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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

COLE A. WOLAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN CONVICTING PETITIONER FOR BOTH POSSESSION OF CHILD PORNOGRAPHY AND FOR RECEIPT AND DISTRIBUTION OF CHILD PORNOGRAPHY WHICH WOULD VIOLATE DOUBLE JEOPARDY.

II. THE SENTENCE IMPOSED ON THE PETITIONER BY THE DISTRICT COURT WAS PROCEDURALLY UNREASONABLE BECAUSE THE COURT RELIED ON INACCURATE INFORMATION AND WAS NOT ABLE TO APPROPRIATELY ESTABLISH THE NATURE AND CHARACTERISTICS OF THE PETITIONER.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of this case.

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Cole A. Wolak, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered and entered in case number 19-3832 in that court on August 4, 2020, Cole Wolak v. United States, which affirmed the judgment and commitment of the United States District Court for the Northern District of Ohio.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment and commitment of the United States District Court for the Northern District of Ohio, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

The Decision of the court of appeals was entered on August 4, 2020. This petition is timely filed pursuant to Sup. Ct. R. 13.1. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Sup. Ct. R. 10.1. The district court had jurisdiction because Petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provides that courts of appeals shall have jurisdiction for all final decisions of the United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

18 U.S.C. § 1341

18 U.S.C. § 2252A(a)(5)(B)

18 U.S.C. § 2252(a)(2)

18 U.S.C. § 3742

18 U.S.C. § 3553(a)

28 U.S.C. § 1291

Statement of Subject Matter

A final order entered in a criminal case on August 17, 2016 sentenced Cole Wolak after a plea of guilty to Possession of Child Pornography (18 U.S.C. §

2252A(a)(5)(B)) and Receipt and Distribution of Visual Depictions of Minors Engaged in Sexually Explicit Conduct (18 U.S.C. § 2252(a)(2)). (Record, (hereinafter R.) 13, Judgment, Page ID #79).

Statement of Case

An indictment returned on March 1, 2016, charged the Petitioner, Cole Wolak, with Possession of Child Pornography and Receipt and Distribution of Visual Depictions of Minors Engaged in Sexually Explicit Conduct. (R. 6, Indictment, Page ID #15).

On May 2, 2016, the Petitioner entered a plea of guilty to both charges. There was no plea agreement. (R. 17, Change of Plea Hearing Page ID #116, 117). Among matters discussed at the change of plea hearing, Mr. Wolak acknowledged that he had a right not to plead guilty and that there was no written plea agreement. He also acknowledged that he was giving up, by his plea of guilty, certain constitutional rights such as the right to trial, the presumption of innocence, the right to remain silent and various other rights. (R. 17, Change of Plea Hearing Page ID #94-98). During the sentencing hearing, the United States provided an estimate of what the sentencing guidelines would be in Mr. Wolak's case, as did his defense attorney. The United States and the Court discussed the length of incarceration that would be required if the offense level was that which the government predicted. Mr. Wolak, reviewing the guidelines chart, accurately stated the guidelines range for another possible offense level. (R. 17, Change of Plea Hearing, Page ID #105-110). Mr. Wolak also stated that he understood the elements of the individual statutes to which he was pleading. (Supra, Page ID #111-112). Mr. Wolak stated that he was fully satisfied with the legal services provided to him by his attorney and noted that no one made any

promises or assurances directly or indirectly to induce him to plead guilty. (Supra, Page ID #115).

Petitioner was sentenced on August 17, 2016. the Court departed significantly downward from the PSR recommendation and the position of the United States, from 360 months to a 300 month term of imprisonment. (R. 18, Sentencing Hearing, Page #148).

Judgment was entered accordingly (R. 13, Judgment, Page ID #79) on August 17, 2016. Notice of Appeal was filed thereafter on August 24, 2016. (R. 14, Notice of Appeal, Page ID# 86).

Statement of Facts

Cole Wolak pled guilty to Possession of Child Pornography and Receipt and Distribution of Visual Depictions of Minors Engaging in Sexually Explicit Conduct. At his Change of Plea Hearing on May 2, 2016, he was sworn in and he acknowledged that he was not under the influence of alcohol or drugs and had no mental condition that would interfere with his ability to understand what was being discussed. He also stated that he reviewed the indictment sufficiently and discussed it with his attorney. He stated that he understood that he had a right not to plead guilty but by entering the plea of guilty was giving up those rights and other rights including the right to trial, to presumption of innocence, to a burden of proof on the government to prove each element beyond a reasonable doubt, to the right to confront and cross examine witnesses, object to evidence offered by the government, and present evidence and call witnesses to testify on his behalf, even having witnesses come to court by use of a subpoena. (Change of Plea Hearing, R. 17 Page ID #93-97). He discussed with the court his knowledge of the statutory penalties and the application of the sentencing guidelines upon his

case. (Supra, Page ID #99-104). Both the United States and the defense attorney presented at the change of plea hearing their guidelines calculations (Supra, Page ID #105-106) and the Court discussed the elements of both charges with the defendant. (Supra, Page ID #110-111). After agreeing with the United States' recitation of the facts of the case Mr. Wolak informed the Court that he was fully satisfied with the legal services provided to him by his attorney. (Supra, Page ID #114-115). Thereafter, the Court found that the plea was knowingly, intelligently and voluntarily made with the advice of counsel and found Mr. Wolak competent to enter such plea. The Court then accepted the plea. (Supra, Page ID #117).

Sentencing took place on August 17, 2016. (R. 18, Page ID #121-148). The United States argued for a 360 to 480 month sentence. Defense counsel argued that the sentences should not run concurrently and also raised two objections. One objection was that Count One was a receipt charge and Count Two was a possession charge. The defense attorney argued that one cannot distribute something if one does not possess it. Thus, the possession was a lesser included charge of receipt. To that argument, the United States noted that Count One charged distribution and receipt. The United States argued that there was no lesser included for possession with in distribution because the elements were different. (ID, Page ID #726, 731). The second objection raised by the defense was to the five level enhancement pursuant to § 2G 22(b)5 of the guidelines as a result of the defendant engaging in a pattern of activity involving the sexual abuse or exploitation of a minor. The defense attorney conceded that the defendant had given a statement to the FBI when he was arrested regarding sexually abusing three children; however, the defense argued that the vast majority of that abuse happened 10 years previously and would be wrong to take actions from 10 years ago

and attribute those actions to the present day offense. The United States responded that the enhancement has no temporal limitations as to when the pattern of activity needs to have occurred. The Court overruled both defense objections and adopted the computations set forth in the presentence report which resulted in an adjusted offense level of 45 and a 3 point reduction for acceptance of responsibility. (Supra, Page ID #122-128).

The Court and the defense noted some mitigating circumstances regarding Mr. Wolak's circumstances. For example it was noted that Mr. Wolak's childhood was a nightmare. From birth until eight years old he was physically, psychologically and mentally abused by his mother. His parents were responsible for the death of one of his siblings. Mr. Wolak was remorseful, and that upon being arrested he confessed everything to the FBI, including sexual transgressions with two other children. The defense also noted that Mr. Wolak had served in the Armed Forces and was honorably discharged. He suffered from PTSD, was 29 years old with no juvenile convictions and two minor misdemeanor convictions. (Supra, Page ID #134). However, the Court also noted that the defendant received and/or shared visual depictions of minors engaged in sexually explicit conduct, and he possessed 2240 child pornography images on his computers and electronic devices. He also possessed 163 videos containing child pornography. (Supra, Page ID #132). The United States, argued for a with in guidelines sentence, noting that the defendant admitted that he produced child pornography as well as trading it. Further, the children that were abused by Mr. Wolak were very young and nonverbal. (Supra, Page ID #136-137).

Mr. Wolak apologized to his victims, and to the victims of the child pornography industry. He admitted that what he did was wrong and that there was no explanation for it. He regretted that his victims were not personally in court

so he could apologize to them face-to-face. He also apologized to his sisters because he had caused heartache and pain to them. He informed the Court that he suffered from PTSD and anger management and was bipolar. (Supra, Page ID #140-144).

The Court then engaged in a guidelines and 18 U.S.C. § 3553(a) analysis of the case. Thereafter, and in contradiction to the recommendation of the PSI and the United States, the Court departed downward from the recommended guidelines range of 360-480 months and sentenced Mr. Wolak to 300 months imprisonment. (Id, Page ID #743-751).

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT ERRED IN CONVICTING PETITIONER FOR BOTH POSSESSION OF CHILD PORNOGRAPHY AND FOR RECEIPT AND DISTRIBUTION OF CHILD PORNOGRAPHY WHICH WOULD VIOLATE DOUBLE JEOPARDY

Legal Standard

"Multiplicity is the charging of a single offense in several Counts. The Fifth Amendment Double Jeopardy Clause prohibits multiplicitous indictments for crimes that are in law and in fact the same offense," United States v. Fall, 955 F.3d 363 (4th Cir. April 3, 2020). "Nor shall any person be subject for the same offense to be twice put in jeopardy," Fifth Amendment, United States Constitution.

In its original 28 U.S.C. § 2255 Memorandum Opinion, the District Court stated, "Wolak also filed a supplement to his petition asking this Court to consider the Eighth Circuit's decision in United States v. Morrisey, 895 F.3d 541

(8th Cir. 2018) ... Wolak asks this Court to consider Morrisey for a completely new argument; that Wolak's convictions for both possession of child pornography and for receipt and distribution of child pornography violate double jeopardy. The Double Jeopardy Clause 'protects against multiple punishments for the same offense.'"United States v. Ehle, 640 F.3d 689, 694 (6th Cir. 2011) (quoting North carolina v Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L.Ed. 2d 656 (1969)) ... In Morrisey, 895, F.3d at 548; See United States v. Hutchinson, 448 F. Appx. 599, 603-04 (6th Cir. 2012). However, "while possession of child pornography is generally a lesser-included offense than receipt of child pornography, convictions under both statutes is permissible if separate conduct is found to underlie the two offenses." Hutchinson, 448 F. Appx. at 603 (quoting United States v. Dudeck, 657 F.3d 424, 429 (6th Cir. 2011)) ... Having considered Morrisey and Hutchinson, the Court finds both inapplicable to Wolak's case. In Morrisey and Hutchinson, the facts underlying the charges are different ... As the Court discussed at the sentencing hearing, the time frames underlying the two counts are different. Further, Wolak's conviction for Count One, Receipt and Distribution, is based on conduct from on or about December 1, 2015, through on or about January 18, 2016, involving images Wolak received from the internet, while Wolak's conviction for Count Two--Possession--is based on conduct from on or about February 3, 2016, when a search of Wolak's house recovered images on a USB storage device, a secure digital card, an iPod, and a cell phone ... Therefore, Wolak's conviction for Receipt and Distribution and Possession, involving different facts, does not violate double jeopardy."

The Double Jeopardy Clause "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 0272. 23 L.Ed. 656 (1969). "Two statutes proscribe different offense only if each offense

requires proof of an element that the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed. 306 (1932). "Using the Blockburger test, we have held that convictions for both knowingly possessing child pornography and knowingly receiveing the same child pornography constituted multiple punishments for the same conduct." United States v. Ehle, 640 F.3d 689, 694-95 (6th Cir. 2011). "However, convictions for both receipt and possession of child pornography will stand if separate conduct underlies the two charges." United States v. Dudeck, 657 F.3d 424, 430 (6th Cir. 2011). "In no reported cases has the Sixth Circuit been confronted with a double-jeopardy challenge to dual convictions for both possession and receiving based on the same criminal conduct differentiated only by different dates of the offense." United States v. Nickie Thomas Gray Jr., 641 Fed. Appx. 462 (6th Cir. 2016).

The Petitioner submits that the conduct and the images received from his email via the internet relating to Count One, Receipt and Distribution from conduct on or about December 1, 2015, through on or about January 18, 2016, were the same ones he received and distributed as his Count Two, Possession convictions, based on or about February 3, 2016, when a search of his home recovered more images on an iPod and cell phone. The Petitioner contends he gave the FBI the USB storage device and a secure digital card upon his apprehension of his own volition and voluntary surrender. All of these devices were used to receive and distribute the same video/images that were found to be on his email with the conduct from Count One.

The issue of "almost identical" charges came up as an objection to the PSR and were preserved at Sentencing. While the attorney appointed to the Petitioner at the time should have raised the issue more directly as to possession being the lesser included offense of Receipt and Distribution, he instead raised the issue

as to concurrently whereas to simply maintain the 240 month sentence as to Count One as should have been imposed. The Government was clearly looking for a way to make its guidelines calculation "stick" with the enhancements it imposed and getting a 300 month sentence with the inclusion of a consecutive 60 month sentence for Count Two.

The feeble attempt and "stumbling" by the Government at Sentencing is very clear from the transcripts as the AUSA at the time didn't even know the circuit precedent and "bobbled" around what he thought was some case relating to this issue. The exact dialogue of the transcripts is as follows:

> THE COURT: Next objection, as the Court understands, is paragraph 65 wherein the defendant argues that since the charges are, quote "almost identical," close quote, the sentences should run concurrently. And I suppose that's something we can take up relative to the sentence in this case. But I suppose we should address that issue preliminarily now. So is there anything further you would like to add? And do I want to indicate that as I read the Indictment, the Indictment involves different time periods. And the charges are separate charges. Count One is December 3, 2015, through on or about January 18, 2016, and deals with receipt and distribution. Count Two, on or about February 3, 2016, is the same time period, and deals with possession. So, anything further to add to your argument, Mr. Greven?
>
> Mr. Greven: Judge, the time period in the two counts differ by about two weeks So I think you could make the argument that as the Court stated, Count One is a distribution -- is the receipt and distribution. Count Two is the possession. Well, you can't distribute something if you don't possess it. I mean, I think these two things go hand-in-hand. My state court analogy is if I steal a car, I may be guilty of grand theft and receiving stolen property, but it's basically the same crime. And even though I might be guilty of both. And our position here, Judge, is, you know, Count One says he received it. Count two says he had it. That's in our opinion, Mr. Wolak's opinion, that's the same crime. And frankly, I think to give him consecutive time, I don't think is proper for the Court to do based on that.
>
> THE COURT: Thank you, Mr. Greven. Mr. Sullivan.
>
> MR SULLIVAN: Thank you Judge. Judge, I'm aware of some Sixth Circuit precedent holding that possession is a lesser

> included of receipt. And so of both counts charge -- of the first count just charged receipt and the second count charged possession and they were during the same time frame, then I believe the defense argument would have some weight. Here that's not the case. First of all, Count One charges distribution and receipt. And I'm not aware of any case that says possession is a lesser included in the distribution. Clearly the elements are different ... In addition, Count Two, if you look also, when they talk about possession it talks about possession on a number of different devices, computers, a USB storage device, secure digital card, an iPod and cell phone ... So, clearly the activity there, the possession, is not just as it comes along with receipt. Clearly he was moving it and putting it on different items with the intention of possessing it. And it certainly separates it, I think factually, even from receipt ... But again, we don't even need to go to that argument because here distribution in Count One is one of the elements -- one of the charges, and possession in Count Two So, I'm not aware of any precedent saying one is lesser included of the other ... Therefore, I believe the Court has the ability to sentence consecutively if the Court feels that that amount of time is necessary to give a sufficient sentence.
> (See Exhibit B - Sentencing Transcripts - pages 6-9).

The Petitioner submits that the record is clear as to the lack of knowledge and intent of the Government as to make its guideline application apply at sentencing. the irony of it all as it comes to the reference the Government made in its argument at sentencing as to "Sixth Circuit precedent" was the case entitled Ehle. As stated in Ehle, "It is true that Ehle's counsel did not object to his convictions on both counts, but he did argue at sentencing against consecutive sentences on the ground that there was really only one crime. He challenged the "concept of how can one receive child pornography without possessing it ... In response the Government argued, among other things, that someone could hypothetically receive pornography without possessing it. Consideration of the issue on appeal is therefore appropriate." United States v. Ehle, 640 F.3d 689 (6th Cir. 2011). The actual case that the Government refers to is the same argument that the Petitioner's counsel raised at sentencing. As

submitted by the earlier affidavit, there was only devices relating to the same criminal conduct, not different possession of different items as the Government eluded to at sentencing.

As referenced earlier in this petition, in no reported case has the Sixth Circuit been confronted with a double-jeopardy challenge to dual convictions for both possession and receiving based on the same criminal conduct differentiated by different offense dates. On that specific question there is no controlling answer in the Sixth Circuit law. Under such circumstances, a split of opinion among other circuits generally 'precludes a finding of plain error, for [it] is good evidence that the issue is subject to reasonable dispute." United States v. Al-Maliki, 787 F.3d 784, 794 (6th Cir. 2015). This issue is ripe for consideration.

II.

THE SENTENCE IMPOSED ON THE PETITIONER BY THE DISTRICT COURT WAS PROCEDURALLY UNREASONABLE BECAUSE THE COURT RELIED ON INACCURATE INFORMATION AND WAS NOT ABLE TO APPROPRIATELY ESTABLISH THE NATURE AND CHARACTERISTICS OF THE PETITIONER

Legal Standard

Pursuant to the Sentencing Reform Act as modified by the Booker and Fanfan decision, United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed. 621 (2005) the Court must find the imposed sentence is sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C. § 3553(a).

"A sentence is substantially unreasonable if it cannot be located within the range of permissible decisions, shocks the conscience, or constitutes

manifest injustice." United States v. Haverkamp, 958 F.3d 145 (2nd Cir. May 4, 2020)

The Petitioner in this matter contends the sentence was procedurally unreasonable because the Court relied on inaccurate information and was not able to appropriately establish the nature and characteristics of the defendant. Additionally, the lack of empirical approach in establishing the sentencing guidelines for this crime indicates the strong possibility that the guidelines themselves call for a sentence that is greater than necessary for the purposes of § 3553(a). The factors set forth in Section 3553(a) include:

The Court shall impose a sentence sufficient, but not greater than necessary. The Court, in determining the particular sentence to be imposed, shall consider:

* The nature and circumstances of the offense
and the history and characteristics of the defendant.

Additionally, errors in the PSR, and improperly applied enhancements prevented the Court from determining the proper offense level and resulting recommended guideline range. Also, it seems the Court relied, heavily, on the need for treatment and rehabilitation.

Petitioner was given pattern-of-activity sentencing enhancement pursuant to U.S.S.G. § 2G2.2(b)(5) which increased his sentence guidelines by five points. This pattern-of-activity enhancement was based on confessions made to the FBI during his initial interrogation. Three minors were alluded to in his interview and used to enhance Petitioner; two being his nieces and one being his ex-girlfriends daughter.

Sentencing Counsel at the time objected to the enhancement under §

2G2.2(b)(5) based upon almost a ten year gap since such incidents occurred regarding the Petitioner. The District Court and the Sixth Circuit Court of Appeals found that there was no time limit regarding how old or how much time had elapsed relating to charges or victims/minors with the pattern-of-activity enhancement. No evidentiary hearing was held based upon known witnesses or completed reports which may have assisted in refuting some, if not all, of the minors relating to the pattern-of-activity enhancement, Petitioner's testimony included.

The Petitioner prior to his initial indictment had sought professional assistance regarding his child pornography addiction at Heartland Behavioral located in Canton, Ohio. Per a phone conversation, he was instructed that unless he was adjudicated, the facility could be of no assistance to him. Relying on this premise, the Petitioner confessed and formulated a strategy to make sure he received the very well-needed treatment.

Interviews were conducted with the Petitioner's nieces regarding his alleged sexual abuse of the minors. The results were published to be used by the Petitioner to assist in removing the pattern-of-activity enhancement. These reports were never received by the proper parties, namely, the Petitioner, the Government, and the District Court. The Petitioner has written Stark County Job and Family Services in an effort to provide the results of the interviews with both of his nieces definitively showing no abuse or neglect on part of the Petitioner.

Additionally. the Petitioner submits that photos that were found of his ex-girlfriend's daughter of a sexual nature were taken by his girlfriend and mailed to him without his request in an effort to reconcile with him.

CONCLUSION

Based upon the foregoing Petition, it is respectfully requested that the Court Grant a writ of certiorari the the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Cole A. Wolak