-production offenses–in particular, the existing enhancements for the nature and volume of the images possessed, an offender's use of a computer, and distribution of images–originally were promulgated in an earlier technological era." *Id*. As a result, according to the Commission, § 2G2.2 "'places a disproportionate emphasis on outdated measures of culpability,' resulting in 'penalty ranges [that] are too severe for some offenders and too lenient for other[s].'" *Helton*, 793 F.3d at 158 (Gregory, J. concurring)(quoting *Commission Report to Congress*, Chapter 12) (alteration in *Helton*).

Congress did not intend for the sentencing guidelines to work this way. As the Sixth

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[6] *See* (J.A. 99 ¶50).

[7] *See* (J.A. 99 ¶52).

[8] *See* (J.A. 99 ¶53).

[9] *See* (J.A. 99 ¶54).

Circuit has observed, sentencing courts should reserve sentences at or near the statutory maximum for the "worst possible variation of the crime" committed by the most dangerous offender. *United States v. Aleo*, 681 F.3d 290, 302 (6th Cir. 2012). Comparing the guideline range for child pornography to the ranges applicable to other more serious offenses–a comparison Petitioner offered at the sentencing hearing–highlights a related issue. In many cases, a defendant who merely received child pornography faces a substantially higher guideline range than if he had engaged in actual sexual contact with a minor. *Dorvee*, 616 F.3d at 187.

Sentencing is "an individualized determination," and a proper review of Petitioner's sentence requires looking beyond the guidelines to his individual facts and circumstances. *See United States v. Tucker*, 473 F.3d 556, 562 (4th Cir. 2007). That individualized determination shows that the district court substantively erred in sentencing him to fourteen years in prison when a much lower sentence would have been sufficient to punish him. Congress requires the district court to impose a sentence "sufficient, but not greater than necessary" to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

In this case, Petitioner had no prior or contemporaneous hands-on sex offenses; had a sparse criminal history; had a history of stable employment; had military experience; had shown himself to be a devoted and dedicated father who successfully met difficult challenges many parents never face; had himself been a victim of childhood sexual abuse; had the support of his family; and desired treatment for his addiction and had attempted to find it. All of this speaks to Petitioner's positive history and characteristics. They also show that a sentence, one less than fourteen years in federal prison, would be sufficient to protect the public from Petitioner.

No one contends that possessing child pornography is an innocuous offense. But the

nature and circumstances of the offense is only one factor in the analysis that Congress obligated the district court to conduct. A proper consideration of Petitioner as a whole person–and not merely as someone who committed a crime–would have resulted in a sentence below 168 months. Considering both the flawed nature of § 2G2.2 and Petitioner's mitigating factors, the district court erred by imposing the long sentence that it did.

One more observation is necessary: that the district court announced it would impose the same sentence if this Court were to find a guideline calculation error does not cure the substantive unreasonableness of the court's sentence. Petitioner is not contending the guideline was miscalculated here. In fact, § 2G2.2 was correctly computed. That is the problem.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 26th day of May, 2020.

Respectfully submitted,

_____

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