No. 19-5946

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY CARL SPENCE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court permissibly considered petitioner's foreign distribution of the child pornography that he transported and possessed in the United States in calculating his offense level under the federal Sentencing Guidelines.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. Spence, No. 17-cr-62 (Oct. 26, 2017)

United States Court of Appeals (11th Cir.):

United States v. Spence, No. 17-14976 (May 2, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 923 F.3d 929.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2019. A petition for rehearing was denied on June 20, 2019. The petition for a writ of certiorari was filed on September 13, 2019. 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 Middle District of Florida, petitioner was convicted of

transporting child pornography, in violation of 18 U.S.C. 2252A(a)(1) and (b)(1), and possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Judgment 1. He was sentenced to 68 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-13.

1. On February 6, 2017, petitioner arrived at the Orlando International Airport on a flight from Jamaica. Presentence Investigation Report (PSR) ¶ 6. U.S. Customs and Border Protection agents searched petitioner's cell phone and found a video of suspected child pornography. Ibid. Agents with the Department of Homeland Security arrived soon thereafter and found two videos on the phone showing child pornography. PSR ¶¶ 6-7; see also PSR ¶¶ 9-11 (describing content of videos). In an interview, petitioner acknowledged sharing the videos with others while in Jamaica and stated that "he was in Jamaica when he received and sent these two child pornography videos." PSR ¶¶ 12-16.

A grand jury subsequently indicted petitioner on one count of knowing transportation of child pornography in violation of 18 U.S.C. 2252A(a)(1) and (b)(1) and one count of knowing possession of child pornography in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Indictment 1-2. Following a trial, petitioner was found guilty on both charges. Pet. App. 2.

2. Applying the 2016 United States Sentencing Guidelines, the Probation Office's PSR grouped the two counts of conviction

and assigned a base offense level of 22. PSR ¶¶ 24-26 (citing, inter alia, Sentencing Guidelines § 2G2.2(a)(2) (2016)). The Probation Office then applied a number of enhancements: two levels because the videos showed a minor under the age of 12 (Sentencing Guidelines § 2G2.2(b)(2) (2016)); four levels because one of the videos showed "sexual abuse or exploitation of an infant or toddler" (id. § 2G2.2(b)(4) (2016)); two levels because the offense involved the use of a cell phone (id. § 2G2.2(b)(6)); three levels because the offense involved two videos (id. § 2G2.2(b)(7)(B)); two levels for obstruction of justice (id. § 3C1.1 (2016)); and two levels because petitioner knowingly distributed the videos to others (id. § 2G2.2(b)(3)(F) (2016)). PSR ¶¶ 27-34; see Gov't C.A. Br. 6. The resulting total offense level of 37, combined with petitioner's criminal history category I, yielded an advisory Guidelines sentencing range of 210 to 262 months of imprisonment. PSR ¶¶ 38, 43, 85.

As relevant here, petitioner objected to the two-level distribution enhancement under Section 2G2.2(b)(3)(F) on the ground that his acts of distribution "occurred in Jamaica" and were therefore "beyond the jurisdictional reach of 18 U.S.C. § 2252A," the principal federal child-pornography statute. Pet. Sent. Mem. 4-5. The Probation Office recommended overruling the objection on the ground that Section 2G2.2(b)(3)(F), which sets forth the distribution enhancement, "does not contain a geographic limitation but rather depends 'upon the factual and logical

relationship between the offense of conviction and the defendant's other acts, wherever they may have occurred.'" Addendum to PSR 3 (quoting United States v. Dawn, 129 F.3d 878, 882 (7th Cir. 1997)). And at sentencing, the government acknowledged that it could not "charge [petitioner] for the distribution in Jamaica" but maintained that it was "still relevant conduct * * * and it certainly was relevant in this case to show lack of a mistake and knowledge on his part of what was on his phone." Sent. Tr. 19.

The district court adopted the Probation Office's factual statements and Guidelines calculations, determining that the enhancement applied, but "invit[ing] [petitioner] to make a variance argument on that matter." Sent. Tr. 19, 24. Petitioner then argued for a below-Guidelines sentence of 60 months (the statutory minimum) on several grounds. Id. at 30-38; see PSR ¶ 84. Addressing the distribution enhancement specifically, petitioner highlighted evidence that he told another person that the abuser depicted in one of the videos "needs to be killed for what he did to that little girl," arguing that this statement demonstrated that he "does not like what he saw; and if he shared it with other people, there's still evidence to show that he did not enjoy the material that he saw." Sent. Tr. 36; see ibid. ("We don't have a predator here.").

The district court ultimately imposed a below-Guidelines sentence of 68 months on each count, to run concurrently. Sent. Tr. 46. The court explained that "the reasons for the downward

variance [are] * * * there is a lack of sophistication. I don't believe that this is a person who's going to -- there's no evidence before the Court that this is a person who has a high risk of re-offending or of expanding to actually putting his hands on children. I think the manner in which this was done was very unsophisticated." Id. at 50-51; see also D. Ct. Statement of Reasons 3-4. In the court's view, "the guidelines are entirely inappropriate based on this particular set of circumstances" and "the sentence imposed is sufficient but not greater than necessary to comply with the statutory purposes of sentencing." Sent. Tr. 50-51.

3. Petitioner appealed, arguing that the district court erred in applying the distribution enhancement based on conduct that took place in Jamaica. In support, he relied on the presumption against extraterritoriality, under which courts will not construe federal statutes to apply extraterritorially absent a clear indication to that effect. Pet. App. 3-4; see generally RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2099-2101 (2016) (discussing presumption against extraterritoriality); see also Pet. App. 4 ("[Petitioner] 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)."). The court of appeals rejected his argument and affirmed. Pet. App. 1-13.

The court of appeals noted that various circuits "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." Pet. App. 5; see id. at 5-7 (discussing Dawn, supra; United States v. Wilkinson, 169 F.3d 1236 (10th Cir. 1999); United States v. Zayas, 758 F.3d 986 (8th Cir. 2014); and United States v. Castro-Valenzuela, 304 Fed. Appx. 986 (3d Cir. 2008)). The court of appeals "agree[d]" with those circuits, explaining that "the presumption against the 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." Id. at 7-8.

The court of appeals observed that "the conduct underlying the offense for which [petitioner] * * * 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." Pet. App. 8. And the court explained that the fact that the "relevant conduct which occurred outside the United States was considered in assessing the gravity of [petitioner's] domestic crime does not mean that he was sentenced for that extraterritorial conduct." Ibid. The court found "no language in the relevant Guidelines provisions which limits consideration of

relevant conduct to conduct occurring in the United States." Id. at 9. The court also observed that 18 U.S.C. 3661 provides that "[n]o 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," thus "confirming the proposition that there is no such geographical limit on relevant conduct that a sentencing court may properly consider." Pet. App. 9.

The court of appeals acknowledged that its decision "could be viewed as being in some tension" with the Second Circuit's decision in United States v. Azeem, 946 F.2d 13 (1991), as well as the decisions in United States v. Chunza-Plazas, 45 F.3d 51 (2d Cir. 1995), and United States v. Chao Fan Xu, 706 F.3d 965 (9th Cir. 2013), both of which adopted Azeem with "little additional elaboration." Pet. App. 9-11. But it observed that the Second Circuit had not applied the presumption against extraterritoriality, id. at 10, and that factors on which the Second Circuit had relied -- Sentencing Guidelines § 4A1.2(h), which "provides that foreign convictions are not counted as part of a defendant's criminal history," and potential problems associated with taking into account foreign convictions -- were inapposite in this case. Pet. App. 10-11. The court emphasized the foreign conduct at issue here was relevant regardless of

whether it formed (or could form) the basis for a foreign conviction. Id. at 12.

ARGUMENT

Petitioner renews his contention (Pet. 11-12) that the presumption against extraterritoriality foreclosed consideration of his foreign distribution of child pornography in calculating the applicable offense level under the Sentencing Guidelines for his transportation and possession of that pornography. The court of appeals' decision was correct and no conflict in the circuits warrants this Court's review. In any event, this case would be a poor vehicle for resolving the question presented because any error in calculating the offense level did not prejudice petitioner.

1. Petitioner appears to acknowledge (Pet. 13) that "Congress or the Sentencing Commission" would have authority to direct district courts to consider foreign conduct in imposing a sentence for a violation of U.S. law. He contends, however, that they have not invoked that authority, and that the district court was accordingly required to assign him the same Guidelines range as a similarly situated defendant who never distributed the child pornography that he transported and possessed at all. That contention, for which he relies on the presumption against extraterritoriality, lacks merit.

a. Under the "canon of statutory construction known as the presumption against extraterritoriality," "[a]bsent clearly expressed congressional intent to the contrary, federal laws will

be construed to have only domestic application." RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (citing Morrison v. National Austl. Bank, Ltd., 561 U.S. 247, 255 (2010)). The presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters," Morrison, 561 U.S. at 255, and "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries," RJR Nabisco, 136 S. Ct. at 2100.

This Court has set forth a "two-step framework for analyzing extraterritoriality issues." RJR Nabisco, 136 S. Ct. at 2101. "At the first step, [courts] ask whether the presumption against extraterritoriality has been rebutted -- that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." Ibid. "If the statute is not extraterritorial, then at the second step [courts] determine whether the case involves a domestic application of the statute * * * by looking to the statute's 'focus.'" Ibid. "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." Ibid. On the other hand, "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." Ibid.

b. The court of appeals correctly determined that the presumption against extraterritoriality did not foreclose consideration of defendant's foreign conduct in calculating his offense level under the Guidelines, for three independent reasons.

First, the presumption does not apply to the Guidelines or the statutory provisions they implement. Courts typically apply the presumption against extraterritoriality "to discern whether an Act of Congress regulating conduct applies abroad." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013). This Court has recognized that the presumption also applies to statutes that merely "afford[] relief," or "confer[] jurisdiction" on courts to recognize causes of action in cases involving foreign conduct. RJR Nabisco, 136 S. Ct. at 2101; see, e.g., Kiobel, 569 U.S. at 116 ("[T]he principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the [Alien Tort Statute]."). The Guidelines, however, have no analogous function.

The Sentencing Guidelines serve the unique purpose of "guid[ing] the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." Beckles v. United States, 137 S. Ct. 886, 892 (2017). A court therefore calculates the Guidelines range in the course of determining a defendant's sentence for his or her domestic conduct. Any foreign conduct that may be considered is relevant not for its own sake, but because it sheds light on the gravity of the domestic offense.

See, e.g., United States v. Watts, 519 U.S. 148, 155 (1997) (per curiam) ("[T]he defendant is punished only for the fact that the present offense was carried out in a manner that warrants increased punishment.") (citation and internal quotation marks omitted); United States v. Castro-Valenzuela, 304 Fed. Appx. 986, 991 (3d Cir. 2008) ("Taking into account conduct related to the offense of conviction in sentencing is not the same thing as holding the defendant criminally culpable for that conduct.").

As a result, the Guidelines are unlike the statutes to which this Court has applied the presumption against extraterritoriality. Those statutes generally authorized courts to impose direct consequences for foreign conduct, rather than authorizing courts to consider foreign conduct in the course of imposing consequences for domestic conduct, and were binding, rather than advisory. See United States v. Dawn, 129 F.3d 878, 883 n.8 (7th Cir. 1997) ("Extraterritoriality principles limit the United States' ability to hold a party to account legally for conduct that occurred beyond its borders. Yet, the Sentencing Guidelines are not laws in the sense that penal statutes are."). The Guidelines accordingly do not implicate the fundamental underlying rationales of the presumption. Compared to direct regulation of foreign conduct, little risk of "international discord," RJR Nabisco, 136 S. Ct. at 2100, arises when a court merely considers foreign conduct in the course of sentencing a defendant for a domestic crime.

Second, even if the presumption against extraterritoriality did apply, the relevant statutory provisions include the requisite clear statement to overcome it. Under 18 U.S.C. 3661, "[n]o 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." (emphasis added). That language precludes the argument that certain types of conduct, including foreign conduct, are categorically excluded from the sentencing analysis. As the Tenth Circuit has observed, "[i]t would be absurd to suggest that there is a long-standing principle that judges cannot consider in calculating a sentence relevant conduct committed outside of the United States. In fact, [Section] 3661 clearly states otherwise." United States v. Wilkinson, 169 F.3d 1236, 1238 (10th Cir. 1999).

Context confirms that a sentencing court need not ignore relevant conduct abroad in determining an appropriate sentence. See Morrison, 561 U.S. at 265 (emphasizing that "[a]ssuredly context can be consulted as well" in determining whether presumption of extraterritoriality is rebutted). Courts have traditionally viewed "the possession of the fullest information possible concerning the defendant's life and characteristics" as "[h]ighly relevant -- if not essential -- to [the judge's] selection of an appropriate sentence." Williams v. New York, 337 U.S. 241, 247 (1949). And "[b]oth Congress and the Sentencing

Commission * * * expressly preserved the traditional discretion of sentencing courts to conduct an inquiry broad in scope, largely unlimited either as to the kind of information they may consider, or the source from which it may come." Pepper v. United States, 562 U.S. 476, 489 (2011) (brackets, citation, and internal quotation marks omitted). Accordingly, the sentencing framework presents no "basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing," Watts, 519 U.S. at 152 -- including evidence regarding foreign conduct.

Third, even if the relevant provisions lacked the requisite clear statement, the presumption would have no effect on the analysis here because the consideration of foreign conduct involves a permissible domestic application of the Guidelines. As this Court has explained, a particular statutory application is domestic if the conduct relevant to the "focus" of the statute occurred in the United States. RJR Nabisco, 136 S. Ct. at 2101. And the focus of sentencing, including the distribution enhancement at issue here, is on determining the appropriate punishment for an offense in violation of U.S. law. The foreign conduct in a case like this one is relevant only because it sheds light on the gravity of that offense. See pp. 10-11, supra; Dawn, 129 F.3d at 884 ("The offense of conviction remains paramount, in terms of both the statutory minimum and maximum punishments and what is relevant for sentencing purposes. Indeed, the very purpose

of looking to circumstances beyond the offense of conviction is to decide what degree of punishment to impose within the typically broad range authorized by the criminal statute.").

Thus, because petitioner's offense conduct (transportation and possession of child pornography) occurred in the United States, sentencing him for that conduct involved a domestic application of the relevant sentencing provisions. So long as "the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." RJR Nabisco, 136 S. Ct. at 2101; see, e.g., Wilkinson, 169 F.3d at 1238 (The relevant Guidelines provisions "as interpreted by the district court properly applied only to conduct that occurred within the United States," because "Wilkinson was held criminally culpable only for his conduct (possession of child pornography) that occurred within the territorial jurisdiction of the United States").

2. Multiple courts of appeals have recognized, in accord with the decision below, that a sentencing court need not disregard relevant foreign conduct in applying the Guidelines. See Pet. App. 5-7; see also United States v. Zayas, 758 F.3d 986, 989-990 (8th Cir. 2014); Castro-Valenzuela, 304 Fed. Appx. at 992-993; Wilkinson, 169 F.3d at 1238-1239; Dawn, 129 F.3d at 881-885. Petitioner contends (Pet. 6-10) that those decisions conflict with the Second Circuit's decision in United States v. Azeem, in which that court declined to include the amount of heroin that the

defendant schemed to import to Cairo as part of the drug quantity for his conviction for schemes to import heroin into New York, on the ground that the Cairo scheme was a foreign crime. 946 F.2d 13, 16-18 (2d Cir. 1991). He also cites the Second Circuit's later decision in United States v. Chunza-Plazas, 45 F.3d 51 (1995), and the Ninth Circuit's decision in United States v. Chao Fan Xu, 706 F.3d 965 (2013), both of which followed Azeem. See Chao Fan Xu, 706 F.3d at 992-993 (declining to include foreign bank fraud in Guidelines calculation for racketeering conspiracy); Chunza-Plazas, 45 F.3d at 57-58 (declining to include foreign drug-cartel activity in Guidelines calculation for fraud). None of those decisions, however, applied the presumption against extraterritoriality or addressed the distribution enhancement at issue here.

Any tension in the circuits would not warrant this Court's review because petitioner's challenge to his sentence rests on a claimed error in the application of an advisory Guidelines sentencing provision. Petitioner effectively acknowledges that the Sentencing Commission could answer the question presented by explicitly addressing whether particular provisions apply to foreign conduct. See Pet. 11 (acknowledging that extraterritorial application would be appropriate if there were an "express statement" to that effect by "the Sentencing Commission") (emphasis omitted). Typically, this Court leaves issues of Guidelines application in the hands of the Sentencing Commission,

which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). That same course is warranted here.

3. In any event, this case would be a poor vehicle for resolving the question presented because even if the district court erred in imposing the two-level distribution enhancement, that error did not prejudice petitioner. The district court calculated a Guidelines range of 210 to 262 months of imprisonment. Without the distribution enhancement, petitioner would have faced a Guidelines range of 168 to 210 months. The court concluded, however, that the "guidelines are entirely inappropriate based on this particular set of circumstances." Sent. Tr. 51. It imposed a substantial downward variance sentence of 68 months -- just eight months above the 60-month mandatory minimum -- and explained in detail why "the sentence imposed is sufficient but not greater than necessary to comply with the statutory purposes of

sentencing." Id. at 50; see also id. at 43-44, 50-51. As a result, the record strongly suggests that the district court would have imposed the same sentence regardless of whether it applied the two-level distribution enhancement. See Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016) (recognizing that a Guidelines error is not prejudicial where the record shows "that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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