25-7149

No. ____________

ORIGINAL

FILED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Timothy R. Defoggi — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Timothy R. Defoggi 56316-037
(Your Name)

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QUESTIONS PRESENTED

1) May an Article III court sua sponte recharacterize an unambiguous filing, and then do so after adversarial briefs have been concluded and filed with the court, depriving Petitioner of his 1st Amendment right to redress and 5th Amendment right to due process?

2) May a U.S. District court choose sua sponte to utilize a post-offense Sentencing Guideline that enacts additional enhancements or punishments in violation of Article I, Section 9, Clause 3 "Ex Post Facto Clause" of the United States Consititution?

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

Criminal Case

District of Nebraska, Case No. 13-CR-105-LSC and 13-CR-105-JFB

Direct Appeal

US v. Defoggi, 838 F. 3d 701 (8th Cir. 2016)

28 USC § 2255

District of Nebraska, Case No 13-CR-105-LSC, ECF No. 346

Granting of Compassionate Release

US v. Defoggi, 2022 US Dist LEXIS 97833

Reversal of Compassionate Release

US v. Defoggi, 2023 US App. LEXIS 15640 (8th Cir. 2023)

Appeal of Petition for Writ of Error Coram Nobis

Defoggi v. US, 8th Circuit Case No. 25-3513

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Bowe v. United States, SCOTUS Case No. 24-5438 (2026)	3,11
Baransksi v. US, 880 F 3d 951, 2018 US App LEXIS 1543 (8th Cir. 2018)	10
Baranski v. US, 889 F 3d 951, 2018 US App LEXIS 1543 (8th Cir. en banc 2018)	11
Castro v. US, 540 US 375, 157 L Ed 2d 778, 124 S Ct 786 (2003)	3,6,10
Defoggi v. US, 8th Cir. Case No. 25-3513	ii
Elonis v. US, 575 US 723m 135 S Ct 2001, 192 L Ed 2d 1 (2015)	
Jacobson v. US, 503 US 540, 551-552, 112 S Ct 1535, 118 L Ed 2d 174 (1992)	5
Molina-Martinez v. US, 578 US 189, 136 S Ct 1338, 194 L Ed 2d 244 (2016)	13
Peugh v. US, 569 US 530, 544, 133 S Ct 2072, 186 L Ed 2d 84 (2013)	13
Ramdeo v. US, 136 F 4th 1348, 2025 US App LEXIS 12265 (11th Cir. 2025)	3

STATUTES AND RULES

Constitution	
Article 1, Section 9, Clause 3 "Ex Post Facto Clause	i,11,12,13
Article III	i,3,10,13
1st Amendment	i,10
5th Amendment	i,10
Statutes	
18 U.S.C. § 875(c)	5
18 U.S.C. § 2251	4
18 U.S.C. § 2252A	4
18 U.S.C. § 2252A(g)	4
18 U.S.C. § 3582(c)(1)(A)	5
28 U.S.C. § 2253(b)(2)	11
28 U.S.C. § 2255	10,13
28 U.S.C. § 2255(h)	3,6
Other	
F.R.Crim.P. Rule 32(e)(2)	9
F.R.Crim.P. Rule 32(i)(3)(B)	8
F.R.Crim.P. Rule 52(b)	6,11
F.R.E. Rule 201	7

TABLE OF AUTHORITEIS Cont.

CASES	Page No.
Sinch v. Tsoukaris, USDC New Jersey, Case No. 26CV-1536	6
Solem v. Helm, 463 US 277, 103 S Ct 3001, 77 L Ed 637 (1983)	6
Stanley v. Georgia, 394 US 557, 565, 89 S Ct 1243, 22 L Ed 2d 542 (1969)	5
United States v. Clark, 2013 US App LEXIS 14067 (8th Cir. 2023)	8
United States v. Curtin, 489 F 3d 935, 960, 2007 US All LEXIS 12110 (9th Cir. en banc 2007	5
US v. Defoggi, 839 F 3d 701 (8th Cir. 2016)	ii,5,11
US v. Defoggi, 2022 US Dist LEXIS 97833	ii,5
US v. Defoggi, 2023 US App LEXIS 15640 (8th Cir. 2023)	ii,6
US v. Morgan, 346 US 502, 74 S Ct 247, 98 L Ed 248 (1954)	10
US v. Valle, 807 F 3d 508, 511, 2015 US App LEXIS 21028 (2nd Cir. 2015)	5

OTHER Cont.	
US Sentencing Guideline (USSG) 1B1.3	13
USSG 2G2.2 (2012)	12
USSG 2G2.2 (2016)	12
USSG 2G2.2(b)(4)(B)	12
USSG 2G2.2 Application Note 1 (2016)	12
USSG 6A1.3(b)	8
USSG Amendment 801	12

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 14

INDEX TO APPENDICES

APPENDIX A Coram Nobis Initial Brief (Sealed sua sponte by the USDC)

APPENDIX B Coram Nobis Reply-Brief

APPENDIX C Motion for Evidentiary Hearing

APPENDIX D US District Court Decision

APPENDIX E Appellant Initial Brief

APPENDIX F 8th Circuit Docket and Motion to Correct the Record

INDEX TO APPENDICES Cont.

APPENDIX G 8th Circuit Panel Decision (No copy provided to Petitioner)

APPENDIX H Petition for Rehearing en banc

APPENDIX I 8th Circuit Decision en banc

APPENDIX J Criminal Case No. 13-CR-105-LSC, ECF No. 275 & Motion for copies

APPENDIX K Sentencing Transcript Excerpt

APPENDIX L Resentencing on Remand Transcript Excerpt

APPENDIX M 2012 US Sentencing Guideline for 2G2.2

APPENDIX N 2016 US Sentencing Guideline for 2G2.2

APPENDIX O 28 U.S.C. § 2255 Decision by Trial & Sentencing Judge

APPENDIX P FOIA Documents, FBI, 11/07/25

APPENDIX Q FOIA Documents, FBI, 12/12/25

APPENDIX R FOIA Documents, FBI, 02/03/26

APPENDIX S Receipt and Order, Judicial Misconduct, Judge Laurie Smith Camp

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 G & I to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. Panel decision not provided by 8th Circuit Family found out of decision thru pacer.gov

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. Case No. 13-CR-105-JFB, ECF No. 544

[ ] 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

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

The date on which the United States Court of Appeals decided my case was 01/28/26.

[ ] 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: 03/02/26, and a copy of the order denying rehearing appears at Appendix I.

[ ] 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. § 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

While it is procedurally improper for an Article III court to recharacterize Petitioner's Writ of Error Coram Nobis, Castro, infra, to a second and successive petition under 28 U.S.C. § 2255(h), this case remains reviewable by the United States Supreme Court under Bowe v. United States, Case No. 24-5438, decided January 9, 2026. Much like the granting of a Writ of Error Coram Nobis by the 11th Circuit in Ramdeo v. United States, Petitioner is seeking to correct errors of a fundamental character, one(s) that are non-custodial in nature e.g., the removal of unsupported enhancements within his PSR. Ramdeo, 136 F. 4th 1348, 2025 US App. LEXIS 12265 (11th Cir. 2025)

STATEMENT OF THE CASE

On April 9, 2013 Petitioner was arrested, charged and later convicted at trial of engaging in a child exploitation enterprise (Count 1), conspiracy to advertise (Count 2) and conspiracy to distribute (Count 3) child pornography as well as the clicking of (11) links constituting access with intent to view child pornography (Counts 4-7). [See 18 U.S.C. §§ 2251 and 2252A] These charges emanated from a social networking website wherein the FBI seized control of a web server and made these same images available to the public at-large for a period of (19) days; arguably revictimizing the very same children that they claimed to protect.

Standing on a plea of not guilty, Petitioner went to trial wherein he was convicted on all (7) counts; with the sentencing court later vacating the (2) conspiracy charges as lessor included offenses of Count 1 of the indictment. Based upon the (5) remaining charges, Petitioner was sentenced to (25) years in federal prison followed by a lifetime term of supervised release.

On direct appeal, the 8th Circuit Court of Appeals overturned the sanctity of a jury verdict, vacating the child exploitation enterprise stating, "But we do not understand how the single act of accessing an image with the intent to view it by clicking on it alone from behind one's computer screen can be done 'in concert with' anyone else." The panel of judges went on to say, "The evidence was insufficient to convict defendant of engaging in a child exploitation enterprise under 18 U.S.C. § 2252A(g) because defendant did not access child pornography 'in concert with' anyone else."; thereby leaving the clicking of (11) links as the only

remaining crimes. (See United States v. Defoggi, 839 F. 3d 701 (8th Cir. 2016))

Upon remand, U.S. District Court Judge Laurie Smith Camp unbundled the low level charges which had previously resulted in a concurrent sentence of (10) years and instead stacked them to achieve the same sentence of (25) years, rendering Petitioner's appeal meaningless. Clearly, acquitted conduct was utilized in order to increase Petitioner's sentence by 150% for the very same set of crimes, doing so without identifying any new conduct. The sentencing court justified its' excessively harsh punishment by citing online "fantasy" comments which never posed a real or credible threat as required under 18 U.S.C. § 875(c). (See Elonis v. United States, 575 U.S. 723, 135 S. Ct. 2001 (2015)) (See also Jacobson v. United States, 503 U.S. 540, 551-552, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992); Stanley v. Georgia, 394 U.S. 557, 565, 89 S. Ct. 1243, 22 L. Ed 2d 542 (1969); United States v. Valle, 807 F. 3d 508, 511, 2015 U.S. App. LEXIS 21028 (2nd Cir. 2015); and United States v. Curtin, 489 F. 3d 935, 960, 2007 U.S. All. LEXIS 12110 (9th Cir. en banc 2007))

After serving approximately (8) years in federal prison, Petitioner filed a Motion for Compassionate Release under 18 U.S.C. § 3582(c)(1)(A) wherein Judge Joseph F. Bataillon granted the motion in large part due to sentencing disparity as he had sentenced all other defendants with similar charges to (4) years in prison, while Petitioner's sentencing Judge, Laurie Smith Camp sentenced him to (25) years in prison followed by a lifetime term of supervised release. (See United States v. Defoggi, 2022 U.S. Dist. LEXIS 97833) In comparison, Judge Bataillon lamented on the record in having to sentence the highest culpable defendant who had been convicted of owning and operating (3) child pornography websites to the statutory minimum of (20) years in prison. This same defendant

was also sentencted to just (10) years of supervised release.

Upon government appeal, Judge Bataillon's decision was reversed by the 8th Circuit, returning Petitioner to federal custody just (2) days prior to his release from the halfway house. (See United States v. Defoggi, 2023 U.S. App. LEXIS 15640 (8th Cir. 2023))

In the case currently before the High Court, Petitioner sought to correct his Presentence Investigative Report (PSR), among other things, through the use of a Petition for Writ of Error Coram Nobis. After all adversarial briefs by both Petitioner and the government had concluded, an Article III court chose to recharacterize the unabmiguous filing sua sponte to a second and successive petition under 28 U.S.C. § 2255(h) without the required notice under Castro v. United States, 540 U.S. 375, 157 L. Ed 2d 778, 124 S. Ct. 786 (2003). The 8th Circuit affirmed en banc.

Ultimately, after all was said and done, Petitioner was sentenced to (25) years followed by a lifetime term of supervised release for the clicking of (11) links, seemingly one of the harshest sentences ever handed down by a federal court. Solem v. Helm, 463 US 277, 103 S Ct 3001(1983

Procedural History
As Raised in Petitioner's Writ of Error Coram Nobis

> "[T]he presumption of regularity and integrity previously and routinely afforded to the Executive branch and the United States Attorney's Office has been undeniably eroded in this jurisdiction and across the country, and this Court will no longer blindly accept statements of fact from Respondents unless they are made under oath by an individual with personal knowledge."
>
> Federal Judge Christine O'Hearn
> District of New Jersey
> February 20, 2026 IN RE: Sinch v. Tsoukaris, Case No. 26-CV-01536

Based upon the actions of the U.S. District Court and that of AUSAs Keith Becker, Michael Norris and Sarah Chang, Petitioner would assert that the cummulative effects of misconduct moved from harmless irregularity to one of constituting plain error under F.R.Crim.P. Rule 52(b),

thereby stripping Petitioner of his trial standard of "Beyond a Reasonable Doubt" and its' lessor post-conviction standard of "Preponderance of the Evidence". Petitioner reasserts the following for the clarity of the High Court and moves the Court to take Judicial Notice under F.R.E. Rule 201 as his request is supported by direct evidence.

• On December 22, 2014 defense counsel filed a Supplemental Sentencing Exhibit List, docketed as ECF No. 275. This filing included a forensic letter marked as Exhibit 9. (See Appendix A, Coram Nobis Initial Brief, Exhibit F or, as provided separately as Appendix J) This forensic letter stated, "2. The eMachines computer had much of the CP [child pornography] and child erotica images placed there because it was backing up an IOS device such as an Iphone." An iPad tablet was seized from Casto's room and an iPhone was observed belonging to Casto but the FBI chose not to seize or examine the device. More significantly, the letter went on to say, "The eMachine file creation dates for much of the pornographic content were apparently created during times that Defoggi [Petitioner who is currently before this Honorable Court] was likely at work." Per the statement provided to the FBI by Petitioner's adopted son, Christopher Casto, he advised the FBI that the eMachine computer located in the basement of the home belonged to him and he admitted to being the primary user, identifying only his brother or sister as possible users aside from himself. (See Appendix A, Coram Nobis Initial Brief, Exhibit E)

During the search of Petitioner's home, the FBI also found a USB storage device containing child pornography on Casto's TV stand where he was playing games as the home was breached. These images along with those stored on Casto's eMachine computer were attributed to Petitioner and placed within his PSR, despite his objections and forensic evidence

to the contrary. In order to demonstrate ownership of the iPad/iPhone, eMachine computer and thumb drive(s), the evidence logs show these items being seized from room "O", Casto's living space in the basement of the home. (See Appendices P & R, FOIA Documents, FBI)

Per the sworn statement provided by Jimmy Dale Bounds, the basement of the home was not shared space and was for the exclusive use of Casto. (See Appendix A, Coram Nobis Initial Brief, Exhibit D)

Despite the direct evidence that Petitioner was likely at work, ALL of the child pornography stored on Casto's eMachine computer and all of the child pornography stored on Casto's thumb drive were placed in Petitioner's PSR. It should be noted that no form of pornography was found to be stored on Petitioner's shared ASUS laptop computer.

• On January 5, 2015 Petitioner was sentenced before Judge Laurie Smith Camp. While Judge Smith Camp acknowledged and summarily denied defense objections as filed under ECFs 267 and 269, the court never acknowledged or resolved the controverted claims presented in ECF No. 275, even though it was timely filed with the court (14) days ahead of the sentencing hearing. This is a direct violation of both F.R.Crim.P. Rule 32(i)(3)(B) and U.S. Sentencing Guideline 6A1.3(b). This wrongul application of (5) points of enhancements for "600 or more images" is reversible on plain error review. (See Appendix K, Sentencing Transcripts, page 3, lines 12-21) "Under Rule 32(i)(3)(B), when a defendant objects to the 'factual allegations' contained in the PSR regarding an issue on which the government has the burden of proof, 'the government must present evidence at the sentencing hearing to prove the existence of the disputed facts." United States v. Clark, 2013 U.S. App. LEXIS 14067 (8th Cir. 2023)

• On January 30, 2017 Petitioner was resentenced on remand before

Judge Laurie Smith Camp. Defense counsel renewed his sentencing statement, sentencing memorandum and indexes which the Court renewed. (See Appendix L, Resentencing Transcripts "RS. T.", page 3, lines 18-20) The sentencing court never denied those objections on the record nor did it acknowledge or rule on the controverted claims raised in ECF No. 275. The court also issued two separate PSRs just hours prior to the sentencing hearing which caused a great deal of confusion for Petitioner and defense counsel alike. (See Appendix L, RS. T., page 3, line 24 - page 4, line 3) In fact, Petitioner's counsel stated, "The other paragraphs, 92 to 106, [the sections containing enhancements] they say they were changed." and, "If I'm wrong and there's additional, Judge, I would just object, if you will. I really haven't had time to go piece by piece, but I think that's what we're talking about." (See Appendix L, RS. T., page 5, lines 6-7 and lines 13-16) Obviously, if Petitioner's counsel was confused, Petitioner was as well. Defense counsel's confusion related to multiple versions of Petitioner's PSR with just a few hours notice is clearly observed through a review of the record. (See Appendix L, RS. T., page 3, line 24 - page 6, line 23) F.R.Crim.P. Rule 32(e)(2) requires the PSR to be provided to defendant 35 days ahead of a sentencing hearing.

REASONS FOR GRANTING THE PETITION

1) May an Article III court sua sponte recharacterize an unambiguous filing, and then do so after adversarial briefs have been concluded and filed with the court, depriving Petitioner of his 1st Amendment right to redress and 5th Amendment right to due process?

First and foremost, an Article III court is procedurally barred from recharacterizing an unambiguous pro se filing, whether it be at the District or Appellate court, or both. (See Castro v. United States, 540 US 375, 157 L Ed 2d 778, 124 S. Ct. 786 (2003)) In its' 9-0 holding, the High Court stated, "A District Court could not recharacterize a pro se litigant's motion as a first motion for postconviction relief under § 2255, unless the court (a) notified the litigant that the court intended to recharacterize the pleading, (b) warned the litigant that this recharacterization meant that any subsequent § 2255 motion would be subject to § 2255's restriction on 'second or successive' motions, and (c) provided the litigant an opportunity to withdraw the motion or to amend it so that it contained all the § 2255 claims that the litigant believed that the litigant had." As cited in his Initial Brief, Page 2, Petitioner was well aware of the 8th Circuit's unique panel decision in Baranski v. United States, 880 F. 3d 951, 2018 U.S. App. LEXIS 1543, wherein a former inmate was barred from utilizing the Writ of Error Coram Nobis as he had previously been denied relief through a habeas petition under 28 U.S.C. § 2255, a decision that contravenes United States v. Morgan, 346 US 502, 74 S. Ct. 247, 98 L. Ed.248 (1954). Petitioner had intended to challenge the Baranski panel decision before the full court as Judge Kelly, Judge Erickson, Judge Grasz and Judge Stras would grant the Baranski petition for rehearing en banc. (See

Baranski v. United States, 889 F. 3d 951, 2018 U.S. App. LEXIS 1543 (8th Cir. 2018)) By recharacterizing Petitioner's filing sua sponte, the District Court and 3-judge panel served only to muddy the water, rendering a review of the Writ of Error Coram Nobis based upon the merits moot. (See also Bowe v. United States, US Supreme Court, Case No. 24-5438, decided January 9, 2026, allowing for review en banc and on Certiorari before the US Supreme Court)

Secondly, the US District court seems to suggest, among other things, that the ex post facto use of an incorrect U.S. Sentencing Guideline which results in a harsher sentence somehow fails the statutory bar establishing that an "applicant has made a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(b)(2). Petitioner respectfully disagrees. Use of an erroneous U.S. Sentencing Guideline on remand is reversible on plain error review pursuant to F.R.Crim.P. Rule 52(b) and will be reasserted for the High Court through Question 2 below.

2) May a U.S. District court choose sua sponte to utilize a post-offense Sentencing Guideline that enacts additional enhancements or punishments in violation of Article I, Section 9, Clause 3 "Ex Post Facto Clause" of the United States Constitution?

Following a jury trial, Petitioner was convicted of a child exploitation enterprise (Count 1), 2 conspiracies (Counts 2 & 3) and the clicking of 11 links constituting access with intent to view child pornography (Counts 4-7) of the indictment. Petitioner was later sentenced on January 5, 2015 at which time he was sentenced to 25 years in prison followed by a lifetime term of supervised release. Upon direct appeal, the 8th Circuit vacated Count 1 of the indictment stating there was insufficient evidence to support the conviction. (See United States

v. Defoggi, 839 F. 3d 701 (8th Cir. 2016)) Counts 2 and 3 were earlier vacated by the trial court as lessor included offenses of Count 1. On January 30, 2017 the District Court resentenced Petitioner utilizing 2016 Sentencing Guidelines that included Guideline Amendment 801 that didn't become effective until November 1, 2016. This new 2016 Sentencing Guideline changed section 2G2.2(b)(4), adding subsection (B) which included a 4 point enhancement for "sexual abuse or exploitation of an infant or toddler" which was applied by the District Court at sentencing. It should also be noted that Application Note 1 to USSG 2G2.2 states, "'Sexual abuse or exploitation' does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor." Not only did the court wrongly utilize a post-offense Guideline but it did so without care as to the exclusion of Petitioner's crime as cited within Application Note 1. (Compare 2012 and 2016 Guidelines as provided in Appendices M and N) According to Petitioner's indictment, his predicate offenses of "access with intent to view child pornography" occurred over the period of November 21 through December 8, 2012. Hence, the appropriate and proper Sentencing Guideline should have been the 2012 guidelines as promulgated on November 1, 2012. By instead utilizing the 2016 guidelines, the sentencing court wrongly exposed Petitioner to additional punishment ex post facto in violation of Article I, Section 9, Clause 3 of the United States Constitution. (See Appendix L, Resentencing Transcript, page 7, lines 13-16)

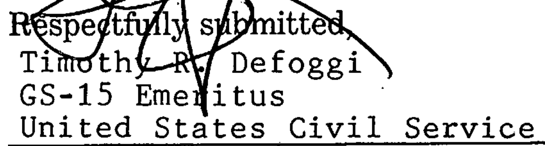
With Zero (0) criminal history at sentencing, Petitioner's offense level changed from 27 with a sentencing range of 70-87 months to 31, with a sentencing range of 108-120 months (at the time of the offense, 120 months was the statutory maximum sentence for access with intent to

view). On remand, the resentencing court unbundled the previously concurrent charges constituting Counts 4-7 and instead stacked them in order to achieve her original sentence of 300 months in federal prison followed by a lifetime term of supervised release (See Appendix L, Resentencing Transcript, page 32, lines 9-13). The court achieved the same sentence with fewer crimes through the use of acquitted conduct at the behest and encouragement of AUSA Keith Becker (See Appendix L, Resentencing Transcript, page 29, line 21 through page 30, line 6). As the High Court is aware, the use of acquitted conduct has been a long standing concern of Congress, Article III courts and the United States Sentencing Commission who, through its' 2024 Amendment cycle, changed USSG 1B1.3, significantly restricting its use.

In Peugh v. United States, 569 US 530, 544, 133 S. Ct. 2072, 186 L. Ed 2d 84 (2013), The Supreme Court held that the Ex Post Facto Clause prohibits retroactive application of amended Guidelines that increase a defendant's sentencing range. And separately, the Supreme Court stated, "When a defendant was sentenced under an incorrect Guidelines range, whether or not the defendant's ultimate sentence fell within the correct range, the error itself could, and most often would, be sufficient to show a reasonable probability of a different outcome absent the error." Molina-Martinez v. United States, 578 US 189, 136 S. Ct. 1338, 194 L. Ed 2d 444 (2016). (See also preserved arguments in Petitioner's Initial Brief (Appendix A), pages 11-14 and its included Judicial Misconduct as Exhibit C, page 4; Petitioner's Reply-Brief (Appendix B), pages 8-10; Petitioner's Motion for Evidentiary Hearing (Appendix C); and 28 USC § 2255 Decision (Appendix O), page 6, section viii where the court provides a trivial and ambiguous response.))

CONCLUSION

The petition for a writ of certiorari should be granted.



Respectfully submitted,
Timothy R. Defoggi
GS-15 Emeritus
United States Civil Service

Date: 3/21/26