No. _____

IN THE
Supreme Court of the United States

ANTHONY CARL SPENCE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Donna Lee Elm
Federal Defender

Adeel Bashir*
Assistant Federal Public Defender
Sup. Ct. Bar. No. 291258
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Telephone: 813-228-2715
Facsimile: 813-228-2562
E-mail: adeel_bashir@fd.org
*Counsel of Record for Petitioner

QUESTION PRESENTED

Whether, absent a clear indication of extraterritoriality, a federal sentencing court is permitted to enhance a defendant's offense level under the sentencing guidelines based on conduct occurring entirely in a foreign country and that is not a crime against the United States.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinion Below 1

Jurisdiction 1

Relevant Constitutional and Statutory Provisions 1

Statement of the Case 2

A. The Offense Conduct. 2

B. The Sentencing 3

C. The Eleventh Circuit Proceedings 4

Reasons for Granting the Writ 6

I. The circuits are split on whether a federal sentencing court may consider foreign conduct not directed at the United States and not constituting a crime against the United States when calculating a defendant's offense level under the Sentencing Guidelines 6

II. The presumption against extraterritorial application extends to preclude the use of conduct occurring entirely in a foreign country and that is not a crime against the United States to enhance a defendant's offense level, absent an express statement from either Congress or the Sentencing Commission 11

III. The question presented is important and this is an excellent vehicle to address the question 12

Conclusion 14

Appendix

Opinion ..... Appendix A-1

TABLE OF AUTHORITIES

CASES **PAGE(S)**

E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991) 1, 4, 11

Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949) 1, 4, 11

Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010) 11

RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016) 8

Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018) 13

United States v. Azeem, 946 F.2d 13 (2d Cir. 1991) ..... *passim*

United States v. Chao Fan Xu, 706 F.3d 965 (9th Cir. 2013) 8

United States v. Chunza-Plazas, 45 F.3d 51 (2d Cir. 1995) ..... *passim*

United States v. Dawn, 129 F.3d 878 (7th Cir. 1997) ..... *passim*

United States v. Spence, 923 F.3d 929 (11th Cir. 2019) 1, 5, 8

United States v. Wilkinson, 169 F.3d 1236 (10th Cir. 1999) 10

United States v. Zayas, 758 F.3d 986 (8th Cir. 2014) 10

STATUTES & CONSTITUTIONAL PROVISIONS **PAGE(S)**

18 U.S.C. § 3231 1

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

UNITED STATES SENTENCING GUIDELINES **PAGE(S)**

U.S.S.G. § 1B1.3 ..... 9, 10

U.S.S.G. § 2G2.2 3

U.S.S.G. § 4A1.2 6

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner Anthony C. Spence respectfully petitions for a writ of certiorari to review the published decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Spence*, 923 F.3d 929 (11th Cir. 2019).

JURISDICTION

The United States District Court, Middle District of Florida, had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. Pursuant to 28 U.S.C. § 1291, the Court of Appeals for the Eleventh Circuit had jurisdiction to review the final order of the district court. The Eleventh Circuit's Panel decision was issued on May 2, 2019. The Eleventh Circuit's order denying Mr. Spence's petition for rehearing en banc was issued on June 20, 2019. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949))."

STATEMENT OF THE CASE

A. The Offense Conduct

Mr. Spence, 45 years old and a life-long resident of Jamaica, was given his first smart cell phone in January 2017. Doc. 66 at 5-7. A "girl at work" set up the phone so he could use it. *Id.* at 6. The phone had WhatsApp and Facebook installed. *Id.* It was the first time Mr. Spence had used either application. *Id.*

On January 15, 2017, someone used WhatsApp to send Mr. Spence a video that contained child pornography ("video number one"). The video was downloaded to Mr. Spence's cell phone on January 16, 2017. Doc. 94 at 37-38; Government Exhibit 6 (Doc. 58-8) at page 27, entry 35. On January 17, 2017, an unknown person sent another video containing child pornography ("video number two") to Mr. Spence via WhatsApp, which was downloaded to his cell phone. Doc. 94 at 38-39, 65, 89-90; Government Exhibit 6 (Doc. 58-8) at page 27, entry 38.

On January 20, 2017, video number two was sent from Mr. Spence's cell phone to a person in Jamaica named Taneisha Singh. Doc. 94 at 48-49, 85; Government Exhibit 9 (Doc. 58-13). On January 25, 2017, video number one was sent from Mr. Spence's cell phone to Taneisha Singh. Doc. 94 at 45-48, 85; Government Exhibit 8 (Doc. 58-12).

On February 6, 2017, Mr. Spence flew from Jamaica to Orlando. An officer with U.S. Customs and Border Protection stamped Mr. Spence's passport, then referred him for a secondary inspection. Doc. 93 at 7-13. The Customs officer at the secondary inspection area checked Mr. Spence's bags, then checked his cell phone. *Id.* at 26-28. The officer went to the WhatsApp application and began reading through messages on Mr. Spence's cell phone. *Id* at 28-29. One of the messages on WhatsApp had a video attached. The video contained child pornography (video number one). *Id.* at 29-30. A special agent with the Department of Homeland Security was called to the airport to inspect the cell phone. He found both video number one and video number two on the phone. Doc. 94 at 100-04. During questioning following his detention, Mr. Spence admitted to receiving the two videos in Jamaica and to sending them to a few other people in Jamaica. Government Exhibit 5 (Doc. 58-7) at 9-11; PSI ¶ 15.

B. The Sentencing

When calculating the offense level, probation applied a 2-level increase because Mr. Spence "knowingly engaged in distribution" of "two videos that contained images of child pornography to other individuals via his cell phone." PSI ¶ 28; *see* U.S.S.G. § 2G2.2(b)(3)(F). Mr. Spence objected to the enhancement for distribution, stating that the conduct "occurred while he was in Jamaica." PSI Addendum; *see* Doc. 73 at pages 19, 22. Probation maintained that the enhancement was proper, citing to *United States v. Dawn*, 129 F.3d 878 (7th Cir. 1997). Doc. 73 at page 19.

The district court overruled the defense objection to the enhancement, but invited the defense to argue the point as a basis for a variance sentence. *Id.* Doc. 96 at 17-19.

The district court determined the advisory Guidelines range of imprisonment was 210-262 months based on a total offense level of 37 and criminal history category I. Doc. 96 at 24. The court sentenced Mr. Spence to 68 months' imprisonment on each count, to run concurrently. *Id.* at 46; *see* Doc. 79. The court explained its downward variance was based on the lack of sophistication in committing the crime, and on the lack of evidence that Mr. Spence was at risk of re-offending or committing a hands-on crime involving children. *Id.* at 50-51.

C. The Eleventh Circuit Proceedings

In his initial brief, Mr. Spence noted that there was "a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949))." Initial Brief (IB) at 7. He argued that the "same principle" should apply "to offense level calculations under the Sentencing Guidelines." *Id.*

The main thrust of his argument, though, was that "the district court erred by enhancing Mr. Spence's offense level for conduct that took place entirely in Jamaica and that did not constitute a crime against the United States." Initial Brief (IB) at 1. He reiterated that his "distribution conduct occurred entirely in Jamaica and did not constitute a crime against the United States, and so should not have been factored into the calculation of the offense level." *Id.*

Mr. Spence relied primarily upon *United States v. Azeem*, 946 F.2d 13 (2d Cir. 1991). There, the defendant Azeem was convicted of conspiring to import heroin into the United States based on an April 1987 delivery of heroin from Pakistan to New York. Azeem and his co-conspirators also delivered another load of heroin from Pakistan to Cairo in June 1987. 946 F.2d at 14. The Second Circuit held that the Cairo heroin "should not have been included in the base offense level calculation" because the delivery of heroin from Pakistan to Egypt "was not a crime against the United States." *Id.* at 16. Mr. Spence also relied upon *United States v. Chunza-Plazas*, 45 F.3d 51 (2d Cir. 1995), and its holding that "Chunza's illegal activities in Colombia were not crimes against the United States, and therefore should not be included in the guideline calculation." *Id.* at 57-58. IB at 9.

The Panel rejected Mr. Spence's argument, stating: "We decline to extend the doctrine of the presumption against extraterritorial application of congressional legislation to also preclude a sentencing judge from considering extraterritorial conduct which otherwise is properly considered as relevant conduct." *United States v. Spence*, 923 F.3d 929, 935 (11th Cir. 2019). In so holding, the Eleventh Circuit "acknowledge[d] that the Second Circuit decisions in *United States v. Azeem*, 946 F.2d 13 (2d Cir. 1991), and *United States v. Chunza-Plazas*, 45 F.3d 51 (2d Cir. 1995), could be viewed as being in some tension with our holding and those of the Seventh, Eighth, and Tenth Circuits." *Id.* at 933. And the Eleventh Circuit stated that, "[t]o the extent that the Second Circuit cases are inconsistent with our holding and that of the Seventh Circuit...Tenth Circuit..., and the Eighth Circuit..., we respectfully decline to follow the Second Circuit." *Id.* at 934.

The Eleventh Circuit denied Mr. Spence's petition for rehearing en banc in a single-page order without explanation.

REASONS FOR GRANTING THE WRIT

I. The circuits are split on whether a federal sentencing court may consider foreign conduct not directed at the United States and not constituting a crime against the United States when calculating a defendant's offense level under the Sentencing Guidelines.

The Court should grant Mr. Spence's petition to resolve the circuit conflict on the question presented: whether, absent an express indication of extraterritorial application, a sentencing court can enhance a defendant's offense level under the Sentencing Guidelines based on entirely foreign conduct that is not a crime against the United States.

1. On one side of the split are the Second and Ninth Circuits, which decline to score such conduct when calculating the guidelines. The Second Circuit has in two cases excluded "foreign crimes" from the realm of relevant conduct, *see United States v. Azeem*, 946 F.2d 13, 17-18 (2d Cir.1991); *United States v. Chunza–Plazas*, 45 F.3d 51, 57-58 (2d Cir.1995). As stated in *Azeem*, the Guidelines envision "a rather limited role" for foreign crimes. 946 F.2d at 17. Foreign sentences are not counted when determining a defendant's criminal history category, but may be considered for upward departure purposes. *See* U.S.S.G. § 4A1.2(h). The *Azeem* court considered this significant because "congressional consideration of an issue in one context, but not another, in the same or similar statutes [generally] implies that Congress intends to include that issue only where it has so indicated . . . . In this case, Congress has already shown that where it intends to include foreign crimes in sentencing, it will do so." *Azeem*, 946 F.2d at 17.

Azeem was convicted of conspiring to import heroin into the United States based on an April 1987 delivery of heroin from Pakistan to New York. Azeem and his co-conspirators also delivered another load of heroin from Pakistan to Cairo in June 1987. 946 F.2d at 14. The Second Circuit held that the Cairo heroin "should not have been included in the base offense level

calculation" because the delivery of heroin from Pakistan to Egypt "was not a crime against the United States." *Id.* at 16. The court explained the policy reasons behind its decision:

> [T]here are good reasons to avoid creating a new use for foreign crimes in sentencing. To do so would require distinguishing between activities that violate both domestic and foreign law and those which violate only domestic law or only foreign law. Examples of activities that violate one, but not both, foreign and domestic laws could be the use and sale of certain drugs that would have violated our law, but not the foreign law where sold and used, or a certain use of alcohol that violates the foreign law where used but would not have done so under domestic law. To permit foreign crimes to figure in fixing the base offense level would require courts to perform a careful comparative analysis of foreign and domestic law in such instances. At some point the advantages of simplicity should prevail. This is one of them.
>
> Were a global approach required, we would soon find it necessary to determine the appropriate evidence that must be produced by the prosecution to show that the activity occurred and that it violated foreign law. For example, we would have to decide whether an arrest or conviction by the foreign country is necessary for inclusion and, if so, whether it should be disregarded if plainly unconstitutional by our law. The fact that section 4A1.2(h) of the Guidelines allows upward departures only for foreign *sentences*, as opposed to uncharged crimes or arrests, apparently reflects some of these concerns. *See* U.S.S.G. § 4A1.2(h).
>
> Without a clear mandate from Congress, we decline to create the complexities that the inclusion of foreign crimes in the base offense level calculation would generate. These issues are best considered and resolved by Congress.

Id. at 17-18.

The Second Circuit followed *Azeem* in *United States v. Chunza-Plazas*, 45 F.3d 51, 57-58 (2d Cir. 1995). Chunza pled guilty to two counts of possessing fraudulent alien-registration cards. *Id.* at 52. The government sought an upward departure on the basis of unproven criminal conduct in Colombia. *Id.* at 52-55. The district court granted the upward departure, but the Second Circuit reversed, explaining:

> The same considerations considered in *Azeem* with respect to base offense level, should guide our determination of whether Chunza's conduct in Colombia may be considered for an upward departure. Like Azeem's Egyptian conspiracy, Chunza's

> illegal activities in Colombia were not crimes against the United States, and therefore should not be included in the guideline calculation.

Id. at 57-58.

The Ninth Circuit has followed *Azeem* and held that "applying . . . relevant conduct analysis to Defendants' foreign conduct is not permissible." *United States v. Chao Fan Xu*, 706 F.3d 965, 992 (9th Cir. 2013), *abrogated on other grounds*, *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016). There, the defendants were Chinese nationals convicted of RICO conspiracy who committed fraud against the Bank of China while on Chinese soil. *Id.* The district court applied a higher offense level based on that foreign conduct. *Id.* The Ninth Circuit, relying on *Azeem*, held that to be procedural error. *Id.* The court reiterated *Azeem*'s policy concerns (set out above), and decided to "follow the Second Circuit and 'decline to create the complexities that the inclusion of foreign crimes in the base offense level calculation would generate.'" *Id.* (quoting *Azeem*, 946 F.2d at 18.).

2. On the other side of the circuit conflict are the Seventh, Eighth, Tenth and Eleventh Circuits (in the decision below), finding such conduct is properly considered when calculating the Guidelines offense level. Following the logic of the Seventh Circuit, the Tenth Circuit, and the Eighth Circuit, the Eleventh Circuit in the decision below concluded that the presumption against the extraterritorial application of congressional legislation should not be extended to preclude a sentencing judge from considering such extraterritorial conduct. *See United States v. Spence*, 923 F.3d 929, 932 (11th Cir. 2019).

The Panel below relied primarily on the Seventh Circuit's decision in *United States v. Dawn*, 129 F.3d 878 (7th Cir. 1997). As the Panel below explains, Dawn was charged with receiving and possessing child pornography. Dawn had taken the film to be developed in his

hometown in Wisconsin. The film processor noticed what he suspected to be child pornography and notified the police. The developed film was delivered to Dawn at his home by an undercover officer, and after Dawn received and signed for it, he was arrested. Dawn had produced the film while in Honduras.

At sentencing, the district court applied the guidelines provision for production because of the cross-reference from the possession and receiving counts. The Seventh Circuit noted that the term "offense" is defined broadly to include not only the offense of conviction but also all conduct deemed relevant by U.S.S.G. § 1B1.3 (that is, all relevant conduct). No one disputed that the production in Dawn was relevant conduct. *Id.* at 881. The Dawn court relied on the fact that none of the relevant Guidelines provisions turn on whether the conduct occurred in the United States. *Id.* at 882. Instead, the court said, the focus of these provisions is on "the factual and logical relationship between the offense of conviction and the defendant's other acts," and none of the relevant Guidelines provisions bars the use of extraterritorial conduct. *Id.* The defendant had argued the general principle known as the presumption against the extraterritorial application of congressional legislation—i.e., that statutes apply only domestically unless Congress explicitly made clear that they applied extraterritorially—barred use of the conduct. The Seventh Circuit rejected this argument because Dawn was not convicted or sentenced for producing the films; instead, the production activity was relevant conduct, which is properly considered by the sentencing court in determining the appropriate sentence for the offense—receiving and possessing child pornography—of which Dawn was convicted. The court held that Dawn's production of the films was appropriately considered because "it sheds light on the gravity of his conduct as a receiver and possessor of the films." *Id.* at 884-85. "[C]ommon sense . . . [indicates] that a receiver

or possessor who has manufactured the pornography in his possession is both more culpable and more dangerous than one who has received or possessed the pornography and no more." *Id.* at 884.

As the Panel below also acknowledged, the Eighth and Tenth Circuits have followed *Dawn*'s logic. In *United States v. Wilkinson*, 169 F.3d 1236 (10th Cir. 1999), the Tenth Circuit applied the same cross-reference to the guidelines provision for production of child pornography because Wilkinson had produced in Thailand the child pornography of which he was convicted of possessing. Following Dawn's rationale, the Tenth Circuit noted that the production was relevant conduct under U.S.S.G. § 1B1.3, that none of the guidelines provisions at issue carve out an exception for conduct occurring outside the United States, and that the higher production offense level was imposed—not because he was being punished for the production—but rather because of the common sense notion that a possessor of child pornography who had manufactured the pornography was more culpable than one who had merely possessed same. *Id.* at 1238. Addressing facts similar to those in *Dawn* and *Wilkinson*, the Eighth Circuit held that extraterritorial relevant conduct could be considered by the sentencing judge. *United States v. Zayas*, 758 F.3d 986 (8th Cir. 2014).

II. The presumption against extraterritorial application extends to preclude the use of conduct occurring entirely in a foreign country and that is not a crime against the United States to enhance a defendant's offense level, absent an express statement from either Congress or the Sentencing Commission.

Congress has the ability to explicitly construct laws to apply extraterritorially. However, "it is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

This canon of statutory construction, commonly known as the presumption against extraterritorial application, should apply with equal force to offense level calculations under the Sentencing Guidelines. This is the better reasoned position, which is set out by the Second Circuit in *Azeem*.

Azeem held that absent a clear indication of extraterritoriality, foreign conduct should not be counted when determining a defendant's offense level under the guidelines. *See Supra*, Section I.1. *Dawn*, the Seventh Circuit case relied upon by the government below and followed by the Panel Opinion, is distinguishable on its facts and unpersuasive. There, Dawn produced films containing child pornography in Honduras, then later was convicted of receiving and possessing those same films while in the United States. 129 F.3d at 879. A cross-reference for the production of child pornography was applied to increase his offense level. *Id.* at 880-81. The Seventh Circuit affirmed the application of the cross-reference "[b]ecause Dawn produced the child pornography that he pled guilty to receiving and possessing." *Id.* at 885-86.

The *Dawn* court attempted to distinguish *Azeem* and *Chunza-Plazas* on their facts. 129 F.3d at 885. That effort, though, demonstrates that those cases are more analogous to Mr. Spence's case than is *Dawn*. Here is what *Dawn* said about the Second Circuit cases: In *Azeem*, the conduct in question (distribution of heroin abroad) took place wholly on foreign soil and had no link to the offense of conviction (conspiring to import heroin into the United States) other than being part of the same course of narcotics trafficking. *See* 946 F.2d at 16. In *Chunza–Plazas*, the link was more tenuous: the defendant had committed murder abroad and subsequently fled to the United States, where he was eventually convicted of possessing false immigration documents. *See* 45 F.3d at 57–58.

Dawn's exploitation of minors in Honduras created the very pornography that he received and possessed here in the United States. In a literal sense, then, Dawn's domestic offenses were the direct result of his relevant conduct abroad; pragmatically speaking, they are inextricable from one another. 129 F.3d at 885.

Unlike *Dawn*, the offenses Mr. Spence committed in Florida were not "the direct result of" his distribution in Jamaica, and so those acts are not "inextricable from one another." *Id.* These acts, occurring outside the United States that are not crimes against the United States, should not be considered when calculating the advisory guidelines' range of imprisonment.

III. The question presented is important and this is an excellent vehicle to address the question.

Given the circuit conflict, the Court should intervene to provide guidance about how to apply the presumption against extraterritoriality when interpreting the federal sentencing guidelines. This is an important federal question of statutory interpretation. Indeed, it is dubious to allow a sentencing court to enhance a defendant's offense level based on foreign conduct absent

an express directive from Congress or the Sentencing Commission, when the underlying federal statute would not be interpreted to extend to conduct occurring entirely in a foreign country and that is not a crime against the United States.

This question is particularly important given the importance the guidelines play in sentencing. As this Court explains:

> The Sentencing Guidelines serve an important role in that framework. "'[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.'" *Peugh v. United States*, 569 U.S. 530, 541 (2013) (quoting *Gall v. United States*, 552 U.S. 38, 50, n.6 (2007)). Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as "a meaningful benchmark" in the initial determination of a sentence and "through the process of appellate review." 569 U.S., at 541, 133 S.Ct. 2072.

Rosales-Mireles v. United States, 138 S. Ct. 1897, 1903-04 (2018). Thus, it is important that this Court provide guidance on whether foreign conduct that is not a crime against the United States can be considered when calculating the guidelines.

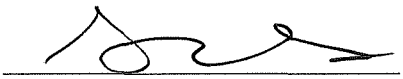
Moreover, this case is an excellent vehicle to resolve the question presented because the conduct in question (here, distribution of child pornography in Jamaica) took place wholly on foreign soil and had no link to the offenses of conviction (here, possession and transportation of child pornography in the Middle District of Florida). Also, as in *Azeem* and *Chunza-Plazas*, Mr. Spence's distribution of the videos in Jamaica was not a crime against the United States, did not affect the United States, and was not intended to affect the United States. Quite simply, the distribution of the videos in Jamaica had nothing to do with the possession and transportation of those videos in Florida. That distribution, then, should not be a part of the calculation of the offense level.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender



Adeel Bashir*
Assistant Federal Public Defender
Sup. Ct. Bar. No. 291258
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Telephone: 813-228-2715
Facsimile: 813-228-2562
E-mail: adeel_bashir@fd.org
*Counsel of Record for Petitioner

Appendix A-1

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14976

D.C. Docket No. 6:17-cr-00062-CEM-DCI-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY CARL SPENCE,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(May 2, 2019)

Before ED CARNES, Chief Judge, MARTIN and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

This case presents an issue of first impression in this Circuit involving the consideration by a sentencing judge of extraterritorial relevant conduct to enhance an offense level under the Sentencing Guidelines. Shortly after Anthony Carl

Spence arrived at the airport from Jamaica, agents discovered two videos of child pornography on his phone. Spence told the agents that he received the cell phone about a month before in Jamaica. He said that he received the first video from a girlfriend in New York and that he showed it to school children in Jamaica to encourage them to report if they had been molested. Spence also told the agents that he sent out the videos to women with children while he was in Jamaica.

Spence was charged with knowing transportation of child pornography in violation of 18 U.S.C. § 2252A(a)(1) and (b)(1) and knowing possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). He proceeded to trial where he was found guilty of both counts. In calculating Spence's Guidelines range, the probation officer grouped Counts One and Two, pursuant to U.S.S.G. § 3D1.2(d), and determined that Count One provided the highest offense level. Spence's base offense level was 22 pursuant to § 2G2.2(a)(2). The probation officer increased Spence's offense level for a number of factors including by two levels, under § 2G2.2(b)(3)(F), because Spence distributed the material. Spence's total adjusted offense level was 37 and because he had no criminal history, he had a criminal history category of I. Based upon a total offense level of 37 and a criminal history category of I, Spence's Guideline imprisonment range was 210 months to 262 months. The probation officer recommended a sentence of 151 months.

In the addendum to the Presentence Investigation Report ("PSI"), the probation officer noted, among other objections that do not bear on this appeal, that Spence objected to receiving a two-level enhancement for distribution. Spence stated that any distribution occurred while he was in Jamaica. The probation officer responded that Spence had admitted to the distribution and noted that there was no territorial limitation found in § 2G2.2.

The court adopted the Guidelines calculation found in the PSI and sentenced Spence to a total sentence of 68 months. The district court stated that it made a downward variance because of Spence's lack of sophistication and because there was no evidence that he was at a high risk of re-offending or of actually molesting children. The court stated that "the guidelines are entirely inappropriate based on this particular set of circumstances."

Spence raises a purely legal question regarding the Sentencing Guidelines, which we review *de novo*. United States v. Vail-Bailon, 868 F.3d 1293, 1296 (11th Cir. 2017) (en banc).

On appeal, Spence's sole argument is that his distribution of the videos while he was in Jamaica should not have affected his Guidelines calculation. He argues that by including his out-of-country conduct in the calculation of his offense level, the district court violated the principle that legislation of Congress should apply only within the United States unless a contrary intent appears. In other

words, Spence is relying upon the canon of statutory construction known as the presumption against the application of congressional statutes to conduct occurring in the territory of a foreign sovereign. See Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115-16, 133 S. Ct. 1659, 1664 (2013). Spence argues that the doctrine should be extended so as to apply not only to preclude construction of statutes as intending to criminalize such extraterritorial conduct but also to apply to preclude sentencing courts from considering such extraterritorial conduct as part of the "relevant conduct" considered pursuant to U.S.S.G. § 1B1.3 in determining the appropriate sentence for conduct (occurring entirely within the United States) of which a defendant was convicted. Thus, Spence argues that his distribution of videos occurring solely in Jamaica should not have been considered by the district court. Spence does not challenge the fact of his distribution or that such distribution would constitute relevant conduct properly considered by the sentencing court (except for his extraterritorial argument).

Thus, the narrow issue in this appeal is whether the presumption against the extraterritorial application of congressional legislation should be extended to apply also to preclude a sentencing judge from considering extraterritorial conduct which would otherwise be properly considered as relevant conduct. This is an issue of first impression in the Eleventh Circuit.

The Seventh Circuit, the Tenth Circuit, and the Eighth Circuit have addressed this precise issue and have concluded that the presumption against the extraterritorial application of congressional legislation should not be extended to preclude a sentencing judge from considering such extraterritorial conduct.

United States v. Dawn, 129 F.3d 878 (7th Cir. 1997), is the leading case. There, the defendant was charged with receiving and possessing child pornography. Dawn had taken the film to be developed in his hometown in Wisconsin. The film processor noticed what he suspected to be child pornography and notified the police. The developed film was delivered to Dawn at his home by an undercover officer, and after Dawn received and signed for it, he was arrested. Dawn had produced the film while in Honduras. At sentencing, the district court applied the Guidelines provision for production because of the cross-reference from the possession and receiving counts.[1] The Seventh Circuit noted that the term "offense" is defined broadly to include not only the offense of conviction but also all conduct deemed relevant by U.S.S.G. § 1B1.3 (that is, all relevant conduct). No one disputed that the production in Dawn was relevant conduct. Id. at 881. The Dawn court relied on the fact that none of the relevant Guidelines provisions turn on whether the conduct occurred in the United States. Id. at 882. Instead, the

[1] The court applied several provisions, including U.S.S.G. § 2G2.4. That section has since been deleted and consolidated with § 2G2.2, effective November 1, 2004. Thus the analysis in Dawn is still pertinent to our discussion.

court said, the focus of these provisions is on "the factual and logical relationship between the offense of conviction and the defendant's other acts," and none of the relevant Guidelines provisions bars the use of extraterritorial conduct. Id. The defendant had argued the general principle known as the presumption against the extraterritorial application of congressional legislation—i.e., that statutes apply only domestically unless Congress explicitly made clear that they applied extraterritorially—barred use of the conduct. The Seventh Circuit rejected this argument because Dawn was not convicted or sentenced for producing the films; instead, the production activity was relevant conduct, which is properly considered by the sentencing court in determining the appropriate sentence for the offense—receiving and possessing child pornography—of which Dawn was convicted. The court held that Dawn's production of the films was appropriately considered because "it sheds light on the gravity of his conduct as a receiver and possessor of the films." Id. at 884-85. "[C]ommon sense . . . [indicates] that a receiver or possessor who has manufactured the pornography in his possession is both more culpable and more dangerous than one who has received or possessed the pornography and no more." Id. at 884.

The Eighth and Tenth Circuits have followed Dawn. In United States v. Wilkinson, 169 F.3d 1236 (10th Cir. 1999), the Tenth Circuit applied the same cross-reference to the Guidelines provision for production of child pornography

because Wilkinson had produced in Thailand the child pornography of which he was convicted of possessing. Following Dawn's rationale, the Tenth Circuit noted that the production was relevant conduct under U.S.S.G. § 1B1.3, that none of the Guidelines provisions at issue carve out an exception for conduct occurring outside the United States, and that the higher production offense level was imposed—not because he was being punished for the production—but rather because of the common sense notion that a possessor of child pornography who had manufactured the pornography was more culpable than one who had merely possessed same. Id. at 1238. Further, the Tenth Circuit pointed to 18 U.S.C. § 3661, which provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Id. at 1238-39. Addressing facts similar to those in Dawn and Wilkinson, the Eighth Circuit held that extraterritorial relevant conduct could be considered by the sentencing judge. United States v. Zayas, 758 F.3d 986 (8th Cir. 2014).[2] The Zayas court followed Dawn with little elaboration.

We agree with the holding and reasoning of the Seventh Circuit decision in Dawn and the Tenth Circuit decision in Wilkinson that the presumption against the

[2] We note that the Third Circuit, in the unpublished opinion, United States v. Castro-Valenzuela, 304 F.App'x 986 (3d Cir. 2008), also followed the holding and reasoning of the Seventh Circuit Dawn decision.

extraterritorial application of congressional legislation does not apply in the sentencing context of a court's consideration of relevant conduct that occurred outside the United States.[3]

First, the conduct underlying the offense for which Spence was convicted and for which he was sentenced occurred in the United States—i.e., his transportation and possession of child pornography. He was not convicted on the basis of conduct that occurred outside the United States, nor was he sentenced for such conduct. That relevant conduct which occurred outside the United States was considered in assessing the gravity of Spence's domestic crime does not mean that he was sentenced for that extraterritorial conduct. The Tenth Circuit in Wilkinson so held, and we agree:

> Consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" for any offense other than the one for which the defendant was convicted. Rather, the defendant is punished only for the fact that the present offense was carried out in a manner that warrants increased punishment.

Wilkinson, 169 F.3d at 1238 (emphasis in original) (alteration and quotation marks omitted) (quoting United States v. Watts, 519 U.S. 148, 155, 117 S. Ct. 633 (1997) (per curiam)).

---

[3] As noted above, the Eighth Circuit in Zayas has also so held.

Second, there is no language in the relevant Guidelines provisions which limits consideration of relevant conduct to conduct occurring in the United States.[4]

Third, confirming the proposition that there is no such geographical limit on relevant conduct that a sentencing court may properly consider, 18 U.S.C. § 3661 expressly provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661. Indeed, even conduct for which a defendant has been acquitted may be considered for sentencing. United States v. Watts, 519 U.S. at 152, 117 S. Ct. at 635.

We acknowledge that the Second Circuit decisions in United States v. Azeem, 946 F.2d 13 (2d Cir. 1991), and United States v. Chunza-Plazas, 45 F.3d

---

[4] Those provisions read, in pertinent part:

> (a) Base Offense Level:
> (1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).
> (2) 22, otherwise.
> (b) Specific Offense Characteristics
> . . .
> (3) (Apply the greatest):
> . . .
> (F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by 2 levels. . .

U.S.S.G. § 2G2.2. Further, the provisions governing the admission of relevant conduct, found in U.S.S.G. § 1B1.3, contain nothing that would limit the conduct to that which occurred in the United States.

51 (2d Cir. 1995), could be viewed as being in some tension with our holding and those of the Seventh, Eighth, and Tenth Circuits. In Azeem, the defendant conspired with a DEA informant in Pakistan to import heroin both to New York and also to Cairo. Azeem was charged only with the former. The Second Circuit held that the drugs in the Cairo transaction should not have been included in the total amount of drugs for purposes of determining the base offense level. Although the court acknowledged that the Cairo transaction was part of the same course of conduct or common scheme—i.e., the court acknowledged that the Cairo transaction was relevant conduct—and also acknowledged that the relevant conduct provision did not address the issue of foreign crimes and activities, 946 F.2d at 17, it held that the district court erred in considering the extraterritorial conduct. The Second Circuit did not mention the doctrine known as the presumption against the extraterritorial application of congressional legislation. Rather, it relied on the fact that the Cairo transaction was not a crime against the United States, and on the fact that a different Guidelines provision provides that foreign convictions are not counted as part of a defendant's criminal history. See U.S.S.G. § 4A1.2(h) ("Sentences resulting from foreign convictions are not counted, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))."). The Second Circuit inferred from this that Congress (really the Sentencing Commission) had "chosen to assign

to foreign crimes a rather limited role." Azeem, 946 F.2d at 17. The court noted what seemed to it as good reasons for excluding foreign crimes—e.g., not involving courts in "distinguishing between activities that violate both domestic and foreign law and those which violate only domestic law or only foreign law." Id. The Chunza-Plazas decision followed the Azeem rationale with little additional elaboration, as did the Ninth Circuit in United States v. Chao Fan Xu, 706 F.3d 965, 992-93 (9th Cir. 2013).

We note that the Second Circuit cases do not address the doctrine of the presumption against the extraterritorial application of congressional legislation, although we acknowledge that they do address related concerns. To the extent that the Second Circuit cases are inconsistent with our holding and that of the Seventh Circuit in Dawn, the Tenth Circuit in Wilkinson, and the Eighth Circuit in Zayas, we respectfully decline to follow the Second Circuit. We believe that reliance upon U.S.S.G. § 4A1.2(h) in Spence's case would be misplaced. That Guidelines provision provides only that foreign convictions and sentences should not be counted in a defendant's criminal history. A court required to consider a foreign conviction as part of a defendant's criminal history might well find itself inquiring about whether the conduct underlying the foreign crime would violate domestic United States law, or whether criminalization of that underlying conduct would violate the public policy of the United States, or whether counting such foreign

conviction would otherwise be inappropriate. Such are the concerns proffered by the Azeem panel. However, such concerns are simply not relevant in the circumstances of Spence's case. We are not concerned with a foreign conviction; rather, we are concerned only with conduct—i.e., the distribution of particular videos which have already been determined to be child pornography and have already been determined to be in violation of United States law. We need not examine any foreign law to know that it is appropriate to consider such distribution as indicating that Spence's crime of possessing the videos in the United States is more culpable than mere possession alone would have been. United States Sentencing Guideline § 2G2.2(b)(3)(F) tells us this. For this reason, we do not consider the rationale of Azeem to be persuasive in the circumstances of the instant case. Indeed, we note that U.S.S.G. § 4A1.2(h), although it provides that foreign convictions not be counted as part of a defendant's criminal history, expressly provides that foreign convictions and sentences can be considered under the upward departure provision. That, we submit, is inconsistent with Spence's position that the presumption against extraterritorial application of congressional legislation should be extended so as to preclude a sentencing judge from considering extraterritorial conduct in the sentencing process.

For the foregoing reasons, we reject Spence's sole argument on appeal. We decline to extend the doctrine of the presumption against extraterritorial

application of congressional legislation to also preclude a sentencing judge from considering extraterritorial conduct which otherwise is properly considered as relevant conduct.

AFFIRMED.