No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

JASON ANDREW DUNLAP,

Defendant-Petitioner.

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

PETITION FOR WRIT OF CERTIORARI

Thomas J. Hester
Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner

QUESTION PRESENTED

Do the sentencing Guidelines limit the maximum offense level to 43, so that, from that highest level, there is a reduction when a defendant accepts responsibility by entering a guilty plea?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

JASON ANDREW DUNLAP,

Defendant-Petitioner.

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

The petitioner, Jason Andrew Dunlap, respectfully requests that a writ of certiorari issue to review whether the United States Sentencing Guidelines cap the offense level calculation at level 43, so that there is a reduction from that highest level when a defendant accepts responsibility and enters a guilty plea.

Opinion Below

The Ninth Circuit panel ruled that the district court correctly applied the Guidelines in concluding that Mr. Dunlap's offense level, after deducting three levels for his timely guilty plea, was 45, and that it was not until "application note 2 or Part A of Chapter 5" that the Guidelines maximum offense level was capped at 43. *United States v. Dunlap*, 801 Fed. Appx. 593 (9th Cir. 2020) (*Dunlap II*, attached as Appendix E).

Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime … without due process of law.

18 U.S.C. § 3553 provides:

> (a) Factors To Be Considered in Imposing a Sentence.—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—
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed—
> >
> > …
> >
> > (3) the kinds of sentences available;

(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, … and . . .

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; . . .

(b) Application of Guidelines in Imposing a Sentence—

(1) In general—

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless 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.

28 U.S.C. § 991(b) describes the Purpose of the Commission:

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and
>
> (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. § 994 delineates the Duties of the Commission, providing, in relevant part:

> (a) The Commission . . . shall promulgate and distribute to all courts of the United States and to the United States Probation System—
>
> (1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, . . .
>
> (f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities. . .
>
> (n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's

substantial assistance in the investigation or prosecution of another person who has committed an offense.

Introduction

In enacting the Sentencing Reform Act of 1984, Congress established the United States Sentencing Commission to accomplish three principal objectives: to increase honesty in sentencing, to provide reasonable uniformity for similar offenders committing similar acts, and to establish proportionately of sentences for criminal conduct of differing severity. 28 U.S.C. §§ 991(b)(1)(B) and 994(a)(2); U.S.S.G. Ch. 1. Pt. A. The few circuit courts to address this issue, which frequently occurs in the most serious of cases, failed to apply this Court's direction regarding statutory construction and also failed to engage in meaningful analysis.

The Sentencing Table unambiguously establishes offense levels ranging from one to 43. U.S.S.G. §1A1. The Introduction to the Guidelines Manual explains, "The Commission has established a sentencing table that for technical and practical reasons contains 43 levels." U.S.S.G.§1A1.4(h) (reproduced in Appd'x G). In *United States v. Stinson*, 508 U.S. 36 (1993), this Court held that commentary consistent with the applicable statutes was binding on sentencing courts.

Resolution of this legal question is extremely important because, under the circuit court's reasoning, in the most serious federal criminal cases, hypothetical offense levels exceeding 43 vitiate the incentives for a defendant to accept

responsibility by pleading guilty or to provide substantial assistance to the government. The Ninth Circuit's decision creates unwarranted disparity by treating someone like Mr. Dunlap, who mitigates his wrongdoing by pleading guilty and providing substantial assistance, the same as someone who vigorously contests his guilt at trial. Its ruling subverts the Sentencing Commissions' central objective of avoiding unwarranted disparities.

Statement of Facts

A. The Charges and Relevant Pre-Plea History

On July 18, 2014, federal agents executed a search warrant at Dunlap's residence and arrested him. CR 5. CR 13.[1] On July 23, 2014, he was arraigned on an amended complaint charging production and transportation of child pornography. CR 10, 11. Further proceedings were repeatedly continued by agreement of the parties. CR 14-22. On March 18, 2015, Mr. Dunlap formally waived indictment and initially pleaded not guilty to an information charging him with one count of production of child pornography, in violation of 18 U.S.C. §2251(a) and (e). CR 23. The information listed the four minor victims, by their initials, in a single count. Appendix A. The information also alleged that, because of a prior Oregon

[1] Citations prefaced by "CR" are to the record of the clerk of the district court in the underlying criminal case, *United States v. Dunlap*, 3:15-cr-00107-SI. As the facts are not in dispute, this is not included as an Appendix to this Petition.

conviction for second degree encouraging child sexual abuse, Mr. Dunlap was subject, under 18 U.S.C. §2251(e), to a twenty-five year mandatory minimum sentence and a fifty-year statutory maximum. Appendix A.

Thereafter, the defense continued the sentencing six times to permit the government investigation of Mr. Dunlap's cooperation. CR 30, 32, 34, 40, 42, 44. On February 10, 2016, although no plea offer had yet been tendered, Mr. Dunlap's case was scheduled for a change of plea. CR 46.

B. Plea, Sentencing, and Initial Appeal

On February 23, 2016, Mr. Dunlap pled guilty to the information without a plea agreement with the government. As the prosecutor explained:

> We drafted the information as we did in anticipation of there being a plea agreement with Mr. Dunlap. This way, it would sort of limit his maximum potential exposure to one count rather than four or more charges. There were also additional charges, including one under 18 U.S.C. 2260A, which would have added a mandatory consecutive ten-year sentence because he committed this particular offense while being required to register as a sex offender under SORNA, but we didn't charge any of those, again, in anticipation that there would be a plea agreement in this case.
>
> Things kind of fell apart, partially because of internal issues within the United States Attorney's Office, which I've discussed with [defense counsel]. So we did not end up offering him quite as favorable a plea offer as we had originally anticipated. So consequently Mr. Dunlap informs us that he would now prefer to plead guilty to the information itself without the benefit of a plea agreement with the Government.

SER 165.[2]

At the initial sentencing, Mr. Dunlap objected that the court's Guideline calculation wrongly employed hypothetical offense levels above the maximum of 43. The district court disagreed and sentenced Mr. Dunlap, at offense level 43, to thirty years in prison. At the initial sentencing, the district court and both attorneys had accepted that an enhancement under § 2251 (e), which was pleaded in the information, operated to increase the sentencing range (without a departure for substantial assistance) to a mandatory minimum of twenty five and a maximum of fifty years.

The initial appeal ensued. Mr. Dunlap raised two sentencing issues. The first related to the government's substantial assistance departure motion, and the second challenged the district court's calculation that the offense level was 48 prior to reduction for acceptance of responsibility. After briefing was completed in the Ninth Circuit, that court decided *United States v. Reinhart*, 893 F.3d 606 (9th Cir. 2018) which undermined the mandatory minimum applied at the first sentencing. As a panel explained in the first appeal:

> The parties first addressed *Reinhart* in Rule 28(j) letters filed shortly before oral argument. Defendant had previously conceded that the prior

[2] Citation is to the Sealed Excerpt of Record filed with Appellant's brief in the direct appeal from the resentencing, *United States v. Dunlap*, No 19-30029. As the facts are not in dispute, this is not included as an Appendix to this Petition.

> state conviction charged in the Information triggered a 25-year mandatory minimum sentence under 18 U.S.C. § 2251(e). However, *Reinhart* constitutes an intervening change in the law that may affect the analysis of this issue, and the parties agree that remand is appropriate.

United States v. Dunlap, 731 Fed. Appx. 698 (9th Cir. 2018) (Appendix B). At oral argument, undersigned counsel advised the panel that *Reinhart*'s application would not moot the offense level issue and urged the panel to resolve that issue. Counsel for the government contended that the court should not reach the maximum offense level issue because it was reasonably likely that Mr. Dunlap would not wish to appeal from the resentencing.

C. Resentencing and This Appeal

At his resentencing, Mr. Dunlap again argued that the Guidelines capped the offense level at 43 and that a reduction for his timely acceptance of responsibility under U.S.S.G. §3E1.1 must be deducted from that maximum. The government reiterated its view that, pursuant to U.S.S.G. §1B1.1(a), the Guidelines' generic maximum offense level was not fixed until Chapter 5 of the Manual. All parties agreed that *Reinhart* reduced the applicable mandatory minimum sentence to fifteen years and that the applicable statutory maximum was thirty years. *See* Appendix D (Memorandum on Resentencing).

The trial judge agreed with the government's view of the Guidelines' maximum offense level, explaining:

> I find the guidelines calculations to result, before acceptance of responsibility, in a level of 48. I then deduct 3 for acceptance of responsibility. That yields 45. But in light of Chapter 5, Part A, Application Note 2, that 45 is now reduced to 43. At a criminal history I, level 43 has an advisory guideline of life, which because the statutory maximum is 30 years, that becomes the advisory guideline, 30 years.

ER 69-70.[3] The judge re-imposed the thirty-year sentence, Appendix C (Judgment in a Criminal Case), and advised that he would write, and subsequently file, an explanation of his legal reasoning. ER 70-71. In his Memorandum, the district court judge noted: "the defense position that the 43 maximum offense level foreclosed higher hypothetical calculations, so that Dunlap's acceptance of responsibility reduced the advisory range to 292 to 365 months." Appx. D at 4. Nevertheless, that court rejected Mr. Dunlap's contentions as a "policy argument" that should be addressed to the Sentencing Commission. *Id.*

In explaining his reasoning, the sentencing judge explicitly relied upon the Application Instruction in U.S.S.G. §1B1.1(a) to apply the Guidelines in the order set out in the manual. In doing so, the judge found that the Guidelines' maximum offense level was not established until Application Note 2 in Chapter 5, Part A. Appx. D at 5 ("[T]he guidelines contemplate capping the defendant's total offense

[3] The reference "ER" indicates to the Excerpt of Record filed in Ninth Circuit in the resentencing appeal, which, once again is not included as an Appendix as the facts are undisputed here.

level at 43 after all guidelines adjustments have been made, and not, as Defendant suggests, at some intermediate point in the calculation.").

After new briefing, a different panel of the Ninth Circuit decided Mr. Dunlap's appeal without oral argument. Acknowledging that its review of the interpretation of the Guidelines was *de novo*, the Ninth Circuit ratified the use of hypothetical levels above 43. *United States v. Dunlap*, 801 Fed. Appx. 593 (9th Cir. 2020)(*Dunlap II*), reproduced at Appendix E. The circuit court's opinion did not address the Guidelines' introductory language that the 43-level grid was established for "technical and practical reasons." Nor did the Ninth Circuit address the negation of acceptance of responsibility adjustment resulting from the use of hypothetical offense levels. Appx. E.

Mr. Dunlap moved the Ninth Circuit to rehear the case *en banc*. On June 23, 2020, that court issued an order denying rehearing. Appendix F.

Reasons for Granting the Writ of Certiorari

A. Whether the Guidelines' Maximum Offense Level is Forty-Three before Reduction for Acceptance of Responsibility is a Critical Legal Question.

The answer to the Guidelines application question presented has a huge impact on the advisory sentences prescribed in the most serious cases involving offenses at the top of the sentencing table. As the government's power over federal sentencings through its charging decisions and factual stipulations has increased, the

vast majority of the federal criminal cases are resolved by guilty pleas. Typically, the government requires appeal waivers as a part of the plea agreements it drafts. Moreover, in the large portion of those most serious cases resolved by guilty pleas, substantial assistance is provided to the government by a defendant seeking to ameliorate his extreme exposure. In such cases, it is even more likely that the defendant, whose hopes rely on the government's good faith, will be required to waive appeal.

B. This Case Presents a Procedurally Clean Vehicle for Announcing the Rule.

In Mr. Dunlap's case, "because of internal issues within the United States Attorney's Office ... [the government] did not end up offering him quite as favorable a plea offer as … originally anticipated." Because of that, there was ultimately no plea agreement, and no appeal waiver. The legal issue was fully preserved and addressed on the merits by the district and circuit courts.

Mr. Dunlap cooperated anticipating that he would enter a plea agreement with the Government. When more than more nineteen months passed without the government tendering a plea offer, Mr. Dunlap scheduled the case for a guilty plea to the information. When the government finally extended a plea offer, it was less favorable than the lawyers had discussed when Mr. Dunlap agreed to provide substantial assistance, which was undertaken without a cooperation agreement.

After he pleaded guilty to the accusatory instrument, the government honored its commitment to move for a substantial assistance departure under U.S.S.G. 5K1.1. However, as the government urged, the sentencing court calculated the offense at 43 after the three-level reduction for the timely guilty plea. There was no appeal waiver. The Ninth Circuit affirmed that result and denied rehearing. The vital legal question -- one that has been percolating for over thirty years -- is now before this Court.

C. The Guidelines Maximum Offense Level is Established in the Guidelines Introduction.

"The Commission has established a sentencing table that . . . contains 43 levels." U.S.S.G.§1A1.4(h); *see also Stinson*, 508 U.S. 36 (1993) (commentary consistent with the applicable statutes binding on courts: *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006). The Guidelines introduction's plain language sets the maximum offense level at 43 and forecloses higher hypothetical levels.

The Ninth Circuit's decision relies on the existence of hypothetical levels above 43. Prior to this case, only the Second and Fifth Circuits have published opinions addressing this important Guidelines issue. The two dispositive opinions are more than twenty-five years old and wrongly reasoned.[4] *United States v. Caceda*,

[4]There are also two unpublished decisions from the Fifth and Seventh Circuits. *United States v. Williams*, 380 Fed. App'x 527 (7th Cir. 2010); *Wood*, 48 F.3d. 530.

990 F.2d 707, 710 (2d Cir, 1993); *United States v. Pittsinger*, 874 F.3d 446, 454 (5th Cir. 2017) (finding argument that offense level is capped at 43 before acceptance reduction was foreclosed by unpublished decision in *United States v. Wood*, 48 F.3d. 530 (5th Cir. 1995) (following *Caceda* without additional analysis)).

In *Caceda*, the Second Circuit stated that the sentencing guideline's are not capped at 43 until Chapter 5 of the Guidelines. Specifically:

> We believe it evident that downward adjustments must be made from the total of the base offense level plus upward adjustments even if that total exceeds 43. Otherwise, a more culpable offender, say, a defendant whose conduct would yield a level of 50 who was entitled to a downward adjustment of 2, would receive a total offense level of 41, while a less culpable defendant with a level of 43 and no applicable upward or downward adjustments would get a higher sentence. We decline to read the Guidelines to compel that perverse result.

Caceda, 990 F.2d at 710.

That conclusion, however, is circular. If the Guidelines maximum is 43, that level describes the most culpable offender. It makes little sense to compare someone who is more than "most" culpable. Moreover, the *Caceda* court's rationale treats "off the chart" offenders, who commit identical acts and have identical criminal histories, the same, even though one such offender accepts responsibility and cooperates with the government while another put his victims (and the government and court) through a protracted jury trial. The result institutionalizes unwarranted disparity.

Lastly, the *Caceda* Court's one-paragraph analysis of this complex issue of first impression erroneously opines that "[t]he Guidelines are not helpful in resolving this issue." *Id.* at 709. That is incorrect.

The language of the application note upon which the Ninth Circuit relied supports Mr. Dunlap's position. Although the Ninth Circuit quoted only a portion of that note, *see* Appx. E, the full note provides:

> In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A **total offense level** of less than 1 is to be treated as an **offense level** of 1. An **offense level** of more than 43 is to be treated as an **offense level** of 43.

U.S.S.G. §5A, app. n. 2 (emphasis added). Notably, this is the only reference in the Guidelines Manual to a hypothetical level above 43.

The Commission's use of "total offense level" for the bottom of the table and "offense level" for the top is significant because "total offense level" describes the end product, the final offense level when going to the sentencing table. That is how the probation office uses the term in its reports. *United States v. Wells*, 878 F.2d 1232, 1232 (9th Cir. 1989) (finding the district court erred when it determined a defendant's "total offense level" before applying the acceptance of responsibility adjustment); *see United States v. Ornelas*, 825 F.3d 548, 554 (9th Cir. 2016) (approving a presentence report's calculation of a defendant's total offense level 15

when the "base offense level was reduced three points for an adjustment for acceptance of responsibility).

In Application Note 2, the Commission employed the term "total offense level" for what might rarely occur on the low end of the Guidelines (less than one), explaining that, in such a case, it should be treated as level one. The Commission chose not to use the phrase "total offense level" for the high end of the table, instead stating that "[a]n offense level of more than 43 is to be treated as an offense level of 43." The choice was equally apt at the low end where the choice of "total offense level" (the final product of the Guidelines' application) remains one, rather than being negative one after the applicable two-level reduction in the offense level for acceptance of responsibility. *See* U.S.S.G. §3E1.1(a). That Guidelines' commentary fully supports the plain meaning of a 43-level Sentencing Table—the top is the top. So do the principles of statutory construction:

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Gozlon-Peretz v. United States, 498 U.S. 395, 404–05 (1991) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The Sentencing Guidelines are construed using the rules of statutory construction. *United States v. Flores*, 729 F.3d 910, 914 n.2 (9th Cir.2013); *United*

States v. Gibson, 135 F.3d 257, 261 (2d Cir.1998) "[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009)(quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). This Court's focus on context requires consideration of one of the Guidelines Commission's central mandates, to avoid unwarranted disparities. *See also* U.S.S.G. §3E1.1, Background (emphasizing the "legitimate societal interests" in a defendant who accepts responsibility being "appropriately given a lower offense level than a defendant who has not demonstrated responsibility"). Only by capping the calculations at 43 do the Guidelines avoid such disparity.

Even if the Guidelines were ambiguous,"where text, structure, and history fail to establish that the Government's position is unambiguously correct[,] the Court applies the rule of lenity to resolve the ambiguity in [the defendant's] favor."). *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see also United States v. Leal-Felix*, 665 F.3d 1037, 1040 (9th Cir. 2011) ("If, after applying the normal rules of statutory interpretation, the Sentencing Guideline is still ambiguous, the rule of lenity requires us to interpret the Guideline in favor of [the defendant].") (citing *DePierre v. United States*, 564 U.S. 70, 88 (2011)).

The rule of lenity is an interpretive tool that operates hand-in-hand with the doctrine of constitutional avoidance:

> [O]ne of the canon's chief justifications is that it allows courts to avoid the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.

Clark v. Martinez, 543 U.S. 371, 381 (2005). The elimination of the Guidelines' consideration of individuals who accept responsibility through a guilty plea, thereby treating them identically to individuals who do not accept responsibility, constitutes arbitrary sentencing in violation of the due process and equal protection clauses.

The Ninth Circuit's opinion is contrary to the Congressional mandate to avoid unwarranted sentencing disparities. It treats Mr. Dunlap, who mitigated his wrongdoing by pleading guilty and providing substantial assistance to the government, the same as if he had contested his case at trial without any remorse or mitigating efforts. In doing so, the circuit also vitiates the federal criminal laws incentives for resolving cases by guilty pleas and providing substantial assistance to the authorities.

Conclusion

This case squarely presents the Court with a substantial question of first impression. Correcting the poorly reasoned opinion of the Ninth Circuit both avoids unwarranted disparities, as the Sentencing Commission was charged with doing, and

protects the systemic incentives for the those who have committed crimes to accept responsibility by pleading guilty and to providing substantial assistance in the investigation of other crimes. This Court should grant the Petition for a Writ of Certiorari and resolve this issue.

DATED this 21st day of September 2020.

/s/ Thomas J. Hester
Thomas J. Hester
Assistant Federal Public Defender
Attorney for Petitioner