

No. _____

In The
Supreme Court of the United States

AARON MICHAEL CRICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

J. Edward Yeager, Jr.
Counsel of Record
ATTORNEY AT LAW
P. O. Box 1656
Cornelius, NC 28031
(704) 490-1518 – Telephone
(866) 805-6191 – Facsimile
yeager@ncappeals.net

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

- A. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY DENYING MR. CRICK'S MERITORIOUS ARGUMENT THAT THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DENYING HIS MOTION FOR A DOWNWARD VARIANCE.

LIST OF PARTIES

AARON MICHAEL CRICK, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aaron Michael Crick respectfully prays for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The decision of the Fourth Circuit Court of Appeals affirming the judgment entered against Mr. Crick is reported at *United States v. Aaron Michael Crick*, 2022 WL 4128082, No. 22-4003 (4th Cir., 12 September 2022). (App A). Pursuant to Federal Rules of Appellate Procedure 32.1, the decision is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued an unpublished decision on September 12, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and this Petition is timely filed within ninety days of the underlying Judgment of the Fourth Circuit pursuant to United States Supreme Court Rule 13(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S. Code § 3553 – Imposition of a Sentence

(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—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(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, 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; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements 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);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement 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

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

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

(7) the need to provide restitution to any victims of the offense.

(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. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating 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 greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution

of another person who has committed an offense and that this assistance established a 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 lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of Reasons for Imposing a Sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing

Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence Procedure for an Order of Notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited Authority To Impose a Sentence Below a Statutory Minimum. — Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

STATEMENT OF THE CASE

On August 16, 2019, a detective with the Charlotte-Mecklenburg (North Carolina) Police Department (CMPD) identified an internet protocol (IP) address on which the detective had contacted someone distributing child pornography through that IP address. After further investigation, law enforcement determined that the IP address was associated with Aaron Michael Crick and obtained a search warrant for Mr. Crick's home. When the warrant was executed on February 13, 2020, law enforcement found Mr. Crick in the process of downloading child pornography. During a subsequent interrogation of Mr. Crick outside of his home he admitted to having downloaded child pornography. He admitted being attracted to pictures of a nude child and gave law enforcement the process he used to find files.

A grand jury in the Western District of North Carolina returned a three-count Indictment on March 17, 2020 charging Mr. Crick with two counts of possession of child pornography and one count of possession of pornography involving a prepubescent minor. The Indictment also contained a notice of forfeiture. On January 22, 2021 Mr. Crick appeared before Magistrate Judge David S. Cayer and entered a plea of guilty to the charges in the Indictment without a plea agreement.

The district court conducted a sentencing hearing on December 1, 2021, the Honorable Frank D. Whitney, Judge Presiding. At the sentencing hearing, Mr. Crick, through counsel, requested a downward variance. Judge Whitney denied the request. The district court accepted the probation officer's calculation that the sentencing guideline range was 151 to 188 months. Judge Whitney imposed a sentence of 151 months on each charge to be served concurrently and which were to be followed by lifetime supervised release. Mr. Crick entered notice of appeal on December 23, 2021. The Fourth Circuit issued an unpublished decision on September 12, 2022 affirming the district court's judgment. (App A).

REASONS FOR GRANTING THE WRIT

Petitioner asserts that the Writ should be issued because the district court erred in its sentencing decision. Judge Whitney conducted a sentencing hearing on December 1, 2021 and imposed a sentence of 151 months. Judge Whitney erred by denying the motion for a downward variance. Even at the lowest point, the advisory sentencing guideline range was excessive and overstated the seriousness of Mr. Crick's nonproduction offenses.

After Mr. Crick was arrested law enforcement interviewed him outside of his home and he admitted to downloading child pornography. Subsequently, law enforcement found and attributed to him 36,065 images. Mr. Crick entered a guilty plea to all the charges. He also signed a factual basis admitting that he knowingly transported and shipped, and aided and abetted, the transportation and shipping of child pornography as well as the possession of child pornography. There is no question of his responsibility. The issue, however, presented to the Fourth Circuit was whether the district court imposed an appropriate sentence.

Mr. Crick admitted responsibility for the offenses but he also had no criminal history other than a prior citation for an improper muffler. He was not a career criminal. It is not to downplay the seriousness of Mr. Crick's offenses, but there was no evidence that he was ever involved in the creation or selling of child pornography.

The majority of federal courts imposing sentences in non-production cases impose below-guideline sentences. The guideline range suggested by U.S.S.G. § 2G2.2 was 151 to 188 months. Mr. Crick argued to the district court as well as the Circuit Court that any sentence within that range – even at the low end of the range – was far greater than necessary to satisfy the goals and purposes of sentencing, namely, to “punish the defendant, to deter him and others from future crimes, to incapacitate the defendant in order to protect the public, and to rehabilitate the defendant.” *United States v. McCracken*, 667 F. Supp. 2d 675, 678 (W.D. Va. 2009), *citing*, *United States v. Raby*, 575 F.3d 376, 380 (4th Cir. 2009).

These goals of punishment can only be met with the district court conducting an individualized assessment of a defendant's circumstances rather than merely applying the guidelines. In Mr. Crick's case, the evidence rejected by the district court included empirical data from the Sentencing Commission that:

- Due to advancements in technology, enhancements that were only intended to apply to the most serious child pornography offenses are now routinely applied to most non-production child pornography offenders;
- U.S.S.G. § 2G2.2 contains a series of enhancements that have not kept pace with technological advancements. Four of the six enhancements – accounting for a combined 13 offense levels – cover conduct that has become so ubiquitous that they now apply in the vast majority of cases sentenced under § 2G2.2;
- In fiscal year 2019, less than one-third (30.0%) of non-production child pornography offenders received a sentence within the guideline range;
- During the same fiscal year, the majority (59.0%) of non-production child pornography offenders received a variance below the guideline range.¹

Judge Whitney acknowledged that he had “the authority to do certain things” but stated a feeling that “the appropriate body is Congress when it’s a rewriting statutes, (sic) particularly when Congress can be retroactive in rewriting statutes and the Sentencing Commission likewise can be retroactive in amending the guideline.”

¹ Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf.

From Judge Whitney's statements it is clear that he understood that he had the authority to make a downward departure. He also stated that the computer "enhancement, for example, does seem to be somewhat out of date; but nonetheless, it's the law." Nevertheless, he took the position that changing the sentence or the guideline was an action to be taken by Congress or the Sentencing Commission. The court's position that a sentence might be inappropriate yet not subject to being addressed by the court was an abuse of the very discretion which the district court is required to exercise in fashioning a sentence which was sufficient, but not greater than necessary. This Court has stated that a court must "make an individualized assessment based on the facts presented." *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 597, 169 L. Ed. 2d. 445 (2007). The district court's individualized assessment in this case was more heavily influenced by the guideline range than was appropriate.

Along this same vein, the district court disregarded examples of other sentencing court's granting variances on nearly identical cases. This would also seem to indicate that rather than the required individualized determination, the district court was, instead, wedded to the sentencing guidelines. Mr. Crick had submitted to two extensive evaluations which determined that he did not meet the criterial for pedophilic disorder and was a "low" risk of sexual recidivism. Mr. Crick also presented evidence from the Sentencing Commission that there was no quantitative difference between the imposition of a guideline range sentence and a downward

departure.² Imposing a sentence which was greater than necessary, as opposed to a more reasonable and appropriate downward departure sentence, was not congruent with deterrence and failed to show consistency with the sentencing factors in § 3553(a). Despite this evidence, Judge Whitney stated that “it is the judgment of the Court having considered the factors noted in 18 U.S.C. Section 3553(a), that defendant, Aaron Michael Crick, is hereby committed to the custody of the United States Bureau of Prisons to be in prison for a term of 151 months on each count, to be served concurrently.”

The Circuit Court affirmed saying that the district court considered Mr. Crick’s “arguments and determined that they justified a sentence at the low end of the Guidelines range rather than a downward variance...Thus, Crick’s sentence is substantively reasonable, and Crick failed to rebut the presumption of reasonableness accorded his sentence.”

Mr. Crick, therefore, asks this Court to grant the writ to determine whether the sentence was, in fact, reasonable. “As a result of [this Court’s] decision [in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)], the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are ‘reasonable.’” *Gall v. United States*, 552 U.S. 38, 46, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). The *Gall* Court went further to “reject...an

² See, U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 14 and 31 (2004) (overall recidivism rates for within guidelines sentence is 23.3% compared with 23% for downward departure sentences).

appellate rule that requires ‘extraordinary’ circumstance to justify a sentence outside of the Guidelines range.” Here, the sentence was within the guidelines range; however, Mr. Crick respectfully asserts that the sentence was excessive and should be reversed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

/S/ J. Edward Yeager, Jr.
J. Edward Yeager, Jr.
P. O. Box 1656
Cornelius, NC 28031
Telephone: 704-490-1518
Facsimile: 866-805-6191
yeager@ncappeals.net

Counsel for Petitioner