No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN BRINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

VERNA WEFALD
65 North Raymond Avenue, Suite 320
Pasadena, California 91103
Telephone: 626-577-2658
Email: verna@vernawefald.com

Counsel of Record

QUESTION PRESENTED

Whether a life without parole sentence for a 24 year old with no prior criminal record for producing child pornography is substantively unreasonable?

RELATED PROCEEDINGS

United States District Court

United States v. Brinson, CR-17-404-AB (C. D. Cal.)

Ninth Circuit Court of Appeals

United States v. Brinson, Ninth Circuit No. 22-50093

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN BRINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner John Brinson respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on November 21, 2023. The decision is unpublished.

OPINION BELOW

On November 21, 2023, the Court of Appeals entered its decision affirming Petitioner's life sentence for child exploitation and production of child pornography. Appendix A.

JURISDICTION

On November 21, 2023, the Court of Appeals affirmed Petitioner's life sentence for child exploitation and production of child pornography. Appendix A. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on February 19, 2024. Supreme Court Rule 13. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a)(2)

(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.

STATEMENT OF THE CASE

On July 23, 2021, without a plea agreement, Petitioner pled guilty to counts 1, 3-6, of a second superseding indictment, to engaging in a child exploitation enterprise [18 U.S.C. § 2252A(g)] and production of child

pornography [§ 2251(a), (e)]. Petitioner stipulated to the factual basis contained in a joint statement.[1]

Petitioner was only 24 when he was arrested in this case and had no prior criminal history of any kind. (PSR at 2 and ¶¶105-110.)

The Presentence Report ("PSR") calculated the guidelines as level 43 and criminal history category I, which resulted in a life sentence. The total offense level was 52 but when the offense level exceeds level 43 it will be treated as level 43. (PSR ¶ 103.) Even though Petitioner had no prior criminal history, the PSR recommended a life sentence based on the facts of the case. (CR 324 at 6-7.)

The government also recommended a life sentence.

Defense counsel complained that both the PSR and the government were requesting a life sentenced based on uncharged conduct. Counsel calculated the total offense level as 39, for a guideline range of 262-327 months (22-27 years). (3-ER-320 [sealed].) Counsel then asked for a downward variance to 240 months (the mandatory minimum) arguing that Petitioner was not as culpable as codefendants Harrell and Martinez; he was

[1] Codefendant Alan Harrell also pled guilty and received a life sentence. Codefendants Moises Martinez pled guilty and was sentenced to 660 months for cooperation. Keith Lawniczak pled guilty and was sentenced to 144 months.

amenable to sex offender treatment; and at the time of his release from prison the government would have the option to file a civil commitment petition under 18 U.S.C. § 4248 to keep him incarcerated if mental health evaluations determined he would likely reoffend. Further, Petitioner was very remorseful and appreciated the wrongfulness of his conduct. (3-ER-306-307 [sealed].) In addition, there was significant mitigation evidence (Petitioner was molested as a child), two favorable psychological reports, and available sex offender treatment in the Bureau of Prisons ("BOP"). A twenty year sentence was sufficient but not greater than necessary under 18 U.S.C. § 3553(a)(2). (3-ER-322 [sealed].)

As for the sentencing guidelines, counsel said they were "off the charts" and "meaningless." (1-ER-20 [sealed].) There was no science in child porn guidelines which the sentencing commission had acknowledged. (1-ER-21 [sealed].)

After reviewing the evidence the court found that the guideline calculation was justified. In making an individualized determination under 3553a, the court found the offense to be "horrific," "violent and tragic." (1-ER-88 [sealed].) Petitioner had abused a position of trust and the court hoped that the children would heal with time. (1-ER-89 [sealed].)

As for the sentence proposed by defense counsel, even with the possibility of a civil commitment, the court declined to take a risk that at some point in time Petitioner would not commit this kind of offense again. (1-ER-90 [sealed].)

The court imposed a life sentence on count 1 and 360 months on the remaining counts to run concurrent. If Petitioner were ever released, he would be on supervised release for life. The court recommended a mental health evaluation, participation in psychological counseling, and a sex offender treatment program. (1-ER-91-92 [sealed].)

On appeal, Petitioner argued that the life sentence, which in the federal system is life without parole, was substantively unreasonable. Petitioner was only 24 years old at the time he committed the crimes, and he had no prior record. The current science, as recognized by the courts, shows that the brains of people under 25 years of age are not fully developed.

The Ninth Circuit affirmed the life sentence. It did not presume that a within Guidelines sentence made it reasonable. However, Petitioner's:

> potential for rehabilitation, even if accepted, does not outweigh the circumstances (specifically, the nature of the offense and the need for deterrence) that reasonablly supported a life sentence under § 3553(a). Nor do [Petitioner's] other characteristics – such as his age (twenty-four years old at the time of arrest) or lack of previous criminal history – render the life sentence unreasonable.

Appendix A at 3.

The Court further held that the case fell with the "overwhelming majority" of cases where a within-Guidelines sentence is reasonable." Appendix A at 4.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A LIFE WITHOUT PAROLE SENTENCE IMPOSED ON A TWENTY-FOUR YEAR OLD WITH NO PRIOR CRIMINAL RECORD IN A SEX OFFENSE CASE IS SUBSTANTIVELY REASONABLE WHERE THAT DEFENDANT IS AMENABLE TO REHABILITATION

A number of district courts have determined that the guidelines in child pornography cases are owed less deference than those for other offenses because these guidelines are "largely the produce of congressional directives, some of which the Sentencing Commission actively opposed, rather than Commission study and expertise." *United States v. Diaz*, 720 F. Supp.2d 1039, 1042 (E.D. Wis. 2010). Accord *United States v. McGrath,* 2014 WL 351975, n. 7 (D. Nebraska 2014) (cases cited therein).

People who have committed sex offenses:

> have taken center stage in both the criminal and civil legal systems. Currently, no other population is more despised, more vilified, more subject to media misrepresentation, and more likely to be denied basic human rights. Endless emotionally charged debates have ensured, focusing on how to ostensibly maintain safety in local communities while containing the 'sexual predator.' Unfortunately, most of these debates are premised upon incorrect facts and spurious data that have been distorted and skewed to support political agendas that respond to - or perhaps in some cases, incite – community outcries for retribution.

Heather Ellis Cucolo and Michael L. Perlin, "Preventing Sex-Offender Recividism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration," 22 Temp. Pol. & Civ. Rts. L. Rev. 1 (Fall 2012) at 1-2 (article by two law professors surveys sex offender laws around the country). " The current sex-offender laws" need to be changed. *Id*. at 41.

> It is time we seriously evaluated them all. We must educate ourselves, confront our fears, and resist the urge to succumb to reactionary responses. These emotionally charged issues must be dealt with through rational solutions directed toward protecting potential victims while preserving human rights for all.

Id. at 41-42.

The trial court said it would not take a "risk" that Petitioner might reoffend someday. (1-ER-90 [sealed].) It did order him to participate in psychological counseling and sex offender treatment. (1-ER-93 [sealed].) It goes without saying, however, that such treatment is futile and

meaningless if he is never released. Testing (Static 99) indicated Petitioner was a low risk to reoffend. (3-ER-335-336 [sealed].)

The U.S. Department of Justice has a website devoted to sex offender crimes and litigation. Http://smart.ojp.gov. A research brief concluded that sex offenders can be successfully treated.

> Although there is agreement among researchers that the knowledge base is far from complete, the evidence suggests that the treatment for sex offenders – particularly cognitive-behavioral/relapse prevention approaches – can produce reductions in both sexual and nonsexual recidivism .... treatment is apt to be most effective when it is tailored to the risks, needs, and offense dynamics of individual sex offenders.

Roger Przybyksi, "The Effectiveness of Treatment for Adult Sexual Offenders," US Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking," July 2015.[2]

The trial court did not take Petitioner's youth into consideration. The courts are beginning to recognize that people under 25 do not have fully developed brains. The California Legislature, however, has gone a long way to recognize this phenomenon. In 2013, the Legislature amended Penal Code section 3051 to provide for a parole hearing to someone who committed the offense (i.e. murder) before the age of 18 and who was sentenced to less than

---

[2] The report is available at: https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/theeffectivenessoftreatmentforadultsexualoffenders.pdf

25 years to life, during his or her 20th year of incarceration. Senate Bill "SB" 260, sec. 4. If the sentence was 25 years to life, the offender would be eligible for parole after 25 years. (*Id.*)

This bill recognized that "only a relatively small proportion of adolescents" who engage in illegal activity "develop entrenched patterns of problem behavior" and that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including "parts of the brain involved in behavior control." SB 260, sec. 1, citing *Miller v. Alabama*, 567 U.S. 460 (2012).

> The purpose of the act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* (2012) 183 L.Ed.2d 407.

SB 260, sec. 1.

In 2015, the state Legislature acted again in SB 261, to expand youthful offender parole hearings to "any prisoner who was under 23 years of age at the time of his or her controlling offense." In 2017, the Legislature

expanded youthful offender parole hearings to prisoners who committed their crimes *when they were 25 years of age and under*.[3] Assembly Bill "AB" 1038.

> Despite the fact that the line between youth and adulthood has traditionally been drawn at 18 years of age, recent amendments to section 3051 recognize that the maturity process does not end at 18 and in many cases extends to at least 25 years of age.

In re Jones, 42 Cal.App.5th 477, 484 (2019).

According to the author of SB 261:

> Recent scientific evidence on adolescent and young adult development and neuroscience shows that certain areas of the brain – particularly those affecting judgment and decision making – do not fully develop until the early to mid 20s. Various studies by researchers from Stanford University (2009), University of Alberta (2011), and National Institute of Mental Health (2011) all confirm that the process of brain development continues well beyond age 18."

In re Jones, 42 Cal.App.5th at 485 (citations omitted).

Since the passage of SB 260 and SB 261, the motivation to focus on rehabilitation has increased:

> An offender is more likely to enroll in school, drop out of a gang, or participate in positive programs if they can sit before a parole board sooner, if at all, and have a chance of being released.

In re Jones, 42 Cal.App.5th at 485 (citation omitted).

---

[3] Penal Code section 3051, subdivision (a)(1) now provides for a youth offender parole hearing for any prisoner who was 25 years of age or younger at the time of the controlling offense. A person 25 years of age or younger who was sentenced to 25 years to life is eligible for a parole hearing after 25 years of incarceration. § 3051(b)(3).

The expansion of youthful offender parole hearings to lifers who were 25 and under was based on scientific studies:

> Research has shown that the prefontal cortex doesn't have nearly the functional capacity at age 18 as it does at 25. The prefrontal cortex is responsible for a variety of important functions of the brain including: attention, complex planning, decision making, impulse control, logical thinking, organized thinking, personality development, risk management, and short-term memory. These functions are highly relevant to criminal behavior and culpability.

In re Jones, 42 Cal.App.5th at 485.

It cannot be overemphasized that the child pornography guidelines were not based on scientific studies. *United States v. Diaz*, 720 F. Supp.2d at 1042; Cucolo and Perlin, supra, at 1-2. If Petitioner had committed first degree murder under California law he would be eligible for parole in 25 years. As it stands now, he will never be eligible for parole no matter how rehabilitated he is.

It is widely acknowledged that the sex offender guidelines are arbitrary and based on politics rather than science. This Court should grant certiorari to determine whether a life without parole sentence for a sex offender who was only 24 years old and had no prior criminal record is substantively unreasonable under 18 U.S.C. § 3553a.

This is the perfect case to decide this important issue.

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: February 9, 2024 Respectfully submitted,

VERNA WEFALD

Counsel of Record