No. 23-

IN THE

Supreme Court of the United States

RICHARD TODD HAAS,

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 A WRIT OF CERTIORARI

WILLIAM J. DINKIN
Counsel of Record
WILLIAM J. DINKIN, PLC
101 Shockoe Slip, Suite J
Richmond, VA 23219
(804) 658-5373
bill.dinkin@dinkinlaw.com

Counsel for Petitioner

324428

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

Circumstances. Following his conviction by a jury sitting in the Eastern District of Virginia, Richard Todd Haas ("Haas") was sentenced by the District Court to life imprisonment on the charge of attempted sex trafficking of children, 240 months for receipt of child pornography and 120 months on each of two counts of being in possession of child pornography, all to be served concurrently. Following a remand by the Fourth Circuit Court of Appeals for resentencing, the district court again imposed a life sentence. The Fourth Circuit in upholding the sentence, declined to analyze whether the district court properly imposed an upward departure from the sentencing guidelines, holding instead that the reasons for its upward variance were "plausible, and they [were] tied to the § 3553(a) factors." The Fourth Circuit denied the Appellant's petition for rehearing and rehearing en banc.

Question for Review. Is the Fourth Circuit's plausibility test for evaluating a variance sentence under the 18 U.S.C. § 3553(a) factors, because it is untethered from any consideration of the lower court's sentencing guidelines calculation, procedurally erroneous?

PARTIES TO THE PROCEEDINGS

All Parties are listed in the caption on the cover page.

RELATED CASES STATEMENT

United States v. Richard Todd Haas, Case no. 3:16-cr-00139-REP (U.S. District Court for the Eastern District of Virginia, Judgment on January 24, 2019).

United States v. Richard Todd Haas, Case No. 19-4077, Fourth Circuit Court of Appeals, Judgment entered on January 28, 2021, 986 F.3d 467, 480 (4th Cir. 2021) (remanding case for resentencing).

United States v. Richard Todd Haas, Case no. 3:16-cr-00139-REP (U.S. District Court for the Eastern District of Virginia, Amended Judgment on Remand from Fourth Circuit entered on March 10, 2022).

United States v. Richard Todd Haas, Case No. 21-4157, Fourth Circuit Court of Appeals, Judgment entered on May 26, 2023) (unpublished opinion), *petition for rehearing denied*, (Order entered July 5, 2023).

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

OPINIONS BELOW

Filed with this Petition are the unpublished Opinion of the Fourth Circuit Court of Appeals denying Petitioner's appeal, *United States v. Haas,* No. 22-4157 (4th Cir. May. 26, 2023) (unpublished opinion), (Pet. App., 1a-6a), and the Fourth Circuit Court of Appeals Order, dated July 5, 2023, denying Petitioner's petition for rehearing (Pet. App., 23a); the unpublished transcript of rulings of the United States District Court of the Eastern District of Virginia in the Petitioner's resentencing (Pet. App., 7a – 22a); and the published opinion of the Fourth Circuit Court of Appeals on the Petitioner's first appeal, which was remanded to the district court for resentencing, *United States v. Haas*, 986 F.3d 467, 480 (4th Cir. 2021).

Statement of Jurisdiction

The Fourth Circuit Court of Appeals entered judgment on May 26, 2023, and denied Haas's petition for rehearing on July 5, 2023. This Court has jurisdiction to consider Mr. Haas's petition from the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. §3742(f) states: Decision and Disposition**.** —If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

18 U.S.C. § 3553(a), which sets forth the factors that must be considered in imposing a sentence, including § 3553(a)(4)(A), "the kinds of sentence and the sentencing range established . . . (i) by the Sentencing Commission . . ." (Pet. App., 24a-25a).

STATEMENT OF THE CASE

On September 26, 2018, a jury sitting in the Richmond Division of the Eastern District of Virginia found Richard Todd Haas ("Haas") guilty of attempted sex trafficking of children, (Count 1), receipt of child pornography, (Count 2), and two counts of being in possession of child pornography (Counts 3 and 4). Joint Appendix ("JA"), p. 18. On January 24, 2019, the District Court entered a sentence of life on Count 1, a term of 240 months on Count 2, a term of 120 months on Count 3, and a term 120 months on Count 4, all to be served concurrently. JA19. A notice of appeal was filed on January 31, 2019. JA20.

After briefing and oral argument, the Fourth Circuit affirmed the convictions, but remanded the case to the district court for resentencing, holding that the district court erred in applying a four-level enhancement under United States Sentencing Guidelines § 2G2.1 for attempting to traffic a fictitious minor. *United States v. Haas*, 986 F.3d 467, 480 (4th Cir. 2021).

The underlying facts of the case are set forth in the *Haas* opinion. *See* 986 F.3d at 472 – 74. In summary, in 2016 Mr. Haas arranged a sexual encounter with a sex-worker named Sarah, with whom he had a prior relationship. *Id.* 472. He had previously mentioned to her that he had a sexual interest in "younger women" and

reinitiated the topic when they first met again in 2016. *Id*. Sarah responded that she was interested, but she secretly intended to report Mr. Haas to law enforcement. *Id*. In response to her feigned interest, Mr. Haas opened his laptop and showed her "probably like 1,500" photos of what appeared to be child pornography. *Id*. Following that meeting, Sarah met with the FBI and provided details of the encounter. To corroborate her report, she provided Mr. Haas's phone number. She also identified a picture of his residence and a photograph of him. *Id*.

Following the meeting with the FBI, Sarah told Mr. Haas a fabricated story about "a woman [she] knew in Baltimore" who "had children that she could bring down from Baltimore for [Haas] to photograph and . . . engage in sexual things with." *Id*. Mr. Haas texted and called Sarah several times to ask about obtaining the young girls to create child pornography. *Id*. The FBI later provided Sarah with a recording device and she subsequently recorded two telephone calls with Mr. Haas in which he encouraged her to bring the children from Baltimore; they also discussed the ages of the children he preferred. *Id*. at 473.

Not long after the recorded calls, the FBI learned that Mr. Haas had been accused of molesting an eleven-year-old girl. *Id*. In response, the FBI obtained a search warrant for Mr. Haas's residence and his personal vehicle. *Id*. When the warrant was executed the next day, two laptop computers were seized from his residence, but Mr. Haas was not at home. He was later located at his workplace and arrested on a state warrant charging sexual battery of the eleven-year-old; a third

laptop was found in his work truck and a search warrant was obtained for that device as well. *Id*.

At the first sentencing, the trial court imposed a four-point enhancement pursuant to USSG § 2G2.1(b)(1)(A) because one of the fictitious minors had "not attained the age of twelve years." On appeal, the Fourth Circuit held that the fictitious minor in this case did not meet the definition of a "minor" under § 2G2.1(b)(1) and that the four-point enhancement should not have been applied, *Id*. at 479 – 80, and the case was remanded for a resentencing.

On remand, the district court again imposed a life sentence, consisting of term life on Count One, 240 months on Count Two, and 120 months on counts three and four, all to be served concurrently. JA 164. To arrive at this sentence, the court granted the government's motions for an upward departure and an upward variance. JA 68.

For the upward departure, the trial court considered whether "any of the circumstances or consequences of the offense of conviction appear atypical such that they potentially take the case out of the applicable guidelines heartland." JA 149. Specifically, the court considered whether to depart upward from Guidelines § 2G2.2(b)(7)(D), which increased Mr. Haas's offense level for the child pornography counts by 5 levels because the offense involved 600 or more images, based on Application Note 6(B)(i) to § 2G2.2, which states that when "the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted." JA 149. The trial court found that "[i]n this instance, there are

over 17,000 images, still images, and there are video clips, which are calculated at the rate of 17 [sic] images per clip" and concludes from the presentence report that the total image count was 21,000. JA 149 – 50.[1]

In addition, the court considered Application Note 6(B)(ii), which states that "If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted." The court found that "many videos were between 4 and 10 minutes" and that "[o]thers had lengths of 13, 14, 16, 18, 20, 25, 33, 58 minutes, 1 hour and 40 minutes, and one hour, and one hour." JA 150. Ultimately, the court concluded that a departure was warranted, stating:

> As the United States says, there's evidence that they were collected over several years. It is argued that the technical advances in computer technology should be taken into account to minimize the fact that a computer was used and the number of images are so many to minimize the effect of that, but it seems to me that here, the fact that these images were collected over a period of years, that there's so many of them that there's evidence that they were downloaded, evidence of viewing technology installed. Counsel is against the conclusion that this is just a situation in which a computer downloaded just a huge amount of material and it ought to be considered as essentially one or very few instances. In addition to that, there's evidence that 6221 of the images involved toddlers and that 408 involve sadomasochism, including some involving toddlers and that 10,000 were prepubescent and pubescent minors. I think, then, it is quite clear that a departure under 2G2.2(b)(7)(D) and Application Note 6 is called for.

JA 150-51. Based on these findings, the court imposed a four-level upward departure based on the total number of images possessed by Mr. Haas over the 600-image maximum enhancement in 2G2.2(b)(7)(D). JA 151 - 52. This resulted in an increase

[1] Application note 6(B)(ii) calculates video clips at 75 images per clip.

in offense level from 38 to 42 and a Guidelines range of 360 months to life. JA 151 – 52.

The trial court also granted the government's motion for an upward variance. As its basis, the court stated that is was supported by the uncharged conduct of alleged abuse by Mr. Haas of an 11 year-old child:

> The record is that the defendant noticed the child, 11 years old, and her parents panhandling and therefore, obviously poor and vulnerable, that he followed them to a hotel, paid a large amount of money to the parents, saying he wanted the child to clean the room. It is obviously despicable what the parents did. They had every reason to believe that what was being done was the procurement of a child for some purpose other than cleaning rooms. And then he picked her up on five to six occasions, blindfolded her, inserted a vibrator, fondled her, digitally penetrated her.

JA 152 – 53. Based on the departure and the variance, the court again sentenced Mr. Haas to a life sentence, consisting of a term of life on Count One, 240 months on Count Two, and 120 months on counts three and four, all to be served concurrently. JA 164.

Mr. Haas appealed the life sentence. the Fourth Circuit held that the district court properly varied from the United States Sentencing Guidelines based on the 18 U.S.C. § 3553(a) factors. *United States v. Haas*, Case No. 22-4157 (decided May 26, 2023) (unpublished). The Fourth Circuit declined to analyze the question of whether the Guidelines were properly calculated, holding instead that the reasons for the variance were "plausible, and they [were] tied to the § 3553(a) factors. So the district court's variance was permissible, and therefore—with no need to investigate the departure—the resulting sentence was reasonable." *Id*. p. 4. Mr. Haas requested a rehearing based on the Fourth Circuit's failure to decide whether the Guidelines were properly calculated. On July 5, 2023, the Fourth Circuit denied the Appellant's

petition for rehearing and rehearing en banc. *See United States v. Haas*, Docket number 48 (Order entered July 5, 2023).

REASONS FOR GRANTING THE PETITION

When reviewing an appeal of a sentence, an appellate court must determine whether the sentence was imposed as a result of an incorrect application of the sentencing guidelines. 18 U.S.C. § 3742(f)(1). In this case, despite Appellant's contention that the guidelines were improperly calculated, the Fourth Circuit dispensed with any review of the district court's sentencing guidelines determination, holding instead that "Thus, absent other errors, a sentence imposed based on a variance is reasonable so long as the reasons justifying the variance are tied to § 3553(a) and are plausible." *Id*. p. 4. More specifically, the court held that:

> So the district court's variance was permissible, and therefore—with no need to investigate the departure—the resulting sentence was reasonable. *See United States v. Howard*, 773 F.3d 519, 528 (4th Cir. 2014) ("If the district court deviates from the Guideline range and provides two or more independent rationales for its deviation, the appellate court cannot declare the sentence unreasonable if it finds fault with only one of the rationales.").

United States v. Haas, Case No. 22-4157, pp. 4 – 5.

This approach ignores the bedrock concept recognized by this Court that the guidelines are the starting point of any sentencing analysis and that they must be correctly calculated first before considering any variances above or below the properly calculated range. *Gall v. United States,* 552 U.S. 38, 49, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Moreover, a district court that "improperly calculat[es]" a defendant's Guidelines range, for example, has committed a "significant procedural error." *Id,* at 51, 128 S.Ct. 586.

While this Court has recognized that a valid sentence can be imposed despite improperly calculated guidelines under a harmless error analysis, *Williams v. United States*, 503 U.S. 193, 203 (1992), this review must first include a determination, first, of whether an error occurred in calculating the guidelines and then, if so, whether "on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed." *Id.*

This Petition should be granted to correct the Fourth Circuit's faulty test, as applied in this case, that dispenses with any review of whether the sentencing guidelines were properly calculated.

ARGUMENT

I. The Fourth Circuit's plausibility test for evaluating a variance sentence under the 18 U.S.C. § 3553(a) factors is procedurally erroneous because it is untethered from any consideration of the lower court's sentencing guidelines calculation.

This Court has repeatedly emphasized the central importance of the sentencing guidelines in determining a proper sentence. In *Molina-Martinez v. United States*, 578 U.S. 189, 198-99 (2016), the Court states that:

> The Court has made clear that the Guidelines are to be the sentencing court's "starting point and ... initial benchmark." *Gall v. United States,* 552 U.S. 38, 49, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Federal courts understand that they " '*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.'" *Peugh,* 569 U.S. [530, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013)], at ——, 133 S.Ct., at 2083. [emphasis in original]. The Guidelines are "the framework for sentencing" and "anchor ... the district court's discretion." *Id.,* at ——, ——, 133 S.Ct., at 2083, 2087." Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.* ' " *Id.,* at ——, 133 S.Ct., at 2083. [emphasis in original].

> The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious. A district court that "improperly calculat[es]" a defendant's Guidelines range, for example, has committed a "significant procedural error." *Gall, supra,* at 51, 128 S.Ct. 586.

The Fourth Circuit's test for review of a variance sentence, which allows for "no need to investigate the departure" is inconsistent with this Court's repeated emphasis on the importance of properly calculating and considering the sentencing guidelines, even when a court decides to impose a sentence that varies from the guidelines. Failure to evaluate the propriety of the guidelines eviscerates this Court's prior holdings that the guidelines are "the starting point" of any sentencing analysis and that courts must remain cognizant of them during the entire sentencing process.

Even if the appellate court's process echoed the rationale of a harmless error analysis, it failed the basic dictates of this Court's harmless error test outlined in a *Williams v. United States*, 503 U.S. 193, 203 (1992), which first requires a finding of whether an error occurred in calculating the guidelines and then, if so, whether "on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed." *Id.* Here, the district court's departure decision increased the guidelines range from 235 to 293 months' imprisonment to 360 months to life imprisonment. *United States v. Haas*, Case No. 22-4157, p. 3. From the record in this case, it is readily apparent that the district court adjusted the frame of what it considered an appropriate variance in light of its departure ruling, stating that "level 42 is 360 months to life, and I think that that is a more appropriate range within which to apply the 3553(a) factors in arriving at a

sentence that is sufficient but not greater than necessary to provide accomplishment of the objectives of the sentencing statute." Sentencing Transcript, pp. 82 – 83. By failing to consider whether this departure was warranted and instead by focusing exclusively on the sentencing court's 3553(a) reasons, the Fourth Circuit improperly evaded the necessary analysis of whether "the [alleged] error did not affect the district court's selection of the sentence imposed" as required by the *Williams* decision.

This Court has also held that while a court "may impose a sentence outside [the properly calculated] range [it] does not deprive the Guidelines of force as the framework for sentencing. Uniformity is also promoted by appellate review for reasonableness with the Guidelines as a benchmark. Appellate courts may presume a within-Guidelines sentence is reasonable, *see Rita v. United States*, 551 U.S. 338, 347, 127 S. Ct. 2456, 168 L. Ed. 2d 203, and may "consider the extent of the deviation" from the Guidelines as part of their reasonableness review, *Gall*, 552 U.S., at 51, 128 S. Ct. 586, 169 L. Ed. 2d 445." *Peugh v. United States*, 569 U.S. 530, 531 (2013). If, as the Fourth Circuit has done here, there is no evaluation of whether the guidelines were properly calculated, then this important function articulated in *Gall, Rita and Peugh* cannot be accomplished. Moreover, in this case, the degree of deviation from the guidelines is unknown because the appellate court did not address whether the guidelines were properly calculated. This is especially problematic where, as here, the trial court increased the guidelines range from 235 to 293 months' imprisonment to 360 months to life imprisonment. Thus, the procedural failure to review the

upward departure results in a substantive sentencing error in failing to assess the extent of the deviation.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case.

Respectfully submitted,

WILLIAM J. DINKIN
Counsel of Record
WILLIAM J. DINKIN, PLC
101 Shockoe Slip, Suite J
Richmond, VA 23219
(804) 658-5373
bill.dinkin@dinkinlaw.com

Counsel for Petitioner

Dated: October 3, 2023

APPENDIX

TABLE OF APPENDICES

Page

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4157

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD TODD HAAS

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, Senior District Judge. (3:16-cr-00139-REP-1)

Submitted: April 12, 2023 Decided: May 26, 2023

Before WILKINSON, HARRIS, and RICHARDSON, Circuit Judges.

Affirmed by unpublished opinion. Judge Richardson wrote the opinion, in which Judge Wilkinson and Judge Harris joined.

ON BRIEF: William J. Dinkin, WILLIAM J. DINKIN, PLC, Richmond, Virginia, for Appellant. Jessica D. Aber, United States Attorney, Richard D. Cooke, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

RICHARDSON, Circuit Judge:

For the second time, Richard Haas asks us to vacate a life sentence he received for his child-abuse-related convictions. The first time—after holding that the district court erred when calculating Haas's Guidelines range—we vacated his sentence and remanded for resentencing. On remand, the district court reimposed a life sentence. This time, we affirm. We find no error and the sentence is reasonable.

Haas was convicted of attempted sex trafficking of a minor and three child-pornography offenses. He attempted to pay an adult sex-worker to bring him a young child to abuse and use to create child pornography. *United States v. Haas*, 986 F.3d 467, 472 (4th Cir. 2021). Unbeknownst to Haas, the sex-worker was helping law enforcement investigate him. *Id.* During the investigation, law enforcement discovered that Haas—separate from his efforts with the sex-worker—was accused of sexually abusing an eleven-year-old girl. So they cut the investigation short and sprang into action. They seized Haas's laptops, which revealed 17,846 images and 53 videos of child pornography. *Id.* at 473. Haas was arrested, convicted, and sentenced to life in prison. He appealed and we vacated his sentence, remanding for resentencing. *Id.* at 478–80, 482.

On remand, Haas was again sentenced to life in prison after the district court varied and departed upwards from the Guidelines sentencing range.[1] His presentence report

[1] These may sound the same, but they're not. *See United States v. Legins*, 34 F.4th 304, 324 (4th Cir. 2022). "Departures are enhancements of, or subtractions from, a guidelines calculation 'based on a specific Guidelines departure provision.' . . . Variances, in contrast, are discretionary changes to a guidelines sentencing range based on a judge's (Continued)

calculated a Guidelines range of 235 to 293 months' imprisonment. [J.A. 195.] But the district court varied upwards to a life sentence, reasoning that this was warranted given Haas's conduct, characteristics, and personal history. In particular, the district court noted Haas's desire to—not just view but—*make* child pornography, as well as his unrelated abuse of an eleven-year-old girl. Separately, the district court departed upward, calculating a new, higher sentencing range of 360 months to life based on its reading of United States Sentencing Guidelines § 2G2.2 and an accompanying application note.[2] [J.A. 151–52.] Haas now appeals this new life sentence.

Haas argues his new sentence is unreasonable because it is based on an impermissible variance. We review criminal sentences only for reasonableness. *United States v. Tucker*, 473 F.3d 556, 560 (4th Cir. 2007). And while a district court's decision to vary is discretionary, *Legins*, 34 F.4th at 324, for the resulting sentence to be reasonable, it must be sufficiently based on the district court's review of the sentencing factors found in 18 U.S.C. § 3553(a), *Tucker*, 473 F.3d at 561. Thus, absent other errors, a sentence imposed based on a variance is reasonable so long as "the reasons justifying the variance

---

review of all the § 3553(a) factors . . . ." *United States v. Brown*, 578 F.3d 221, 225–26 (3d Cir. 2009).

[2] Section 2G2.2(b)(7) prescribes enhancements for child-pornography offenses involving a large number of images. The maximum enhancement is a five-level enhancement for 600 or more images. *See* U.S.S.G. § 2G2.2(b)(7)(D). Haas's 17,846 images and 53 videos well exceeded that threshold. So he got the five-level enhancement. [J.A. 83.] But an application note instructing judges on how to determine the number of images also says that an upward departure may be warranted when "the number of images substantially underrepresents the number of minors depicted" or if "the length of the visual depiction is substantially more than 5 minutes." U.S.S.G. § 2G2.2 cmt. n.6(B)(i), (ii). The district court relied on this note to upwardly depart.

are tied to § 3553(a) and are plausible." *Id.* (quoting *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006)); *cf. United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011) ("[D]istrict courts have extremely broad discretion when determining the weight to be given each of the § 3553(a) factors.").

Haas's sentence is reasonable. The reasons for the variance are plausible and tied to the § 3553(a) factors. *See Tucker*, 473 F.3d at 561. Those factors—including "the nature and circumstances of the offense," "the history and characteristics of the defendant," and the need for the sentence to "reflect the seriousness of the offense," "afford adequate deterrence," and "protect the public"—are precisely what the district court cited to justify the variance sentence. *See* § 3553(a). During the sentencing hearing, it noted that Haas had a multi-year obsession with obtaining and creating child pornography. It also pointed to Haas's calculated abuse of an eleven-year-old girl. [J.A. 144–48, 152–53, 173.] For the district court, these findings showed that Haas was a sexual predator for whom a life sentence was "necessary" to deter future crime and protect the public.[3] J.A. 156. [J.A. 144–48, 152–53, 173–74.] These reasons for varying are plausible, and they are tied to the § 3553(a) factors. So the district court's variance was permissible, and therefore—with no need to investigate the departure—the resulting sentence was reasonable. *See United States v. Howard*, 773 F.3d 519, 528 (4th Cir. 2014) ("If the district court deviates from the

[3] Along with its discussion during the sentencing hearing, the district court underscored its reliance on the § 3553(a) factors in the Statement of Reasons, explaining that the variance was justified because Haas's behavior revealed "a particularly acute need for both specific and general deterrence and to protect the public." J.A. 172. [J.A. 172, 174.]

Guideline range and provides two or more independent rationales for its deviation, the appellate court cannot declare the sentence unreasonable if it finds fault with only one of the rationales.").

Even so, Haas argues that his sentence is unreasonable because the upward variance alone does not justify the life sentence. Instead, he argues, it depended on the upward departure. And because he says the departure was erroneous, he argues, in turn, that the sentence imposed pursuant to the variance was also improper because it was based, at least in part, on a flawed departure. Put simply, Haas argues that even if the variance to an above-Guidelines sentence was permissible, the sentenced imposed was tainted by the purportedly impermissible departure to a higher Guidelines range to begin with.

But the district court made plain that the variance and departure were separate grounds to reach the ultimate sentence. True, the district court noted that a life sentence was justified after both departing and varying. *See* J.A. 174 ("Consideration of the factors at [ ]§ 3553(a) . . . indicates that an above-Guideline sentence is merited and that, within the range of sentences available to the Court *after applying an upward departure and upward variance*, a life sentence is appropriate" (emphasis added)). Yet that does not show that the variance alone failed to support the sentence. Instead, the record shows that the variance was a stand-alone justification for the life sentence. The government presented the departure and variance as independent grounds for imposing a life sentence. J.A. 41 ("In the event that the Court denies the government's motion for an upward departure, the United States requests that the Court impose an upwardly variant sentence . . . of life."). And that is how the district court considered and granted the government's motions. J.A.

156 ("[H]aving granted an upward departure . . . and having granted an upward variance."); J.A. 171–74 (granting the motions separately and justifying them individually in the Statement of Reasons). [J.A. 148–52, 152–52.] The district court also made clear that the § 3553(a) factors underlying the variance—standing on their own—justified a life sentence. J.A. 156 (listing and considering the § 3553(a) factors before declaring a life sentence is necessary). [J.A. 155.] So the district court's upward variance adequately supports the life sentence.[4]

* * *

The district court varied upwards for plausible reasons tied to the § 3553(a) factors. So the sentence imposed is reasonable. That's all we require. Accordingly, Haas's sentence is

AFFIRMED.

[4] Since we find that the variance is an independent and adequate ground for imposing a life sentence, we need not—and do not—address whether the departure was also proper.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA	
v.	Criminal Case No.: 3:16 CR 139
RICHARD TODD HAAS	

March 3, 2022

COMPLETE TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

Brian R. Hood, Esquire
OFFICE OF THE UNITED STATES ATTORNEY
919 East Main Street
Suite 1900
Richmond, Virginia 23219

Counsel on behalf of the United States

William J. Dinkin, Esquire
WILLIAM J. DINKIN, PLC
101 Shockoe Slip
Suite J
Richmond, Virginia 23219

Counsel on behalf of the Defendant

TRACY J. STROH, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

prison as far as the record shows. I'm sure if there was any, I would have heard about it.

The extensive list of rehabilitation was gone through by Mr. Dinkin in his argument, and I've considered all of it. I think the significant and distinguishing factor here, however, is that the lengthy and extensive effort toward rehabilitation has not, in any way, saluted the fundamental criminal conduct of which the defendant was convicted, and nor do I see any -- any evidence of remorse for the particular conduct. The record seems to be that the defendant is trying to do the best he can in prison, but he's not remorseful for what he did do, and he's not -- his work in prison has not addressed the underlying problem that precipitated and resulted in the criminal conduct.

So for all of those reasons, I think, then, while the rehabilitation evidence must be considered, it certainly doesn't lead to a conclusion that a variance downward ought to be granted here. There's no support for it, in other words. So the motion for a variance sentence, which is ECF 217, is denied.

That brings me to the government's motion for an upward departure. An upward departure is different than a variance analysis. That analysis is governed still by *Rybicki* in our circuit, and in *Rybicki*, the Court has to

decide whether any of the circumstances or consequences of the offense of conviction appear atypical such that they potentially take the case out of the applicable guidelines heartland, and at that point, the Court is to identify the bases for departure and then determine whether they are forbidden, encouraged, discouraged or unmentioned. Having thusly classified any such basis, the Court has to consider certain limitations. Encouraged factors are usually bases for departure.

Here, we have, as asserted as a ground of departure by United States, 2G2.2(b)(7)(D), and in that guideline provision, it is -- it calls upon the Court to consider, in cases of this kind under Section (b)(7), the sufficiency of (7)(D), which says increase by 5 levels, which has already been done, if 600 or more images are involved.

In Application Note 6 thereto, the number of images is calculated in Section (6)(B)(i). It says, "If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted." In this instance, there are over 17,000 images, still images, and there are video clips, which are calculated at the rate of 17 images per clip. And it says, "If the length of the visual depiction is substantially more than five members, an upward departure

may be warranted." And here, the length of the videos involved that many videos were between 4 and 10 minutes. Others had lengths of 13, 14, 16, 18, 20, 25, 33, 58 minutes, 1 hour and 40 minutes, and one hour, and one hour. So what happened is the presentence report calculates that adding all of those together, there were images of 21,000.

As the United States says, there's evidence that they were collected over several years. It is argued that the technical advances in computer technology should be taken into account to minimize the fact that a computer was used and the number of images are so many to minimize the effect of that, but it seems to me that here, the fact that these images were collected over a period of years, that there's so many of them that there's evidence that they were downloaded, evidence of viewing technology installed. Counsel is against the conclusion that this is just a situation in which a computer downloaded just a huge amount of material and it ought to be considered as essentially one or very few instances. In addition to that, there's evidence that 6221 of the images involved toddlers and that 408 involve sadomasochism, including some involving toddlers and that 10,000 were prepubescent and pubescent minors.

I think, then, it is quite clear that a

departure under 2G2.2(b)(7)(D) and Application Note 6 is called for. The question then becomes how does one calculate it. The bottom line here is that if you use the offense -- the level by -- offense level by offense level approach and if you consider the fact that the guideline itself doubles depending upon the number of images and you apply that principle to the number of images here, dividing the number of images by 600, you come up with 36.2 doublings. And under *United States v. Johnson*, the Seventh Circuit case, that's an appropriate way to address the issue. In addition to that, the Fourth Circuit has recognized that the offense level increase is an appropriate way to arrive at a principal determination of what the ground is for departure.

So we have an encourage factor here, which is encouraged by the Application Note 6, and the ground of departure authorized thereby does, in fact, take the case out of the applicable guidelines heartland and a departure is warranted, and the amount of the departure, viewing the matter on a level-by-level basis, would be justified by looking at the structure followed in the guideline itself to depart by five levels. In fact, by much more than five levels.

I think reasonably applied here, the departure ought to be by -- to level 42. Level 43 is a mandatory

life sentence, and level 42 is 360 months to life, and I think that that is a more appropriate range within which to apply the 3553(a) factors in arriving at a sentence that is sufficient but not greater than necessary to provide accomplishment of the objectives of the sentencing statute.

Also, I think it appropriate to be mindful of the fact, in arriving at a sentence within the guideline range, of the United States' request for a variance attributable to the fact that Mr. Haas abused E.J. and that there was thus established in the record a pattern of abuse, proof of molestation.

The record is that the defendant noticed the child, 11 years old, and her parents panhandling and therefore, obviously poor and vulnerable, that he followed them to a hotel, paid a large amount of money to the parents, saying he wanted the child to clean the room. It is obviously despicable what the parents did. They had every reason to believe that what was being done was the procurement of a child for some purpose other than cleaning rooms. And then he picked her up on five to six occasions, blindfolded her, inserted a vibrator, fondled her, digitally penetrated her.

What all that shows is it's serious and predatory behavior. So that also warrants a departure

above the guideline range and is complementary to a departure at the level specified. So the guidelines simply do not adequately reflect the need for punishment evinced by the conduct in the case.

In addition to that, the record, as part of that variance request, is the willingness of the defendant to procure young people to -- young girls to make pornography, and that also warrants a departure.

All right. Any argument on sentencing within the guideline range of 40 -- the guideline range would be 42 at Criminal History Category I?

And that would be 360 months to life; is that correct?

MR. HOOD: Yes, Your Honor.

THE COURT: Is that correct --

MR. DINKIN: That's correct, Judge.

THE COURT: -- Ms. Hushour?

MS. HUSHOUR: Yes, Your Honor.

THE COURT: All right. For Count One. 240 months concurrent for Count Two. 120 months concurrent for Counts Three and Four.

Do any of the other parameters change? The supervised release? The fine? Anything else?

MS. HUSHOUR: No, Your Honor, they stay the same.

THE COURT: All right. Anybody have any other arguments on sentencing?

MR. HOOD: Not from the government, Your Honor.

THE COURT: Mr. Dinkin.

MR. DINKIN: Your Honor, obviously, I'm going to argue, within that range, for 360 months.

THE COURT: Right.

MR. DINKIN: I think it is appropriate. I've heard your comments regarding the rehabilitation. I do think that that's part of his history and characteristics to be taken into consideration.

THE COURT: Yes, it is.

MR. DINKIN: And I think that that certainly does, when evaluating within that range, provide a very good basis for a 360-month sentence, and that's what I would ask for in this case, Judge.

THE COURT: All right.

Mr. Haas, do you have anything to say before sentence is imposed? If you do, come to the lectern and I'll hear what you have to say.

MR. DINKIN: He does not, Judge.

THE COURT: No?

THE DEFENDANT: No, sir.

THE COURT: I have reflected considerably upon this case.

Mr. Haas, if you will stand up.

I've taken into account the arguments that have been made on both sides of the matter and reviewed the evidence in the file, and it is clear in this case from the record that Mr. Haas is a sexual predator of young people. His interest in the videos is significantly toward younger people, that he presents a significant danger to younger people. His willingness to use them to make pornography, his willingness to target, track down and take advantage of a poor child, a vulnerable child to sate his own desires, his lengthy and extensive viewing and examination collection of pornography all disclose and prove a predator.

That's the fact of the matter, and that's what's shown in the nature and circumstances of the offense and the history and characteristics of the defendant, along with the other factors. He may very well be redeemable based on his efforts to rehabilitate himself and they are commendable, but as I have said, they do not -- there's nothing in the record that he has ever evinced any remorse for the real conduct of which he was convicted.

And this is one of the most serious offenses, when people are predators upon those who are vulnerable in our society, and there, thus, needs to be a sentence that will deter him from such conduct, that will protect the

public from such conduct, and a lengthy sentence is necessary to that end.

I've reflected upon whether a life sentence is necessary to that end in perspective of all of the evidence that's been presented, and I have concluded that a life sentence is, in fact, appropriate in this case to provide just punishment, to protect the public, to deter the defendant.

So pursuant to 18, U.S.C., section 3553(a) and having considered the guidelines as advisory, having granted an upward departure and denied the request for a downward variance, it is the judgment of the Court that the defendant -- and having granted an upward variance -- that Richard Todd Haas is here committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life, consisting of life on Count One, 240 months on Count Two, and 120 months on each of Counts Three and Four, all to be served concurrently.

The defendant is remanded to the custody of the United States Marshal. If he's ever released from prison, he shall be placed on supervised release for a term of life on each of the Counts One through Four, to be served concurrently. That is necessary, in the event of release, to provide protection to society, to deter him, and to assure proper treatment.

Within 72 hours of release from custody of the Bureau of Prisons, if it occurs, he shall report in person to the probation office in the district to which he's released. While he's on supervision, he shall not commit another federal, state or local crime. He shall not unlawfully possess a controlled substance and shall not possess a firearm or destructive device.

He has been advised, and has so acknowledged, that he is aware of the standard conditions of supervised release recommended by the Commission, adopted by the Court, and reflected in the presentence report.

He shall comply with those standard conditions and with the following special conditions:

(1), He shall provide the probation officer access to requested financial information.

(2), He shall participate in a program approved by the probation office for mental health treatment, to include a psychosexual evaluation and sex offender treatment as directed by the probation officer. He shall waive all rights of confidentiality regarding sex offender/mental health treatment to allow the release of information to the probation office and authorize communication between the probation officer and the treatment provider.

(3), He shall not have access to or possess any

pornographic material or pictures displaying nudity or any magazines using juvenile models or pictures of juveniles under 18.

(4), He shall not use sex-related adult telephone services, websites or electronic bulletin boards, and shall submit any records requested by the probation officer to verify compliance with this condition, including, but not limited to, credit card bills, telephone bills, cable and satellite television bills.

(5), Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, he shall register with the state sex offender registration agency in any state where he resides, works or attends school according to federal and state law, as directed by the probation officer.

(6), Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, he shall submit to a search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media and effects at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of supervision.

(7), He shall comply with the requirements of the computer monitoring program as administered by the

probation officer. He shall consent to the installation of computer monitoring software on any computer to which he has access. Installation shall be performed by the probation officer, and the software may restrict and/or record any and all activity of the computer, including capturing keystrokes, application information, Internet use history, e-mail correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software. The defendant shall also notify others of the existence of that software. He shall not remove, tamper with, reverse engineer or in any way circumvent the software. The costs of the monitoring shall be paid for by the defendant.

Considering all the financial factors, the defendant is not capable of paying a fine, and none will be imposed. He is not capable of paying the $5000 special assessment per count in accord with 18, U.S.C., Section 3014.

He shall pay a special assessment on each count of conviction of $100. So a total of $400. It will be due and payable immediately and during the period of incarceration, with any balance remaining unpaid on the assessment at the beginning of any supervision to be paid by him in installments of not less than $25 a month until

paid in full. Payments to begin 60 days after supervision begins, and payment shall be a special condition of supervised release.

Has there been a forfeiture order entered in this case?

MR. HOOD: Your Honor, it was previously entered in the case.

THE COURT: Yes. The forfeiture order previously entered is hereby made a part of the sentence and shall be included in the judgment.

Is there anything that needs to be done in the case by the government?

MR. HOOD: No, Your Honor. Although I would respectfully invite the Court to put on the record that if, in the event, on appeal the Court were to find that there's any miscalculations of the guidelines, that under the 3553(a) factors, the Court would impose the same sentence.

THE COURT: Well, I did take the 3553(a) factors into account as well as the guidelines, and applying those factors was a way in which I reached the result of the sentence that I imposed.

MR. HOOD: All right. Thank you.

THE COURT: Mr. Haas, I'm not suggesting there's a reason for appeal or a right of appeal. I guess there

is a right of appeal since you pled not guilty. So you do have a right of appeal. Any appeal that is to be taken should be taken by filing written notice of appeal with the Clerk of the Court in 14 days' time from the date of the judgment of the Court. And if that's not done in that way, in that time, in that place -- that is, with filing with the Clerk in writing -- then whatever right of appeal may exist is lost forever.

Do you understand what I said?

THE DEFENDANT: Yes.

THE COURT: And, Mr. Dinkin, any appeal that is to be taken must be taken -- filed by you, but that doesn't obligate you to handle the matter beyond that which, by contract, you have done with your client -- or actually, you're appointed.

MR. DINKIN: I was appointed, right.

THE COURT: So your appointment -- the Fourth Circuit, I'm sure, would be glad to have you serve as appellate counsel once again, and I assume they will be.

MR. DINKIN: Yes, sir.

THE COURT: And I will say that the Court appreciates your service in this case.

All right. Mr. Haas, I wish you well in the service of your sentence. I'm also going to recommend as

part of the sentence that you receive sex offender counseling as is available for which you are eligible and for which you volunteer as part of the sentence.

All right. We'll be in adjournment.

I don't think I said it, Mr. Dinkin, but the Court appreciates your service in this case.

MR. DINKIN: Oh, thank you, Judge.

(The proceeding concluded at 1:39 p.m.)

REPORTER'S CERTIFICATE

I, Tracy J. Stroh, OCR, RPR, Notary Public in and for the Commonwealth of Virginia at large, and whose commission expires September 30, 2023, Notary Registration Number 7108255, do hereby certify that the pages contained herein accurately reflect the stenographic notes taken by me, to the best of my ability, in the above-styled action.

Given under my hand this 16th day of March 2022.

/s/
Tracy J. Stroh, RPR

FILED: July 5, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4157
(3:16-cr-00139-REP-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD TODD HAAS

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Harris, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

18 U.S.C. § 3553

(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.[1]

(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.