

No. _____

**In the
Supreme Court of the United States**

GEORGE DANIEL MCGAVITT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

CHERI THOMAS
LEWIS THOMAS LAW PC
4801 Woodway Dr., Suite 480E
Houston, Texas 77056

LEWIS THOMAS
**Counsel of Record*
LEWIS THOMAS LAW PC
4801 Woodway Dr., Suite 480E
Houston, Texas 77056
Tel.: (281) 513-9880
Fax: (713) 955-9662
lewisthomaslaw@gmail.com
Counsel for Petitioner

QUESTION PRESENTED

Whether self-penetration by a minor (not prepubescent) using a benign household item is “sadistic or masochistic” under USSG § 2G2.1(b)(4)(A).

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. George Daniel McGavitt was the defendant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff and respondent in the district court, the appellee in the court below, and is the Respondent here.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. McGavitt*, No. 4:19-cr-00649 (S.D. Tex. Jan. 21, 2021).
2. *United States v. McGavitt*, No. 20-20575 (5th Cir. 2022).

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
DIRECTLY RELATED PROCEEDINGS	ii
TABLE OF CONTENTS	iii
PETITION APPENDIX	iii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	3
REASONS TO GRANT THE PETITION	6
I. There is a conflict between the appellate courts regarding the application of USSG § 2G2.1(b)(4)(A)’s four-level “sadistic or masochistic” enhancement.	6
CONCLUSION	15

PETITION APPENDIX

Fifth Circuit Opinion.....	1a
Fifth Circuit Judgment.....	15a
Fifth Circuit Order Denying Petition for Rehearing En Banc... ..	16a
Amended District Court Judgment	17a

TABLE OF AUTHORITIES

Cases

<i>United States v. Canada</i> , Nos. 96-30319 and 96-30320, 1997 U.S. App. LEXIS 12789 (5th Cir. Apr. 7, 1997).....	12
<i>United States v. Cloud</i> , 630 F. App'x 236 (5th Cir. 2015)	11
<i>United States v. Comeaux</i> , 445 F. App'x 743 (5th Cir. 2011)	11
<i>United States v. Corp</i> , 668 F.3d 379 (6th Cir. 2012)	8
<i>United States v. Cover</i> , 800 F.3d 275 (6th Cir. 2015)	8, 9
<i>United States v. Delmarle</i> , 99 F.3d 80 (2d Cir. 1996).....	13
<i>United States v. Desadier</i> , 495 F. App'x 501 (5th Cir. 2012) (unpublished).....	11
<i>United States v. Fuller</i> , 77 F. App'x 371 (6th Cir. 2003)	12
<i>United States v. Garrett</i> , 190 F.3d 1220 (11th Cir. 1999)	12
<i>United States v. Johnson</i> , 784 F.3d 1070 (7th Cir. 2015).....	6,7
<i>United States v. Kimbrough</i> , 69 F.3d 723 (5th Cir. 1995).....	11
<i>United States v. Lyckman</i> , 235 F.3d 234 (5th Cir. 2000)	12
<i>United States v. McGavitt</i> , No. 20-20575 (5th Cir. 2022).....	ii
<i>United States v. McGavitt</i> , No. 4:19-cr-00649 (S.D. Tex. Jan. 21, 2021) .	ii
<i>United States v. Nesmith</i> , 866 F.3d 677 (5th Cir. 2017).....	4
<i>United States v. Parker</i> , 267 F.3d 839 (8th Cir. 2001)	13
<i>United States v. Tanaka</i> , No. 20-50171, 2021 U.S. App. LEXIS 22790 (5th Cir. Aug. 2, 2021) (per curiam)	12

Statutes

18 U.S.C. § 3553(a)(4).....	1, 2
18 U.S.C. § 3742(a).....	5
28 U.S.C. § 1254(1).....	1

28 U.S.C. § 1291	5
------------------------	---

Other Authorities

USSG §2G2.2(b)(2)	6
-------------------------	---

USSG § 2G2.1(b)(4)(A)	i, 1, 2, 3, 6
-----------------------------	---------------

USSG § 5G1.1(a).....	8
----------------------	---

Briefs

<i>United States v. Desadier</i> , No. 11-31110, Appellee’s Br. (5th Cir. July 9, 2012).....	11
--	----

<i>United States v. Starr</i> , No. 07-2397, Appellee’s Br. (8th Cir. Nov. 7, 2007).....	10
--	----

PETITION FOR A WRIT OF CERTIORARI

Petitioner George Daniel McDavitt respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Fifth Circuit appears at Appendix 1a-14a to the petition and is reported at 28 F.4th 571.

JURISDICTION

The Fifth Circuit rendered judgment on March 11, 2022. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of USSG § 2G2.1, which is applicable pursuant to 18 U.S.C. § 3553(a)(4). The statute provides in pertinent part:

(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—

...

- (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.

18 U.S.C. § 3553(a)(4).

The relevant guideline, USSG § 2G2.1, provides in pertinent part:

(b) Specific Offense Characteristics

. . .

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; . . . , increase by 4 levels.

STATEMENT

This case arises from a three-count indictment charging McGavitt with coercion and enticement, sexual exploitation of a child, and possession of child pornography. App., *infra*, at 1a. McGavitt pleaded guilty to all three counts. App., *infra*, at 1a.

The presentence investigation report (“PSR”) calculated McGavitt’s Total Offense Level to be 43, in part by adding four levels under USSG § 2G2.1 on the ground that the offense involved material that portrayed sadistic or masochistic conduct. App., *infra*, at 4a. With a Total Offense Level of 43 and a Criminal History Category of I, the advisory Guidelines sentence was life imprisonment. App., *infra*, at 4a.

The enhancement was based on one video involving a 12- or 13- year old girl, nude, penetrating herself with a plastic hairbrush handle. App., *infra*, at 6a. The 12- or 13-year old was alone in the video, and there was no suggestion in the video that anyone other than the girl herself chose to insert the hairbrush handle into her own vagina. Consequently, it would appear to an objective observer that young teen was voluntarily masturbating with a hairbrush.

McGavitt filed a written objection to the PSR’s assessment of a four-level enhancement under USSG § 2G2.1. App., *infra*, at 4a. The district court overruled McGavitt’s objection to the enhancement, adopted the PSR, and then sentenced McGavitt to a within-Guidelines sentence of life imprisonment.¹

McGavitt argued on appeal, as he had before the district court, that images in the video did not meet the definition of “sadistic or masochistic” under the standard articulated in *United States v. Nesmith*, 866 F.3d 677 (5th Cir. 2017). Under *Nesmith*, “the inquiry should focus on an observer’s view of the image—what is portrayed and depicted—rather than the viewpoint of either the defendant or the victim.” *Id.* at 680.

McGavitt pointed out that nothing about the images in the video would cause an objective observer to perceive that the 12- or 13-year old girl experienced physical or emotional pain contemporaneous with the images’ creation, as the depiction showed no force, violence, or pain.

¹ McGavitt received a sentence of life imprisonment for Count 1. App., *infra*, at 18a. Because Counts 2 and 3 had statutory maximum sentences of 30 years and 10 years, respectively, McGavitt received concurrent sentences of 30 years for Count 2 and 10 years for Count 3, App., *infra*, at 18a; *see generally* USSG § 5G1.1(a). The district court also imposed a 15-year term of supervised release. App., *infra*, at 19a.

The all-male Fifth Circuit² panel disagreed, summarily concluding that, “an objective observer would perceive the conduct depicted in the video at issue as causing [MV1] physical or emotional pain contemporaneously with the image’s creation.” App., *infra*, at 6a. The panel cited *Nesmith* but did not explain how *Nesmith* led to its conclusion. The panel “underscore[d]” MV1’s age (12 or 13) and the object used (a plastic hairbrush handle), but in reaching its conclusion, the panel relied upon cases involving images of bondage, sexual devices, and penetration of prepubescent children by adults. App., *infra*, at 6a.

² The Fifth Circuit had jurisdiction of the appeal under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

REASONS TO GRANT THE PETITION

I. There is a conflict between the appellate courts regarding the application of USSG § 2G2.1(b)(4)(A)’s four-level “sadistic or masochistic” enhancement.

A four-level enhancement under USSG § 2G2.1(b)(4)(A) applies when the “offense involved material that portrays . . . sadistic or masochistic conduct or other depictions of violence.” Different U.S. appellate courts have interpreted USSG § 2G2.1 in significantly different ways. The Fifth Circuit concluded below that a 12- or 13-year old girl’s apparent masturbation with a benign household item is sadistic. Would a 12- or 13-year old boy’s apparent masturbation with a benign household item (e.g., a sock) also be considered sadistic? Not likely. Although the behavior is private behavior, it simply is not sadistic.

The Seventh Circuit has thoughtfully noted, “certainly there are circumstances where self[-]penetration by a foreign object would be within the realm of sexual exploration or self-pleasuring—it is certainly not our place to opine on the varied and creative sexual proclivities of even minor individuals.” *United States v. Johnson*, 784 F.3d 1070, 1075-76 (7th Cir. 2015).

In *Johnson*, the court ultimately concluded that the depiction of a young girl inserting the handle of a screwdriver into her vagina would be considered sadistic because of the connotation associated with a screwdriver and based on the coercive circumstances surrounding the creation of the images (the Seventh Circuit does not apply the “objective-observer” standard required by the Fifth Circuit). *Id.* at 1075-76. The court explained, “[a] screwdriver is ordinarily used in a workshop setting for applying force with a sharp and potentially dangerous point.” *Id.* at 1075. Unlike a screwdriver, a hairbrush has no dangerous or violent connotations. It is a common and benign household item that is easily accessible to most teenagers.

Perhaps some individuals may believe it inappropriate for a 12- or 13- year-old girl to masturbate or self-penetrate using a hairbrush handle, but that is a subjective matter, based on personal feelings, beliefs, or opinions, not objective fact. An objective observer should not be influenced by personal feelings or opinions in considering facts, and as stated by the Seventh Circuit, the Court should not opine on the “varied and creative sexual proclivities of even minor individuals.” *Id.*

The Sixth Circuit has cautioned district courts about applying the sadism enhancement when the images at issue do not involve prepubescent girls.³ *United States v. Cover* and *United States v. Corp* are instructive. *Corp* involved sexually explicit images of postpubescent girls. *United States v. Corp*, 668 F.3d 379, 382-83 (6th Cir. 2012). The Sixth Circuit remanded the case to the district court to reconsider its application of the sadism enhancement. *Id.* at 388-91. The court explained that while cases involving prepubescent children or bondage are inherently sadistic, an image involving ejaculation in the face of a postpubescent girl was “more complicated.” *Id.* at 390. The court noted that the girl’s expression did not convey what could objectively be perceived as a manifestation of humiliation or disgust. *Id.*

The Sixth Circuit also found merit in an objection to the sadism enhancement in *United States v. Cover*. *Cover* involved a video depicting an 11- to 13-year-old girl engaging in “oral to genital intercourse with a male.” *United States v. Cover*, 800 F.3d 275, 279 (6th Cir. 2015). The court held there was insufficient evidence to support the sadism

³ A prepubescent minor is a minor who has not attained the age of 12 years. *See, e.g.*, USSG. §2G2.2(b)(2).

enhancement because there was “no indication that [the girl] was visibly pained or prepubescent.” *Id.* at 280.

In the present case, there is insufficient evidence to support the sadism enhancement because there was no indication that the girl in the video was pained or prepubescent. The four-level enhancement for an offense involving material portraying “sadistic or masochistic” conduct should not have been applied because there was no evidence that an objective observer would perceive the 12- or 13- year-old’s actions as causing the teen physical or emotional pain contemporaneously with the video’s creation.

The Eighth Circuit has applied a stricter approach, proclaiming it “difficult to imagine that the sexual penetration with a foreign object of a minor female would not qualify as ‘violence’ even if self-inflicted.” *United States v. Starr*, 533 F.3d 985, 1001-02 (8th Cir. 2008). The Seventh Circuit has explicitly rejected this approach. *Johnson*, 784 F.3d at 1075 (holding it “would not go so far as the Eighth Circuit [*Starr* court] in suggesting that the self-penetration by a minor of a foreign object would *always* be violent or sadistic.”). The Fifth Circuit also purported to reject this approach below. App., *infra*, at 6a-7a (stating that it was

not applying a per se rule applicable to self-penetration cases, citing *Starr* in comparison).

However, the images relevant in *Starr* were more egregious than those involved in the present case. The images in *Starr* depicted anal penetration with an unspecified foreign object. 533 F.3d at 990. The Government’s brief in *Starr* indicates that the videos showed a minor penetrating her anus with a foreign object and spanking herself until her buttocks were red. *United States v. Starr*, No. 07-2397, Appellee’s Br. at 6, 10, 48-50 (8th Cir. Nov. 7, 2007). Relative to vaginal penetration, which is commonplace for many postpubescent young women (tampons,⁴ masturbation), an objective observer might perceive anal penetration with a foreign object as painful. Moreover, the video at issue in the present case does not contain any punishing behavior like spanking. Like

⁴ It is not uncommon for postpubescent girls to insert “hard plastic” tampon applicators of approximately the same size into their vaginas. One does not need a medical degree to grasp this basic and well-known information concerning the hygiene of postpubescent girls. An objective observer would not perceive the actions shown in the video as causing the 12- or 13- year old girl physical or emotional pain contemporaneously with the image’s creation.

the Seventh Circuit, but unlike the Fifth Circuit, the *Starr* court did not apply an “objective observer” standard. *Starr* 533 F.3d at 1001-02.

The application of the sadism enhancement in other cases has also involved either more egregious images or prepubescent children. Below, the Government and the Fifth Circuit cited to numerous Fifth Circuit cases applying the enhancement, all of which are readily distinguishable from Appellant’s. *Desadier* and *Kimbrough* involved images of children in bondage. *United States v. Desadier*, 495 F. App’x 501 (5th Cir. 2012) (unpublished); *United States v. Desadier*, No. 11-31110, Appellee’s Br. at 8 (5th Cir. July 9, 2012) (“Specifically, some of the images depict a child in bondage and others portray anal penetration of young children by adult males.”); *United States v. Kimbrough*, 69 F.3d 723, 734 (5th Cir. 1995) (“The PSR stated that “Two of the child pornography pictures admitted into evidence are those of a female minor in bondage.”).

Cloud, *Comeaux*, and *Lyckman* all involved images of prepubescent children engaging sexually with adults. *United States v. Cloud*, 630 F. App’x 236, 237 (5th Cir. 2015) (unpublished) (involving five videos of a mother engaging in sexual activity with her seven-year-old son, including the mother performing oral sex on the seven-year-old); *United States v.*

Comeaux, 445 F. App'x 743, 744 (5th Cir. 2011) (unpublished) (describing a video of defendant performing oral sex on his 10-year-old step daughter, directing her to masturbate, and forcing her to perform oral sex on him); *United States v. Lyckman*, 235 F.3d 234, 236 (5th Cir. 2000) (concluding images of prepubescent girls having sex with adult males were sadistic).

Tanaka involved video footage of an adult male subjecting a minor to “various forms of sexual assault, including rape and forced oral sex, over her verbal objections.” *United States v. Tanaka*, No. 20-50171, 2021 U.S. App. LEXIS 22790, at *8 (5th Cir. Aug. 2, 2021) (per curiam) (unpublished).

Canada did not involve any analysis of whether the material in the images was sadistic because the defendant in that case did not challenge the district court’s characterization of the material as sadistic. *United States v. Canada*, Nos. 96-30319 and 96-30320, 1997 U.S. App. LEXIS 12789, at *12 n.5 (5th Cir. Apr. 7, 1997) (unpublished).

The Government also cited cases from other circuits applying the enhancement to prepubescent children. *Fuller*, *Garrett*, and *Delmarle* all involved prepubescent children. *United States v. Fuller*, 77 F. App'x 371, 384 (6th Cir. 2003) (“the pictures found on defendant’s computer included

images of sexual penetration of prepubescent girls”); *United States v. Garrett*, 190 F.3d 1220, 1224 (11th Cir. 1999) (expert testified images “involved children between eight and 11 years of age being penetrated vaginally and anally by adult males. One photograph depicted an 11 year old girl with a glass soda bottle in her vagina.”); *United States v. Delmarle*, 99 F.3d 80, 83 (2d Cir. 1996) (“Medical practitioners . . . estimated the age of the boy to be 8 or 9. It is also plain that a cylindrical object, of a circumference sufficiently substantial . . . , is being inserted by an adult hand into the child’s anus.”).

The Eighth Circuit’s holding in *Parker* rested on the depiction of adult males engaging in sadistic sexual conduct. *See United States v. Parker*, 267 F.3d 839, 847 (8th Cir. 2001). Although the court did note an image of “sexual penetration by a minor girl upon herself by using a large carrot,” it also noted images of “forced oral sex, an adult male ejaculating into the face and open mouth of a crying baby, and adult males standing over and urinating in the face of a female child.” *Id.* Ultimately, the court “determine[d] that when a pornographic image depict[ed] an adult male engaging in the sexual conduct of [that] nature,” the conduct qualified as sadistic. *Id.*

The images in the video in this case do not rise to the level of the “sadistic or masochistic” conduct in these cases. The video in this case did not involve bondage or any other sort of restraint. The video in this case did not involve prepubescent children or sexual activity with adults. The video in this case did not depict sexual assault, rape, or any forced sexual activity.

To the extent production of the video may have been subjectively painful, coercive, abusive, or degrading, there is nothing about the material portrayed in the video that made it objectively so. The video does not depict any expression of what could objectively be perceived as a manifestation of humiliation or disgust. Nothing in the video would lead an objective observer to believe that anyone was “causing” the young teen to insert a hairbrush handle into her vagina. It would appear to an objective observer that young teen was voluntarily masturbating with a hairbrush, not self-flagellating or otherwise causing herself pain.

The Fifth Circuit’s published decision below is out of line with the cases applying the sadism enhancement in the Sixth, Seventh, Eighth Circuits (as well as other cases in the Fifth Circuit). By granting this petition, the Court will have the opportunity to address the various

circuit conflicts in the application of sadism enhancement (objective observer standard or no, judgment regarding the sexual proclivities of non-prepubescent minors or no, per se rule or no).

CONCLUSION

Petitioner respectfully asks that this Court grant this petition and set the case for a decision on the merits.

Respectfully submitted,

CHERI THOMAS
LEWIS THOMAS LAW PC
4801 Woodway Dr., Suite 480E
Houston, Texas 77056

s/ Lewis Thomas
LEWIS THOMAS
**Counsel of Record*
LEWIS THOMAS LAW PC
4801 Woodway Dr., Suite 480E
Houston, Texas 77056
Tel.: (281) 513-9880
Fax: (713) 955-9662
lewisthomaslaw@gmail.com
Counsel for Petitioner

Date: July 30, 2022