
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALDEN BRENT COOPER,

PETITIONER,

vs.

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

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QUESTIONS PRESENTED

Section 18 U.S.C. § 2252A(a)(1) can be violated by either knowingly receiving or distributing child pornography. A defendant accused of a violation of that statute is entitled to a two-level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1(a) if the defendant clearly demonstrates acceptance of responsibility for his offense. The paramount factor in determining eligibility for § 3E1.1 credit is whether the defendant truthfully admits the conduct comprising the offense or offenses of conviction.

1. Does denial of acceptance-of-responsibility credit for alleged criminal conduct the defendant refuses to admit and denies in good faith he committed violate the Due Process Clause of the Fifth Amendment and lack a proper foundation for the denial of the acceptance-of-responsibility credit in light of a defendant's due process right to contest alleged factual errors in his Presentence Investigation Report?

2. Where a defendant has admitted guilt both to federal law enforcement officers and in open court at sentencing, and expressed remorse, does the denial of the acceptance of responsibility reduction because the admission of guilt was not made to the probation officer during the presentence investigation interview violate due process and penalize a defendant for asserting his constitutional rights?

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IN THE SUPREME COURT OF THE UNITED STATES

ALDEN BRENT COOPER,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

The Petitioner, ALDEN BRENT COOPER, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 25, 2023.

OPINION BELOW

On April 25, 2023 the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the sentence of Petitioner as guilty of distributing and receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1), holding that:

(1) the district court committed no clear or obvious error in considering acts in addition to the acts underlying the offense of conviction so long as those acts constitute "relevant conduct" and relying on this conduct to deny petitioner a reduction under § 2G2.2 (b)(1);

(2) the district court committed no clear or obvious error when it denied petitioner an adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1(a) because petitioner admitted his offense to a government detective in a post-arrest interview and proceeded to trial, and did not acknowledge his guilt during his presentence interview with the probation officer;

(3) the district court committed no clear or obvious error in applying the U.S.S.G. § 2G2.2(b)(6) enhancement for the use of a computer which did not violate his due process rights because his base offense level already accounted for the use of computers to receive child pornography; and

(4) petitioner failed to show that the \$5,000 assessment pursuant to the Justice for Victims of Trafficking Act was error because the district court did not find that he was "non-indigent" as required by the act.

A copy of the unpublished opinion is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

“[no] person shall be...deprived of life, liberty, or property without due process of law.”

STATEMENT OF THE CASE

On October 13, 2021 petitioner was charged, in a one-count indictment in the Northern District of Texas, Abilene Division alleging a violation of 18 U.S.C. §2252A(a)(2) & 2252A(b)(1), Distribution and Receipt of Child Pornography.

A. Offense of Conviction and Related Conduct.

The indictment alleged that beginning on or about a date unknown and continuing to on or about April 20, 2021, petitioner did knowingly distribute and receive child pornography and material that contained images of child pornography, which had been shipped and transported in and affecting interstate and foreign commerce by any means, including by computer.

B. The District Court Proceedings.

On February 22, 2022, petitioner appeared before U.S. District Judge Mark T. Pittman, in Fort Worth, for a bench trial. On that same date, Judge Pittman found petitioner guilty of Count 1 of the Indictment. Sentencing was scheduled for June 24, 2022, in Abilene.

1. Presentence Investigation Report and Objections.

The initial Presentence Investigation Report ("PSR") was filed on April 19, 2022, finding a total offense level of 37, a Criminal History Category of I, and a Guideline Imprisonment Range of 210 to 262 months.

Petitioner objected to the paragraphs in the PSR concerning "Drop Box" that failed to point out that "Drop Box" is a personal cloud account which does not demonstrate an attempt to distribute. In addition, petitioner objected to the allegations regarding

distribution of child pornography for the reason that there was no evidence of distribution in the discovery except uploading and storage of the material to a personal cloud account. Petitioner further objected that there was "no evidence of distribution ...to anyone." Petitioner objected to the 2-level increase for "knowingly engaging in distribution" and objected to allegations of certain alleged criminal conduct and abuse from a state case, arguing that the allegations had been rejected by the state District Attorney's office and should not be considered part of "relevant conduct." The probation officer noted in her Addendum to the PSR that the PSR would be updated to include certain information about petitioner's other alleged criminal conduct from a state case which was rejected by the state prosecutor.

2. Sentencing Hearing.

At the Sentencing Hearing held on July 8, 2022, petitioner stated that he regretted his mistakes and accepted responsibility. Petitioner also stated that he loved his children and that he had never touched them. Nevertheless, the district judge upheld the denial of acceptance of responsibility, thereby leaving petitioner's total offense level without the possible three level reduction, and a substantially higher guidelines range.

Petitioner was sentenced to 210 months on the single count. Petitioner is presently in custody serving that sentence.

On July 11, 2022, 2016, a Notice of Appeal to the Fifth Circuit was filed.

C. The Court of Appeals' Decision.

On April 25, 2023, the Court of Appeals for the Fifth Circuit affirmed the district court's sentence.

The Fifth Circuit found that the district court committed no clear or obvious error in denying petitioner an adjustment for acceptance of responsibility under Sentencing Guidelines § 3E1.1(a).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court of Appeals has decided an important and recurring question of federal law that has not been, but should be settled by this court.

A. The Court Erred By Incorrectly Calculating the Guidelines Sentencing Range.

The sentencing court must begin sentencing proceedings by correctly calculating the applicable Guideline sentencing range because "[t]hat range provides an anchor for the court in evaluating the effects of the § 3553(a) factors." *See, e.g., United States v. Dixon*, 984 F.3d 814, 824 (9th Cir. 2020); *United States v. Snowden*, 806 F.3d 1030, 1036 (10th Cir. 2015).

A mistake in calculating the recommended Guidelines Sentencing Range is a significant procedural error that requires remand for resentencing. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 (9th Cir. 2011)(per curiam). The district court in the instant case erred when it failed to apply the three level acceptance of responsibility reduction to Cooper's offense level, in part because he "minimized his conduct in the post-arrest interview ... and did not acknowledge his guilt during his presentence interview with the probation officer (emphasis supplied) and consequently improperly calculated his advisory Guideline range. Proper application of the reduction would have yielded an adjusted offense level of 32 and an advisory Guidelines range of 121 to 151 months of imprisonment, a

significantly lower range than the 168 to 210 months of the PSR Addendum.

B. Petitioner Was Eligible for the Acceptance of Responsibility Guidelines Reduction.

Under the Guidelines, a defendant is entitled to a two level reduction to his base offense level if he "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). The failure to admit to conduct that a court in a bench trial, did not convict on does not necessarily preclude application of the acceptance of responsibility reduction. *See, e.g., United States v. Dixon*, 984 F.3d 814, 824 (9th Cir. 2020); *United States v. Delacruz*, 862 F.3d 163, 177 (2nd Cir. 2017). The district court's denial of "acceptance of responsibility" credit based on conduct "beyond the offense of conviction" lacked a proper foundation, and as a result the petitioner was denied due process of law. The fact that there were some timing issues in establishing petitioner's eligibility for the acceptance reduction was not the result of petitioner's actions but resulted from the conflict between timing of certain steps in the process of granting the reduction with the petitioner's constitutional due process right to object to alleged factual errors in his PSR. In such a case, the due process right to put on a defense trumps the timing issues involved in obtaining credit for the reduction.

"In light of a defendant's due process right to contest alleged factual errors in his PSR, his good-faith objection to material PSR statements that he disputes does not provide a proper foundation for denial of the acceptance-of-responsibility credit."

United States v. Delacruz, 862 F.3d at 178.

C. A Defendant is Not Required to Confess to any Relevant Conduct beyond the Offense of Conviction in order to Obtain the Reduction for Acceptance of Responsibility.

The failure to admit to conduct that the court in the bench trial did not convict on does

not preclude acceptance of responsibility. The "commentary to the acceptance-of-responsibility guideline specifies that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a) [of Guideline § 3E1.1]. *Delacruz*, 862 F.3d at 177. The bench trial convicted petitioner of only receipt, viewing and purchasing child pornography, for which he had consistently admitted responsibility, and did not convict him of "knowing distribution" of child pornography. Nothing in § 3E1.1 requires that a defendant admit to all the charged offenses. Nothing in § 3E1.1 requires that a defendant "acknowledge his guilt during his presentence interview with the Probation Officer" as the appellate court below suggests. Petitioner was denied the acceptance of responsibility credit, in part, because he was viewed as falsely attempting to "minimize" his participation in the charged offenses. Nothing in § 3E1.1 requires that a defendant not "minimize" his conduct in a post-arrest interview, as the court below suggests. Does a denial of "distribution" conduct constitute "minimization"? Minimization is nowhere mentioned or defined in the guideline or commentary. In fact, petitioner was exercising his due process right to contest alleged factual errors in his PSR, and he should not be penalized for doing so. Defending one's self against an inaccurate criminal charge is not "minimization"--it is the right to defend yourself against factual errors that have serious consequences if not challenged and defeated.

Petitioner has a due process right to contest the allegation of "knowing distribution." Petitioner admitted the charged offenses other than distribution. The district judge found that petitioner had twice admitted those offenses to government law enforcement agents.

The petitioner had, in effect, timely notified authorities that he accepted guilt to all of the offenses charge, other than distribution, and the government could have investigated the objections to the charge of knowing distribution and resolved the charges by accepting a plea to the other charges as accurately defined and avoid preparing for trial. Petitioner should not suffer a loss of the acceptance of responsibility reduction because the government did not timely investigate petitioner's defense and determine then that petitioner was not guilty of distribution, leaving the way open to resolve the criminal charges without going to trial. Petitioner accepted responsibility for all conduct for which he was convicted. The PSR Addendum, filed on June 17, 2022, accepted petitioner's objection to the allegation of "knowing distribution" and removed the 2-level enhancement for knowingly engaging in "distribution." Had that process been completed earlier, all parties could have avoided the necessity to prepare for trial.

D. The District Court Erred in Failing to Award the 2-level Adjustment for Acceptance of Responsibility for his "Actual" Criminal Conduct because Petitioner Acknowledged Responsibility to Law Enforcement Twice Prior to Sentencing, Contesting only the charge of "Distribution" which was not part of the Crime of which he was Convicted.

The Indictment charging Cooper alleged that he "did knowingly distribute *and* receive child pornography which had been shipped and transported in and affecting interstate and foreign commerce." (emphasis added). Petitioner disputed that he had "distributed" child pornography but admitted receiving, viewing and paying for child pornography. Petitioner acknowledged responsibility for his "actual" criminal conduct to law enforcement officers twice prior to sentencing and again accepted responsibility in open court at sentencing on July 8, 2022.

Petitioner's Objections to the PSR, numbers 1 through 4, objected to paragraphs 6, 11, 17 and 24 and the statements that defendant engaged in "distribution." Petitioner's objections stated that there was "no distribution to anyone" and that "Drop Box" is a personal cloud account "which does not demonstrate an intent to distribute" and there is "no evidence of distribution" except the uploading and storage of the material to a personal cloud account. The government in its Response to Defendant's Objections to the Presentence Report stated that "[a]fter speaking with the case agent, the Government acknowledges that it has no evidence Cooper distributed pornography to other like-minded individuals."

Petitioner was not "convicted" of "distribution" of pornography at his bench trial and the Findings of Fact and Conclusions of Law, coupled with the district judge's rulings at sentencing on "distribution" make it clear that "distribution" was not part of petitioner's criminal conduct and that Petitioner did not admit guilt and express remorse "only then" after the conviction. He had admitted guilt to the receipt, possession and viewing of child pornography to law enforcement on April 20, 2022. There was no reason for petitioner to admit guilt and express remorse for distribution, because that was not a part of his criminal conduct.

The Government argued in its brief that the district court did not err in failing to award the adjustment for acceptance of responsibility because Cooper failed to demonstrate "sincere contrition," minimized his behavior by blaming alcohol and "refused" to accept his guilt or acknowledge responsibility when interviewed by a probation officer.

Cooper did, in fact, admit his guilt and did accept responsibility, both at sentencing and before, to law enforcement. There was no showing that Cooper "refused to accept his guilt or acknowledge his responsibility when interviewed by a probation officer" as alleged in the government's brief. "[A] defendant is not required to volunteer or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a)" of Guideline § 3E1.1. U.S.S.G. 3E1.1, comment. n. 1 (A). In addition, the commentary states that "[a] defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under [subsection a of § 3E1.1]." (§ 3E1.1, comment. n.1 (A). The PSR did not state that Cooper "refused" to acknowledge guilt or accept responsibility when interviewed. Words have meaning. It said only that the defendant "did not acknowledge his guilt or accept responsibility." A defendant can be accused of not accepting responsibility or acknowledging guilt if he does not "volunteer" and/or simply "remains silent" when conduct not properly a part of his criminal conduct is charged? The Guidelines permit a defendant to do that without it affecting his right to obtain a reduction under § 3E1.1(a). Yet here Cooper's ability to obtain the reduction was withheld improperly by imprecision of words used to describe his actual convicted conduct.

The Government was accusing Cooper of "distribution" of child pornographic materials. The district court's ruling on Cooper's objections to the allegations of "distribution" in the PSR did not occur until the sentencing hearing on July 8, 2022. A defendant "may *clearly* demonstrate an acceptance of responsibility for his criminal

conduct even though he exercises his constitutional right to a trial." § 3E1.1, comment n.2 (emphasis added). The commentary states "[t]his may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct.)" That is what happened in this case. The PSR stated that Cooper was guilty of "distribution" and he was not. It was not until the Addendum to the PSR was filed that the probation officer accepted Cooper's objections to the "distribution" allegations and amended various paragraphs in the PSR, which impacted Cooper's guidelines range. However, Cooper did not get the tangible benefit of a reduction in his sentence for acceptance of responsibility which he should have received because he was clearly eligible for it. He truthfully admitted his conduct, although he disputed the "distribution" allegations, and rightly so. The district court's decision with respect to an adjustment for acceptance of responsibility did not have "a sufficient foundation for withholding the reduction," as alleged by the government in its brief, because the Guideline clearly states that a defendant is not required to volunteer or affirmatively admit relevant conduct beyond the offense of conviction "in order to obtain a reduction under subsection (a)." (§ 3E1.1, comment n. 1 (a).) Cooper continued to object to the allegations that he was guilty of "distribution" when he was not, but he "confessed to law enforcement on two separate occasions to knowingly viewing child pornography" (as stated by the district judge in his Conclusion of Law 33), did not "falsely deny" or "frivolously contest" relevant conduct that the court determined to be true, and did not act in a manner inconsistent with acceptance of responsibility. When Cooper stated to law

enforcement that he looked at pornography when he was drinking, that is not "minimiz[ing] his own conduct" (as stated by the government in its brief) but simply being honest and open about the problem he had. Furthermore, the district court did not determine the relevant conduct to be true, but instead determined, and stated, that there was no distribution.

A defendant cannot be held to have "refused to admit guilt on the issue of "distribution"--one element of the charged offense, when he denied that he "distributed" pornography and the district court stated he was, in fact, not guilty of distribution, thus justifying his "refusal" to admit guilt to that charge. "Distribution" of child pornography was not part of petitioner's "criminal conduct" and there was no "sufficient foundation" for withholding the reduction for acceptance of responsibility.

The errors did affect Cooper's substantial rights because a correct calculation of the sentence begins with the required correct guidelines calculation. Plain error was shown here, where there was not a sufficient foundation for withholding the reduction. The PSR said only that "the defendant did not acknowledge his guilt or accept responsibility for his criminal conduct" and did not say that Cooper "refused" to acknowledge guilt or "refused" to accept responsibility for his criminal conduct. It did not say that he was "asked" if he acknowledged guilt. A defendant is not required to do either of these at a time when he and his counsel are disputing that a significant element of criminal conduct--"distribution"--was disputed (and Cooper ultimately prevailed in that dispute). Cooper was clearly entitled to "acceptance of responsibility" and withholding it for incorrect reasons is not justified.

The government argued in its brief that Cooper failed to show that the alleged error affected his substantial rights. However, the court commits a procedural error when it imposes a sentence not based on a correctly calculated guidelines range. A sentencing court must properly calculate the guideline sentencing range because "[t]hat range provides an anchor for the court in evaluating the effects of the § 3553(a) factors. *See United States v. Snowden*, 806 F.3d 1030, 1036 (10th Cir. 2015). The record must clearly show not only that the district court intended to provide an alternative sentence, but also that the alternative sentence is based on an identifiable, correctly calculated guidelines range and some explanation of that sentence. *United States v. Icaza*, 492 F.3d 967, 971 (8th Cir. 2007). The district court's error affected Cooper's sentence and seriously affected the fairness, integrity, or public reputation of judicial proceedings. Cooper's sentence should be vacated and remanded for resentencing. *See United States v. Andino-Ortega*, 608 F.3d 305, 311-12 (5th Cir. 2010).

At sentencing, the court sustained petitioner's objections to "distribution" as described in the PSR. There was no "distribution" of child pornography by petitioner and petitioner's objections relating to "distribution" were properly raised and his right to a bench trial to assert his objections is clear. The reduction for "acceptance of responsibility" should have been granted to petitioner and withholding it was prejudicial error that unjustifiably increased his sentence.

The failure to correctly apply the Guidelines was specifically listed by the Supreme Court in *Gall* as a "significant procedural error." *Gall v. United States*, 552 U.S. 38, 51 (2007). "[A] district court should begin all sentencing proceedings by correctly

calculating the applicable Guidelines range." *Gall*, 552 U.S. at 49. A district court that improperly calculates a defendant's Guidelines range has committed a "significant procedural error." *Gall* at 51. *Molina-Martinez* stated that "the record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). The "record" is silent as to what the district court might have done had it considered the correct guideline range. For example, in *United States v. Munoz-Camarena*, 631 F.3d 1028, 1031 (9th Cir. 2011), the court stated that "[a] district court's mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand, because the court's analysis did not flow from an initial determination of the correct Guidelines range."

E. Petitioner Is Entitled to a Reduction in Sentence for Acceptance of Responsibility and it Was Plain Error to Refuse the Reduction for Contesting the Allegation of Refusal to Admit a Charge that Petitioner Was Not Guilty of Committing.

At sentencing, the district judge granted the petitioner's objections to the PSR, including the objections to "distribution." The Probation Officer filed an Addendum to the PSR on June 17, 2022 stating, among other things, that "[a]fter further review of the investigative materials, it was determined the defendant did not use Drop Box to distribute child pornography, but only to upload and store the images and videos he received." The 2-level increase under U.S.S.G. § 2G2.2(b)(3)(F) if the defendant knowingly engaged in distribution, was deleted. Petitioner's criminal conduct did not include "distribution." It was clear and obvious error to deny an adjustment for

acceptance of responsibility where the reasons given for such denial were clear and obvious errors. Petitioner did acknowledge his guilt to the charges except for the charge of distribution. However, that charge was denied by petitioner and was not proven. In fact, the court granted counsel's objection to distribution at sentencing, and the two-level increase given to petitioner in the PSR for knowingly engaging in distribution was deleted in the Addendum to the PSR.

II. There is Conflict Among the Lower Courts Regarding the Question Presented and the Question Presented Significantly Impacts the Administration of Justice.

"If a defendant enters a guilty plea prior to trial, truthfully admits the conduct comprising the offense, and admits, or at least does not falsely deny, any additional relevant conduct for which he is accountable, the court may find significant evidence of the defendant's acceptance of responsibility." *United States v. Medina-Anicacio*, 325 F.3d 638, 648 (5th Cir. 2003). A defendant is "not required to volunteer or affirmatively admit relevant conduct beyond the conviction offense." *United States v. Patino-Cardenas*, 85 F.3d 1133, 1135 (5th Cir. 1996). However, a defendant may not "falsely deny or frivolously contest relevant conduct that the court determined to be true." *Id.*

B. Petitioner Clearly Acknowledged His Guilt and Expressed Contrition, Both at His PSR Interviews and at Sentencing.

At sentencing petitioner again acknowledged his guilt and expressed contrition, saying "Just like to say that I regret my mistakes and accept responsibility. And I love my children, I've never touched them." At no time did petitioner deny guilt or frivolously contest his guilt or conviction. Under these circumstances, petitioner was entitled to a 3-

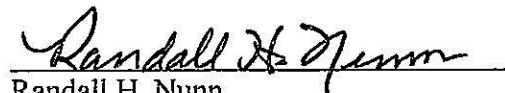
level reduction for acceptance of responsibility under Section 3E1.1 (a) and to deny him the reduction for acceptance of responsibility is to penalize him for asserting his constitutional rights.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: July 23, 2023

Respectfully submitted,

A handwritten signature in cursive script, reading "Randall H. Nunn", is written over a horizontal line.

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CERTIFICATE OF SERVICE

RANDALL H. NUNN, a member of the Bar of the State of Texas and appointed

under

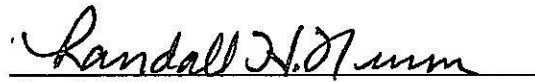
the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding
Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed In
Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents
by United States Postal Service mail, and addressed to:

The Honorable Elizabeth Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Joseph Wyderko, Esq.
Deputy Chief Appellate Section
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and further certifies that all were served on July 23, 2023.



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