No. 2D14-4628

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

DAVID PETER VALESANO, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit
in and for Hillsborough County, State of Florida
L.T. Nos. 13-CF-10114 & 13-CF-16104, Hon. Chet A. Tharpe

AMENDED INITIAL BRIEF OF DAVID PETER VALESANO, JR.

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Statement Of The Case

By information, the State charged Appellant David Peter Valesano, Jr., with 300 counts (140 counts in Case No. 13-CF-10114 and 160 counts in Case No. 13-CF-16104) of second degree felony possession of child pornography (10 images or more) in violation of § 827.071(5) and § 775.0847(2) & (3), *Fla. Stat.* R. 332-426, 660-767. Mr. Valesano pled guilty without a plea agreement, filed a sentencing memorandum, and moved for a downward departure to a sentence of supervision. R. 272-301, 302, 482-88. The sentencing guidelines suggested a sentence of almost 37 years' imprisonment. R. 592. The trial court denied Mr. Valesano's request for a downward departure to a sentence of supervision, sentenced him to the statutory maximums of 15 years' imprisonment in Case No. 13-CF-010114 and 15 years' imprisonment in Case No. 13-CF-016104, to run consecutively (i.e., 30 years total), and entered judgment. R. 457-468, 593, 979-91.

Mr. Valesano timely appealed. R. 469-70. While this appeal was pending, Mr. Valesano filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) to correct a sentencing error, which asked the trial court to vacate the sentence and reassign for resentencing before a different circuit judge. R. 998-99. Specifically, this motion contended the presiding Circuit Judge, the Honorable Chet A. Tharpe, had made statements regarding his general personal policy of

denying probation to all child pornography defendants in a prior case, *Barnhill* v. *State*, 140 So. 3d 1055 (Fla. 2d DCA 2014) (en banc), which called into question whether any child pornography defendant sentenced in Hillsborough County's sex crimes division proceeds in a "dispassionate environment before a fair and impartial judge," *id.* at 1061. Judge Tharpe denied the motion. R. 1,000-41.

Three weeks later, while this appeal remained pending, by administrative order dated December 23, 2014, Hillsborough County dismantled its sex crimes division and reassigned Judge Tharpe to the general civil (Jimmy Royce Act) and criminal justice divisions. *See* Hillsborough County Administrative Order A-2014-061, *available at* http://www.fljud13.org/Portals/0/AO/DOCS/A-2014-061.pdf.

Mr. Valesano appeals his sentence and the denial of his Rule 3.800(b)(2) motion and raises issues regarding this Court's recent decisions in *Barnhill* and *Goldstein* v. *State*, 154 So. 3d 469 (Fla. 2d DCA 2015), and the excessive length of his 30-year sentence. Mr. Valesano reported to prison on September 23, 2014 and is currently incarcerated.

Statement Of The Facts

A. The Charges, Sentencing Memorandum, And Motion For Downward Departure

By information, the State charged Mr. Valesano with 300 counts of possession of child pornography (10 images or more) in violation of § 827.071(5) and § 775.0847(2) & (3), *Fla. Stat.* R. 332-426, 660-767. Mr. Valesano pled guilty

without a plea agreement, filed a sentencing memorandum, and moved for a downward departure to a sentence of supervision. R. 272-301, 302, 482-88.

In his sentencing memorandum, Mr. Valesano explained he "has a long, impressive record of personal achievement, hard work, helpfulness, generosity, and, most significantly, devotion to his family and community." R. 273. Mr. Valesano also described his "cooperation with the State of Florida, his genuine remorse, and his efforts and amenability to rehabilitation, as demonstrated by the strides he has made in the specialized treatment program he independently is undertaking." R. 273. Importantly, Mr. Valesano explained he "ha[d] never inappropriately touched or solicited for an improper purpose a child, nor ha[d] he ever attempted to do so." R. 273. Instead, Mr. Valesano's "criminal behavior [wa]s limited to possessing a large library of pornographic material, a portion of which contained child pornography." R. 273. In short, Mr. Valesano's "possession of the pornographic materials depicting children represent[ed] a single and isolated occurrence in an otherwise exemplary life." R. 273.

A polygraph test confirmed Mr. Valesano had never touched a child or had sexual conversations with children over the Internet. R. 273-74. Moreover, a psychologist confirmed Mr. Valesano "has a low likelihood of additional sexual misconduct and that programs such as those in which Mr. Valesano has been involved since his arrest even further lower the likelihood." R. 274. Additionally, Mr.

Valesano "voluntarily began sex offender treatment," in which he had been "continuously active . . . throughout his nearly ten months of incarceration." R. 274.

Mr. Valesano also related his "traumatic and chaotic" childhood growing up in a broken home and his "unpleasant" and "aimless" time in high school. R. 275. In college, Mr. Valesano's life came into focus when he became a Christian and joined a Christian fellowship organization. R. 275. At that point, Mr. Valesano changed his major from mathematics to history, and he ultimately became a high school teacher. R. 275-76. Shortly after college, Mr. Valesano married his current wife, Mary. R. 276. For the next 20 years, Mr. and Mrs. Valesano were active in their church and worked primarily as educators. R. 276.

Finally, Mr. Valesano explained in further detail his remorse and close relationships with his wife, his 19-year-old daughter, and his 22-year-old autistic son. R. 277-80. Mr. Valesano attached to his sentencing memorandum numerous letters of support from family and friends. R. 284-301.

The State did not submit a sentencing memorandum or a written response to Mr. Valesano's motion for a downward departure.

B. The Plea And Sentencing Hearing

The plea and sentencing hearing occurred three months after this Court decided *Barnhill*. At that hearing, Mr. Valesano knowingly and voluntarily pled

guilty without a plea agreement. R. 482-86. The State then provided the factual basis for the plea:

> MR. HUBBARD: On July 18th of 2013, law enforcement officials with the Hillsborough County Sheriff's Office conducted a search warrant on the residence that was later found to belong to a David Peter Valesano.
>
> Prior to that date, law enforcement obtained a search warrant to enter and search that residence based on their investigation into the downloading of child pornography from an I.P. address that was located within Hillsborough County. That I.P. address belonged to the residence where Mr. Valesano resided.
>
> On July 18th of 2013, law enforcement conducted that search warrant and located computers and electronic devices within the home. Mr. Valesano was present during the search warrant of that home. One of the desktop computers, a Hewlett Packard desktop computer belonging to Mr. Valesano was located.
>
> After a forensic review of that computer by law enforcement, law enforcement located numerous items that were videos and images depicting children under the age of 18 engaged in sexual conduct. Mr. Valesano was identified as the person that was in possession of that computer and possession of the images and videos.
>
> There were ten or more images and videos on that computer and at least one of those was a video and also depicted children under the age of 18 engaged in sexual battery, sexual conduct with one another, qualifying him for the enhancement. All offenses occurred in Hillsborough County and as I stated earlier, Mr. Valesano, through the forensic review, statements made on scene, was identified as the person in possession of those items.

R. 487-88. Judge Tharpe accepted the plea. R. 488.

When the hearing turned to sentencing, the State called only one witness, a detective, who described executing the search warrant and the extent of Mr.

Valesano's collection of child pornography, child erotica, and adult pornography.[1] R. 489-523. On cross-examination, the detective agreed there was no evidence Mr. Valesano was engaged in any commercial enterprise. R. 524.

Mr. Valesano called seven witnesses. First, Mr. Valesano called Timothy L. Gregory, a licensed marriage and family therapist who had worked with Mr. Valesano for 4-1/2 years. R. 529. Mr. Gregory testified Mr. Valesano's autistic son was at a developmental stage at which it was very important for him to have a close relationship with his father in order to continue moving toward independent living. R. 528-30. Mr. Gregory also testified that although Mr. Valesano's behavior was "reprehensible," it was "not synonymous with the word recidivism." R. 530.

Second, Mr. Valesano called Robert Ruben Drake, a licensed mental health counselor who had been treating Mr. Valesano's sexual deviancy during his pretrial release. R. 531-32. According to Mr. Drake, Mr. Valesano had "been a real enthusiastic treatment guy" who had "really shown some real fervor to get to his treatment." R. 532. Mr. Valesano had "always done everything I've asked of him," "really is remorseful," and "really is adamant about doing this treatment work." R. 532-33. As such, Mr. Drake thought Mr. Valesano was "a good treatment prospect." R. 533. In this regard, Mr. Drake explained at length how Mr. Valesano

[1] Mr. Valesano possessed approximately 3,000 images of child pornography (illegal) and approximately 712,000 images of child erotica and adult pornography (not illegal). R. 589.

presented a low risk for recidivism and was a good candidate for treatment and supervision:

> The latest research really on recidivism rates for somebody who has not committed a hands-on offense, never been charged or never been convicted and is solely based on downloading pornography, those recidivism rates are very low. The general recidivism rate, as I understand it—and I've done a lot of research of the research—it's about 30 percent general recidivism, and that's counting all kinds of recidivism such as not complying with probation rules or curfew violations.
>
> But out of that 30 percent, the subset of sexual recidivism is really around 5 percent with 3 percent of those going and downloading child porn and being caught for that again and 2 percent with the hands-on offense. So that's a pretty low recidivism rate. And I really searched trying to find literature and the research that had higher rates than that, but they all lingered around that from as high to 7 percent sexual recidivism to five and 4 percent.
>
> And generally, the child pornography would be the more prevalent recidivism, but that's 3 percent. I mean that's pretty low. So they—you know, people with—that don't have hands-on offenses and only engage in downloading are real good candidates for treatment obviously because, you know, they are safer in the community and you can, you know, better management and stuff like that.
>
> So as far as him—as far as David, you know, some of the things that really present as protective factors for him are his family, that he's always been—there's never been a break up of the family. He's always had employment. He doesn't exhibit psychopathy or antisocial as evidenced by no prior criminal history. And he's got, from what I understand, a very large support group that is aware of his offense in detail and is willing to step in and also provide support and supervision.
>
> So with that, I just think he's a real good candidate more for treatment and, you know, supervision in the community using polygraph measures, using probation office, using a therapist and the sup-

> port group as kind of an overall containment model they call it, the containment model which is the best practice.

R. 535-36. Ultimately, Mr. Drake recommended the "containment model" as the "best practice"; in other words, "kind of an alliance between the therapist, the probation officer, the polygrapher, kind of a triangle kind of thing that surrounds the offender." R. 538. Mr. Drake further observed a sentence of incarceration would be inappropriate for Mr. Valesano, because "the prison systems right now don't have comprehensive sex offender treatment." R. 539.

Third, Mr. Valesano called Jonathan Scott Weaver, a member of Mr. Valesano's bible study group. R. 550. Mr. Weaver testified he supported Mr. Valesano after he heard about the child pornography charges and had heard Mr. Valesano express his remorse. R. 551. Mr. Weaver further offered to provide an "accountability plan" and "buffer zones" to prevent Mr. Valesano from recidivating. R. 552. Specifically, Mr. Weaver said, "I'm available to have regular lunches, regular phone calls, regular texts, whatever I need to do to ensure as far as—you know, it depends on accountability purposes to help ask difficult questions, to be available to him, his family, his wife, to ensure that he has the guardrails to be successful as he, you know, lives out the time." R. 553-54. Mr. Weaver had every confidence Mr. Valesano was "willing to reinvent himself" and would not present a danger to the community. R. 554.

Fourth, Mr. Valesano called Amanda Luis Decourt, his neighbor of 10 years. Ms. Decourt testified, "I believe that if there's a possibility for redemption—and I do believe there's a possibility for redemption—I believe he has it. I think he's got a strong support system. I think he's got amazing people here who love him and love his family." R. 556-57.

Fifth, Mr. Valesano called Glen Scott Ranck, a pastor of 20 years who led a men's group at Mr. Valesano's church. R. 557-59. Mr. Ranck related that Mr. Valesano had asked for his help five years earlier because he was "struggling." R. 558. In other words, then, Mr. Valesano recognized his problem and "was looking then to build some structure into his life." R. 558. After his arrest, Mr. Ranck had "seen real life change happen" with Mr. Valesano. R. 559. Specifically, Mr. Valesano became "very willing to do whatever he has to do to get better." R. 559.

Sixth, Mr. Valesano called Gerardo Luna, a member of Mr. Valesano's church who saw him every week for four years in a church group. R. 561-63. Mr. Luna asked "for mercy, to give him that opportunity of successful treatment since all the evidence show that he has the support system that can make him successful in his treatment." R. 563.

Seventh, Mr. Valesano called his wife, Mary, and his daughter, Alexandra, to the stand to testify together. R. 563-64. First, Alexandra testified:

> I would just ask you to have mercy on my dad. I have such an amazing bond with my dad and it kills me that I can't share this rela-

> tionship with him in person or on a daily basis. I see the relationship that a lot of my friends have with their dads and I see they are non-existent or just very weak.
>
> And this makes me sad that I can't be with him every single day and be able to have him in my life. There's a lot that he's missing out on in my life and it would be amazing to have him around.

R. 564. Next, Mary testified:

> I've been married to David for 30 years. I absolutely love that man and that is why I'm standing here today and that is why I have not gone anywhere. Despite the mistakes that he's made, despite his arrest and the things that he did which were reprehensible, I love that man and I'm not going anywhere and the reason why is because I see in him an open heart.
>
> I see somebody who is truly remorseful, who truly wants to be better not only for his family's sake, but for his own sake as well. Another thing that I love about him is he really is about giving back to the community. He is actively involved—during the three months he was out, actively involved in men's groups. He wants to share his story as a cautionary ta[le].
>
> He wants to help prevent other people, specifically men that are struggling in these issues, to get help now and I really think he could do some good in the community. I just love my husband and I really believe in him. I really believe in his desire to change. I believe in God's power to change him and I'm not going anywhere.
>
> I'm going to stand right by him and I just would ask please for mercy for our family for a chance for us to reconnect, for a chance for us to heal and move forward and be of God's other people, other families as well.

R. 565-66

Then, Mr. Valesano himself testified. R. 566-82. Mr. Valesano explained he had been exposed to adult pornography for 45-46 years since age six. R. 567. His

interest in child pornography was more "recent" and was only a "three month activity." R. 567-68. Within the previous 5-6 years, Mr. Valesano had twice downloaded child pornography and kept it on his computer for a few months until it "became repugnant" to him, and he deleted it. R. 569. Mr. Valesano described his arrest and incarceration as having lifted a burden off him. R. 574-77. While on pretrial release, Mr. Valesano related how he had attended two sexaholics anonymous meetings on a weekly basis. R. 575. Mr. Valesano also described how pornography had become a drug to him, but he had now put it behind him. R. 578.

After all witnesses had testified, counsel presented argument. R. 582-90. The State noted Mr. Valesano's punishment score sheet suggested a total punishment of 336 to 4,500 years in prison. R. 589. Accordingly, the State requested two consecutive 15-year sentences (i.e., 30 years total) for Case No. 13-CF-10114 and Case No. 13-CF-16104. R. 590. Mr. Valesano requested a downward departure to a sentence of supervision. R. 590.

Finally, Judge Tharpe addressed Mr. Valesano:

> . . . . Mr. Valesano, you've had a problem for a long, long time and apparently this problem, in your own words, has gotten worse as time goes by because if I take what you have said at its face value, you've progressed from pornography, which you admit you had a problem with and you attempted to seek help for it, but if I take your statement at face value, your problem became worse in the past five years to where you advanced to child pornography.
>
> And what I have observed over the years that I have been in this division, as bad as all child pornography is, there is some that can be

considered worse than others, that being bestiality involving children and bondage involving children, and you had both.

Another aspect of this case that is extremely disturbing is your collection of particular children and the amount of pictures you had of those specific children and how you had them categorized. Without question, this particular case is probably one of the most sophisticated in terms of categorization of videos and images not only by the type such as bestiality, bondage, but also the specific child that was individualized in your categories.

To say that it's extremely disturbing is probably to put it very mildly. The sentencing guidelines call for the bottom of the guidelines being 4,042 and a half months which equates to over 36 years in the Florida State Prison. And without having reasons for a departure sentence, the law requires me to impose that sentence to you.

I have taken into consideration the testimony of all of the witnesses that are here on your behalf including that of Mr. Drake. I've taken into consideration the memorandum that has been provided by your attorney for the court's review. I have reviewed all of the documents that are contained therein.

I have considered statutory mitigators in this particular case. I have also considered the comments of your attorney as well as those of the assistant state attorney. The primary objective, at least, of this court in fashioning a sentence that I believe is proper after taking into consideration all of those factors is one that the legislature intends, which is punishment, and the other is for the protection of the community, more specifically children who you have, for at least several years, derived sexual satisfaction in observing and downloading those videos and those images, those children being involved in sexual acts.

I previously have adjudicated you guilty, sir, as to all counts. With regard to case number 13-16104, I'm going to sentence you to 15 years in the Florida State Prison. On case number 13-10114, I'm going to sentence you to 15 years in the Florida State Prison. That will run consecutive to case number 13-16104.

All counts within each count within each case will run concurrent with each other. The cases themselves will run consecutive to

each other. You'll have 30 days, sir, in which to appeal the judgment and sentence of the court. Good luck.

R. 591-93. Court adjourned. R. 593.

C. The Appeal

Mr. Valesano timely appealed.[2] R. 469-70.

D. The Rule 3.800 Motion To Correct A Sentencing Error

While this appeal was pending, Mr. Valesano filed a Rule 3.800(b)(2) motion to correct a sentencing error. R. 998-99. The motion asked Judge Tharpe to vacate Mr. Valesano's sentences and reassign for resentencing before a different circuit judge. R. 998-99. Specifically, Mr. Valesano contended Judge Tharpe's statements in *Barnhill* called into question whether any child pornography defendant sentenced in Hillsborough County's sex crimes division proceeds in a "dispassionate environment before a fair and impartial judge." 140 So. 3d at 1061. Judge Tharpe denied the motion. R. 1,000-41.

E. The Administrative Order Dismantling Hillsborough County's Sex Crimes Division And Reassigning Judge Tharpe

While this appeal remained pending, by administrative order dated December 23, 2014, Hillsborough County dismantled its sex crimes division and reassigned Judge Tharpe to the general civil (Jimmy Royce Act) and criminal justice divisions. *See* Hillsborough County Administrative Order A-2014-061, *available*

[2] Although the record on appeal contains only one notice of appeal (R. 469-70), counsel simultaneously filed identical notices of appeal in both Case No. 13-CF-10114 and Case No. 13-CF-16104.

at http://www.fljud13.org/Portals/0/AO/DOCS/A-2014-061.pdf. Today, there no longer is a sex crimes division in Hillsborough County.

SUMMARY OF ARGUMENT

Once Judge Tharpe candidly stated his personal general policy of denying probation to all child pornography defendants in *Barnhill* and *Goldstein*, it became clear no child pornography defendant could receive a fair and impartial sentence from him. The only remedy in these circumstances, as provided in *Barnhill* and *Goldstein*, is to reverse Mr. Valesano's sentences and remand for resentencing before another trial judge.

Additionally, the Trial Court abused its discretion when it sentenced Mr. Valesano to two consecutive statutory maximum 15-year sentences. No reasonable person could believe 30 years' imprisonment is an appropriate punishment here.

ARGUMENT

I. ISSUE 1: SHOULD THIS COURT REVERSE JUDGE THARPE'S SENTENCES AND REMAND FOR RESENTENCING BEFORE A DIFFERENT JUDGE IN LIGHT OF HIS PERSONAL POLICY OF DENYING PROBATION TO ALL CHILD PORNOGRAPHY DEFENDANTS, AS STATED IN *BARNHILL* AND *GOLDSTEIN*?

This Court should reverse Judge Tharpe's sentences and remand for resentencing before a different judge in light of his personal policy of denying probation to all child pornography defendants, as stated in *Barnhill* and *Goldstein*.

Standard Of Review

"Ordinarily, we would review the trial court's discretionary decision regarding whether to impose a downward departure for abuse of discretion. But because the issue here revolves around the trial court's applying an incorrect standard in determining whether to exercise its discretion, we apply a de novo standard of review." *Barnhill*, 140 So. 3d at 1060-1061 (citing *Banks* v. *State*, 732 So. 2d 1065, 1067 (Fla. 1999), *Cromartie* v. *State*, 70 So. 3d 559, 563 (Fla. 2011), and *Pressley* v. *State*, 73 So. 3d 834, 836 (Fla. 1st DCA 2011)).

Merits

A. Judge Tharpe Previously Made Statements In *Barnhill* v. *State* And *Goldstein* v. *State* Regarding His Personal Policy Of Denying Probation To All Child Pornography Defendants

Before Judge Tharpe sentenced Mr. Valesano, he had made certain statements regarding his personal general policy of denying probation to all child pornography defendants in at least two other cases. Specifically, in both *Barnhill* and *Goldstein*, expert psychologists testified the defendants had no desire to touch children and presented low probabilities to recidivate. Nevertheless, at sentencing, Judge Tharpe explained at length he "had established a general policy—personal to himself and at odds with the law of Florida—that caused him to sentence [child pornography defendants], not for the crimes [they] had committed and for [their] circumstances at the time of sentencing, but rather for the crimes [he] feared [they]

might commit in the future based on the nature of the crimes for which [they were] convicted." *Goldstein*, 154 So. 3d at 470. In relating those statements, this Court quoted Judge Tharpe's sentencing soliloquies at length in *Barnhill* and *Goldstein*.

1. *Barnhill* v. *State*

In *Barnhill*, the defendant pled guilty to 20 counts of possession of child pornography, and the defendant's forensic psychologist testified Mr. Barnhill "was a low risk sexual offender" who was amenable to therapy. 140 So. 3d at 1057. According to the forensic psychologist, Mr. Barnhill was not in denial of his problem, understood his actions were wrong, and was not antisocial or criminally predisposed. *Id.* Accordingly, the forensic psychologist concluded, "there was a 'negligible potential' that Mr. Barnhill would 'engage in future acts of sexually related impropriety.'" *Id.* Additionally, the forensic psychologist "relied on a polygraph examination which revealed that Barnhill was truthful when denying any sexual contact with minors." *Id.* In response to Judge Tharpe's questions whether Mr. Barnhill wanted to touch children, the forensic psychologist responded, "there was no evidence [Barnhill] had engaged in any 'hands-on' sexual impropriety nor was there any 'indication of going beyond that boundary.'" *Id.* He "also noted that Barnhill had cooperated with law enforcement, was intellectually astute, and had maintained steady employment in a high-tech occupation." *Id.*

The State did not contest the forensic psychologist's testimony. *Id.* at 1058. Instead, it "reiterated the issue that the court was concerned with: whether Barnhill had an interest in touching a child." *Id.*

Mr. Barnhill requested a downward departure to a five-year sentence and a lengthy term of probation. *Id.* at 1057. Judge Tharpe denied a downward departure and sentenced him to consecutive sentences of 15 years on Count I and 7 years on Counts II through XX (to run concurrently to each other). *Id.* at 1058. "Thus, Barnhill received a total lawful prison sentence of twenty-two years." *Id.* In justifying this sentence, Judge Tharpe stated at length:

> I want to assure Mr. Barnhill, and I want to make it clear on the record there is not one thing that the [S]tate of Florida can say, have they ever said, nor will they ever be able to say in the future that is going to scare me or cause me the concern that would make me give out some lengthy sentence.
>
> I give out sentences that I believe are appropriate, and I'm telling you this, and don't—please don't take anything personal. I just want you to know that I struggle on these cases, not just Mr. Barnhill's, but these types of cases every single day of my life since I've been put into this division, and there's not one day that goes by, not one, that I don't think about these cases.
>
> Mr. Barnhill is one of many individuals that come in front of me that have absolutely no criminal record whatsoever, none, that live a dark side, if you will, that no one knows about. Family members don't know about, teachers don't know about, business associates don't know about[.] [T]he only people that know about it is Mr. Barnhill and other persons that have like interests that he would choose to know about his interests as well.
>
> But the vast majority of the people that come in front of me in this courtroom . . . don't have prior criminal histories. . . .

This child pornography phenomenon, if you will, is becoming an epidemic. It's bigger, I think, than what any of us in this room or in law enforcement circles absolutely realize . . . . It's an epidemic. I didn't know until today, and Dr. Bursten has testified in front of me on numerous occasions, so has Dr. Carpenter, as well as other psychologists, that the new study has come out [and] the percentage is 50/50 of child pornographers having hands-on [contact]. That is scary. That is—that is scary. We're not talking about a fantasy.

And the psychologists in their book . . . list it as a fantasy[.] [P]edophiles are real. They're real. They may have some twisted fantasy about observing prepubescent children in bondage situations and being raped and having sexual intercourse and oral intercourse, being sodomized, but even though that might be a fantasy of watching those things on a computer while they stimulate themselves, it's real when they touch. And when they touch, that child is damaged forever, forever.

And maybe it's what some people don't even—don't even think about. It's just a picture. It's not just a picture. This is a child who has actually been manipulated either by fear or because a person is so much older and can control them and grooms them to go into these sexual scenarios, and even though you get some of these pictures where you get a six year old [*sic*] or seven year old [*sic*] and it appears to be, and I've seen them, I've seen them in this courtroom, where they appear in the video or on the pictures to be enjoying the act, they've been groomed.

That first time they are—they were raped and they are being raped each time as it happens. That's what scares me. That is what scares me in these types of cases.

But I guess first and foremost, I want you to know that there is not one thing that the [S]tate of Florida can, has or ever will be able to say that is going to cause me to sentence someone that I don't believe the sentence is appropriate, for whatever that is worth.

. . . .

. . . I honestly believe that this is an epidemic of greater proportions than any of us in this room . . . ever realized.

> And there is no magic answer as to whether you're going to reoffend, or you're not going to reoffend in this particular case, whether you're going to touch or you're not going to touch. . . .
>
> And some people say, well, you've taken my life away or you've taken my husband's life away or you've taken my father's life away, but in these types of cases, if you touch, you take the life away of a child[.] [A]nd I cannot tell you how many times I have seen in this courtroom where we have attempted to pick a jury[,] the numbers of men and women, adult men and women, some of which are older than I am [who] have stood at the bench in front of me with tears rolling down their faces because they were sexually abused as a child.
>
> The question is whether or not—first of all, the court is going to downward depart. After listening to all of the witnesses and the presentation not only by your attorney and your family and friends . . . as well as listening to the presentation . . . by the [S]tate of Florida, I'm going to find that there is no legal reason at this point in time to downward depart.

Barnhill, 140 So. 3d at 1058-59.

Applying de novo review, this Court, sitting en banc, concluded Judge Tharpe "erred by failing to consider the totality of the circumstances of Barnhill's case and by instead imposing a general standard based on the type of case involved." *Id.* at 1060. Because child pornography cases "are disturbing by their very nature," this Court explained it was "not unsympathetic to the difficulty that each trial judge must face when presiding over such cases." *Id.* at 1061. Nevertheless, "trial judges are required to rise above the disturbing nature of these and other crimes and to provide every defendant a fair opportunity to be heard by an impartial judge who will consider only the evidence presented." *Id.* Judge Tharpe's comments, however, made clear that "evidence from other hearings factored into

his decision not to downwardly depart," and he "lumped Barnhill with all other similarly charged defendants irrespective of the testimony that Barnhill presented at sentencing." *Id.* In light of these shortcomings, "even to the most casual observer, it could not be believed that Barnhill received a hearing in a dispassionate environment before a fair and impartial judge." *Id.* Ultimately, this Court reversed Mr. Barnhill's sentences and remanded for resentencing before another trial judge. *Id.* at 1060-62. On remand, Judge Caroline J. Tesche resentenced Mr. Barnhill to 10 years' imprisonment followed by 15 years' supervision. *See State* v. *Barnhill*, No. 11-CF-9149-A (Fla. Cir. Ct.); App. A.

2. *Goldstein* v. *State*

In *Goldstein*, Judge Tharpe faced a similar situation. The defendant, Mr. Goldstein, pled guilty to 100 counts of possession of child pornography. *Goldstein*, 154 So. 3d at 470. Although the guidelines recommended 111.875 years' imprisonment, the State offered Mr. Goldstein an open plea that would cap his sentence at 10 years, followed by unlimited supervision. *Id.* But Judge Tharpe rejected that plea. *Id.* When Mr. Goldstein subsequently entered an open plea, Judge Tharpe sentenced him to 15 years' imprisonment on Count I and 5 years' imprisonment on the remaining counts, to run consecutively to Count I but concurrently to each other (i.e., 22 years' imprisonment). *Id.* "These sentences [we]re a significant downward departure." *Id.*

At sentencing, "[t]here was no evidence that [Mr. Goldstein] had used the internet to meet children or, most importantly, that he had ever had any sexual contact with any child." *Id.* In fact, Mr. Goldstein "had taken a polygraph examination that indicated that he had never inappropriately touched a child." *Id.* In offering the original plea deal, the State had considered a psychological evaluation of Mr. Goldstein, in which a forensic psychiatrist observed he "is a low risk to commit future sexual offenses," "presents without antisocial orientation, significant problems with general or sexual self-management, or substance use problems," and "is participating in mental health services and has a positive and supportive social system in the community." *Id.* Accordingly, the forensic psychiatrist believed Mr. Goldstein's "already low risk [to recidivate] will reach negligible levels at approximately eight years" after release. *Id.* 471. Ultimately, the forensic psychiatrist concluded Mr. Goldstein "presents with minimal risk should he be returned to the community with supervision and supportive mental health treatment." *Id.*

At sentencing, numerous friends, neighbors, colleagues, and family members testified warmly and enthusiastically in support of Mr. Goldstein. *Id.* at 471-72. "All of the witnesses asked the court to show mercy on Goldstein." *Id.* at 472. Mr. Goldstein also relied on two studies by the United States Sentencing Commission to "show how child pornographers who do not commit contact offenses are far less likely to commit any contact offenses in the future." *Id.* In contrast, the State

merely "presented evidence that a search of Goldstein's computers uncovered 272 images of child pornography" and offered a detective's testimony that Mr. Goldstein admitted he downloaded child pornography. *Id.*

Judge Tharpe considered all this testimony and evidence. *See id.* at 472-73. In imposing Mr. Goldstein's sentence, Judge Tharpe stated:

> I can tell you that I could probably count on one hand the number of persons that come in front of me charged with child pornography that have criminal histories. Almost every single one has never been involved in the criminal system. It's [a] first-time offense.
>
> Someone mentioned that Mr. Goldstein lived in—or in his circle of friends, that no one knew about this. And I'm sure that you didn't because there's a dark side in child pornographers[']lives that no one knows about, except other child pornographers. Those are the ones that know.
>
> And I would be just like you, had I not had the experience of being involved with child pornography, of knowing someone for 30 years or all my life because I'm related to them, or 10 or 15 years thinking I can't believe that this happened, that's not the person that I know, but what you don't also realize is that these—for the most part men, live two lives. They live the life that we all know. And then they live the dark side that no one knows other than other child pornographers that they are sharing their files with. . . .
>
> Some people have told me that "it's just pictures, Judge." It's not just pictures. In order to make that picture or to make that movie, you have to rape a child. There's no other way of getting around it. You have to rape a child.
>
> I'm in trial in this division every other week. . . . In the years that I've been trying these cases, there has not been one time when I didn't have at least two people, I have had as many as ten or twelve, approach the bench, some crying, saying that they had been abused as a child and could not hear this particular case. I have had more than

that approach the bench and tell me that they have had a loved one sexually abused.

. . . .

I guess the last thing that I want to say is child pornography perpetuates the sexual abuse of children. It does. And although you may not have had someone tell you this before, but I know from my experience in sitting in this courtroom day-in and day-out, that these men in their dark side are sexually aroused, sexually interested in children. And a child's innocence, it's not like stealing a car or someone breaks in your house and steals your television or your jewelry, you can replace that. You cannot replace a child's innocence. Once that's taken away from a child, it's taken away forever.

We—we are taught to respect adults. We're taught to respect our elders. An adult man can be rebuked by an adult woman. It's very, very, very hard for a child to stop an adult or a man from grooming them or getting into a situation where the child is vulnerable and now because of his sexual interest he takes advantage of that child.

We also know that we don't have years and years of studies and competent data to accurately predict whether or not a person who is a child pornographer is going to reoffend by actually touching a child because the phenomenon, according to experts, is still too new. And we have had studies that say the risk assessments are so low, and then that same study has gone back to those individuals who have then said we didn't tell the truth or we then went out and we actually did contact children when we told you that we had not.

There are other studies that say that the risk assessments are higher than what other studies say and they have come back and revised those studies as well.

The fact of the matter is, the phenomenon is so new to the scientific society, that we don't know what the honest to good true risk assessment is for a child pornographer going out and touching a child, even though we do know that they are sexually attracted to children. That's a given.

I'm not willing to take that risk. It's real easy for me to put a child—a car thief on probation, say don't do it again. He goes out and

> steals a car, okay. *I'm not—I'm not willing to take the risk that at some point in time Mr. Goldstein, or others that have a proclivity for child pornography, bondage, eight year olds, that's not at some point in time going to offend by actually sexually abusing a child.*

Id. (emphasis in original).

On appeal, this Court concluded Judge Tharpe's statements were "remarkably similar—in fact, almost identical—to the statements that this court found fundamentally erroneous in *Barnhill*." *Id.* at 473-74. "As we read [Judge Tharpe's] comments, the policy he explains is one of denying probation to all defendants convicted of possession of child pornography because science has not proven they will not become sexual predators in the future." *Id.* at 475. Judge Tharpe's "personalized general policy," however, was "at odds with Florida law." *Id.*

"Additionally, in both *Barnhill* and [Mr. Goldstein's] case," Judge Tharpe "apparently feared that the defendants would commit new criminal acts of abuse that they were never accused of committing and took this speculation into account when imposing sentence." *Id.* "As in *Barnhill*, this fear was not based on the evidence before the trial court as to this defendant." *Id.* Put bluntly, "a court cannot rely on crimes it fears the defendant might possibly commit in the future simply because he has admitted the charged offenses." *Id.* "While protection of the public is clearly a proper consideration, the judge's comments taken in the context of the evidence presented raise the concern that the court was applying generalized, per-

sonal concerns rather than considering the specific circumstances of this case." *Id.* at 476.

Although judges can "learn from experience" and may "consider prior cases when seeking to impose a proper sentence," the "problem here is that [Judge Tharpe] expressly considered and relied upon [his] own generalized fears of greater future offenses for any person who possesses child pornography." *Id.* "Such fear is simply a factor that [Judge Tharpe], as a matter of law, had no authority to use when exercising its wide discretion or drawing from personal experience." *Id.* As such, Judge Tharpe "fundamentally erred in relying on its generalized fears of greater future offenses for any similarly charged defendant and applying a general policy in sentencing Goldstein contrary to Florida law." *Id.* Ultimately, in a virtually identical reprise of *Barnhill*, this Court reversed Mr. Goldstein's sentences and remanded for resentencing before another trial judge. *Id.* On remand, Judge Christopher C. Sabella has not yet resentenced Mr. Goldstein. *See State* v. *Goldstein*, No. 12-CF-671-A (Fla. Cir. Ct.).

Once again, Judge Tharpe has applied his personal general policy of denying probation to all child pornography defendants. The only distinction of any significance between Mr. Valesano's case on one hand and *Barnhill* and *Goldstein* cases on the other is that, this time, Judge Tharpe did not candidly admit on the record he was applying this personal general policy. Mr. Valesano's sentences constitute a

malfunction of the justice system, because Mr. Valesano is entitled to receive an appropriate sentence fashioned by a fair and impartial judge who has not prejudged his case, but rather one who has dispassionately considered only the evidence presented in court. In such circumstances, the only appellate remedy is to reverse Mr. Valesano's sentences and remand for resentencing before another trial judge.

In *Barnhill*, Judge Tharpe "erred by failing to consider the totality of the circumstances of Barnhill's case and by instead imposing a general standard based on the type of case involved." 140 So. 3d at 1060. Although child pornography cases "are disturbing by their very nature," Judge Tharpe was "required to rise above the disturbing nature of these and other crimes and to provide every defendant a fair opportunity to be heard by an impartial judge who will consider only the evidence presented." *Id.* at 1061. But Judge Tharpe's comments on the record in *Barnhill* made clear that "evidence from other hearings factored into his decision not to downwardly depart," and he "lumped Barnhill with all other similarly charged defendants irrespective of the testimony that Barnhill presented at sentencing." *Id.*

In *Goldstein*, Judge Tharpe's statements were "remarkably similar—in fact, almost identical—to the statements that [were] fundamentally erroneous in *Barnhill*." 154 So. 3d at 473-74. "As we read [Judge Tharpe's] comments, the policy he explains is one of denying probation to all defendants convicted of possession of child pornography because science has not proven they will not become sexual

predators in the future." *Id.* at 475. But this "personalized general policy" was "at odds with Florida law." *Id.* at 470. In both *Barnhill* and *Goldstein*, Judge Tharpe "apparently feared that the defendants would commit new criminal acts of abuse that they were never accused of committing and took this speculation into account when imposing sentence." *Id.* at 475. "As in *Barnhill*, this fear was not based on the evidence before the trial court as to this defendant." *Id.* Put bluntly, "a court cannot rely on crimes it fears the defendant might possibly commit in the future simply because he has admitted the charged offenses." *Id.* at 475-76. "While protection of the public is clearly a proper consideration, [Judge Tharpe's] comments taken in the context of the evidence presented raise the concern that the court was applying generalized, personal concerns rather than considering the specific circumstances of this case." *Id.* at 476. In short, a judge has "no authority" to "expressly consider[] and rel[y] upon [his or her] own generalized fears of greater future offenses for any person who possesses child pornography." *Id.*

Here, Judge Tharpe sentenced Mr. Valesano after this Court decided *Barnhill*, but before this Court decided *Goldstein*. In one sense, when sentencing Mr. Valesano, Judge Tharpe was chastened by this Court's decision in *Barnhill*, because he did not state on the record his personal general policy of denying probation to all child pornography defendants. But in another, more important sense,

Judge Tharpe was not the least bit deterred by *Barnhill*, because he quietly did the same thing he always does: deny probation to a child pornography defendant.

In virtually every pertinent respect, Mr. Valesano's circumstances were identical to Mr. Barnhill's and Mr. Goldstein's circumstances. None of them had committed contact offenses. None of them had sexual conversations with children over the Internet. All of them had passed polygraph tests. All of them had psychologists or psychiatrists testify they were good candidates for therapy and presented low risks to recidivate. All of them had good support systems in place. All of them had numerous family members, friends, and colleagues testify warmly and enthusiastically in their defense at sentencing.

B. The Court Should Reverse Judge Tharpe's Sentences And Remand For Resentencing Before A Different Judge

Once again, however, Judge Tharpe incorrectly disregarded all of that undisputed testimony and evidence. *See Spencer* v. *State*, 645 So. 2d 377, 385 (Fla. 1994) ("Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved."). Additionally, "for justice to be done, it must also *appear* to be done." *Nawaz* v. *State*, 28 So. 3d 122, 125 (Fla. 1st DCA 2010) (emphasis in original). In *Nawaz*, the First District vacated a sentence and remanding for resentencing before another judge because it was "unclear whether the trial court would have imposed the same sentence absent consideration of appellant's national

origin." *Id.*; *accord Scott* v. *Anderson*, 405 So. 2d 228, 239 (Fla. 1st DCA 1981) ("[t]he appearance of justice requires, under such circumstances, that the contempt conviction be set aside and be redetermined by another judge"); *Atkinson Dredging Co.* v. *Henning*, 631 So. 2d 1129, 1130 (Fla. 4th DCA 1994) ("'justice must satisfy the appearance of justice,' even though this 'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties'"). Like *Nawaz*, it is, at the very least, "unclear" whether Judge Tharpe would have imposed the same sentences on Mr. Valesano absent his general personal policy of denying probation to all child pornography defendants given how emotionally and forcefully he had previously stated that policy on the record. *See Goldstein*, 154 So. 3d at 472-73; *Barnhill*, 140 So. 3d at 1058-59. Accordingly, the only appellate remedy, consistent with *Barnhill* and *Goldstein*, is to reverse Mr. Valesano's sentences and remand for resentencing before another trial judge.[3]

[3] On remand, of course, it may turn out that Judge Tharpe's "decision not to downwardly depart and the sentence ultimately imposed in this case may, in fact, be appropriate." *Barnhill*, 140 So. 3d at 1061. But, if recent history with a different judge resentencing Mr. Barnhill on remand can serve as a guide, that result would be unlikely to be the case for Mr. Valesano. Recall Judge Tharpe had sentenced Mr. Barnhill to 22 years' imprisonment, whereas on remand Judge Tesche sentenced him to 10 years' imprisonment and 15 years' supervision. *See* App. A.

II. ISSUE 2: DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DECLINED TO DOWNWARDLY DEPART LOWER THAN TWO CONSECUTIVE STATUTORY MAXIMUM 15-YEAR SENTENCES?

The Trial Court abused its discretion when it declined to downwardly depart lower than two consecutive statutory maximum 15-year sentences.

Standard Of Review

"A trial court's decision whether to depart from the guidelines is a two-part process." *Banks* v. *State*, 732 So. 2d 1065, 1067 (Fla. 1999). "First, the court must determine whether it *can* depart, i.e., whether there is a valid legal ground and adequate factual support for that ground in the case pending before it (step 1)." *Id.* "This aspect of the court's decision to depart is a mixed question of law and fact and will be sustained on review if the court applied the right rule of law and if competent substantial evidence supports its ruling." *Id.* "Second, where the step 1 requirements are met, the trial court further must determine whether it *should* depart, i.e., whether departure is indeed the best sentencing option for the defendant in the pending case." *Id.* at 1068. "In making this determination (step 2), the court must weigh the totality of the circumstances in the case, including aggravating and mitigating factors." *Id.* "This second aspect of the decision to depart is a judgment call within the sound discretion of the court and will be sustained on review absent an abuse of discretion." *Id.* "Discretion is abused only where no reasonable person would agree with the trial court's decision." *Id.*

Merits

There is no dispute that Mr. Valesano passed *Banks*'s step one, because the Trial Court did downwardly depart below the recommended guideline sentence, and the State did not take a cross-appeal. Nevertheless, the Trial Court misapplied *Banks*'s step two when it declined to downwardly depart lower than two consecutive statutory maximum 15-year sentences.

No reasonable person could believe 30 years' imprisonment is the best sentencing option for a 52-year-old man who merely possessed child pornography over a three-month period when he had not committed a contact offense, never had sexual conversations with children over the Internet, passed a polygraph test, had a mental health counsel testify he was a good candidate for therapy and presented low risks to recidivate, had good support systems in place, and had numerous family members, friends, and colleagues testify warmly and enthusiastically in his defense at sentencing and offer their availability as a support network. The only aggravating circumstances the Trial Court identified in fashioning its sentence were that Mr. Valesano's child pornography collection involved bondage, bestiality, and categorization. Those circumstances should not equate to two consecutive statutory maximum 15-year sentences.

CONCLUSION

For the foregoing reasons, the Court should reverse Mr. Valesano's sentences and remand for resentencing before a different Circuit Judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 15, 2015, I electronically served the following via the Florida e-portal: Office of the Attorney General (crimapptpa@myfloridalegal.com).

May 15, 2015

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

May 15, 2015

/s/ Thomas Burns
Thomas A. Burns