Case No. ___________

IN THE

SUPREME COURT OF THE UNITED STATES

DANE SCHRANK,

PETITIONER,
v.

UNITED STATES,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

I. Must Circuit Courts provide reasoned decisions to deny parties oral argument under Federal Rule of Appellate Procedure 34(a)(2)?

II. Does a policy of mandatory prison time violate the individualized sentencing mandate of this Court and 18 U.S.C. § 3553(a)?

LIST OF PARTIES

Petitioner Dane Schrank is currently free pending a sentencing proceeding in the District Court. Mr. Schrank agreed to proceed via an information, waived his right to a jury trial and plead guilty.

The United States instituted criminal proceedings against Mr. Schrank.

CORPORATE DISCLOSURE

There are no corporate disclosures necessary for this case.

LIST OF PROCEEDINGS

1. Trial Court Proceedings:

a. *United States v. Dane Schrank*, Case No. 2:17CR20129-SHL (WD Tennessee).

b. Charges per Information:

Ct. 1: Knowing Possession of a Computer Containing Visual Depictions of a Minor Engaging in Sexually Explicit Conduct, 18 U.S.C. § 2256(2)(A).

c. Guilty Plea: May 16, 2017.

d. Sentencing: August 25, 2017

e. Time served; 5 years supervised release; 12 months home confinement; DNA collection; mental health assessment and treatment; sexual offender registration conditions (SORNA); special assessment of $100.00; Justice for Victims of Trafficking Act of 2015 ("JVTA") assessment of $5,000.00; and forfeiture of one Acer Aspire laptop computer and one Gateway laptop computer. Mr. Schrank is subject to the reporting requirements of the Probation Department, he must participate in mental health treatment, not commit another state or federal offense, must obtain permission of his probation officer to change jobs or to move, and has significant limitations on movement and associations.

2. Direct Appeal - Government Appeal:

a. *United States v. Dane Schrank*, Case No. 17-6093 (Sixth Circuit of Appeals).

i. Sentence reversed April 16, 2019.

ii. Case citation: *United States v. Schrank*, 768 Fed. Appx. 512 (6th Cir. 2019).

3. Resentencing Proceeding:

a. *United States v. Dane Schrank*, Case No. 2:17CR20129-SHL (WD Tennessee).

b. Sentencing: August 7, 2019

c. Time served; 5 years supervised release; 12 months home confinement; DNA collection; mental health assessment and treatment; sexual offender registration conditions (SORNA); special assessment of $100.00; Justice for Victims of Trafficking Act of 2015 ("JVTA") assessment of $5,000.00; and forfeiture of one Acer Aspire laptop computer and one Gateway laptop computer. Mr. Schrank is subject to the reporting requirements of the Probation Department, he must participate in mental health treatment, not commit another state or federal offense, must obtain permission of his probation officer to change jobs or to move, and has significant limitations on movement and associations.

4. Direct Appeal - Government Appeal:

a. *United States v. Dane Schrank*, Case No. 19-5903 (Sixth Circuit of Appeals).

i. Sentence reversed September 14, 2020.

ii. Case citation: *United States v. Schrank*, 975 F.3d 534 (6th Cir. 2020).

iii. Petition for Rehearing En Banc denied: November 12, 2020

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On August 25, 2017, the United States District Court for the Western District of Tennessee sentenced Schrank to time served; 5 years supervised release; 12-months home confinement; DNA collection; mental health assessment and treatment; sexual offender registration conditions (SORNA); special assessment of $100.00; Justice for Victims of Trafficking Act of 2015 ("JVTA") assessment of $5,000.00; and forfeiture of one Acer Aspire laptop computer and one Gateway laptop computer. Mr. Schrank is subject to the reporting requirements of the Probation Department, he must participate in mental health treatment, not commit another state or federal offense, must obtain permission of his probation officer to change jobs or to move, and has significant limitations on movement and associations. The United States appealed this sentence.

On April 16, 2019, the Sixth Circuit reversed the District Court, vacated the sentence, and remanded for a new sentencing proceeding. *United States v. Schrank*, 768 Fed. Appx. 512 (6th Cir. 2019). (Appendix A).

On August 7, 2019, the District Court conducted a sentencing hearing and imposed the same sentence. The United States appealed this sentence.

On September 14, 2020, the Sixth Circuit reversed the District Court, vacated the sentence, remanded for a new sentencing proceeding, and ordered reassignment of the matter to a new judge. *United States v. Schrank*, 975 F.3d 534 (6th Cir. 2020). (Appendix B).

On November 12, 2020, the Sixth Circuit denied Schrank's Petition for Rehearing En Banc. (Appendix C).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §§ 1257 and 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment VI provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and 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 defense.

STATEMENT OF THE CASE

In 2015 the United States took over and operated a website called “Playpen.” This site contained child pornography. During the Government’s operation of this website data collected indicated that a person with screen name “DJMguy” spent some three hours on the site from February 28, 2015 to March 4, 2015. Investigation lead to an IP address in the Western District of Tennessee. The investigation identified the home that Schrank lived at as the physical location of the IP address.

During the execution of the search warrant Schrank spoke with the investigators and admitted that the identified email address and other information was his. He admitted accessing the Playpen site and commenting on pictures on the site. A search of his laptop revealed around 840 images files and 3 video files.

Mr. Schrank waived his right to an indictment, agreed to proceed via an information and to plead guilty to a single count under 18 U.S.C. § 2256(2)(A). The District Court imposed a sentence of time served; 5 years supervised release; 12-months home confinement; DNA collection; mental health assessment and treatment; sexual offender registration conditions (SORNA); special assessment of $100.00; Justice for Victims of Trafficking Act of 2015 (“JVTA”) assessment of $5,000.00; and forfeiture of one Acer Aspire laptop computer and one Gateway laptop computer. Mr. Schrank is subject to the reporting requirements of the Probation Department, he must participate in mental health treatment, not commit another state or federal offense, must obtain permission of his probation officer to change jobs or to move, and has significant limitations on movement and associations. The United States appealed.

On the appeal to the Sixth Circuit, in spite of the fact that both parties requested oral argument, the Sixth Circuit refused to hold oral argument. On April 16, 2019, the Circuit vacated

the District Court's sentence and remanded for a new sentencing proceeding. *United States v. Schrank*, 768 Fed. Appx. 512 (6th Cir. 2019).

The District Court conducted another sentencing hearing and again imposed time served; 5 years supervised release; 12-months home confinement; DNA collection; mental health assessment and treatment; sexual offender registration conditions (SORNA); special assessment of $100.00; Justice for Victims of Trafficking Act of 2015 ("JVTA") assessment of $5,000.00; and forfeiture of one Acer Aspire laptop computer and one Gateway laptop computer. Mr. Schrank is subject to the reporting requirements of the Probation Department, he must participate in mental health treatment, not commit another state or federal offense, must obtain permission of his probation officer to change jobs or to move, and has significant limitations on movement and associations. The United States appealed.

On the appeal to the Sixth Circuit, in spite of the fact that Schrank requested oral argument, the Sixth Circuit again refused to hold oral argument. On September 14, 2020, the Circuit vacated the District Court's sentence, remanded for a new sentencing proceeding, and ordered the case transferred to a different judge. *United States v. Schrank*, 975 F.3d 534 (6th Cir. 2020).

STATEMENT OF FACTS

The facts of the underlying offense are very straight-forward. There is Mr. Schrank and his life story that is also relevant to this matter.

Prior to this offense Mr. Schrank's life was marked by periods of normalcy and periods of extreme upheaval and personal loss. Until high school Mr. Schrank's family moved a lot as his father worked for Hilton Hotels. Even with this Mr. Schrank was integrated into his high school, played on the football team, and was active in his church. A clumsy sexual encounter with a

girlfriend resulted in bullying of Mr. Schrank and he withdrew from high school to be home schooled.

Then tragedy struck when Dane's mother, Laura, died at the age of 49 from cardiac arrest. Adding to this tragedy is the fact that she died in front of Dane and his father. Dane's father described this event to the District Court: Laura began coughing and then started coughing up blood. She then went into cardiac arrest. (Doc. 15-1, PageID 67) Dane called 911 and gave instructions to his father on performing CPR. Their efforts, and the efforts of the medical teams, were unable to save her. After returning from the hospital, Dane went about the task of cleaning his mother's blood from the kitchen. As explained by Dane's father, Scott Schrank, in both his letter to the District Court and his statement at sentencing, this event sent the family into disarray. (Doc. 15-1, PageId 67-38, Doc. 20, PageID 110-112)

Tragedy continued for Dane and the family. Shortly after Laura died, Dane's grandfather died. Then Scott met another woman, fell in love, and got married. The wedding was less than two years from Laura's death. The family struggled to adapt to these events and began to become separate and detached.

Then Dane was involved in an automobile accident and he suffered cracked vertebra and two broken bones in his left leg. He was forced to move back to his father's house for medical care. While he was rehabilitating at his father's Dane's apartment was burglarized and his limited personal possessions were stolen.

It was during this time that Dane was charged with possession of marijuana and was placed in a diversion program. He successfully completed the diversion program in April 2015. He was also charged with possession of a controlled substance and paraphernalia and was fined $500.00 in municipal court.

It took a long time but the family was finally put their lives back together, collectively and individually. Dane found work at Hawaiian Pools rising to the level of Assistant Manager. (Doc. 20, PageID 112) As Jim Hartigan, a family friend, advised the District Court, “Dane has seemed to find himself again.” (Doc. 15-1, PageID 71) His sister, Jamie, wrote the District Court that Dane was receiving profession help and was making “tremendously positive changes in his appearance and the way he carries himself. His beard is gone. His haircut is kept neat. He has started going to the gym and eating healthy. He spends more time with us. He talks more openly about things.” (Doc. 15-1, PageID 70)

Mr. Schrank was 21 years old when he made the decision to spend three hours over a 5-day period on the Playpen website. And while his family and life history does not excuse his conduct, it does place it in context for sentencing purposes. As recognized by the District Court Dane Schrank is “radically different than the person who looked at these images.” (Doc. 20, PageID 120) It is this radical difference that supports, justifies, and warrants the sentence handed down in this case.

REASONS FOR GRANTING REVIEW

I. Must Circuit Courts provide reasoned decisions to deny parties oral argument under Federal Rule of Appellate Procedure 34(a)(2)?

Federal Rule of Appellate Procedure 34(a)(2) is clear: oral argument must be held in every case if a party so requests. The only grounds for refusing to hold oral argument are set forth in Federal Rule of Appellate Procedure 34(a)(2). The rule is written in the affirmative. That is, oral argument must be held unless a specific exception exists. The Rule is clear:

> (2) Standards. Oral argument **must** be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
> (A) the appeal is frivolous;
> (B) the dispositive issue or issues have been authoritatively decided; or

> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Fed.R. App. P. 34(a)(2)(A)-(C) (emphasis added).

If even one party requests oral argument the court of appeals must hold that oral argument. Only if the Panel determines that either the appeal is frivolous, the issues have been authoritatively decided, or the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument can oral argument be rejected. In spite of this clear directive the Sixth Circuit in this case, and the courts of appeals across the country, routinely deprive parties of their right to oral argument in summary and unexplained orders under Fed.R. App. P. 34(a)(2)(A)-(C).

According to the Administrative Office of the U.S. Courts, the percentage of cases terminated on the merits without oral argument increased from 55% in 1990 to 79.6% in 2019. Table 2.2, U.S. Courts of Appeals Judicial Facts and Figures (September 30, 2019) https://www.uscourts.gov/statistics/table/22/judicial-facts-and-figures/2019/09/30 (last visited February, 25, 2021). In raw numbers, in 1990 the Courts of Appeals[1] terminated on the merits 21,006 cases. Of these cases, 9,447 were terminated after oral argument and 11,559 were terminated without oral argument. But in 2019 the Courts of Appeals[2] terminated on the merits 29,738 cases. Of these cases, 6,056 were terminated after oral argument and 23,682 were terminated without oral argument. A review of reported and unreported cases reveals that the courts of appeals reject oral argument in summary and conclusory fashion. *United States v.*

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[1] This data does not include date from the U.S. Court of Appeals for the Federal Circuit.

[2] This data does not include date from the U.S. Court of Appeals for the Federal Circuit.

Williams, 630 F.3d 44, 47 n. 2 (1st Cir. 2010); *Evancho v. Fisher*, 423 F.3d 347, 249 (3rd Cir. 2005) ("the appeal was submitted without oral argument because the facts and legal arguments were adequately presented in the briefs and record"); *Cannon v. S. Univ. Bd. Of Supervisors*, 827 Fed. Appx. 454, 454 (5th Cir. 2020) ("Because we unanimously agree that oral argument is unnecessary under Federal Rule of Appellate Procedure 34(a)(2)(C), Cannon's motions for argument and a hearing are denied."); *Montgomery v. Ferentino*, 2021 U.S. App. Lexis 5519 (6th Cir. 2021) ("This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a)."); The prevailing legal doctrine of the courts of appeals was best expressed by the Third Circuit: "We point out that an appellate panel may decline to hear oral argument anytime it is 'unanimously of the opinion that oral argument is not needed.' Third Circuit LAR 34.1(a);" *Nagle v. Alspach*, 8 F.3d 141, 144 (3rd Cir. 1993). This is clearly not the standard of Fed. R. App. P. 34(a)(2). This Court needs to provide clarity, direction, and a clear legal and factual standard to regulate the application of Fed. R. App. P. 34(a)(2).

In Schrank's case the panel issued an order refusing to hold the requested oral argument. The Panel clearly made no such finding as there is zero rationale offered in the Panel's Notice. The totality of the Notice reads:

> The Court has determined that oral argument is not required. See I.O.P. 34(a)(4). The case noted above is submitted to the Court on the briefs of the parties and the record. You will be promptly advised of the Court's decision, or any other order or direction it may issue.

Notice, Doc. 21. In order to properly invoke Appellate Rule 34(a)(2) the Panel must actually conduct the review required by the rule and make the specific findings required. Absent those findings oral argument "must be allowed." Fed. R. App. P. 34(a)(2).

Applying Fed. R. App. P. 34(a)(2) to Schrank's case demonstrates that none of the three grounds for rejecting argument apply. First, the Panel determined that the sentence imposed was improper and vacated the district court's judgment. Reversing a lower court by definition demonstrates that the appeal is not frivolous under Fed. R. App. P. 34(a)(2)(A). The context, plain language, and purpose of the frivolous review is to eliminate arguments in cases in which the Appellant's appeal is frivolous, not when the Appellant's appeal has (arguable) merit.

Second, each sentencing decision by a district court is individually and independently reviewed under an abuse of discretion standard. Because the standard is abuse of discretion, each appeal must be independently reviewed because each sentencing decision is unique to the defendant, the crime, and the sentencing factors under 18 U.S.C. § 3553. As such the issues presented in each case are not "authoritatively decided." Fed. R. App. P. 34(a)(2)(B).

Finally, oral argument would have significantly aided the Panel in order to ensure that the Panel properly applied the correct legal standard of review, understood the totality of the district court's sentencing review, and the validity of the sentence under § 3553. See Section II, *infra*. The standard of review in criminal sentencing appeals is abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). Through and robust oral argument on the parameters of the standard of review, the nuances and substance of the district court proceedings, and the balancing of the sentencing factors under 18 U.S.C. § 3553, would assist the panel in exploring and determining the issues.

Because the United States and Mr. Schrank requested oral argument in the first appeal and Mr. Schrank requested oral argument in the second appeal, and Fed. R. App. P. 34(a)(2) mandates oral argument in all but the most limited of circumstances, the Panel erred in refusing to conduct oral argument.

In order to ensure that the lower courts are properly applying Fed. R. App. P. 34(a)(2), and only denying oral argument when allowed under the rule, the Court should grant the petition, permit full briefing and oral argument on the merits of this important appellate issue.

II. Does a policy of mandatory prison time violate the individualized sentencing mandate of this Court and 18 U.S.C. § 3553(a)?

The Sixth Circuit adopted a requirement that all child pornography cases must include a prison sentence is contrary to the clear dictates of the Supreme Court. *United States v. Bistline*, 720 F.3d 631, 632 (6th Cir. 2013); *United States v. Robinson*, 778 F.3d 515 (6th Cir. 2015). In so doing, the Sixth Circuit relies exclusively the issue of deterrence under 18 U.S.C. § 3553(a)(2)(B). The Sixth Circuit mandates that this sentencing factor, to the exclusion of the other six sentencing considerations, requires a period of incarceration for all defendants in all child pornography crimes. The Sixth Circuit's position is that *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), are irrelevant.

Additionally, the Sixth Circuit eliminated the sound exercise of discretion delegated to the district courts to review the totality of the § 3553(a) sentencing factors, including consideration of the Sentencing Guideline Ranges, to determine the appropriate sentence for each defendant coming before the district courts. Rather than permitting district courts the liberty to impose sentences based on the totality of the circumstances, the Sixth Circuit forces district courts to consider only deterrence theory in the abstract and mandates that a prison sentence must be imposed. In so doing, the Sixth Circuit substitutes its sentencing judgment for the district court's and fails to give due deference to the district court's sentence.

The critical aspect of judicial review under abuse of discretion is to "give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *United States v. Johnson*, 640 F.3d 195, 202 (6th Cir. 2011), *citing Gall v. United States*, 552 U.S.

38, 51 (2007). "The fact that [we] might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.* A considered judgment of the district court "may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Id., quoting Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981). The Sixth Circuit's mandatory prison policy fails to abide by this limitation on its review authority.

District courts are to exercise sound discretion, including consideration of the Guidelines and § 3553, in determining the sentence in every single case. *Booker*, 543 U.S. at 245-246. And, in consideration of all of the factors of the case, the district court must make an "individualized assessment based on the facts presented." *Gall*, 552 U.S. at 50. District court judges are in the best position to determine the proper, individualized sentence in a case because the judge sees the defendant, listens to the defendant and other witnesses directly, can determine issues of credibility and sincerity that are lacking in a cold appellate record, and can observe relevant factors that are not apparent from a record (for example whether a defendant enjoys the support of family and friends as demonstrated by attendance at court proceedings), as well as an intimate familiarity with a host of criminal sentencing matters that appellate courts simply do not see. District courts perform countless sentencing proceedings, observe first-hand the diversity of the people involved in criminal cases, and must directly face the victims, the families, the defendant, and the public in each sentencing decision handed down. The awesome responsibility to decide whether, and for how long, to remove a person from our society is part science, part art, and part experience. It is properly granted great deference when reviewed by appellate courts that are not connected to the

local community, observing the actors, making daily sentencing judgments, and directly face the defendant when imposing sentence.

The fundamental hallmark of the American criminal justice system is that "the punishment should fit the crime." *Williams v. New York*, 337 U.S. 241, 247 (1949). *See also Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937); *Pepper v. United States*, 562 U.S. 476 (2011); *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J. concurring). This touchstone directs that criminal sentencing should consider "every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). *See also* 18 U.S.C. § 3553(a). "Judicial punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of a real right." Kant, Immanuel, *The Philosophy of Law*, (W. Hastie trans., 1887), pp. 194-198. A direct impact of this societal value for justice is that sentencing judges are vested with wide discretion to craft sentences uniquely suited to the specific case and defendant before the court. It was this foundation that the District Court rested upon in determining the appropriate sentence for Mr. Schrank.

The district court did not ignore general deterrence or any other sentencing factor. The district court clearly considered all § 3553 factors and exercised her discretion to impose a sentence that properly balanced all of those factors.

> And I hope that if this is appealed again and the Sixth Circuit is considering it again, that that consideration will take into account that this is a decision that's been based on a weighing of all of the factors involved in 3553, that it's based on the material that I've been submitted and required to evaluate and weigh, that it's been based on

> what I have -- the new material that's been submitted as to what Mr. Schrank has done since the last sentencing. And I don't think there's a factor -- I don't think there's a factor I've failed to weigh.

(Sentencing Transcript, R. 47, PageID# 273-74)

The Sixth Circuit's mandatory prison time in child pornography cases is clearly contrary to this Court's mandate for individualized sentencing considerations. In order to ensure that defendants receive the individualized, and considered, sentences under 18 U.S.C. § 3553(a), this Court must grant the petition and review to bring the Sixth Circuit into line with the Congressional mandate and this Court's precedent.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for the reasons stated herein, this Honorable Court should grant the petition for writ of certiorari to the Sixth Circuit Court of Appeals and review these fundamental questions of appellate procedure and sentencing rights.

Respectfully submitted,

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