No. _____

In the Supreme Court of the United States

LAMARK ARMOND COMBS, Jr.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

I. May a district court expand the record on remand to allow the government to present additional evidence even though the government's burden was clear at the initial sentencing?

II. Should the Federal Sentencing Guidelines for non-production child pornography offenses be entitled to a presumption of reasonableness?

Related Proceedings

I. *United States v. Combs*, S.D. Iowa No. 3:20-cr-30; Judgment entered October 14, 2021.

II. *United States v. Combs*, Eighth Cir. Ct. App. No. 21-3448; Judgment entered April 14, 2022.

III. *United States v. Combs*, S.D. Iowa No. 3:20-cr-30; Judgment entered November 29, 2022.

IV. *United States v. Combs*, Eighth Cir. Ct. App. No. 22-3556; Judgement entered November 7, 2023.

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On August 12, 2022, the Eighth Circuit reversed the district court for the Southern District of Iowa's sentencing decision in a published opinion. *United States v. Combs*, 44 F.4th 815 (8th Cir. 2022) (Appx. 12). On remand, the district court entered its judgment on November 29, 2022. Combs filed a notice of appeal on

December 9, 2022. (DCD 322)[1]. The Eight Circuit affirmed the district court's judgment on November 7, 2023. *United States v. Combs*, 2023 WL 7321916 (8th Cir. 2023).

Jurisdiction

Jurisdiction of the district court was pursuant to 18 U.S.C. § 3231. Judgment entered October 14, 2021. (Appx. 3). The first Notice of Appeal was filed October 28, 2021. *United States v. Combs*, S.D. Iowa No. 3:20-cr-30, DCD 294 (Oct. 28, 2021). Jurisdiction for the Eighth Circuit was pursuant to 28 U.S.C. § 1295(a)(1). Judgment was entered August 12, 2022. (Appx. 12). Following remand, the district court again entered judgment on November 29, 2022. Combs filed a second Notice of Appeal on December 9, 2022. (DCD 322). Jurisdiction for the Eighth Circuit was pursuant to 28 U.S.C. § 1295(a)(1). Judgment was entered on November 7, 2023. (Appx. 26). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statement of the Case

Combs was indicted on March 11, 2020, with two counts of producing child pornography in violation of 18 U.S.C. §§ 2251(a) and 2251(e), and one count of enticing a minor in violation of 18 U.S.C. § 2422(b). (DCD 2). A superseding indictment on July 7, 2020, added two counts of receiving child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1), and one count of possessing child pornography in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). The case involved Combs using Snapchat to flirt with, date, and obtain sexually explicit photos of girls

[1] All "DCD" references are to the docket for *United States v. Combs*, S.D. Iowa No. 3:20-cr-30.

ages 13 to 16 while Combs was 18 and 19 years old. Ultimately, Combs pled guilty to counts three through six, with the remaining counts dismissed. (DCD 255).

A draft PSI was prepared, and both parties filed objections. (PSR, DCD 258, 259). Both parties filed sentencing memoranda and exhibits. (DCD 262 and attachments, 267, 269, 270). Both parties replied to the others' sentencing memoranda. (DCD 272, 273). The final PSI was filed October 4, 2021.

Combs specifically objected to various portions of the offense conduct section of the PSR, including unproven allegations of non-statutory sexual assault. (DCD 259 (Objections to PSR)). He denied possessing or receiving sexually explicit photos of HP. (*Id.* at 3 (Objections to PSR ¶¶ 16-17)). He denied possessing or receiving sexually explicit photos of other victims listed in the PSR in paragraphs 33-35, although he acknowledges that he possessed photos where the individual was unable to be identified. (*Id.* at 5 (Objections to PSR ¶¶ 33-35)). Finally, Combs objected to the grouping, noting that the PSR writer was not able to identify any of the victims of Count 6. (*Id.* at 6 (Objections to PSR ¶¶ 72-79)).

The upshot of these objections was that there should have been three grouped offenses at sentencing, rather than four. Combs' offense is found in the sentencing guidelines under USSG § 2G2.1. Pursuant to this section, if the offense involved more than one victim, the guidelines shall be applied as if each victim was contained in a separate count of conviction. USSG § 2G2.1(d)(1). The PSR writer treated H.P. and MV3 as separate victims (along with MV1 and MV2), meaning that they were each treated as a separate count rather than being grouped together under USSG § 3D1.2.

(PSR ¶ 48). This resulted in procedural error: Combs' guideline's sentencing range was higher than called for by the unobjected to offense conduct. The PSR writer noted Combs' objection in the final version of the PSR describing "whether the probation office has appropriately grouped the offenses" and "whether the guideline calculations have been appropriately calculated" as issues to be resolved at the sentencing hearing. (PSR at 1). As acknowledged by the Eighth Circuit, Combs never withdrew these objections. *United States v. Combs*, 44 F.4th 815, 818 (8th Cir. 2022).

The government, Combs, and the Court acknowledged that this grouping issue was still an issue at the time of the sentencing hearing. The Court asked counsel for Combs which "objections . . . remain and need to be resolved for sentence to be imposed today?" (Re-Sent. Tr. at 2-3; Appx. 37-38). Counsel for Combs listed, among other issues:

> Whether the Court should determine all victims in this case to determine an appropriate sentence, or should some of them be excluded?
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> * * *
>
> And then the grouping . . . of the offense which you saw our objections to the grouping.

(*Id.* at 3-4; Appx. 38-39). The government summarized what it believed to be the outstanding issues: "the Government believes that the grouping issue and the computer issue are the only issues that actually . . . affect the sentence to be imposed." (*Id.* at 6; Appx. 41). Shortly thereafter, the government announced their intention not to offer any evidence. (*Id.*). The district court ruled that the "grouping was correctly done by the probation office." (*Id.* at 54; Appx. 89).

Despite its decision not to put on any evidence as to the proper guidelines sentencing range, the government presented an alleged victim impact statement by S.W. to shore up its allegations that Combs had committed a violent sexual assault of S.W. No charges were ever filed against Combs regarding S.W., and S.W. never claimed to have sent Combs sexually explicit or even nude photographs. Yet, after the presentation of the evidence, when the court asked the government if it had any victim impact statements, the government produced S.W. The Court relied on S.W.'s statement, which was not subject to cross examination, in imposing its sentence. (*See, e.g.* Sent. Tr. at 82:19-21; Appx. 35) ("[F]rom the victim impact testimony we've heard today, we know something of the harm that has been done, and it is enormous.").

Combs submitted mitigating evidence, including his supportive family, history of employment, and lack of criminal history. He further argued that the production and possession of child pornography guidelines were unreasonable as applied to his case. The government did not present rebuttal witnesses, aside from the erroneous victim impact statement. Ultimately, the court imposed a sentence of 210 months, which represented a downward variance from the advisory guidelines range of 262 to 327 months.

Combs appealed. The Eighth Circuit acknowledged procedural error on the grouping issues and remanded the matter for re-sentencing. *Combs*, 44 F.4th 815. It did not reach Combs' challenges to the use of S.W.'s victim impact statement, nor did it address the substantive reasonableness of his sentence. *Id.* The Eighth Circuit left

it up to the district court to determine whether the government would be permitted to submit supplemental evidence at the resentencing hearing.

Prior to the re-sentencing hearing, the parties filed supplemental briefs. (DCD 308, 309). Over Combs' vigorous objection, the government presented the testimony of Detective Sean Johnson to attempt to prove disputed facts within the PSR. (Re-Sent. Tr. at 17-76). The District Court justified this by stating she did not "think the judge allowed either party enough time to present relevant evidence at the time of the original sentencing hearing." (*Id.* at 15:17-22). The District Court limited Combs' ability to cross-examine and impeach Johnson. For example, Combs, who is Black, was prevented from putting on evidence that law enforcement focused its investigation on him, over another white individual who was older than Combs, already a registered sex offender, and having a sexual relationship with MV3. (*Id.* at 58:19-59:24; Appx. 52-111). Combs was also prevented from questioning Johnson about derogatory statements made by Johnson or another officer (the video was unclear) with racist undertones. (*Id.* at 60-66; Appx. 95-101). During this exchange, the government accused Combs' counsel of race-baiting. (*Id.* at 60:21-61:6; Appx. 95-96).

Ultimately, the parties agreed that the guidelines should be based on three groups: MV1, MV2, and a third group made up of sexually explicit photos of minors possessed by Combs, but for which no victim had been identified. (*Id.* at 77:3-8; 79:1-4; Appx. 112, 114). This resulted in an advisory guidelines range of 235 to 293 months. (*Id.* at 80; Appx. 80). Notably, counts 4 and 6 carried a maximum sentence of 240

months, and Count 6 carried a maximum sentence of 120 months. (*Id.*). The effective guideline range therefore was 235-240 months. The Court varied downward to a sentence of 183 months, in light of Combs' mitigating history and characteristics. (*See, e.g.* Re-Sent. Tr. at 103:14-104:5, 104:24-105:4; Appx. 138-140). The district court's downward variance included the *Pepper* analysis.

Reasons Relied on for Allowance of the Writ

I. The District Court's Decision to Reopen the Record on Remand Represents a Substantial Departure from The Accepted and Usual Course of Judicial Proceedings.

The petition for writ of certiorari should be granted because the district court reopened the record and allowed the Government to put on additional evidence at Combs' resentencing hearing. This decision represents a substantial departure from the accepted and usual course of proceedings. Sup. Ct. R. 10(a).

A sentencing court may accept the facts in a PSR as true unless the defendant objects to specific factual allegations. *United States v. Sorrells*, 432 F.3d 836, 838 (8th Cir. 2005). However, "[i]f the defendant objects to any of the factual allegations contained [in the PSR] on an issue on which the government has the burden of proof…the government must present evidence at the sentencing hearing to prove the existence of the disputed facts." *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004). Unless the disputed facts have been proven by a preponderance of the evidence, the district court cannot rely on them at sentencing. *Id.* (*citing United States v. Hammer*, 3 F.3d 266, 272 (8th Cir. 1993)).

Typically, when the Court relies on factual allegations in the PSR which have not been proved by a preponderance of the evidence in determining the sentence, the government is not permitted a second bite at the apple on remand. *See, e.g., United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997) (precluding the government from introducing additional evidence on remand because the defendant made an unambiguous objection to the factual allegations in the PSR). That is because the law in this area is well-settled, and the government's burden of proof is clear. *Id.* There are some "special circumstances," such as when the government's burden was unclear, or the evidence was previously unavailable, where the district court may be permitted to expand the record, but these situations are the rare exceptions to rule. *United States v. Archer*, 671 F.3d 149, 168 (2nd Cir. 2011). Special circumstances aside, the traditional rule is that "where the government knew of its obligation to present evidence and failed to do so, it may not enter new evidence on remand." *Id.* As long as there are no "arcane legal principles involved in the case, and the district court committed no legal error that misled the government or deflected it from introducing evidence," the district court must resentence the defendant on the record already before it. *United States v. Gammage*, 580 F.3d 777, 779 (8th Cir. 2009).

The Eighth Circuit left it up to the district court's discretion to decide whether to allow additional evidence on remand. *United States v. Combs*, 44 F.4th 815, 818-19 (8th Cir. 2022). In doing so, it found that Combs "failed to timely assert the objection a second time." *Id.* The Eighth Circuit reaffirmed this decision on Combs'

second appeal, pointing to the "confusing" nature of Combs' objection. *United States v. Combs*, 2203 WL 7321916 *1 (8th Cir. 2023).

The Eighth Circuit's conclusions regarding the Combs' objection were wrong. A look at the record reveals that the objections were not confusing, and it was clear that the government would need to bring evidence in support of their sentencing request at the hearing. Combs denied the events described by H.P. and her mother in his objections to the PSR. (DCD 259 at 3). He also denied the allegations made by MV3. (*Id.* at 4). Based on these denials, he then objected to grouping the alleged offenses against H.G. separately from those against MV3. (*Id.* at 6) Combs objected to treating the alleged offenses against H.G. as a separate un-grouped conviction, given that the PSR writer was unable to identify a victim to Count Six. (*Id.*).

Combs renewed this objection to the grouping at the sentencing hearing. The government, Combs, and the district court clearly acknowledged that the grouping issue was still a live issue at the time of the sentencing hearing. The district court first asked counsel for Combs which "objections…remain and need to be resolved for sentence to be imposed today?" (Sent. Tr. at 2-3; Appx. 29-30). Counsel for Combs listed, among other issues:

> Whether the Court should determine all victims in this case to determine an appropriate sentence, or should some of them be excluded?
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> ****
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> And then the grouping…of the offense which you saw our objections to the grouping.

(*Id.* at 3-4). The government outlined what it believed to be the unresolved issues at sentencing: "the grouping issue and the computer issue are the only issues…that actually affect the sentence to be imposed." (*Id.* at 6). After detailing other miscellaneous issues, the government then reiterated its understanding of the remaining issues:

> So it's the government's understanding that really the only issues that affect the sentencing guidelines range is the grouping and the two-level enhancement for computer use.

(*Id.*). The government was asked if it intended to offer any evidence, and it declined. (*Id.*). After Combs put on several character witnesses, the discussion returned to determining the appropriate sentence under the guidelines. (*Id.* at 51). Combs reasserted his objection to the grouping and stated that the argument on this point was clearly laid out in Combs' sentencing brief. (*Id.* at 54). The government asserted in a conclusory fashion that the grouping calculation was correct but did not put on any evidence to resolve the underlying factual disputes that formed the basis of Combs' objection to the grouping. (*Id.* at 52).

The district court allowed the government to present evidence on remand because, in its view, the nature of Combs' objections was not "sufficiently clear," nor did the previous district court judge "allow[] either party enough time to present relevant evidence at the time of the original sentencing hearing." (Re-Sent. Tr. at 15:17-22; Appx. 50). This is plainly contradicted by the record. In his objections to the PSR, Combs objected to the grouping and the underlying offense conduct that resulted in the creation of four groups for guidelines purposes. He renewed his

objection to the grouping at sentencing and asked the Court to determine if all the victims should be considered for purposes of sentencing. While Combs did not expressly renew his objections to the factual allegations made by H.P. and MV3 at the hearing, the nature of his objection was still sufficiently clear – the objection to the grouping was premised on his objections to H.P. and MV3's allegations and would not have made sense otherwise. The only way to prove that the grouping calculation was accurate was to prove that the underlying factual allegations were true. Absent this proof, MV3 and H.P. could not be treated as separate counts of conviction. The government acknowledged this objection at the time of the sentencing hearing and was offered the opportunity to put on evidence to prove the disputed facts. It chose not to do so, instead simply stating that the grouping calculation was correct:

> We have…essentially four groups for guidelines purposes, one for Minor Victim 1, one for Minor Victim 2, one for Minor Victim 3, and one for H.P., and that is true *even though only Minor Victim 1 and 2 are related to the counts of conviction*.

(Sent. Tr. at 52; Appx. 34) (emphasis added). The government acknowledged that the facts linking MV3 and H.P. to the counts of conviction were sparse. Accordingly, it should not have been surprised by the need to present evidence at the sentencing hearing, because the law regarding disputed facts in the PSR is well-established. *See e.g., United States v. Jenners*, 473 F.3d 894, 897-98 (8th Cir. 2007); *United States v. Flores*, 9 F.3d 54, 55 (8th Cir. 1993). There is no excuse for the government's failure to prepare for the original sentencing hearing.

Under similar circumstances, the Eighth Circuit has observed:

> Rules can, and certainly do, provide for new trials on the basis of newly-discovered evidence in some kinds of cases, but not for the government in criminal cases. And besides, there is no newly-discovered evidence here: The government had the evidence but simply did not introduce it. Relief can also be had for certain kinds of mistakes by defense counsel in criminal cases through post-conviction remedies, but of course there is no similar remedy open to the government. The law, from considerations of efficiency and fairness, does not generally favor do-overs, as various estoppel doctrines like *res judicata* and double jeopardy attest. *We see no apparent reason to stray from the traditional path in the present circumstances*. The government, moreover, does not invoke any general legal principle that would authorize us to afford it a second chance to make its case, and given the present record, and the current state of applicable common-law and statutory arrangements, we cannot discern one.

Gammage, 580 F.3d at 779-780 (8th Cir. 2009) (emphasis added). By allowing the district court to introduce new evidence on remand even though its original burden was clear, the Eighth Circuit has strayed far from the traditional path. Combs' objections were clear, and the government acknowledged his objections at the sentencing hearing. There were no arcane legal principles at play or special circumstances that would make the prohibition on new evidence unfair. The government's burden was clear; it simply chose not to carry it. Under these circumstances, the Eight Circuit's decision to allow the district court to reopen the record on remand represents a substantial departure from the accepted and usual course of judicial proceedings, and the Supreme Court should grant certiorari to rectify this error.

Combs was prejudiced by the district court's error. The government was permitted to put on additional evidence in support of its unfounded allegations that Combs committed forcible rape in his sexual encounters with several of the minor

victims. (Re-Sent. Tr. at 83; Appx. 118). While this additional evidence did not increase the guidelines range, it impacted the district court's decision to vary the sentence downward. It is true that the district court varied downward from the guidelines range, but the possibility that the district court may have reduced the sentence even further absent this additional evidence cannot be ruled out. *See Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016) ("Absent unusual circumstances, [a criminal defendant] will not be required to show more [than this possibility]"). Combs should not be left to speculate what the district court might have done had this additional evidence been excluded. *United States v. Harris*, 908 F.3d 1151, 1156 (8th Cir. 2018).

II. The Application of the Child Pornography Guidelines to Combs Presents an Important Question of Federal that Should Be Settled by this Court.

The 183-month sentence imposed on Combs was substantively unreasonable, as it resulted from the application of sentencing guidelines which have failed to keep up with advancements in technology and social science. Numerous district courts, as well as the Sentencing Commission itself, have acknowledged the flaws in the current child pornography guidelines and have called into question the guidelines' validity in this area. This uncertainty represents an important question of federal law that should be, but has not yet been, settled by the Supreme Court.

Combs' 183-month sentence is greater than necessary to accomplish the goals set out in § 3553(a)(2). Under normal circumstances, a guidelines sentence is presumed to be reasonable. *See, e.g. Rita v. United States*, 551 U.S. 338, 347 (2007). This presumption reflects "the nature of the Guidelines-writing task that Congress

set for the Commission and the manner in which the Commission carried out that task," *Id.*, and the fact that "[t]he Commission has made a serious . . . effort to carry out" its "mandate" to write guidelines that will serve the objectives of § 3553(a). *Id.* at 348. With this presumption in mind, it is "nearly inconceivable" that a below-guidelines sentence constitutes a substantively unreasonable sentence. *United States v. Lazarski*, 560 F.3d 731, 733 (8th Cir. 2009). Yet, the application of the child pornography guidelines to this case reveals the rare occasion where an unreasonable sentence resulted despite the downward variance.

The child pornography guidelines should not be entitled to any presumption of reasonableness, because the Sentencing Commission has recognized since 2012 that the guidelines are out of proportion with the realities of run-of-the-mill child pornography offenses. The guidelines should not be presumed to be reasonable.

> [T]he 2012 *Child Pornography Report* evaluated the severity of offender behavior to provide a more complete understanding of non-production child pornography offenses and offenders. The Commission emphasized the seriousness of non-production offenses, noting that child pornography offenses normalize the sexual abuse of children and may promote existing tendencies toward sex offending and the production of new images. . . .
>
> The 2012 *Child Pornography Report* also examined sentencing outcomes and resulting disparities. The Commission explained that guideline ranges and average sentences had increased substantially since Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003. Through the PROTECT Act, not only did Congress directly amend the guidelines to add new sentencing enhancements and create new statutory mandatory minimum penalties, but the underlying conduct triggering such enhancements and penalties increasingly applied to more offenders. Due to advancements in technology, enhancements that were intended to apply to the most serious child pornography offense were routinely applied to most non-production child pornography

> offenders. At the same time, within range sentences were imposed in less than one-third of non-production child pornography cases. . . .
>
> Based on those findings, the Commission concluded that the non-production child pornography sentencing scheme should be revised to account for technological changes in offense conduct, emerging social science research about offender behavior, and variations in offender culpability and sexual dangerousness.

United States Sentencing Commission, *Federal Sentencing of Child Pornography, Non-Production Offenses* (June 2021) (hereinafter USSC 2021 Report). To fix the fact that the guidelines skewed all defendants toward the maximum statutory sentence, thereby failing to distinguish between offenses qualitatively more or less serious than others, the Commission in 2012 proposed amending the guidelines to account for three factors that would more accurately sort child pornography defendants into different guidelines based on the seriousness of their crimes. *Id.* at 2. Those factors were:

> (1) The **content** of the offender's child pornography collection and nature of the offender's collecting behavior; (2) the offender's degree of involvement with other offenders, particularly in an internet **community** devoted to child pornography and sexual exploitation; and (3) the offender's engagement in sexually abusive or exploitative **conduct** in addition to the child pornography offense.

Id. at 2.

The DOJ acknowledged after the 2012 Sentencing Commission report that changes needed to be made, specifically stating "that advancements in technology and the evolution of the child pornography 'market' have led to a significantly changed landscape – one that is no longer adequately represented by the existing sentencing guidelines. . . . we agree with the Report's conclusion that the existing Specific Offense Characteristics ('SOCs') in USSG § 2G2.2 may not accurately reflect

the seriousness of an offender's conduct, nor fairly account for differing degrees of offender dangerousness." Anne Gannon, Nat'l Coordinator for Child Exploitation Prevention and Interdiction, on Behalf of the DOJ, March 5, 2013, https://sentencing.typepad.com/files/doj-letter-to-ussc-on-cp-report.pdf.

Following the DOJ's lead, a number of federal judges have rejected the child pornography guidelines on policy grounds. *See, e.g. United States v. Broxmeyer*, 699 F.3d 265, 297-302 (2d Cir. 2012) (Jacobs, C.J., dissenting, regarding a sexting case); *United States v. Nash*, 1 F. Supp. 3d 1240, 1241 (N.D. Al. 2014) (sexting case); *United States v. Child*, 976 F. Supp. 2d 981, 982 (S.D. Ohio Oct. 2, 2013) (non-sexting case); *United States v. Campbell*, 738 F. Supp. 2d 960, 961-62 (D. Neb. 2010); (non-sexting case); *United States v. Zenor*, 722 Fed. Appx. 595 (8th Cir. 2018) (non-sexting case).

Applied to Combs, the guidelines are inherently unreasonable because they do not distinguish this young offender, who was sexting with peers and has no criminal history, from the worst of the worst child pornographers. Dr. Rosell testified at the original sentencing hearing that Combs is "definitely [an] atypical and unique [offender]." (R. Doc. 284 at 19-22). First, Combs had substantially less images than the average child pornography offender. While the average non-production child pornography offender possesses thousands, even *millions*, of images, Combs had only 7 images and 23 videos that could be classified as sexually explicit. (SC 2021 Report at 30; PSR ¶ 36). Applying USSG § 2G2.2 cmt. 6(B)(ii), this is treated as 1,732 images. This means Combs is less culpable than the average offender and suggests a lower

sentence. *Gall v. United States*, 552 U.S. 55 (2007) (dissimilar offenders should be sentenced dissimilarly).

Second, Combs did not have a single image or video involving infants, toddlers, or prepubescent victims. In 2019, over half of child pornography offenders had images or videos of infants or toddlers, and nearly every offender (99.4%) had images or videos depicting prepubescent minors. USSC 2021 Report at 31. While all sexually explicit images of children are noxious, it is obvious that images of younger children are more serious and deserve greater punishment than images of children 13-plus. *See, e.g.* USSG § 2G2.2(b)(2). In this regard, Combs' offense was less serious than 99.4% of child pornography offenses. Third, Combs did not distribute any child pornography. In 2019, regardless of how the offender was charged (i.e., with distribution, receipt, or possession), 68.3% of offenders distributed images of child pornography. USSC 2021 Report at 33. Combs did send one photo, but it was not child pornography as defined in 18 U.S.C. § 2256(2)(A). § 3553(a) and *Gall*.

Fourth, Combs received images through sexting with individuals with whom he formed close personal relationship, and with whom he was relatively close in age,[2] rather than from a child pornography network or community. The commission found the most common method of receiving child pornography across all

[2] In 2019, the average child pornography offender was 41 years old. USSC 2021 Report at 18. As a result, the average age gap between a child pornography offender and their victims is at least 23 years. (41 minus 18). This age gap is concerning for obvious reasons – a 41-year-old has fully matured and has a great deal of power and control over immature victims. *See, e.g.* USSG § 2G1.3(b)(2)(B), App. N. 3 (in a sexual exploitation context, applying a presumption that a 10+ year age gap results in undue influence or pressure to traffic victims). While Combs was not legally able to have sex with each of his victims, it is nevertheless not unusual for a teenager to be sexually interested in other teenagers. While Combs was an adult, there is no doubt that he was immature at the time of these offenses.

offenders was through a website. USSC 2021 Report at 32. These offenders seek out secretive communities for researching and furthering their unnatural sexual interest in children, and for a "safe haven" for trading and acquiring more and more images or videos. *Id.* at 36. Participation in such a community indicates greater culpability: the offender knew his conduct was illegal and subversive and was looking for secretive ways to further it. In the typical case, images of the victim are produced and disseminated against the victim's will or without their knowledge. By contrast, the images and videos in Combs' possession were self-produced by a victim near in age to Combs and with whom he had formed a close personal relationship. While nothing legally justifies Combs' actions, his conduct was well outside the ambit of the typical offender.

Despite Combs' differences from the typical offender, his sentencing guidelines range was 235 to 293 months – the very top of the maximum statutory sentence on Counts 4 and 5, and nearly double the statutory maximum sentence on Count 6. While the Court varied downwards to account for the mitigating factors it observed in Combs, it was unreasonable to rely on a guidelines range of 235 to 293 months as a starting point. Combs was an 18- and 19-year-old kid who was engaging in consensual activity with victims who were close to him in age and maturity level. He had no prior criminal history and possessed other significant mitigating factors. Nonetheless, he was still sentenced as if he was the most heinous of offenders. This case demonstrates the inherent inability of the current sentencing guidelines to adequately distinguish between levels of culpability. Numerous federal courts have

already called the guidelines' validity into question. The uncertainty around this issue cannot remain, and the Supreme Court should settle this important question of federal law.

Conclusion

Combs respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

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