No. 10-727

In the Supreme Court of the United States

WILLIAM IREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the standards applied by the court of appeals in reviewing petitioner's sentence for reasonableness are inconsistent with *United States* v. *Booker*, 543 U.S. 220 (2005), and *Gall* v. *United States*, 552 U.S. 38 (2007).

2. Whether the court of appeals abused its discretion by delaying issuance of the mandate after a panel of the court affirmed petitioner's sentence.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-257) is reported at 612 F.3d 1160. The vacated panel opinion of the court of appeals (Pet. App. 258-266) is reported at 563 F.3d 1223.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2010. On October 12, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 24, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was

convicted of production of child pornography, in violation of 18 U.S.C. 2251(c). He was sentenced to 210 months of imprisonment, to be followed by a life term of supervised release. A panel of the court of appeals affirmed. Pet. App. 258-266. On its own motion, the en banc court voted to rehear the case and vacated the panel opinion. *Id.* at 322-323. The en banc court vacated petitioner's sentence and remanded with instructions that the district court impose the 30-year sentence recommended by the advisory Sentencing Guidelines. *Id.* at. 1-257.

1. Between 2001 and 2005, petitioner made numerous trips to brothels in Cambodia, where he photographed and videotaped himself raping and sexually torturing at least 50 children, ranging in age from four to 16. Pet. App. 4-7; Presentence Investigation Report (PSR) ¶¶ 17-18.[1] Petitioner paid up to $1500 for the use of each child and usually purchased two or three children at a time. Pet. App. 4. After federal agents intercepted e-mails petitioner sent offering to trade child pornography, the agents searched petitioner's home and found a computer hard drive containing more than 1200 images of petitioner sexually abusing children.[2] *Id.* at 8; PSR ¶¶ 16-17. Further investigation revealed that images petitioner produced had been widely circulated on the internet, turning up in child-pornography investiga-

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[1] Petitioner did not object to the factual findings in the PSR, Pet. App. 274, and admitted in the district court that he had "done the things which are graphically spelled out in it." *Id.* at 6 n.2.

[2] Petitioner admitted that after he began having sex with children in Cambodia, he sought out child pornography on the internet. Pet. App. 77 n.25. Petitioner also acknowledged lying to his wife about credit card charges he incurred for accessing pornography websites and stealing from his company to support his sexual activities. *Id.* at 90.

tions conducted by more than 100 law enforcement agencies. Pet. App. 8-9; PSR ¶ 17.

Photographs and videos petitioner produced showed him "engaged in vaginal and anal intercourse with prepubescent Asian girls" who were "tied up and bound with black and grey duct tape." Other images depicted petitioner "on a bed with several prepubescent female Asian children performing oral sex on him while he perform[ed] oral sex on them." There were images of petitioner "engag[ing] in anal and vaginal intercourse with a prepubescent Asian female with the words '9 Yo Fuck' marked on her body," and "an arrow * * * painted on her body which point[ed] to her vaginal area." In some of the images, the words "'Front,' 'Back,' 'Brown,' 'Back door,' and '9 Yo Fuck' [were written] on prepubescent girls' bodies," with "arrows pointing to the vaginal and anal areas." Petitioner also appeared "with nude prepubescent children posing as trophies." Pet. App. 6-7; PSR ¶ 18.

Other images showed petitioner "inserting a plastic green/yellow glow stick, dildos, cockroaches, and candy in the vaginal cavity of prepubescent Asian females." In several images, petitioner was depicted "inserting a plastic tube into the vagina of a prepubescent Asian female," with "the plastic tube containing cockroaches crawling into the vagina of these children." One image showed petitioner "performing vaginal intercourse on a prepubescent girl"; imbedded on the image was the phrase: "BIG COCK PUSH BUG DEEP INTO 9 YO GIRL, SHE HURT IN PANE." Pet. App. 7; PSR ¶ 18.

2. a. Petitioner pleaded guilty to production of child pornography, in violation of 18 U.S.C. 2251(c). Pet. App. 9-10. Section 2251 provides for a mandatory minimum sentence of 15 years of imprisonment and a maximum

sentence of 30 years of imprisonment. 18 U.S.C. 2251(e). The probation office prepared a presentence investigation report calculating a total offense level of 43, PSR ¶ 51, and a criminal history category of I, PSR ¶ 53, yielding an advisory Guidelines range of life imprisonment. PSR ¶ 73. Because that range exceeded the statutory maximum sentence, however, the statutory maximum of 360 months of imprisonment became the advisory sentence. *Ibid.*; see Guidelines § 5G1.1(a).

Petitioner requested a downward variance to "15-20 years in prison." Pet. App. 12; Pet. Sent. Mem. 9-11. Relying on psychological evaluations diagnosing him with pedophilia, petitioner argued that he had "limited ability to control [his] behavior," but that he was amenable to treatment and posed a relatively low risk of recidivism. Pet. App. 14-18; Pet. Sent. Mem. 9-10. The government urged the court to impose a sentence of 30 years of imprisonment, arguing that a below-Guidelines sentence would be unreasonable in light of petitioner's "horribl[e]" sexual abuse of numerous children over a period of years. Pet. App. 12-13; Gov't Sent. Mem. 5-6.

b. At sentencing, the district court adopted the PSR's factual findings and Guidelines calculations. Pet. App. 274. Several of petitioner's family members and friends testified about his past acts of generosity and kindness. *Id.* at 23-25, 286-305. Dr. Ted Shaw, a psychologist who had examined petitioner, confirmed petitioner's diagnosis as a pedophile who was sexually interested in children younger than 13. *Id.* at 23, 284. Dr. Shaw explained that pedophilia is a "well-recognized disorder," and "not a disorder that someone chooses." *Id.* at 20, 281. According to Dr. Shaw, "the availability of child images, particularly on the Internet, has fueled an epidemic of pedophilia" in "people [who] might not

have even known that they suffered from it." *Ibid.* The court asked whether "a person who acts out as a result of this condition [is] acting totally of rational free will or * * * as a result of something that is in essence an illness that he at that point has no control over?" *Id.* at 21, 282. Dr. Shaw responded that "[p]edophiles are capable of not re-offending, even if they have an urge, in the same way that compulsive dessert eaters can choose to not eat dessert." *Id.* at 22, 283. Dr. Shaw also testified that petitioner was "in the medium low to medium or moderate risk categories" for recidivism, "which is below a threshold of likely," and that by the time petitioner was released, he would have "experienced a reduction naturally in testosterone and a reduction in sex drive." *Id.* at 19, 278-279. Dr. Shaw concluded that petitioner was "amenable to treatment," *id.* at 276-278, noting that with effective treatment, many pedophiles "are in recovery and doing just fine." *Id.* at 22-23, 282-283.

Petitioner's counsel requested a below-Guidelines sentence, arguing that "the behavior of a pedophile is not totally volitional" and that "other than this disease," petitioner had lived an "exemplary life." Pet. App. 25, 307-310. Petitioner also addressed the court and apologized for his "horrible deeds." *Id.* at 27, 310.

The government argued that the Guidelines sentence of 30 years was appropriate for petitioner's repeated acts of torture directed at children as young as four years old, which "forever ruined" the children's lives. Pet. App. 27-29, 310-313. The prosecutor pointed out that petitioner was "not being prosecuted for being a pedophile," but for his crimes, and that just "[a]s an alcoholic doesn't have to drive a car, a pedophile doesn't have to put [himself] in a brothel in Cambodia." *Id.* at 27, 310-311.

c. The district court addressed the sentencing factors in 18 U.S.C. 3553(a).[3] Pet. App. 29-35, 313-318. The

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[3] Section 3553(a) provides:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code * * * [;]

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code * * * [;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. 3553(a).

court found that petitioner's conduct was "horrific," that "[t]he victims were numerous and perhaps the most vulnerable of the world's society," and that the offense was at "the very top in terms of its seriousness and its effect on other human beings." *Id.* at 30, 314. After noting that the "young children were victims who may never, never overcome their abuse," the court stated that "[petitioner] and his family and friends are also victims here; and society at large is a victim because, as Dr. Shaw indicated, * * * the Internet * * * has made possible what Dr. Shaw describes as an epidemic of child pornography." *Ibid.* The court concluded that "in terms of the characteristics of the offense, the seriousness of it itself, the longstanding, long-term engagement in it certainly does not mitigate in favor of any leniency." *Id.* at 30-31, 314.

Turning to petitioner's history and characteristics, the court found that he had been a "good husband and father," "a good friend," and "a good person to his community," and that except for "lies and thefts" petitioner committed to "cover up his illness," he had not "engaged in any other sort of criminal conduct or conduct representing poor character." Pet. App. 31, 315. The court also found that petitioner's pedophilia, "if you look at the reports of the mental health people here and into the literature," made his conduct "not purely volitional"; rather, petitioner's actions "were due in substantial part to a recognized illness." *Ibid.* The court also found it "appropriate to credit the opinion of the mental health professionals" that petitioner was "pursuing treatment and * * * doing so apparently successfully and, in the view of the mental health professionals, is treatable and has a low risk of recidivism." *Ibid.* The court found the risk of recidivism "somewhat academic," however, not-

ing that by the time petitioner was released from prison, he would be "at an age where recidivism would be unlikely, just from a physiological standpoint." *Id.* at 32, 315.

Finally, the court considered the need for the sentence to provide adequate deterrence and protect the public. The court stated that "a serious sentence is hopefully going to deter others * * * , although when we're dealing with an illness like this, I'm not sure that that rationally follows." Pet. App. 32, 316. Nevertheless, the court stated, "deterrence is an appropriate consideration, and a stiff sentence is in keeping with the seriousness of this offense." *Ibid.* The court found that a 30-year sentence was not necessary to protect the public, given petitioner's age, his amenability to treatment, and his "low risk of recidivism." *Id.* at 32-33, 316-317. The court concluded that, in assessing "what promotes respect for the law and provides just punishment[,] * * * a 30-year sentence, given the personal factors that I have touched upon, is greater than necessary to accomplish the statutory objectives," but that "in light of the seriousness of the crimes, * * * a sentence above the mandatory minimum is called for." *Id.* at 33, 317. The court sentenced petitioner to 210 months (17½ years) of imprisonment, to be followed by a life term of supervised release. *Id.* at 33-34, 317.

3. On the government's appeal, a three-judge panel of the court of appeals affirmed petitioner's sentence. Pet. App. 258-266. The court found that the district court had given reasoned consideration to the sentencing factors in 18 U.S.C. 3553(a) and that the sentence it imposed was "within the outside borders of reasonable sentences for this case." Pet. App. 263-265.

4. The court of appeals, on its own motion, vacated the panel opinion and ordered rehearing en banc. Pet. App. 322-323. The en banc court vacated petitioner's sentence and remanded with instructions to the district court to impose a sentence within the Guidelines range, *i.e.*, 30 years.[4] *Id.* at 1-257. The court recognized that this Court's decisions in *United States* v. *Booker*, 543 U.S. 220 (2005), and *Gall* v. *United States*, 552 U.S. 38 (2007), required it to apply a deferential standard in reviewing sentences for substantive reasonableness and to reverse only where the "district court abused its discretion by committing a clear error in judgment." Pet. App. 2, 54-66. The court held that a sentencing court abused its discretion when it "fail[ed] to afford consideration to relevant factors that were due significant weight," "g[ave] significant weight to an improper or irrelevant factor," or "commit[ted] a clear error in judgment in considering the proper factors." *Id.* at 55 (quoting *United States* v. *Campa*, 459 F.3d 1121, 1174 (11th Cir. 2006) (en banc)). In order to review the district court's balancing of the Section 3553(a) factors, the court explained, it was "required to make the [sentencing] calculus" itself and to "consider the totality of the facts and circumstances." *Id.* at 56-57 (quoting *United States* v. *Pugh*, 515 F.3d 1179, 1191-1192 (11th Cir. 2008)). The court emphasized that it could not vacate a sentence "merely because we would have decided that another one is more appropriate"; rather, reversal was warranted only where the court found, "after giving a full measure of deference to the sentencing judge, that

[4] Petitioner's resentencing has been stayed pending resolution of his certiorari petition. Pet. App. 326-353.

the sentence imposed truly is unreasonable." *Id.* at 60-61.

Applying those principles, the court of appeals held that the district court committed a clear error in judgment in weighing the Section 3553(a) factors and arriving at the sentence it imposed. Pet. App. 75-130. The court identified numerous errors in the district court's reasoning, including its mistaken view of petitioner as a "victim" (*id.* at 75-79), its reliance on the theory that pedophiles have reduced volition in committing sex crimes against children (*id.* at 79-86), and its suggestion that petitioner's family support and community ties could "remotely approach the heavy weight stacked against him for the criminal acts he committed" (*id.* at 86-92). The court found that the district court failed to give adequate weight to the seriousness of petitioner's offense and the harm inflicted on the victims (*id.* at 93-103), the importance of deterring child sex offenses (*id.* at 103-108), and the need to protect the public (*id.* at 108-118); "effectively ignored" the Guidelines range and policy statements that advised against a below-Guidelines sentence (*id.* at 118-123); created a substantial disparity with sentences imposed for comparable offenses (*id.* at 123-128); and unreasonably concluded that a 17½-year sentence was sufficient to reflect the seriousness of the offense and to promote respect for the law (*id.* at 129-130).

The court concluded that in the circumstances of this case, "[n]othing less than the advisory guidelines sentence of 30 years" would "serve the sentencing purposes set out in § 3553(a)." Pet. App. 130-136. Accordingly, it remanded with directions that the district court

resentence petitioner within the Guidelines range.[5] *Id.* at 136.

Judge Tjoflat concurred in part and dissented in part. Pet. App. 139-238. He concluded that petitioner's sentence was an abuse of discretion because the district court's findings about the seriousness of petitioner's offense—that his crime was "horrific" and at "the very top in terms of seriousness"—were impossible to reconcile with the sentence the court imposed. *Id.* at 207-212. Judge Tjoflat therefore agreed with the majority that petitioner's sentence should be vacated. *Id.* at 139-140, 212. Judge Tjoflat disagreed, however, with the majority's decision to remand with instructions that the district court impose a Guidelines sentence. *Id.* at 139, 213-238. In Judge Tjoflat's view, the majority had effectively applied de novo review and had "assume[d] the role of resentencer" by considering "evidence and arguments never offered to the district court, mak[ing] new findings, reweigh[ing] the § 3553(a) factors, and concluding as a matter of law that [petitioner] must be sentenced to 30 years' imprisonment." *Id.* at 214-232.

Judge Edmondson, joined by Judges Birch, Barkett, and Martin, dissented. Pet. App. 239-251. Judge Edmondson believed that the abuse of discretion standard of review required only "some reasonable basis in the record" for the district court's sentencing decision and that an appellate court overstepped its authority by "reweighing * * * the evidence or giving the facts a different construction * * * to grant something in the record more or less value" than the district court did. *Id.* at 240-244. Applying that standard to this case,

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[5] In a brief concurring opinion, Judge Hill agreed that petitioner's offense "demand[ed] the maximum sentence." Pet. App. 137-138.

Judge Edmondson concluded that "the record as a whole was sufficient to allow * * * the imposition of something less than the maximum sentence," *id.* at 244-249, and that the sentence the district court imposed was not "beyond the outside borders" of reasonableness. *Id.* at 250. Judge Birch and Judge Barkett issued separate dissents expressing similar views. *Id.* at 252-257.

ARGUMENT

1. Petitioner contends (Pet. 12-37) that the court of appeals "effectively applied de novo review" in holding that his sentence was substantively unreasonable and that its decision conflicts with decisions of this Court and other courts of appeals. Petitioner's contention is mistaken, and further review is not warranted.

a. In *United States* v. *Booker*, this Court held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial fact-finding under mandatory federal Sentencing Guidelines. 543 U.S. 220, 226-244 (2005). To remedy that Sixth Amendment problem, *Booker* severed 18 U.S.C. 3553(b) to make the Guidelines "effectively advisory." 543 U.S. at 245. It also severed 18 U.S.C. 3742(e), which had served to reinforce mandatory guidelines by "set[ting] forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range." 543 U.S. at 259. In its place, the Court adopted appellate review for "unreasonable[ness]." *Id.* at 261.

In *Gall* v. *United States*, this Court held that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." 552 U.S. 38, 41 (2007). In applying that stan-

dard, a court of appeals must ensure that the district court "correctly calculat[ed] the applicable Guidelines range," "consider[ed] all of the § 3553(a) factors," "ma[de] an individualized assessment based on the facts presented," and "adequately explain[ed] the chosen sentence to allow for meaningful appellate review." *Id.* at 49-50. If the district court fulfilled these procedural requirements, an appellate court may assess the substantive reasonableness of the sentence. *Id.* at 51; see *Rita* v. *United States*, 551 U.S. 338, 354 (2007) (noting that "district judges at times make mistakes that are substantive" and "impose sentences that are unreasonable," and that "[c]ircuit courts exist to correct such mistakes when they occur"). In conducting its review, the appellate court may not apply a presumption of unreasonableness because the sentence under review is outside the Guidelines range and may not hold the sentence unreasonable simply because it would have concluded that a different sentence was appropriate. *Gall*, 552 U.S. at 51.

In reviewing petitioner's sentence for unreasonableness, the court of appeals recognized that the abuse of discretion standard adopted in *Booker* required it to "accord[] 'substantial deference' to the district court's sentencing decisions." Pet. App. 46 (quoting *Koon* v. *United States*, 518 U.S. 81, 97-99 (1996)). Under that standard, the court held, "[t]he relevant question * * * is not whether we would have come to the same decision if deciding the issue in the first instance * * * [but] whether the district court's decision was tenable, or, we might say, 'in the ballpark' of permissible outcomes." *Id.* at 55 (quoting *Ledford* v. *Peeples*, 605 F.3d 871, 922 (11th Cir. 2010)).

Petitioner contends (Pet. 21-27) that the court of appeals, by reweighing the Section 3553(a) factors based on its own analysis of the facts and circumstances of this case, in effect applied the same standard that led to this Court's reversal of the Eighth Circuit in *Gall*. Contrary to petitioner's suggestion, *Gall* did not prohibit an appellate court from reviewing the district court's balancing of the statutory factors as part of its determination of the substantive reasonableness of a sentence. See *Gall*, 552 U.S. at 57-59 (finding that district court "quite reasonably attached great weight" to Gall's voluntary withdrawal from drug conspiracy and "self-motivated rehabilitation"). Instead, the Court in *Gall* reversed the Eighth Circuit's decision because the court of appeals had not given "due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 59-60. The court of appeals in this case emphasized the deferential nature of its review of the district court's weighing of the Section 3553(a) factors, Pet. App. 66 n.20, and recognized that under *Gall*, the appropriate question was not whether "in its view" the sentence was appropriate, but "whether the district court's weighing and the resulting sentence were reasonable." *Id.* at 62-63 n.18; see *id.* at 58 n.15 (court's "recognition of the fact that statutory criteria are at play" did not mean that it was "reviewing *de novo* the district court's balancing of those criteria").

Petitioner is incorrect in suggesting (Pet. 26 & n.2) that the court of appeals' application of the abuse of discretion standard conflicts with the decisions of other courts of appeals. Those courts recognized that review of the district court's balancing of the statutory factors

must be deferential.[6] But following the decision in *Gall*, courts of appeals have also "consider[ed] whether [a] factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case." *United States* v. *Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc). As the Second Circuit has explained, that approach "ensures that appellate review, while deferential, is still sufficient to identify those sentences that cannot be located within the range of permissible decisions." *Ibid.*; see Pet. App. 64-66 & n.20 (citing decisions from nine other circuits authorizing consideration of sentencing courts' weighing of Section 3553(a) factors and agreeing with those courts about

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[6] See *United States* v. *Zapata*, 589 F.3d 475, 488 (1st Cir. 2009) (sentencing court's "decision to emphasize the nature of the crime over the mitigating factors" was "not a basis for a founded claim of sentencing error"; reasonableness requires only "a plausible sentencing rationale and a defensible result") (citations and internal quotation marks omitted); *United States* v. *Tomko*, 562 F.3d 558, 574 (3d Cir. 2009) (en banc) (court of appeals would evaluate the substantive reasonableness of a sentence "based on the reasons that the district court provided, in light of the particular facts and circumstances of [the] case" and would "reverse only when we discern an abuse-of-discretion"); *United States* v. *Douglas*, 569 F.3d 523, 527-528 (5th Cir. 2009) ("the district court must consider various factors in crafting an individualized sentence and is free to give more or less weight to factors already accounted for" in the advisory Guidelines range); *United States* v. *Muñoz-Nava*, 524 F.3d 1137, 1148 (10th Cir. 2008) (sentencing court's emphasis on defendant's family circumstances was "supported by the record" and not "arbitrary, capricious, whimsical, or manifestly unreasonable"); *United States* v. *Smart*, 518 F.3d 800, 807-808 (10th Cir. 2008) (court of appeals "may not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them, as a legal conclusion to be reviewed de novo," but instead must defer to the sentencing court's "determinations of the weight to be afforded" to its factual findings).

"the deferential nature of the review"). Petitioner's disagreement with the court of appeals' description and application of that standard to the facts of this case does not warrant further review.[7]

b. Petitioner contends (Pet. 31-33) that the court of appeals incorrectly applied "closer review" to the district court's determination that petitioner's diagnosis as a pedophile meant that his volition was impaired with respect to the commission of sexual offenses against children. The court of appeals held that the finding that petitioner's conduct was not "purely volitional" could not "reasonably carry much weight," given that petitioner had never molested a child in this country but had only done so in Cambodia, "where he could get away with sexually violating children." Pet. App. 83-84. The court went on to state that because the district court's "theory that pedophiles have reduced volition" would apply to virtually all child sex offenses, it was "more properly seen as a variance based on the judge's view that the guidelines range for crimes involving the sexual abuse of children does not properly reflect § 3553(a) factors even in mine-run cases." *Id.* at 85-86. The court of appeals recognized that this Court's decision in *Kimbrough* v. *United States*, 552 U.S. 85 (2007), "allows a district court to vary from the guidelines based solely on its judgment that the policies behind the guidelines are wrong," Pet. App. 108, but concluded that when a court varies based on a policy disagreement with the guidelines, "'closer review' of its reasoning is warranted."

[7] Petitioner's claim (Pet. 22, 24-25) that the court of appeals gave "dispositive weight to the seriousness of the offense" is mistaken. See Pet. App. 2-3 (finding sentence substantively unreasonable "primarily, but not solely, because of the nature and extent" of petitioner's criminal conduct).

Ibid. (citing *Kimbrough*, 552 U.S. at 109). "Exercising that closer review," the court held, the district court's "view that the guidelines involving sex crimes against children are too harsh in a mine-run case because pedophiles have impaired volition" was unreasonable. *Id.* at 86. The court emphasized that it was not "rul[ing] out the possibility that a sentencing court could ever make a reasoned case for disagreeing with the policy judgments behind the child pornography guidelines," but found that in this case, "the district court did not come close to doing so." *Id.* at 106 n.32.

Kimbrough left open whether "closer review may be in order" on appeal when "the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 351). Petitioner does not dispute that more searching appellate review might be appropriate for variances based on policy disagreements with the Guidelines. Instead, he argues (Pet. 32-33) that the court of appeals erred in treating the district court's consideration of petitioner's pedophilia as a categorical rejection of the Guidelines range for child sex offenses, rather than as part of the court's individualized assessment of the circumstances of this case. Petitioner's case-specific claim that the court of appeals erred in characterizing the district court's sentencing explanation as a policy disagreement with the Guidelines does not implicate any legal issue of recurring significance that would warrant this Court's review.

c. Petitioner also objects (Pet. 27-31) to the court of appeals' use of the term "heartland," claiming that the court mistakenly applied the standard for Guidelines

departures in reviewing the district court's decision to vary from the advisory range. The court's references to the "heartland" of cases to which the guidelines for sex crimes against children were intended to apply, see Pet. App. 85, echoed this Court's statements concerning sentencing determinations that may be subject to "closer review." See *Kimbrough*, 552 U.S. at 109 ("a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply'") (quoting *Rita*, 551 U.S. at 351); see *Spears* v. *United States*, 555 U.S. 261 (2009) (per curiam) ("implication" of *Kimbrough* "was that an 'inside the heartland' departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a 'categorical basis') may be entitled to less respect").

Contrary to petitioner's claim (Pet. 27-28), the court of appeals did not hold that a district court is prohibited from varying based on factors that are disfavored grounds for departure under the Guidelines (*e.g.*, the defendant's age or mental condition), absent extraordinary or atypical circumstances. The court correctly recognized that while sentencing courts are required to consider the Guidelines and policy statements, provisions restricting the availability of departures "are in no way binding" on the court. Pet. App. 119-120, 123.

d. Petitioner asserts (Pet. 9, 34-37) that the court of appeals improperly "engaged in independent fact-finding" based on evidence that was not before the district court. But, as petitioner acknowledges (Pet. 34), the court of appeals repeatedly noted that the government had not challenged any of the district court's factual findings. Pet. App. 77, 82, 116. Accordingly, the

court assumed that those findings were correct for purposes of reviewing the reasonableness of petitioner's sentence.[8] *Id.* at 77-78 (court accepted finding that availability of child pornography on the internet enticed petitioner to sexually abuse children "as a given in [its] analysis"); *id.* at 82-83 & n.28 (court "accept[ed] as a fact, for this case only," finding that pedophiles' molestation of children is not "purely volitional," but is "due in substantial part" to their pedophilia); *id.* at 116-117 & n.35 (court "expressly accepted" for purposes of appeal finding that petitioner would present a low risk of recidivism at the end of a 17½-year sentence); see also *id.* at 89 (noting that the "facts about [petitioner] as a husband, father, and member of the community are not disputed").

e. Petitioner's claim (Pet. 14-15) that the court of appeals erred in instructing the district court to impose a 30-year sentence on remand also does not warrant review. Petitioner is correct that, absent highly unusual circumstances, a court of appeals that finds a sentence to be substantively unreasonable should not dictate the sentence the district court should impose on remand. But the court of appeals did not disagree with that proposition. Rather, it concluded that this case presented an "unprecedented situation," involving "both extreme

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[8] Petitioner is thus incorrect in asserting (Pet. 34-35) that the court of appeals relied on empirical evidence not presented to the district court to "dispute[]" the district court's finding that pedophiles' sexual abuse of children is not purely volitional and to find that pedophiles who have abused children are a threat to reoffend. Petitioner also faults (Pet. 34-35) the court of appeals for relying on a study that was not presented to the district court to conclude that "most sexual abuse of children is done by pedophiles," but he does not contest even now that pedophiles are more likely to molest children than are non-pedophiles.

facts and circumstances rendering any downward variance unreasonable and a pinpoint guidelines range—one where the bottom and top were the same sentence." Pet. App. 135 n.45. In these circumstances, the court held, a remand permitting the district court to resentence petitioner below the Guidelines range would likely result only in a "pointless ping pong game" of repeated appeals and remands for resentencing. *Id.* at 135 n.46.

In any event, as petitioner notes (Pet. 12), since *Gall* was decided, no other court of appeals has set a specific limit on the sentence that the district court may impose on remand. Nor is it clear that the Eleventh Circuit will follow that approach in any subsequent case. Thus, this Court's review is unwarranted.[9]

2. Petitioner contends (Pet. 38-41) that the court of appeals violated Federal Rule of Appellate Procedure 41 by failing to issue its mandate following the panel's affirmance of the district court and the expiration of the time for filing a rehearing petition. He also contends (Pet. 42-43) that the court abused its discretion by delaying issuance of the mandate for more than four months without notifying the parties that the mandate was being withheld. Those contentions are incorrect and do not warrant further review in any event.

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[9] Petitioner asserts (Pet. 15) that "in many cases," a remand for imposition of a Guidelines sentence would require the district court to "impose a sentence based on facts not found by a jury or admitted by the defendant, in violation of the Sixth Amendment." The court of appeals did not suggest that a requirement that the district court impose a Guidelines sentence on remand would be justified outside the "extreme" circumstances of this case, Pet. App. 131, much less "in many cases," and petitioner does not claim that there was a Sixth Amendment violation in his case.

The panel issued its decision affirming petitioner's sentence on March 30, 2009. Pet. App. 258. On August 12, 2009, the court of appeals, on its own motion, vacated the panel opinion and ordered rehearing en banc. *Id.* at 322-323. Petitioner does not dispute the court's authority to order to order sua sponte that the case be reheard en banc. Fed. R. App. P. 35(a); see 28 U.S.C. 46(c); *Western Pac. R.R.* v. *Western Pac. R.R.*, 345 U.S. 247, 262 (1953). Although Rule 35 requires petitions for rehearing to be filed within a specified time period, Fed. R. App. P. 35(c), it sets no time limit for orders granting en banc review sua sponte.

The court's delay in issuing its mandate while it considered whether to grant rehearing in this case also did not violate Federal Rule of Appellate Procedure 41, as petitioner contends. Rule 41 requires an appellate court to issue its mandate within seven days after the time for filing a rehearing petition expires, but it authorizes the court to "shorten or extend the time." Fed. R. App. P. 41(b). The court of appeals thus had discretion to withhold its mandate following the panel's decision affirming petitioner's sentence. Nor does Rule 41 require a court of appeals to notify the parties that it is delaying issuance of the mandate, as petitioner suggests. As the Fifth Circuit has explained, the rule "grants [the court] power to shorten or enlarge the specified period by order," but "[t]here is no requirement in the rule that such an order be formal [or] written, or that the parties be given notice of it, though this might be desirable." *Sparks* v. *Duval County Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979), aff'd on other grounds *sub nom. Dennis* v. *Sparks*, 449 U.S. 24 (1980).

Petitioner relies (Pet. 39-42) on this Court's decision in *Bell* v. *Thompson*, 545 U.S. 794 (2005), but that case

involved a different issue. In *Bell*, the court of appeals affirmed the district court's dismissal of a federal habeas corpus petition stemming from a state murder conviction and death sentence, but stayed the issuance of its mandate pending disposition of the defendant's petition for certiorari. *Id.* at 796-800. After this Court denied certiorari and a petition for rehearing, the court of appeals withheld its mandate for more than five months without entering a formal order and then issued an amended opinion remanding the case to the district court. *Id.* at 800-801. This Court reversed, holding that the court of appeals had "abused any discretion Rule 41 arguably granted it to stay its mandate, without entering a formal order, after this Court had denied certiorari." *Id.* at 813-814. Unlike in *Bell*, the court's delay in issuing its mandate in this case did not occur after this Court had denied certiorari, but while the case was still before the court of appeals. Thus, the only reasonable assumption by the parties was that the court had not issued its mandate because it was considering whether to exercise its authority to rehear the case en banc. Cf. *Bell*, 545 U.S. at 804-806 (after denial of certiorari, parties reasonably assumed that federal habeas proceedings were complete). And unlike in *Bell*, where the parties and the state court expended "considerable time and resources" in litigating issues relating the defendant's pending execution "on the mistaken assumption that the federal habeas proceedings had terminated," *id.* at 800, 805, 812, petitioner does not identify any prejudice he suffered from the delay in issuing the mandate in his case.

But even if the court of appeals had been required to give notice of its delay in issuing the mandate, the issue would not warrant review. Petitioner's case-specific

claim that the court of appeals exceeded its discretion raises no important issue of federal law warranting this Court's review, particularly because, as petitioner notes (Pet. 42), the Eleventh Circuit has since amended its rules to require a docket entry alerting the parties that the mandate has been withheld. Pet. App. 324-325; 11th Cir. R. 35, I.O.P. 6 ("If a petition for rehearing or a petition for rehearing en banc has not been filed by the date that [the] mandate would otherwise issue, the Clerk will make an entry on the docket to advise the parties that a judge has notified the clerk to withhold the mandate.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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