

## *U.S. v. Hernandez: Going to Trial and Losing Too Much*

In *U.S. v. Albert Silva Hernandez*, 2018 WL 3352608 (9th Cir. July 10, 2018), the Ninth Circuit Court of Appeals dealt with issues relating to the sexual misconduct of a high school softball coach. The three-judge panel agreed on the legal issues relating to the crimes charged, but split 2-1 on whether Hernandez had been punished for exercising his Sixth Amendment right to a jury trial.

Hernandez coached softball at a high school in Las Vegas, and also coached a club team. He met 17 year-old N.C. when she joined the club softball team. He initiated a sexual relationship with her. N.C. and Hernandez exchanged photographs using a password-protected cell phone app that limited access of the photos to the two of them. She took sexually explicit photos of herself with her mobile phone, often at his direction, and sent them to him. Hernandez took sexually explicit photos of himself, and often at her direction, sent those photos to N.C. Hernandez also took photos of himself and N.C. engaged in sexual activity together, and later sent those photos to N.C. via his mobile phone. The relationship came to the attention of authorities when N.C.'s father delivered her phone to the police.

Hernandez was charged with eight counts of 18 U.S.C. §2251(a)(e), sexual exploitation of a child, and three counts of 18 U.S.C. §2252A(a)(1),(b), transporting child pornography. Following a jury trial, Hernandez was convicted of the sexual exploitation counts and acquitted of the transporting counts. After applying several enhancements and denying any reduction for acceptance of responsibility, the district court sentenced Hernandez to over 23 years in federal prison.

### **Distribution... to an Audience of One**

The Ninth Circuit first addressed the applicability of a sentencing guideline for "distribution": "Resolution of this case turns in part on what it means to "distribute" child pornography under U.S.S.G. §2G21(b)(3), which provides for a two-level sentencing enhancement "if the offense involved distribution."

Hernandez argued that distribution has been interpreted to require distribution to third parties. The court disagreed, and found that the distribution enhancement applied here, where the pornographic images are transferred to the minor victim depicted in the images.

### **"You Decided to Roll the Dice, and You Came Up Snake Eyes"**

The main issue of interest here is "[Did] the district court . . . increase Hernandez's sentence or with[hold] a reduction for acceptance of responsibility based on Hernandez's decision to go to trial[?]" *Hernandez* at \*4.

Answer: Yes: "[B]ecause the record suggests that the district court penalized Hernandez by increasing his sentence based on his decision to exercise his Sixth Amendment right to go to trial, we issue a limited remand for resentencing." *Id.* at \*1.

Two of the circuit judges, (Judges McKeown and Murgia), were concerned that Hernandez may have been punished for going to trial: "The Supreme Court has repeatedly emphasized that '[t]o punish a person because he has done what the law plainly allows him to do is a due process violation "of the most

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basic sort.” *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).” *Hernandez* at \*10. Hernandez goes on to say, “We have consistently echoed this principal, including in the context where a district court withholds a reduction for acceptance of responsibility...” *Id.*

There were several statements made by the district court judge at sentencing that the judges found troubling, or more precisely, “discomfiting”: “[O]ur review of the sentencing transcript leaves us discomfited that the district court penalized Hernandez for his assertion of protected Sixth Amendment rights. The district court emphasized Hernandez’s decision to go to trial five separate times during the sentencing hearing. The court first stated that ‘it would mean something if [Hernandez] took responsibility before the trial.’ The court then repeated that ‘contrition means something

when it happens before trial.’ . . . Still further, the court continued: ‘[W]hat I look for is somebody who feels remorse before the trial, before you put this young girl through the—through the agony of testifying, having to testify to what went on, and then identify pictures of herself, personal pictures. So, I don’t see—I don’t see much remorse there, Mr. Hernandez.’ This comment revealed the court’s dim view of Hernandez’s right ‘to be confronted with the witnesses against him.’ U.S. Const. amend. VI.” *Id.* at \*5.

Just before imposing sentence, the trial court declared, “You decided to roll the dice, and it came up snake eyes. You didn’t think that she’d testify, and she did. You went—you wanted to go to trial, so you went to trial....” The court of appeals stated that deciding to “roll the dice” could only refer to Hernandez decision to go to trial, a right enshrined in the constitution and guaranteed by the Sixth amend-

ment. The ruling also points out, “Critically here, the district court’s comments regarding Hernandez’s decision to go to trial comprised virtually the entirety of the explanation for the sentence. It does not appear that the court “based its decision on the facts of the case and on this particular record as a whole... Hence, we vacate the sentence and order a limited remand to permit the district court to “adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing....”

In federal court, the consequences of rolling the dice and coming up snake eyes, i.e., going to trial and losing, are already dire enough without the departure of “acceptance of responsibility” also being at risk. As Judge McKeown put it, “Although most federal criminal cases result in guilty pleas, the Sixth Amendment

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right to trial remains an important safeguard to defendants who insist on their innocence. Permitting courts to impose harsher sentences on those few defendants who do go to trial could in practice restrict the exercise of the right to those with unusual risk tolerance—or uncommon courage.” *Id.* at \*6.

### Teacher-Student Cases

Criminal cases against high school teachers who have sex with their students, and coaches who have sex with minors on their teams, are prosecuted frequently, usually by the DA of the county where the crime occurs. That is certainly the norm in San Diego. However, many criminal cases can be prosecuted under either federal statutes or state statutes. Hernandez’s case was investigated by the Clark County School District Police, but also by ICE’s Homeland Security Investigations, and it was prosecuted by the office of the U.S. Attorney in Las Vegas.

In Nevada, the age of consent is 16, but teachers and coaches who have sex with minors under 18 can receive up to 6 years in prison. In California, the age of consent is 18, but teachers and coaches charged with statutory rape of 17 year-olds, when other circumstances are not aggravated, often receive a year or less in custody. Recidivist sexter Anthony Weiner was sentenced to 21 months in prison for his conviction of sending photos of his private parts to a 15 year-old girl. By contrast, after his prosecution in federal court, and because he not only had a sexual relationship with a 17 year-old but also exchanged intimate texts with her, Hernandez was sentenced to over 23 years in prison (it is possible that the remand ordered by the court of appeals may end up reducing that sentence by a couple of years).

Both the DOJ and the FBI web sites stated that Hernandez’ 23-year sentence demonstrates that sexual exploitation of minors will not be tol-

erated. This phraseology, and the disproportionately long sentence it seeks to justify, are unfortunate because they conflate Hernandez’s crime with the much more serious crimes of sex trafficking. 23 years in prison for this particular crime is even more discomfiting to me than the Sixth Amendment violation that resulted in an extra year or two, but aside from the loss of the acceptance of responsibility departure at issue in his appeal, the decades Mr. Hernandez will spend in prison are supported by the Sentencing Guidelines.

For further reading on the erosion of the right to trial by jury that result from severe sentences post-trial, and suggestions to remedy the situation, see the National Association of Criminal Defense Lawyer’s recent report, “The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It”, available at <https://www.nacdcl.org/trialpenaltyreport/> **TBN**



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