

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

MICHAEL PAUL GIANFRANCESCO,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

ISSUE 1: The Appellate Court erred in denying petitioner relief where Appellant's 210 month sentence is procedurally and substantively unreasonable.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED
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The Petitioner, MICHAEL PAUL GIANFRANCESCO,
respectfully prays that a writ of certiorari issue to
review the judgment-order of the United States Court of
Appeals for the Eleventh Circuit entered on May 1, 2024
Case No. 23-11294; Southern District of Florida Case No.
22-cr-80127-DMM-5.

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OPINION BELOW

On May 1, 2024, the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's final judgement; Case No.23-11294. A copy of the opinion-order is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the defendant in the District Court and will be referred to by his name or as the petitioner. The respondent, the United States of America, will be referred to as the respondent. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The petitioner is incarcerated and is serving his sentence in the Federal Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition
in the Court Below

Petitioner was originally arrested and charged by second superseding indictment with one count of conspiracy to distribute child pornography and three counts of distribution of child pornography. DE 21. Petitioner was alleged to have been included, for a very short (over 4 total days) time frame, in an online, internet based Kik Messenger group chat between September 26, 2021 and September 29, 2021. The Department of Homeland Security monitored the activity in the group chat for approximately 3 weeks learning that petitioner was not a member of the chatroom when the investigation began, and his participation ended before the online monitoring investigation ended. DE 153-5-14. Petitioner participated in the chatroom on 5 total occasions over an 4 day period, sharing 2 videos depicting child pornography and posting 3 online comments, all between December 26 and 29, 2021. DE 153-5-14. Petitioner did not organize or manage the chatroom, nor did he solicit any new members to join the chatroom. DE 153-5-14. According to the PSI, there were numerous video images and still images distributed in the chatroom during the timeframe that petitioner was logged

into the chatroom, yet he only distributed 2 video images and posted comment on 3 video images. DE 153-5-14.

Petitioner accepted repsonsibility and pled guilty the second superseding indictment pursuant to a written plea agreement and stipulated proffer of facts. DE 116-117. A draft presentence investigation report ("PSI") was prepared.

DE 153. The PSI computed that the base offense level under § 2G2.2 was a level 22. DE 153-100. The PSI recommended five upward enhancements: (1) a two level enhancement pursuant to § 2G2.2(b)(2), for material that involved a prepubescent minor or a minor who had not attained the age of 12 years, DE 153-27, (2) a five level enhancement pursuant to §2G2.2(b)(3)(B), for distributing material in exchange for any valuable consideration but not for pecuniary gain, DE 153-27, (3) a four level enhancement pursuant to § 2G2.2(b)(4), for sadistic or masochistic conduct or other depictions of violence or sexual abuse or exploitation of an infant or toddler, DE 153-27, (4) a two level enhancement pursuant to § 2G2.2(b)(6), for the use of a computer, DE 153-27, and (5) a five level enhancement pursuant to § 2G2.2(b)(7), for an offense involving 600 or more images, DE 153-27. This resulted in an adjusted offense level of 40. DE 153-27. Based on a 3 level reduction for acceptance of responsibility, the PSI

recommended a total offense level of 37. DE 153-28.

Petitiner scored 2 criminal history points resulting in a criminal history category of II. DE 153-35. Based on the PSI, petitioner's advisory sentencing range was 235 to 293 months. DE 153-27. Petitioner filed a motion for downward variance and sentencing memorandum. DE 180. The government responded and opposed the motion with their own sentencing memorandum. DE 184. At sentencing, the District Court sentenced petitioner to a total sentence of 210 months imprisonment followed by 15 years of supervised release. DE 209. Petitioner timely filed his notice of appeal. DE 219. Petitioner's appeal was denied by opinion/order on May 1, 2024. The petition ensues therefrom.

Statement of the Facts

The facts and factual basis on review arise from the stipulated factual basis filed January 25, 2023 (DE 116); the record of the filed transcript documenting the sentencing hearing; (DE 252); and the PSI Report filed in the district court; (DE 153). The evidence of appellant's offense was as follows:

A Homeland Security Investigations Task Force Officer (HSI TFO) was invited into a Kik chat room named "Hansel and Gretel" by another Kik user. From September 21, 2021

through October 10, 2021, the HSI TFO monitored the Hansel and Gretel chat room in an undercover capacity to observe and document any illegal activity that might be occurring relating to child exploitation. The room was predicated on users posting photographs and videos of child pornography or links to websites that allowed users to view or download child pornography, which is referred to as "CP" in some of the chats. Prior to entering the room, users were vetted and only allowed in by "Pandora."

Upon entering the chat room, the HSI TFO observed that the administrator of the chat room "Pandora" posted a list of rules for all users in the chat room. These rules were posted every time a new user entered the chat room. The rules included that this chat room "is extreme and 13 down" (referring to the fact that the image and video content shared in this chat room was to depict children 13 and under). It also stated that to remain in the chat room, each user must post at least three videos, a user must state their age and sex (no catfishing), and inactive users will be removed. The rules also provided that the room was "private" and by "invite only." For a user other than "Pandora" to allow a new member into the room, a new member would have to be added "to the Public first" prior to being invited into the private chat room. Finally, private

messaging was prohibited between users unless it was first asked without the chat room.

The HSI TFO observed that the users in the chat room were soliciting and distributing numerous graphic videos and images of child pornography. The images and videos depicted the sexual abuse of very young children. The HSI TFO screen recorded the entirety of the messages in the chat room including the photographs and video-preview photographs. When available, the HSI TFO clicked on and viewed the video. This activity continued daily within the chat room from September 21, 2021, through October 10, 2021. The Hansel and Gretel chat room had dozens of users come and go over the course of the 20 days the HSI TFO monitored the room. Based on the images and videos shared and sought, the chat room was predicated on users distributing, soliciting, receiving, and discussing child pornography depicting children under the age of 13. As to Count 18, on September 26, 2021, at 5:37 A.M., Bwc694200, a/k/a M.H., later identified as Michael Paul Gianfrancesco (petitioner), entered the Hansel and Gretel room and distributed a video of child pornography in the chat room transmitting it to all members of the room including the TFO.

Thereafter petitioner typed 3 online comments concerning certain videos observed in the chatroom and on

September 29, 2021 shared a second video depicting child pornography.

After September 29, 2021, petitioner was not observed in the chatroom.

The investigation was concluded and closed on October 10, 2021. DE 153-5-14.

On September 7, 2022, petitioner was arrested at his residence in Tennessee. Thereafter, petitioner gave a post-Miranda statement to the agents making admissions and admitting to the offense conduct. DE 153-20.

Following removal from Tennessee to the Southern District of Florida, petitioner made his initial appearance in Florida on November 30, 2022 (DE 74) and later pled guilty on January 25, 2023. DE 115.

REASONS FOR GRANTING THE WRIT

ISSUE 1: The Appellate Court erred in denying relief where Appellant's 210 month sentence is procedurally and substantively unreasonable.

The first phase in the advisory guideline sentencing process is for the district court to properly calculate the guideline range. Gall v. United States, 552 U.S. 38 (2007). Thereafter, the district court must apply the sentencing factors under 18 U.S.C. § 3553(a), and decide if an upward

or downward variance from the total guideline sentencing range is warranted. Gall, 552 U.S. at 49-50, 128 S.Ct. at 596-97. Where the facts and circumstances support such a variance, the court must decide the level of variance in order to fashion a sentence sufficient but not greater than necessary. Gall, 552 U.S. at 49-50, 128 S. Ct. at 596-97. On direct appeal review this court must: ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence - including an explanation for any deviation from the final guidelines range. Where the district court's sentencing decision is procedurally sound, the reviewing court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard, taking into account all facts and circumstances of the case and the individual accused, including the amount of any variance from the final guidelines range. Gall, 552 U.S. at 51, 128 S.Ct. at 597. The 18 U.S.C. § 3553(a) factors relied upon by the court include: the nature and circumstances of the offense; the history and characteristics of the defendant;

the need to avoid unwarranted disparities among defendants; the federal guideline ranges; and the need for the sentence to promote respect for the law, provide a just punishment, afford adequate deterrence, protect the public, and provide the defendant with needed training and services. Moreover, the premise guiding all these factors is that the sentence should be "sufficient, but not greater than necessary" to achieve the state goals of sentencing. 18 U.S.C. § 3553(a); Gall, 552 U.S. at 50 n.6, 128 S.Ct. at 596 n.6; Kimbrough v. United States, 552 U.S. 85, 101 (2007); United States v. Booker, 543 U.S. 220 at 268-69 (2005). In the case at bar, most respectfully, the sentence imposed by the district court was greater than necessary and thus an unreasonable sentence in excess of that required by the § 3553(a) factors. Petitioner's total sentence of 210 months was unreasonable, in that the district court failed to adequately take into consideration the sentencing factors under 18 U.S.C. § 3553(a) (1)-(7). See Gall, 552 U.S. at 50, n.6; Kimbrough, 552 U.S. at 101; Booker, 543 U.S. 220. The district court must not only weigh the 18 U.S.C. § 3553(a) factors, but it must also apply those factors in a reasonable manner. Moreover, the premise guiding all of these factors is that the sentence should be "sufficient, but not greater than necessary" to comply with its

enumerated goals. 18 U.S.C. § 3553(a); Gall, 552 U.S. at 50 n.6; Kimbrough, 552 U.S. at 101. As reasonableness review is deferential, the district court's discretion in imposing the sentence is not without limit as the courts have reversed sentences as unreasonable following Booker. United States v. Martin, 455 F.3d 1227 (11th Cir. 2006) (reversing post-Booker sentence as unreasonable, albeit too lenient, where the sentence imposed failed both to take into account and to promote statutory sentencing criteria); United States v. Crisp, 454 F.3d 1285, 1290 (11th Cir. 2006) (reversing post-Booker sentence because the court relied on one factor to the exclusion of other § 3553(a) factors). By way of mitigation, petitioner's upbringing was a difficult one. His family move regularly, first residing in Delaware, then moving to New Jersey for a time, thereafter moving to New York, then Florida for a short time (where he ultimately left high school his senior year due to the frequent relocations, DE 17.), then back to New York and finally to Tennessee. DE 16. Petitioner never enjoyed the stable location, home and relationships which are the hallmark of a solid foundational upbringing. Compounding this absence of stability, petitioner was sexually assaulted by a relative at age 8 which triggered mental health issues manifested during his time in school and

later in his life through substance abuse and efforts to self medicate (5 controlled substance/alcohol related arrests; DE 153-28-36) documented in his alcohol and controlled substance related criminal history (diagnosis depressive disorder and attempted suicide disorder). DE 15-16. Petitioner faced a sentencing disparity due to the inclusion of 2 criminal history points for 1) possession of a shotgun and, 2) driving with a suspended license. DE 17. Further, petitioner's offense conduct involved only a minimal level of sophistication (viewing internet websites) and was of short duration (3 days, 2 images, 3 comments; as stated above; the PSI report offense conduct section tracks from page 5 paragraph 9 to page 14, paragraph 43 with only 5 total references) and is a direct consequence of his childhood sexual abuse. DE 153-5-14. Finally, petitioner's expert found a lower potential for recidivism, particularly in light of available treatment (which appellant is receiving currently at Butner, North Carolins). DE 18. Additionally, petitioner has the unconditional support of his family in his effort to finally receive the mental health and substance abuse treatment he required but never received. DE 153-37-39. Petitioner has a solid work ethic and history of employment as a mechanic and electrician. DE 153-42-43. Petitioner was indicted for

participating in a group chat on September 26, 28, and 29, 2021, three times total. DE 153-7-12. Law enforcement agents infiltrated the group chat for over 20 days. DE 153-5-16. Petitioner was not a member of the chatroom at the beginning of the investigation, and his 4 days of participation in the chatroom ended well before the investigation concluded. DE 153-5-16. Petitioner was only logged into the chatroom on 3 occasions over a 4 day period, sharing only 2 videos and 3 comments during this brief time frame. DE 153-5-16. Petitioner did not organize or manage the chatroom in any way, and he never solicited any other persons to log into the chatroom. DE 153-5-16. As reported in the highly detailed PSI, of the all video images and still images uploaded and/or shared in the chatroom, or typed comments, between December 26 and 29, 2021, petitioner was involved on only 5 occasions, 2 videos and 3 comments. DE 153-5-16. As and for petitioner's case offense conduct, there was no production or attempted production of child pornography or enticement or attempted enticement of a minor. There is no allegation at all that petitioner ever had any physical contact inappropriate or otherwise with any minor. Petitioner never attempted to verbally contact a minor, or a person he believed to be a minor, for inappropriate reasons. There is nearly zero risk

that petitioner will reoffend in the future in light of his current mental health treatment. Proportionate sentencing encourages respect for the law, and ensures that similar offenses or offenders will be sentenced similarly and dissimilar offenses and offenders will be sentenced differently, thus, district courts can vary downward in order to achieve proportionate sentence among co-defendants.

United States v. Martin, 520 F.3d 87 (1st Cir. 2008)

(upholding a sentence 91 months below the career offender guideline range which was imposed, in part, in order to avoid unwarranted sentencing disparity between co-conspirators). Petitioner's 210 month prison sentence was dis-proportional to his criminal conduct (sharing 2 videos, making 3 comments on 3 dates during a brief 4 day section of a 3 week online investigation). This sentence was not proportional to petitioner's criminal conduct, thus in this case, the total sentence imposed failed to impose a sentence sufficient but not greater than necessary in this case where petitioner's conduct was very limited in scope and duration when compared to the codefendants. Ordinarily, the guidelines gain their authority from the Commission's ability to "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." Kimbrough v. United States, 552 U.S.

85, 108- 109 (2007). The child pornography guidelines have been justifiably critiqued as unduly harsh. U.S.S.G. §2G2.2 “fails to adequately differentiate among offenders based on their culpability and sexual dangerousness, needs to be updated to reflect recent changes in typical offense conduct associated with the evolution of computer and Internet technologies, and is too severe for some offenders.” United States v. R.V., 157 F. Supp. 3d 207, 261 (E.D.N.Y. 2016) (quoting U.S. Sentencing Comm’n, Federal Child Pornography Offenses, at xii). Another district court has held that, “the child pornography guideline has been steadily increased despite evidence and recommendations by the Commission to the contrary.” United States v. Riley, 655 F.Supp.2d 1298, 1301 (S.D. Fla. 2009). The U.S. Sentencing Commission writes that, “across all non-production child pornography offense types, §2G2.2 fails to distinguish adequately between more and less severe offenders.” U.S. Sentencing Comm’n, Federal Sentencing of Child Pornography Non-Production Offenses (June 2021). During fiscal year 2019, for offenders charged with distribution, 96.8% received a 2-level enhancement for the age of victims, 89.6% received a 4-level enhancement for sadistic or masochistic conduct or abuse of an infant or toddler, 95.4% received a 2-level enhancement for use of a

computer, and 97% received an enhancement for the number of images. Id. All of these 4 enhancements were applied to petitioner even given his very limited offense conduct resulting in an increase of 13 levels in his PSI report. DE 153-27. As applied to petitioner the sentencing guidelines fail to adequately make account for individual culpability in this case. Petitioner was sentenced below the guideline range calculated by the district court applying the guidelines, however the § 3553(a) factors required a much lower prison sentence in order to achieve a reasonable sentence for appellant's criminal conduct. The appellate court erred in denying relief to petitioner where the district Court imposed a 210 month, greater than necessary, sentence upon petitioner in this case.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED this 28th day of July, 2024.

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APPENDIX "A"