No. 18-9183

ORIGINAL

FILED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

ZACHARY WAYNE JONES — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Ninth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Zachary Wayne Jones
(Your Name)

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Petersburg, Virginia 23804
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N/A
(Phone Number)

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QUESTION(S) PRESENTED

Is it a violation of Due Process under the Fifth Amendment for the federal government to utilize a state statute in the prosecution of a federal law as the predicate offense, when that state statute is broader than the generic federal standard and fails to pass the categorical approach?

Does congress passing of§2423(a), which allows the language of a state misdemeanor for which a defendant was not charged, to define a federal Class A felony, violate Due Process?

LIST OF PARTIES

All parties are listed on the cover page.

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A. Scalia and B. Garner, Reading Law: The Interpretation of Legal Texts 167 2012

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 28, 2019.

No petition for rehearing was filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2243

18 U.S.C. 2423

18 U.S.C. 2241

VA CODE ANN 18.2-371

Due Process

STATEMENT OF THE CASE

On June 7, 2016 Zachary Jones was indicted after he drove his girlfriend from Washington State East towards Virginia. His girlfriend was 16 years old at the time and she freely chose to move to Virginia to be near him.

The indictment alleged that Zachary Jones knowingly transported an individual who had not attained the age of 18 years in interstate commerce, with the intent that such individual engage in sexual activity for which any person can be charged with a criminal offense, in violation of 18 USC 2423(a).

On December 21, 2016 Zachary Jones pled guilty to the single count of violating 18 USC 2423(a).

On March 30, 2017 the court sentenced the movant to the statutory minimum sentence of 120 months in federal prison.

Zachary Jones timely filed a motion under 28 USC 2255 challenging the use of Virginia Code Ann 18.2-371 which is broader than the generic federal definition of consensual sexual intercourse.

On June 13, 2018 the district court denied the motion and denied a certificate of appealability.

Zachary Jones then filed to the Ninth Circuit Court of Appeals which also denied his motion on January 28, 2019 and also denied a certificate of appealability.

REASONS FOR GRANTING WRIT

18 U.S.C. §2423(a), a part of the Mann Act originally implemented to combat human sex trafficing, has in recent decades become a very broad catch-all law. A Class-A felony carrying ten years up to life imprisonment, meant for horrendous acts involving pimping minors and child sex slavery, is now in very rare cases as this one being used to prosecute consensual boyfriend/ girlfriend relationships.

Conduct that in the majority of this country is not even an issue, and in those that it is, only carries punishments that are a far cry from the ten years up to life imprisonment that 18 U.S.C. §2423(a) carries. In the instant offense the crime of choice used by the federal government is VA Code Ann §18.2-371, a class 1 misdemeanor. One of the major issues at stake here is the elevation of a misdemeanor to a Class-A felony, with the only change in conduct being the crossing of a state line.

The second major issue is that this raises the issue of equal protection under the law. When in this case, the state of destination was any of the states surrounding Virginia other than Tennessee, there would not have been any charge under §2423(a).

How can two exactly-the-same actions, where the only difference is that the state of destination, be classified so differently by the same federal law? One instance is a class-A felony and the second instance in not a crime at all.

ARGUMENT

THE JEROME PRESUMPTION

As a general rule, commonly called the Jerome Presumption, the application of a federal law does not depend on state law unless Congress plainly indicates otherwise. [See: Jerome v. United States, 318 U.S. 101, 104, 63 S.Ct. 483, 87 L.Ed. 640 (1943).]

Convicting a defendant under §2423(a) involves a complicated "meshing process... as we observe two sovereigns competing for their legitimate spheres." [Dickson v. First Nat'l Bank, 400 F.2d 548, 549 (5th Cir. 1968)(Goldberg, J.).] But if there is any doubt, it is the interest of the state sovereign that must give way because, after all, 2423(a) is a violation of federal law. Stated another way, 2423(a) should be applied uniformly irrespective of how the victim happens to be characterized by its home jurisdiction.

What is more, since Jerome was decided the Supreme Court has rejected attempts to impose enhanced federal punishments on criminal defendants in light of a state conviction, when those attempts do not also ensure that the conduct that gave rise to the state conviction justified imposition of an enhancement under a uniform federal standard. [See: Taylor v. United States, 495 U.S. 575, 579, 590-91, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (rejecting argument that "burglary" in the Armed Career Criminal Act means "burglary" however a state chooses to define it); Esquivel-Quintana v. Sessions, 137 S.Ct. 1562, 1570, 198 L.Ed.2d 22 (2017) (rejecting argument that "sexual abuse of a minor" encompasses all state statutory rape convictions regardless of the state's age of consent, because that definition "turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the state where the defendant was convicted").] These decisions

reinforce the idea that charging a federal crime under 2423(a) requires something more than intent based on a state's determination of the age of consent in regards to what constitutes "any sexual activity for which any person can be charged with a criminal offense."

"In light of the above, there is ample confidence that federal law is the interpretive anchor to resolve the ambiguity at issue here." [United States v. Townsend, 897 F.3d 66, 72 (2nd Cir. 2018).] Any other outcome would allow 2423(a) to turn the categorical approach on its head by defining, any sexual activity for which any person can be charged with a criminal offense, "as whatever is illegal under the particular law of the State where the defendant was convicted," a clear departure from Jerome and its progeny. [See: Esquivel-Quintana, 137 S.Ct. at 1570.]

Thus, "any sexual activity for which any person can be charged with a criminal offense" under §2423(a) must refer "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants," to federal law - that is, §2243. [See: Id. at 1571.]

--Comparing state statutes as predicate offenses to their corresponding federal crimes.

Concluding that "any sexual activity for which any person can be charged with a criminal offense" of §2423(a) includes only statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants when the victim is less than 16, based upon a closely related federal statute §2243, does not end the analysis. A state statute will qualify as a predicate offense under §2423(a) if the state statute aligns with, or is a "categorical match" with, federal

law's definition of the conduct described. To determine whether the definition matches, we must know the state crime that was selected and compare the elements of that crime to the elements of the corresponding generic federal crime. If a state statute is broader than its federal counterpart - that is, if the state statute criminalizes some conduct that is not criminalized under the analogous federal law - the state statute cannot stand as a predicate offense. [See: United States v. Jones, 878 F.3d 10, 15-16 (2nd Cir. 2017).]

There are two ways to compare state statutes to their generic federal counterparts: the categorical approach and the modified categorical approach. [Mathis v. United States, 136 S.Ct. 2243, 2248-49, 195 L.Ed.2d 604 (2016).] Which approach a court takes turns on whether the state statute defining the crime... is divisible or indivisible. [Id. at 2249.]

A statute is divisible when it lists elements in the alternative, thereby defining multiple crimes within one statute. [Jones, 878 F.3d at 16.6] A divisible statute triggers the modified categorical approach. [Id.] If a statute is divisible, courts do not know by looking only at the text of the statute which alternative version of the statute the defendant may have violated. [Id.] Therefore, if the statute at issue is divisible, courts apply the modified categorical approach and consider a very limited set of materials to help determine the specific elements of the crime. [Id.; Descampus v. United States, 570 U.S. 254, 261-62, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013).]

Once courts determine the particular elements of the state statute, the analysis is the same for both approaches. [Mathis, 136 S.Ct. at 2249. (finding that once courts determine, under the modified categorical approach, which alternative version of the crime committed, "court[s] can then compare that crime, as the categorical approach commands, with the relevant

generic offense").] If the elements of the government's chosen state statute are the same as, or narrower than, the generic federal counterpart for that crime, the particular state statute can serve as a predicate offense under §2423(a). Conversely, if the elements of the state statute are broader than those in the corresponding federal crime, the statute does not give rise to a predicate offense under §2423(a). In other words, a state statute that punishes conduct not criminalized by federal law cannot be used in the administration of federal laws.

--Applying the modified categorical approach to VA §18.2-371 in respect to its use as a predicate offense for §2423(a).

An element of a state offense categorically matches its federal counterpart if the state element is "the same as, or narrower than" the federal element. [See: Descampus, 570 U.S. at 257.] With respect to any sexual activity for which any person can be charged with a criminal offense, that means the state law must criminalize only those sexual activities that are criminalized under federal law and the significant majority of the States. Section 2423(a) matches transportation of minors illegal based on the intent, not based on their actual conduct. Accordingly, to determine whether a defendant's intent qualifies as any sexual activity for which any person can be charged with a criminal offense under that section, we "employ a categorical approach by looking to the statute..., rather than to the specific facts underlying the crime." [Kawashima v. Holder, 565 U.S. 478, 473, 132 S.Ct. 116, 182 L.Ed.2d 1 (2012) (applying the categorical approach set forth in Taylor v. United States to 2423(a)).] Under that approach, we ask whether the state statute defining the crime of intent categorically fits within the generic federal definition of

that crime. In other words, we presume that the state crime "rested upon... the least of the acts" criminalized by the statute, and then we determine whether that conduct would fall within the federal definition of the crime. [Johnson v. United States, 559 U.S. 133, 137, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010); see also: Moncrieffe v. Holder, 569 U.S. 191, 133 S.Ct. 1678, 185 L.Ed.2d 727, 738 (2015) (focusing "on the minimum conduct criminalized by the state statute").] If a defendant might be convicted of violating VA 18.2-371 for conduct that fails to pass the categorical approach that state conviction or intent thereof cannot qualify as a predicate offense. [See: Esquivel-Quintana, 137 S.Ct. at 1572.]

At the time of Zachary Jones' conviction, the Virginia State Statute §18.2-371, included sexual activity with minors between the ages of 16 and 17 years old as prohibited under VA law. Thus making consensual sex between an adult and a 16 or 17 year old a misdemeanor.

Surrounding provisions of §2423 further guide the interpretation of any sexual activity for which any person can be charged with a criminal offense. [See: A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012).] This offense is listed in Public Law as "Penalties for conduct relating to child prostitution" [Pub. L. Sec. 204.]. Furthermore, the text directly prior to "any sexual activity" reads as "engage in prostitution" adding to the perceived intent of Congress for §2423 to criminalize human sex trafficking. The "or" in "engage in prostitution, or in any sexual activity" clearly in this instance means "as relates to" by Congress' intent to expand on the wide range of offenses related to sex trafficking. Otherwise, why even include anything other than "in any sexual activity for which any person can be charged with a criminal offense" ? Congress did not wish to punish so harshly, with a Class A Felony, consensual boyfriend/girlfriend relationships, which is a misdemeanor

in the state of question and legal in the majority of other states as discussed below.

A closely related federal statute, 18 U.S.C. §2243, provides further evidence that the generic federal definition of any sexual activity for which any person can be charged, incorporates an age of consent of 16, at least in the context of statutory rape offenses predicated solely on the age of the participants. [Leocal v. Ashcroft, 543 U.S. at 12-13, N.9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (concluding that Congress' treatment of 18 U.S.C. §16 in an Act passed "just nine months earlier" provided "strong support" for the interpretation of §16 as incorporated into the INA); Powerex Corp. v. Reliant Energy Services, Inc., 551 U.S. 224, 232, 127 S.Ct. 2411, 168 L.Ed.2d 112 (2007).] Section 2243, which criminalizes "sexual abuse of a minor or ward," contains the only definition of statutory rape in the United States Code, based solely on the age of the participants. As originally enacted in 1986, §2243 proscribed engaging in a "sexual act" with a person between the ages of 12 and 16 if the perpetrator was at least four years older than the victim. In 1996, Congress expanded §2243 to include victims who were younger than 12, thereby protecting anyone under the age of 16. [See: Esquivel-Quintana, 137 S.Ct. at 1571; §2243(a); see also: §2241(c).] Congress did this just under two years before adding "with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense," which suggests that Congress understood that phrase to cover victims under age 16. [1998 - Subsec. (a) Pub. L. 105-314, §103(a).]

As in other cases where the categorical approach has been applied, we look to state criminal codes for additional evidence about the generic meaning of "any sexual activity for which any person can be charged."

[See: Taylor, 495 U.S. at 598; Duenas-Alvarez, 549 U.S. at 190, 127 S.Ct. 815, 166 L.Ed.2d 683 (interpreting "theft" in the INA in the same manner as Taylor).]

Now in this instance, a single term is not in question, rather a very broadly sweeping statement of "any sexual activity that is illegal." So the state codes we will examine are those that are relevant to the proffered predicate offense, VA §18.2-371. At current and at the time of the instant offense, 34 states including the District of Columbia set the age of consent where there is no 'significant relationship' between the participants at 16. Virginia is clearly in the minority here and so, the general consensus from state criminal codes points to the same generic definition as dictionaries and federal law: Where sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16.

In sum, because the state statute used as the predicate offense is a divisible statute, the modified categorical approach apples. And because the state statute in question criminalizes consensual sex between an adult and a 16 or 17 year old, ages not criminalized under federal law and the majority of states, the Virginia state statute does not categorically match the federal crime. Consequently, Zachary Jones' intent to violate VA §18.2-371 cannot qualify as a predicate offense under 2423(a).

CONCLUSION

The Supreme Court has defended the Constitutional protections of states rights. In cases such as 2423(a) congress has made a federal crime using anything that the individual fifty states make criminal.

In light of the above, to avoid violation of Due Process under the fifth amendment, the federal government must apply the catagorical or modified categorical approach to /any/ state statute to be used as a predicate offense. This should apply to 2423(a) or any other statute of federal origin as it already does to the INA, sentencing guidelines, and controlled substances. Thus preserving equal application of federal law across all fifty states.