In the
SUPREME COURT of the UNITED STATES
October Term, 2023

BLAISE CAROLEO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a waiver of the protections against cruel and unusual punishment afforded to a defendant under the Eighth Amendment is valid and enforceable.

2. Whether the sentencing scheme under 18 USC §2251 and the corresponding guideline USSG §2G2.1 result in inherently barbaric punishment in violation of the defendant's rights under Eighth Amendment of the Constitution

PARTIES TO THE PROCEEDING

The are no parties other than those named in the caption of this petition who were parties to the proceeding before the court whose judgment is sought to be reviewed.

DIRECTLY RELATED CASES

1. United States District Court for the Eastern District of New York

   United States v. Blaise Caroleo, 17-CR -177 (ENV) Judgment entered March 3, 2022

2. United States Court of Appeals for the Second Circuit

   United States v. Blaise Caroleo, 22-Cr-537, Summary Order entered July 5, 2023

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Guidelines

Petitioner Blaise Caroleo respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 5, 2023.

OPINIONS BELOW

The opinion of the Second Circuit dated July 5, 2023, attached hereto as Appendix A.

JURISDICTION

In a Summary Order entered July 5, 2023, the United States Court of Appeals for the Second Circuit in *United States v. Blaise Caroleo,* 22-Cr-537 entered an order dismissing that appeal. This petition for certiorari is being filed within 90 calendar days of the order dismissing the appeal. This Court's jurisdiction is invoked under Title 28, United States Code, section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. The District Court Proceedings - Conviction and Sentence

This petition relates to the sole offense to which Mr. Caroleo entered a guilty plea, which was Count Four of the indictment a violation of 18 U.S.C. §2251(a) and (e), and while

the plea was to a single count of the indictment, reference was made to multiple victims in the remaining counts of the indictment.

Count Four charged that on or about and between January 24, 2016 and October 12, 2016, in the Eastern District of New York and elsewhere, the defendant did knowingly and intentionally employ, use, persuade, induce, entice and coerce a minor, to wit: Jane Doe #1, to engage in sexually explicit conduct, for the purpose of producing one or more visual depictions of such conduct, knowing and having reason to know that such visual depictions would be transported and transmitted using a means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce, which visual depictions were produced and transmitted using materials that had been mailed, shipped and transported in and affecting interstate and foreign commerce by any means, to wit: one or more mobile Internet devices, computers and smartphones, and such visual depictions were actually transported and transmitted using a means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce.

The government alleged, in the indictment, that the defendant had conversations with and requested images from Jane Doe #1 in October 2015. The government indicated that Jane Doe #1 was 14 years old at that time. The petitioner had multiple sexually explicit conversations with her, requested that she send an explicit video of herself and distributed that video to another person.

In addition to these images, the government recovered 1 image and 3 videos depicting sexual acts on minors as young as 7 years old that were stored on the petitioner's phone.

The government recovered additional devices at the defendant's home. The government uncovered messages from January 17, 2017, between the petitioner and another adult male

trading pornographic images involving a 6 year-old, an 11 year-old and a 12 year-old. The government identified at least nine minor victims form images and information on the petitioner's devices ranging from the ages of 12-15 years old.

Petitioner pled guilty pursuant to a plea agreement. That agreement provided a guideline stipulation. The agreement provided that the petitioner's base offense level under U.S.S.G. § 2G2.l(a) is 32, with an increase of two levels for each of the following, Victim Between Age Twelve and Sixteen (§2G2.l(b)(l)(B)); Engaged in Distribution (§ 2G2.1 (b)(1)(B)); Use of a Computer (§ 2G2.l(b)(6)(B)); and an additional five levels for Multiple Victims (§ 3Dl.2(d); § 3Dl.4)) for a total offense level of 43. The agreement included the application of a two-level reduction for acceptance of responsibility pursuant to U.S.S.G. 3E1.1(a) resulting in total offense level of 41 and "a range of imprisonment of 360-life, assuming that the defendant falls within Criminal History Category II." Because 360 months is the statutory maximum, the effective guidelines range of imprisonment stipulated to in the agreement was 360 months.

The agreement also included an appellate waiver that indicated that the petitioner would have to agree not to file an appeal or petition pursuant to 28 USC §2255 or any other provision of law, the conviction or sentence in the event that the court imposes a term of imprisonment of 360 months or below. In addition, the petitioner was required to waive the right to raise on appeal or on collateral review any argument that (1) the statute to which the defendant is pleading guilty is unconstitutional and (2) that the admitted conduct does not fall within the scope of the statute.

As a part of the plea hearing, the court conducted an extensive inquiry into both the petitioners understanding of the plea agreement, particularly, the manner in which the guidelines would be calculated, and the potential sentence and that there was no limitation as to the conduct

the Court would consider upon sentencing. The government laid out the conduct it could prove if the case had gone to trial. The petitioner took no issue with admitting the elements of the offense and indicated that he had not taken issue with the conduct or elements of the offense, but to the sentencing scheme.

In addition, the government laid out the petitioner's appellate waiver indicating,

> the defendant agrees not to file an appeal or otherwise challenge by 28 U.S.C. §2255 or any other provision, the conviction or sentence in the event that the Court imposes a term of imprisonment of 360 months or below. He also then goes on to waive other rights of appeal or collateral review with respect to his pleading guilty would be unconstitutional or that the admitted conduct does not fall within the scope of the statute.

The Court once again informed the petitioner as to his appellate waiver,

> You do understand that if I sentence you to a sentence of 360 months or below, you will be giving up your right to file an appeal or collaterally attack either the conviction or the sentence that I impose; do you understand that?

Both times Mr. Caroleo indicated that he understood.

Finally, the court asked Mr. Caroleo to state what happened. He sufficiently admitted the elements of the offense, and the remainder of the plea proceeding was unremarkable.

The Presentence Report

The probation department employed a different calculation of the defendant's guideline level. Even though Caroleo's plea involved only one victim, probation calculated separate offense levels for all nine individuals named in the underlying indictment and performed a multi-count analysis based on USSG §2G2.1, and determined that the combined adjusted offense level was level 45. To that, the probation added five additional levels pursuant to USSG §4B1.5(b) and subtracted two levels for acceptance of responsibility pursuant to USSG §3E1.1(a).

Probation nonetheless determined that the total offense level, while calculated at 48, will be treated as 43 pursuant to Chapter 5, Part A (comment n.2) that indicates that where the total offense level is calculated in excess of 43, the offense level will be treated as a level 43

Probation calculated a criminal history score of two which corresponds to criminal history category of two. Accordingly, probation outlined that the minimum term of imprisonment is 15 years and the maximum is 30 years pursuant to 18 USC §2251(a) and 18 USC §2251(e), and accordingly determined that the "statutorily authorized maximum sentence is 30 years" and that "the restricted guideline range is 360 months."

The PSR also outlined that the guideline for supervised release is 5 years to life (USSG §5D2.1(b)(2)) and that the defendant was subject to a $5000 special assessment under 18 USC §3013 and 18 USC §3014, and that the fine range for this offense is from $50 to $250,000. (USSG §5E1.2(c)(3)).

The Sentencing

On March 22, 2022, the defendant appeared with Counsel for sentencing. In connection with the sentencing, the District Court reviewed the PSR as well as submissions by both the defendant and the government. Neither the government nor the defendant had objections to the facts and circumstances of the offense of conviction or the facts and circumstances of Mr. Caroleo's background. Likewise, neither party took objection to probation's offense level computation and recommendation or criminal history category computation and recommendation. The court received statements from two of the victims and heard from the defendant, defense counsel and the government.

The Court outlined its reasons for the sentence. The Court indicated that it considered this case both production and distribution of child pornography and that it considered a number

of incidents as aggravating factors. Specifically, the Court was disturbed by the defendant's alleged threats of exposing one of his victims to their friends when they refused to "perform" and that the defendant made attempts to arrange a meeting with a young girl in Medford, Long Island.

The Court noted that Mr. Caroleo was a criminal history category II, with a prior firearms violation and a pending assault case and that there is a need for general deterrence and a need to incapacitate offenders of this kind.

The Court sentenced Mr. Caroleo to 360 months' imprisonment to be followed by ten years supervised release. The Court imposed no fine or restitution, and only ordered a $100 special assessment and required the defendant to register as a sex offender. The Court also informed the defendant as to numerous special obligations and restrictions, mental health treatment and no contact with minors under the age of 18 upon release.

Finally, the Court reminded Mr. Caroleo of the appellate waiver and notified him that he would have the right to appeal under certain circumstances.

B. The Appeal in the Second Circuit

Mr. Caroleo appealed to the Second Circuit arguing first, that petitioner's appellate waiver was not enforceable because protections against cruel and unusual punishment afforded to a defendant under the Eighth Amendment were not waivable, and that the sentencing scheme under 18 USC §2251 and the corresponding guideline USSG §2G2.1 result in inherently barbaric punishment in violation of the defendant's rights under Eighth Amendment of the Constitution, and that the defendant's 360-month term of incarceration, premised on application of a Guideline is analogous to a Guideline that this Court has recognized as eccentric, outdated, and disproportionate, was substantively unreasonable.

The government opposed and moved to dismiss the appeal. The Second Circuit granted the government's motion and dismissed Caroleo's appeal, holding that "[a]ppellant has not demonstrated that the waiver of his appellate rights is unenforceable under *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000).

REASONS FOR GRANTING THE PETITION

The Second Circuit's Decision Is In Violation of the Petitioner's Protections Under the Eighth Amendment of the Constitution

A. The Defendant's Appellate Waiver Is Invalid And Unenforceable

[A] defendant may have a valid claim that the waiver of appellate rights is unenforceable ... when [1] the waiver was not made knowingly, voluntarily, and competently, [2] when the sentence was imposed based on constitutionally impermissible factors, such as ethnic, racial or other prohibited biases, [3] when the government breached the plea agreement, or [4] when the sentencing court failed to enunciate any rationale for the defendant's sentence, thus amounting to an abdication of judicial responsibility subject to mandamus." United States v. Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000) (quotation marks and citations omitted).

Because "[p]lea agreements are subject to the public policy constraints that bear upon the enforcement of other kinds of contracts," this Court has recognized that "a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court." United States v. Yemitan, 70 F. 3d 746, 748 (2d Cir. 1996) (quotation marks omitted).

A violation of a fundamental right warrants voiding an appeal waiver. United States v. Riggi, 649 F.3d 143, 147 (2d Cir. 2010). A defendant may be deemed incapable of waiving a right that has an overriding impact on public interests, United States v. Ready, 82 F.3d 551, 555

(2d Cir. 1996), as such a waiver may "irreparably discredit[] the federal courts," id. at 556 (quoting United States v. Mezzanatto, 513 U.S. 196, 204 (1995)).

Here, the defendant's plea agreement included a provision waiving the constitutionality of the statute under which the defendant was convicted under is unconstitutional. The waiver is overbroad and vague and it requires the defendant to waive a fundamental right that has an "overriding impact on public interests." Specifically, the defendant is being forced to waive the protections provided under the Eighth Amendment of the constitution, rights that are fundamental and crucial to every human being. In addition, public policy should frown upon such waivers. Requiring a defendant to give up the right to argue that his punishment is "cruel and inhuman," could yield disastrous results and open up defendants to untold and unimagined abuses.

Courts have recognized that appellate waivers are unenforceable in similar circumstances. See Bonilla vs. United States, 2020 U.S. Dist. LEXIS 15896 (E.D.N.Y. Jan. 29, 2020), 2020 WL 489573, at *3 (finding that a defendant's "waiver of appealability is not enforceable" against a Davis challenge); Leyones v. United States, 2018 WL 1033245, at *2-3 (E.D.N.Y. Feb. 22, 2018) (expressing "serious doubts" that "an appellate or collateral review waiver [is] enforceable to bar a petitioner's claim that a newly announced constitutional rule warrants vacating his criminal conviction")

B. The Statute and Sentencing Scheme violate the Eighth Amendment of the Constitution

The statute to which Mr. Caroleo plead guilty and was convicted under, and its sentencing scheme is unconstitutional as it is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

The Supreme Court first interpreted the Eighth Amendment to prohibit "greatly

disproportioned'" sentences in Weems v. United States, 217 U.S. 349, 371 (1910) (quoting O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting)). Since then, the Court has emphasized that constitutional proportionality is a "narrow" principle in that it "does not require strict proportionality," and it "forbids only extreme sentences that are `grossly disproportionate' to the crime." Graham v. Florida, 560 U.S. 48, 58 (2010)

A number of principles relate to this narrow view of the constitutional mandate of proportionality: (1) the "substantial deference" generally owed by reviewing courts "to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes"; (2) a recognition that the Eighth Amendment does not mandate "any one penological theory" and that "competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic"; (3) respect for the "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms" that "are the inevitable, often beneficial, result of the federal structure"; and (4) prudential understanding that proportionality review "should be informed by objective factors to the maximum possible extent," that the "most prominent objective factor is the type of punishment imposed," and that while the Supreme Court has frequently referenced "the objective line between capital punishment and imprisonment for a term of years," it has itself acknowledged a "lack [of] clear objective standards to distinguish between sentences for different terms of years." Harmelin v. Michigan, 501 U.S. at 998-1001 (Kennedy, J., concurring) (internal quotation marks omitted).

The Supreme Court's proportionality cases fall into two classifications. "The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case." Graham v. Florida, 560 U.S. at 58 (emphasis added). In making a case-

particular assessment of proportionality, the Court has employed a two-step analysis, first "comparing the gravity of the offense and the severity of the sentence." Id. at 58. The Court observed that it will be "`the rare case in which this threshold comparison... leads to an inference of gross disproportionality.'" Id. (quoting Harmelin v. Michigan, 501 U.S. 957,1005 (1991) (Kennedy, J., concurring) (first alteration in Graham omitted)).

Should such an inference arise, however, the second step of the analysis requires a court to "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." Id. Only "[i]f this comparative analysis `validate[s] an initial judgment that [the] sentence is grossly disproportionate'" will the sentence be deemed "cruel and unusual." Id. (quoting Harmelin v. Michigan, 501 U.S. at 1005 (Kennedy, J., concurring), United States v. Reingold, 731 F.3d 204 (2d Cir. 2013).

The US Supreme Court has made clear that the Eighth Amendment's ban on cruel and unusual punishments "prohibits the imposition of inherently barbaric punishments under all circumstances." Graham, 560 U.S. at 59 (citation omitted).

As illustrated below, (POINT TWO) when compared to sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions, there is no doubt that Caroleo's sentence is "cruel and unusual" and therefore violates the defendant's Eighth Amendment constitutional rights.

Because of the reasons listed above, Caroleo's appellate waiver is invalid and unenforceable.

C. The Sentencing Scheme Under 18 USC §2251 And USSG §2G2.1 Result In Inherently Barbaric Punishment In Violation Of The Defendant's Rights Under Eighth Amendment Of The Constitution.

The child pornography production guideline, U.S.S.G. § 2G2.1, shares many of the same flaws identified by this Court when it reviewed the child pornography distribution guideline[1], U.S.S.G. § 2G2.2. See United States v. Dorvee, 616 F.3d 174, 184-88 (2d Cir. 2010). Both guidelines do not require consideration of the defendant's characteristics and do not meaningfully account for differences in conduct committed by persons who violated the same statute. It is axiomatic that punishment should be proportional to an offense. See Graham v.

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[1] Rather than being a product of the Commission's empirical study, Congress has driven amendments to that guideline and some enhancements are applicable in so many cases that the guideline does not help distinguish between levels of culpability among defendants. See, e.g., U.S. Sentencing Comm'n, Federal Child Pornography Offenses 249 (2012) (the "2012 Commission Report"), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf ("Over the years, the Commission increased the base offense level [under 2G2.1] and added additional enhancements, usually as a result of congressional directives."); U.S. Sentencing Comm'n, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based, Fiscal Year 2018 44, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2018/Use_of_SOC_Guideline_Based.pdf (showing that 90.4 percent of sentences under section 2G2.1 included a two-or four-point enhancement based on the victim's age; that 47.6 percent of those sentences included a two-point enhancement because the offense involved a sex act or sexual contact; and that 39 percent of those sentences included a two-level enhancement because the victim was in the defendant's custody, care, or control); Brown, 843 F.3d at 89 (Pooler, J., dissenting) ("[M]uch of the Dorvee court's criticism of the child pornography guidelines applies to the guidelines for production offenses as well."); United States v. Grigsby, 749 F.3d 908, 911 (10th Cir. 2014) ("Defendant may be correct when he says the child pornography production guideline, § 2G2.1, suffers from the same apparent defect as the distribution guideline, § 2G2.2.") (citing 2012 Commission Report at 247); United States v. Zauner, 688 F.3d 426, 431 (8th Cir. 2012) (Bright, J., concurring); United States v. Price, 2012 U.S. Dist. LEXIS 38397, 2012 WL 966971, at *11 (C.D. Ill. Mar. 21, 2012) (explaining that section 2G2.1 "presents some of the same problems" as section 2G2.2), aff'd, 775 F.3d 828, 840-41 (7th Cir. 2014); United States v. Jacob, 631 F. Supp. 2d 1099, 1115 (N.D. Iowa 2009); United States v. Krueger, 2009 U.S. Dist. LEXIS 114096, 2009 WL 4164122, at *3 (E.D. Wis. 2009); but see United States v. Murphy, 792 F. App'x 232, 235 (3d Cir. 2019).

Florida, 560 U.S. 48, 59 (2010); see also Dorvee, 616 F.3d at 187 ("[C]ourts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct.") (citing Gall v. United States, 552 U.S. 38, 55, (2007)). Assuring proportionality is one major reason that the Sentencing Guidelines exist. See 28 U.S.C. § 991(b)(1)(B) (articulating that a purpose of the Sentencing Commission is to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct"); U.S.S.G. ch. 1, pt. A, at § 1.3 (noting that, in instituting Guidelines, "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity"); 18 U.S.C. § 3553(a)(6).

Statistically, Caroleo's conduct places him in the *least serious 10 percent* of production defendants nationwide. In 2010, 74 percent of "production offenders were physically present with their victims or remotely aided and abetted another adult offender in the commission of a sexual contact offense against a minor victim." See U.S. Sentencing Comm'n, *Federal Child Pornography Offenses, at* 263 (2012) (the "2012 Commission Report.")[2]

In addition, 15.5 percent of production offenders were "physically present with their victims" but did not touch them or aid another in touching them. See id. Only 10.5 percent of production offenders neither were physically present nor touched the minor. See id.

That last category—"offenders who solicited still images of self-produced child pornography from minors via email or text or who recorded sexually explicit conduct of minors who appeared remotely via webcam"—describes Caroleo. See Id. at 263 n.56. Even though Caroleo's conduct would have placed him in the least serious 10 percent of production offenders

[2] https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

for the fiscal year 2010, his sentence was *93 months longer* than the *average sentence* for all production offenders in 2010. *See* 2012 Commission Report at 253 (reporting average sentence for production offenders as 267.1 months). That disparity shocks the conscience.

Similarly, in 2019, the mean sentence for a sexual abuser[3] under the Guidelines was 206 months. *See* U.S. Sentencing Comm'n, *2019 Sourcebook of Federal Sentencing Statistics* tbl.15 (the "2019 Sourcebook.")[4]

To that end, the mean sentence for a sexual abuser in *criminal history category VI* was 272 months. *See id.* at tbl.27. By any statistical metric, Caroleo was sentenced much too harshly.

The Guidelines recommend that many defendants who subject children to repeated, inappropriate sexual contact should spend less than 30 years in prison. For instance, under the Guidelines, a first-time offender "who intentionally seeks out and contacts a twelve[-]year-old on the internet, convinces the child to meet and to cross state lines for the meeting, and then engages in repeated sex with the child," would be subject to a Guidelines range of 151 to 188 months' imprisonment. See Dorvee, 616 F.3d at 187 & n.11. Similarly, a first-time offender who, through the internet, entices a 14-year-old into crossing state lines under false pretenses, sells her into the sex trade, and profits from her commercial sex acts would be subject to the same Guidelines range of 151 to 188 months' imprisonment. In both of the above situations, the Guidelines range would be 108 to 135 months' imprisonment if the hypothetical defendants pled guilty and earned three points off for acceptance of responsibility. See U.S.S.G. § 3E1.1. In too

[3] The category "sexual abuse" includes: criminal sexual abuse, sexual abuse of a minor, sexual abuse of a ward, abusive sexual contact, transportation of a minor for sex, sex trafficking of children, sex trafficking of adults by force, fraud or coercion, child pornography production, and child exploitation enterprises. It includes "offenders sentenced under USSG §2G1.1 who received a Base Offense Level of 34, and all offenders sentenced under USSG §§2A3.1, 2A3.2, 2A3.3, 2A3.4, 2G1.2 (deleted), 2G1.3, 2G2.1, 2G2.3, and 2G2.6." See 2019 Sourcebook at 214.
[4] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf.

many other cases to count, child pornography defendants who rape, molest, or torture children get meaningfully shorter sentences than Caroleo did in this case. See, e.g., United States v. Brown, 843 F.3d 74, 92 (2d Cir 2016) (Pooler, J., dissenting) (citing United States v. Gilmore, 599 F.3d 160, 162 (2d Cir. 2010) (affirming 30-year sentence for defendant who repeatedly raped eight-year-old daughter) ; United States v. Swackhammer, 400 F. App'x 615, 616 (2d Cir. 2010) (affirming 168-month sentence for defendant who repeatedly molested children); United States v. Irey, 612 F.3d 1160, 1166 (11th Cir. 2010) (en banc) (determining that 30-year sentence (statutory maximum) should be imposed on defendant who raped, sodomized, and sexually tortured fifty or more little girls, some as young as four); United States v. Castro-Valenzuela, 304 F. App'x 986, 988 (3d Cir. 2008) (affirming 220-month sentence for defendant who recorded himself violently sexually assaulting his girlfriend's seven-year-old niece)); United States v. Batchu, 724 F.3d 1, 3, 14 (1st Cir. 2013) (affirming 365-month sentence for defendant—a "skilled and apparently undeterrable predator" and "relentless and highly dangerous child molester"—who travelled all over the country to sexually exploit fifteen-year-old and violated court-issued restraining orders and state-level prosecutions to do 326-month sentence when defendant "made several videos of himself sexually abusing his fourteen-year-old daughter" and had six prior felony convictions, putting him in criminal history category VI).

Caroleo's conduct is closer to the conduct of defendants in distribution cases than to the conduct of a bad production offender (*e.g.*, a child rapist). In distribution and possession cases, which typically do not include sexual contact, the Second Circuit has vacated as substantively unreasonable several sentences much shorter than the one in this case. See Dorvee, 616 F.3d at 176 (20 years); Jenkins, 854 F.3d at 184 (225 months); see also United States v. DiMartino, 797 F. App'x 27, 30 (2d Cir. 2019) (affirming sentence but acknowledging that the sentences in

Dorvee and *Jenkins* were “shockingly high.”)

In New York, an individual who produces child pornography in the way that Caroleo did has committed the crime of “promoting an obscene sexual performance by a child.” *See* N.Y. Penal Law § 263.10. That crime is a class D felony, which is punishable by a *maximum* of seven years' imprisonment. *See Id.* at § 70.00(2)(d). In addition, in New York, an individual who knowingly possesses "an obscene sexual performance by a child" has committed a class E felony, for which the maximum punishment is four years. *See id.* at § 263.11 (possession); *id.* at § 70.00(2)(e) (class E felony punishment). See also Brown, 843 F.3d at 88-89 & n.2 (Pooler, J., dissenting) (making this very point).

The US Supreme Court has made clear that the Eighth Amendment's ban on cruel and unusual punishments “prohibits the imposition of inherently barbaric punishments under all circumstances.” Graham, 560 U.S. at 59 (citation omitted).

Individuals in New York who commit crimes worse than Caroleo's will be subject to statutory maximum penalties below Caroleo's sentence if they are prosecuted by state authorities. For instance, in New York, an individual who has sex with a child under eleven years old has committed rape in the first degree. *See* N.Y. Penal Law § 130.35(3). As a class B felony, the maximum sentence for such conduct is 25 years' imprisonment. *See id.* at § 70.00(2)(b). Thus, a child rapist who lives on Caroleo's street might be capped at a sentence of 25 years so long as the local authorities prosecute him. Meanwhile, Caroleo, who has never made in person physical, sexual contact with a child, received a 30-year sentence in the federal courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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October 3, 2023

APPENDIX

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17-cr-177
Vitaliano, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of July, two thousand twenty-three.

Present:

Gerard E. Lynch,
Joseph F. Bianco,
Myrna Pérez,
Circuit Judges.

United States of America,

Appellee,

v. 22-537

Blaise Caroleo,

Defendant-Appellant.

The Government moves to dismiss this appeal as barred by the waiver of appellate rights contained in Appellant's plea agreement. Appellant opposes in a brief. Upon due consideration, it is hereby ORDERED that the motion is GRANTED and the appeal is DISMISSED. Appellant has not demonstrated that the waiver of his appellate rights is unenforceable under *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court