

No. 17-_____

In the Supreme Court of the United States



JOHN HANLON,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID JOFFE

COUNSEL FOR PETITIONER

JOFFE LAW, P.A.

THE 110 TOWER BUILDING

110 S.E. 6TH STREET

17TH FLOOR, SUITE 1700

FT. LAUDERDALE, FL 33301

(954) 723-0007

DAVIDJJOFFE@AOL.COM

JANUARY 9, 2018

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether certiorari review should be granted where the Eleventh Circuit erred in dismissing the appeal based upon HANLON's appeal waiver.

2. Whether certiorari review should be granted where the Eleventh Circuit erred in finding that the record was insufficient to find that HANLON's trial counsel was ineffective during plea negotiations and at sentencing.

3. Whether certiorari review should be granted where the Eleventh Circuit erred in affirming HANLON's sentence.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINION OF THE COURT BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE.....	2
1. Facts Pertaining to HANLON’S Sentence	6
A. Whether Certiorari Review Should Be Granted Where the Eleventh Circuit Erred in Dismissing the Appeal Based Upon HANLON’S Appeal Waiver	8
B. Whether Certiorari Review Should Be Granted Where the Eleventh Circuit Erred in Finding That the Record Was Insufficient to Find That HANLON’S Trial Counsel Was Ineffective During Plea Negotiations and at Sentencing	9
C. Whether Certiorari Review Should Be Granted Where the Eleventh Circuit Erred in Affirming HANLON’S Sentence	9
REASONS FOR GRANTING THE PETITION.....	10
I. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN DISMISSING THE APPEAL BASED UPON HANLON’S APPEAL WAIVER	10

TABLE OF CONTENTS – Continued

	Page
II. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN FINDING THAT THE RECORD WAS INSUFFICIENT TO FIND THAT HANLON’S TRIAL COUNSEL WAS INEFFECTIVE DURING PLEA NEGOTIATIONS AND AT SENTENCING	16
III. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING HANLON’S SENTENCE.....	20
CONCLUSION.....	24

APPENDIX TABLE OF CONTENTS

Opinion of the Eleventh Circuit (August 2, 2017)	1a
Judgment in a Criminal Case (January 27, 2017).....	5a
Plea Agreement (September 29, 2014).....	14a
Order of the Eleventh Circuit Denying Petition for Rehearing (October 11, 2017).....	32a

TABLE OF AUTHORITIES

Page

CASES

<i>Boykin v. Alabama</i> , 395 U.S. 238, 89 S.Ct. 1709 (1969)	14
<i>Chandler v. United States</i> , 218 F.3d 1305 (11th Cir. 2000)	12
<i>Collier v. Turpin</i> , 177 F.3d 1184 (11th Cir. 1999)	9, 20
<i>Gall v. United States</i> , 552 U.S. 38, 128 S.Ct. 586 (2007)	22
<i>Glover v. United States</i> , 531 U.S. 198, 121 S.Ct. 696 (2001)	18
<i>Grossman v. McDonough</i> , 466 F.3d 1325 (11th Cir. 2006)	11
<i>Hill v. Lockhart</i> , 474 U.S. 52, 106 S.Ct. 366 (1985)	12, 13
<i>Johnson v. Duckworth</i> , 793 F.2d 898 (7th Cir. 1986)	12, 15
<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S.Ct. 1019 (1938)	16
<i>Jones v. United States</i> , 224 F.3d 1251 (11th Cir. 2000)	13
<i>Kimbrough v. United States</i> , 552 U.S. 85, 128 S.Ct. 558 (2007)	21, 22
<i>Koon v. United States</i> , 518 U.S. 81, 116 S.Ct. 2035 (1996)	22, 23

TABLE OF AUTHORITIES—Continued

	Page
<i>Lockhart v. Fretwell</i> , 506 U.S. 364, 113 S.Ct. 838 (1993)	12, 13
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441 (1970)	12
<i>Miller v. Champion</i> , 262 F.3d 1066 (10th Cir. 2001)	13
<i>Mills v. Singletary</i> , 63 F.3d 999 (11th Cir. 1995)	20
<i>Mincey v. Head</i> , 206 F.3d 1106 (11th Cir. 2000)	12
<i>Silva v. Woodford</i> , 279 F.3d 825 (9th Cir. 2002)	17
<i>Stewart v. Secretary, Department of Corrections</i> , 476 F.3d 1193 (11th Cir. 2007)	11
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984)	11, 12
<i>Turner v. Crosby</i> , 339 F.3d 1247 (11th Cir. 2003)	11
<i>United States ex rel. Caruso v. Zelinsky</i> , 689 F.2d 435 (3rd Cir. 1982)	12, 15
<i>United States v. Bender</i> , 290 F.3d 1279 (11th Cir. 2002)	16
<i>United States v. Booker</i> , 543 U.S. 220, 125 S.Ct. 738 (2005)	21, 22, 23
<i>United States v. Bushert</i> , 997 F.2d 1343 (11th Cir. 1993)	16

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Dorvee</i> , 616 F.3d 174 (2nd Cir. 2010)	21, 22
<i>United States v. Howle</i> , 166 F.3d 1166 (11th Cir. 1999)	14
<i>United States v. Irey</i> , 612 F.3d 1160 (11th Cir. 2010)	23
<i>United States v. Jiminez</i> , 983 F.2d 1020 (11th Cir 1993)	16
<i>United States v. Livesay</i> , 525 F.3d 1081 (11th Cir. 2008)	22, 23
<i>United States v. Nguyen</i> , 618 F.3d 72 (1st Cir. 2010)	15
<i>United States v. Olano</i> , 507 U.S. 725, 113 S.Ct. 1770 (1993)	24
<i>United States v. Rodriguez</i> , 398 F.3d 1291 (11th Cir. 2005)	24
<i>United States v. Stricklin</i> , 290 F.3d 748 (5th Cir. 2002)	17, 20
<i>United States v. Ter-Esayan</i> , 570 F.3d 46 (1st Cir. 2009)	14
<i>United States v. Weaver</i> , 275 F.3d 1320 (11th Cir. 2001)	13
<i>United States v. Williams</i> , 526 F.3d 1312 (11th Cir. 2008)	23

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. V	2
U.S. Const. amend. VI	passim
STATUTES	
18 U.S.C. § 2252(a)(2)	2, 3, 4
18 U.S.C. § 2252(a)(4)(B)	3, 4
18 U.S.C. § 2252(b)(1)	2, 3, 4
18 U.S.C. § 3553	9, 22, 23
28 U.S.C. § 1254	1
28 U.S.C. § 2255	5, 7, 8, 15
JUDICIAL RULES	
Sup. Ct. R. 10	1
Sup. Ct. R. 13.1	1
Fed. R. Crim. P. 32	17
SENTENCING GUIDELINES	
U.S.S.G. § 2G2.2(b)(2)	6
U.S.S.G. § 2G2.2(b)(4)	6
U.S.S.G. § 2G2.2(b)(6)	6
U.S.S.G. § 2G2.2(b)(7)(D)	6
U.S.S.G. § 2G2.2(b)(F)	6

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

U.S.S.C. Sentencing Commissions, <i>Report to the Congress: Federal Child Pornography Offenses</i> (2012)	10, 21, 23
--	------------



PETITION FOR WRIT OF CERTIORARI

The Petitioner, John Hanlon (hereinafter “HANLON”), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit issued on August 2, 2017.



OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit issued a five (5) page opinion, *John Hanlon v. United States*, No: 16-17457-AA, on August 2, 2017, which was not selected for publication. (App.1a.)



JURISDICTION

On August 2, 2017, the Court of Appeals issued an opinion affirming the Judgment of the United States District Court. The Eleventh Circuit Court of Appeals issued its order denying HANLON’S Petition for Rehearing and Petition for Rehearing *En Banc* on October 11, 2017. (App.32a). The jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C. § 1254 and Rule 10, Rules of the Supreme Court. This Petition for a Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.



CONSTITUTIONAL PROVISIONS

- **U.S. Const. amend. V**

The Fifth Amendment to the Constitution provides in relevant part that:

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 deprived of life, liberty, or property, without due process of law;”

- **U.S. Const. amend. VI**

The Sixth Amendment to the Constitution provides in relevant part that:

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.



STATEMENT OF THE CASE

On February 19, 2014, the United States filed a two (2) count Indictment charging HANLON with knowingly receiving and distributing child pornography, in

violation of 18 U.S.C. §§ 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (Count 1) and knowingly possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and 18 U.S.C. § 2252(b)(1) (Count 2). (DE:cr: 1) On September 29, 2014, HANLON pled guilty pursuant to a written plea agreement to knowingly receiving and distributing child pornography, in violation of 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) and knowingly possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and 18 U.S.C. § 2252(b)(1). (DE:cr:33).

At HANLON'S change of plea hearing HANLON admitted that he had been under the care of a psychiatrist and that he did not believe his mental competency was ever challenged. (DE:cr:64:4). At the change of plea hearing, HANLON'S Trial Counsel objected to certain language in the plea agreement. However, because Trial Counsel had HANLON sign the Agreement with said "objectionable language" the District Court stated that "it seems to me the only thing to do is to note for the record that you object—although you've agreed to this plea agreement, you object to that language, and I'll let you state specifically; and the Government can either go forward with the plea under those circumstances or it can choose not to". (DE:cr: 64:8-10). Based upon that the government chose to go forward noting that HANLON objected to the language "deceptive at first" and the "comma but later" in the final sentence of Paragraph 10 on page 14 of the plea agreement. (DE:cr:64:11). Again, the District Court reiterated that "the Government is not—is going to go forward with the plea recognizing that you've made such an objection, even though you signed admitting

all of the allegations and language contained in the factual basis.” (DE:cr:64:12).

In addition to the above issue Trial Counsel also stated to the District Court that although “not a promise or a representation” but “we have been doing everything we can to give him the full benefits of a possible departure; but he completely understands that that is not guaranteed and it has not been represented to him in any way. It’s just we have discussed that at length and that was part of his material decision to enter the plea versus go to trial on any of the counts.” (DE:cr:64:15)

Furthermore, at the change of plea hearing, when the District Court asked about “substantial assistance” Trial Counsel for HANLON answered “[s]ort of, yes, sir. When you say substantial assistance, the debriefing and all the like is why he’s—he may be called on in the future.” (DE:cr:64:16). Even after making said representations, Trial Counsel proceeded to allow HANLON to plead guilty to both Count 1 and Count 2. As a result of the above, a PSI was ordered.

On September 29, 2014, HANLON pled guilty pursuant to a written plea agreement to knowingly receiving and distributing child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1) and knowingly possessing child pornography in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(1). (DE:cr:33)

The District Court sentenced HANLON to 84 months incarceration as to each count, to run concurrently, ten years of supervised release as to each count, to run concurrently and a special assessment of \$200 with restitution to be determined. (DE:cr:53; 62:106-109)

HANLON was allowed to self-surrender and HANLON was ordered to report on February 2, 2015. (DE:cr: 53; 62:117-118)

On November 11, 2015, HANLON filed his Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255. (DE:cv:1) (DE:cr:70).

On July 11, 2016, the District Court entered its Order setting HANLON'S Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255 for an evidentiary hearing for November 4, 2016. (DE:cv:13).

On December 2, 2016, an evidentiary hearing was held before the District Court Judge John E. Steele, on HANLON'S Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255. (DE:cv:17).

On December 5, 2016, The District Court entered its Opinion and Order and Judgment in both the criminal case and the civil case. The District Court granted in part and dismissed in part HANLON'S Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255. The District Court vacated the Judgment entered in the criminal case and re-sentenced HANLON to "the same sentence as originally imposed in the Judgment in the Criminal Case (Cr.Doc. #66), and the Clerk of the Court shall enter a new Judgment in the Criminal Case imposing the same terms as originally imposed." (DE:cv:21:8) (DE:cr:76, 82). In addition, the District Court dismissed HANLON'S Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255, without prejudice. (DE:cv:21, 22) (DE:cr:76, 82).

As a result of the sentence that was re-imposed HANLON filed a timely Notice of Appeal and is confined. (DE:cr:77) On August 2, 2017, the Eleventh Circuit issued its five (5) page opinion affirming HANLON'S conviction and sentence. On October 11, 2017, the Eleventh Circuit Court of Appeals denied HANLON'S Petition for Rehearing and Petition for Rehearing *En Banc*.

1. Facts Pertaining to HANLON'S Sentence

Pursuant to the PSI, HANLON'S base offense level was 22. (PSI: 29) HANLON received a two-level enhancement for the material involving a prepubescent minor, pursuant to U.S.S.G. § 2G2.2(b)(2); a two-level enhancement for sharing child pornography on the internet in peer to peer file sharing programs, pursuant to U.S.S.G. § 2G2.2(b)(F); and a four level enhancement for having pornographic videos depicting children engaged in intercourse with adults, with such depictions portraying conduct that is obviously painful to the children, pursuant to U.S.S.G. § 2G2.2(b)(4); a two level enhancement for the use of a computer pursuant to U.S.S.G. § 2G2.2(b)(6); and a five level enhancement for having 600 or more images of child pornography pursuant to U.S.S.G. § 2G2.2(b)(7)(D). (PSI: 30-34) As such, HANLON'S adjusted offense level increased to 37. (PSI: 38) HANLON received a three-level reduction for acceptance of responsibility, making his total offense level 34. (PSI:40-42). HANLON'S total offense level became 34 and his advisory criminal history category was I. Based on the above, HANLON'S guideline imprisonment range was 151-188 months. (PSI: 77)

HANLON'S Trial Counsel failed to file any objections or seek a variance. As a result of Trial Counsel's

ineffective assistance, the District Court sentenced HANLON to 84 months incarceration as to each count, to run concurrently, ten years of supervised release as to each count, to run concurrently and a special assessment of \$200 with restitution to be determined. (DE:cr:53; 62:106-109) HANLON was allowed to self-surrender and HANLON was ordered to report on February 2, 2015. (DE:cr:53; 62:117-118) HANLON never filed an appeal because his Trial Counsel failed to timely file a Notice of Appeal although HANLON requested same be filed. On November 11, 2015, HANLON filed his Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255. (DE:cv:1) (DE:cr:70). In his Motion, HANLON argued that Trial Counsel was ineffective for failing to file any written objections, failing to argue, in writing and at the sentencing hearing, against the enhancements being sought by the government and probation, failing to seek a variance and for failing to file a Notice of Appeal when he was specifically asked to do so by HANLON and his family. (DE:cv:1) (DE:cr:70).

On July 11, 2016, the District Court entered its Order setting HANLON'S Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255 for an evidentiary hearing for November 4, 2016. (DE:cv:13).

On December 2, 2016, an evidentiary hearing was held before the District Court Judge John E. Steele, on HANLON'S Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255. (DE:cv:17).

On December 5, 2016, The District Court entered its Opinion and Order and Judgment in both the

criminal case and the civil case. The District Court granted in part and dismissed in part HANLON'S Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255. The District Court vacated the Judgment entered in the criminal case and re-sentenced HANLON to "the same sentence as originally imposed in the Judgment in the Criminal Case (Cr.Doc. #66), and the Clerk of the Court shall enter a new Judgment in the Criminal Case imposing the same terms as originally imposed." (DE:cv:21:8). In addition, the District Court dismissed HANLON'S Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to 28 U.S.C. § 2255, without prejudice. (DE:cv:21, 22) (DE:cr:76, 82). As a result of the sentence that was re-imposed, HANLON timely filed his Notice of Appeal and is incarcerated. (DE:cr:77)

A. Whether Certiorari Review Should Be Granted Where the Eleventh Circuit Erred in Dismissing the Appeal Based Upon HANLON'S Appeal Waiver

HANLON'S Trial Counsel was ineffective while representing HANLON in his plea negotiations and because of this, HANLON'S appeal waiver should have been found unenforceable by the Eleventh Circuit. Although the Eleventh Circuit did not dismiss the appeal in total, the Eleventh Circuit erred in dismissing the appeal as it related to HANLON'S arguments that Trial Counsel was ineffective during his sentencing. The Eleventh Circuit should have found that because HANLON received ineffective assistance, his sentence was entered in violation of his Sixth Amendment right to effective assistance of counsel and his sentence must be vacated. Because the Eleventh Circuit erred

in dismissing HANLON'S appeal because of his appeal waiver, HANLON'S Petition for Writ of Certiorari must be granted.

B. Whether Certiorari Review Should Be Granted Where the Eleventh Circuit Erred in Finding That the Record Was Insufficient to Find That HANLON'S Trial Counsel Was Ineffective During Plea Negotiations and at Sentencing

HANLON specified the errors, both in the record and outside of the record, in his initial brief and Petition for Rehearing and Rehearing *En Banc*. HANLON conclusively established deficient performance and prejudice as a result of Trial Counsel's ineffective assistance. *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999).

As such, HANLON'S Trial Counsel was ineffective while representing HANLON in his plea negotiations and during his sentencing. Therefore, HANLON received ineffective assistance of counsel causing his sentence to be entered in violation of his Sixth Amendment right to effective assistance of counsel. Because the Eleventh Circuit erred in finding that the record was insufficient to support HANLON'S argument, HANLON'S Petition for Writ of Certiorari must be granted.

C. Whether Certiorari Review Should Be Granted Where the Eleventh Circuit Erred in Affirming HANLON'S Sentence

HANLON'S sentence is in violation of the policy argument that supports 18 U.S.C. § 3553, to wit: assuring that the sentence that is imposed is sufficient but not greater than necessary. Based on this policy

argument, the Eleventh Circuit should have considered the fact that the Commission has warned that “as a result of recent changes in the computer and internet technologies that typical non-production offenders use, the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability.” U.S.S.C. Sentencing Commissions Report to the Congress: Federal Child Pornography Offenses (2012). Based upon the above, the Eleventh Circuit should have vacated HANLON’S sentence and remand to the District Court so that HANLON could properly be sentenced. However, because the Eleventh Circuit affirmed HANLON’S sentence, HANLON’S Petition for Writ of Certiorari must be granted in order to assure that HANLON’S due process rights are protected.



REASONS FOR GRANTING THE PETITION

I. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN DISMISSING THE APPEAL BASED UPON HANLON’S APPEAL WAIVER

HANLON’S Trial Counsel was ineffective while representing HANLON in his plea negotiations and because of this, HANLON’S appeal waiver should have been found unenforceable by the Eleventh Circuit. The Eleventh Circuit erred in dismissing the appeal as it related to HANLON’S arguments that Trial Counsel was ineffective during his sentencing. The Eleventh Circuit should have found that because HANLON received ineffective assistance, his sentence was entered

in violation of his Sixth Amendment right to effective assistance of counsel and his sentence must be vacated.

The standard of ascertaining if counsel was ineffective was established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). In order to ascertain if counsel rendered ineffective assistance, a defendant must first establish that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *Stewart v. Secretary, Department of Corrections*, 476 F.3d 1193 (11th Cir. 2007). The standard in evaluating a counsel's performance for a claim of ineffective assistance of counsel is "reasonableness under prevailing professional norms". *Grossman v. McDonough*, 466 F.3d 1325, 1345 (11th Cir. 2006). The District Court must then determine whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Grossman v. McDonough*, 466 F.3d at 1345-46.

A defendant must also show that counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. at 693; *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. at 693; *Turner v. Crosby*, 339 F.3d at 1275 ("that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different”); *Mincey v. Head*, 206 F.3d 1106 (11th Cir. 2000). Prejudice analysis must not only focus on outcome determination, but on “the question whether counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair”. *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838 (1993). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. at 686.

In *Hill v. Lockhart*, the Supreme Court held that *Strickland*’s two-part standard applied to ineffective assistance claims arising out of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985). To establish ineffective assistance of counsel, HANLON had to show (1) that the advice he received from his attorney was not “within the range of competence demanded of attorneys in criminal cases”, *Hill v. Lockhart*, 474 U.S. at 56 [quoting, *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441 (1970)]; and (2) that he was prejudiced by his attorney’s performance. *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000). The Sixth Amendment right to counsel includes the right to competent advice regarding the choice to accept a plea bargain or go to trial. *Johnson v. Duckworth*, 793 F.2d 898, 900-02 (7th Cir. 1986) (criminal defendant has right to effective assistance of counsel in deciding whether to accept or reject proposed plea agreement); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3rd Cir. 1982) (decision to reject plea agreement is critical stage at which right to effective assistance attaches). As such, HANLON was

entitled to his attorney zealously representing him, not only at trial but during plea negotiations and at sentencing. *Jones v. United States*, 224 F.3d 1251 (11th Cir. 2000).

In determining if Trial Counsel's ineffective performance in negotiating HANLON'S plea prejudiced HANLON, this Court must consider the factual circumstances surrounding HANLON'S plea. *Miller v. Champion*, 262 F.3d 1066 (10th Cir. 2001). In the case at hand, HANLON'S minimum sentence was 60 months. He was sentenced to 84 months. When considering the fact that HANLON admitted to being under psychiatric care and same was not pursued by Trial Counsel, the fact that Trial Counsel allowed HANLON to execute the plea agreement and appeal waiver, although there was language that was objectionable, not properly informing the District Court of HANLON'S "substantial assistance" and not clearly advising HANLON about the enhancements, it is clear that HANLON did not enter into the plea agreement knowingly and/or voluntarily. HANLON received ineffective assistance and said deficient performance "affected the outcome of the plea process". *Hill v. Lockhart*, 474 US at 59.

Case law is clear that requiring a defendant to waive his or her right to appeal does not violate due process. *United States v. Weaver*, 275 F.3d 1320 (11th Cir. 2001). However, a sentence-appeal waiver must be knowing and voluntary and will not be enforced if the government cannot show that (1) the District Court specifically questioned the defendant about the waiver or (2) the record makes clear that the defendant otherwise understood the full significance of the waiver. *United States v. Weaver*, 275 F.3d 1320 (11th

Cir. 2001); *see also*, *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). The waiver should only be upheld if the waiver was in fact knowing and voluntary. *United States v. Howle*, 166 F.3d 1166 (11th Cir. 1999). And, even if the waiver is knowing and voluntary, the waiver should not be upheld if it will result in a miscarriage of justice. *United States v. Ter-Esayan*, 570 F.3d 46 (1st Cir. 2009). Although the record makes clear that the District Court specifically questioned HANLON about the waiver, the issue of whether he understood what was being asked of him is questionable, especially considering that when asked by the District Court about his health, HANLON admitted that he had been under the care of a psychiatrist and that he did not believe his mental competency was ever challenged. (DE:64:4). In addition, it is questionable that HANLON entered into the plea agreement knowing he was waiving his right to appeal, when you consider, that the change of plea hearing, HANLON'S counsel objected to certain language in the plea agreement, but allowed HANLON to proceed to plea to the charges. Because HANLON'S counsel had HANLON sign the Agreement with said "objectionable language" the District Court stated that "it seems to me the only thing to do is to note for the record that you object—although you've agreed to this plea agreement, you object to that language, and I'll let you state specifically; and the Government can either go forward with the plea under those circumstances or it can choose not to." (DE:64:8-10). Based on the above alone, it is quite clear that Trial Counsel failed to properly represent HANLON within the standard necessary for Trial Counsel to be effective. It is quite evident that Trial

Counsel was ineffective in negotiating a viable plea agreement and further, at sentencing.

The Sixth Amendment right to counsel includes the right to competent advice regarding the choice to accept a plea bargain or go to trial and a third choice to accept a plea bargain without a written agreement. *Johnson v. Duckworth*, 793 F.2d 898 (7th Cir. 1986) (criminal defendant has right to effective assistance of counsel in deciding whether to accept or reject proposed plea agreement); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3rd Cir. 1982) (decision to reject plea agreement is critical stage at which right to effective assistance attaches). It is clear that when a defendant agrees to plead guilty, the loss of his or her right to a jury trial or to cross-examine witnesses and his or her accusers is unavoidable, to-wit: there is no trial. However, waiving the constitutional right to challenge constitutional issues or other errors that may occur in the future should be a concern of this Court. The language used in the government's plea agreements concerning the waiver of a defendant's right to appeal is routinely inserted and leaves a defendant without the right to file for post-conviction relief no matter what meritorious issues a defendant may have. Again, the upholding of HANLON'S appeal waiver was and is a "miscarriage of justice" and a violation of HANLON'S due process rights. *United States v. Nguyen*, 618 F.3d 72 (1st Cir. 2010).

The Eleventh Circuit dismissed the appeal without prejudice to HANLON to file a 2255 Motion as to his argument that Trial Counsel was ineffective during plea negotiations. However, if in fact Trial Counsel was ineffective during plea negotiations, then HANLON'S

arguments that Trial Counsel was ineffective during sentencing, is viable and therefore HANLON'S claims that Trial Counsel was ineffective during sentencing should not have been dismissed. As such, HANLON waiving his right to appeal was not knowing and voluntary. *See, United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) (appeal waiver is valid if knowingly and voluntarily entered); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938). HANLON was sentenced in violation of his due process rights. Based upon this, HANLON'S Petition for Writ of Certiorari must be granted.

II. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN FINDING THAT THE RECORD WAS INSUFFICIENT TO FIND THAT HANLON'S TRIAL COUNSEL WAS INEFFECTIVE DURING PLEA NEGOTIATIONS AND AT SENTENCING

It is true, that normally, claims of ineffective assistance of counsel are not raised on direct appeal. However, if the record supports a claim of ineffective assistance of counsel, an Appellate Court will consider said ineffective assistance on direct appeal. *United States v. Bender*, 290 F.3d 1279 (11th Cir. 2002). In the case at hand, the record as presented to the Eleventh Circuit was in fact "sufficiently developed" to allow the Eleventh Circuit to rule on the issue of whether HANLON'S Trial Counsel provided ineffective assistance of counsel. *United States v. Jiminez*, 983 F.2d 1020 (11th Cir 1993).

HANLON argued that his Trial Counsel was ineffective because: (1) Trial Counsel failed to properly file written objections to the PSI; (2) Trial Counsel failed to argue against the improper enhancements

that substantially increased HANLON'S sentence at the sentencing hearing; and (3) Trial Counsel never sought a variance.

The docket shows that Trial Counsel failed to file said written objections to the PSI and the transcript from the sentencing hearing clearly shows that (1) Trial Counsel failed to seek a variance and/or downward departure; and (2) Trial Counsel failed to argue against the improper enhancements that substantially increased HANLON sentence.

In reviewing the docket and the sentencing transcript it is quite clear that Trial Counsel rendered deficient performance in failing to properly challenge the PSI, thus impacting the outcome of the sentence imposed in this case. Rule 32 of the Federal Rules of Criminal Procedure require the defendant to timely notify the parties and District Court of his objections to the PSI and positions with respect to sentencing factors. Here, Trial Counsel failed to file written objections to the PSI prior to the sentencing and therefore failed to object to any of the enhancements sought by the government and granted by the District Court. *See, United States v. Stricklin*, 290 F.3d 748 (5th Cir. 2002); *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002). Because of Trial Counsel's failure to properly object, both in writing and at sentencing, HANLON'S sentence was increased substantially. And because Trial Counsel's failure to properly object is evidenced in the record and the sentencing transcript, the Eleventh Circuit should not have declined to rule on these claims. As such, HANLON'S Petition for Writ of Certiorari must be granted.

As a result of Trial Counsel's ineffective assistance, the District Court sentenced HANLON to 84 months incarceration as to each count, to run concurrently, ten years of supervised release as to each count, to run concurrently and a special assessment of \$200 with restitution to be determined. (DE:cr:53; 62:106-109) HANLON'S Trial Counsel's ineffective assistance caused HANLON'S guideline sentencing range to be improperly inflated and thus caused HANLON to receive a greater sentence than he should have. *Glover v. United States*, 531 U.S. 198, 121 S.Ct. 696 (2001) (prejudice exists where there is a significant increase in the amount of imprisonment).

The record clearly shows that during plea negotiations with the government, that HANLON'S Trial Counsel was ineffective. At HANLON'S change of plea hearing, HANLON admitted that he had been under the care of a psychiatrist and that he did not believe his mental competency was ever challenged. (DE:cr:64:4). Trial Counsel never pursued this nor investigated this fact prior to having HANLON waive his right to appeal.

In addition, at the change of plea hearing, HANLON'S Trial Counsel objected to certain language in the plea agreement. However, because Trial Counsel had HANLON sign the Agreement with said "object-tionable language" the District Court stated that "it seems to me the only thing to do is to note for the record that you object—although you've agreed to this plea agreement, you object to that language, and I'll let you state specifically; and the Government can either go forward with the plea under those circumstances or it can choose not to. (DE:cr:64:8-10). Based upon that, the government chose to go forward noting

that HANLON objected to the language “deceptive at first” and the “comma but later” in the final sentence of Paragraph 10 on page 14 of the plea agreement. (DE:cr:64:11). Again, the District Court reiterated that “the Government is not—is going to go forward with the plea recognizing that you’ve made such an objection, even though you signed admitting all of the allegations and language contained in the factual basis.” (DE:cr:64:12).

Further support that the record is sufficiently developed is the fact that Trial Counsel also stated to the District Court that although “not a promise or a representation” but “we have been doing everything we can to give him the full benefits of a possible departure; but he completely understands that that is not guaranteed and it has not been represented to him in any way. It’s just we have discussed that at length and that was part of his material decision to enter the plea versus go to trial on any of the counts.” (DE:cr:64:15) Again, said departure was never sought and again this is clearly in the record.

Also, at the change of plea hearing, which is part of the record, when the District Court asked Trial Counsel about “substantial assistance” Trial Counsel answered “[s]ort of, yes, sir. When you say substantial assistance, the debriefing and all the like is why he’s—he may be called on in the future.” (DE:cr:64:16). Even after making said representations, Trial Counsel proceeded to allow HANLON to plead guilty to both count 1 and count 2. Because of the above, and the enhancements that Trial Counsel never discussed with HANLON, HANLON’S Trial Counsel’s representation was

ineffective and therefore HANLON was sentenced in violation of his right to effective counsel.

In reviewing the transcript and the docket from the District Court, it is clear that HANLON specified the errors, both in the record and outside of the record, which conclusively establish deficient performance and prejudice to HANLON. *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999). In reviewing the lack of action by Trial Counsel, it is quite clear that HANLON was sentenced based on the worst case possible, which is not supported by case law. As such, Trial Counsel's failure to file objections and seek a downward departure and variance should have been found to be ineffective assistance of counsel by the Eleventh Circuit. *See, United States v. Stricklin*, 290 F.3d 748 (5th Cir. 2002); *Mills v. Singletary*, 63 F.3d 999 (11th Cir. 1995). The record clearly shows that HANLON was prejudiced by Trial Counsel's failure to object to the enhancements. Accordingly, HANLON was sentenced to the worst possible sentence and was sentenced in violation of his Sixth Amendment right to effective assistance of counsel. Therefore, because the record supports HANLON'S claims and the Eleventh Circuit declined to rule on these issues, HANLON'S Petition for Writ of Certiorari must be granted.

III. CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING HANLON'S SENTENCE

In considering that the Sentencing Commission has requested that Congress consider whether the guidelines are in need of revision in light of feedback from judges as reflected in their sentencing decisions, the Eleventh Circuit should have considered that "as

a result of recent changes in the computer and Internet technologies that typical non-production offenders use, the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability.” U.S.S.C. Sentencing Commissions Report to the Congress: Federal Child Pornography Offenses (2012). Based upon the above, the Eleventh Circuit should have vacated HANLON’S sentence and remanded the matter back to the District Court so that HANLON could be properly sentenced.

It is quite clear that the sentencing guidelines for child pornography more than exceed those guidelines recommended for more serious crimes. As can be seen in the case at hand, HANLON’S base offense level began at 22 and then was increased by the enhancements that are inherent in the crime. Because of said enhancements, the guideline range almost always exceeds the statutory minimum mandatory sentence. *United States v. Dorvee*, 616 F.3d 174 (2nd Cir. 2010). HANLON’S sentence, because of said enhancements, is almost as much as a defendant would receive if he actually had sex with a minor. It is definitely more than a defendant would get who was charged with a violent offense and had prior convictions. *United States v. Dorvee*, 616 F.3d at 187. Because of the harshness of the guideline for this crime, using the District Court’s discretionary sentencing powers under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005) and *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007) is and was necessary to assure a fair and reasonable sentence be imposed.

Based on the above analysis, HANLON’S sentence is unreasonable due to the fact that this is his first offense, he never engaged in any sexual misconduct before and he is in treatment and he never had the requisite intent. This Court must adhere to the finding of the Second Circuit in *Dorvee*, to-wit: “unless applied with great care, [guidelines] can lead to unreasonable sentences that are inconsistent with what 3553 requires”. *United States v. Dorvee*, 616 F.3d at 184; *see also, United States v. Grober*, 624 F.3d 592 (3rd Cir. 2010) (upholding the statutory minimum instead of the guideline sentence).

Because of the sentence imposed, HANLON was denied his right to due process of law and a reasonable sentence pursuant to the dictates of *Booker*, *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007) and *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007). HANLON’S sentence did not promote the administration of justice nor law. It did not provide just punishment considering the fact that HANLON pled guilty and accepted responsibility and has substantial personal characteristics that support a finding that his sentence is unreasonable. *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996); *United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008

Furthermore, the Eleventh Circuit should have considered the fact that the Commission has warned that “as a result of recent changes in the computer and Internet technologies that typical non-production offenders use, the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability.” U.S.S.C. Sentencing Commissions Report to the Con-

gress: Federal Child Pornography Offenses (2012). Based upon the above, the Eleventh Circuit should have considered HANLON’S arguments and should have vacated HANLON’S sentence and remanded the matter to the District Court so that HANLON could properly be sentenced. However, because the Eleventh Circuit affirmed HANLON’S sentence without even considering the policy arguments, HANLON’S Petition for Writ of Certiorari must be granted.

HANLON’S sentence, in its entirety, was violative of 18 U.S.C. § 3553(a) requirements. HANLON’S sentence did not promote the administration of justice nor law; all it provided was “punishment”. However, it did not provide just punishment considering the individual factors of HANLON’S history and characteristics. *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996); *United States v. Livesay*, 525 F.3d 1081, 1090 (11th Cir. 2008). *United States v. Williams*, 526 F.3d 1312 (11th Cir. 2008); *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010). HANLON argued that in sentencing him after *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), and pursuant to an advisory application of the United States Sentencing Guidelines, the sentence imposed by the District Court was error and said error was not harmless. Therefore, again because the Eleventh Circuit affirmed HANLON’S sentence, HANLON’S Petition for Writ of Certiorari must be granted.



CONCLUSION

This Honorable Court should explicitly adopt HANLON'S position based upon law and equity. The upholding of HANLON'S sentence seriously affects the fairness, integrity and public reputation of the judicial proceedings. *See generally, United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). For all of these reasons and in the interest of justice, the Petitioner, John Hanlon prays that this Honorable Court will issue a Writ of Certiorari and reconsider the Eleventh Circuit's decision.

Respectfully submitted,

DAVID JOFFE

COUNSEL FOR PETITIONER

JOFFE LAW, P.A.

THE 110 TOWER BUILDING

110 S.E. 6TH STREET

17TH FLOOR, SUITE 1700

FT. LAUDERDALE, FL 33301

(954) 723-0007

DAVIDJJOFFE@AOL.COM

JANUARY 9, 2018