No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2024

COLT JACOBY BARNETT,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DID THE DISTRICT COURT ERR IN OVERRULING MR. BARNETT'S OBJECTION TO THE TWO-LEVEL UPWARD ADJUSTMENT PURSUANT TO U.S.S.G. 2G2.2(B)(6) WHERE THERE IS THE USE OF A COMPUTER ?

2. IS THE FACTUAL BASIS TO SUFFICIENT TO SUPPORT MR. BARNETT'S CONVICTIONS ?

3. DID THE DISTRICT COURT REVERSIBLY ERR BY DENYING MR. BARNETT'S MOTION TO DISMISS THE INDICTMENT BECAUSE 18 U.S.C. § 2252A VIOLATES THE DUE PROCESS CLAUSE AND THE SEPARATION-OF-POWERS DOCTRINE?

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REPORTS OF OPINIONS

The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Barnett*, No. 23-20174 (5th Cir. July 26, 2024). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Southern District of Texas.

Consequently, Mr. Barnett files the instant Application for a Writ of Certiorari under the authority of 28 U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Southern District of Texas because Mr. Barnett was indicted for violations of Federal law by the United States Grand Jury for the Southern District of Texas.

CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fifth and the Fourteenth Amendment requires that a defendant knowingly and voluntarily enter a plea of guilty. *See Boykin v. Alabama*, 395 U.S. 238 (1969).

The Fifth Amendment says to the federal government that "no person shall be. . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fourteenth Amendment prohibits state governments from doing the same. U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. Procedural History.

On March 14, 2019, a four-count Indictment was returned by a grand jury in the United States District Court for the Southern District of Texas, Houston Division, naming Colt Jacoby Barnett as the defendant. Count 1 charged Mr. Barnett with distribution of child pornography, on or about January 12, 2019, through February 6, 2019. Count 2 charged Mr. Barnett with receipt of child pornography, on or about January 12, 2019, through March 3, 2019. Count 3 charged Mr. Barnett with possession of child pornography, on or about March 4, 2019. Count 4 charged Mr. Barnett with destruction of property, on or about March 4, 2019. ROA. 119-121.[1]

Mr. Barnett appeared with counsel before United States District Judge Lynn N. Hughes on October 17, 2022, and entered a plea of guilty as to Counts 1, 2, 3, and 4 of the Indictment, without a plea agreement. The Court accepted Mr. Barnett's guilty plea and ordered a Presentence Report.

At sentencing before Chief Judge Randy Crane, the District Court sentenced Mr. Barnett to a term of imprisonment of 210 months. No fine was imposed, but Mr.

[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

Barnett was ordered to pay a $400 special assessment. Restitution was also ordered. Thereafter, Mr. Barnett filed a Notice of Appeal. ROA.375, 382.

On July 26, 2024, the Fifth Circuit affirmed Mr. Barnett's conviction and sentence, but vacated portions of the restitution order.

3. Statement of Facts.

Mr. Barnett is a 40-year old man who was studying mechanical engineering at the University of Houston. He was briefly married but has no children. He provided care-taking assistance to his disabled father until his arrest and incarceration.

Mr. Barnett allegedly Distributed, Received and Possessed Child Pornography, in violation of 18 USC § 962 (d), in the Southern District of Texas. Mr. Barnett also destroyed property as he was being arrested. That is the conduct that comprised the charges to which he entered a plea of guilty.

The PSR established a base offense level of 22 for Count One (distribution).[2] ROA. 509. The PSR assigned a two level upward adjustment pursuant to U.S.S.G. §2G2.2(b)(2) because the PSR officer found that the material involved prepubescent minors under the age of 12. The PSR assigned a two level upward adjustment pursuant to U.S.S.G. §2G2.2(b)(3)(F) because the PSR officer found that Mr. Barnett

[2]"PSR" refers to the Presentence Investigation Report prepared by the United States Probation Department (under seal).

knowingly engaged in distribution. The PSR assigned a four level upward adjustment pursuant to U.S.S.G. §2G2.2(b)(4) because the PSR officer found that the offense involved material that portrays sadistic or masochistic conduct and/or the sexual abuse or exploitation of an infant or toddler. The PSR assigned a two level upward adjustment pursuant to U.S.S.G. §2G2.2(b)(6) because the PSR officer found that Mr. Barnett used his personal computer media to store videos and images of child pornography, and he utilized the internet to receive or access with intent to view the material. The PSR assigned a five-level upward adjustment pursuant to U.S.S.G. §2G2.2(b)(7)(D) because the PSR officer found that Mr. Barnett should be held accountable for a total of 4,125 images (55 videos x 75 images = 4,125 images). Pursuant to U.S.S.G. §2G2.2(b)(7)(D), the offense level is increased by five levels, as the offense involved 600 or more images.

The PSR officer also found that Mr. Barnett willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and the obstructive conduct related to the defendant's offense of conviction and any relevant conduct; or a closely related offense. The PSR increased the offense level by two levels pursuant to U.S.S.G. §3C1.1. The PSR found that, pursuant to USSG §3E1.1(a)

and (b), the offense level should be reduced by three, because Mr. Barnett exhibited an affirmative acceptance of responsibility for his criminal conduct

Due to the multiple counts of conviction, the PSR officer determined that the grouping rules contained in USSG, Chapter Three, Part D, were applicable. Counts involving substantially the same harm shall be grouped together into a single group. Counts 1, 2, and 3 are grouped pursuant to U.S.S.G. §3D1.2(d), since the offense level is determined largely on the basis of an aggregate measure of harm, loss, or substance, or is ongoing or continuous in nature and the offense guideline is written to cover such behavior. In this case, Count 1 resulted in the highest offense level. Counts 1 and 4 were grouped pursuant to U.S.S.G. §3D1.2©, since one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

The total offense level was 36. Based on a criminal history score of III, the advisory guideline range of imprisonment was 210-262 months. Based on Mr. Barnett's prior conviction for a sexual offense, the term of imprisonment for Count 1, a violation of 18 U.S.C. § 2252A(a)(2)(B), is not less than 15 years and not more than 40 years imprisonment. *See* 18 U.S.C. § 2252A(b)(1).

Mr. Barnett objected to the PSR, arguing that the two-level increase for use of a computer was improperly assessed. This objection was denied. ROA.446.

The District Court sentenced Mr. Barnett to a 210-month term of imprisonment,. ROA.457. The District Court made the following statement when imposing the sentence:

> **THE COURT:** ....The Court adopts the factual findings contained within the presentence report, I do find it all correctly scored, and after granting all 3 acceptance points, it left the Defendant a Total Offense Level of 36. His Criminal History Category is 2, which places him in a range of 210 to 262 months. The Court considers those factors under 18 USC 3553(a) and concludes that a sentence within the guidelines satisfies them and therefore, pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court Mr. Barnett 2 is committed to the custody of Bureau of Prison for imprisonment for a term of 210 months. Upon release from imprisonment he is placed on supervision for, what do we think, it could be up to life. That seems -- All right. The Court's going to place him on supervision for 10 years, and while on supervision he's not to commit any other federal, state or local crime, he's to comply with the standard conditions adopted by this Court, abide by any mandatory conditions required by law. In addition he's not to possess a firearm or other destructive device, and to cooperate in providing a DNA sample. Also, as a special condition of supervision he is required to comply with the requirements of the Sex Offender Registration Notification Act as directed by his probation officer or the Bureau of Prisons and any state sex offender registry requirement. He must participate in a sex offense specific treatment program, follow all the rules and regulations of that program until he completes the program with approval of a probation officer and the program director. Must not, you know, possess any pornography. Next, he is not to possess or use computers or other electronic communication, data storage devices without the approval of probation officer. I'm going to except from that a cell phone, however, the Defendant must make that phone available to his probation officer upon request for periodic unannounced searches. And the probation officer can also permit him to own and possess computers, hard to know what our society's going to be like when he gets out of jail, but I assume he's going to need access to all that stuff.

Again, it'll just need to be -- whatever electronic devices he has, he'll need to make those available for inspection by the probation officer without prior notice. Let's see, he's not to have any direct contact with any child under the age of 18, excluding family members within three degrees of consanguinity. And, all right, that's all the special conditions. I'm going to find he cannot afford to pay any fine given his situation, but I do assess the $100 special assessment. And I'm going to order restitution in the following amounts to the following victims: $5,000 for the eight kids, four series, payable to Tanya Hawkins in trust for John Doe at the law offices of Eric Baker, P.O. Box 1091, Tacoma, Washington 98401, and that's Paragraph 87 of the presentence report; $5,000 for the April blonde series payable to restore the child in trust for Angela at Restore the Child, PLLC, 25224 North Proctor Street, Suite 85, Tacoma, Washington; and $3,000 for the Jenny series payable to the Marshall Law Firm, P.O. 6 Box 4668, New York, New York 10163; $3,000 for the SpongeBob Series payable to the March Law Firm, PLLC at 548 Market Street in San Francisco, California; and then $5,000 for the Sweet One Sugar series payable to Deborah A. Bianco in trust, P.O. Box 6503, Bellevue, Washington. Anything else that I –..... Okay. So this sentence will run concurrent as to all counts to which he pled guilty, save Count 4, and the Court orders a 60-month sentence to run concurrent on that count. Probably supervision is maxed out at 3 years on that count, so only 3 years supervision to run concurrent on that count.....then supervision will run concurrent on all these counts. And then the special assessment is $400 in special assessments since he pled to four different counts.

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MR. ADLER: I just want to -- Mr. Barnett did not waive any appellate rights, so I just want to put a few things on the Record.....First of all, for the restitution I would reiterate my objections or my concerns I previously voiced about the restitution order that the Court has just entered. And I would also object to any restitution for alleged victims that are not substantiated in the PSR. Secondly, I would object that the sentence is greater than necessary to meet the goals of 3553(a) and is substantially -- substantially and procedurally unreasonable. That's for the Record, Your Honor.

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> **THE COURT**: -- the benefit of the Record, the Court will acknowledge it has no idea whether any of these victims have been paid any amounts. It's not something the Court is aware of. They could have been paid substantial sums or practically nothing. I'm not aware of that. I only did what is required by legislation that I must do and that's the minimum. All right. ROA. 463-466.

Mr. Barnett thereafter timely filed a Notice of Appeal. ROA.375, 382. On July 26, 2024, the Fifth Circuit vacated a part of the restitution order but otherwise affirmed Mr. Barnett 's conviction and sentence. *See United States v. Barnett*, No. 23-20174 (5th Cir. 2024)(not published).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE DISTRICT COURT ERRED IN OVERRULING MR. BARNETT'S OBJECTION TO THE TWO-LEVEL UPWARD ADJUSTMENT PURSUANT TO U.S.S.G. 2G2.2(B)(6) WHERE THERE IS THE USE OF A COMPUTER.

Virtually all child pornography crimes involve the use of a computer. *See*, e.g., *United States v. C.R.*, 792 F.Supp.2d 343, 512 (E.D.N.Y.). The sentence of most defendants charged with a child pornography offense would receive this two-level increase under this section. The increase resulted in impermissible double counting because Mr. Barnett's use of computers was the same conduct for the base offenses of distribution, possession and receipt of child pornography. The base offense level for the offense of distribution already took into account the use of those computers, and included, and punished, the act of shipping or transporting and receiving child pornography materials, using a computer, which is the basis of the 2-level enhancement under Sec. 2G2.2(b)(6). The offense conduct in using the computer to commit the offenses was the same conduct being used as the basis for the enhancement. *See*, e.g., *United States v. Garrison*, 133 F.3d 831, 842 (11th Cir. 1998). Since Mr. Barrett's use of computers to commit the offenses was part of the same conduct described in the indictment, the enhancement was not warranted. Punishing a defendant twice for the same conduct violates due process.

Typically, the sentencing guidelines sentencing range will roughly approximate a sentence that would achieve the objectives of § 3553(a). *Kimbrough v. United States*, 552 U.S. 85, 109. These ranges are typically the product of the Sentencing Commission's careful study, and are "based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Gall*, 552 U.S. at 46. Not all Sentencing Guidelines achieve this goal. Where a Guideline does not reflect the careful study of the Commission, it is likely not "a reliable indicator of the Sentencing Commission's perspective on a fair sentence." *United States v. Shipley*, 560 F.Supp.2d 739, 744 (S.D. Iowa 2008). As numerous courts and commentators have explained, the child pornography Guidelines are by and large not the result of the Commission's expertise, nor based on careful study and empirical data. *United States v. Henderson*, 649 F.3d 955, 960–63 (9th Cir. 2011); *United States v. Dorvee*, 616 F.3d 174, 184–86 (2d Cir. 2010). Instead, § 2G2.2 is the result of two-decades' worth of Congressional directives—at times actively opposed by the Commission—that have continually ratcheted up penalties and piled on enhancements. *Henderson*, 649 F.3d at 960–63; *Dorvee*, 616 F.3d at 184–86; *see* also, generally, Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (2009). Congress' active role in shaping § 2G2.2 is not in and of itself reason to question the Guideline's

wisdom or efficacy. As the Sixth Circuit observed, saying that "Congress has encroached too much on the Commission's authority with respect to sentencing policy .... is like saying a Senator has encroached upon the authority of her chief of staff, or a federal judge upon that of his law clerk." *United States v. Bistline*, 665 F.3d 758, 761 (6th Cir. 2012). Within our nation's constitutional and democratic framework of governance, it is Congress' role to make such decisions. Unlike the Commission, Congress is free to base its decisions on"political considerations (which, less pejoratively, are oftentimes democratic considerations)...." *Id*.

Courts across the country have recognized that § 2G2.2 does not work. *United States v. Grober*, 624 F.3d 592, 607–10 (3rd Cir. 2010); *Henderson*, 649 F.3d at 960–63; *Dorvee*, 616 F.3d at 184–86; *United States v. Diaz*, 720 F. Supp.2d 1039, 1041–42 (E.D. Wis. 2010). Rather than carefully differentiating between offenders based on their culpability and dangerousness, § 2G2.2 consists of a hodgepodge of outdated enhancements that apply in nearly every case. *Dorvee*, 616 F.3d at 186. As a result, this Guideline routinely results in sentencing ranges near or exceeding the statutory maximum, even in run-of-the-mill cases involving first-time offenders. *Id*.

This has not escaped the Sentencing Commission's attention. Following several years of research, the Commission issued a comprehensive report on § 2G2.2. United States Sentencing Commission, Report to Congress: Federal Child Pornography

Offenses (Dec. 2012). The Commission concluded that "the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior." Comm'n Rep. at 321. At the same time, it results in unduly lenient ranges for other offenders who are more culpable or dangerous. *Id*. For instance, the Commission found that, for 2010, the enhancement for use of a computer (§ 2G2.2(b)(6)), applied in over 96% of all § 2G2.2 cases, and over 10% of these cases are assessed five levels under the patter of activity enhancement. Comm'n Rep. at 209.These enhancements were "promulgated in an earlier technological era[,]" when offenders typically received and distributed child pornography through the postal system. *Id*. at 313. Over the last decade, technological changes, such as the widespread use of P2P file-sharing networks, have changed the typical offender's profile. *Id*. at 312–13. In particular, the anonymous and ready accessibility offered by new technologies means that the typical offender's collection has not only grown in volume but is also likely to include more of the worst kinds of material, including graphic sexual abuse of prepubescent children. Now, even "entry-level offenders" can easily acquire and distribute large quantities of child pornography. *Id*. at 6, 149, 154, 312–13.

The use of a computer enhancement add a total of two levels,"based solely on sentencing enhancements that are all but inherent to the crime of conviction." *Dorvee*,

616 F.3d at 186; *see* also Comm'n Rep. at 316. The district court has a responsibility at sentencing to distinguish between such offenders based on their culpability and dangerousness. An impartial viewer could find that a sentencing court cannot fulfill this responsibility by deferring to § 2G2.2, which concentrates most offenders at or near the statutory maximum, with little regard for the nature of their offense or their personal characteristics. This is "fundamentally incompatible with § 3553(a)" and "violates the principle, reinforced in *Gall*, that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct." *Dorvee*, 616 F.3d at 187; *see* also *Gall*, 552 U.S. at 55.

Thus, the district court should have rejected outright the enhancement for use of a computer. This enhancement applies in nearly every case and no longer serves any reasonable purpose. Computer use is now so widespread that this enhancement "is a little like penalizing speeding, but then adding an extra penalty if a car is involved." *United States v. Kelly*, 868 F. Supp.2d 1202, 1209 (D.N.M. 2012).

Because the district court improperly enhanced Mr. Barrett's sentence under § 2G2.2(b)(6) and thereby calculated an improper guideline range, the court committed a procedural error. *See United States v. Delgado-Martinez*, 564 F.3d 750, 752 (5th Cir. 2009); *see* also *Gall*, 552 U.S. 38. Procedural errors that are "harmless" will not require reversal. *Id*. A procedural error during sentencing is harmless if "the

error did not affect the district court's selection of the sentence imposed." *See Williams v. United States*, 503 U.S. 193, 203 (1992). The burden of establishing that an error is harmless rests on the party seeking to uphold the sentence: The proponent of the sentence "must point to evidence in the record that will convince us that the district court had a particular sentence in mind and would have imposed it, notwithstanding the error made in arriving at the defendant's guideline range." *United States v. Huskey*, 137 F.3d 283, 289 (5th Cir.1998); *see* also *United States v. Langford*, 516 F.3d 205, 215–17 (3rd Cir. 2008) (explaining that "the improper calculation of the Guidelines range can rarely be shown not to affect the sentence imposed").

There is nothing in the record to suggest that the district court would have imposed the same sentence without the two-level upward adjustment. *See Delgado-Martinez*, 564 F.3d at 754. Thus, the district court's sentencing error is not harmless. *Id*.

ISSUE #2

I. MR. BARNETT'S GUILTY PLEA WITH REGARD TO THREE COUNTS OF CONVICTION –RECEIPT, DISTRIBUTION AND POSSESSION OF CHILD PORNOGRAPHY– BECAUSE THE FACTUAL BASIS WAS INSUFFICIENT TO PROVE AN OFFENSE CONSISTENT WITH THE UNITED STATES CONSTITUTION.

The District Court plainly erred in accepting Mr. Barnett's guilty plea with regard to three counts of conviction – production, receipt and possession of child pornography – because the factual basis was insufficient to prove an offense consistent with the United States Constitution.

Federal Rule of Criminal Procedure 11 "requires a district court taking a guilty plea to make certain that the factual conduct admitted by the defendant is sufficient as a matter of law to establish a violation of the statute to which he entered his plea." *United States v. Trejo,* 610 F.3d at 313; *see also United States v. Reasor,* 418 F.3d 466, 470 (5th Cir. 2005)("A district court cannot enter a judgment of conviction based on a guilty plea unless it is satisfied that there is a factual basis for the plea.") This requirement protects against the danger that a defendant will plead guilty unaware that his or her conduct does not actually fall within the definition of a prosecutable offense. *See Reasor,* 418 F.3d at 470. "A guilty plea does not waive the right of a defendant to appeal a district court's finding of a factual basis for the plea on the ground that the facts set forth in the record do not constitute a federal crime." *Id*.; *United States v. Spruill,* 292 F.3d 207, 215 (5th Cir. 2002).

With regard to his conviction on Count 1, distribution of child pornography, the proffer does not indicate that a sufficient nexus to interstate. With regard to his conviction on Count 2, Mr. Barnett admitted that he received the materials on a

computer. Regarding Count 3, Mr. Barnett admitted that he possessed the images on a computer. The factual basis for these three counts of conviction does not admit that the offense itself caused the movement of these objects, nor that such movement was recent, nor any other fact establishing that the offense involved the buying, selling, or movement of any commodity. Barnett argues that this factual basis was therefore insufficient to establish a violation of federal law.

Section 2252A(a)(5)(B) authorizes conviction when the defendant knowingly possesses "any computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer." Each statute may be read to include conduct that has little or nothing to do with the movement of commodities in interstate commerce, such as the production of child pornography with objects that crossed state lines years ago for entirely innocent purposes. Under this view, Mr. Barnett's conduct with respect to each count represented a federal offense. This Court's opinion in *Bond v. United States*, 572 U.S. 844 (2014), suggests that this is not the proper reading.

Bond was convicted of violating 18 U.S.C. § 229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond,* 572 U.S. at 851-52; 18 U.S.C. § 229(a). She placed toxic chemicals - an arsenic compound and potassium dichromate - on the doorknob of a romantic rival. *See id* at 852. This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 862-66. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 860-62.

Notably, § 229 defined the critical term "chemical weapon" broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. § 229F(8)(A). Further, it criminalized the use or possession of "any" such weapon, not just a weapon included in a named subset. 18 U.S.C. § 229(a). The Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal

> enforcement," and "involve a substantial extension of federal police resources." *[United States v.]Bass,* 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal antipoisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones [v. United States],* 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable-- and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack. *Bond,* 572 U.S. at 863.

As in *Bond,* it is possible to read § 2251(a) and § 2252A(a)(5)(B) to reach the conduct admitted here: use of an object that once moved across state lines to commit a criminal act, without proof that the crime caused the instrumentality to move, nor even proof that the instrumentality moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, or to the interstate movement of commodities. As the Fifth Circuit observed in *United States v. Kallestad,* 236 F. 3d 225 (5th Cir. 2000), before sustaining the constitutionality of the substantially similar statute with respect to possession of

visual depictions constituting child pornography, 18 U.S.C. § 2252(a)(4)(B), criminal liability premised on the mere prior movement of a criminal instrumentality "has no principled limit." *Kallestad,* 236 F.3d at 229.

After all, "it is one thing for Congress to prohibit possession of a weapon that has itself moved in interstate commerce, but it is quite another thing for Congress to prohibit homicides using such weapons." *Id*.

It is plain that Congress intended the "interstate movement" requirement to bind § 2251 and § 2252A(a)(5)(B) to federal interests in interstate commerce. *See Kallestad*, 236 F.3d at 229. (identical requirement in 18 U.S.C. § 2252(a)(4)(B) "reflects Congress's sensitivity to the limits upon its commerce power, and Congress's express interest in regulating national markets."). This prong of the statute underlying each count of conviction challenged here should therefore be read in a way that accomplishes this purpose. The better reading of the phrase found in § 2251(a) – "produced ... using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer" – and of the similar phrase "mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate

or foreign commerce by any means, including by computer" found in § 2252A(a)(5)(B), therefore requires a meaningful connection to interstate commerce. Such a reading would require either: 1) proof that the defendant's offense caused the materials to move in interstate commerce, or, at least, 2) proof that the relevant materials moved in interstate commerce at a time reasonably near the offense.

Alternatively, conceding that the issue is foreclosed, Mr. Barnett submits that Congress's power under the commerce clause authorizes it to regulate only commercial activity. *See Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519 (2012) (opinion of Roberts, C.J.). The use of an object that may have traveled in interstate commerce at a prior unspecified time is not, by itself, a commercial act. *See Nat'l Fed'n of Indep. Bus.,* 132 S. Ct. at 556 (opinion of Roberts, C.J.) ("An individual who bought a car *two years ago* and may buy another in the future is *not* 'active in the car market 'in any pertinent sense.'"). Further, any effect that Mr. Barnett's conduct had on the volume or channels of interstate commerce is remote and *de minimis.* Federal criminal liability for such conduct amounts to a federal police power. *See United States v. Morrison,* 529 U.S. 598, 618-619 (2000).

Mr. Barnett's conduct is well within any number of Texas state criminal prohibitions. It is not necessary to create a federal police power in order to criminalize the possession, receipt and distribution of child pornography. Mr. Barnett

concedes that the current state of the law does not support his view of the statutes of conviction. *See United States v. Bailey*, 924 F.3d 1289, 1290 (5th Cir. 2019) (holding arguments raised here foreclosed); *see also United States v. Miller*, No. 22-10915, 2023 WL 3179205 at *1 (5th Cir. May 1, 2023)(unpublished) (with regard to § 2251(a); *United States v. Riley*, No. 21-40638, 2022 WL 797411 at *1 (5th Cir. Mar. 15, 2022) (unpublished with regard to § 2252A(a)(5)(B)). The plainness of error is determined at the time of appeal, not at the time of trial. *See Henderson v. United States,* 568 U.S. 266, 279 (2013). Further, development of *Bond* or *Nat'l Fed'n of Indep. Bus.* in either this Court, or in other circuits might accordingly make Mr. Barnett's position plain before the conclusion of his direct appeal.

If the error in accepting Mr. Barnett's guilty plea were plain, his convictions on Counts 1, 2 and 3 would have been obtained in spite of the absence of proof of an essential element. The error is the conviction itself on each of these counts. The error thus affected the outcome of district court proceedings. Mr. Barnett's convictions on Counts 1, 2 and 3 seriously affect the fairness, integrity and public reputation of judicial proceedings for two reasons. First, the erroneous convictions effectively establish that he has been convicted on the basis of conduct that does not constitute a federal offense. Second, Mr. Barnett's view of the statute is necessary to enforce limits on federal power. These limits protect important structural guarantees against

federal aggrandizement, and so affect the liberties of the public generally. *See New York v. United States*, 505 U.S. 144, 181 (1992). The integrity of judicial proceedings demands that these limits be enforced. Rather, than acquiesce in the unwarranted extension of federal power, the Court should vacate the convictions.

ISSUE #3

I. THE DISTRICT COURT REVERSIBLY ERRED BY DENYING MR. BARNETT'S MOTION TO DISMISS THE INDICTMENT BECAUSE 18 U.S.C. § 2252A VIOLATES THE DUE PROCESS CLAUSE AND THE SEPARATION-OF-POWERS DOCTRINE.

Mr. Barnett filed a motion to dismiss based on separation of powers issues. ROA.113-123. The District Court denied this motion[3]. ROA.137-140.

The District Court Reversibly Erred by Denying the Motion to Dismiss.

1. The Legislative History of Receipt and Possession Shows the Lack of Differentiation Between Them.

Congress first criminalized child pornography in 1977.2 At that time, only distribution, and receipt of child pornography were prohibited. Possession was not a federal crime until 1990. Senator Strom Thurmond, who introduced the 1990 bill criminalizing possession, said the bill would "prevent the production, dissemination, and possession of child pornography." Notably, the Senator did not list receipt of child pornography as a separate harm. Again, in a 1996 bill, Congress described the governmental interest in "prohibiting the production, distribution, possession, sale,

[3]"This court reviews *de novo* the district court's denial of a motion to dismiss an indictment." *United States v. Arrieta*, 862 F.3d 512, 514 (5th Cir. 2017). A defendant's unconditional guilty plea does not bar him from challenging the constitutionality of the statute of conviction. *Class v. United States*, 138 S. Ct. 798, 803 (2018).

or viewing" of child pornography, not listing receipt as a separate harm. The Department of Justice also categorized these crimes the same way, describing chapter 110 of the criminal code as prohibiting the "production, distribution, or possession of child pornography."

That logical merging of receipt and possession makes sense given how those crimes were investigated before possession was federally criminalized in 1990. Through "Operation Looking Glass," the United States Postal Inspection Service posed as child pornography dealers and would ship illegal images to people. That type of sting operation enabled the government to prove defendants had received child pornography. Individuals who received child pornography from private citizens, on the other hand, typically escaped prosecution because the government could not prove how or when those people received the images. Congress designed the 1990 bill to fill that gap, permitting prosecutors to charge those who possessed child pornography, whether or not the government had sent the images to them. Thus, the new federal crime of possession targeted the same harm as receipt of child pornography. Congress wanted to punish anyone who possessed illegal images.

In keeping with that view, after the criminalization of possession in 1990, the United States Sentencing Commission developed a new Guideline system that would

punish possession and receipt of child pornography equally, and less severely than distribution crimes.[4] That scheme, however, was undone by an amendment to an Appropriations bill in Congress.[5] It required the Sentencing Commission to punish receipt convictions under the same Guideline as distribution, rather than under the lower Guideline for possession offenses.[6] The amendment was never debated and was simply added onto a much larger bill.[7]

Before that amendment passed, however, the Chairman of the Sentencing Commission and former Chief Judge of the Fourth Circuit William W. Wilkins wrote to Congress objecting to the amendment.[8] He wrote "[r]ecognizing that receipt is a logical predicate to possession," he warned Congress that the proposed amendment

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[4]*Bacon, supra* note 8, at 1034-35.

[5]*Id*. at 1035.

[6]*Id*.

[7]*Id*.; *see* also U.S. Sentencing Commission, 2012 Report to the Congress: Federal Child Pornography Offenses (2012) (hereafter "2012 Report") at 28, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sexoffense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf (last accessed March 18, 2018) (explaining that there are no legislative findings, committee reports, or relevant floor statements to explain the different penalties for receipt and possession).

[8]137 Cong. Rec. H6736-02 (1991) (letter from Chairman Wilkins); *see* also U.S. Sentencing Commission, 2012 Report to Congress, *supra* note 13, at 326-27 & n.77.

would "reintroduce sentencing disparity among similar defendants and render the guidelines susceptible to plea bargaining manipulation."[9] His warning was prophetic.

2. Section 2252A Violates the Due Process Clause and the Separation of Powers Doctrine.

Section 2252A of Title 18 grants prosecutors broad authority to control the ultimate sentence a defendant will receive. This broad control that prosecutors wield violates the Constitution's guarantees of due process and separation of powers. Receipt and possession of child pornography involve the same conduct and the same harm,[10] yet receipt is punished much more harshly than possession.[11]

"When a prosecutor elects to charge a defendant with 'receipt' instead of, or in conjunction with, 'possession,'" one scholar has explained, the prosecutor thereby "strips the judicial branch of its authority to fashion an appropriate sentence in light

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[9] 137 Cong. Rec. H6736-02 (1991) (letter from Chairman Wilkins).

[10] *See United States v. Robinson*, 669 F.3d 767, 776 n.2 (6th Cir. 2012) ("standing alone, the current statutory scheme makes no principled distinction between possessing and receiving child pornography"); *United States v. Olander*, 572 F.3d 764, 769 (9th Cir. 2009) ("There is little to distinguish possession from receipt. If one receives child pornography, one necessarily possesses it, at least for a short time."); Carissa Byrne Hessick, Disentangling Child Pornography from Child Sex Abuse, 88 WASH. U.L. REV. 853, 863 n.38 (2011) (explaining that possession and receipt are "essentially identical" though they have different sentencing ranges).

[11] Receipt carries a statutory range of 5 to 20 years in federal prison, along with a base offense level of 22 under the Guidelines; possession carries a statutory range of 0 to 10 years in prison, along with a base offense level of 18. *See* 18 U.S.C. §§ 2252A(a)(2)(B), (a)(5)(B), (b)(1), (b)(2); USSG § 2G2.2(a)(1)-(2).

of the defendant's conduct."[12]This statutory scheme allows a prosecutor to bind the sentencing court's discretion and effectively determine much of the ultimate sentence.

It permits prosecutors to arbitrarily enforce the law, and it gives them vast control over the ultimate sentence, in violation of the Constitution.[13]

a. This statutory scheme violates due process.

The child pornography statute at issue here is unconstitutionally vague because it permits prosecutors to arbitrarily select the ultimate sentence a defendant will receive. A criminal statutory scheme is unconstitutionally vague, in violation of the Fifth Amendment's due process guarantee, if it fails to provide adequate notice or if it authorizes and encourages arbitrary and discriminatory enforcement.[14] The Supreme Court has described this due process requirement as a way of ensuring that criminal statutes do not "permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections."[15] The rule against vagueness applies to

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[12]*Bacon, supra* note 8, at 1030.

[13]*See id*. ("This discretion [to choose between possession and receipt charges] furnishes the prosecution with the power to determine the defendant's ultimate sentencing fate.").

[14]*See Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see* also *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015).

[15] *Kolender*, 461 U.S. at 358.

laws that fix sentencing ranges, not just to laws defining the elements of a crime.[16] The sentencing provisions of 18 U.S.C. § 2252A violate due process by permitting prosecutors to arbitrarily control much of the ultimate sentence based on a nonexistent difference between receipt and possession. Many others have raised this exact concern with the federal child pornography laws.

The Seventh Circuit, for example, raised the question of "why receiving . . . should be punished more severely than possessing, since possessors, unless they fabricate their own pornography, are also receivers."[17] That court, however, declined to rule on the issue because in that case it was not briefed by either party. The United States Sentencing Commission recognized the frequent criticism that "there is no rational basis to treat receipt offenses . . . and possession offenses . . . differently under the guidelines or penal statutes."[18] At least one district court has written that there is little if any rational basis for treating receipt offenders differently from

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[16]*See Johnson,* 135 S. Ct. at 2556-57; *see* also *United States v. Batchelder*, 442 U.S. 114, 123 (1979), and invalidating, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act which increased the defendant's prison term to a minimum of 15 years and a maximum of life).

[17]*United States v. Richardson*, 238 F.3d 837, 839 (7th Cir. 2001).

[18]U.S. Sentencing Commission, 2012 Report to Congress, *supra* note 13, at 13 (summarizing the criticism the United States Sentencing Commission received about USSG § 2G2.2 and its corresponding penal statutes).

possession offenders, noting that "the original rationales for treating receipt offenses more harshly no longer hold up."[19]

One crucial reason for the *Batchelder* decision, then, was that those statutes only expanded the judiciary's discretion in imposing incarceration. The second statute only increased the statutory maximum sentence and decreased the maximum fine. Section 2252A, however, goes well beyond that. The child pornography scheme allows a prosecutor to unilaterally select not only the maximum sentence but also the mandatory minimum sentence and the base offense level under the Sentencing Guidelines. That prosecutorial control goes far beyond what the Supreme Court allowed in *Batchelder*. Because this statutory scheme allows prosecutors to arbitrarily select the ultimate sentence, it fails to provide due process to defendants.

b. This statutory scheme also violates the separation-of-powers doctrine.

The separation-of-powers doctrine serves as an important check on governmental power in the Constitution: "'the Constitution sought to divide the delegation powers of the new Federal Government into three defined categories,

[19] *United States v. Abraham*, 944 F. Supp.2d 723, 731 (D. Neb. 2013) (varying downward based on a policy disagreement with the child pornography guideline that imposes a four-level gap between receipt and possession offenders).

Legislative, Executive and Judicial.'"[20] "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'"[21]

The child pornography statutory and sentencing scheme impermissibly grants prosecutors vast control over the ultimate sentence to be imposed. Congress has a constitutional responsibility to set punishments for crimes it defines[22]; it may give courts wide latitude to sentence defendants, but Congress cannot give that same power to the prosecution. To do so violates the separation of powers.[23] As James Madison wrote long ago: "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."[24] U.S.C. § 2252A, however, allows an individual prosecutor to look at a single act—receiving and thereby possessing child pornography—and to select a

[20]*Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *see* also *INS v. Chadha*, 462 U.S. 919, 951 (1983).

[21]*Bowsher*, 478 U.S. at 721; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[22]*See United States v. Hudson*, 11 U.S. 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."); cf. *United States v. Evans*, 333 U.S. 483, 486 (1948) ("In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions."); U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States").

[23]*See*, e.g., *Viereck v. United States*, 318 U.S. 236, 241-47 (1943) (reversing conviction based on an indictment broader than authorized by statute or rule).

[24]THE FEDERALIST No. 47 (J. Cooke ed. 1961).

sentencing scheme and a Guideline level, thus significantly binding the hands of the sentencing court. That degree of prosecutorial control violates the separation of powers.

The charging decision controls the statutory maximum and minimum sentence, and it makes a 4-level difference to the defendant's Sentencing Guideline base offense level. *See* USSG § 2G2.2(A)(1)-(2). That 4-level difference creates a significant risk that a defendant charged with receipt will receive a higher sentence than a defendant charged only with possession.[25] That risk flows from the role of the Sentencing Guidelines, which the Supreme Court has called the "starting point and . . . initial benchmark" for a sentencing court, which "must begin [its] analysis with the Guidelines and remain cognizant of them throughout the sentencing process."[26]

The Guidelines have a "real and pervasive effect" on sentencing, which is why the Court stressed that they are "in a real sense[,] the basis for the sentence."[27] So the

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[25]Cf. *Peugh v. United States*, 569 U.S. 530, 550 (2013); *see* also *Garner v. Jones*, 529 U.S. 244, 251 (2000)(finding under the Ex Post Facto Clause that a change to the guideline range created a "significant risk" of a higher sentence for the defendant).

[26]*Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

[27]*Id*. at 1345-46.

prosecutor in a child pornography case controls the statutory range as well as the "initial benchmark" and "the basis for the sentence." That control violates the separation of powers and impermissibly grants judicial authority to the prosecution.

Because 18 U.S.C. § 2252A grants the unfettered discretion to the prosecution to select the statutory minimum, the statutory maximum, and the Sentencing Guideline base offense level for a criminal act, it is unconstitutional, and the district court reversibly erred by declining to dismiss Count 1.

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 24th day of October 2024, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Carmen Castillo Mitchell
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Colt Jacoby Barnett
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/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 2024

COLT JACOBY BARNETT,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 26, 2024
Lyle W. Cayce
Clerk

No. 23-20174

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

COLT JACOBY BARNETT,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CR-181-1

Before JOLLY, SOUTHWICK, and DUNCAN, *Circuit Judges*.

PER CURIAM:[*]

Colt Barnett pleaded guilty to distribution of child pornography, receipt of child pornography, possession of child pornography, and destruction of property. At sentencing, the district court ordered him to pay $21,000 in restitution to various victims. On appeal, he challenges his conviction and sentence. In making its determination as to restitution, the district court ordered Barnett to pay restitution to victims who are not

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

mentioned in the record and failed to conduct the required proximate-cause analysis for these victims. The failure to conduct such analysis was erroneous. But we find no error with his conviction, term of imprisonment, and restitution order to the victim Barnett injured, so we AFFIRM in part and VACATE the restitution order as to the victims not injured by Barnett.

I.

In January 2019, the FBI began an investigation into a specific internet network that allowed the sharing of child pornography. During the investigation, the FBI received and downloaded more than ten videos of child pornography from a specific IP address that belonged to Barnett. The FBI then obtained a search warrant for Barnett's house. When the agents entered the house to execute the warrant, they found Barnett attempting to destroy his laptop computer. The agents seized the laptop and arrested Barnett. The FBI conducted a forensic analysis of Barnett's laptop and found more than fifty videos containing child pornography.

Barnett was indicted by a federal grand jury on four charges: (1) distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B) and § 2252A(b)(1); (2) receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B) and § 2252A(b)(1); (3) possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and § 2252A(b)(2); and (4) destruction of property, in violation of 18 U.S.C. § 2232(a). The Government did not offer Barnett a plea agreement. Instead, Barnett entered a guilty plea to all four counts of his indictment at a re-arraignment hearing.

Following his plea, the district court ordered a presentence investigation and report ("PSR"). The PSR calculated a base offense level of 22 under U.S.S.G. § 2G2.2(a)(2). The base offense was then increased by several levels, including a two-level increase under U.S.S.G. § 2G2.2(b)(6) because Barnett used his personal computer to store videos and images of

child pornography and used the internet to receive or access the material.[1] In total, the PSR recommended an imprisonment range of 210–262 months.

Additionally, the PSR noted that Barnett is required to pay restitution under 18 U.S.C. § 2259 because Barnett's offense is a child pornography trafficking offense. The PSR noted that "April" was the only identifiable victim in the materials Barnett possessed and distributed.[2] April submitted a victim impact statement telling the district court that she suffers from chronic post-traumatic stress disorder and will require lifelong therapeutic support. Her treatment costs are estimated to total over $225,000. Based on these estimates, she requested the district court grant restitution in an amount between $3,000 and $20,000.[3]

At the sentencing hearing, the district court sentenced Barnett to 210 months in prison and ten years of supervised release. The district court also ordered Barnett to pay the following amounts in restitution:[4] $5,000 for the "eight kids, four" series; $5,000 to April; $3,000 for the "Jenny" series; $3,000 for the "SpongeBob" series; and $5,000 for the "Sweet One Sugar"

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[1] The PSR increased the base offense by some additional levels, but we omit discussion of these levels because Barnett does not challenge them on appeal.

[2] April is the identifiable victim in the "Aprilblonde" series of child sex abuse material, which is the material Barnett possessed.

[3] Although her treatment costs were estimated to be over $225,000, April only requested restitution in an amount between $3,000 and $20,000 in this case. This request was based on several factors, including the number of images Barnett possessed and the number of past criminal defendants found to have contributed to April's losses. April's images are traded throughout the world and are continuously disseminated on the internet. Based on these factors, April only requested between $3,000 and $20,000 in restitution for the harm Barnett caused her. She does not challenge the district court's award of $5,000.

[4] At sentencing, the parties requested that the district court grant them ninety days to confer and stipulate to an agreed amount of restitution. The district court denied this request and instead imposed restitution at the sentencing hearing.

series. Barnett objected to the order of restitution on two grounds. First, he objected to the payment of restitution for any alleged victims that were not substantiated in the PSR. Second, Barnett objected to the payment of restitution if the victim has been made whole. The district court overruled Barnett's objection and noted that restitution is mandated by statute.

After the sentencing hearing, the district court signed and filed the written judgment. The written judgment only contains a restitution for April, in the amount of $5,000. Barnett has timely appealed.

II.

On appeal, Barnett challenges both his conviction and his sentence. He raises four arguments: (1) the factual basis was insufficient to support his conviction; (2) 18 U.S.C. § 2252A, the statute under which he was convicted, violates due process and separation-of-powers principles; (3) the district court erroneously applied U.S.S.G. § 2G2.2(b)(6) for his use of a computer to access the pornographic material; and (4) the district court's award of restitution was arbitrary and unrelated to the victim's needs. Barnett concedes that his first three arguments are foreclosed by our circuit precedent. Thus, we only address his fourth argument.

Barnett preserved his objection to the district court's restitution order by objecting at sentencing. *See United States v. Sepulveda*, 64 F.4th 700, 712 (5th Cir. 2023). Accordingly, we review the legality of a restitution order *de novo* and the amount of restitution for abuse of discretion.[5] *United States v. Villalobos*, 879 F.3d 169, 171 (5th Cir. 2018).

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[5] The parties dispute whether we should review the district court's order of restitution *de novo* or for plain error. If Barnett had not objected to restitution at sentencing, we would review for plain error. *See Sepulveda*, 64 F.4th at 712. But Barnett's objections at sentencing were sufficient to preserve the issue. Further, even if we were to review under plain error, a portion of the restitution order would still be vacated because

III.

Barnett challenges the legality of the district court's restitution order. A district court is statutorily required to impose restitution when a defendant is convicted under § 2252A. 18 U.S.C. § 2259. But the district court must order a restitution amount that "reflects the defendant's relative role in the causal process that underlies the victim's losses." *Id.* at § 2259(b)(2)(B). In other words, restitution is proper under § 2259 "only to the extent the defendant's offense proximately caused a victim's losses." *Paroline v. United States*, 572 U.S. 434, 448 (2014). An order of restitution that does not contain a proximate cause analysis is an illegal sentence. *United States v. Chem. & Metal Indus., Inc.*, 677 F.3d 750, 752 (5th Cir. 2018); *United States v. West*, 99 F.4th 775, 780 (5th Cir. 2024).

In *Paroline*, the Supreme Court recognized the difficulty in determining the damages proximately caused by a defendant where, as here, the defendant is one of many individuals who has possessed the victim's images. 572 U.S. at 449. But the district court must assess the amount of loss proximately caused by the defendant "as best it can from available evidence." *Id.* at 459. *Paroline* set forth seven non-exclusive factors to assist courts in calculating the loss proximately caused by the defendant: (1) the number of past criminal defendants found to have contributed to the victim's general losses; (2) reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's

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"restitution that exceeds the court's statutory authority is an illegal sentence, which always constitutes plain error." *Id.* (citing *United States v. Penn*, 969 F.3d 450, 458 (5th Cir. 2020)). As we will explain below, a portion of the restitution award exceeded the district court's statutory authority. *See United States v. Winchel*, 896 F.3d 387, 389 (5th Cir. 5th Cir. 2018) ("[I]f a court orders a defendant to pay restitution under § 2259 without determining that the defendant's conduct proximately caused the victim's claimed losses, the amount of restitution necessarily exceeds the statutory maximum.").

general losses; (3) any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); (4) whether the defendant reproduced or distributed images of the victim; (5) whether the defendant had any connection to the initial production of the images; (6) how many images of the victim the defendant possessed; and (7) other facts relevant to the defendant's relative causal role. *Id.* at 460. Our court's precedent clearly establishes that a district court's failure to conduct a proximate-cause analysis under *Paroline* "seriously undermines the fairness, integrity, and public reputation of judicial proceedings." *West*, 99 F.4th at 782 (quoting *Winchel*, 896 F.3d at 389) (internal quotations omitted).

We first address the district court's restitution award to victims not mentioned in the PSR. The district court's restitution award to victims in the "eight kids, four" series, the "Jenny" series, the "SpongeBob" series, and the "Sweet One Sugar" series is erroneous because the record lacks any evidence to support the district court's order of restitution for these victims. *See United States v. Sharma*, 703 F.3d 318, 323 (5th Cir. 2012) (explaining that every dollar in the restitution award must be supported by record evidence). The PSR states that April is the only identifiable victim. Further, April is the only victim that submitted a victim impact statement and requested restitution. The Government argues that the district court's imposition of these restitution awards is harmless because the amounts do not appear in the written judgment. But our precedent makes clear that "where there is any variation between the oral and written pronouncements of sentence, the oral sentence prevails." *United States v. Shaw*, 920 F.2d 1225, 1231 (5th Cir. 1991); *accord United States v. Martinez*, 250 F.3d 941, 942 (5th Cir. 2001) (per curiam). Accordingly, we VACATE the restitution awards to these victims because we find no basis to support the restitution award for these victims based on the record before us.

Next, we turn to the district court's restitution award to April. Unlike the awards to the other victims, the record clearly shows that Barnett proximately caused injury to April by possessing and sharing her images. April's statement to the district court recited the *Paroline* factors and detailed the cost of her treatment plan for future medical needs, which are estimated to cost over $225,000. The amount of restitution that the district court awarded is a small fraction of April's estimated future costs to cope with her post-traumatic stress and other injuries. Additionally, there is no indication that April has received duplicative recovery. We have affirmed the restitution award in cases where similar showings have been made. *See, e.g.*, *United States v. Teijeiro*, 79 F.4th 387, 395 (5th Cir. 2023); *United States v. Musgraves*, No. 21-20147, 2022 WL 7283887 (5th Cir. Oct. 12, 2022) (per curiam) (unpublished).[6] These factors, taken together, properly support the assessment of $5,000 in restitution owed to April.

IV.

For the foregoing reasons, we VACATE the restitution award to the victims not mentioned in the PSR. The conviction, sentence, and restitution award for April are otherwise AFFIRMED.[7]

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[6] In each of these cited opinions, the respective panels held that the defendant failed to show a reasonable probability of error, relying on the plain error standard of review. In the instant case, however, we are reviewing the district court's award under a *de novo* standard of review. But the different standard applied makes no difference in this case. Because the district court's analysis is proper under a *de novo* standard of review, it would also be proper under the more deferential plain error standard.

[7] In this instance, we find no need to remand to the district court to enter judgment consistent with this opinion. As we noted earlier, the judgment of conviction and sentence that the district court entered into the record only contained a restitution award for April. But as our precedent makes clear, the oral pronouncement of sentence prevails when there is "any variation between the oral and written pronouncements of sentence." *Shaw*, 920

VACATED IN PART AND AFFIRMED.

F.2d at 1231. Thus, we vacate the oral pronouncement of restitution that is inconsistent with the written judgment and, in so doing, affirm the written pronouncement of judgment.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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July 26, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 23-20174 USA v. Barnett
USDC No. 4:19-CR-181-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L. Leto

By:_____
Rebecca L. Leto, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Mr. Brent David Chapell
Ms. Carmen Castillo Mitchell