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In The
Supreme Court of the United States

—◆—
BENJAMIN ERNEST JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

—◆—
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether those portions of the United States Sentencing Guidelines which apply to prosecutions under 18 U.S.C. Sec. 2251(a) [App. 13a] and 18 U.S.C. Sec. 2422(b) [App. 16a] for production of child pornography, violate the Eight Amendment protection against cruel and unusual punishment when applied to defendants charged with sexting, absent proof of force, physical contact, dissemination or intention to engage in the production or trafficking of child pornography?

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OPINIONS BELOW

The Fourth Circuit filed its decision on October 4, 2017, in an unpublished opinion in case No. 16-4788, *U.S. v. Johnson*, (App. 1a), and its Judgment. (App. 5a). The Fourth Circuit denied the Petition for Rehearing *En Banc* on November 28, 2017. (App. 4a). The United States District Court for the Western District of North Carolina entered its final judgment on February 8, 2016. (App. 6a).

JURISDICTION

The Fourth Circuit filed its decision on October 4, 2017. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are: (1) Eighth Amendment to the U.S. Constitution; (2) 18 U.S.C. Sec. 2251(a); (3) 18 U.S.C. Sec. 2422(b); (4) 18 U.S.C. Sec. 3553(a); (5) U.S.S.G. Sec. 2G1.3(a)(3); (6) U.S.S.G. Sec. 2G1.3(b)(3)(B); (7) U.S.S.G. Sec. 2G1.3(c)(1); (8) U.S.S.G. Sec. 2G2.1(a); (9) U.S.S.G. Sec. 2G2.1(b)(1)(B); (10) U.S.S.G. Sec. 2G2.1(b)(6)(B); (11) U.S.S.G. Sec. 2G2.1(d)(1); (12) U.S.S.G. Sec. 3D1.4; (13) U.S.S.G. Sec. 4B1.5(b)(1); and (14) U.S.S.G. Chapter 5, Part A.

STATEMENT OF THE CASE

This is a simple sexting case gone awry due to the lack of sentencing guidelines appropriate to the crime. Johnson is a college graduate, married with children, and actively served in the U. S. Navy for almost 20 years. At the time of his arrest, he was working as a Navy recruiter at a high school in Western North Carolina. During his twenty year career with the Navy, Johnson held a secret clearance in his prior position as a Nuclear Electronics Technician, and received more than twenty commendations and awards, including five Good Conduct medals. Johnson had no prior criminal record and a criminal history score of zero.

Johnson is now serving a 17 year sentence at the Federal Correction Institution at Ashland, Kentucky, based on a guilty plea to one count of exchanging a handful of nude photographs with a high school girl, because that is the punishment which the Sentencing Guidelines proscribed. When the Sentencing Guidelines are applied to prosecutions under child pornography statutes, the result, as in Johnson's case, runs contrary to any rational sense of fairness and justice, in violation of the constitutional protections against cruel and unusual punishment.

A. Factual Background

In the late fall of 2013, during the course of his employment as a recruiter, Johnson met a fifteen year old JRROTC student at the high school and began texting with her via cell phone. On February 26, 27 and 28, 2014,

Johnson requested and exchanged with the minor sexually explicit photos via cell phone. The girl sent three photos to Johnson. Two of the three photos were taken by her on a prior occasion, unrelated to Johnson. Sometime later, the girl showed her phone to a friend, who reported it to school authorities. Although the prosecution alleged a similar consensual relationship with a seventeen year old student from whom Johnson had received two nude photos at an unknown date.

However, the three photos, exchanged over the course of three days in February of 2014, are the sole basis for Johnson's conviction.

Johnson's cell phone was examined by an FBI detective who found four nude pictures of the minor alone. The cell phone belonging to the minor contained the same four nude pictures of herself, including the three that she had sent to Johnson, and two nude pictures of Johnson alone. No pictures were found, or alleged, that involved sexual activity with another. Johnson never had any direct physical contact of a sexual nature with the minor. Johnson never used any kind of force or threats against the minor to make her comply with or reciprocate his amorous remarks. In fact, his relationship with the girl was totally consensual. Johnson never shared, sold or disseminated the pictures the minor sent to him, nor did he have any intention of producing or trafficking in child pornography.

B. Procedural Background

The district court had jurisdiction pursuant to 18 U.S.C. Sec. 3231.

Benjamin Ernest Johnson was originally arrested by state police who turned the case over to federal agents, who charged him on January 21, 2016, in the Western District of North Carolina, Asheville Division, pursuant to a 4-Count Bill of Indictment alleging violations of 18 U.S.C. Sec. 2251(a), [App. 13a], & (e), 2252A(a)(1), 2242A(a)(5)(B), [App. 16a], and 2422(b), [App. 16a]. All charges involved the coercion of a minor to produce visual depictions of sexually explicit conduct, and receiving and possessing such visual depictions by text message.

On May 2, 2016, Johnson entered into a Plea Agreement in which he pled guilty to Count Two, which alleged a violation of 18 U.S.C. Sec. 2251(a), [App. 13a], and 18 U.S.C. Sec. 2422(b), [App. 16a]. The text of those statutes are as follows:

18 U.S.C. Sec 2251(a) reads, in relevant part, as follows:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct ... shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce . . . , if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using

any means or facility of interstate or foreign commerce . . . or mailed.

18 U.S.C. Sec. 2422(b) reads, in its entirety, as follows:

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 had 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.

On May 11, 2016, Johnson appeared before U.S. Magistrate Judge Dennis Lee Howell and pled guilty to Count Two pursuant to the Plea Agreement.

According to the presentence report, Johnson's base offense level was calculated as follows: The guideline for violation of 18 U.S.C. Sec. 2422(b), [App. 16a], is found in U.S.S.G. Sec. 2G1.3(a)(3), [App. 20a], and calls for a base offense level of 28. Pursuant to U.S.S.G. Sec. 2G1.3(b)(3)(B), [App. 20a], 2 points were added because the defendant used a computer. U.S.S.G. Sec. 2G1.3(c)(1) was applied because the defendant caused the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct; therefore U.S.S.G. Sec. 2G1, [App. 20a], applied and the base offense level was raised to 32 under U.S.S.G. Sec. 2G2.1(a), [App. 25a]. Because the minor was fifteen years old, 2 points were added pursuant to U.S.S.G. Sec. 2G2.1(b)(1)(B), [App. 25a]. Another 2 points were added under U.S.S.G. Sec. 2G2.1(b)(6)(B), [App. 25a], because a computer was used to solicit the minor's

participation. Because the defendant's relevant conduct involved more than one minor and pursuant to U.S.S.G. Sec. 2G2.1(d)(1), [App. 25a], multiple count adjustments applied and 2 points were added under U.S.S.G. Sec. 3D1.4, [App. 30a]. Chapter Four enhancements applied since the defendant engaged in a pattern of activity involving prohibit sexual conduct. Therefore 5 points were added under U.S.S.G. Sec. 4B1.5(b)(1), [App. 31a]. Three points were subtracted for the defendant's acceptance of responsibility pursuant to U.S.S.G. Sec. 3E1.1(a) and (b).

The use of all the cross-referenced upward adjustments available to the probation office resulted in total base offense level of 40. Johnson's criminal history score was zero, resulting in a criminal history category of I.

The Presentence Investigation Report concluded that the statutory provision required imprisonment of ten years to life and supervised release of five years to life. The guideline range calculated by the Probation Office recommended imprisonment of 292 to 365 months (24-30 years), [App. 35a]. At sentencing, the district court established a total base offense level of 36, which carried a sentencing range of 188 to 235 months, or approximately 15-20 years, [App. 35a].

The United States District Court for the Western District of North Carolina entered its final judgment on February 8, 2016, sentencing Johnson to 204 months, which is 17 years, incarceration and supervision for life, [App. 6a]. Johnson timely filed an appeal to the Fourth Circuit, which affirmed the

trial court's decision in an unpublished opinion filed October 4, 2017, [App. 1a]. Johnson requested rehearing *en banc*, which the Fourth Circuit denied on November 28, 2017, [App. 4a].

REASONS WHY THE WRIT SHOULD BE GRANTED

I. WHEN APPLIED TO DEFENDANTS CHARGED WITH SEXTING, THOSE PORTIONS OF THE UNITED STATES SENTENCING GUIDELINES PROSCRIBED FOR PROSECUTIONS OF CHILD PORNOGRAPHY VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Eighth Amendment to the U.S. Constitution guarantees protection to every criminal defendant against excessive bail, excessive fines, and cruel and unusual punishment. *Eighth Amendment to the U.S. Constitution*, [App. 19a]. Although appellate courts give a certain degree of latitude to trial courts on bail and fines, much closer scrutiny should be given when a punishment is challenged. Although sentencing is inherently subjective, a paramount purpose of the United States Sentencing Guidelines, coupled with the directives under 18 U.S.C. Sec. 3553(a), [App. 18a], is to prevent disparity in sentencing between similarly situated defendants, no matter where in the country they are tried.

The Second Circuit has expressed concern over the Guidelines for child pornography due to the fact that they were created by a “hailstorm of Enhancements” at the direction of Congress, rendering them fundamentally different from most of the Guidelines which were developed by the Sentencing Commission based on empirical evidence. *U.S. v. Dorvee*, 616 F.3d. 174, @ 184

(2010). The court stated “the district court was working with a Guideline that is fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what [18 U.S.C.] Sec. 3553, [App. 18a], requires. *Id. Dorvee*. It was the court’s opinion that “sentencing enhancements, cobbled together through this process, routinely result in Guideline projections near or exceeding the statutory maximum, even in run-of-the-mill cases,” *Id.* @ 185, and that the “result is fundamentally incompatible with Sec. 3553(a)”. *Id.* @ 187. The court further stated that these “eccentric Guideline[s] of highly unusual provenance”, will often result in unreasonable sentencing, *Id.* @188. This is the case with Mr. Johnson.

Chief Judge Bowdre, of the United States District Court for the Northern District of Alabama has expressed serious concerns with the application of the Sentencing Guidelines to sexting cases involving a consensual relationship. She stated that “regardless of the appropriateness of engaging in such virtual conversations, the court doubts that this behavior is the kind that Congress was targeting when it passed child pornography laws.” *U.S. v. Nash*, 1 F.Supp.3d 1240, @ 1244, (N.D. Alabama 2014).

Judge Bennett of the Northern District of Iowa similarly expressed more general concerns about the Sentencing Guidelines, stating that after they were implemented, “discretion in sentencing was shifted from judges to prosecutors” and “prosecutors largely controlled sentencing because things like mandatory sentences and guideline ranges were determined by decisions they made.”

(Mark Bennett & Mark Osler, *The wrong people decide who goes to prison*, CNN.COM, December 3, 2013, <http://www.cnn.com/2013/12/03/opinion/bennett-osler-sentencing>). According to Judge Bennett, this change in structure of federal sentencing had two undeniable repercussions; (1) it resulted in a surge of incarcerations, and (2) it did nothing to fix disparity in sentencing. *Id.*

Concerns over the child pornography Guidelines specifically have been addressed by Judge Graham of the Southern District of Ohio. He stated that “[t]here is widespread agreement among judges, lawyers and legal scholars that the guidelines for child pornography offenses are seriously flawed,” and the Sentencing Commission itself has “publicly declared that the existing guidelines for child pornography offenses were flawed in need of repair.” *U.S. v. Childs*, 976 F. Supp. 2d 981, 82 (S.D. Ohio, 2013).

Punishment should fit the crime, and punishments that fail to align with “the evolving standards of decency that mark a maturing society” are subject to invalidation by the Supreme Court. *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). Not only the evolving standards of decency, but also the evolving nature of criminal activities, should be considered in determining the appropriateness of a given sentence. Sexting, of the nature for which Mr. Johnson, and many others, have been tried and sentenced, is a relatively new phenomenon in society, and has been thoughtlessly dumped into the pornography statutes that were written before sexting was even a thing.

As a result, the Sentencing Guidelines fail to adequately account for the wide range of seriousness of crimes charged under those statutes. In many cases, as with Mr. Johnson, sexting is a non-violent, consensual, and therefore, victimless crime.

The current sentencing scheme, which is appropriate for crimes involving the forced production of child pornography for dissemination and profit, is unconstitutional when applied to crimes for sexting not involving force, physical contact, dissemination and intention to engage in the production or trafficking of child pornography. Application of these portions of the Sentencing Guidelines result in a violation of the Eight Amendment prohibition against cruel and unusual punishment. Over recent years, much has been written about the need for changes to current Guidelines. And yet, neither Congress nor the Sentencing Commission has taken curative action, leaving defendants like Mr. Johnson in the unfortunate position of receiving sentences grossly inappropriate for the crimes they have committed. Mr. Johnson, and others, have no resource but to ask the Supreme Court to step in and right this wrong.

CONCLUSION

For the foregoing reasons, the Petition for Writ for Certiorari should be granted.

Respectfully Submitted,

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