No. 24-6618

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DILESH SHARMA—PETITIONER

VS.

UNITED STATES OF AMERICA—RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has 30 years of technological changes caused the offense enhancements for use of a computer under Sections 2G1.3(b)(3) and 2G2.2(b)(6) of the United States Sentencing Guidelines to become irrational, violating the Fifth Amendment Due Process Clause?

2. Are offense enhancements based on the number of images under 2G2.2(b)(7) of the United States Sentencing Guidelines arbitrarily defined, violating the Fifth Amendment Due Process Clause?

LIST OF PARTIES

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

RELATED CASES

- United States v. Sharma, No. 2:17-cr-00055-TLN-1, U.S. District Court for the Eastern District of California. Judgment entered Mar. 30, 2023.
- United States v. Sharma, No. 23-616, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Oct. 28, 2024.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Dilesh Sharma, respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at 119 F.4th 1141 (9th Cir. 2024).

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was October 28, 2024.

No petition for rehearing was timely filed in my case.

An Application to Extend the Time to File a Petition for a Writ of Certiorari is filed contemporaneously with this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

2. The statute under which Petitioner was prosecuted for Count One, though nothing turns on it terms, was 18 U.S.C. § 2422(b), which provided:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

3. The statute under which Petitioner was prosecuted for Counts Two and Three, though nothing turns on it terms, was 18 U.S.C. § 2252(a)(2), which provided:

> (a) Any person who—(2) knowingly receives or distributes—(A) any child pornography using any means or facility of interstate of foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate of foreign commerce by any means, including by computer; or (B) any material that contains child pronography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped

> or transported in or affecting interstate or foreign commerce by any means, including by computer;
>
> shall be punished as provided in subsection (b).

4. The sentencing guidelines under which Petitioner was sentenced, relative to Petitioner's appeal to the Ninth Circuit and this present petition, was U.S.S.G. § 2G1.3(b)(3), which provided:

> If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels;

and U.S.S.G. § 2G2.2(b)(6), which provided:

> If the offense involved the use of a computer or an interactive comuter service for the posession, transmission, receipt, or distribution of the material, of for accessing with intent to view the material, increase by 2 levels;

and U.S.S.G. § 2G2.2(b)(7), which provided:

> If the offense involved—at least 150 images, but fewer than 300, increase by 3 levels.

STATEMENT OF THE CASE

What was constitutional in the 1990s is not necessarily constitutional today. The law is not fixed. "Even when laws have been written down, they ought not always to remain unaltered." Aristotle, Politics, c.322 B.C. This petition puts forward a question of federal law that this Court should settle.

This case arose out of an online conversation between an undercover-law-enforcement officer and the Petitioner, Mr. Sharma, in which Mr. Sharma sought to meet the undercover officer and the officer's ficticious child for sex. After law enforcement arrested Mr. Sharma, they searched his home and iPhone, which led to the discovery of child pornography.

Mr. Sharma pled guilty to a three-count indictment. At sentencing, over Mr. Sharma's objections, the district court applied two-point enhancements for using a computer under U.S.S.G. §§ 2G1.3(b)(3) and 2G2.2(b)(6) and a three-point enhancement based on the number of child-pornography images under U.S.S.G. § 2G2.2(b)(7). The district court sentenced Mr. Sharma, including imprisonment, and Mr. Sharma appealed to the Ninth Circuit Court of Appeals, arguing that the 30-year-old enhancements for using a computer are no longer rational, and the enhancement for the number of images is arbitrary and unrelated to a legitimate governmental purpose; those enhancements violate due process.

PROCEDURAL HISTORY

Petitioner, Dilesh Sharma, was arrested on March 31, 2017.

On April 13, 2017, a grand jury indicted Mr. Sharma: Count One charged attempted online enticement of a minor for sexual purposes. 18 U.S.C. § 2422(b); 4-ER-647—50 ["ER"—Excerts of Records submitted to Ninth Circuit in 4 volumes]. On January 24, 2019, a grand jury returned a second-superseding indictment, adding two counts: Count Two charged distribution of child pornography and Count Three charged reciept of child pornography. 18 U.S.C. § 2252(a)(2); 3-ER-536—42. On August 29, 2019, Mr. Sharma entered an open guilty plea to the three counts of the second-superseding indictment. 3-ER-535.

On June 18, 2020, the draft Pre-Sentence Report ("PSR") was released. PSR ER-781. The government and defense submitted objections to the PSR. On June 7, and 10, 2021, the court held an evidentiary hearing to resolve disputed allegations that Mr. Sharma sexually abused his niece when she was 11 or 12 years old. 3-ER-531—32. Those allegations had two 5-level-enhancement effects to the PSR under U.S.S.G. §§ 2G2.2(b)(5) and 4B1.5(b)(1). PSR, paras. 32, 44. Between November 2022 and January 2023, the parties filed post hearing briefs. 2-ER-137; 2-ER-110; 2-ER-101. On February 7, 2023, the court ruled that the government met their burden of proof about the enhancements. SER-3, 12.

Mr. Sharma filed objections to the PSR, and both parties filed sentencing memorandums. 2-ER-85; 2-ER-64; 2-ER-41. Mr. Sharma objected to the child pornography guidelines and due-process objections to the enhancements for use of acomputer and the number of images. 1-ER-15—17. Mr. Sharma was sentenced on

March 30, 2023. 1-ER-11.

The court rejected all of Mr. Sharma's objections. 1-ER-22. The court sentenced Mr. Sharma to "imprisonment of 288 months on Count 1 and 240 months on each of Counts 2 and 3, for a total concurrent term of 288 months." 1-ER-11. The court added various fines and fees and a life term of supervised release. Id. Mr. Sharma timely filed a notice of appeal on April 4, 2023. 4-ER-665.

Between September and December 2023, the parties filed appellate briefs. The Ninth Circuit heard oral arguments on July 15, 2024. Mr. Sharma argued that the use-of-a-computer enhancements in U.S.S.G. §§ 2G1.3(b)(3) and 2G2.2(b)(6) and the number-of-images enhancement in U.S.S.G. § 2G2.2(b)(7) violate the due process clause. On October 28, 2024, the court of appeals affirmed the district court's rulings that the enhancements do not violate due process.

DISTRICT COURT JURISDICTION

The district court had jurisdiction pursuant to Title 18 United States Code Section 3231 because Mr. Sharma was charged with federal crimes related to the receipt and distribution of child pornography. 4-ER-652; 4-ER-647.

COURT OF APPEALS JURISDICTION

The court of appeals had jurisdiction pursuant to Title 18 United States Code Section 3742(a) and Title 28 United States Code Sections 1291 and 1294(1).

STATEMENT OF FACTS

Sometime after late 2015, Mr. Sharma posted an ad on www.Craigslist.com titled "Taboo chat-m4m (Sacramento)." 4-ER-655. An undercover agent ("UA") responded to Mr. Sharma's ad, which led to the two electronically communicating from November 2016 to March 2017. Id. The UA presented himself as an adult with access to a girlfriend's 11-year-old (fictitious) daughter. Mr. Sharma asked about the girl and commented sexually about her. 4-ER-657—58.

Over the months, Mr. Sharma expressed interest in the UA's (fictitious) daughter and discussed sexual acts he would like to perform with the girl. Id. Mr. Sharma suggested meeting the girl in person for sexual purposes. 4-ER-622—63. First, however, Mr. Sharma suggested that just he and the UA meet "to see if [they] clicke[d]. 4-ER-663—64. On March 30, 2017, Mr. Sharma met a different UA—whom Mr. Sharma believed was the individual he had been chatting with online—in a parking lot in Sacramento. 4-ER-663. The two discussed a plan where the UA would bring the girl to a hotel; they agreed to meet the following day at a designated location before going to the hotel to meet the girl. Id.

On March 31, 2017, Mr. Sharma arrived at the meeting place, and officers arrested him. 4-ER-663—64. Officers searched Mr. Sharma's vehicle and found a stuffed bunny rabbit. PSR, para. 10; 2-ER-201.

Law enforcement forensically examined Mr. Sharma's iPhone

and discovered dozens of Kik-messenger chat threads that Mr. Sharma had deleted. 3-ER-506—08; 2-ER-183. Law enforcement discovered that Mr. Sharma had chatted with [K.M.] who sent Mr. Sharma files containing child pornography; Mr. Sharma commented to [K.M.] about the files. 2-ER-178—83. Later that day, Mr. Sharma chatted with [M.B.], and the two traded child-pornography files; both commented about the exchanged files. PSR, para's.11—14. Law enforcement found that Mr. Sharma possessed 275 child-pornography images. PSR, para. 35.

REASONS FOR GRANTING THE PETITION

The use-of-a-computer enhancements in U.S.S.G. §§ 2G1.3(b)(3) and 2G2.2(b)(6) violate the Fifth Amendment Due Process Clause. Thirty years ago, the internet was new, and Congress may have had a rational basis for that enhancement. Today, however, there is no rational basis for that enhancement—technology changes made it arbitrary because it applies in most cases and is unrelated to a legitimate governmental purpose.

The number-of-images enhancement in U.S.S.G. § 2G2.2(b)(7) violates due process. That enhancement punishes based on the quantity of child-pornography images possessed. That theory makes sense, but the execution is arbitrary and unrelated to a legitimate governmental purpose. Congress defined the enhancement levels without any research.

CRITICS OF NON-PRODUCTION GUIDELINES

Commentators, courts, the Department of Justice ("DOJ"),

and the United States Sentencing Commission ("Commission") have criticized non-production-child-pornography sentencing enhancements. The Commission—an independant agency—was created to reduce sentencing disparity and promote transparency and proportionality. In order to achieve those goals, the Commission collects, analyzes, and distributes information. The Commission's research provided evidence that the non-production enhancements do not comport with due process and must be overturned.

In February 2023, the Commission issued a 300-plus-page report to Congress for 2012 ("Report"), suggesting changes to the non-production-child-pornography guidelines. See www.ussc.gov/research/congressional-reports/2012-report-congress-federal-child-pornography-offenses; last visited Dec. 18, 2023. The Report repudiated the § 2G2.2 based on the Commission's empirical research, data analysis, and consideration of comments from relevant groups. The Commission noted, "[F]our of the six sentencing enhancements in § 2G2.2—those relating to computer usage and the type and volume of images possesed by offenders, which together account for 13 offense levels—now apply to most offenders." Report, Exec. Summ. at i-iii. The Commission added, "[T]he current non-production guideline warrants revision in view of its outdated and dispropotionate enhancement relating to offenders' collecting behavior...." Id.

In 2022, the Commission's position continued: [C]ourts and the government contend with the outdated statutory and guidelines structure...." U.S. Sent'g. Comm., 2021 Research Publication:

Non-Production Child Pornography, p. 7, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf.

Courts across the country agreed that the non-production guidelines lack an evidentiary basis. See, for example, United States v. Dorvee, 616 F.3d 174, 187, 188 (2nd Cir. 2010) (labeling § 2G2.2 "irrational" and cautioning "eccentric" child pornography Guidelines, with their "highly unusual provenance" "can easily generate unreasonable results"); United States v. Grober, 624 F.3d 592, 598 (3d Cir. 2010) ("Instead it is truer to say that § 2G2.2, the designated guideline for the typical downloading case, is what falls outside the heartland.") (quoting United States v. Grober, 595 F.Supp.2d 382 (D.N.J. 2008)); United States v. D.M., 942 F.Supp.2d 327, 352 (E.D.N.Y. 2013) ("rationales for child pornography Guidelines for non-production offense have been shredded"); United States v. Kelly, 868 F.Supp2d 1202, 1206, 1211 (D.N.M. 2012) (referencing 2G2.2 as "irrational guideline" and observing greater than necessary Guidelines range "is largely due to serious flaws in" § 2G2.2, "and all too frequently generates unjustly excessive terms of incarceration"); United States v. C.R., 792 F. Supp.2d 343, 481 (E.D.N.Y. 2011) (summarizing Dorvee—"court expressly critiqued the sentencing guidelines is not based on rational factors, but instead arbitrary assumptions"); United States v. Manke, 2010 WL 307937, *4, 5 (E.D. Wis. 2010) (§ 2G2.2 is "seriously flawed" and "entitled to little respect"; "Congress ... frustrated the

Commission's attempt to create a logical approach"); United States v. Cruikshank, 667 F.Supp.2d 697, 702 (S.D.W. Va. 2009) (guideline could advise "higher sentence than the Guidelines would recommend for an offender who actually rapes a child"); United States v. McElheney, 630 F.Supp.2d 886, 893 (E.D. Tenn. 2009) ("[T]he [child pornography] Guidelines [are] no longer descriptive or predictive."); United States v. Beierman, 599 F.Supp.2d 1087, 1105 (N.D. Iowa 2009) ("This guideline, thus, blurs logical differences between least and worst offenders, contrary to the goal of producing a sentence no greater than necessary to provide just punishment."); United States v. Burns, 2009 WL 3617448, *14 (N.D. Ill. 2009) ("The [child pornography] Guidelines reflect little other than that Congress was angry. Section 3553 does not permit rage to inform the sentencing process.").

USE OF COMPUTER

Congress promulgated the use-of-a-computer enhancement in 1995; that is, 30 years ago, 10 years before iPhones were invented, and electric vehicles only existed in science-fiction movies. Thirty years ago, phones were attached to cords, and computers were tools scientists used. According to Pugh Research Center, only 14% of the population had internet access in 1995, and most users used slow dial-up connections. See https//www.pewresearch.org/internet/2014/02/27/part-1-how-the-internet-has-woven-itself-into-american-life.

Today, the average person has a phone in their pocket and carries with them a computer more powerful than those that sent the first manned spacecraft to the moon. Eighty-five percent of people in the United States possesses a smart-phone. See https://www.explodingtopics.com/blog/smatphone-stats#. Ninety-four percent of people in the United States possesses a computer. See https://www.ibisworld.com/us/bed/percentage-of-households-with-at-least-one-computer/4068/.

In the 1990s, obtaining child pornography via a computer was difficult; it required computer sophistication beyond that of the average person. It was difficult for law enforcement to find those offenders. A sentencing enhancement for using a computer made sense.

Today, anyone who can run a google search can find child pornography on the internet, but law enforcement knows how to find those people. They have a litany of tools to track the trading of illegal images online. Undercover agents work in internet chat rooms and on social media websites. Companies like Facebook, Instagram, and Snapchat report users who access suspected child pornography. Using a computer today makes it more likely that law enforcement can trace people accessing illicit images, more likely offenders will get caught.

On its own, use of a computer does not constitute aggravating conduct:

> Specifically, the Commission has noted that the enhancement for use of a computer does not make much

> sense because online pornography comes from the same pool of images found in specialty magazines or adult bookstores. Further, to the extent that use of a computer may aggravate an offense, it does not do so in every case. For example, someone who e-mails images to another is not as culpable as someone who sets up a website to distribute child pornography to a large number of subscribers. If the defendant did not use the computer to widely disseminate the images, use them to entice a child, or show them to a child, the purpose for the enhancement is not served. Yet it applies in virtually all cases.

United States v. Hanson, 561 F.Supp.2d 1004, 1009—10 (E.D. Wis. 2008), citing Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progession of the Child Pornography Guidelines, available at https://www.sentencing.typepad.com (June 10, 2008).

When the guidelines were promulgated, "the typical offender obtained child pornography in printed form in the mail." Report, Exec. Summ. at iii. Today, almost all trading in child pornography is done via the use of a computer. For the two-level enhancement to be constitutional, there had to be something about Mr. Sharma's conduct that made his use of a computer more culpable than that of another person's use of a computer.

The Commission recommended changes to the use-of-a-computer enhancement, noting it applied in nearly every case and "thus fails to differentiate among offenders...." Report at 324. The DOJ replied, "Because the vast majority of child-pornography offenses now involve the use of a computer, this [specific offense characteristic] should be eliminated and replaced by others ... which better distinguish between different classes of

offenders." Letter from U.S. Dept. of Justice to U.S. Sent'g. Comm. (Mar. 5, 2013) at 4.

There are no Commission statistics tracking those cases in which child pornography was possessed as a hard-copy book or magazine. Mr. Sharma searched but found no legal decisions in any federal court in the past 15 years that involved receipt, possession, or distribution of child pornography in book or magazine form. The lack of statistics and cases confirms that computers and the internet account for nearly all cases of child pornography today.

In its 2021 report to Congress, the Commission stated in no uncertain terms that the use-of-a-computer enhancement failed to take changes in technology into account and should be changed.

_____.

The basis for the computer enhancement has changed over the last 30 years, swaying away from constitutional principals. The assumptions Congress' rationale relied upon in 1995 no longer exist. This Court cannot ignore all relevant advances in technology that undermine the enhancement's previous validity. This Court cannot ignore a legal tradition of acknowledging changes in society that requires changes in the law.

Justice Scalia wrote:

> Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That

> system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word of praise: They left us free to change.

U.S. v. Virginia, 518 U.S. 515, 566—567 (1996) (Scalia, J. dissenting).

The law is not fixed. When the passage of time pursuades a court that "what we took for granted is not so," our laws change.

NUMBER OF IMAGES

The guideline dictates sentencing a person to more time if they have more than 150 images. U.S.S.G. § 2B2.2(b)(7). The theory was that those with more images should receive stronger sentences.

While having more images of child pornography may be more culpable than having fewer, Congress arbitrarily defined the enhancement levels—no evidence to support a three-level increase for 150 images, a four-level increase for more than 300 images, and so forth. There were no congressional hearings about the number of images and how to translate the number of images into an appropriate punishment. Congress provided no research-backed rationale. United States v. Apodaca, 643 F.3d 1077, 1083 (9th Cir. 2011). Evidence from the Hanson court supports those allegations:

> Finally, in 2003 as part of the Feeney Amendment to to the PROTECT Act, Congress added the 5-level enhancement for the number of images. No research study or rationale was provided for this huge increase. At the same time, Congress established the 5-year mandatory minimum applicable in [Hanson], as a result of which the Commission does increased the

> base level to 22 to keep pace. Again this had nothing to do with the Commission's statutory mission of satisfying the purpose of sentencing.
>
> ... Furthermore, as a result of internet swapping, defendants readily obtain 600 images with minimal effort, resulting in a five-level increase. See U.S.S.G. § 2G2.2(b)(7)(D)....

Hanson, supra, 561 F.Supp.2d at 1010, citing Stabenow at 18—19.

In their 2012 report to Congress, the Commission reported that since the PROTECT Act of 2003—when Congress added the current sliding scale enhancement for number of images—distinguishing among offenders is increasingly difficult and results in the application of many sentencing enahncements to a higher number of offenders. The Commission said, "The current sentencing scheme in § 2G2.2 places a disproportionate emphasis on outmoded measures of culpability regarding offenders' collections (e.g., a 5-level enhancement under § 2G2.2(b)(3)(B) for possession of 600 or more images of child pornography, which the typical offender possesses today)." Report at 321.

In response to that that report, the DOJ recognized the outdated nature of the number-of-images enhancement: "This [specific offense characteristic] should continue to tie the guideline range to the quantity of child pornography an offender collected, but, in light of the technology-facilitated ease of obtaining larger child pornography collections, the numeric thresholds should be substantially increased for each offense level...." Letter from U.S. Dept. of Justice to Chair of the U.S. Sent'g. Comm. (Mar. 5, 2013) at 4.

This Court concluded that a statute does not violate substantive due process "so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." Chapman v. United States, 500 U.S. 543, 565 (1991) [citations ommitted]. In Chapman, this Court examined the congressional record and determined Congress had a basis for a sentencing scheme based on drug weight. Such a finding cannot be made here; some evidence must exist that the specific numbers in § 2G2.2(b)(7) had some meaning, some evidence that a person possessing, say, 175 images is more culpable, more dangerous, or more likely to reoffend than someone with 149 images. There is no congressional evidence that 36 images make a difference in a person's relative culpability.

The number-of-images enhancement could be a logical basis for determining a sentence. The current method in the guideline, however, do not do so in a manner consistant with the constitution. Those numbers have been arbitrary since their promulgation in 2003. Today, they are arbitrary and ignore changes in technology that allow people to download hundreds or even thousands of images with a single mouse click.

DUE PROCESS REVIEW

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision that neither the use-of-a-computer enhancements nor the number-of-images enhancement violate due process. Those decisions are important questions of federal law that have not been addressed by this Court.

Furthermore, in part, the court of appeals' decision conflicts with a relevant decision of this Court; that is, Chapman v. United States, 500 U.S. 543 (1991). Petitioner did not assert simple "erroneous factual findings or the misapplication of a properly stated rule of law"; rather, he asserted constitutional questions—questions this Court holds jurisdiction to review on certiorary. S. Ct. R. 10.

CONCLUSION

The Petition for a Writ of Certiorary should be granted.

Executed on February 11, 2025

Respectfully submitted,

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