No. 20-7296

IN THE SUPREME COURT OF THE UNITED STATES

DANE SCHRANK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals violated Federal Rule of Appellate Procedure 34(a)(2) in finding that it could decide this case without oral argument.

2. Whether the court of appeals erred in determining that, in the circumstances of this case, a 12-month noncustodial home-confinement sentence for petitioner's possession of nearly 1000 violent child-pornography images, in violation of 18 U.S.C. 2252(a)(4)(B), was substantively unreasonable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B4) is reported at 975 F.3d 534. A prior opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 768 Fed. Appx. 512.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2020. A petition for rehearing was denied on November 12, 2020 (Pet. App. C1). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-

court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on February 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Tennessee, petitioner was convicted on one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Judgment 1. He was sentenced to five years of supervised release, one condition of which was a 12-month term of home confinement. Judgment 2-3, 5. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A1-A4. On remand, the district court imposed the same noncustodial sentence. Am. Judgment 2-3, 5. The court of appeals again vacated petitioner's sentence and remanded for resentencing, and ordered the reassignment of the case to a different district judge. Pet. App. B1-B4.

1. In February and March of 2015, petitioner used a computer to access a members-only website containing child pornography. Presentence Investigation Report (PSR) ¶¶ 7-8. The website resided on the "dark net" -- a portion of the Internet accessible only to users who have the specific website address and specialized software, such as a program known as "TOR," that masks the location and identity of the user's computer. PSR ¶¶ 5-6. Server data

showed that petitioner viewed website materials containing child pornography, including an image of an adult male forcing a prepubescent girl to perform oral sex. PSR ¶ 8.

Law enforcement identified petitioner as the perpetrator by determining the computer's internet-protocol address, connecting it to a Memphis, Tennessee, residence where petitioner lived, and executing a search warrant and seizing various computer equipment at that residence. PSR ¶¶ 8-10. Petitioner provided a statement to agents admitting that he had accessed the website and viewed child pornography. Ibid. A forensic examination of petitioner's computer identified 840 image files, 332 thumbnail image files, and three video files of prepubescent children and toddlers. PSR ¶ 11. The files depicted adult men engaged in sexual acts with minor victims. PSR ¶ 12. Some of the images involved young children suffering violent or sadistic sexual abuse. Pet. App. A1-A2.

Petitioner was charged by information with one count of knowingly possessing visual depictions of prepubescent minors engaging in sexually explicit conduct, which had been transported using a means or facility of interstate and foreign commerce, in violation of 18 U.S.C. 2252(a)(4)(B). Information 1. Petitioner waived indictment and pleaded guilty to the information pursuant to a plea agreement. D. Ct. Docs. 3, 4 (May 16, 2017).

2. The statutory maximum term of imprisonment for a violation of 18 U.S.C. 2252(a)(4)(B) is 20 years. 18 U.S.C. 2252(b)(2). In its presentence report, the Probation Office assigned petitioner a base offense level of 18 under Sentencing Guidelines § 2G2.2.* PSR ¶ 18. The Probation Office then applied the several enhancements: two levels because petitioner possessed images showing prepubescent children, Sentencing Guidelines § 2G2.2(b)(2); four levels because the images involved sadomasochistic or other violent conduct or the sexual abuse or exploitation of an infant or toddler, Sentencing Guidelines § 2G2.2(b)(4); two levels because the offense involved the use of a computer, Sentencing Guidelines § 2G2.2(b)(6); and five levels because the offense involved 600 or more images, Sentencing Guidelines § 2G2.2(b)(7)(D). PSR ¶¶ 19-22. The Probation Office also applied a three-level reduction for acceptance of responsibility. See Sentencing Guidelines § 3E1.1; PSR ¶¶ 28-29.

Based on the resulting total offense level of 28, combined with petitioner's criminal history category of III, the Probation Office calculated an advisory Guidelines sentencing range of 97 to 120 months of imprisonment. PSR ¶¶ 30, 37, 67. Petitioner requested a variance that would include no imprisonment, citing his troubled upbringing, his rehabilitation efforts, and his

* References in this brief to the Sentencing Guidelines refer to the 2016 version in effect at the time of petitioner's sentencing. PSR ¶ 17.

concern that incarceration would impede his rehabilitation. Pet. App. A2. The government requested a custodial sentence at the low end of petitioner's guidelines range. Sent. Tr. 8. The government observed that the images possessed by petitioner depicted "incredibly violent activity," including "sexual assault on even toddlers." Id. at 9. It further observed that petitioner's "emotional pain or life circumstances [were] not an excuse for harming defenseless people," which was "what child pornography does." Id. at 11. And the government noted that petitioner's actions on the website "encourag[ed] others to not only share and replicate and keep and collect" existing child-pornography depictions, but also "to make new images." Ibid.

The district court adopted the presentence report's guidelines calculations, including its determination of an advisory Guidelines range of 97-120 months. Sent. Tr. 6-7. But the court varied downward from that range to a noncustodial sentence of five years of supervised release, one condition of which was a 12-month term of home confinement. Id. at 27-28; Judgment 5. The court acknowledged that petitioner's offense was "extraordinarily serious" because his viewing of child pornography "creates a market for" those images, "and it means that children are abused and raped in order for those images to be created." Sent. Tr. 21. But the court commended petitioner for his rehabilitation and mental-health treatment, id. at 22-24, and his

decision to "immediately admit[] to everything," id. at 25-26. Finally, the court "d[id]n't see that prison [was] going to accomplish anything for" petitioner. Id. at 27.

3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A1-A4.

The court of appeals reviewed the substantive reasonableness of petitioner's noncustodial sentence for abuse of discretion. Pet. App. A3. Observing that petitioner had received "a very large downward variance -- 97 months (or 100%) from the bottom of the advisory range" -- the court inquired "whether the district court's reasons were 'sufficiently compelling' to support that substantial downward variance." Ibid. (citation omitted).

The court of appeals determined that the district court's sentence "ignored or minimized the severity of the offense and failed to account for general deterrence." Pet. App. A4. In particular, the court observed that petitioner "did not accidentally stumble onto a few risqué pictures on the internet," but instead had "downloaded an anonymizer so that he could go to the 'dark net' to get nearly 1,000 images of babies and toddlers being forcibly, violently, and sadistically penetrated." Ibid. The court described those images as "arguably the worst of child pornography," and determined that the "mitigating facts" discussed by the district court did not justify the wholly noncustodial sentence that it had imposed. Ibid.

4. On remand, the district court reimposed the same noncustodial sentence. Am. Judgment 2-3, 5.

At the outset of the resentencing hearing, the district court announced that "[it] disagreed with the Sixth Circuit" and criticized the appellate judges for "second-guess[ing] [its] decision on what the sentence should be based on their own evaluation of the factors." Resent. Tr. 5. The court questioned whether the court of appeals understood the "ease" with which someone could engage in the computer conduct involved in this case. Id. at 6. In particular, the district court discerned "a disconnect between generations and the way in which people understand computers today versus some of us who are older." Id. at 7. Turning to the sentencing factors under 18 U.S.C. 3553(a), the district court recognized that petitioner committed "an extraordinarily serious offense" that "creates a market forum" for child pornography and "adds to the exploitation of children." Resent. Tr. 16-17. In particular, the court acknowledged that the children depicted in petitioner's photographs "were abused" and had "violence perpetrated upon them." Id. at 17. But the court -- commenting positively on petitioner's history and characteristics, his experience dealing with his mother's death, and the support he had received from others; his compliance with his sex-offender treatment and registration duties and his efforts to take college classes; and the court's lack of concern about

recidivism -- asserted that, even though "general deterrence should be a factor," "there is a real conflict" with the individualized sentencing factors. Resent. Tr. 19-26. Remarking that "maybe the Sixth Circuit will reverse me again," it again imposed a wholly noncustodial sentence. Id. at 27; see id. at 27-29.

5. The court of appeals again vacated petitioner's sentence and remanded for resentencing, and it directed the reassignment of the case on remand to a different district judge. Pet. App. B1-B4.

The parties disagreed on the need for oral argument in this proceeding. The government contended that "the briefs adequately set forth the legal issues" and "d[id] not believe that the decisional process would be significantly aided by oral argument." Gov't C.A. Br. iv. Petitioner requested oral argument on the ground that "the appeal involves important constitutional and structural criminal law issues." Pet. C.A. Br. iv. The court of appeals subsequently "determined that oral argument [was] not required" and "submitted" the case "on the briefs of the parties and the record." C.A. Doc. 21 (June 26, 2021). And after review of those materials, the court of appeals found that petitioner's "sentence remains substantively unreasonable for the reasons set forth in [its] earlier opinion." Pet. App. B2.

The court of appeals rejected the district court's criticisms of its understanding of petitioner's offense conduct or the asserted "ease" at which a computer user may access child

pornography over the Internet. Pet. App. B3. The court explained that petitioner's crime "takes a conscious effort, which includes downloading special software (normally Tor routing software) and using a specific sixteen-digit web address that is often obtained from other users." Ibid. In doing so, the court emphasized that "[it] [wa]s well-aware of the sophisticated operations of the dark web" and observed that petitioner had "surreptitiously and repeatedly downloaded violent child pornography from a clandestine website." Ibid.

The court of appeals again determined that the district court's noncustodial sentence "d[id] not 'reflect the seriousness of the offense,'" "'provide just punishment,'" or "'afford adequate deterrence to criminal conduct.'" Pet. App. B3 (quoting 18 U.S.C. 3552(a)(2)(A) and (B)). The court of appeals recognized that "[c]hild pornography is an abhorrent offense that scars the children affected forever" and that petitioner's conduct -- "repeatedly downloading images of young children being raped" -- both "contributed to their past victimization" and "fuel[ed] the demand for child pornography," thereby "contribut[ing] to the future harm done to children in the name of profit." Ibid. The court of appeals additionally recognized that, because "[c]hild pornography offenses happen in the shadows, making it difficult to apprehend perpetrators like [petitioner] who use anonymizing software to hide their identities," it is "especially important"

to "impose sentences sufficient to deter this clandestine criminal conduct," and that "a noncustodial sentence in a child pornography case will almost always be insufficient to account for general deterrence." Id. at B3-B4. And it found that petitioner's "noncustodial sentence is no exception." Id. at B4.

The court of appeals also ordered that "this case be reassigned to another district court judge for resentencing" on remand, finding that the "'original judge would reasonably be expected . . . to have substantial difficulty putting out of her mind previously-expressed views or findings.'" Pet. App. B4 (quoting United States v. Bistline, 720 F.3d 631, 634 (6th Cir. 2013), cert. denied, 572 U.S. 1009 (2014)) (brackets omitted). The court observed that, "despite [its] binding holding" in the first appellate proceeding, "the district judge refused to follow the law and impose an appropriate sentence." Ibid.

ARGUMENT

Petitioner contends (Pet. 6-10) that the court violated Federal Rule of Appellate Procedure 34(a)(2) in finding oral argument unnecessary in this case. He also contends (Pet. 10-13) that the court of appeals erred in determining that a noncustodial sentence for his conviction of possessing nearly 1000 child-pornography images and videos, in violation of 18 U.S.C. 2252(a)(4)(B), is substantively unreasonable. Those contentions

lack merit and do not implicate any circuit conflict warranting this Court's intervention. Further review is not warranted.

1. As a threshold matter, review is unwarranted in the case's current posture because the decision below is interlocutory. See, e.g., American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 384 (1893). The court of appeals vacated petitioner's sentence and remanded the case to the district court for reassignment and resentencing. Pet. App. B4. That posture "alone furnishe[s] sufficient ground for the denial of" his petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); Virginia Mil. Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). If petitioner ultimately is dissatisfied with the sentence imposed on remand, and if that sentence is upheld in any subsequent appeal, he will be able to raise his current claims, together with any other claims that may arise with respect to his resentencing, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam). This case presents no occasion for this Court to depart from its usual practice of awaiting final judgment before determining whether to review a challenge to a criminal conviction or sentence.

2. Petitioner contends (Pet. 6-10) that the court of appeals violated Federal Rule of Appellate Procedure 34(a)(2) when it determined that it could decide this case without oral argument. That contention lacks merit.

a. Federal Rule of Appellate Procedure 34(a)(2) provides that

> [o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or
>
> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Fed. R. App. P. 34(a)(2). In the proceedings below, the government advised the court of appeals that "the briefs adequately set forth the legal issues" and that it "d[id] not believe that the decisional process would be significantly aided by oral argument." Gov't C.A. Br. iv. Petitioner, by contrast, requested oral argument. Pet. C.A. Br. iv.

The court of appeals informed the parties that "the [c]ourt ha[d] determined that oral argument [wa]s not require[d]" in this case. C.A. Doc. 21. That determination reflects an appropriate exercise of the court's discretion to forgo oral argument in cases where "the facts and legal arguments are adequately presented in

the briefs and record, and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(C). The government had recommended that the court decide the case on the briefs; the judges assigned to the case were already familiar with the record, having decided the previous appeal involving the district court's original imposition of the same sentence; and the government's lone assignment of error -- that petitioner's noncustodial sentence was substantively unreasonable, see Gov't C.A. Br. 2 -- mirrored the issue resolved in the previous appeal, which also had been decided without oral argument. See Pet. App. A3-A4; 17-6093 C.A. Doc. 31 (Aug. 10, 2018).

Petitioner disputes (Pet. 9) the court's application of Rule 34(a)(2)(C). But his factbound, procedural objection does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

b. Petitioner additionally contends (Pet. 7) that the courts of appeals -- including the court in this case -- "routinely deprive parties of their right to oral argument in summary and unexplained orders." He seeks (Pet. 8) a directive from this Court requiring the courts of appeal to "make * * * specific findings" on the record before denying a party's request for argument. Further review of that contention is unwarranted.

Rule 34(a)(2) requires "a panel of three judges who have examined the briefs and record [to] unanimously agree[] that oral argument is unnecessary" under the listed standards. Fed. R. App. P. 34(a)(2) (emphasis added). It does not additionally require the panel to issue written "findings" explaining the "rationale" (Pet. 8) for the panel's determination.

Petitioner fails to identify any disagreement in circuit practice. His survey identifies (Pet. 7-8) multiple instances where other courts of appeals issued similar notices that a particular case would be decided without oral argument. Even if petitioner had identified some discrepancy in how courts screen cases for oral argument, that question would not warrant this Court's intervention. To the contrary, the Court has recognized that the "courts of appeals have significant authority to fashion rules to govern their own procedures." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993).

In any event, this case would not be an appropriate vehicle to consider the proper application of Rule 34(a)(2). "[T]his Court reviews judgments," Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984), and, as explained below, petitioner has failed to demonstrate any error in the court of appeals' judgment vacating his sentence as substantively unreasonable. See pp. 15-20, infra.

3. Petitioner separately contends (Pet. 10-13) that the court of appeals erroneously adopted a rule under which the sentencing factor of general deterrence invariably requires a term of incarceration. That contention is incorrect, and the court of appeals' circumstance-specific evaluation of the particular sentence in this case does not warrant this Court's review.

a. After ensuring that a district court has not committed any procedural error in imposing a sentence, an appellate court "should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." Gall v. United States, 552 U.S. 38, 51 (2007). If the sentence is outside the advisory Sentencing Guidelines range, the reviewing court cannot presume that the sentence is unreasonable and must give "due deference to the district court's decision that the [sentencing factors listed in 18 U.S.C. 3553(a)], on a whole, justify the extent of the variance" from the Guidelines range. Ibid. And a court of appeals may not reverse a sentence simply because it "might reasonably have concluded that a different sentence was appropriate" had it been in the district court's position. Ibid.

But if a court of appeals, applying that deferential standard, determines that a district court has imposed a substantively unreasonable sentence, the court of appeals may set that sentence aside. See Rita v. United States, 551 U.S. 338, 354 (2007). "In

sentencing, as in other areas, district judges at times make mistakes that are substantive," and "[a]t times, they will impose sentences that are unreasonable." Ibid. "Circuit courts exist to correct such mistakes when they occur." Ibid.

b. The court of appeals did not err in its performance of that function here. In its original decision, the court of appeals "review[ed] the substantive reasonableness of [petitioner's] sentence for an abuse of discretion," Pet. App. A3, and it determined that, in the circumstances of this case, the noncustodial sentence the district court had imposed either "ignored or minimized the severity of the offense and failed to account for general deterrence," id. at A4. The court of appeals reiterated that determination in its subsequent decision of which petitioner now seeks review. Id. at B3-B4. Its determination reflects its reasonable assessment of the circumstances of this case.

The court of appeals observed that petitioner's offense conduct entailed possessing "nearly 1,000 images of babies and toddlers being forcibly, violently, and sadistically penetrated," Pet. App. A4 -- conduct that both "contributed to [the children's] past victimization" and "fuel[ed] the demand for child pornography," thus "contribut[ing] to the future harm done to children," id. at B3. The court observed that the advisory Sentencing Guidelines range for petitioner's offense was 97-120

months of imprisonment, id. at A2, B2, and that the district court's noncustodial sentence improperly discounted the sophistication of petitioner's offense, which involved conscious and repeated efforts to download child pornography from the "dark web" through special efforts and special software. Id. at B3; see id. at A2-A3, B2-B3. The court of appeals relatedly stressed the importance of general deterrence with respect to child-pornography offenses, which "happen in the shadows" and involve perpetrators who are "difficult to apprehend." Id. at B3. Those case-specific determinations do not warrant further review.

Petitioner contends (Pet. 10) that the court of appeals erred by "rel[ying] exclusively [on] the issue of deterrence under 18 U.S.C. § 3553(a)(2)(B)" to "require[] a period of incarceration for all defendants in all child pornography crimes." That contention is incorrect. At no point did the court require that all child-pornography sentences include a prison term. The court stated that "'general deterrence is crucial in the child pornography context'" because the offense "scars the children affected forever," "contribute[s] to the future harm done to children" "by fueling the demand," and involves "clandestine criminal conduct" that is hard to detect. Pet. App. B3 (quoting United States v. Bistline, 720 F.3d 631, 632 (6th Cir. 2013), cert. denied, 572 U.S. 1009 (2014)). And in light of those depraved characteristics, none of which petitioner contests, the court of

appeals reasoned that "a noncustodial sentence in a child pornography case will almost always be insufficient to account for general deterrence." Id. at B3-B4. But it did not foreclose the possibility that such a sentence could be appropriate in a particular case -- it simply found this case not to be one. Id. at B4.

The decisions here thus appropriately reflect a court of appeals' role in reviewing whether a district court has abused its discretion in weighing the Section 3553(a) factors with regard to conduct, such as petitioner's, that implicates the sexual abuse or exploitation of minor victims. Following this Court's decision in Gall, courts of appeals have regularly "consider[ed] whether [a] factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case." United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008) (en banc), cert. denied, 556 U.S. 1268 (2009); see, e.g., United States v. Sandoval, 959 F.3d 1243, 1246 (10th Cir.) (abuse-of-discretion standard permits appellate court to determine whether "the district court was arbitrary, capricious, whimsical, or manifestly unreasonable when it weighed the permissible [Section] 3553(a) factors" (citation omitted)), cert. denied, 141 S. Ct. 931 (2020); United States v. Kane, 639 F.3d 1121, 1136 (8th Cir. 2011) ("[S]ubstantive review exists, in substantial part, to correct sentences that are based on unreasonable weighing decisions."

(citation omitted)), cert. denied, 565 U.S. 1229 (2012); United States v. Irey, 612 F.3d 1160, 1193-1194 & n.20 (11th Cir. 2010) (en banc), cert. denied, 563 U.S. 917 (2011). As the Second Circuit has explained, that approach "ensures that appellate review, while deferential, is still sufficient to identify those sentences that cannot be located within the range of permissible decisions." Cavera, 550 F.3d at 191. Petitioner, by contrast, identifies no decision of this Court or another court of appeals holding that an appellate court may not reverse a sentence based on its determination that a district court has unreasonably minimized or discounted a particular Section 3553(a) factor in sentencing a particular defendant.

Petitioner relatedly asserts (Pet. 10) that the court of appeals "eliminated the sound exercise of discretion delegated to the district courts to review the totality of the [Section] 3553(a) sentencing factors." That is also incorrect. The court of appeals instead emphasized the "considerable discretion" afforded to the district court's balancing of the Section 3553(a) factors, while correctly observing that such "discretion is not unfettered." Pet. App. B4. The court's approach accords with this Court's decisions, which contemplate that reviewing courts will assess the reasonableness of the sentencing court's analysis of the relevant factors, including whether the analysis justifies "the extent of any variance from the Guidelines range." Gall, 552 U.S. at 51;

see Rita, 551 U.S. at 354. Petitioner's contrary suggestion (Pet. 11-12) that the courts of appeals may not review the district court's conclusions about the weight afforded to a given sentencing factor would substantially eliminate the substantive-reasonableness review that Gall requires.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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