NO. _____

In the

Supreme Court of the United States

JOSEPH CURTIS HUBMAN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. QUESTION PRESENTED FOR REVIEW

Whether an upward variance sentence nearly two years higher than recommended by the Sentencing Guidelines is greater than necessary to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) where the defendant was convicted of merely possessing child pornography and had no countable criminal history.

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Cases

Constitutional Provision

Federal Statutes

Rules

Guidelines

Other Authorities and Sources

IV. LIST OF ALL DIRECTLY RELATED PROCEEDINGS

- *United States v. Hubman*, No. 3:22-cr-00024, U.S. District Court for the Southern District of West Virginia. Judgment entered November 16, 2022.
- *United States v. Hubman*, No. 22-4694, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on April 10, 2024.

V. OPINIONS BELOW

The Fourth Circuit affirmed Hubman's sentence in an unpublished opinion that is attached to this Petition as Appendix A. The district court's explanation of the imposed sentence came during Hubman's sentencing hearing. The relevant portion of the sentencing hearing transcript is attached to this Petition as Appendix B. The final judgment order of the district court is unreported and is attached to this Petition as Appendix C.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on April 10, 2024. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of 18 U.S.C. § 3553, which provides, in pertinent part:

> **(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set

forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28).

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On January 25, 2022, an indictment was returned in the Southern District of West Virginia charging Joseph Curtis Hubman with possession of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2). JA007-008.[1] Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Hubman pleaded guilty to the indictment. JA009-011. A Judgment and Commitment Order was entered on November 16, 2022. JA064-072. Hubman filed a timely notice of appeal on November 30, 2022. JA073. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case results from a call to local police from Hubman's son after he found what he suspected was child pornography on Hubman's computer. Ultimately, Hubman was sentenced to 120 months in prison after pleading guilty to possession of child pornography, nearly two years more than recommended by the Sentencing Guidelines and requested by the Government. The issue in this Petition is whether that sentence violates the fundamental dictates of sentencing set forth by Congress.

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[1] "JA" refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

1. Hubman pleads guilty to the possession of child pornography.

In November 2020, Hubman's 19-year-old son called police after finding what he suspected was child pornography on Hubman's computer. JA076. Police arrived and, after speaking with the son, obtained a state search warrant and seized not only the computer but numerous other electronic devices and storage media. They then obtained a federal search warrant to search those items. JA077. On them, investigators found 13 images and over 15,000 videos "constituting child pornography of toddlers and prepubescent minors, who had not attained the age of 12." JA080. Of those, approximately 25 were bookmarked as involving bondage and five bookmarked as involving bestiality. *Ibid*.

In addition to videos of child pornography, investigators also found a video on Hubman's phone of his son masturbating. The video shows Hubman "placing a recording device in what appeared to be the living room area" facing "a computer setup." JA80. Hubman's son was "shirtless and sitting at the computer desk with headphones on." *Ibid*.

As a result of the search of Hubman's devices he was charged with possession of child pornography. JA007-008. He pleaded guilty to that offense, without a plea agreement. JA009-011; JA076.

Following Hubman's guilty plea a Presentence Investigation Report ("PSR") was prepared to assist the district court at sentencing. JA074-112. Applying the conversion rate for videos in the Guidelines, the probation officer concluded that Hubman was responsible for over 1.1 million images of child pornography. JA080.

The probation officer recommended that Hubman's base offense level be 18, with enhancements for images involving prepubescent minors (two levels), images involving sadistic or masochistic conduct (four levels), use of a computer (two levels), and more than 600 images (five levels), along with a three-level reduction for acceptance of responsibility for a final offense level of 28. JA086-087. Combined with a Criminal History Category I, Hubman's advisory Guideline range was 78 to 97 months in prison.[2] JA094; JA098. The probation officer also noted that both the length of some of the videos involved and the "sheer volume of child pornography" might both support upward departures from the advisory Guideline range. JA110.

In a memorandum filed prior to sentencing, Hubman argued for a downward variance from the advisory Guideline range. JA012-025. Hubman's primary argument was that the applicable Guideline, U.S.S.G. § 2G2.2, "should be afforded less deference because it was not based upon empirical data and national experience that the Commission exercises when carrying out its institutional role," which numerous courts have concluded is a basis for imposing variance sentences. JA014-015; *see, e.g.*, *United States v. Jenkins*, 854 F.3d 181 (2d Cir. 2017); *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. Grober*, 624 F.3d 542 (3d Cir. 2010). He did recognize the "relatively large number of videos" in this case and did not request a downward variance on that aspect of the Guideline, but asked the district court to "reject the probation officer's invitation to entertain an upward variance or departure on such a

[2] Neither party had any objection to those calculations. JA112.

basis." JA021. Hubman also stressed his lack of countable criminal history and his age when released from incarceration, noting the decrease in recidivism that accompanies aging. JA022-023. In conclusion, Hubman requested a sentence of 48 months in prison. JA024. He did not address the video of his son found on his phone.

In its sentencing memorandum, the Government argued in support of a sentence within the advisory Guideline range. JA026-032. In addition to reporting prior instances of Hubman's son witnessing Hubman view child pornography, the Government set forth allegations of a hands-on offense committed by Hubman against his step-son more than a decade prior. JA027-029. The Government emphasized the "breathtaking" nature of the scope of Hubman's videos, as well as his "behavior in surreptitiously videotaping his own son" and the "allegations of touching a young boy." JA029-030.

2. The district court imposes a 120-month sentence, greater than recommended by the Sentencing Guidelines and requested by the Government.

Sentencing for Hubman was held on November 14, 2022. JA035-064. The district court adopted the advisory Guideline calculations in the PSR. JA039. Before arguing for a variance, Hubman began to "address some of the allegations made by the government in their sentencing memo, particularly with respect to the contact offenses for incredibly dated conduct." JA039-040. The district court interrupted, holding "I'm going to make this easy for you" and that because "these are all second or third hand reports" that "haven't been tested" the district court was "not inclined

to rely upon those sorts of statements in determining what the sentence should be." JA040.

Hubman reiterated his argument for a downward variance, noting that "I know Your Honor is familiar with" the arguments about the flaws in the Guidelines. JA040. Hubman argued that he had "zero criminal history points at 50 years old." *Ibid.* He had "worked full-time for most of his life" and "he would continue to do so upon release" and fulfill any financial obligations the district court imposed. JA040-041. His proposed sentence of 48 months in prison was "a significant sentence for someone who has never been in prison before" and was "a particularly long sentence when viewed alongside the term of supervised release and how onerous . . . these conditions will be." JA041.

The Government countered that a variance was not appropriate given the size of Hubman's collection of images, which it described as "huge," "enormous," and "one of the biggest collections certainly that I've brought before Your Honor in the last three years." JA042. The Government also noted that "this was an ongoing pattern of activity . . . over years' time" and that was not "an isolated incident." JA043. The Government also pointed to the video of Hubman's son "engaged in a private moment." *Ibid.*

In response, Hubman stated that, with regard to the video of his son, Hubman set the camera up "because he was concerned his son was snooping around his computer" and had "no reason to believe it would catch his son in this private moment." JA044. The Government asked, as a follow up, "why did he keep it?" JA045.

In his allocution, Hubman explained that the reason he kept the video was that "I had intended on talking – actually confronting my son over that and I just – I couldn't do it." *Ibid.*

The district court stated that "it's astounding to me that you had such an extensive collection," noting that it involved "a huge number of images," and that "I don't know that I've seen any case where we've had this many images and these long videos and the nature of the videos." JA046. Recognizing that "I have typically exercised my discretion and decided not to apply some of the guideline enhancements because . . . they appear to be in every case," the district court decided it "can't justify doing that in your case at all." *Ibid.* In addition to Hubman having a "huge collection," it was "maintained over a long period of time" and "involved a number of different devices." JA047. There was also "a huge added factor in your case . . . that you had a video of your own son . . . masturbating." *Ibid.* The district court concluded it was "preposterous . . . to think that you accidentally recorded that, you were recording it for some other reason, and then saw and then kept it." *Ibid.* While stating it was "not going to consider" the allegations of touching from the Government's sentencing memorandum, the district court concluded that the video of Hubman's son "really crosses the line into a very dangerous possibility," indicating that "you were someone who was becoming so obsessed with his child pornography that you started to take steps to either make your own production, or that you would have done something else in the nature of direct contact with a minor." JA048. Therefore, "I think a sentence above the guideline is appropriate here." *Ibid.*

The district court imposed a sentence of 120 months in prison, followed by a 15-year term of supervised release. JA048-049.

3. The Fourth Circuit affirms Hubman's sentence.

Hubman appealed his sentence to the Fourth Circuit Court of Appeals. In an unpublished decision, the court affirmed. *United States v. Hubman*, 2024 WL 1554756 (4th Cir. 2024). The court concluded that "[a]lthough the district court sentenced Hubman to a prison term 23 months above the top end of the Guidelines range, we conclude that the imposition of this term was not an abuse of discretion under the totality of the circumstances." *Id.* at *1. In doing so, the court did recognize that "reasonable jurists could perhaps have balanced those competing factors differently and arrived at a different result." *Ibid. quoting United States v. Abed*, 3 F.4th 104, 119 (4th Cir. 2021).

IX. REASONS FOR GRANTING THE WRIT

The writ should be granted to determine whether an upward variance sentence nearly two years higher than recommended by the Sentencing Guidelines is greater than necessary to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) where the defendant was convicted of merely possessing child pornography and had no countable criminal history.

Congress has decreed that at sentencing district courts are to impose a sentence "sufficient, but not greater than necessary" to achieve the purposes of sentencing. In this case, the parties argued that such a sentence was, at most, within the applicable advisory Guideline range. Unrequested by either party, the district court *sua sponte* imposed a sentence almost two years harsher, on a defendant

convicted of a single count of simple possession of child pornography who had no countable criminal history. Whether such a sentence comports with the directives of Congress is an important question of federal law this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. Sentencing courts must impose a sentence sufficient, but not greater than necessary, to achieve the purposes of sentencing.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the mandatory application of the Sentencing Guideline violated the Sixth Amendment, building on its holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). As a remedy, this Court excised the mandatory language from the applicable statute, 18 U.S.C. § 3553(b)(1). "So modified," this Court concluded, "the Federal Sentencing Act, *see* Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the Guidelines effectively advisory." *Id.* at 233. While no longer mandatory, "the Guidelines should be the starting point and the initial benchmark" at sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007).

Taking the place of the Guidelines as the driving force in criminal sentencing is the sentencing mandate found in 18 U.S.C. § 3553(a) that directs that the district court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection, including the need to provide just punishment and reflect the seriousness of the offense, the need for adequate deterrence and to protect the community from the defendant, and the

defendant's need for training, medical care, or other treatment. 18 U.S.C. § 3553(a)(2). In doing so, the district court must also consider the nature of the offense and characteristics of the defendant, the kind of sentences available, the sentence recommended by the Guidelines, while avoiding unwarranted disparity in sentencing, and considering the need of victims to receive restitution. 18 U.S.C. § 3553(a)(1), (3)-(7). When imposing sentence, the district court "always must consider a defendant's non-frivolous arguments for a lower sentence." *United States v. Webb*, 965 F.3d 262, 270 (4th Cir. 2020).

B. An upward variance sentence for a defendant convicted of simple possession of child pornography with no countable criminal history does not comply with Congressional directives.

The 120-month sentence of imprisonment imposed by the district court in this case is inconsistent with the directives of Congress because it is greater than necessary to comply with the purposes of sentencing set forth in § 3553(a). Specifically, it is greater than needed "to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). That is because the sentence does not accurately reflect the "nature and circumstances of the offense and history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Therefore, the district court abused its discretion in imposing the 120-month sentence. While notice is not required before a district court imposes a variance on its own initiative, *Irizarry v. United States*, 553 U.S. 708 (2008), courts should view with scrutiny a *sua sponte* upward variance that results in the imposition of a sentence more severe than either party requested.

In this case, the district court's decision to impose a *sua sponte* variance was based on two factors – the size of Hubman's collection of child pornography and the fact that he recorded a video of his adult son masturbating in the living room of their home. JA044-046. While each factor is relevant under § 3553(a) to the determination of Hubman's ultimate sentence, the district court placed too great a weight on each to the exclusion of other relevant factors, such as Hubman's lack of countable criminal history and his age. Judged by the totality of the factors in this case, the 120-month sentence imposed by the district court is substantively unreasonable.

It is reasonable to distinguish between offenders who possess a few images of child pornography and those who possess a sufficient amount of the images to demonstrate a pattern of collection.[3] Nonetheless, once a certain threshold has been passed the ultimate number of images should not drive a sentence. As one court recognized, "while drug quantity is often a reliable indicator of intent to distribute drugs, number of images is no such reliable indicator of the culpability of the conduct of a defendant convicted of a child pornography offense" due to the "increased ability to easily and inexpensively capture and store images with computers." *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1106-1107 (N.D. Iowa 2009)(cleaned up). The number of images in this case reflects that Hubman's collection of child pornography was not accidental and occurred over some period of time, but it ultimately says no more about his culpability than if the collection had been one thousand or one

[3] Hubman recognized this by specifically disclaiming the flaws with the U.S.S.G. § 2G2.2(b)(6) enhancement as a basis for a downward variance. JA021.

hundred thousand images rather than one million. This factor simply cannot bear the weight that the district court put on it to justify a sentence nearly two years longer than the Government requested.[4]

The same is true for the fact that Hubman had a video on his phone of his adult son masturbating. There is no dispute that Hubman's retention of the video is troubling, but the only evidence in the record as to why the video was made is that Hubman wanted to determine if his son was "snooping around his computer." JA042. Given that Hubman's conviction stems from his son finding child pornography on his computer that was a rational concern. JA076. Although the district court called that explanation "preposterous," there is nothing in the record to support that conclusion. There is nothing in Hubman's past that suggests he had ever attempted to manufacture any kind of pornographic material or to do anything sexualized with regard to his son. The district court concluded that the video shows a "very dangerous possibility" that Hubman "was becoming so obsessed with his child pornography that you started to take steps to either make your production or that you would have done something else in the nature of direct contact with a minor." JA048. But the video did not involve a minor and there is no evidence Hubman intended to catch his son during an intimate moment. As with the number of images attributed to Hubman, this factor cannot support a sentence nearly two years longer than the Government requested.

[4] While the Government asked non-specifically for a sentence within the advisory Guideline range, JA031; JA043, as a practical matter, because the district court had "typically exercised my discretion and decided not to apply some of the guideline enhancements" the upward variance is greater than two years. JA046.

The district court focused on those two factors to the exclusion of others that support a lower sentence. The first was that Hubman has no countable criminal history. JA094. Hubman does have prior criminal convictions, but most are for minor offenses and were committed in the previous century. Most importantly for the purposes of sentencing in this case, none of them were sexual offenses, much less sexual offenses that involve minors. JA089-094. That history suggests two things. The first is that Hubman's involvement with child pornography is of fairly recent vintage and an aberration compared to the rest of his life. It does not show that he has made a life by preying on children.[5] Second, it shows that he has, for the past two decades, largely lived a law-abiding life. Such a history does not support a conclusion that a 120-month sentence is required. The second factor the district court overlooked was Hubman's age. He was fifty years old at the time of sentencing. JA075. In studying recidivism rates, the Sentencing Commission found that age "exerted a strong influence on recidivism across all sentencing length categories" and that "[o]lder offenders were less likely to recidivate after release than young offenders who had severed similar sentences." *The Effects of Aging on Recidivism Among Federal Offenders*, p. 3 (December 07, 2017).[6] Offenders in their fifties have a rearrest rate of 16.1% compared to 53% for those offenders under the age of thirty. *Id*. at 25.

[5] While the Government reported allegations that Hubman had touched a child years ago, the district court recognized them as "second or third hand reports" that "haven't been tested" and did not rely on them when imposing sentence. JA038; JA046.

[6] Available online at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf (last visited July 2, 2024).

To the extent that the district court concluded that a lengthy sentence would be a means to deter future conduct, empirical studies refute that notion, concluding that the certainty of receiving punishment, rather than the severity of the punishment received, is the key to deterrence. Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, The Sentencing Project (November 2010).[7] In other words, "[w]hat really deters is the certainty of being caught." John Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* 194-195 (2017). Thus, "enhancing the severity of punishment will have little impact on people who don't believe they will be apprehended for their actions." Wright at 2; *see also The Effects of Aging on Recidivism Among Federal Offenders* at 3 (older offenders were less likely to recidivate compared to younger ones "regardless of the length of the sentence imposed" and "there was no clear association between the length of sentence and rearrest rate"). The efficacy of lengthy sentences is also suspect because there is a distinct risk the person serving a lengthy sentence will become institutionalized and therefore less likely to successfully reintegrate into society at the conclusion of their sentence, which increases the rate of recidivism. Wright at 7. There is no evidence to suggest a 120-month sentence, versus a substantially lower sentence as requested at sentencing, would have any more of a deterrent effect on Hubman.

[7] Available online at https://webpage.pace.edu/jhumbach/Crim-SentencingProject%20ReportonDeterrence.pdf (last visited July 2, 2024).

The fundamental command to a sentencing court is that it impose a sentence that is "sufficient, but not greater than necessary to comply" with the purposes of sentencing. 18 U.S.C. § 3553(a); *Holguin-Hernandez v. United States*, 589 U.S. 169, 171-175 (2020). To that end, sentencing courts are required to conduct an "individualized assessment" of each case when imposing sentence. *Gall*, 552 U.S. at 50. An individualized assessment of Hubman's conduct, history and characteristics in this case show that a sentence of 48 months, or at least within the advisory Guideline range, was no greater than necessary to comply with the purposes of sentencing. Therefore, the district court's imposition of a 120-month sentence neither party requested is at odds with Congressional directives.

X. CONCLUSION

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

Respectfully submitted,

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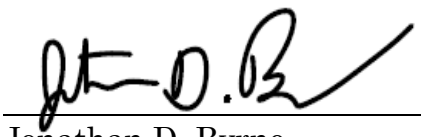

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