

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD ERIC ARY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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Northern District of Texas

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-10082

United States Court of Appeals
Fifth Circuit

FILED

June 14, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RONALD ERIC ARY,

Defendant – Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before ELROD, COSTA, and HO, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

Ronald Ary appeals his sentence following a conviction for distributing a visual depiction of a minor engaged in sexually explicit conduct. He argues that the district court erred in determining that his Texas deferred adjudications qualify as prior convictions for the purpose of 18 U.S.C. § 2252(b)(1)'s sentencing enhancement and in sentencing him to a term of imprisonment that exceeded the statutory maximum term of imprisonment charged in his indictment. Because the district court did not err, we AFFIRM.

I.

Ary pleaded guilty to distributing a visual depiction of a minor engaged in sexually explicit conduct. Under 18 U.S.C. § 2252(b)(1), Ary was subject to

a maximum term of imprisonment of 20 years unless he had a prior conviction involving the sexual exploitation of a minor. 18 U.S.C. § 2252(b)(1).

The United States Probation Office prepared a presentence report, which noted that Ary had pleaded guilty in Texas state court to one charge of aggravated sexual assault and one charge of indecency with a child. For both offenses, Ary was granted deferred adjudication and placed on ten years of probation with a condition to serve 90 days of imprisonment.

With a total offense level of 42 and a criminal history category of III, Ary's range was 360 months to life imprisonment under the United States Sentencing Guidelines. The presentence report explained that the applicable maximum term of imprisonment depended on whether Ary had any qualifying prior convictions for the sexual exploitation of children. *See* 18 U.S.C. § 2252(b)(1). Ordinarily, for an offense under § 2252, the statutory minimum term of imprisonment is 5 years, and the maximum term of imprisonment is 20 years. *See* § 2252(b)(1). However, if a defendant has a previous conviction for sexual exploitation under certain federal statutes or "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children," the statutory minimum and maximum terms of imprisonment increase to 15 years and 40 years, respectively. 18 U.S.C. § 2252(b)(1).

The presentence report noted Ary's Guidelines range would be 360 to 480 months if the district court determined that he had a qualifying prior conviction.¹ If not, the Guidelines term of imprisonment would be 240

¹ The statutory maximum sentence (480 months) is less than the maximum Guidelines term (life), so the Guidelines maximum term of imprisonment becomes 480 months. U.S.S.G. § 5G1.1(a).

months.² Responding to the presentence report, the government argued that the enhanced statutory maximum term in § 2252(b)(1) should be applied in Ary's case because his deferred adjudications qualified as prior convictions. In his objections to the presentence report, *inter alia*, Ary argued that the enhanced statutory maximum term should not be used to calculate his Guidelines range because: (1) Texas deferred adjudications do not qualify as convictions for purposes of § 2252(b)(1); and (2) his prior convictions were not alleged in his indictment or admitted by him.

The district court determined that Ary's deferred adjudications qualified as prior convictions and applied the enhanced minimum and maximum terms of imprisonment set forth in § 2252(b)(1). It sentenced Ary to 360 months of imprisonment and a life term of supervised release. Ary timely appealed.

II.

Because Ary preserved his arguments for appellate review, we review his claims *de novo*. See *United States v. Hubbard*, 480 F.3d 341, 344 (5th Cir. 2007).

III.

According to Ary, the district court erred in treating Ary's deferred adjudications as prior convictions because they are not convictions under § 2252(b)(1). Section 2252(b)(1) provides that a defendant who has a "prior conviction under . . . the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children" is subject to

² The statutory maximum sentence (240 months) is less than the maximum Guidelines term (360 months), so the Guidelines term of imprisonment becomes 240 months. U.S.S.G. § 5G1.1(a).

a term of imprisonment of at least 15 years but not more than 40 years. 18 U.S.C. § 2252(b)(1). “Conviction” is not defined for the purpose of the § 2252(b)(1) sentencing enhancement. *See* 18 U.S.C. § 2256. And neither party has identified any Fifth Circuit cases addressing the question of whether a deferred adjudication qualifies as a “prior conviction” for the purposes of this enhancement.

One issue is whether we should consult state or federal law to define “conviction.”³ The language of § 2252(b)(1) specifies that this sentencing enhancement applies if the defendant has a prior conviction, *inter alia*, “under the laws of any State relating to” the sexual exploitation of minors. 18 U.S.C. § 2252(b)(1) (emphasis added). There is a list of federal crimes between “prior conviction” and “under the laws of any State,” but the prepositional phrase beginning with “under the laws of any State” refers to prior conviction.

Absent “a plain indication to the contrary . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law.” *NLRB v. Nat. Gas Utility Dist. of Hawkins Cty.*, 402 U.S. 600, 603 (1971). Here, there is arguably a “plain indication to the contrary” in the text of the statute. Section 2252(b)(1) appears to instruct us to analyze whether the defendant has a prior conviction under “the laws of any State.” “[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.” *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). The statutory language suggests that we should consult state law to determine whether a deferred adjudication qualifies as a prior conviction under § 2252(b)(1).

³ It is true that “[w]hether the Sentencing Guidelines apply to a prior conviction is a question of federal law.” *United States v. Mills*, 843 F.3d 210, 213 (5th Cir. 2016). Here, we are interpreting a federal statute, not a provision of the Sentencing Guidelines, and so Sentencing Guidelines enhancement cases do not control.

The Eighth Circuit has said otherwise. Sitting *en banc*, the Eighth Circuit consulted federal law to decide whether a juvenile deferred adjudication is a “conviction” under § 2252(b)(1). *United States v. Gauld*, 865 F.3d 1030, 1032 (8th Cir. 2017) (*en banc*). *Gauld* cites to an earlier Eighth Circuit case that held that a similar statute—18 U.S.C. § 2252A(b)(2)—looks to federal law to determine what is a “conviction,” but *Gauld* itself does not address the state versus federal issue in detail. *See id.* (“Even though Gauld’s adjudication occurred under state law, we look to federal law to define this term.” (citing *United States v. Storer*, 413 F.3d 918, 921 (8th Cir. 2005))).⁴

However, we need not decide whether federal or state law defines “conviction” under § 2252(b)(1). Under either state or federal law, Ary’s deferred adjudications qualify as prior convictions. Ordinarily, “[u]nder Texas law, deferred adjudication probation is neither a conviction nor a sentence.” *United States v. Mondragon-Santiago*, 564 F.3d 357, 368 n.9 (5th Cir. 2009) (citing *Hurley v. State*, 130 S.W.3d 501, 506 (Tex. App.—Dallas 2004, no pet.)). However, there are exceptions to this general rule. Prior deferred adjudications for certain offenses, including aggravated sexual assault and indecency with a child, are counted as prior convictions under the enhancement scheme for repeat and habitual offenders. Tex. Penal Code § 12.42(g); *see also Scott v. State*, 55 S.W.3d 593, 595–96 (Tex. Crim. App. 2001). As such, Ary’s two deferred adjudications, for aggravated sexual assault and indecency with a child, would be considered convictions under the Texas Penal Code.

If we were writing on a blank slate, the question of whether a deferred adjudication qualifies as a prior conviction under federal law would be more

⁴ Interpreting 18 U.S.C. § 2252A(b)(2), the Eleventh Circuit has also consulted federal law to determine what qualifies as a conviction. *United States v. Maupin*, 520 F.3d 1304, 1306–07 (11th Cir. 2008).

difficult. We are not. As we have observed in a number of cases,⁵ “[f]ederal law counts Texas’s deferred adjudication probation as a conviction.” *Mondragon-Santiago*, 564 F.3d at 368; *see also United States v. Mills*, 843 F.3d 210, 216 (5th Cir. 2016) (discussing “our treatment of deferred adjudication as the functional equivalent of a final conviction in various other contexts” under federal law). In *United States v. Cisneros*, we held that a defendant’s deferred adjudication was a prior conviction “for purposes of sentence enhancement under § 841(b)(1)(A).” 112 F.3d 1272, 1282 (5th Cir. 1997). We reasoned that the state trial court “had to find the evidence substantiated” the defendant’s guilt even though it did not enter an adjudication of guilt, and so the defendant’s guilty plea that resulted in a deferred adjudication qualified as a prior conviction. *Id.* Here, Ary pleaded guilty to these two offenses; the district court determined that there was sufficient evidence of Ary’s guilt and entered orders of deferred adjudication. Therefore, Ary’s deferred adjudications qualify as convictions under federal law as well as state law.

Accordingly, the district court did not err in applying § 2252(b)(1)’s sentencing enhancement based on Ary’s deferred adjudications.

IV.

Ary also argues that his due process rights were violated because his indictment did not allege a prior conviction, and his sentence exceeds the statutory maximum term of imprisonment under § 2252(b)(1) for a defendant without a qualifying prior conviction. As Ary acknowledges, his argument is

⁵ We have repeatedly treated Texas deferred adjudications as “convictions” under federal law. *See, e.g., Mills*, 843 F.3d at 215 (holding a Texas deferred adjudication is a prior conviction for purposes of section 4B1.5(a) of the Sentencing Guidelines); *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 653–56 (5th Cir. 2007) (holding that a Texas deferred adjudication is a conviction for purposes of a dismissal of a § 1983 action); *United States v. Stauder*, 73 F.3d 56, 56–57 (5th Cir. 1996) (determining that a Texas deferred adjudication is a prior conviction when calculating the defendant’s criminal history score under the Sentencing Guidelines).

foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (emphasis added)). We are bound by our precedent, and Ary’s due process claim fails.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

RONALD ERIC ARY

Case Number: 4:16-CR-00203-O(01)
U.S. Marshal's No.: 54560-177
Aisha Saleem, Assistant U.S. Attorney
Michael A. Lehmann, Attorney for the Defendant

On September 21, 2016 the defendant, RONALD ERIC ARY, entered a plea of guilty as to Count One of the Indictment filed on August 16, 2016. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 2252(a)(2)	Distribution of a Visual Depiction of a Minor Engaged in Sexually Explicit Conduct	July 18, 2016	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on August 16, 2016.

Pursuant to 18 U.S.C. § 3014 and the Justice for Victims Trafficking Act of 2015, the \$5,000 assessment was not ordered because the defendant is indigent.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed January 3, 2017.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed January 6, 2017.

Judgment in a Criminal Case

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Defendant: RONALD ERIC ARY

Case Number: 4:16-CR-00203-O(1)

IMPRISONMENT

The defendant, RONALD ERIC ARY, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Three Hundred Sixty (360) months** as to Count One of the Indictment filed on August 16, 2016.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **LIFE** as to Count One of the Indictment filed on August 16, 2016.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

- (1) not leave the judicial district without the permission of the Court or probation officer;
- (2) report to the probation officer as directed by the Court or probation officer and submit a truthful and complete written report within the first five (5) days of each month;
- (3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) support the defendant's dependents and meet other family responsibilities;
- (5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;
- (7) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- (8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- (9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;
- (11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
- (12) not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and,
- (13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

Judgment in a Criminal Case

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Defendant: RONALD ERIC ARY

Case Number: 4:16-CR-00203-O(1)

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the U.S. probation officer;

have no contact with minors under the age of 18, including by correspondence, telephone, internet, electronic communication, or communication through third parties. The defendant shall not have access to or loiter near school grounds, parks, arcades, playgrounds, amusement parks or other places where children may frequently congregate, except as may be allowed upon advance approval by the probation officer;

have no contact with the victim(s), including correspondence, telephone contact, or communication through third parties except under circumstances approved in advance by the probation officer and not enter onto the premises, travel past, or loiter near the victims' residences, places of employment, or other places frequented by the victims;

neither possess nor have under his/her control any pornographic matter or any matter that sexually depicts minors under the age of 18 including, but not limited to, matter obtained through access to any computer and any matter linked to computer access or use; and,

shall participate in sex-offender treatment services as directed by the probation officer until successfully discharged, which services may include psycho-physiological testing to monitor the defendant's compliance, treatment progress, and risk to the community, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

Judgment in a Criminal Case

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Defendant: RONALD ERIC ARY

Case Number: 4:16-CR-00203-O(1)

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY

Deputy Marshal