

No. _____

IN THE
Supreme Court of the United States

TIMOTHY JOSEPH CARLSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a defendant pleads guilty to an indictment charging a greater and lesser offense, such that sentencing on both offenses would violate Double Jeopardy, does a presumption of sentencing on the greater offense conflict with the mandates of 18 U.S.C. §3553(a) when the sentencing court concludes that application of the presumption results in a sentence greater than necessary under the §3553(a) factors?

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

Petitioner, Timothy Joseph Carlson, respectfully prays that a writ of certiorari issue to review the memorandum of the United States Court of Appeals for the Ninth Circuit, entered on October 31, 2016. (App. 1-6).

OPINIONS AND ORDERS BELOW

Timothy Carlson was indicted on May 6, 2014, for possession of child pornography (Count I) and receipt of child pornography (Count II) in violation of 18 U.S.C. § 2252A(a)(2) and (a)(5)(B). (E.R. 1-3). On August 8, 2014, Mr. Carlson entered a plea of guilty to both counts of the Indictment, without a Plea Agreement.

Mr. Carlson was sentenced on October 6, 2014. The District Court concluded that Mr. Carlson had prior convictions which qualified for enhancement, and sentenced Mr. Carlson to the mandatory minimum term of imprisonment of fifteen years for receipt of child pornography, and dismissed the lesser offense of possession of child pornography.

Mr. Carlson appealed. On August 1, 2017, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's judgment and sentence. (App 1-6).

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's sentence in this matter. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2252(a)(2), (5)(B), (b)

(a) Any person who—

...

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

...

(5) either—

...

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, 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;

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 3553(a)

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant;
 - and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

Timothy Carlson was indicted on May 6, 2014, for possession of child pornography (Count I) and receipt of child pornography (Count II) in violation of 18 U.S.C. § 2252A(a)(2) and (a)(5)(B). (E.R. 1-3). On August 8, 2014, Mr. Carlson entered a plea of guilty to both counts of the Indictment, without a Plea Agreement.

Mr. Carlson was sentenced on October 6, 2014. At sentencing, Mr. Carlson argued that his prior convictions for statutory rape and child molestation should not qualify for enhancement under 18 U.S.C. § 2252A(b)(1),(2). The government argued that the prior convictions did qualify for enhancement.

Mr. Carlson also argued that since possession of child pornography was a lesser included offense of receipt of child pornography, it would violate double jeopardy principles to sentence Mr. Carlson on both counts. Mr. Carlson argued that under the 18 U.S.C. § 3553(a) factors, the District Court should sentence Mr. Carlson for possession of child pornography and dismiss the receipt count. The government conceded that the District Court had the discretion to determine whether to dismiss the greater count and sentence on the lesser, or vice versa. The government argued that the District Court should sentence Mr. Carlson for receipt of child pornography and dismiss the possession count.

The District Court concluded that Mr. Carlson had prior convictions which qualified for enhancement. The District Court noted that it had the discretion to determine whether to sentence on the greater and dismiss the lesser, or sentence on

the lesser and dismiss the greater. The District Court noted that under *United States v. Maier*, 646 F.3d 1148 (9th Cir. 2011), a sentencing Court is to be guided in making this decision by the 18 U.S.C. § 3553(a) factors. The Court then applied the presumption contained in *United States v. Maier, supra*, establishing that a district Court should sentence on a greater offense and dismiss the lesser offense absent unusual and compelling circumstances. The District Court then sentenced Mr. Carlson to the mandatory minimum term of imprisonment of fifteen years for receipt of child pornography, and dismissed the lesser offense of possession of child pornography. In doing so, the District Court explicitly stated that the fifteen-year mandatory minimum sentence it handed down was greater than necessary under the 18 U.S.C. § 3553(a) factors.

Mr. Carlson appealed. On August 1, 2017, the United States Court of Appeals for the Ninth Circuit, after citing the decision in *United States v. Maier, supra*, affirmed the District Court's judgment and sentence. (App 1-6).

REASONS FOR GRANTING THE WRIT

I. Only This Court Can Resolve the Tension Between the Presumption of Sentencing On a Greater Offense and a Reasoned Consideration of the 18 U.S.C. § 3553(a) Factors

A. Double Jeopardy Principles Prohibit Sentencing On Both a Greater and Lesser Offense

Count 1 of the indictment charged Mr. Carlson with possession of child pornography pursuant to 18 U.S.C. § 2252A(a)(5)(B). Count 2 charged Mr. Carlson with receipt of child pornography pursuant to 18 U.S.C. § 2252A(a)(2). Possession of child pornography is a lesser-included offense of receipt of child pornography. *United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008). This is so because it is impossible to ‘receive’ something without, at least at the very instant of ‘receipt,’ also ‘possessing’ it. “[F]ederal statutes criminalizing the receipt of contraband [generally] require a knowing acceptance or taking ... possession of the prohibited item.” *United States v. Romm*, 455 F.3d 990, 1001 (9th Cir.2006) (internal quotation marks omitted); *see also United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir.1999) (looking to the relevant statute’s plain language and adopting, for statutory interpretation purposes, the ordinary meaning of the word “receive,” namely “to take ... into one’s possession”).

While the government may have been within constitutional boundaries to include both offenses in the indictment, entering judgment against him on these counts would have been multiplicitous and therefore in violation of the Fifth Amendment’s prohibition of double jeopardy. *United States v. Davenport*, 519 F.3d at 944, 948. Both

the Double Jeopardy Clause and principles of statutory construction prohibited entry of convictions on both counts. *See United States v. Jose*, 425 F.3d 1237, 1247 (9th Cir. 2005).

Mr. Carlson was entitled to a complete dismissal of one of the two counts. *See United States v. Zalpa*, 509 F.3d 1064-65 (9th Cir. 2007) (explaining the prejudice incurred by allowing one count to remain, even when sentences are imposed to run concurrent; such prejudice includes the erroneous imposition of a mandatory penalty assessment); *accord United States v. Kuchinski*, 469 F.3d 853 (9th Cir. 2007) (noting that sentencing courts cannot ignore the collateral consequences of entry of multiplicitous counts of conviction; said consequences are not eliminated by the entry of concurrent sentences). Based on this insurmountable multiplicity problem, the Court was obligated to exercise its discretion to vacate one of the two convictions. *United States v. Hector*, 577 F.3d 1099, 1101, 1103 (9th Cir 2009).

B. Inconsistent Approaches by The Circuit Courts Have Eroded Application of Consideration of the Sentencing Factors Set Forth in 18 U.S.C. § 3553(a)

Some courts have held that, in deciding whether to vacate a lesser-included offense or a greater offense, a district court should be guided by the sentencing factors set forth in 18 U.S.C. § 3553(a), and “ ‘should’ exercise its discretion to vacate the lesser-included offense, absent unusual circumstances and compelling reasons to vacate the

greater offense.” *United States v. Maier*, 646 F.3d 1148, 1154 (9th Cir.2011) (citing *United States v. Jose*, 425 F.3d 1237, 1247 (9th Cir.2005)).

In practice however, it appears that the sentencing factors set forth in 18 U.S.C. § 3553(a) are barely a consideration, and the presumption is practically mandatory. Ordinarily it is “the conviction carrying the lesser penalty that is vacated.” *United States v. Peel*, 595 F.3d 763, 768 (7th Cir.2010); *Lanier v. United States*, 220 F.3d 833, 842 (7th Cir. 2000)(noting it would be paradoxical to give the defendant a shorter sentence than he would have received had the government not also charged him with the less serious offense). Absent unusual circumstances and compelling reasons to vacate the greater offense, a district court “should” exercise its discretion to vacate the lesser-included offense. *United States v. Maier*, 646 F.3d 1148, 1154 (9th Cir.2011) (“Such a rule safeguards against cases where a defendant charged with both possession and receipt/distribution of child pornography pleads guilty to both offenses with the hope that he will be sentenced under the lesser crime.”); see *United States v. Jose*, 425 F.3d 1237, 1247 (9th Cir.2005) (“Thus, when a jury convicts on both the greater and the lesser included offenses, absent a clear indication by Congress that it intended to allow punishment for both offenses, the district court should enter a final judgment of conviction on the greater offense and vacate the conviction on the lesser offense.”); see generally *Rutledge v. United States*, 517 U.S. 292, 306 (1996) (stating that it is presumed that a legislature does not intend to impose two punishments where two statutory provisions proscribe the “same offense.”); *United States v. Boyd*, 131 F.3d 951, 954–55

(11th Cir.1997) (“The proper remedy for convictions on both greater and lesser included offenses is to vacate the conviction and the sentence of the lesser included offense.”); *United States v. McSwain*, 197 F.3d 472, 483 (10th Cir.1999); *United States v. Brito*, 136 F.3d 397, 408 (5th Cir.1998); *United States v. Rosario*, 111 F.3d 293, 301 (2d Cir.1997)(vacating conviction on lesser-included offense); *see also, e.g., United States v. Batchelder*, 442 U.S. 114, 125 (1979) (“Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced.”).

While the Ninth Circuit pays lip service to application of the sentencing factors set forth in 18 U.S.C. § 3553(a), other circuits do not. For example, the Seventh Circuit has held that it is an abuse of discretion for a district court to dismiss the greater offense and sentence on the lesser offense. *See United States v. Peel*, 595 F.3d 763, 768 (7th Cir.2010). *See also Lanier v. United States*, 220 F.3d 833, 842 (7th Cir. 2000). The Eleventh Circuit has simply stated that the “proper remedy for convictions on both greater and lesser included offenses is to vacate the conviction and the sentence of the lesser included offense.” *United States v. Boyd*, 131 F3d 951 (11th Cir. 1997). The Fifth Circuit’s approach is identical to the Eleventh Circuit’s approach. *See United States v. Brito*, 136 F.3d 397 (5th Cir. 1998). Other Courts have simply assumed that the lesser offense must be dismissed in favor of the greater without comment. *See, e.g., United States v. Grubbs*, 829 F.2d 18, 19 (8th Cir. 1987).

**C. Whether Styled as a Non-Rebuttable Presumption or Otherwise,
Automatically Sentencing On the Greater Offense While
Dismissing the Lesser Offense Conflicts with The Purposes
Behind 18 U.S.C. § 3553(a)**

The core congressional command in 18 U.S.C. § 3553(a) is that district courts must “impose a sentence sufficient, but not greater than necessary, to comply” with specified purposes of punishment. The statutory language is an elegant distillation of one of the most long-established and influential maxims in criminology: the principle of parsimony. That principle, which provides that punishment should *never* exceed the minimum necessary to effect its purposes, has deep roots in American soil. It was well known to the founding generation through the work of the Italian criminologist Cesare Beccaria, who borrowed the concept from Montesquieu, as well as the English philosopher Jeremy Bentham. The maxim was given new currency in the twentieth century and was one of the foundational ideals for a number of reform-minded criminal law scholars whose efforts culminated in the Sentencing Reform Act of 1984 (SRA).

The principle of parsimony has reasserted itself in light of *Booker*. By excising a conflicting command in 18 U.S.C. § 3553(b)(1) that district courts must hew to the Sentencing Guidelines, the remedial majority in *Booker* left the principle of parsimony as the sole binding substantive feature of the statutory sentencing scheme. Federal courts must follow that congressional command at every step of the sentencing process just as seriously as they were required to follow the Guidelines before *Booker*.

In the federal system, 18 U.S.C. § 3553(a) frames the sentencing process by “specifying various factors that courts must consider in exercising their discretion.” *Pepper*, 131 S. Ct. at 1241. A sentencing judge has an “overarching duty under § 3553(a) to ‘impose a sentence sufficient, but not greater than necessary’ to comply with the sentencing purposes set forth in § 3553(a)(2).” *Id.* at 1242 (quoting 18 U.S.C. 3553(a)). Those purposes are that the sentence should “reflect the seriousness of the offense,” “promote respect for the law,” and “provide just punishment for the offense,” 18 U.S.C. § 3553(a)(2)(A); “afford adequate deterrence to criminal conduct,” 18 U.S.C. § 3553(a)(2)(B); “protect the public from further crimes of the defendant,” 18 U.S.C. § 3553(a)(2)(C); and “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner,” 18 U.S.C. § 3553(a)(2)(D).

The set of factors that the court “shall consider” in exercising its judgment about what sentence would best accomplish those purposes are “the nature and circumstances of the offense and the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1); “the need for the sentence imposed” to satisfy the purposes set forth in Section 3553(a)(2), 18 U.S.C. § 3553(a)(2); “the kinds of sentences available”; 18 U.S.C. § 3553(a)(3); “the kinds of sentence and the sentencing range” contained in the most recent version of the Sentencing Guidelines, 18 U.S.C. § 3553(a)(4); “any pertinent policy statement *** issued by the Sentencing Commission,” 18 U.S.C. §

3553(a)(5)(A); “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” 18 U.S.C. § 3553(a)(6); and “the need to provide restitution to any victims of the offense,” 18 U.S.C. § 3553(a)(7). Nowhere in the statute are any presumptions of harsh sentencings approved of. To the contrary – such presumptions seem to fly in the face of the statutory framework.

Section 3553(a) directs district judges to think carefully about the general purposes of punishment; the history and characteristics of the offender; the nature of the offense; and the views of the Sentencing Commission. District judges must then exercise reasoned discretion to tailor a sentence for the particular person who stands before the court. Section 3553(a), in short, creates a regime in which mechanical calculation stemming from presumptions is not to be elevated over individualized consideration, and in which bureaucratized punishment is not to supplant human judgment.

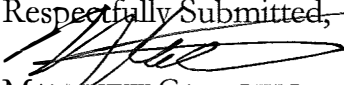
The presumption that the lesser offense be dismissed and the greater offense be sentenced upon conflicts with the purposes behind, and application of, 18 U.S.C. § 3553(a). As noted under cases such as *Maier, supra*, the sentencing court is purportedly vested with discretion to consider the sentencing factors contained in 18 U.S.C. § 3553(a). And yet, the operation of the presumption appears effectively non-rebuttable. And in this case, it lead to the contradictory result that the presumption called for the

greater sentence even though the sentence called for was greater than necessary under § 3553(a).

CONCLUSION

Based on the conflicts between the presumption and 18 U.S.C. § 3553(a), and for the reasons discussed herein, it is requested that this Court grant this Petition for Writ of Certiorari, reverse the Ninth Circuit's decision affirming the Mr. Carlson's sentence, and remand with instructions to conduct further proceedings consistent with this Court's decision.

Dated: December 6, 2017

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