25-5685

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

ANTHONY LEMICY — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANTHONY LEMICY
(Your Name)

U.S.P. TERRE HAUTE, P.O.BOX 33
(Address)

Terre Haute, In 47808
(City, State, Zip Code)

n/a
(Phone Number)

QUESTION(S) PRESENTED

I. CAN THE GOVERNMENT PROVE THE SPECIFIC INTENT OF "USE" "FOR THE PURPOSE" WITHOUT THE MINORS TESTIFYING(direct evidence), OR CIRCUMSTANTIAL EVIDENCE(hot line tip, captions on the videos, etc.), WITH NOTHING MORE THAN JUST THE IMAGES THEMSELVES IN VIOLATION OF 18 U.S.C. §2251(a), and 18 U.S.C. §2256(2)(A)(v)?

II. DOES A FEDERAL JUDGE HAVE TO CONDUCT A THOROUGH DIALOGUE ON THE RECORD TO MAKE SURE A DEFENDANT, SHACKLED OR NOT, PRO SE OR REPRESENTED, KNOWINGLY AND VOLUNTARILY WAIVE THE RIGHT TO TESTIFY, AND DOES THE SUFFICIENCY OF THE EVIDENCE WHICH CAME ABOUT AFTER ALL THE EVIDENCE OVERRIDES THE CONSTITUTIONAL VIOLATION THAT BEGAN AT THE START OF THE TRIAL?

III. WAS THE PETITIONERS SENTENCE MISCALCULATED AND UNREASONABLE DUE TO THE JUDGE BEING VINDICTIVE AND NOT STRAYING FROM THE "DRACONIAN MANDATE" OF THE FEENEY AMENDMENT BILL?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix F 2-19 to the petition and is

[X] reported at 122 F. 4th 298, 305-06(8th cir 2024); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 11/26/2024.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 1/17/2025, and a copy of the order denying rehearing appears at Appendix F-1.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including June 16, 2025 (date) on May 2, 2025 (date) in Application No. 24 A 1055.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C 2251(a) provides in relevant part: Any person who employs, uses,persuades,induces,entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished under subsection (e).

18 U.S.C 2256 provides inrelevant part: (2)(A) "[S]exually explicit conduct" means actual or simulated (i)sexual intercourse,including genital-genital,oral-genital,anal-genital, or oral-anal, whether between persons of the same or opposite sex;(ii)bestiality;(iii)masturbation; (iv)sadistic or masochistic abuse; or (v)lascivious exhibition of the anus,genitals,or pubic area of any person.

The Fifth Amendments provides in relevant part: Nor be deprived of life, liberty, or property, without due process of law;

The Sixth Amendment provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right to a ... trial by an impartial jury...,and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...

The Eighth Amendment provides in relevant part; Nor cruel and unusual punishment inflicted.

The Fourteenth Amendment provides in relevant part: Section 1. Nor shall any State deprive any person, life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is charged with four counts of 18 U.S.C 2251(a), count 1, petitioner is charged with using a minor to engage in a lascivious exhibition for the purpose of producing a depiction of such conduct; Petitioner is charged in count 2 and 3 with using a minor in a sexually explicit conduct for the purpose of producing a depiction of such conduct; petitioner is charged in count 4, withusing a minor to engage in a lascivious exhibition for the pirpose of producing a depiction of such conduct.

Law enforcement responded to a disturbance call at Mr. Lemicy's resident after a brief cursory interview the petioner was transported to police headquarters for an in-custody interview.After the interrogation the petitioner was arrested. He was released 24 hours later with no pending charges.

With an invalid consent to search form law enforcement accesed the S.d card located in the petitioners cellphone and located the images of count 1, which is to minors taking a shower and the petitioner is talking to them.

The detectives had State charges issued and Federal charges issued.

The investigation was closed a few months later and a year later after the warrant was returned as executed the detectives conducted another search of the petitioners phone without a new warrant or probable cause statement to validate going ouside of the scope of the warrant.

The petioner filed for a new lawyer when the one he had only spoke of plea deals and wouldn't file for a suppression hearing.

The new lawyer spoke of only plea deals also. The petitioner filed his own motions and decided to go pro se.

The day of the trial the petioner wasn't released from his shackles to conduct his trial properly and non of the alledge victims didn't testify

The District court rejected petitioner proposed jury instruction and allowed the jury to convict him on evidence that didn't meet the standard of beyond a reasonable doubt.

Petitioner was sentence harshly due to his decision to go to trial.

INTRODUCTION

This case presents an important and recurring question in the Eighth circuit about the scope of a Federal statue criminalizing the production of child porn.

Can a defendant be found guilty of 'using' aminor to produce child porn in violation of 2251(a) by finding that the defendant took the photos for 'a purpose' or a 'dominate purpose' rather than 'the purpose' of producing a depiction of such conduct thus eliminating the specific intent requirement from the statue.

The Eighth circuit Court of Appeals has an opinion on this question that deviates for other circuits and fron the language of the statue itself.

The Fourth Circuit, joined by at least 3 other circuits, holds that the defendant has to have a specific nintent in having the minor engage in the sexually explicit conduct to capture a depiction of 'such conduct',and the specific intent must come before the sexually explicit conduct occures

The Eighth circuit has rejected the statutory requirement of 'uses' 'for the purpose' and instead believes that any photo that is created meets the requirement without proving that the defendant had the specific intent to photograph the sexually explict conduct for the purpose of creating the depiction

This understanding has created a circuit split that will not resolve itself absent this Court's intervention.

The Eighth circuit upheld petitioners conviction based on an erroneous interpretation that allows a jury to consider a defendant's motive and intent with nothing more than just a photo or video.

Other court of appeals have come to a mutial understanding of the statue, itss widespread acceptance has not reached the Eighth circuit.

As Judge Jordan on the 5th and 11th circuit panel stated"My concern is that we are coming close to making 2251(a), a strict liability statue" ..."the court may be sayung that if the defendant takes a photo during sexual intercourse with a minor,that act will always provide enough evidence tro convict the defendant of production of child pornograph under 18 U.S.C 2251(a).United States v. Gatlin 90 F 4th 1050(5th&11 cir 2024)

The language "the purpose" requires that the filming be at the very least a significant purpose in the sexual conduct itself, not merely incidental. United States v. McCauley 983 F 3d 690(4th cir2020)

This does not mean that conduct like petitioner's cannot be criminalized. It can be under the laws of many states including Missouri(R.S.mo 573.023) But here,the issue is whether the conduct is criminal under the Federal child pornography laws with punishment of many decades in prison.

The Eighth circuit unlike other like minded court of appeals is going outside of the definition of this statue, modifying Congress clear limitation on the scope of the Federal child pornography laws.
The Eighth circuit has not acknowledge as much by denyimg petitioners direct appeal and en banc review on this issue.

Cases dealing with "For the purpose" occurs frequently and is a question of surpassing importance.

At this point, there is no benifit to futher percolation. Almost every circuit gas staked out a posution, and there is no reason to expect the Eighth circuit, to reconsider their position that has generated this entrenched split. Thus case is an idea vehicle to decide the question,as the issue was both fully preserved and outcome determinative as to the conviction at issue.

The petition should be granted.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit is divided from the other circuits over the statutory interpretation of the meaning of "For the purpose". The petitioner is charged in count 1 with using a minor to create a visual depiction of a"lascivious exhibition" of the genitals.

The image of count 1 was not surreptitiously recorded, and depicted no sexually suggestive conduct of any kind, and thus did not violate 18 U.S.C 2251 (a) or 18 U.S.C 2256 (2) (A) (v), for not being produced to capture a depiction of such conduct.

This case squarely present this consequential and recurring question and is an excellant vehicle for answering it.

The Eighth circuit position is profoundly wrong:As a matter of law, the mere capturing of an image of a nude minor depicting absolutely no sexual or sexually suggestive conduct without more evidence does not meet the specific intent element of 18 U.S.C 2251 (a) "For the purpose to capture a depiction of such conduct".

This Court should grant certiorari to resolve this conflict, and reverse the Eighth circuit's misguided and legally incorrect ruling.

(1) The petitioner captured a video of two (2) minors washing themselves and engaging in routine personal hygiene activities. The jury found the petitioner guilty of producing child pornography under 2251(a), when there was no direct or circumstantial evidence to support the specific intent element that he the petitioner "captured sexually explict conduct 'for the purpose' of producing a depiction of such conduct.

The Fourth circuit listed a few ways to prove such intent in the Palomino - Coronado case: (1) direct evidence of intent; (2) evidence of the defendant's actions, instructions, and descriptions of the visual depictions produced. United States v. Palomino - Coronado, 805 f 3d 127 (4th cir 2015)

The petitioner's Sixth Amendment right to confront his accuser(s) was violated because the two (2) minors of count 1 did not testify. The confrontation clause provides that "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witness against him. Crawford v. Washinton, 541 u.s 36, 158 L.Ed 2d 177, 124 S Ct 1354

The government filed a witness list on March 20, 2023,and only one (1) minor

was listed as a witness. The petitione was under the impression that all three (3) of the minors would be present to testify at his trial.

!8 U.S.C 2251 (a), is a specific intent crime and the 'uses' component which the[petitioner]is charged with needs direct evidence(alleged victim testimony))of how the defendant "actively engineered the sexually explicit conduct". United States v. Heinrich 57 f 4th 154

Without the minors testifying the government could not and did not prove how the petitioner initiated the illegal sexual contact "For the purpose" of producing the depiction which the statue requires. It also supports the petitioners motion for acquittal based on insuffuciency of the evidence.

To promote reliability in the truth finding functions of a criminal trial ... the central concern of the Confrontation Clause is to ensure the reliabilty of the evidence against the criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the tryer of facts. Crawford

The minors testimony (direct evidence) would have carried more weight with the jury than the witnesses who did testify, and by one of the minors mothers testifying (count 1), the minor was available. Had cross - examination been allowed it would of elicited exculpatory evidence showing that the petitione did not engineer any sexually explict conduct. The video was just two nude minors taking a shower.

The government stated "the dost factors are a focal point of what lascivious means". The government goes on to state that "count one does meet the definition of lascivious exhibition." "He [petitioner] tried to get a close - up and did of their genitals and pubic area, and that is what is required under the law to find him guilty of that count".(page 44, vol 3)

During the trial Mr. Lemicy, asked the governments witness detective Hefele, "is the focal point on the genitals or pubic area ? (not from that angle), can you see the labia minora ? (not from that angle),Is the minors depicted in an unatural pose or inappropriate attire ? (neither), are there any captions on the pictures ? (there are not) (page 192 of vol 1)

"Lascivious exhibition" appears in a list with sexual intercourse; bestuality; masturbation; and sadistic or maschoschistic abuse; it's meaning is narrowed by the common sense canon of Noscitur a Sociis. Lascivious exhibition must be performed in a manner that cannotes the commission of a sex act". United States v. Hillie, 39 f 4th 674 (D.C. 2021)

The minors in the video at issue of count 1 (1) were not having sexual intercourse, they were not masturbating, and there was nosadistic or maschoschistic depiction in the video. "A video of a child in a shower being filmed is unlike the images of overt sexual activity typically encountered in prosecutions involving commercial child pornography". United States v. Ward, 686 f 3d 883 (8th cir 2012)

Surreptitious recorded images are synonymous with intent dealing with 'lascivious exhibition'. Even though the videos shows the minors nude body, they only depict the minor engaged in ordinary grooming activities and nothing more as the petitioner talks to them. "Sexually explict conduct" requires that the video depict sexual or sexually suggestive conduct, and 'lascivious exhibition' means revealing private parts in a sexually suggestive manner. A child who uncovers her private parts to change clothes, use the toilet,clean themselves, or bathe does not lasciviously exhibit them" United States v. Hillie, 39 f 4th 674 (D.C)

In the petitioners case the government presentd noievidence that "the purpose" was to produce depiction of sexually explict scenes, therfore the petitioner did not "use" the minors "for the purpose".

(2) The petitioner is charged in count 2 and 3 with 'using' a minor to create a visual depiction of sexually explict conduct (genutal to genital penitration) 'for the purpose' of producing a visual depiction of such conduct.

The image of count 2 and 3 was not surreptitiously recorded, yet depicted sexual conduct. The images at issue do not violat 2251 (a) on account of no evidence being presented to establish that the petitioner orchestrated or engineered the sexually explicit conduct for the purpose to produce a dipiction of such conduct.

The mere capturing of an image of a minor engaging in sexually explicit conduct does not meet the specific intent element of 18 U.S.C 2251(a).

This Court should grant certiorari to resolve this conflict, and reverse the Eighth circuit's misguided and legally incorrect ruling.

The petitioner recorded two (2) videos using his cellphone of himself and an alleged minor engaging in sexual intercourse, both of the videos are taken a few minutes apart on the same day. The jury found the petitioner guilty of producing child pornography under 18 U.S.C 2251(a) when ther was no direct or circumstantial evidence to support the specific intent element that he captured 'sexually explicit' conduct 'for the purpose' of producing a depiction of such conduct.

The minor of count 2,3, and 4 is a differentperson than the two(2) other minors in count one(1). The minor of count 2 and 3 did not testify, the government claims that the

minor wasn't called because the government believed it met it's burden of proof to convict the petitioner.

The witness list that was filed on March 20, 2023, did list the alleged victim of count 2,3, and 4. The mother of the minor did testify so the minor was available to testify.

The petitioner Sixth Amendment right to confront his accuser was violated by the government not calling the minor to testify and allowing Mr. Lemicy the opportunity to cross-examine the minor about her statements given to law enforcement.

"The text of the Confrontation Clause reflects this focus. It applies to witnesses against the accused, in other words, those who bears testimony ... An accuser who makes a formal statement to the government officers bears testimony ... The clause ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantial guarantee". Crawford

"Cross-examination is a tool used to flush out the truth, not an empty procedure. The right to cross-examination protected by the Confrontation Clause, thus is essentially a "functional" right designed to promote reliability in the truth-finding functions of a criminal trial" Crawford

There was no testimony that the defendant gave an instruction or direction to the minor as part of the sexual encounter that would indicate purpose. All the record shows is that the[petitioner]had engaged in sexual activity with the minor ... and the that the explict images were taken and later deleted. Palomino-Coronado

"The government is required to prove both an actus reas, and a mens rea. The mens rea,that the prosecution must prove is that the defendant must engineer the sexually explict conduct 'For the purpose' of producing a visual depiction of such conduct" Heinrich

The specific intent element "For the purpose ..." is at issue here.

During the petitioners trial the government repeatedly stated that "the crime is that he produced a video, and that Mr. Lemicy acted with the purpose of producing a visual depiction, ... that's defined and it basically means he took a video recording with his cellphone". (page 145 vol 2)

The petitioners case is on all fours with the Fourth circuit case Palomino - Coronado. This case was the bases of the petioners and his direct appeal attorneys argument on the direct appeal briefs.

The prosecution argued that the timing of when the videos were made, their content, number, and length, proved Mr. Lemicy's intent. In the Eighth circuit brief on page 14 it states that "the video were filmed from a first-person point of view", which is the same sentiment the government advanced in their reply brief

Just like in Palomino all the record shows is that Palomino (petitioner) had engaged in sexual activity with the minor on more than one occassion,and the fact that the videos at issuefocused on Palomino (petitioner) genital area as he engaged in the sexual activity.

The government does little to explain how these conclusory statements indicate that Palomino (petitioner) initiated the sexual activity "for the purpose" of producing the picture. Instead the government appears to conflate the voluntary act of taking the picture with the specific intent required under the statue.

"It is not enough to say 'the photo speaks for itself, and for the defendant and that is the end of the matter". United States v. Crandon,173 f 3d 122, 129 (3rd cir 1999)

" A narrower construction, particulaarly one that would limit "production" to only the moment an image is captured by a camera, is problematic for the simple reason that it is not compatible with Congree definition of production" United states v. Foley,740 f 3d 1079 (7th cir 2014)

"Our sister circuits ... have held that production encompasses more than the device used to capture the image or video". United States v. Pattee, 820 f 3d 496 (2nd cir 2016)

During the closing argument at the petitioners trial the government restates that "the fact that they were produced is the crime" (page 44,vol) The government is doing exactly what goes against the plain language of the statue, and is eliminating the need to prove the specific intent element.

This is what Palomino as well as Gatlin and Hillie warns against.

"The mere presence of a cellphone is not evidence of purpose, the use of a cellphone will never be evidence of purpose under 2251(a)". Palomino

The petitioners case also lacked circumstantial evidence as well. During the petitioner trial, he asked the investigating detective was there any evidence to say the explict conduct was initiated 'for the purpose' of creating a depiction ?, was there any captions on them ?, were different poses asked ?, was there different directions given ?, the detective said no to all the questions. The government objected to the petitioner asking if there was any evidence to show the videos were initiated "for the purpose" and said thats for the jury to decide.

The petitioner asked the detective who had conducted the search with the software, "was an IP address attached to any of the videos ?","was the videos on a computer tower, instagram,facebook ?", his answer was "I don't know" (page 75 and 82)

The detective was asked,"does the evidence show Mr. Lemicy's perpose was to create the depiction". The government objected once again and said objection based on same argument.

The specific intent requirement is met if there is sufficient proof that one of the petitioners 'dominate perpose' was to create a visual depiction. Fortier

Fortier's collection of explicit videos and photos contained many other homemade recordings ... the videos were apart of a larger collection with titles on them making it unlikely his intent was anything other than producing visual depictions. United States v. Fortiers, 956 f 3d 563 (8th cir 2020); none of this type of evidence presented in the case at hand to support the notions that the petitioner 'dominate' purpose was to create the depictions.

In Smith the two photo's depicted the minor in lascivious poses saved and catalogued in a folder with sexually explicit titles along side other images of the minor inllingerie advertising sexual service. All these circumstances permit a strong inference Mr. Smith intended sexually explicit conduct to occur. United States v. Smith, 662 fed. Appx 132 (3rd cir 2016). Again this type of circumstantial evidence wasn't present in the petitioners case.

In United States v. Lebowitz, 676 f 3d 1000,1003(11th cir 2012), the defendant and the minor discussed videotaping the sexual encounter prior to the recording. Evidence of perpose is essential and there must be proof that the defendant used, induced, or otherwise caused sexually explicit conduct by the minor 'for the purpose'of producing images of that conduct.

In Lebowitz, the defendant set up a camera and tripod in the minors bedroom because there wasn't enough room in the car, unlike the petitioners case where he only used his cellphone and there was no testimony about the encounter prior to the recording.

Had Mr. Lemicy been tried in any other Federal courts he would of been found not guilty of producing a depiction of the sexually explicit conduct 'for the perpose', on account that the government presented no direct evidence or circumstantial evidence to support the argument that the petitioner initiated the sexual activity 'for the purpose' (2) The Eighth circuit is divided from the other circuits over the statutory interpretation of the meaning of 'For the Purpose"

(3) The petitioner is charged in count four(4) with using a minor to create a visual depiction of a "Lascivious exhibition' of the genitals for the purpose to produce a depiction of such conduct.

The image of count four(4) was not surreptitiously recorded, and depicted no sexual coyness or willingness to engage in sexual activity, and thus did not violate 18 U.S.C 2251(a) or 2256(2)(A)(V), for not being produced to capture a depiction of such conduct.

This case squarely present a consequential and recurring question and is an excellant vehicle for answering it.

The Eighth circuit position is profoundly wrong: As a matter of law, thecapturing of an image of a nude minor depicting absolutely no sexual coyness or wonting sexual behavior or without more evidence does not meet the specific intent element of 18 U.S.C 2251(a) "for the purpose to capture a depiction of such conduct".

This Court should grant certiorari to resolve this conflict and reverse the Eighth circuit misguided and legally incorrect ruling.

The petitioner captured a video of a minor spreading open her genitalia. The minor was not captured acting coyley or willing to engage in sexual activity. The jury found the petitioner guilt of producing child pornography under 18 U.S.C 2251(a), when there was no direct or circumstantial evidence to support the specific intent element that he "captured sexually explict conduct 'for the purpose' of producing a depiction of such conduct.

By the minor not testifying in regards to count two(2),and three(3), the petitioner was denied his Constitutional right to cross-examine the minor and confront his accuser on count four(4).

"Physical presence, oath, cross-examination, and observation of demeanor by the trier of facts serves the purpose of the Confrontation Clause by ensuring evidence is reliable and subject to adversial testing." United States v. Bernloehr 833 f 2d 749, 752(8th cir 1987)

Common-law tradition is one of live testimony in court subject to adversial testing ... A rule of common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine. Crawford

The inquiry is not whether the video, on their face, are of a sexual character. The inquiry is whether petitioner 'used' a minor to produce a lascivious visual depiction that is intended or designed to elicit a sexual response in the viewer 'for the purpose' of capturing a depiction of such conduct.

'Lascivious exhibition' appears in a list with sexual intercourse; bestiality; masturbation; and sadistic or maschoschistic abuse. It's meaning is narrowed by the common sense cannon of Nøscitur a Sociis. Lascivious exhibition must be performed in a manner that cannotes the commission of a sex act. United states v. Hillie, 39 F 4th 674 (D.C 2021) No such act exist in the depiction of count four(4).

2251(a) consist of two halfs, half one(1) describes the actus reus, the unlawful act(s) required for the crime. Half two(2) adds a mens rea, the mental state that the defendant need to have while doing those acts. Heinrich

The government states that the petitioner is recording the minor because he intends to record it ... then seconds later takes a picture of her. That is intent. (page 45 vol 2).

"There is no testimony from the minorabout how the photo came to be taken. Nor is there any evidence about whether she ...[the petitioner] had discussed photographing their encounter at any poind before the photo was taken, whether he gave the minor any instruction before or during their encounter to facilitate the taking of the photo" United states v. Gatlin 90 F 4th 1050 (2024)

"It is critically important to be certain that the defendant's purpos was, in fact, to create pornographic pictures" Heinrich @ 10

The Sixth Dost factor, which ask whether the visual depiction was intended to elicit a sexual response in the viewer is especially troubling. Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused, and this Dost factor encourages both judges and juries to improperly consider a non-statutory element. Hillie

In Gatlin the government's theory at closing argument seems to have been that the mere taking of the photograph establishes ... Mr. Gatlin antecedant purpose to produce pornography. In the petitioners case the government and the Eighth circuit pushes the same incorrect theory.

In determining whether the statue was violated, we analyze not whether the picture at issue appealed or were intende to appeal to the videographers sexual interest but whether on their face, they appear to be of a sexual character. United States v. petroske,928 f 3d 767 (8th cir 2019)

In the petitioners case the minor was not masturbating, or apart of a sadistic or maschoschistic scene or participating in sexual intercourse whic goes back to the common sense of Noscitur a Sociis meaning of 'Lascivious'.

The overall content of the video does not reflect the petitioner's intent in creating the video was "to arouse or satisfy" his sexual desires 'for the purpose' to capture a depiction of such conduct.

The statutory term "lascivious exhibition' therefore refers to the minors conduct that the visual depiction depicts, and not the visual depiction itself. That is why the Supremem Court repeatedly describes 'lascivious exhibition of the genitals' to mean depictions of showing a minor engaged in "hard core" sexual conduct, not sexual depictions that elicit a sexual response in the viewer. Hillie

In Williams, Justice Scalia explained that "sexually explicit conduct" cannotes actual depictions of the sex act rather then merely the suggestion that it is occuring 533 u.s @ 297, but the Dost factors stray to far from this basic teaching, allowing a depiction that portrays sexually implicit conduct in the mind of the viewer to be caught in the snare of a statue that prohibits creating a depiction of sexually explicit conduct performed by a minor or by an adult with a minor". Hillie

The Second Circuit saud "It goes without saying that the Dost criteria are neither definitive or exhaustive". United States v. Rivera, 546 F 3d 245,253 (2nd cir 2008)

As factors they mitigate the risk that jurors will react to raw images in a visceral way, rely on impulse or revulsion, or lack any framework for reasoned dialogue in the jury room". United States v. Amirault, 173 F 3d 28,32 (1st cir 1999)

The petitioner filed a motion to limit the exposure of the videos to the jury yet his motion was denied. It took only 30 minutes for the jury to find him guilty of all four counts.

With the jury seeing the videos from count 1,2, and 3, and being told by the government that the crime is basically he made a video with his phone, along with the jury instruction ommitting the specific intent element (for the purpose), it was a no brainer to convict the petitioner of 'using' a minor to create a visual depiction of a 'lascivious exhibition' of the genitals 'for the purpose' to produce a depiction of such conduct. Even without direct or curcumstantial evidence presented.

The Eighth Circuit jury instruction is erroneous for the same reason. The district court chose not to include the specific intent element of 2251(a) 'for a purpose' into the finale proposed jury instruction.

As a pro-se litigant at trial, the petitioner based his objection to the governments proposed jury instruction off of the same case law that the government cited. United States v. lohse, 797 f. 3d 515 (8th cir 2015).

In the petitioners case the government proposed to convict a person under the theory that the minor only has to be videotaped or recorded.

Mr. Lohse, did not object to the proposed jury instruction stating that 'used' means just photographed or videotaped. The petitioner asked the court to include "the person has to be used in a sexual depiction". (vol 2 page 136). The petitioner asked for his proposed language to be used in all four(4) verduct directors. (page 137 Appx A-1)

The jury instruction was flawed. The instructions vitiated all of the jury's finding."The deficient instruction deprived ... [the petitioner] of his Sixth Amendment right to a jury's finding of guilt Beyond a Reasonable Doubt". Sullivan v. La, 508 U.S. 275, 113 S.Ct 2078, 124 L. Ed 2d 182 (1993)

The court's instruction did not explain to the jury that it must find some predominance of purpose consistent with Congress choice to employ the phrase 'the purpose' rather than 'a person'. The instruction swept to far in proclaiming that the jury could

find that the defendant engaged in the sexual activity for the purpose at [any point during the sexual conduct].The instruction invited the jury to believe, mistakenly, that 'a purpose' to film could spontaneously arise at the moment the video was taken. united States v. McCauley,983 F 3d 690 (4th cir 2020)

By the government stating in it's closing argument at the petitioners trial that he acted with the purpose ... means he took a video with his cellphone(page 30,vol 3), and the jury instruction stating the crime is complete by a photo or video striped the petitioner of being found guilty of 2251(a) which is a specfic intent crime, instead he was convicted of a strict liability crime which uses no direct or circumstantial evidence.

In the petitioner's case the court said the government's jury instruction was the Gold standard, and to modify as the petitioner suggest is not necessary, and it would mislead the jury as to theur duty. (Page 144, vol 2 appx A-4)

On page 14 of the Eighth Circuit Appeals court brief, the court quoted Fortier. The intent requirement of 2251(a) is satisfied if there is sufficient evidence that one of the defendant's 'dominate purpose' was to create a visual depiction of his sexual acts with the girls.

The appeals court said that the petitioner filmed from a first person point of view. First, "the use of a cellphone will never be evidence of purpose". Palomino - Coranado.Secondly the fact that the petitioner was holding the phone only lends to the fact that the video could have been recorded on a spur of the moment decision.see Palomino - Coranado,which is the petitioners argument.

The fact that the recording device was not set up in any way, like on a tripod or mounted anywhere, futher lends to the fact that the recording was a spontaneous decision. see Lebowitz, which shows 'uses' 'for the purpose'.

18 U.S.C 2251(a), is a specific intent crime, 2251(a) expressly requires a mental state(mens rea) 'for the purpose' of producing a visual depiction, the mens rea seperate wrongful from otherwuse innocent conduct. The verbs cannotes action calculated to achieve a particular end. Heinrich

For the Appeals court to say "The evidence in the record is sufficient to permit a rational jury to draw reasonable inferences and find beyond a reasonable doubt that one of ... [Petitioners] dominate purpose in recording the video was to produce visual depictions of sexually explicut conduct" is faulty on account the statue states "for the purpose" not "dominate purpose".

The court continue to say ... that the petitioners "explanation that he lacked the requisite intent because he deleted the videos was a 'classic jury call'. If the Appeals court would of looked at the petitioners Motion for Judgement of Acquittal

after all the evidence has been presented, the court would have seen that the judge stated "to fully understand ... [the petitioners] argument (A)They were deleted, (B) none of the photos were downloaded or uploaded and because of A&B the photos were not initiated "for the purpose" set forth in the statue" (page 108, vol 2)

This was the petitioners reasoning that he shouldn't be convicted due to no circumstantial evidence being presented or no direct evidence either.

Unlike Raplinger and Fortier which the court cites as their authority, the government did not produce any direct evidence in the petitioners case as to how the photos came about or any circumstantial evidence to give an inference like the government did in United states v. Raplinger 555 F 3d 687(8th cir) and Fortier.

If the petitioner would of been charged in the Fourth circuit he would of been judged under the Palomino standard; If he would of been charged in the D.C cicuit, he would of been judged under the Hillie standard, and if the petitioner would of been tried in the 11th cir, he would of been tried under the Gatlin standard.

The government in the petitioners case has a misunderstanding of what the statue 2251(a) requires, and it is a necessity for this court to help the Eighth Circuit understand what it's role is when charging defendant's with a specific intent crime.

The government contends ... "[the petitioner] is not charged with transporting or distributing ... only producing it on a material that moved in interstate commerce" (page 129,vol2). The government goes on to say "the crime is that they were produced in the first place, the fact they were produced is the crime" (page 32, vol 3). This is simply not what the statue requires or states as the burden needed to convict.

The petitioner states to the jury during his closing argument that the government didn't present any evidence that he acted with 'the purpose' ... and the government must show Beyond a Reasonable Doubt that his actions were motivated by the intent to produce the images.(page 40 - 41, vol 3).

The question presented is hugely consequential and regularly recurs. Every year, Federal courts sentences close to 2,000 defendants for offenses incorporating the definition of 'for the purpose', U.S Sentg Comm'n Federal Sentencing of Child Pornography: Production Offenses (2021).

At this point, these prosecutions have become so frequent that nearly every regional circuit has confronted the underlying issue.

The stakes are significant, both for the petitioner in this cas, and the many criminal defendants in a similar position.

The district sentenced petitioner to a term of 1,200 months imprisonment based on the charged videos and images.

This severe sentence is no aberration. A first time offender convicted of producing

one image under 18 U.S.C 2251(a), faces a statutory minimum of 15 years(180 months) inprison, but far many more have their sentences start at the statutory maximum of 30 years(360)months).

Such severe punishment should not turn on factors that lack any grounding in the statutory text and apply differently depending on the geographic circuit in which the defendant happens to be charged.

This case is an excellant vehicle to review the question presented.

One of the videos do depict nude minors bathing, they are not touching each other or themselves, and their genitals are not on display. Two of the videos do depict a minor engaging in sexual activity, and the last video is of a minor exposing her genitalia but is not exhibiting the willingness to engage in sexual activity.

The question is whether the government can prove the specific intent of 'use' 'for the purpose' without the minors testifying(direct evidence), or circumstantial evidence(Hot line tip,captions on the videos,ect.)with nothing more than just the images themselves in violation of 18 U.S.C 2251(a), and 18 U.S.C 2256(2)(A)(V), this issue was expressly raised, and preserved, and ruled upon in both District court and the Eighth Circuit Appealcourt.

The judgement in this case must be reversed and petitioners criminal conviction on the revelant counts must be set aside, if, as in the Fourth circuit and D/C. circuit has rightly held, 'uses' ... 'for the purpose' needs evidence that the defendant initiated the sexual contact 'for the purpose' under 18 U.S.C 2251(a).

"It is this court's responsibility to say what a (federal) statue means and once the court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law". "A judicial construction of a statue meant before as well as after the decision of the case give rise to that construction". Rivers v. Roadway Exp, Inc 511 U.S 298,312-13, 194 S.Ct 1510,128 L Ed 2d 274(1994).

Had the jury been properly instructed as to what the law requires, there is, at an absolute minimum, a reasonable probability that one or more jurors would have harbored reasonable doubt as to whether the charged videos and images were produced for the purpose of capturing a visual depiction of such conduct.

The Eighth Circuit seriously misconstrued the statutory language of 18 U.S.C 2251(a)

The petitioner Fourteenth Amendment right of Equal Protection of The Law was violated due to him being denied his Fifth Amendment right of Due Process of The Law, and Procedural Due Process protected by the Fifth Amendment.

The petitioner was denied his Sixth Amendment right to confront his accuser which hindered his ability to present the defense of his choosing, which led to him being convicted upon proof of less then a reasonable doubt.

The Due Proces Clause of the Fourteenth Amendment guarantees that a criminal defendant may be convicted only "upon proof Beyond a Reasonable Doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship 397 U.S 358,364 90 S.Ct 1068 25 L.Ed 2d 368 (1978)

QUESTION II: Does A Federal Judge Have To Conduct A Thorough Dialogue On The Record To Make Sure A Defendant, Shackled Or Not, Pro Se Or Represented, Knowingly And Voluntarily Waive The Right To Testify, And Does The Sufficiency Of The Evidence Which Came About After All The Evidence Override The Constitutional Violation That Began At The Start Of The Trial ?

This issue is worthy of this Court's review. This issue is important, and this case is an excellant vehicle.

The Eighth circuit's decision is wrong.

There is not a Federal Court of Appeals or State high court decision that directly conflict with the decision in the petitioners case. Yet given the importance of the issue, it is worth seeking Supreme Court review.

The decision in the petitioners case is directly contrary to a decision of this Court. The decision of the Eighth circuit ia an overreaching expansion in direct conflict with this Courts decision of Deck v. Missouri, and Rock v. Arkansas.

The Eighth circuit's opinion diminishes the Accountability of the Federal court officials in it's district, and rarely makes it to appellate courts

The petitioner is leaning heavily on importance due to the conflict and expansion of this Court's decision based off of the lower courts decision and error.

In United States v. Deck, 544 U.S 622,629, 125 S Ct 2007 L. Ed 2d 953 (2005), the Supreme Court stated that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of it's discretion, that they are justified by an interest specific to a particular trial.

The appeals court misunderstood the petitioners claim in his pro se supplemental brief.He was not trying to advance a claim about how he felt compelled to wear his jail issued clothing.

The petitioner complaint was that as a pro se litigant at trial, the court abused it's descretion to have him in ankle shackles during all three(3) days of his trial, and also the fact that there were two(2) U.S Marshals seating next to him without a court determination that he was a flight risk or even a violent individual.

The petitioner is asking this Court to examine whether his right to testify was violated by him being shackled during his trial, and should the court have held a hearing on the record that the petitioner knowingly and voluntarily waived his rights to testify.

A criminal defendant's right to testify on his own behalf is a fundamental right waivable only by that individual, which is protected by the Sixth Amendment. In Rock v. Arkansas, 483 U.S 44,49,107 S. Ct 2704 (1987), the Supreme Court confirmed that criminal defendants have a Constitutional right to testify on their own behalf.

If a defendant waives his right to testify like his waiver of other Constitutional rights, it should be made voluntarily and knowingly. State v.Fanning, 939 s.w 2d 941,949 (Mo App W.D. 1997).

During the voir dire of the petitioners trial, potential juror 51 asked the court :"I would like to ask a question as far as fair and impartial goes ... If I went to that interview in an orange suit, and ankle bracelets, how is that fair and impartial".

The court responded "your tone and tenor suggest that somehow Mr. Reichert, you have formed an opinion about the defendant ... that would affect your ability to be fair to the defendant and perhaps even fail to the United States".

Juror 51;"I don't see how that's fair and impartial" (Appx b1

The court nver had a hearing outside of the presence of the jury as to why the petitioner was shackled, and a case specific reason was not given. Instead this dialogue was conducted in front of all the other potential jurors, and through out the trial the selected jury knew that the petitioner was shackled.

At the direct appeal hearing the government conseaded that the petitioner was shackled the whole duration of his trial.

The petitioner was routinely shackled in front of the jury as a pro se litigant, and was not able to address the jury or the witnesses properly, he also had to conduct his whole defense sitting down.This prejudiced the petitioner by making him look guilty and infected the jury with bias.

The record shows the extent of the jury awareness of the restraints, the restraints impeded the petitioner from participating in the proceeding, and there was no risk Mr. Lemicy might try to flee.

The Supreme court requires a showing of actual prejudice on the part of the defendant unless the exposure was so prejudicial that the inquiry can be presumed ... Shazckles are indications of the need to seperate a defendant from the community at large. Holbrook v. Flynn 475 U.S 560, 568-69, 106 S. Ct 1340, 89 L.Ed 2d 525(1986))

The petitioner was not briefly shackled, he was routinely shackled which is prohibited by the Supreme Court in "Deck". "Visible shackling undermines the presumption of innocence and the related fairness of the fact finding process." "Deck"

The petitioner wanted to testify at his trial, yet being shackled he didn't know the procedure to take the witness stand,and worried that walking to the stand shackled would automatically make him look guilty.

The petitioner advances the question whether the court abused its descretion for not advising the petitioner how he would be able to testify on his own behalf being shackled or even making a record that Mr. Lemicy knowingly and intentionally waived his right to testify.

The petitioner was asked by the trial court if he had any other witnesses, and never asked him if he wanted to testify. Mr.Lemicy was under the impression that the Federal judge would of asked a series of questions like a state judge would of to get a clear and complete record of the waiver to testify. (Appx B-11

Criminal defendants have a right to testify on their own behalf under the Due Process Clause of the Fourteenth Amendment, and the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. The accused has the right to present his own version of events in his/her own words. ... A defendant's opportunity to conduct his own defense by calling witnesse is incomplete if he may not present himself as a witness. Rock v. Arkansas

"If the defendant is unaware of his right to testify without consultation, and unilaterally declines to call himselfas a witness on his own behalf, the defendants right to make an informed decision has been nullified." Casiano-Jimenez v. United States 817 F 3d 816 (1stcir 2010).

The Supreme court stated in Deck v. Missouri that being shackled would interfer with a defendant's ability to participate in his own defense. The petitioner was shackled the whole three days of his trial, and this did interfere with his trial rights in a substantial way.

Mr. Lemicy's testimony was necessary to refute the allegations made by the government. The petitioner would have testified about his purpose(for the purpose) for producing the images at issue since he was charged wuth a specific intent crime.

Under the circumstances of this case, the petitioner's own testimony was crucial to his defense because there was no direct evidence(minors testifying), or circumstantial evidence(hot line tip, titles on the images,ect) presented to support the governments case at chief.

The Appeals court said due to the overwhelming evidence of guilt, ther is no indication that the ankle restraints affected Mr. Lemicy's substantial rights.

The act of shackling raises a strong presumption in the jury's mind that the defendant is guilt and very likely influenced the jury verdict.

Shackles are inherently prejudicial because they are an unmistakable indication of the need to seperate a defendant from the community at large. Holbrook

The petitioner was not briefly shackled, he was shackled the whole duration of his trial "Visible shackling undermines the presumption of innocence and the related fairness of the fact finding process" Deck

The government [or the appeals court] has offered no evidence to prove beyond a reasonable doubt that the leg irons did not contribute to the jury's verdict. The government failed to bear it's burden." Chapman v. California 386 U.S 18,24,17 L.Ed 2d 765 87 S. Ct 824 (1967) No where in 'Deck' does it say that the sufficiency of the evidence overrides the Constitutional violation.

Mr. Lemicy was shackled during voir dire,the opening statement and the rest of the first day. When the second day started the petitioner was still being shackled without justification and questioned a few of the witnesses. The jury still hasn't seen any of the photographic evidence at this stage of the trial. The constitutional violation started and continued throughout the trial, well before the evidence could have become sufficient enough to negate the constitutional violation of being in shackles in the presence of the jury throughout trial. This argument is flawed though, because a constitutional violation of this magnitude, which infected the jury's opinion from the start of trial, can never be overridden by conclusary legal standard.

By allowing Mr. Lemicy to remained shackled throughout the trial, the court violated Mr. Lemicy's Fifth Amendment Procedural Due Process Rights and his Sixth Amendment Right to a Fair Trial.

QUESTION III: Was The Petitioners Sentence Miscalculate and Unreasonable Due To Judge Being Vindictive and Not Straying From The 'Draconian Mandate' Of The Feeney Amendment Bill ?

This issue is worthy of this Court's review. This issue is important, and this case is an excellant vehicle.

The Eighth circuit's decision is wrong.

The decision in the petitioners case is directly contrary to decisions of this Court. The Eighth circuit decision is an abuse of descretion.

The Eighth circuit said that the petitioners sentence was reasonable,the petitioner was not offered the assistance of counsel to conduct his sentencing hearing he proceeded pro se, and objected to all the sentencing enhancements.

In 2003, the Protect Act,also known as the Amber Alert bill was signed into law by President Bush. Title iv of the Protect Act is called the "Feeney Amendments". The amendments were attached at the last minutes and enacted without a hearing or meaningful debate.

The Guidelines for child exploitation offenses were not developed under the statistical approach, but were promulgated, for the most part in response to statutory directives. It is difficult to defer to the commission's guidelines when even the commission believes that they are flawed.

To say the final product of 2G2, is the result of the Commission data, study, and expertise simply ignores the fact that Congress has used a comination of Mandatory Minimum increases and directives to change the sentencing policy. United States v. Grober

The petitioner filed a motion for a variance trying to avoid a sentencing disparity, and yet he was denied. His request was based upon the fact that a sentence in strict accordance with the advisory guidelines of 2G2 is at odds with the 'Parsimony Provision' of 18 U.S.C 3553(a),which direct a sentence to be imposed that is sufficient but not greater than necessary to accomplish the goals of sentencing. "The Mission statement of the United States Department of Justice is to seek just punishment for those guilty of unlawful behavior and to ensure the fair and impartial administration of justice for all. U.S v. Beiermann, 599 F Supp 2d 1087

There is a problem of sentencing disparity between plea deals, and the penalty for going to trial. 2G2 enhancements are promoting sentencing disparities, when sentencing functions transform core conduct, the harshness of 2G2 characteristics fosters a capricious and dangerous enviroment merely because a defendant does not pled guilty. Grober

Child pornography cases install a sense that the defendant(s) deserve what they get , no matter how long the sentence might be. But like all offenses,child pornograph offenses vary in theur seriousness, even the conduct of producers of child pornograph occurs along a spectrum, that spectrum call for a concomitant range in seriousness of the sentence imposed ... It is axiomatic that punishment should be proportional to an offense. United States v. Muzio, 966 F 3d 61(2nd cir 2020)

The guidelines enhancements impermissibly and illogically skews sentences for even "average" defendants to the upper end of the statutory range, regardless of the particular defendant's acceptance of responsibility, criminal history, specific conduct, or degree of culpability, and this reflects a 'put them down the oubliette mentality' that has not greater than necessary to accomplish the goal of sentencing. Beiermann

The encroachment of the Judicial branch by the executive branch is through title 4( ) (401) of the Protect act.

The power and scope of the Executive branch has been expanded while that of the Judicial branch is diminished commensurately, in violation of the Seperation of Power doctrine. The Feeney amendments gives the Executive branch - the prosecutor arm of the government - effective control over the Sentencing Commission, and therefor,over the Sentencing Guidelines.

The Feeney Amendments increase prosecutorial power at the expense of the Judicial branch. The Executive branch, through the plea bargining process,exerts considering power over the sentencing eventually imposed.

The Executive branch initiates and prosecute criminal cases. It is a party toevery Federal criminal proceeding. To permit the same body to serve as prosecutor, as advocate for the sovereign, and also todetermine the penalty for the offense, is contrary to the fundamental notions of Liberty and Justice.

Since the power to charge and get a certain conviction rest exclusively with the prosecution, a large portions of cases do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecutor, and to the extent the prosecutoral discretion is exercised with preference to some and not others, disparity is reintroduced into the system. United States v. Hayack

The courts duty is to uphold the Constitution(Article iv), even in cases were the court might prefer otherwuse.United States v. Detwiler, 338 f supp 2d 1166(9th cir 2004) The judge has the authoruty to adopt some other well reasoned bases for sentencing. United States v. Beiermann,

The petitioner, would like the Court to also consider the fact being sentenced pursuant to an invalid system presents an actual concrete invasion of a legally

protected interest in every meaningful sense of the phrase. "The defendant will suffer an injury in fact if he us sentenced pursuant to an unconstitutional sentencing scheme.The injury is both fairly traceable to the challenged law, due to the fact that Title iv of the protect Act has created or contributed to sentencing system that violates the Constitution. United States v. Schnepper, 302 F Supp 2d 1170(9th cir 2004)

Where a mandatory minimum sentence is at issue, application of Apprendi would mean that the government cannot force a judge who does not wish to impose a higher sentence to do so unless a jury finds the requisite statutory factual predicate. Jury-based fact finding would act as a check against a sentencing judge wrongly being required to impose the higher sentence that the judge believes is appropriate Alleyene v. United States, 133 S. Ct 2151 186 L Ed 2d 314 (2013)

It is beyond dispute that the Feeney Amendments was aimed at chilling the exercise of judicial discreation, and making judges subservant to the will of Congrss and the Attorney General, instead of fallowing the laws of the Constitution. Detwiler

The Sixth Amendment therefor provides for trial by jury as a double security, against the prejudice of judges, who may partake of the wishes and opinions of the government and against the passions of the multitude who may demand their victim with clamorous precipitence. Alleyene

The petitioner objected at the sentencing hearing that all four counts are not groupable offenses even more so in regard to count 2 and 3. The basis is that 3D1.2 states that "exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

According to 1B1.3 Application of subsection(a)(2),#5 Application of (a)(2)(A) relationship to Grouping Multiple Counts. Offenses of a character for which 3D1.2 would require grouping of multiple counts as used in subsection(a)(2) applies to offenses foe which grouping of counts would be required under 3D1.2(d) had the defendant been convicted of multiple counts.

In the Introduction to the Guidelines Manual under the basic Approach(policy statement) #4 The Guidelines Resoletion of major Issues(e) multi-count conviction.

When a defendant engages in conduct that causes several harms,each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. If it did, many of the simplest offenses for reasons that are often fortuitous would lead to sentences of life imprisonment.

life imprisonment.

One of the petitioners objections where to the addition of 5 points that was added for a pattern of activity involving prohibited sexual conduct,this Specific Offense Characteristic is attached to count 2-3. The indictment nor the jury instruction alleged this accusation, this is also an element that the jury did not weigh when they found Mr. Lemicy guilty.

The count regrouping requirement of U.S Sentencing Guidelines Manual 3dl.2 is not triggered merely by conduct,rather, it is triggered when one of the counts embodies conduct that is treated as a specific offense. United States v. Aguirre Miron 988 f 3d 683 (3rdcir 2020)

If the court would of grouped all four count the petitioner would of received a substantially lower sentence instead of 1,440 months(120 years)

#3 The Appeal court misstated that the petitioner asserts that imposing additional criminal history points amounts to double counting.The petitioner raised that argument. The appeals court said the district court did not clearly err in calculating Mr.Lemicy's points because the Stae and Federal convictions are severable,distinct offenses.

The petitioner referenced at the sentencing hearing that in the application notes #2 of 4al.2, it states that to "to qualify as a sentence of imprisonment,the defendant must have actually served a period of imprisonment on such sentence"

Application note #1 states "prior sentence"means a sentence imposed prior to the sentencing on the instant offense.The petioner pointed out that the P.S.I stated that "the defendant has not been transported to the Missouri Dept of Corrections which shows that he has not served time on his State case.

The sentencing and Appeal court over looked the fact that the State conviction was based off of the same State issued warrant that led to the instant offense, and that the state conviction and the instant offense happened at the petitioners house also the minor of count 1 in the instant case is the same minor of the State conviction.

Factors that are sufficiently connected or related to each other to be considered part of the same course of conduct include the degree as similarity of the offense, the regularity(repetitious) of the offense(s), and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. United STates v. McArthur 853 Fed Appx 30 @ 33(8th cir 2021)

The District court erred by adding the 3 additional criminal history points due to the petioners State conviction,and the Appeal court was erroneous for upholding this dicision.These 3 points did prejudice Mr.Lemicy by increasing his criminal historu category from level 1 to level 2.

Any conduct that is part of the instant offense is relevant conduct and is considered in the calculations of the defendants offense level, not the criminal history points.United States v. Borough 649 f 3d 887(8th cir 2011)

#4 The Supreme Court said"It is unconstitutional to remove from the jury the assessment of facts that alters the congressionally prescribed range of penalties to which a defendant is exposed"Jones v. U.S 526,227 119 S.Ct 1215,143 L Ed 2d 311

The petitioner base offense level was 32(2G2.1) for a violation of 18 U.S.C 2251 (a).The statutory minimum term of imprisonment is 15 years(180 months),and the maximum term is 30 years(360 months).The P.S.I calculated the term of imprisonment at 1,440 months.

The jury verdict in the petitioners case authorized a 121 to 151 month sentence (32),he asked to be sentenced at the mandatory minimum mark of a 180 months(15 years) His total offense level after all the sentencing enhancements ballooned his points from a 32 to a 53, which made his mandatory minimum go from 180 months to 360 months.

The 8th circuit Appeals court stated we presume a sentence imposed by the district court that is within the applicable sentencing Guideline rang and based on permissible sentencing consideration listed in 3553(a) is reasonable.United States v. Jones 990 F 3d 1141,1144(8th cir2021)

Booker's abuse of discretion standard directs appeallat courts to evaluate what motuvated the District Judges individualized sentencung decision. Rita v. United States 1217 S Ct 2456, 168 L Ed 2d 203 551 U.S 338(2007)

The sentencing range supported by the jury's verdict was a 121 to 151 month sentence, yet 2G2.1 has a mandatory 180 month sentence. The judge rather than the jury found beyond a perponderance, facts that increased the mandatory minimum.(The facts should of been submitted to the jury).This increased the penalty to which Mr.Lemicy was subjected to and violated his Sixth Amendment right

"Any fact that increase the mandatory minimum is an element that must be submitted to the jury. Alleyene

The pre-Apprendi rule of deference to the legislative retains a built in polatical check to prevent lawmakers from shifting the prosecution for crimes to the penalty phase proceeding ... A jury must find, not only the facts that make up the crime of which th offender is charged,but also(punishment increasing)facts about the way in

which the offender carried out the crime.United States v. Blakely

The district court said to the petitioner,that the additional evidence the prosecution is attempting to enter is a result of the investigation done by the office of Probation and Parole who comes up with the recommended sentence.

Consistent with Common Law and Early American practice,Apprendi conclude that any "facts that increases the prescribed range of penalties to which a criminal defendant is exposed 'are elements of the crime". We held that the Sixth Amendment provides defendants with the right to have a jury find these facts beyond a reasonable doubt, ... the principle applied in Apprendi applies with EQUAL FORCE to facts increasing the mandatory minimum. Alleyne

The petitioners indictment did not include any of the enhancement and is on all fours with United States v. Hillie 227 f supp 3d 57(D.C 2017).The petitioner filed a motion to dismiss indictment for a lack of specifics, the judge denied the motion without holding a hearing.

Justice Ms.Brown Jackson stated that "a facially valid indictment is intended to guarantee at least two core constitutional protections;(1)an indictment's main purpose is to inform the defendant of the nature of the accusation against him, This protection is established in the Sixth Amendment, which provides that in all criminal prosecutions,the accused shall enjoy the right to beinformed of the nature and cause of the accusation.

Which wasn't done in the instant case.

Justice Jackson also stated "the charging document does not specify "nature or type of sexually explicit conduct at issue, the indictment merely quotes the broad language of the statue without including anf facts that specify the particular conduct that is the basis of the governments charges, and these deficiencies amounted to an insufficient notice of the nature of the accusation against him.

This was the petitioners claim as well because he didn't know what image made up what count or the full scope of what he was to build a defense against. The Petitioner also brought up at the sentencing hearing that the enhancements goes against Apprendi. The Government said"the Petitioner is muddling what is required in the indictment, and there is no required notice that I (AUSA) put the sentencing enhancement in the indictment."

The traditional understanding regarding the indictment and also regarding the elemenmts of a crime is as follows: 1) The indictment must allege whatever is in law essential to the punishment sought to be inflicted; 2) the indictment must contain an allegation of every fact which is legally essential to punishment to be inflicted; 3) The indictment must contain an overment of every particular thing which enters into

the punishment. Apprendi, quoting Bishop, Criminal Procedure. When an offense is committed, the indictment must alleged what aggrevated the offense and incures a higher penalty. Alleyne.

#5 The Petitioner asked the court to give him an individualized sentence due to his crime not being as 'severe' as others who are chared with violating the statute and received less time, and to sentence him at the high end would amount to curel and unsusal pinushment, and it wouldnt be proportionate to other sentences.

In the introduction to the guidelines manual under Basic Approach (Policy Statement) it states Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity. Rita.

The petitioner gave the court three reasons:(not distributed over the internet, not traded, nor was he a part of a community of like-minded people.) as to why he should not be punished at that range, reccomneded by the PSI (1440 Months), and said the sentence wouldn't be proportionate to somebody who did the three things and got less time. See United States v. Wallenfang, 568 F.3d 649, 657 (8th Cir. 2009)(320 Months) posted inages online and traded with other individuals); United States v. Hoover, 95 F.4d 763 (4th Cir 2024)(840 Months, both victims testified to a long period of inappropriate comments and sexual abuse); United States v. Raplinger, 555 F.3d 687, 693 (8th Cir. 2009)(450 Months, uploaded photos to the internet alongside of other girls being offered for sex trade).

Mr. Lemicy asked to be sentenced at the low end of the 15 year bench mark because sentencing him at the high end of the proposal would be cruel and unusual punishment because life without parole would not promote respect for the law or give him a chance to show that he has changed.

Any sentence by definition, that shocks the consciounce and is barbaric is therefore substantially unreasonable. The Supreme Court has made clear that the Eighth Amendment ban on cruel and unusual punishment "prohibit the imposition inherently barbaric punishment under all circumstances. Barbaric sentences do not promote respect for the law. Muzio.

An accumulation of a sentence that equals a life sentence deprives the convicted of the most basic libertys without giving hope of resteration, this sentence means denial of hope; it means that good behavior and character improvement are imaterial; it means that whatever the future might hold in store for the mind and spirit of the convicted, he will remain in prison for the rest of his life.

A life sentence improperly denies a chance to demonstrate growth and maturity.

Deterrance does not justify imposing the sedond most severe penalty, and a

penalty of a life sentence forswears alltogether the rehabilitation idea. Graham.

The guidlines routienely replace defendants near or over maximum sentence, eliminating any meaningful distinction between the least and most culpable offenders. United States v. Zauner, 688 F.3d 426 (8th Cir. 2012).

When a judge inflicts punishment that the jury verdict alone does not allow, the jury has not found all the facts which makes the law essential to the punishment, and the exceeds his proper authority . Rita.

Booker's abust of discretion standard directs appellate courts to evaluate what motivated the district judge's individualized sentencing decision. Booker's standard of review allows, indeed, requires district judges, to consider all of the factors listed inside the 3553(a), and to apply them to the individual defendant before them. Rita.

The sentencing judge states, "If the petitioner would have shown some contrition, this matter would have been resolved in another format." (Pg. 34, Dkt #287). The judge had denied every single motion that the petitioner filed throughout the whole proceeding and overruled on all of his objections to the PSI at the sentencing hearing which led the petitioner to say to the judge on the record that he knew that the judge was going to overrule on all of his objections and that he feels like he didn't get a fair chance on the whole proceeding. (see appx C-1_)

There is anecdotal evidence that [the petitioner] was given a heavier sentence because he exercized his right to trial by jury. Without a well-reasoned analysis for this disparity by the sentencing judge, we have little, if any, evidence to determine whether vindictiveness actually occured. United States v. Fry, 794 F.3d 884 (8th Cir. 2014).

The judge did not state a reason for imposing the sentence that he did. The judge did not take into consideration any of the 3553(a) factors except the nature and circumstance of the offense, (a)(1), when he sentenced the petitioner.

Because of the absence of the information to review, there is a "reasonable likelihood" the sentence was vindictive. Fry.

Section 3553(a) requires more than a mechanical recitation that a sentence complies with the requirement of section 3553(a), which was done in petitioners case. The sentencing judge was required, and failed, to hand down a well reasoned sentence, and do so in a fashion that demonstrated that the defendant received a individual consideration due to him under 3553(a).

United States v. Goodwing, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L.Ed.2d 74 (1982), articulated the standard that a presumption of vindictiveness arises whenever a detrimental action is taken after a defendant exercizes a legal right in

circumstances in which there is a reasonable liklihood of vindictiveness. @459.

The petitioner contends that the sentencing judge imposed a vindictive sentence. The petitioner asserts the vindictiveness should be infered because his sentence is substantially higher than similaly situated defendants who did not exercize their right to trial and thererfore violated Mr. Lemicy's 14th Amendment right to Due Process and Equal Protection of the Law, his 6th Amendment Right to a fair trial.

CONCLUSION

For the reasons stated above, Mr. Lemicy asks this Court to GRANT his Petition For Certiorari, and in the event that this Court does not elect to review his Petition in the Supreme Court, Mr. Lemicy asks that they remand his case to the District court to correct the Multiple Constitutional Violations present in his case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Submitted Anthony Lemicy

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