No. 26-5201 ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

RANDOLPH BULLOCK - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

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QUESTIONS PRESENTED

1. Can the United States Sentencing Commission create new penalties (enhancements) via clerical edits / merger of the Guidelines without Congressional direction to do so?

2. Is Kisor v. Wilkie relevant to judicial review / application of the United States Sentencing Commission Guideline Commentary?

3. When a Congressional mandate is ambiguous but the United States Sentencing Commission Commentary conflicts with a reasonable (Kisor) analysis of Text, Structure, Purpose, and History of the mandate and Guideline, does Commentary overrule?

4. When three (3) Circuit Courts hold that USSG §2G2.2(b)(5) Pattern enhancement behavior must be related to the instant offense under a Kisor analysis, and other Circuit Courts hold otherwise, what is the proper requirement to apply the enhancement?

5. Is it incumbent on today's courts to use tools of Kisor analysis to resolve conflicts and ambiguity in agency rules?

6. For enhancements that have a substantial impact on a sentencing guideline, does Due Process require proof greater than preponderance of the evidence and require proof by at least clear and convincing evidence?

LIST OF PARTIES

The caption set out above contains the names of all the parties.

LIST OF CASES DIRECTLY RELATED TO THIS CASE

1. United States Court of Appeals for the Second Circuit
2. Case No. 23-7341
3. United States of America v. Randolph Bullock
4. Date of Judgment: December 16, 2025

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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

The judgment of the district court was appealed to the United States Court of Appeals for the Second Circuit, which affirmed the judgment on August 22, 2025. The Petitioner filed for a rehearing en banc and that petition for rehearing was denied on December 16, 2025, case no. 23-7341.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 22, 2025. Rehearing was sought and was denied on December 16, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Petitioner was convicted of three (3) counts of Possession of Child Pornography. The presentence report recommended a 5-point enhancement under §2G2.2(b)(5) for a pattern-of-activity. The plea agreement did not stipulate to the enhancement, however the Government stated in the plea agreement that it believed the 5-point enhancement was warranted. The government provided police investigation reports to support the 5-point enhancement. At sentencing, Petitioner objected to the 5-point enhancement and argued that there was insufficient evidence to support the enhancement. Despite the enhancement nearly doubling the Petitioner's guideline range, the Court found that the 5-point enhancement should apply.

The district court imposed a sentence of 97-months imprisonment followed by 20-years of supervised release. The Court imposed numerous special conditions, including a special condition that bans Petitioner from viewing or possessing any sexually explicit material, i.e., adult pornography.

ARGUMENT

1. The Application of the Enhancement In Light of Kisor v. Wilkie

Whether the enhancement under §2G2.2(b)(5) applies to Petitioner's case turns upon what weight, if any, the Court must give the Sentencing Commission's commentary supplementing those provisions. The Supreme Court's decision in Kisor v. Wilkie, 139 S.Ct. 2400, 204 L.Ed.2d 841 (2019), as well as Circuit Court opinions guide this analysis. See, e.g., United States v. Nasir, 17 F.4th 459 (3rd Cir. 2021) (en banc) and United States v. Adair, 38 F.4th 341 (3rd Cir. 2022).

In some circumstances the Sentencing Commission's commentary may be entitled to deference. See, Stinson v. United States, 508 U.S. 36, 45, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993). In considering whether that is the case, courts apply a three-step framework the Supreme Court articulated in Kisor v. Wilkie, 588 U.S. 558.

At Step 1, the court "must exhaust all the 'traditional tools' of construction", considering "the text, structure, history, and purpose of a regulation" to determine whether the regulation is genuinely ambiguous. Kisor, 588 U.S. at 573-75. "If uncertainty does not exist' after applying these tools, 'there is no plausible reason for deference,'" and the Court simply applies the unambiguous meaning of the Guideline. United States v. Dupree, 57 F.4th 1269, 1274-77 (11th Cir. 2023).

But if "genuine ambiguity remains," courts proceed to Step 2, which asks whether the commentary's interpretation of the text is "reasonable." Kisor, 588 U.S. at 575 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)). To be reasonable, that interpretation must "come within the zone of ambiguity the court has identified after employing all its interpretive tools," such that it falls within "the outer bounds of permissible interpretation" established by the rule's text, structure, and purpose. Id at 576.

Finally, if the commentary's interpretation is reasonable, at Step 3, the court "must make an independent inquiry into whether the character and context" of the agency's reasonable interpretation "entitles it to controlling weight." Id. Deference would not be appropriate if the interpretation is not the "official position" of the agency, does not implicate the agency's substantive expertise," or fails to "reflect fair and considered judgment." Id at 576-79. Only if these conditions are met does the court defer to the commentary's interpretation. See, Dupree, 57 F.4th at 1274-75.

In determining whether a regulation or Guideline is "genuinely ambiguous" courts must "consider the text, structure, history, and purpose of a regulation, in all the ways [the court] would if [the court] had no agency to fall back on." Id. at 575.

In the instant case, the Defendant was convicted of possession of child pornography and at sentencing the district court imposed a 5-point enhancement under §2G2.2(b)(5) for a "pattern of activity involving the sexual abuse or exploitation of a minor." The commentary to §2G2.2 explains that the quoted phrase "means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor, whether involving the same or different victims." U.S.S.G. §2G2.2.

Section 2G2.2(b)(5)'s plain language, read literally, admits of no temporal limitations; a defendant need only have "engaged" in certain activity. "The enhancement's scope cannot be determined from that word alone, however, and therein lies ambiguity." United States v. Debus, at 14. This Court does not need to determine whether the enhancement applies to offenses other than the offense of conviction. United States v. Chapman, 60 F.3d 894 (1st Cir. 1995) and United States v. Surratt, 87 F.3d 814 (6th Cir. 1996) "presciently" undertook the kind of context-driven textual analysis Kisor now requires.

The issue is whether the enhancement could apply under the facts of this case. It should be axiomatic that the enhancement's application is confined to "past sexual abuse or exploitation activities related to the offense of conviction" by its placement in subsection (b) "under the listing of 'Specific Offense Characteristics.'" See, Surratt, 87 F.3d at 819. Chapter Two of the Guidelines, where the enhancement is found, addresses "offense conduct", while past acts unrelated to the offense of conviction are addressed in Chapter Four as part of the defendant's criminal history.

The general focus of each provision in Section 2G2.2 provides further support for an interpretation limited in scope. Eight of that section's various provisions address what "the offense involved." One provision implicates "The material involved." U.S.S.G. §2G2.2(b)(2).

Another provision to "the defendant's conduct." §2G2.2(b)(1)(B) while three others turn on if the defendant did something such as distribute or engage in a pattern of activity. §2G2.2(b)(3)(B), (F), (b)(5). It would be an unusual interpretative exercise to single out subsection (b)(5) as the sole provision applicable to conduct unrelated to the specific offense subject to enhanced punishment, as the commentary suggest. Courts have "doubt[ed] Congress intended this result when it directed the Commission to adopt the pattern-of-activity enhancement." United States v. Debus, 2023 U.S. Dist. LEXIS 1486423 at *16 (M.D. Pa. Aug. 23, 2023).

The title of Section 2G2.2 refers only to trafficking, receiving, or possessing "material involving the sexual exploitation of a minor", not any acts of sexual exploitation themselves. §2G2.2. Courts have held that possession of child pornography does not constitute sexual abuse or exploitation of a minor. See Chapman, 60 F.3d at 897. Notably, the Sentencing Guidelines deal with the sexual exploitation of minors separately in Section 2G2.1, as clearly indicated by that provision's title. Chapman, at 897. Compare 18 USC §2251 ("Sexual Exploitation of Children") with §2252 ("Certain activities related to material involving the sexual exploitation of minors").

Congress's intent to partition the Guidelines to account for past acts of sexual exploitation unrelated to the offense of conviction somewhere other than Chapter Two is clear. The commentary advises that "an upward departure may be warranted"..."[i]f the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct)." USSG §2G2.2 cmt. no. 9.

"The absence of similar language in subsection (b)[(5)]" and its conspiciuous "classifi[cation] under the rubric of 'Specific Offense Characteristics' compelled the Chapman Court to conclude any pattern of activity must "relate to the offense of conviction." Chapman at 901.

Section 2G2.2(b)(5) is not genuinely ambiguous when examined with "traditional tools of construction." Kisor, 139 S.Ct. at 2415. "Context resolves any latent ambiguity about the enhancement's scope and forecloses consideration of the Sentencing Commission's more punitive position." United States v. Debus, 2023 U.S. Dist. LEXIS 148642 at 17-18 (M.D. Pa. Aug. 23, 2023).

Here, the Petitioner's uncharged past conduct lacks any logical or temporal connection to his admitted possession of child pornography. He did not "engage" in a pattern of activity involving the sexual abuse of a minor when he possessed images for which he pled guilty. As such, his prior uncharged conduct cannot be used to substantially enhance his sentence under §2G2.2(b)(5).

2. <u>The Reliability of Information Used at Sentencing and the Factual Basis Relied Upon for the Imposition of the §2G2.2(b)(5) Enhancement</u>

USSG §2G2.2(b)(5) provides for a 5-point enhancement if the defendant "engaged in a pattern of activity involving sexual abuse or exploitation of a minor." The Guidelines commentary defines "pattern of activity" as "any combination of two or more separate incidents of the sexual abuse or sexual exploitation of a minor by the defendant." USSG §2G2.2(b)(5) cmt. 1, <u>United States v. Pulham</u>, 735 Fed. Appx. 937, 943-44 (10th Cir. 2018).

Courts have held that "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." <u>United States v. Lucerno</u>, 747 F.3d 1242, 1248 (10th Cir. 2014). "Sexual abuse or exploitation has a specific meaning as used in this context, it encompasses only conduct that would constitute an offense under certain enumerated federal statutes." <u>United States v. Pulham</u>, 735 Fed. Appx. at 944. "More specifically, sexual abuse or exploitation includes "conduct described in 18 USCS §2241, 2242, 2251(a)-(c), 2251(d)(1)(B), 2251A, 2260(b), 2421, 2422, or 2423; (b) an offense under State law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the U.S." <u>United States v. Pulham</u>, 735 Fed. App. at 944.

Those statutes primarily concern the use of force or threats to engage in a "sexual act." <u>See</u>, 18 USC §2241-43, and 2421, 2422, and 2243. The term "sexual act" is defined in 18 USC §2246(2) as:

(A) contact between the penis and the vulva or the penis and the anus, and for the purpose of this subparagraph, contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by hand or finger or by an object, with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person, or

(D) the intentional touching, not through clothing, of the genetalia of another person who has not attained the age of 16 years with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Courts have found that "[t]his is a rather narrow definition of sexual abuse or exploitation. Common usage would include much less egregious conduct, and it is apparent that all those participating in Defendant's sentencing were thinking in terms of common usage." United States v. Pulham, 735 Fed. Appx. 937, 957 (10th Cir. 2018). Here, the presentence report ("PSR") does not state or even cite the statutory definition of sexual abuse referred to by that Guideline. At sentencing, The Court did not properly cite the definition and "there is a reasonable probability that, but for the error [in understanding the definition of sexual abuse or exploitation in the guideline] the result of the proceeding would have been different." United States v. Rosales-Mirando, 755 F.3d 1253, 1258 (10th Cir. 2014).

In this case, there was no finding of guilt in any of the instances propounded by the Government. Moreover, none of the alleged conduct in those instances would qualify as a federal offense under 18 USC §2241, 2242, 2243, 2251(a)-(c), 2251(d)(1)(B), 2251A, 2260(B), 2421, 2422, or 2423. Therefore, none of those instances would qualify for the 2G2.2(b)(5) enhancement. To be sure, neither the PSR, nor the Government, nor the Court identified which of the above specific enumerated statutes applied to Petitioner's alleged conduct.

The allegations in the PSR were not sufficiently reliable to support the enhancement. Petitioner has consistently denied the allegation, and the allegations never resulted in any prosecution. "The Court cannot impermissibly rest its pattern-of-activity enhancement solely on the PSR's factual findings." United States v. Pulham, 735 Fed. Appx. 937, 946 (10th Cir. 2018). See, United States v. Ortiz, 993 F.2d 204, 207 (10th Cir. 1993)(holding that unsworn, out-of-court statements "must have 'sufficient corroboration by other means'" to form the basis for an enhancement)(quoting USSG §6A1.3 cmt.)).

At sentencing the Court did not state its reasoning for tacitly concluding that the conduct at issue satisfied the Guidelines definition of "sexual abuse or exploitation."

At sentencing, the Court relied on the PSR and police reports to support the 5-point §2G2.2(b)(5) enhancement. While the "court may rely on hearsay at sentencing", it may only do so "as long as the evidence has sufficient indicia of reliability" and "the court makes explicit findings of fact as to the credibility, and the defendant has an opportunity to cross examine the evidence." United States v. Anderton, 136 F.3d 747 (11th Cir. 1998). Here, counsel for the defendant did not have such an opportunity.

Importantly, even if a defendant offers no rebuttal evidence, the sentencing court still has to make an independent determination as to the reliability of the sentence-enhancing evidence presented by the government, which must verify the accuracy of its information by a preponderance of the evidence. United States v. Colon-Maldonado, 953 F.3d 1 (1st Cir. 2020).

"In fact, the U.S. Court of Appeals for the First Circuit has repeatedly cautioned against relying on mere charges to infer unlawful behavior unless there is proof by a preponderance of the evidence of the conduct." Id.

Even before the Guidelines regime, the Supreme Court held it violated due process to impose a sentence on the basis of assumptions concerning a defendant's criminal record which are materially untrue. Id. To give content to this right, a court must take pains to base sentencing judgments upon reliable and accurate information. Id. Reflexive reliance on hearsay accusations can hollow out those rights. Id. After all, as the Federal Rules of Evidence and virtually every State recognize: out-of-court statements lack the conventional indicia of reliability. Id.

A sentencing court is not limited to considering only evidence of the convicted offense; it may take into account other relevant conduct, see U.S.S.G. §1B1.13 cmt. Nevertheless, there are distinct limits to this discretion, and they include a defendant's due process right to be sentenced based on accurate information. See, United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d. 592 (1972). See also, Townsend v. Burke, 334 U.S. 736, 740-41, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948)(noting that "whether caused by carelessness or design, [it] is inconsistent with due process of law" for a defendant to be sentenced based on assumptions concerning his criminal record that were materially untrue, when the defendant's sentence had been influenced by other criminal charges to which he had not pled guilty).

Here, the PSR relied upon a police report, however, not every police report satisfies the reliability floor. See, United States v. Ruby, 706 F.3d 1221, 1230 (10th Cir. 2013)(describing potential "concerns" with the police report at issue, including the officer's accuracy in recording information provided to him); United States v. Dougan, 684 F.3d 1030, 1033 n.3 (10th Cir. 2012)("Not every police complaint, i.e. report, has sufficient indicia of reliability for use in sentencing"); United States v. Jordan, 742 F.3d 276, 280 (7th Cir. 2014)("police reports are not presumed to be categorically reliable); United States v. Leekins, 493 F.3d 143, 149 (3rd Cir. 2005)("a mere police report is not inherently reliable"); United States v. Gibson, 189 Fed. Appx. 841, 846 (11th Cir. 2006)("The reliabilty of police reports is far from absolute"); United States v. Bell, 785 F.2d 640, 644 (8th Cir. 1986)(police reports "are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true"); United States v. Jones, 815 Fed. Appx. 870, 884 (6th Cir. 2020)(Courts "have explicitly discounted the reliability of police reports for sentencing purposes").

Importantly, police reports are not inherently reliable because they "can be adversarial in nature." Jordan, 742 F.3d at 280. Relatedly, police reports "can also be advocacy pieces, written for prosecutors to use in deciding whether or how to charge a suspect." Id. And, typically, police reports "are generated early in an investigation...and [thus] do not account for later events, such as...amendments [] or corrections." Prucencio v. Holder, 669 F.3d 472, 483 (4th Cir. 2012).

For those very reasons, the Federal Rules of Evidence "[d]espite their liberality toward public and business records", explicitly omit police reports from the hearsay exception for public records. Olivas-Motta v. Holder, 746 F.3d 907, 918 (9th Cir. 2013). See, Fed. R. Evid. 803(8)(A)(ii).

"And, because police reports - as a category of evidence - are not inherently reliable, it follows that courts cannot resolve disputed sentencing facts simply by assuming that information contained in a police report meets the due process reliability floor." United States v. Padilla, 793 Fed. App. 749, 757 (10th Cir. 2019). "[B]ecause police reports and complaint applications generally are not conclusive records made or used in adjudicating guilt, the Court found that sentencing courts cannot rely on those documents to enhance sentences." United States v. Cherry, 194 Fed. Appx. 128, 131 (4th Cir. 2006).

Courts have found that facts relevant to sentencing must be found by a preponderance of the evidence. United States v. Vaughn, 430 F.3d 518, 521 (2d Cir. 2005).

It is axiomatic that in a criminal trial "an indictment is not evidence of guilt," nor may it alter the presumption of innocence with which every defendant is cloaked; it is "only a finding of probable cause that a crime has been committed." United States v. Romano, 706 F.2d 370, 374 (2d Cir. 1983)(emphasis added). While the evidentiary standard at sentencing is more relaxed than at trial, and the burden of proof on the government is a preponderance of the evidence and not beyond a reasonable doubt, probable cause is a lower standard than preponderance of the evidence; it "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." United States v. Bakhtiari, 913 F.2d 1053, 1062 (2d Cir. 1990)(quoting Illinois v. Gates, 462 U.S. 213, 243 n.13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Moreover, an indictment is not meant to serve an evidentiary function. Its primary purpose is to "acquaint the defendant with the specific crime with which he is charged." United States v. Berlin, 472 F.2d 1002, 1007 (2d Cir. 1973, allow him to prepare a defense, and protect him from double jeopardy. United States v. Doe, 297 F.3d 76, 87 (2d Cir. 2002).

At Sentencing, the Government argued that Petitioner's uncharged conduct could be used to enhance his sentence under §2G2.2(b)(5). The allegations in the police report lacked probable cause for an arrest, as demonstrated by the fact that there was no arrest at all, and it is undisputed that probable cause is a lesser standard of evidence than the preponderance of the evidence.

Notably, "the record reveals nothing about why local authorities did not prosecute [Petitioner]." United States v. Torres-Melendez, 2022 U.S. App. LEXIS 7296 at *6 (1st Cir. 2022). Circuit courts have "express[ed] our distaste for [the] district court's reliance on [the] defendant's record described in the PSR or prior arrests and charges without conviction...(even when the PSR contained detailed facts underlying the individual charges), warning that [a] court imposing incarceration for a later crime cannot simply presume that past charges resolved without conviction...are attributed to flawed or lax prosecutorial or judicial systems rather than the defendant's innocence." United States v. Rondon-Garcia, 886 F.3d 14, 25-26 (1st Cir. 2018).

In United States v. Cortes-Media, 810 F.3d 62, 73 (1st Cir. 2016) the Court held that "[w]here the charges...did not bear fruit, they do not demonstrate culpability" and that where the evidence of culpability does not meet that level of reliability, the district court erred by factoring unproven charges into the sentence" . Simply put, "a sentencing enhancement based solely on unproven charges ...would be improper." United States v. Juwa, 508 F.3d 694, 700 (2d Cir. 2007).

See also, United States v. Castillo-Torres, 8 F.4th 68, 71-72 (1st Cir. 2021)(listing a string of decisions and "find[ing] it unsurprising that many of our admonitions against the use of unsupported allegations in mere charges contain no hint that they should apply only to some forms of sentence enhancements and not others").

In the case at bar, there were not any charges whatsover, only allegations. Circuit Courts have also made clear that judicial findings based solely on unreliable evidence cannot be established by a preponderance and are therefore clearly erroneous." United States v. Colon-Maldonado, 953 F.3d 1, 9-10 (1st Cir. 2020).

3. The Evidentiary Standard for Imposing a Substantial Sentencing Enhancement

Circuit courts have held that "facts found by a sentencing court must be supported by a preponderance of the evidence." United States v. Ortiz-Carrasco, 863 F.3d 1, 3 (1st Cir. 2017). The preponderance standard is not toothless, and the court must ensure that the government carries its burden by presenting reliable and specific evidence. United States v. Martinez, 584 F.3d 1022, 1027 (11th Cir. 2009). See also, United States v. Lacouture, 835 F.3d 187, fn. 6 (1st Cir. 2016) ("a sentencing enhancement cannot be applied unless the government meets its burden to the predicate facts by a preponderance of the evidence.")

The 5-point pattern-of-activity enhancement substantially increased the Petitioner's guideline range. "As a general rule, factual finding underlying a sentencing enhancement need only be found by a preponderance of the evidence." United States v. Parlor, 2 F.4th 807, 816 (9th Cir. 2021). But in some instances, especially here, a sentencing enhancement has "an extremely disproportionate impact on the sentence." United States v. Walle, 940 F.3d 473, 479 (9th Cir. 2019). "In those circumstances", courts have "held that due process may require the government to demonstrate facts underlying disputed enhancements by clear and convincing evidence." United States v. Lonich, 2020 U.S. Dist. LEXIS 623 at *64, 23 F.4th 881 (9th Cir. 2022).

In United States v. Shonubi, 103 F.3d 1085, 1089 (2d Cir. 1997), the court recognized that "[a] guideline system that prescribes punishment for unconvicted conduct at the same level of severity as convicted conduct obviously obliges the courts to proceed carefully in determining the standards for establishing whether the relevant conduct has been proven...though the Sentencing Commission has favored the preponderance of the evidence standard for resolving all disputed fact issues at sentencing, U.S.S.G. §6A1.3, p.s., comment., we have ruled that a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence."

In United States v. Kikumura, 918 F.2d 1084 (3rd Cir. 1990), expressed concern that, in some cases, establishing facts pertinent to sentencing but not resulting in conviction by a preponderance of the evidence "can create the potential for significant unfairness." Id at 1099.

The Petitioner contends that in extraordinary circumstances, such as the five-level increase in his sentence, where the disputed sentencing factors become "a tail wags the dog of the substantive offense," McMillan v. Pennsylvania, 477 U.S. 79, 88, 91 L.Ed.2d 67, 106 S.Ct. 2411 (1986), due process requires proof by clear and convincing evidence. The Supreme Court has noted "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." United States v. Watts, 519 U.S. 148, 156, 136 L.Ed.2d 554, 117 S.Ct. 633 (1997)(per curiam).

Some circuit courts require clear and convincing evidence for extreme sentencing enhancements. See, United States v. Jordan, 256 F.3d 922, 927-29 (9th Cir. 2001); United States v. Paster, 173 F.3d 206, 219-21 (3rd Cir. 1999). While most courts use the preponderance of evidence standard, courts have recognized that "legal rules-even rules that function perfectly well in familiar contexts when stated in categorical terms - cannot always be applied in extreme situations."

Kikumura, 918 F.2d at 1100 (3rd Cir. 1990).

Here, the 5-level enhancement doubled the guidelines range and an increase of this magnitude approximates the "tail wagging the dog" situation recognized by the Eighth Circuit in United States v. Bradford, 499 F.3d 910, 920 (8th Cir. 2007) (increase in the permissible sentencing range could be "an extreme' case where due process requires clear and convincing evidentiary support."); United States v. Garth, 540 F.3d 766, 773 (8th Cir. 2008)(acknowledging continuing validity of "clear and convincing" standard in some cases). Courts have held that an enhancement of five levels "is extreme." United States v. Stults, 2008 U.S. Dist. LEXIS 106344 (8th Cir. 2008).

In this case, the enhancement would have "an extremely disproportionate effect on the sentence relevant to the offense of conviction." United States v. Romero-Rendon, 220 F.3d 1160 (9th Cir. 2000). See also, United States v. Jordan, 256 F.3d 922, 926 (9th Cir. 2001)(considering combined impact of sentencing enhancements when deciding which standard of proof to apply).

There is no "bright-line" rule governing the application of the extremely disproportionate effect test; rather, courts look to the totality of the circumstances in determining whether the test is met. See, Jordan, 256 F.3d at 928. Courts have identified six factors that should be considered: "(1) whether the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment; (2) whether the enhanced sentence negates the presumption of innocence or the burden of proof for the alleged crime; (3) whether the facts offered in support of the enhancement create new offenses requiring separate punishment; (3) whether the increase in sentence is based upon the extent of the conspiracy; (5) whether the increase in number of offense levels is less than or equal to four; and (6) whether the length of the enhanced sentence more than doubles the length of the sentence authorized by the initial Guidelines range "in a case where the defendant would otherwise received a relatively short sentence." United States v. Salvatierra, 268

Fed. Appx. 516 (9th Cir. 2008).

On number 5 above alone, as the increase in offense level is greater than four, factor 5 weighs in favor of applying a heightened standard of proof. Here, the district court should have applied the clear and convincing standard. The Ninth Circuit has held that Factor 6 is applied to the totality of enhancements, not just a single enhancement, so in this case, Factor 6 applies as the "enhanced sentence") is five (5) times the length of the unenhanced sentence, forcing a higher standard of proof on all enhancements. Many courts in the Ninth Circuit have adhered to this rubric, requiring a higher standard of proof. The "tail wagging the dog" is used in cases where the totality of enhancements creates a sentence length of three (3) times or more the length of the unenhanced sentence. See, Jordan, 256 F.3d 922 (9th Cir. 2001).

Whereas the base offense level with acceptance of responsibility is 15 (18 to 24 months), due to other enhancements, and the pattern of activity enhancement raised the sentence guideline by 40-50 months, increasing the offense level to over 30, which substantially overshadows the base offense.

4. The History of the Sentencing Guidelines Demonstrates that the 5-Point Pattern of Activity Enhancement Should Apply to Conduct in USSG §2G2.1, not §2G2.2

The Sentencing Commission formulates and constantly refines sentencing standards. The Sentencing Commission "has the capacity courts lack" and can "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." Kimbrough v. United States, 552 U.S. 85, 128 S.Ct. 558, 570, 169 L.Ed.2d 481 (2007).

In formulating the Guidelines, the Commission developed and used data ~~a~~ on past practices and recidivism. See, U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing (Nov. 2004)("Fifteen-Year Assessment") at 14. Courts have held that based on these sentencing statistics, the Commission establshed the offense levels for each crime, linked to a recommended imprisonment range. Fifteen-Year Assessment at 14.

When Guidelines are not the result of "the Commission's exercise of its characteristic institutional role," such as when they are not based on an empirical approach, but are instead keyed to or guided by statutory directives, a court is not presented with the "ordinary case," in which "the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve §3553(a) objectives.'" See, e.g. Kimbrough, 128 S.Ct. at 574. Consequently, the Guideline range of imprisonment for those crimes are a less reliable appraisal of a fair sentence. Id.

For policy reasons, and because of statutory mandatory minimum sentences, the Commission departed from past practices in setting offense levels for such crimes as fraud, drug trafficking, and child abuse crimes and sexual offenses. Fifteen-Year Assessment at 15, 72-73.

The Guidelines for child exploitation offenses were not developed under the empirical approach, but were promulgated, for the most part, in response to statutory directives. See, U.S.S.G. App. C, Vol. I, Amends. 537 & 538 (Nov. 1, 1996); Vol. II, amend. 592 (Nov. 1, 2000), 615 (Nov. 1, 2001), 649 (April 30, 2003); Supp. Vol. amend. 651 (Oct. 27, 2003), 664 (Nov. 1, 2004); United States Sentencing Commission, Report to Congress: Sex Offenses Against Children, Findings and Recommendations Regarding Federal Penalties (June 1996)("Sex Offenses Against Children Report"). The Commission itself acknowledges that "[t]he frequent mandatory minimum legislation and specific directives to the Commission to amend the Guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress." Fifteen-Year Asse ss ment at 73.

At the inception of the Guidelines, simple possession of child pornography was not a crime and the relevant Guideline provision, §2G2.2, was limited to "transporting, receiving, or trafficking" offenses. See, U.S.S.G. §2G2.2 (1987). The crimes of possession and possession with intent to sell were added to the statute as part of the Crime Control Act of 1990. See, Pub. L. 101-647, §323(b), 104 Stat. 4789, 4818-19 (1990).

Correspondingly, Congress directed the Sentencing Commission to "amend existing Guidelines for sentences involving sexual crimes against children...so that more substantial penalties may be imposed if the Commission determines current penalties are inadequate." Pub. L. 101-647, 1990 S.3266, Title III, §323(a), (b), 104 Stat. 4789, 4819 (Nov. 29, 1990).

In response, the Commission proposed the creation of a separate guideline provision, §2G2.4, with a base offense level of 10 to cover possessing, receiving, or transporting child pornography. Under the Sentencing Commission's proposal, trafficking would continue to be covered in §2G2.2, with a base offense level of 13.

Later, over the objection of the Sentencing Commission, Congress, reacting to the erroneous perception that the Sentencing Commission had lessened penalties for child pornography crimes, again direct the Commission to alter the Guidelines. See, 137 Cong. Rec. H6736-02, H6737 (1991). In doing so, Congress rejected the Sentencing Commission's advice and abandoned the studied empirical approach to child pornography sentencing. See id. at H6738 (Correspondence to Congressman Edward R. Roybal from Sentencing Commission Chairman William Wilkins).

Congress explicitly directed the Sentencing Commission to increase the base offense level for simple possession from 10 to 13, to include "receiving" pornography in the Guidelines section that governed trafficking and transporting.

to increase the base offense level for receiving, transporting and trafficking from 13 to 15 and to add enhancements for the number of items possessed and for a pattern of activity involving the sexual abuse or exploitation of a minor. Id. at H6741.

In 1995, Congress again directed the Commission to increase penalties for child pornography and other sex crimes against children. See U.S.S.G. App. C. Vol. 1, Amends. 537 & 538 (November 1996). It also directed the Sentencing Commission to prepare a report and analysis of sex offenses against children and child pornography for submission to Congress. See, Sex Crimes Against Children Prevention Act of 1995, Pub. L. No. 104-71, H.R. 1240, 104th Cong., 109 Stat. 774, 775 (1995).

The Sentencing Commission carried out the directive by increasing the base offense levels for producing, trafficking, and possessing child pornography by two levels and adding a two-level enhancement for the use of a computer. The Commission also added other amendments clarifying and broadening the definition of the "pattern of activity involving sexual abuse of a minor" enhancement to apply to conduct unrelated to the offense of conviction in order to "increase the sentences for the most dangerous offenders." It still only applied under §2G2.2, not possession. see, U.S.S.G. App. C, Vol. I, amend. 537.

In its report to Congress, noting that "[i]t appears that a significant portion of child pornography offenders have a criminal history that involves the sexual abuse and exploitation of children," the Sentencing Commission recommended that Congress increase the statutory maximum sentences for production of child pornography and double the statutory maximum for offenders with prior convictions for sex abuse crimes. Sex Offenses Against Children Report at ii. The amendments and recommendations were intended to "ensure lengthy incarceration of repeat sex offenders who show the greatest risk of victimizing children." Id. at i. Noting that it was constrained by the 1991 Congressional directive that cases involving receipt of pornography should be sentenced under the trafficking guideline rather than the possession guideline, the Commission contemplated consolidating the trafficking/receipt and possession guidelines in a future amendment in order to reduce unwarranted disparity between convictions for receipt and those for possession. Id. at 11, 41.

In compiling and analyzing its statistics, the Sentencing Commission noted that federal prosecutions for child sex offense represented a small percentage of the total number of such cases nationwide, because the vast majority of sex offenses were prosecuted in state court. Id. at 1.

Congress responded to the Commission's report with new legislation increasing penalties for child pornography, exploitation, and abuse. Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, 1998 H.R. 3494, 105th Cong., 112 Stat. 2974 (1995)(enacted).

Congressional enactment of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (the "PROTECT Act") established a five-year mandatory minimum sentence for trafficking/receipt offenses and made several direct amendments to the Guidelines. See, PROTECT Act, Pub. L. No. 108-21, 2003 S. 151, 108th Cong., 117 Stat. 650, 653 (2003)(enacted); U.S.S.G. App. C, Vol. II, amend 649 (April 30, 2003).

While implementing unrelated directives of the Act, the Sentencing Commission collapsed the guideline dealing with possession (formerly U.S.S.G. §2G2.4) into the guideline dealing with trafficking of pornography (U.S.S.G. §2G2.2). See, U.S.S.G. App. C., Supp. Vol., amend 664 (Nov. 1, 2004). Notably, nothing in PL 108-21 directed the Commission to collapse §2G2.4 into §2G2.2. The Commission did this on their own as a clerical change.

This consolidation allowed the pattern-of-activity enhancement to be applied to simple possession cases that were never before subjected to any such enhancement as the pattern-of-activity enhancement was originally implemented to enhance sentences involving actual exploitation and abuse.

The Sentencing Commission's empirical analysis never recommended that the pattern-of-activity enhancement should apply in possession cases. Rather, the enhancement was able to be applied to possession cases only because the Commission consolidated §2G2.4 and §2G2.2 sentencing guidelines. It is clear from the history of the enhancement that its purpose was to enhance the sentences of those offenders who were charged with actual exploitation or abuse statutes, and not simple possesion cases.

After Congress directed the Commission to add the pattern-of-activity enhancement to §2G2.2, and not §2G2.4, Congress approving the ensuing Amendment. There were numerous other changes between then and 2004 when the Commission could have added the pattern-of-activity enhancement to §2G2.4, but chose not to. Lastly, the clarification in 1996 that the pattern-of-activity included conduct unrelated to the offense was added by the Commission, not by any Congressional statutory directive.

CONCLUSION

For all of the reasons stated herein, the Petitioner respectfully requests that the Court grant the Petition for a writ of certiorari.

Respectfully Submitted,

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