No. 07-673

In the Supreme Court of the United States

GARY REINER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly ordered petitioner to forfeit, under 18 U.S.C. 981(a)(1)(C) and (2)(A), the foreseeable proceeds of the interstate prostitution conspiracy in which he participated.

2. Whether the district court correctly calculated the amount of money that petitioner was required to forfeit under 18 U.S.C. 982(a)(1) (Supp. V 2005) as "property * * * involved in" his money laundering offense.

3. Whether the district court abused its discretion in sentencing petitioner to a within-Guidelines sentence of 60 months of imprisonment.

4. Whether the district court abused its discretion in denying petitioner's motion for a mistrial based on allegedly prejudicial testimony, where the court instructed the jury to disregard the testimony.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 500 F.3d 10. The memorandum opinion of the district court on forfeiture (Pet. App. A17-A42) is reported at 397 F. Supp. 2d 101.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2007. The petition for a writ of certiorari was filed on November 19, 2007 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maine, petitioner was convicted of conspiracy to violate the Travel Act and the Mann Act; traveling in interstate commerce to promote prosti-

tution; inducing an individual to travel in interstate commerce to engage in prostitution; and conspiracy to commit money laundering. He was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Petitioner was also ordered to forfeit $3,927,392.40 jointly and severally with his co-defendants. The court of appeals affirmed. Pet. App. A1-A16; Judgment 1-5; Final Order of Forfeiture.

1. From January 1999 to June 2004, petitioner and several associates operated an interstate prostitution ring under the guise of a legitimate massage parlor in Kittery, Maine. Between 2001 and 2004, petitioner handled the operation's finances and oversaw its daily business. He was also responsible for all personnel decisions and the content of advertisements that the operation placed in adult publications. Pet. App. A2-A3, A8, A38-A39 & n.29.

In April 2005, a grand jury in the District of Maine charged petitioner with conspiracy to operate an interstate prostitution ring, in violation of the Travel Act and the Mann Act (18 U.S.C. 371; 18 U.S.C. 1952 (2000 & Supp. V 2005); 18 U.S.C. 2421; and 18 U.S.C. 2422 (Supp. V 2005)) (Count 1); traveling in interstate commerce to promote prostitution, in violation of the Travel Act (18 U.S.C. 2 and 18 U.S.C. 1952 (2000 & Supp. V 2005)) (Count 2); inducing an individual to travel in interstate commerce to engage in prostitution, in violation of the Mann Act (18 U.S.C. 2 and 18 U.S.C. 2422(a) (Supp. V 2005)) (Count 3); and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h) and 1957 (Count 7). Pet. App. A2, A4; Superseding Indictment 1-10.

2. At trial, several of petitioner's co-conspirators, associates, and customers testified against him, including Russell Pallas, a former police officer whom peti-

tioner had hired to manage the massage parlor's front desk. See Pet. App. A3-A4; Gov't C.A. Br. 7-23. When asked about police surveillance at the parlor, Pallas testified that petitioner told him "we were being watched by the FBI from across the street, and it was originally based on a complaint of under-aged girls at the club." *Id.* at 23-24; see Pet. App. A4. Petitioner objected to the "mention of under-aged girls." Gov't C.A. Br. 24. He moved to strike the testimony and for a mistrial. Pet. App. A4. The court struck the testimony and instructed the jury, at petitioner's request, "to disregard the comment of under-age girls" because "[t]here is no charge against [petitioner] concerning under-age girls in this case." Gov't C.A. Br. 24; see Pet. App. A4. After finding no government misconduct, the court denied the motion for a mistrial. Gov't C.A. Br. 24. At the trial's conclusion, the court reminded the jury that "anything * * * I have * * * instructed you to disregard is not evidence" and "[y]ou must not consider it." *Id.* at 46. The jury found petitioner guilty of all the charges. Pet. App. A4.

At sentencing, the district court determined that petitioner's recommended sentencing range under the advisory United States Sentencing Guidelines was 51 to 63 months of imprisonment. Pet. App. A5. Petitioner argued that he should receive a sentence similar to the six-month prison term that Pallas received or the five-year term of probation that Mary Ann Manzoli (a second co-conspirator) received. Sent. Tr. 81. The court rejected that argument, reasoning that Pallas was a low-level "employee" in the scheme, and Pallas and Manzoli had accepted responsibility by pleading guilty and had provided "critical" testimony against petitioner, whereas petitioner was the "linchpin" of the operation yet

pleaded "innocent ignorance" at a jury trial. *Id.* at 81-84. After considering the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005), the court sentenced petitioner to 60 months of imprisonment. Sent. Tr. 86-87.

The district court also ordered petitioner to forfeit $3,927,392.40 as a joint and several liability with his co-defendants. Pet. App. A42; Final Order of Forfeiture. On the charge of an interstate prostitution conspiracy (Count 1), the court concluded that petitioner was liable to forfeit $3,927,392.40, the gross receipts of the prostitution operation between August 2000 and June 2004. Pet. App. A20-A28. Relying principally on *United States* v. *Hurley*, 63 F.3d 1 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996), the court held that "conspirators are vicariously liable for the foreseeable criminal conduct of their co-conspirators and therefore can be required to forfeit proceeds that other members of the conspiracy foreseeably reap." Pet. App. A25. The court found that the prostitution operation's gross receipts of $3,927,392.40 "were foreseeable" to petitioner. *Id.* at A26. Accordingly, the court concluded that petitioner had "obtained" $3,927,392.40 in forfeitable "proceeds," within the meaning of 18 U.S.C. 981(a)(1)(C) and (2)(A), the forfeiture provisions applicable to Count 1. Pet. App. A20-A21 & n.9, A28.

The district court also concluded that petitioner was liable, under the same provisions, to forfeit the same amount for the Travel Act violation (Count 2). The court reasoned that the gross receipts of the operation represented the proceeds that petitioner had either personally obtained or had aided and abetted his co-defendants to obtain. Pet. App. A28-A29. On the charge of inducing an individual to travel in interstate commerce to engage

in prostitution (Count 3), the court concluded that petitioner was liable, under 18 U.S.C. 2253(a), to forfeit $581,310, the proceeds that the prostitute's activities had generated. Pet. App. A29-A35.

On Count 7, the money laundering count, the district court found that petitioner was subject to forfeiture of $3,349,602.26. Pet. App. A39. The court concluded that this sum represented the money "involved in" petitioner's money laundering offenses under 18 U.S.C. 1956(h) and 1957, and therefore was the amount forfeitable under 18 U.S.C. 982(a)(1) (Supp. V 2005), the forfeiture provision applicable to money laundering. Pet. App. A35-A39. "[T]o avoid any double counting," the court imposed a "single money judgment * * * of $3,927,392.40—the greatest amount sought for all four Counts," *id.* at A41, "as a joint and several liability on the part of [petitioner] with his co-defendants," *id.* at A42. See Final Order of Forfeiture.

3. The court of appeals affirmed petitioner's convictions and sentence, including the forfeiture order. Pet. App. A1-A16.

a. As relevant here, the court rejected petitioner's arguments that the district court erred in ordering him to forfeit $3,927,392.40. Petitioner argued that he had not "obtained" (see Pet. App. A22) the entire gross receipts of the prostitution operation because he had "never used or personally possessed the money." *Id.* at A16; Pet. C.A. Br. 63-64. The court of appeals found that contention foreclosed by its earlier decision in *Hurley*, which "held that the principle of finding members of a conspiracy substantively liable for the foreseeable conduct of other members of the conspiracy

extend[s] to forfeiture rules." Pet. App. A16 (citing *Hurley*, 63 F.3d at 22).[1]

Petitioner also argued that the district court had erred in determining that he was liable to forfeit $3,349,602.26 under Count 7. Pet. C.A. Br. 64-66. He contended that the district court had mistakenly "fail[ed] to separate legitimate from illegitimate funds" when finding the amount of property "involved in" the money-laundering offense. *Id.* at 66. The court of appeals rejected that contention, pointing out that the district court had "determin[ed] that all of the [massage parlor's] proceeds were subject to forfeiture because the [parlor] was nothing more than a front for illegal prostitution." Pet. App. A16. "Reviewing the record," the court concluded that the district court's finding was "not clearly erroneous," because "[t]he sole purpose of the [massage parlor] was prostitution." *Ibid.*

b. The court of appeals also held that petitioner's 60-month, within-Guidelines prison term was not unreasonable. Pet. App. A11-A15. The court concluded that the district court had correctly calculated the Guidelines range, *id.* at A11-A12, and that petitioner's 60-month sentence was substantively reasonable because it was a "defensible overall result" that the court had supported with "a plausible explanation," *id.* at A13 (quoting *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 928 (2007)). The court of appeals rejected petitioner's claim of "an unwarranted sentence disparity" between his sentence and the sentences of Manzoli and Pallas. *Id.* at A14.

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[1] Petitioner did not challenge, and the court of appeals did not disturb, the district court's finding (Pet. App. A26) that the operation's gross receipts of $3,927,392.40 were foreseeable to petitioner under *Hurley*.

The court explained that the sentencing differential was not unwarranted because, unlike petitioner, Manzoli and Pallas had "accepted responsibility for what they had done and then cooperated with the government." *Id.* at A14-A15.

c. The court of appeals also rejected petitioner's contention that the district court had abused its discretion in denying petitioner's motion for a mistrial based on Pallas's testimony about under-age girls. Pet. App. A9-A11. The court of appeals observed that the district court had "immediately struck" Pallas's testimony and had instructed the jury to disregard it. *Id.* at A10. Recognizing that, "whenever 'a curative instruction is promptly given, a mistrial is warranted only in rare circumstances implying extreme prejudice,'" *id.* at A9 (quoting *United States* v. *Torres*, 162 F.3d 6, 12 (1st Cir. 1998), cert. denied, 526 U.S. 1057 (1999)), the court found no "extreme prejudice" in petitioner's case. Petitioner claimed prejudice based on a statement that one juror had made during voir dire that "she was close to two individuals who had suffered from sexual abuse." *Ibid.* But the court of appeals found that the juror's voir dire statement did not "rebut[] th[e] presumption" that jurors follow curative instructions, and the court therefore "conclude[d] that the district court did not abuse its discretion in denying [the] motion for a mistrial." *Id.* at A10-A11.

ARGUMENT

Petitioner reiterates his forfeiture, sentencing, and mistrial claims. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore not warranted.

1. Petitioner contests (Pet. 8-13) the forfeiture order of $3,927,392.40 under Count 1, the interstate prostitution conspiracy charge, on the ground that he did not personally "obtain[]" the entire gross receipts of the prostitution operation. The court of appeals correctly rejected that argument and it does not warrant this Court's review.[2]

a. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. 981 *et seq.*, subjects to forfeiture "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to * * * any offense constituting 'specified unlawful activity' * * * or a conspiracy to commit such offense." 18 U.S.C. 981(a)(1)(C). In cases, such as this one, which involve "illegal services," the term "proceeds" is expressly defined to mean "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense." 18 U.S.C. 981(a)(2)(A). Petitioner does not dispute that those provisions apply to the interstate prostitution conspiracy for which he was convicted under Count 1. See Pet. 8-13; see also Pet. App. A20-A21; 18 U.S.C. 1956(c)(7)(A) (defining "specified unlawful activity" to include any offense listed under 18 U.S.C. 1961(1)); 18 U.S.C. 1961(1) (Supp. V 2005) (listing viola-

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[2] Petitioner is not clear whether this challenge to the forfeiture order is limited to Count 1 or also extends to Counts 2 and 3. See Pet. 8-13. Because the district court entered a money judgment equal to the amount of forfeiture ordered on Count 1, and the amounts ordered on Counts 2 and 3 are less than or equal to that amount, any challenge to the forfeiture on Counts 2 and 3 would have no effect on the judgment if the forfeiture order on Count 1 is valid. We therefore respond to petitioner's argument only as it relates to Count 1.

tions of 18 U.S.C. 1952 (2000 & Supp. V 2005); 18 U.S.C. 2421; and 18 U.S.C. 2422 (Supp. V 2005)); 18 U.S.C. 1956(c)(7)(B)(vii) (2000 & Supp. V 2005) (defining "specified unlawful activity" to include "trafficking in persons * * * or transporting, recruiting or harboring a person, * * * for commercial sex acts"); 28 U.S.C. 2461(c) (allowing government to seek forfeiture in a criminal case whenever a person is charged with violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized).

As he argued in the court of appeals, petitioner contends that he did not "obtain[] directly or indirectly" the gross receipts of the massage parlor because he "only delivered" the parlor's money to the bank "*and never had any right* to" it. Pet. 9. The court of appeals correctly rejected that argument. Under this Court's decision in *Pinkerton* v. *United States*, 328 U.S. 640 (1946), all members of a conspiracy are liable for "the substantive offense[s] * * * committed by [any] one of the conspirators in furtherance of the unlawful project," where (as here) such conduct is foreseeable. *Id.* at 647. As the court of appeals earlier observed in *Hurley*, "[i]t would be odd * * * to depart from this principle" of vicarious liability "when it comes to apply[ing] the forfeiture rules." 63 F.3d at 22. And the phrase "obtained directly or indirectly" in Section 981(a)(2)(A) is broad enough to encompass both funds that a conspirator obtains personally and funds that he obtains "indirectly" by virtue of his participation in the conspiracy. See *United States* v. *McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997).

Contrary to petitioner's suggestion (Pet. 12-13), CAFRA and related forfeiture statutes serve interests "beyond merely separating a criminal from his ill-gotten

gains." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 629 (1989). Specifically, they are focused on punishment and remuneration, imposing forfeiture "as a kind of shadow fine" and using the amount of a criminal enterprise's proceeds as a means of measuring harm to, and recompensing, the enterprise's victims and society at large. *Hurley*, 63 F.3d at 21; see *Libretti* v. *United States*, 516 U.S. 29, 39 (1995) ("criminal forfeiture * * * 'is clearly a form of monetary punishment,'" much like a fine) (citation omitted); *Caplin & Drysdale*, 491 U.S. at 629-630 (forfeiture serves "the objective of returning property, in full, to those wrongfully deprived or defrauded of it," helps to "lessen the economic power" of criminals, and also subsidizes law-enforcement activities). It is entirely consistent with those broader principles to hold all co-conspirators jointly and severally liable for the forfeiture of the foreseeable proceeds of the entire conspiracy.

Indeed, given that petitioner was "the critical linchpin" of the prostitution scheme (Sent. Tr. 83; see *id.* at 85), it would flout congressional intent to absolve him from the punitive effects of forfeiture simply because of the "fortuit[y]" that he served as a conduit rather than a recipient of the operation's proceeds. *Hurley*, 63 F.3d at 22; see *id.* at 21 ("since temporary custody is certainly enough for a possession charge in a drug case, it is hard to see why 'obtained' should be read more narrowly" (citation omitted)).

All of the other courts of appeals that have addressed the issue have held that the forfeiture statutes impose vicarious liability on co-conspirators. See, *e.g.*, *United States* v. *Benevento*, 836 F.2d 129, 130 (2d Cir. 1988) (per curiam); *McHan*, 101 F.3d at 1043 (4th Cir.); *United States* v. *Edwards*, 303 F.3d 606, 643-644 (5th

Cir. 2002), cert. denied, 537 U.S. 1192, 1240 (2003); *United States* v. *Corrado*, 227 F.3d 543, 553 (6th Cir. 2000); *United States* v. *Spano*, 421 F.3d 599, 603 (7th Cir. 2005), cert. denied, 546 U.S. 1095, 1122 (2006); *United States* v. *Simmons*, 154 F.3d 765, 769-770 (8th Cir. 1998); *United States* v. *Caporale*, 806 F.2d 1487, 1506-1509 (11th Cir. 1986), cert. denied, 482 U.S. 917 and 483 U.S. 1021 (1987); see also *United States* v. *Wilson*, 742 F. Supp. 905, 909 (E.D. Pa. 1989), aff'd, 909 F.2d 1478 (3d Cir.) (Table), cert. denied, 498 U.S. 1016 (1990). In light of the uniformity among the courts of appeals, this Court's review is unwarranted.

b. Petitioner erroneously contends (Pet. 8-13) that the decision below conflicts with the Seventh Circuit's decision in *United States* v. *Masters*, 924 F.2d 1362, cert. denied, 500 U.S. 919, and 502 U.S. 823 (1991). *Masters* actually rejected an argument that the defendant did not "obtain[]" certain bribe money that he merely forwarded to his co-conspirators and held that, because there is "joint and several liability," each co-conspirator "is fully liable for the receipts of the other members of the enterprise." *Id.* at 1369-1370; see *id.* at 1370 ("The fact that [the defendant] did not keep the whole amount is irrelevant given the jointness of each of the [co-conspirators'] liability."). The Seventh Circuit recently reaffirmed that "the proceeds of a conspiracy are a debt owed by each of the conspirators," observing that "[i]t would be absurd to treat them more leniently than the law treats a lawful partnership, all of whose members are severally as well as jointly liable for the partnership's debts." *Spano*, 421 F.3d at 603 (citing, *inter alia*, *Edwards*, 303 F.3d at 643-644).

Petitioner mistakenly argues (Pet. 12-13) that the decision below conflicts with *Masters* on the meaning of

the word "proceeds." Petitioner is correct that *Masters* held, contrary to every other court of appeals that has considered the issue, that, under the RICO forfeiture provision, 18 U.S.C. 1963(a)(3), the term "proceeds" refers to net profits, not gross receipts. 924 F.2d at 1369-1370; but see *Hurley*, 63 F.3d at 21 (holding that "proceeds," as used in the RICO provision, means gross receipts, not "profits"); *Simmons*, 154 F.3d at 770-771 (same); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997) (same). In addition, this Court recently heard argument in *United States* v. *Santos*, No. 06-1005 (argued Oct. 3, 2007), to resolve a related circuit conflict over whether the term "proceeds," as used in the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), means the gross receipts from unlawful activities or only the net profits. But neither of those conflicts is implicated in this case. The forfeiture on Count 1 does not involve either Section 1956(a)(1) or Section 1963(a)(3), but rather 18 U.S.C. 981(a)(1)(C) and (2)(A). As explained above, Section 981(a)(2)(A) expressly states that, in a case involving illegal services, the term "proceeds" includes "any property traceable" to the offense and "is not limited to the net gain or profit realized" therefrom. The decisions below are fully consistent with that definition. Because the parallel circuit conflicts on the scope of Sections 1956(a)(1) and 1963(a)(3) are not implicated by the forfeiture order on Count 1, they do not support either granting plenary review or holding the petition in this case pending the Court's decision in *Santos*.

Even if there were some conflict of authority that bore on Count 1, further review would be inappropriate because this Court's resolution of the conflict would have no practical impact on petitioner's sentence. Apart

from the forfeiture ordered on Count 1 (and Counts 2 and 3), petitioner was also correctly ordered to forfeit $3,349,602.26 on Count 7, the money laundering charge. The $3,349,602.26 forfeiture order on Count 7 suffices to cover any amount that petitioner will realistically have to pay, no matter what this Court's disposition on Count 1.

The government cannot recover from petitioner any amounts forfeited by his co-conspirators. See Pet. App. A41; *Hurley*, 63 F.3d at 23 (government can collect enterprise's total receipts "only once"). And one of petitioner's co-conspirators, Manzoli, has already forfeited at least $2,177,947.11. Sent. Tr. 14-15. Thus, as a practical matter, petitioner will not be required to pay a penny more than the amount that he has been ordered to forfeit under Count 7.

Moreover, any conflict on the meaning of the words "obtain" and "proceeds" would not affect the correctness of the forfeiture order on Count 7. Forfeiture under Count 7 is governed by 18 U.S.C. 982(a)(1) (Supp. V 2005). As the district court observed, that provision "is not limited to ['proceeds'] 'obtained by' the defendant but extends to 'any property * * * involved in such offense.'" Pet. App. A35-A36. Accordingly, no conflict among the courts of appeals is implicated by this case.

2. Petitioner also mistakenly contends that the forfeiture order under Count 7 is erroneous because the courts below did not distinguish between "the legitimate and illegitimate funds that came into the [massage parlor]." Pet. 14-15. Contrary to that contention, it is irrelevant whether the forfeited funds were legitimate or illegitimate, because 18 U.S.C. 982(a)(1) (Supp. V 2005) calls for the forfeiture of all "property * * * involved in [the] offense," without distinguishing legitimate from ill-

gotten gains. In any event, the district court concluded that all of the receipts of the massage parlor were illegitimate because "the Club's seemingly legitimate locker room, whirlpool, spa, and entrance fee[] were all just a front so that the health club could remain open as a house of illegal prostitution." Pet. App. A24. "Reviewing the record," the court of appeals concluded that "the district court's determination regarding the nature of the [massage parlor] [was] not clearly erroneous," and "[t]he sole purpose of the [massage parlor] was prostitution." *Id.* at A16. That finding of fact, on which both courts below were in agreement, does not present a recurring issue of importance for this Court to resolve. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

3. This Court's review is also not warranted to address petitioner's fact-bound contention (Pet. 15-19) that his sentence is unreasonable. Petitioner argues that his within-Guidelines sentence of 60 months of imprisonment is substantively unreasonable because it is unduly harsh in comparison to the sentences received by co-conspirators Pallas and Manzoli. That claim was correctly rejected by both the district court and the court of appeals, and it does not warrant this Court's review. See *Graver Tank*, 336 U.S. at 275; *Johnston*, 268 U.S. at 227.

As this Court recently held in *Gall* v. *United States*, 128 S. Ct. 586 (2007), a claim that a sentence is substantively unreasonable is reviewed under a "deferential abuse-of-discretion standard." *Id.* at 591. Moreover, sentences within the advisory range recommended by the Sentencing Guidelines are especially likely to be reasonable. See *Rita* v. *United States*, 127 S. Ct. 2456,

2463-2465 (2007). Applying a deferential standard of review consistent with *Gall* and *Rita*, the court of appeals correctly concluded that the difference in the sentences received by petitioner and co-conspirators Pallas and Manzoli did not render petitioner's sentence substantively unreasonable. Pet. App. A13-A15. The district court cited numerous facts that justified giving petitioner a sentence substantially longer than the sentences that Pallas and Manzoli received: Pallas was a low-level "employee" in the scheme, Pallas and Manzoli had accepted responsibility by pleading guilty, and they had provided "critical" testimony against petitioner, whereas petitioner was the "linchpin" of the operation and, instead of accepting responsibility, he lost at a jury trial. Sent. Tr. 81-84. As the court of appeals correctly concluded, those facts amply established that petitioner is not "similarly situated to Pallas and Manzoli," and his sentence is entirely reasonable. Pet. App. A14. There is no cause for this Court to revisit that fact-specific conclusion.

4. Petitioner's similarly fact-bound contention (Pet. 19-25) that the district court erroneously denied his motion for a mistrial also does not warrant this Court's review. Petitioner himself acknowledges (Pet. 20) that the decision to grant or deny a mistrial is a discretionary one. Nor does petitioner dispute the court of appeals' statement that, "whenever a curative instruction is promptly given, a mistrial is warranted only in rare circumstances implying extreme prejudice." Pet. App. A9 (internal quotation marks omitted); see *Francis* v. *Franklin*, 471 U.S. 307, 325 n.9 (1985) ("Absent * * * extraordinary situations, * * * we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.").

Petitioner's only dispute is with the lower courts' on-the-scene assessment that extreme prejudice did not occur here. The court of appeals took into account the concerns that juror 19 expressed at voir dire, but concluded that Pallas's "isolated comment" about "under-age girls" did not rise to the level requiring a mistrial. Pet. App. A10. Because there was no prosecutorial misconduct (see Gov't C.A. Br. 24), and the district court "immediately struck" Pallas's fleeting comment (Pet. App. A9-A10), the court of appeals' determination that petitioner did not suffer "extreme prejudice" does not "so far depart[] from the accepted and usual course of judicial proceedings" that it warrants this Court's review. Sup. Ct. R. 10(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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