"THE FEDERAL CORNER"

The Most Unbelievable Sentence Ever Imposed in a Child Pornography Case

Buck Files

Only one criminal defense lawyer in America has ever before seen the fact situation that was presented to the United States Court of Appeals for the Sixth Circuit. *United States v. Collins,* ___F.3d___, 2016 WL 3583999 (6th Cir. 2016) [Panel: Circuit Judges Guy, Batchelder and Cook. Opinion by Judge Guy.] That lawyer was the attorney of record for Mr. Collins.

- The offenses: 18 USC §§ 2252(b)(1) and 2252A(b)(1) [Distributing child pornography and possessing child pornography]
- The jury's verdicts: Guilty on each count
- The statutory maximum punishment: 20 years
- The advisory Sentencing Guidelines range: 262 - 327 months
- The sentence imposed: Two concurrent five year sentences
- The appellate court's decision: **Affirmed**

The Court held, as a matter of first impression in the Circuit, that United States District Judge James S. Gwin's consideration of a jury sentencing poll was a permissible part of determining the sentence to be imposed.

So, after years of reading opinions of the various United States Courts of Appeal holding that the decision of a district court to grant a departure or a variance from the advisory Sentencing Guidelines range was substantively unreasonable, how did three judges of the Sixth Circuit come to the decision that Collins' sentence should be affirmed?

[Judge Gwin Polled the Jurors]

Yes, he really did! None of us have ever seen this before. Here, Judge Guy describes Judge Gwin's *polling*:

> At sentencing, Judge James S. Gwin revealed that, after the verdict, he 'polled the jury to ask them ... "State what you believe an appropriate sentence is."' Jurors' responses ranged from zero to 60 months' incarceration, with a mean of 14.5 months and median of 8 months. With one exception, every juror recommended a sentence less than half of the five-year mandatory minimum accompanying defendant's offenses. *See* 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1). Each juror's recommendation was but a fraction of defendant's calculated guidelines range.

[The Government's Failure to Preserve Error]

Judge Guy notes:

Over the government's objection, the district judge considered the jury poll as 'one factor' in fashioning defendant's sentence, noting that it 'reflect [s] ... how off the mark the Federal Sentencing Guidelines are.'

* * *

The government reiterated its objection to the variance based on the jury poll, *but raised no other objection to the sentence.* The government appealed, challenging the district judge's use of the jury poll and his alleged failure to adequately consider deterrence as a sentencing factor. (emphasis added)

The remainder of Judge Guy's opinion reads, in part, as follows:

[Plain Error Review of the Reasonableness of Judge Gwin's Sentence]

We review the reasonableness of a sentence for an abuse of discretion, giving 'due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.' *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). A district court abuses its discretion in the sentencing context if it 'commit[s a] significant procedural error,' *id.* 'selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor,' *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008).

Because the government did not object to defendant's sentence on grounds that the district court inadequately considered deterrence under § 3553(a), we review that issue for plain error. *United States v. Vonner*, 516 F.3d 382, 385 (6th Cir. 2008) (en banc).

[Jury Polling as a Case of First Impression]

The propriety of jury polling in imposing a sentence is an issue of first impression. In *United States v. Martin*, we commented in passing on the same judge's use of results of prior jury polls as an 'academic exercise' which he believed provided 'some suggestion' that the defendant deserved a below-guidelines sentence. 390 Fed.Appx. 533, 535 (6th Cir. 2010).

* * *

…we concluded that the district judge properly carried out his sentencing function because he had not 'relied solely, or even primarily, upon the juror surveys and then ignored the [§ 3553(a) factor] results.' *Id.* The case at hand requires us to squarely address what was mere *dicta* in *Martin*: *whether the district judge's explicit consideration of a jury sentencing poll rendered the resultant sentence substantively unreasonable.* We conclude that, in these circumstances, it did not. (emphasis added)

[The Government's First Argument on Appeal and the Court's Response]

The government first contends that the district judge's reliance on the jury poll impermissibly conflates the distinct roles of judge and jury. The United States Supreme Court has expressed concern over the commingling of the judge's sentence-crafting function and the jury's fact-finding function. Stating that such intermingling 'invites them [jurors] to ponder matters that are not within their province,' the Court concluded that '[i]nformation regarding the consequences of a verdict is ... irrelevant to the jury's task.' *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994). However, because the district judge conducted the poll after the jury reached a verdict, it did not implicate the concerns raised by the Court in *Shannon* and by Courts of Appeals elsewhere.

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Accordingly, the district judge's use of a jury poll as one factor in formulating defendant's sentence did not conflate the respective duties of judge and jury.

[The Government's Second Argument on Appeal and the Court's Response]

The government also argues that the jury poll was an 'impermissible factor [ ]' for the district judge to consider in crafting an appropriate sentence. *Conatser*, 514 F.3d at 520. We again disagree. Federal law provides *nearly unfettered scope* as to the sources from which a district judge may draw in determining a sentence. 18 U.S.C. § 3661 ('*No* limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.') (emphasis added)

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[The Community's View of the Gravity of the Offense]

District courts also have the authority to 'reject the Guidelines sentencing ranges based on articulated policy disagreements in a range of contexts.' *United States v. Kamper*, 748 F.3d 728, 741 (6th Cir. 2014).

When establishing the Sentencing Commission, Congress directed it to take '*the community view of the gravity of the offense*' into account when crafting appropriate criminal sanctions. 28 U.S.C. § 994(c)(4). As reflected in his writing on the subject, and briefly in the sentencing hearing below, the district judge reasons that the Commission fell short of this directive. *See* Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. & Pol'y Rev. 173, 185 (Winter 2010) (In basing the guidelines on sentences in 10,000 past cases, 'the Sentencing Commission did not attempt independently to determine sentences that would

accurately reflect community sentiment' and '[t]hus ... relied on inputs distant from any meaningful measurement of community sentiment—past or present.'). In an effort to address this perceived defect in the Sentencing Guidelines, the district judge considered the jury's sentencing recommendation as 'just one factor' in assessing 'the most important [§ 3553(a)] factor ... just punishment.' *See* 18 U.S.C. § 3553(a)(2)(A) (sentencing court must consider 'the seriousness of the offense ... and ... just punishment for the offense'). The district judge made it clear that 'their [the jurors'] recommendation is not in any way controlling.' (emphasis added)

[The Jury and Judge Gwin]

Though we reiterate that juries lack 'the tools necessary for the sentencing decision,' *Martin*, 390 Fed.Appx. at 538, they can provide insight into the community's view of the gravity of an offense. … *Ring v. Arizona*, 536 U.S. 584, 615–16, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (Breyer, J., concurring) (jurors 'reflect more accurately the composition and experiences of the community as a whole' and are 'better able to determine in the particular case the need for retribution') (internal quotations and citations omitted).

The jury did not determine or impose defendant's sentence. Rather, the district judge—who does possess the necessary tools for the sentencing decision—was at all times interposed between the jurors' views of an appropriate sentence and the sentencing guidelines' § 3553(a) factors. Considering the jury's sentencing recommendation as part of the sentencing calculus did not conflict with the district judge's duty or ability to properly weigh the § 3553(a) factors and independently craft an appropriate sentence.

Moreover, we find that the district judge otherwise properly carried out his sentencing function, and that the resulting downward variance was not unreasonable. *See* *Gall*, 552 U.S. at 53, 128 S.Ct. 586

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The district judge cited just punishment as 'the most important factor,' albeit tempered by 'how off the mark the Federal Sentencing Guidelines are.'

* * *

[The Court's Conclusion]

We are satisfied with the district court's discussion of the sentencing factors in granting defendant a downward variance.

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We find that the district court did not abuse its discretion.

My Thoughts

- I cannot understand or explain the Court's opinion in *Collins* because it is so grossly inconsistent with other opinions of the Sixth Circuit in other child pornography cases. I looked in WestLaw's Sixth Circuit database and found other possession of child pornography cases; *e.g.*,
  - *United States v. Robinson*, 778 F.3d 515 (6th Cir. 2015) -- Defendant convicted of possession of child pornography -- advisory Sentencing Guideline range 78-97 months. Sentence imposed: One day in custody and 5 years supervised release. *Substantively unreasonable*.
  - *United States v. Robinson*, 669 F.3d 767 (6th Cir. 2012) -- Defendant convicted of possession of child pornography -- advisory Sentencing Guideline range 78-97 months. Sentence imposed: One day in custody and 5 years supervised release. *Procedurally and substantively unreasonable*.
  - *United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012) -- Defendant convicted of possession of child pornography -- advisory Sentencing Guideline range 63-78 months. Sentence imposed: One night's confinement in the courthouse lock up and 10 years supervised release. *Substantively unreasonable.*
  - *United States v. Christman*, 607 F.3d 1110 (6th Cir. 2010) -- Defendant convicted of possession of child pornography -- advisory Sentencing Guideline range 57-71 months. Sentence imposed: 5 days' imprisonment and 15 years supervised release. *Substantively unreasonable*.
  - *United States v. Camiscione*, 591 F.3d 823 (6th Cir. 2010) -- Defendant convicted of possession of child pornography -- advisory Sentencing Guideline range 27-33 months. Sentence imposed: Confinement for the remainder of the day of sentencing and 3 years supervised release. *Procedurally reasonable and substantively unreasonable*.

- Just to make certain that I had not forgotten something, I reviewed the Court's opinion in *United States v. Gall*, 128 S.Ct. 586, 594-595 (2007), and paid particular attention to these excerpts from that opinion:

> In *Booker* we invalidated both the statutory provision, 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV), which made the Sentencing Guidelines mandatory, and § 3742(e) (2000 ed. and Supp. IV), which directed appellate courts to apply a *de novo* standard of review to departures from the Guidelines. As a result of our decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are 'reasonable.' Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions. See 543 U.S., at 260–262, 125 S.Ct. 738

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> *It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.* (emphasis added)
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> *In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines.* We reject, however, an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence. (emphasis added)

- It appears to me that the Court, in its review of the actions of Judge Gwin as required by *Gall,* paid attention to *form* rather than *substance.* In *Collins*, the jury returned verdicts of guilty to both the possession and the *distribution* charges. Judge Gwin simply did not explain his conclusion that the unusually lenient sentence that he imposed was appropriate, supported by sufficient justifications. I cannot imagine any other Court of Appeals affirming this case.

- Would the Court's decision have been different if the review had not been under a plain error standard? I just don't know.