

IN THE SUPREME COURT OF THE UNITED STATES

DAVID CARBONARO,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari from the United States
Court of Appeals for the Third Circuit at Appeal Number 21-2442

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Whether the Court erred when it overruled the objections to the enhancements for the use of a computer and the number of images?
- II. Whether the Court imposed an unreasonable sentence?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Court of Appeal for the Third Circuit. The Third Circuit's Non-Precedential Opinion is attached hereto as Appendix A.

JURISDICTION

This litigation began as a criminal prosecution against David Carbonaro, Petitioner, for violations of laws of the United States. On November 19, 2019, Petitioner entered an open plea to the charges. On July 28, 2021, the Court sentenced Petitioner to a net sentence of 265 months, lifetime Supervised Release, and \$38,000.00 Restitution. The Petitioner appealed and on June 22, 2023, the Third Circuit Affirmed. This Petition for a Writ of Certiorari seeks a review of the Third Circuit's June 22, 2023 decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Sentencing Guidelines

STATEMENT OF THE CASE

On December 6, 2018, the Government charged Petitioner in an Indictment alleging Production of Child Pornography,¹ Distribution of Child Pornography,² and Possession of Child Pornography.³ Specifically, Petitioner was accused of taking nine images and a video of a three-year-old toddler; of uploading over 300 images of child pornography to the internet; and of possessing over 7,000 images of child pornography. On November 19, 2019, Petitioner entered an open plea to the charges. On July 28, 2021, the Court sentenced Petitioner to a net sentence of 265 months,⁴ lifetime Supervised Release, and \$38,000.00 Restitution. The Court did not impose a fine. The Petitioner appealed, and on June 22, 2023, the Third Circuit Affirmed.

Relevant Facts

Petitioner was born on February 15, 1993, in Florida to David Carbonaro and Crystal Jenkins. His parents are divorced. Petitioner has one older maternal half-brother who lives in Virginia. Petitioner also has three paternal half-siblings.

¹ 18 U.S.C. § 2251(a) and (e).

² 18 U.S.C. § 2252(a)(2) and (b)(1).

³ 18 U.S.C. § 2252(a)(4)(B) and (b)(2).

⁴ Count One 265 months; Counts Three and Four 240 months each. All sentences to run concurrently.

Petitioner has had no contact with his siblings since he was incarcerated. Petitioner was raised by his parents until he was three years old, when his parents separated due to his father's infidelity. After the divorce, Petitioner lived in several places in Florida and North Carolina. He resided with his mother and his older half-brother. However, whenever his mother had a boyfriend, the boyfriend lived with them. This lasted from 1996 to 2004, when Petitioner's mother married Michael Barker ("Mr. Barker"). This marriage resulted in another move in 2005 to Seattle, Washington, for financial opportunities. Unfortunately, this did not work, and in 2006, the family returned to Florida. Petitioner's mother divorced Mr. Barker in 2010. They later remarried, only to get divorced again.

Petitioner's mother and Mr. Barker physically abused Petitioner. This physical abuse eventually resulted in an intervention by child protective services. This is not the only time authorities had to intervene. During the time Petitioner's mother was married to Mr. Barker, Petitioner got into an argument with her, and his mother called the police and had him arrested.

Petitioner's life was quite traumatic. Petitioner's maternal half-brother abused him sexually and physically. His brother forced Petitioner to perform oral sex, and he also fondled him. When his mother found out about the sexual abuse, her only measure was to put them in separate bedrooms. His brother also beat Petitioner regularly until he moved out when Petitioner was 11 years old. On one

occasion, he sat on his chest until Petitioner could not breathe. As a result, Petitioner had chest pains that lasted several weeks. When Petitioner was 19 years old, he again lived with his brother, who continued to assault him.

Petitioner witnessed domestic abuse, was exposed to graphic internet porn, and was physically and sexually assaulted, all before the age of eleven. In addition, Petitioner's mother would take his older brother and leave Petitioner home alone for days. She would abuse Petitioner for the slightest transgressions, like not arriving on time from school. The school was three miles away, and it was unrealistic for him to get home when she wanted him to arrive. She would lock Petitioner out of the house for hours whenever she felt that he did not walk the dog properly. Also, she regularly denied him food by locking the food pantry so that Petitioner would not have access to it. Last, she had a quick temper and often lost control and would beat Petitioner and have her husband, Mr. Barker, beat Petitioner.

Despite these problems, Petitioner remained in school and graduated from High School in 2011 from F.W. Buchholz High School in Gainesville, Florida. While in middle school and in high school, Petitioner was monitored closely through an Individualized Education Plan. Petitioner explained that this plan was designed to address the impact his psychological conditions had on his education.

Petitioner's Psychological Conditions

At seven, he was diagnosed with Attention Deficit Hyperactivity Disorder

(A.D.H.D.). This evaluation was prompted by behavior and performance problems in school as well as persistent anxiety. At 11, Petitioner was diagnosed with Tourette's Syndrome and a possible bicipital brain dysfunction. These conditions were treated with Paxil⁵, Risperdal,⁶ and Concerta.⁷ At 13, Petitioner was diagnosed with Asperger's Syndrome. This is an Autism Spectrum Disorder (A.S.D.). A year later, in 2007, he was reevaluated because he was experiencing mood swings, and his medications were adjusted, and Depakote was added to his daily medications.⁸ In 2008, at the age of fifteen, he attempted to kill himself. In 2009, his medications were adjusted as follows: Risperdal for mood stabilization; Depakote for anxiety and Tourette's syndrome; Paxil for Obsessive-Compulsive Disorder (O.C.D.)⁹ and anxiety; and Metadate and Methylin for A.D.H.D. Petitioner continued treatment until 2011, when at 18, he stopped treatment due to a lack of insurance.

Upon his arrest, Petitioner was evaluated in the Philadelphia F.D.C., and he was diagnosed with Adjustment Disorder with Mixed Anxiety and Major Depressive Disorder. As a result, he was placed on Depakote and Prozac.

Petitioner's Experience in Prison

⁵ Used to treat depression and anxiety.

⁶ Used to treat mood instability.

⁷ Used to treat Attention Deficit Hyperactivity Disorder.

⁸ Used to treat Anxiety and Tourette's Syndrome.

⁹ Petitioner does not recall when he was diagnosed with OCD.

While in custody, Petitioner has had a horrendous experience. When his fellow inmates learned about his case, he was immediately confronted. A month later, another inmate demanded his commissary. This happened on multiple occasions. He was quickly beaten and taken to the computer so that he could prove that he did not have money. As a result of this event, he was placed in the Special Housing Unit ("SHU"). While in SHU, he had many panic attacks, and his cellmate got angry, attacked him, and threatened to kill Petitioner if he continued to have panic attacks. He was then placed in a different unit. When he arrived at that unit, he was named Creepy Dave and harassed constantly. For example, when he was trying to sleep, other inmates banged on his door. If he requested a book, it would not come for months. If he asked for bread from the kitchen, he was asked to pay for the bread. One inmate slapped him. Another inmate attacked him, and he had to defend himself. Both were sent to SHU. During this period, Petitioner attempted to sharpen an object to hurt himself. As a result, he was placed on temporary suicide watch and was subsequently returned to the mental health unit at the F.D.C.

Petitioner's Relationship with Ms. Kayla Parker

In 2013, Petitioner and Ms. Kayla Parker began to live together in King of Prussia, Pennsylvania. In 2014, Ms. Parker got pregnant and had a boy. The boy lives with his maternal great-grandparents. Ms. Parker

had a young girl, which is Minor # 1. Minor # 1 lived with her maternal great-grandparents until January of 2015. Minor # 1, who was three years old, stayed with Petitioner and Ms. Parker from January 2015 to November 2015. Petitioner pleaded guilty to taking nine photos and a video of Minor # 1. This involved the charge of Production of Child Pornography, in violation of 18 U.S.C. § 2251(a) and (e).

THE FINDINGS OF THE PRE-SENTENCE INVESTIGATION REPORT

The P.S.R. initially found that the Base Offense Level was 42, the Criminal History Category was I, and the recommended guideline incarceration range was 360 months to life. However, the life sentence was reduced to 840 months because the combined statutory maximum is 840 months. P.S.R. ¶ 92.

The P.S.R. included four enhancements to the Base Offense Level. The first enhancement was in ¶ 25 of the P.S.R., which found that "[t]he offense involved material that portrayed an infant or a toddler. [footnote omitted] Therefore, the offense level is increased by 4 levels. U.S.S.G. § 2G2.1 (b)(4)(8)." The Court sustained Petitioner's objection to this enhancement because it violated the ex post facto clause and reduced the Base Offense Level by four levels. As a result, the Base Offense Level was reduced to 39, which resulted in a recommended guideline incarceration range of 262 to 327 months. (App. 174, 175).¹⁰

¹⁰ App. refers to the Appendix filed in the Third Circuit which is attached hereto as

The second enhancement was in ¶ 26 of the P.S.R. that found "[t]he Defendant lived in an apartment with Minor# 1 and provided for her basic needs, including food and shelter. Since Minor # I was in the custody, care, or supervisory control of Defendant, the offense level is increased by 2 levels. U.S.S.G. § 2G2.1(b)(5)." The Court overruled Petitioner's Objection to this enhancement. However, after consulting with Counsel, Petitioner withdrew this objection during the sentencing hearing. (App. 178).

The third enhancement was in ¶ 36 of the P.S.R., which found that "[s]ince the offense involved the use of a computer or interactive computer service for the possession, transmission, receipt, or distribution of the material, the offense level should be increased by 2 levels. U.S.S.G. §2G2.2(b)(6)." The Court overruled Petitioner's Objection to this enhancement.

The fourth enhancement was in ¶ 37 of the P.S.R. that found "the Defendant's computer and devices revealed over 7,000 images of child pornography. As the offenses involved more than 600 images, the offense level is increased by 5 levels. USSG §2G2.2(b)(7)(D)." The Court overruled Petitioner's Objection to this enhancement.

REASONS FOR GRANTING THE PETITION

THE COURT ERRED WHEN IT OVERRULED PETITIONER'S OBJECTIONS TO THE ENHANCEMENTS FOR THE USE OF A COMPUTER AND THE NUMBER OF IMAGES

On the issues of using a computer and the number of images, the Sentencing Commission in February 2013 released a report to Congress about the child pornography guidelines for nonproduction offenders. *See* U.S. Sent'g Comm'n, *Report to the Congress: Federal Child Pornography Offenses*. (2012). The Commission explained that because the enhancements for computer use and type and volume of images "now apply to most offenders," the guideline "fail[s] to differentiate among offenders in terms of their culpability." *Id.* at iii, xi, 209, 323. It explained that "technological changes have resulted in exponential increases in the volume and ready accessibility of child pornography, including many graphic sexual images involving very young victims, a genre of child pornography that previously was not widely circulated." *Id.* at 6. Because "sentencing enhancements that originally were intended to provide additional proportional punishment for aggravating conduct now routinely apply to the vast majority of offenders," *id.* at xi, the "current guideline does not adequately distinguish among offenders regarding their culpability for their collecting behaviors." *Id.* at 323. The cumulative enhancements addressing the content and volume of images possessed, "in addition to base offense levels of 18 or 22, result[] in guideline ranges that are overly severe

for some offenders in view of the nature of their collecting behavior." *Id.*

The Commission reported that approximately one-quarter of federal offenders "received child pornography from commercial websites, thereby fostering the commercial markets," and one quarter engaged in "personal distribution" to another individual through bartering or trading of images, also described as a "market." *Id.* at 98-99. There is, however, no social science research available to support the theory that criminal punishments "have affected commercial or non-commercial 'markets' in child pornography since the advent of the Internet and P2P filesharing." *Id.* at 98.

As many courts have observed, the child pornography guideline, by enhancing sentences based upon factors inherent in the crime and thus appearing in every case, concentrates offenders at or near the statutory maximum and thus fails to distinguish more serious from less serious offenders.

The Use of a Computer

Petitioner submits that ¶ 36 improperly increased the Base Offense Level by two levels. Paragraph 36 states, "[s]ince the offense involved the use of a computer or interactive computer service for the possession, transmission, receipt, or distribution of the material, the offense level should be increased by 2 levels. U.S.S.G. §2G2.2(b)(6)." Multiple courts have declined to apply this enhancement because all child pornography offenders use computers. For example, in *U.S. v.*

Husmann, 765 F.3d 169, 172 (3rd Cir. 2014), the Circuit declined to apply a two-level enhancement under U.S.S.G. § 2G2.2(b)(6) for the use of a computer, since all child pornography offenders use computers. In *United States v. McGuire*, 2011 U.S. App. LEXIS 14342 (3rd Cir. 2011), the District Court declined to apply the two-level enhancement for the use of a computer under § 2G2.2(b)(6), and it stated these crimes always involve a computer, and therefore it is almost de facto, not de jure, but de facto - - that the use of the computer is synonymous with the crime. In *U.S. v. Cunningham*, 2016 U.S. App. LEXIS 2296 (3rd Cir. 2016), the Court sustained the Defendant's objection to the two-level enhancement under § 2G2.2(b)(6). Last, in *U.S. v. Crayton*, 2015 U.S. App. LEXIS 12093 (3rd Cir. 2015), the Court agreed with Defendant's argument that the § 2G2.2(b)(6) enhancement applied to every child pornography case, and that resulted in double counting.

Therefore, Petitioner submits that the Court erred when it overruled the objection for the use of a computer enhancement.

The Number of Images

Petitioner submits that ¶ 37 improperly increased the Base Offense Level by five levels. Paragraph 37 states: "the Defendant's computer and devices revealed over 7,000 images of child pornography. As the offenses involved more than 600 images, the offense level is increased by 5 levels. USSG §2G2.2(b)(7)(D)." Similarly, multiple courts have declined to apply this enhancement, for example, in

United States v. McGuire, 2011 U.S. App. LEXIS 14342 (3rd Cir. 2011), the District Court declined to apply a five level enhancement for the number of images under § 2G2.2(b)(7) and stated that:

"the number of images doesn't reflect intent any longer because the click of a mouse can result in many more images than anybody ever really perhaps wanted. Although he has them. But I don't view that as making the crime worse in this case, the number of images."

Id. In *U.S. v. Peiritsch*, 2012 U.S. App. LEXIS 13296 (3rd Cir. 2012), Defendant objected to a five-level enhancement for possession of more than 600 images of child porn under § 2G2.2(b)(7), while the Court overruled the objection it granted a six-level variance. Therefore, Petitioner submits that the Court erred when it overruled the objection to the enhancement for the number of images. On this point, Dr. Samuel explained that Asperger Syndrome is ". . . an extraordinarily brain based dysfunction, if you will, which results in this compulsive need to seek out certain things, for example, 1,000 Pokemon cards at one point. He goes from one thing to the next and unfortunately, ends up going down an illegal route, if you will." (App. 184). Thus, besides the ease of access to these images online, Petitioner's Asperger driven compulsion also contributed to the high number of images. The District Court's discussion about the use of a computer and the numbers of images can be found in App. 157, 158, 160, 161, and 166.

A NET SENTENCE OF 265 MONTHS WAS UNREASONABLE UNDER
THESE CIRCUMSTANCES

It is within the discretion of the District Court to determine the appropriate sentence for a Defendant. This discretion, however, is not unfettered. Section 3553(a) of the United States Code states that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes outlined in paragraph (2) of this subsection." 18 U.S.C. § 3553(a)(2). Further, the Supreme Court has held that sentences must be reasonable. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court set the review of sentences under a reasonable standard. *Id.* at 224.¹¹ Subsequently, the Court reaffirmed this standard of review. Specifically, in *Gall v. U.S.*, 552 U.S. 38 (2007), the Supreme Court stated:

As a result of our decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are "reasonable." Our explanation of "reasonableness" review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.

Id. at 46.

¹¹"Here, these factors and the past two decades of appellate practice involving departures from the Guidelines imply a familiar and practical standard of review for unreasonable[ness]." *Booker*, 543 U.S. at 224.

Petitioner was facing a recommended guidelines incarceration range of 262 to 327 months. He was also facing a mandatory minimum sentence of 180 months. Based on the factors that will be discussed below and the arguments above about the enhancements for the use of a computer and the number of images, Petitioner submits that a sentence below 262 months was reasonable and that the Court should have granted the requested variance.

In *U.S. v. Michael Shore*, 2020 U.S. Dist. LEXIS 118400 (E.D. PA 2020), the District Court granted a variance based on the consideration of the § 3553 factors. In *Shore*, Mr. Shore was charged with similar charges,¹² Using Facebook, cell phone, and text messaging, Shore solicited from girls 12 – 16 years old, nude photos, photos of the girls masturbating, and photos having sex. One of the girls sent several photos to Shore, who sent them to another person. *Shore* considered that the more severe manufacturing penalty was aimed at those who prey upon children for their own greed/profit. Shore, like Petitioner, did not engage in production for profit. *Shore* also considered the Defendant's culpability. Shore,

¹² Use of an Interstate Commerce Facility to Entice a Minor to Engage in Sexual Conduct in violation of 18 U.S.C. § 2422(b), Manufacturing and Attempting to Manufacture Child Pornography (3X) in violation of 18 U.S.C. § 2251 (a), Distribution of Child Pornography in violation of 18 U.S.C. § 2252(a)(2), and Possession of Child Pornography in violation of 18 U.S.C. § 2252(a)(4).

like Petitioner, was suffering from Asperger Syndrome, an Autism Spectrum Disorder. On this point, the Court found that Autism Spectrum Disorder (A.S.D.) affected the level of culpability and stated the following:

Shore, like others with A.S.D., shares the same characteristics with juveniles whom the Supreme Court has found are "constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). *These include immaturity. impulsivity, and failure to appreciate the risks and consequences of their actions. The same analysis applies here. (emphasis added).*

Shore's A.S.D. is a component of the culpability analysis. It bears on his perspective and appreciation of the wrongfulness of his offense conduct. It goes to his intent. Thus, we look at how A.S.D. played a role in Shore's conduct.

Autism is a neuro-developmental disability involving the brain. It is characterized by the presence of narrow, repetitive behavior and differences and difficulties in social interaction, communication, and adjusting to change. *A person suffering from A.S.D. is neurologically impaired in his ability to appreciate the unacceptability of his conduct or to intuit why this conduct is unacceptable. Because of his difficulty observing social norms, an A.S.D. individual may engage in socially disapproved or unacceptable behavior, with no consciousness of wrongdoing or a real sense of how his behavior is viewed by others. (emphasis added).*

A.S.D. is defined in the DSM-V as typified by extreme social and emotional immaturity, the inability to read others or respond appropriately in social settings, lack of intuitive

awareness of social/moral/legal constraints, and intense and narrowly directed repetitive activities. AM. *Psychiatric Ass'n Diagnostic and Statistical Manual of Mental Disorders (DSM- V)* 50 (5th ed. 2013). These features combine to create a risk of offensive behavior towards others without any offensive purpose.

Because they are typically isolated from their peers of the same age, persons with A.S.D. have limited socio-sexual understanding. *They do not recognize sexual boundaries.* They are naive and socially awkward. They have a desire to "fit in". Yet, when they do, they fail to perceive and appreciate the feelings of others, and they engage in inappropriate behavior. They are not antisocial, they are asocial.

"Much of the deviant or sexual offending behavior exhibited among those with A.S.D. is often a manifestation of their A.S.D. symptoms, and not malice." M.C. Mogavero, *Autism Sexual Offending, and the Criminal Justice System, J. Intellectual Disabilities & Offending Behav.* 11 6-126 (2016). How the lack of sociosexual understanding leads to inappropriate sexual behavior has been described as follows:

We do recognize that problems with sexual expression and experiences can lead to a person with Asperger's syndrome being charged with a sexual offence. The charges tend to be for sexually inappropriate behavior rather than sexually abusive or sexually violent behavior (Ray, Marks and Bray-Garretson 2004). The person may have difficulty distinguishing between kindness and attraction, and assume a friendly act was an indication of romantic or sexual attraction. This can lead to a crush or infatuation with the person. Due to problems

with Theory of Mind abilities and reading social cues, the person with Asperger's syndrome assumes that the degree of adulation is reciprocal, and signs of rejection or annoyance are not recognized. The person may be charged with offences related to stalking.

The focus or expressions of sexual pleasure can also be of concern. For example, the person with Asperger's syndrome may not have had the usual social, sensual and sexual experiences of typical adolescents, and may develop sexually arousing fantasies involving objects, clothing, children or animals. The technical term is paraphilia. Acting out some paraphilias is illegal. The person with Asperger's syndrome may have been sexually abuse and subsequently repeat the offense with others, assuming such sexual behavior is acceptable, or as an attempt to understand why some one would engage in, and appear to enjoy, such behavior. (emphasis added).

A curiosity and confusion regarding sexuality can lead to the desire for more information and the development of a solitary and clandestine special interest in pornography. There can then be the assumption that the sexual behavior seen in films and described in magazines is a script for a first date. When certain suggestions are made, the person can be labeled a pervert or sexual deviant, and face the possibility of charges of sexual assault. There has been the suggestion that having Asperger's syndrome could be a factor in at least one case of sexual serial homicide (Silva, Ferrari and Leong 2002). Thus, I strongly advocate guidance in sexuality for adolescents and adults with Asperger's syndrome, using the

programs designed by specialists in Asperger's syndrome (Henault 2005), and appropriate modifications for treatment programs for sexual offenders (Ray et al. 2004).

Tony Atwood, *the Complete Guide to Asperger's Syndrome* 336 (Jessica Kingsley ed., 2007).

"Sexual curiosity and drive (along with a lack of appropriate channels for sexual expression and interaction) can lead individuals with AS to explore websites with child pornography without understanding the criminal and predatory context." Michael D. Powers & James M. Loomis, *Asperger Syndrome in Adolescence and Adulthood*, in *Asperger Syndrome: Assessing and Treating High-Functioning Autism Spectrum Disorders* 331, 339 (James C. McPartland et al eds., 2d ed. 2006). In other words, they have no appreciation of the seriousness or gravity of their transgressions.

Shore's A.S.D. contributed to his offense conduct. Dr. Shawn Channel, a staff psychologist at Federal Medical Center, Devens, and Dr. Elliot Atkins, a clinical psychologist who tested and evaluated Shore, concluded that his A.S.D. played a role in his behavior. [footnote omitted] Noting that A.S.D.'s role was "very complicated", Dr. Channel testified, "I believe [his A.S.D.] contributed to his offense conduct." [footnote omitted] He testified that Shore's A.S.D. impaired his understanding of the wrongfulness of his behavior. [footnote omitted]

Dr. Atkins opined that "Michael's Autism Spectrum Disorder has contributed to his commission of the instant offenses in a manner that clearly differentiates him from those individuals that both Congress and the Sentencing Commission had in mind when the Sentencing Guidelines were crafted." [footnote

omitted] Dr. Atkins explained that Shore suffers from "severe deficits in social functioning and doesn't fully appreciate the impact of his behavior on others." [footnote omitted] He lacked the ability to understand that his actions were harmful to others. "He had very little or no appreciation of the harm he was doing." [footnote omitted]

Shore, who is full of self-doubt and sees himself as socially alienated, has characteristic traits of A.S.D. He has poor judgment skills. He demonstrates a lack of remorse and empathy. [footnote omitted] He is socially immature. Testing revealed a "profound immaturity and dependency" that led him to create his own inner world. [footnote omitted] Deficits in socio-emotional reciprocity result in his over interpreting the degree of significance of a relationship. [footnote omitted] He functions socially and emotionally at the level of an adolescent. [footnote omitted] "He is still functioning much like a teenager himself and interacting like a young teenager instead of someone his own age." [footnote omitted] [13]

When the experts say an A.S.D. individual lacks empathy, they do not mean he is callous, sadistic or sociopathic. It means he has extreme difficulty viewing the world through the eyes of others. He does not notice when others suffer or he misunderstands others' feelings. Gary B. Mesibov et al., *Understanding Asperger Syndrome and High Functioning Autism* (2001). Although an A.S.D. individual may know it is wrong to induce children to engage in sexual behavior, he does not appreciate its impact or its consequences.

Having found that Shore's culpability in light of his A.S.D.

¹³ Mr. Carbonaro was not fully evaluated and treated by a psychologist so that this Court, like in *Shore*, could have the benefit of the testimony that was presented in *Shore*. This was a function of his lack of resources and because he was incarcerated.

mitigates the gravity of the offense, we turn to the severity of the sentence. Then, we must determine whether there is a "gross imbalance".

U.S. v. Shore, 2020 U.S. Dist. LEXIS 118400 at 9 - 15 (E.D. Pa. 2020). As found by *Shore*, Asperger Syndrome, has a neurological impairment that affects the ability to realize that conduct can be unacceptable. That this condition typically causes people to be isolated from their peers, which in turn results in limited socio-sexual understanding. They do not recognize sexual boundaries. As a result, a person with Asperger's Syndrome may lack the traditional sexual experiences, and they can develop sexually arousing fantasies involving children. *Shore* also recognized that as here, a person who has been sexually abused can subsequently abuse others and assume that said behavior is acceptable. Lastly, their sexual curiosity and drive can lead these individuals to explore child pornography websites without a full understanding of the criminal and predatory context. Therefore, it is respectfully submitted that Petitioner's A.S.D. also affected his ability to analyze and behave in sexual situations. In Petitioner's case, this condition is further exacerbated because he was the victim of sexual abuse.

The Court in *Shore* then proceeded to analyze the severity of the sentence. First, the Court in *Shore* stated that while retribution was a valid goal in punishment, it had to be determined considering the impact A.S.D. had on the culpability of the Defendant. The Court then concluded that in terms of

punishment, a 15-year sentence was not necessary to satisfy the need for retribution. In terms of deterrence, the Court determined and concluded that the 10-year mandatory minimum was sufficient. Here, the mandatory minimum is 15 years, which is 50% higher. In terms of recidivism/incapacitation, the Court in *Shore* analyzed this issue within the context of rehabilitation and concluded that because Shore could be rehabilitated with the necessary treatment, his recidivism would be significantly reduced. Here, it is also respectfully submitted that Petitioner, as testified to by Dr. Samuel, with the appropriate therapy, could be rehabilitated and the risk of recidivism significantly reduced. Specifically, Dr. Samuel stated:

I think if he participates in the treatment, I think it should have the effect – certainly, looking at the sentencing guidelines, it should have the effect of reducing his risk, his risk is very high right now, for sexual re-offense, or sex offense recidivism, if you will, but I do think that the treatment could help and reduce.

No one can say with 100 percent certainty whether that's true or not. That's really not possible, but I think in my experience, treatment over an extended period of time could help reduce the risk. And the idea, again, is to rein in the impulses, be able to control the emotions, around the behavior that was causing us to be here today. And I think that that's possible.

(App. 184, 185).

Bottom line, Dr. Samuel, your opinion is that after you examined the Defendant and you considered all the factors,

that if he is afforded appropriate treatment, that the risk of reoffending can be significantly reduced?

I think that's very likely, given the amount of time that it looks like he'll spend in custody.

(App. 191, 192).

Last, the Court in *Shore* considered the length of sentences imposed for violations of § 2251(a), which is the most serious offense charged in this case, in this and other districts. Within this district, the Court found that sentences of 15 years were not unusual, i.e., eighty-three defendants in this district had been sentenced to 15 years. Outside this district, the Court found that on a national basis for violations of § 2251, 15-year sentences were also not unusual. However, the Court in *Shore* found that a variance from the recommended guidelines was appropriate.

In this case, besides A.S.D., there were other factors that supported a variance that were presented to the Court in the Defendant's Sentencing Memorandum, but the Court did not accept it as a proper basis to grant the requested variance. (App. 42 - 86).

Petitioner, as a young child, was physically and sexually abused. He was exposed to pornography. He suffered from mental illness. He was mistreated by his parents. He was unsupervised and not provided moral guidance. Further,

while in *Shore*, Defendant was able to participate in treatment between arrest and sentencing. In this case, Petitioner was not. He, unlike Shore, was incarcerated, and the facility did not provide the needed counseling and treatment. If Petitioner had been properly treated during the three years he was incarcerated, he could have presented a better evaluation and opinion about his prospects for rehabilitation to the Court. This was extremely important because, for sex offenders, cognitive behavioral therapy substantially reduces recidivism. U.S. Dep't of Justice, Center for Sex Offender Management, *Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses* 10 (2006).

Additionally, the Commission reported that recent studies show that "appropriate 'treatment interventions . . . are associated with lower rates of recidivism-some of them very significant," *id.* at 278 & n.31 (quoting Center of Sex Offender Management, *The Comprehensive Approach to Sex Offender Management* 5 (2008)), and that "[p]olygraph testing of sex offenders is widely accepted by experts as a critically important corollary of effective treatment." *Id.* at 282. As such, Petitioner's lack of resources and incarceration deprived him of the opportunity to participate in psychological therapy that could have supported a reduced sentence.

Please note that in October 2019, Petitioner asked about participating in a class called Sexual Self Regulation, and the prison employee stated that he was not familiar with this class. Then, Petitioner asked about participating in a class called Victim Impact; this time, he was told that the class was going to be offered in May of 2020. This class was never provided because of the COVID restrictions.

The Court also should have considered that as Petitioner aged, the risk of recidivism is reduced. The Commission found that "[a]ge exerted a strong influence on recidivism across all sentence length categories. Older offenders were less likely to recidivate after release than younger offenders who had served similar sentences, regardless of the length of sentence imposed." *See* Kim Steven, Ph.D. and Billey Easley, J.D., *The Effects of Aging on Recidivism Among Federal Offenders*, U.S. Sentencing Commission, Executive Summary, p. 2 December 2017. Here, the conduct subject to the charge took place in 2015, when the Defendant was only 22 years old, and if the Court had imposed a 15-year sentence, Petitioner would have been 35 to 38 years old, after a reduction for good time and a halfway house. That is a significant period, which, coupled with the needed counseling and treatment, followed by appropriate supervision, would have addressed all the concerns about recidivism and retribution. Dr. Samuel also

testified that age also reduced the risk of recidivism, i.e., "[t]hose disorders tend to burn out of the system, if you will, neurologically, over time." (App. 192). Dr. Samuel also stated that "Pedophilia ... is something that over time can be reduced." Further, while argued above individually as Argument I, the valid objections to the enhancement for the use of the computer and the number of images recognized by the Third Circuit also favored the granting of the requested variance.

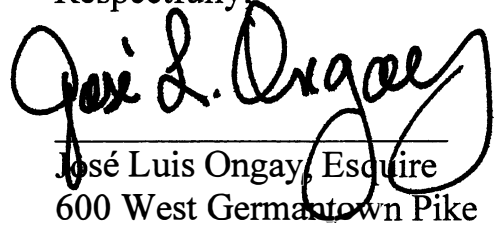
In sum, it is respectfully submitted that a first-time offender, that is young, with psychological conditions that affected his culpability; himself a victim of physical and sexual abuse; raised without guidance and supervision; who did not have the benefit of the needed counseling and treatment while other offenders had; should have received less than 262 months of incarceration. It is respectfully submitted that a 180-month sentence was sufficient but not greater than necessary. Within this time, Petitioner could have been treated and counseled, which would have enabled him to join society with a reduced risk of recidivism.

The Court can find the District Court's discussion of the reason for the sentence imposed at App. 261 - 270.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari be granted, and the United States Supreme Court reviews the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully,

A handwritten signature in black ink, appearing to read "José L. Ongay", is written over a horizontal line.

José Luis Ongay, Esquire
600 West Germantown Pike
Suite 400
Plymouth Meeting, PA 19462

Date: December 18, 2023

PROOF OF SERVICE

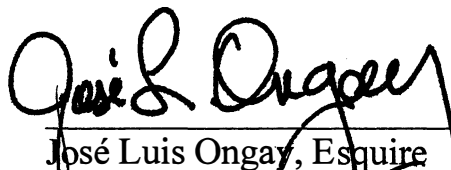
I, José Luis Ongay, Esquire, do swear or declare that on this date, December 5, 2023, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's Counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid: The names and addresses of those served are as follows:

Josh Davison, AUSA, 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106

Elizabeth Barchas Prelogar, Solicitor General, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001

David Carbonaro, 76938-066, F.C.I. Elkton, P.O. Box 10, Lisbon, OH 44432

I declare under the penalty of perjury that the foregoing is true and correct.



José Luis Ongay, Esquire
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484 681-1117

Executed on December 18, 2023