In the

United States Court of Appeals

For the Seventh Circuit

No. 18-2742

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARIN KAUFMANN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 15-cr-59 — **Theresa L. Springmann**, *Chief Judge*.

ARGUED SEPTEMBER 6, 2019 — DECIDED OCTOBER 9, 2019

Before EASTERBROOK, KANNE, and BRENNAN, *Circuit Judges*.

KANNE, *Circuit Judge*. For certain federal crimes involving sexual exploitation of minors, a federal statute—18 U.S.C. § 2252(b)—increases the mandatory minimum sentence when the defendant has a prior conviction "under the laws of any State relating to," among other things, "possession … of child pornography." Darin Kaufmann pled guilty to two federal crimes involving sexual exploitation of a minor.

The district court imposed an enhanced mandatory minimum sentence under § 2252(b) because Kaufmann has prior convictions for possession of child pornography under an Indiana statute. Kaufmann challenged his sentence, arguing that his prior state convictions do not support a § 2252(b) enhancement because the Indiana statute of his convictions criminalized conduct broader than the federal version of possession of child pornography.

In *United States v. Kraemer*, we held that a § 2252(b) enhancement does not require the state statute of conviction to be the same as or narrower than the analogous federal law. 933 F.3d 675 (7th Cir. 2019). Rather, the words "relating to" in § 2252(b) expand the range of enhancement-triggering convictions. *Id.* at 679–83. Under *Kraemer*, Kaufmann's Indiana convictions are ones "relating to … possession … of child pornography" and thus support the mandatory minimum enhancement. Adhering to our decision in *Kraemer*, we affirm Kaufmann's sentence.

I. BACKGROUND

Kaufmann arranged to care for an elderly man in exchange for room and board. The living arrangement ended when police arrested Kaufmann for stealing money from the man. As the man's family packed Kaufmann's belongings, they discovered child pornography. A grand jury indicted Kaufmann on charges of receiving and possessing materials involving sexual exploitation of a minor, in violation of 18 U.S.C. § 2252(a)(2) and (a)(4), and Kaufmann pled guilty to both offenses without a plea agreement.

The mandatory minimum sentence for this pair of convictions is enhanced to fifteen years if the defendant 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*." 18 U.S.C. § 2252(b)(1) (emphases added).[1]

The district court concluded that this enhancement applies because Kaufmann has prior convictions for possession of child pornography in violation of Indiana Code § 35-42-4-4 (2007). The court accordingly sentenced Kaufmann to an aggregate fifteen-year term of imprisonment, followed by five years of supervised release. Kaufmann appealed that sentence, contesting the district court's determination that his Indiana convictions trigger the enhancements under § 2252(b).

II. ANALYSIS

We review *de novo* a district court's determination that a state conviction supports a sentencing enhancement under § 2252(b). *Kraemer*, 933 F.3d at 679.

Kaufmann argues that this determination calls for the "categorical" approach of *Taylor v. United States*, 495 U.S. 575

[1] Both subsection (b)(1) and subsection (b)(2) enhance the mandatory minimum sentence for certain crimes involving sexual exploitation of minors. Subsection (b)(1) imposes a fifteen-year minimum for some crimes (including Kaufmann's conviction under § 2252(a)(2)) while subsection (b)(2) imposes a ten-year minimum for other crimes (including Kaufmann's conviction under § 2252(a)(4)). For each subsection, the enhancement may be triggered by 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." 18 U.S.C. § 2252(b)(1), (2).

(1990). Under that approach, we compare the elements of the state offense to the elements of the comparable federal offense. *Kraemer*, 933 F.3d at 679. Only if the state offense is the same as or narrower than the federal offense does the state conviction trigger an enhancement. *Id.* Kaufmann contends that the "relating to" language in § 2252(b) does not broaden the scope of state offenses that qualify as predicates for an enhancement.

Applying this categorical approach to Kaufmann's Indiana convictions, Kaufmann argues that the underlying Indiana statute criminalizing possession of child pornography is broader than federal possession of child pornography and therefore cannot support an enhancement under § 2252(b).

A federal statute supplies the applicable definition of child pornography:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256(8).

Kaufmann argues that the Indiana statute captures not only possession of materials falling within this definition of "child pornography," but also possession of materials falling outside it. He specifically contends that the Indiana statute encompasses possession of images that do not depict an actual minor.

Kaufmann is right that the Indiana statute does not replicate the federal definition of child pornography. But it demonstrates at least substantial overlap in content. The state statute reads:

> A person who knowingly or intentionally possesses:
>
> (1) a picture;
> (2) a drawing;
> (3) a photograph;
> (4) a negative image;
> (5) undeveloped film;
> (6) a motion picture;
> (7) a videotape;
> (8) a digitized image; or
> (9) any pictorial representation;
>
> that depicts or describes sexual conduct by a child who the person knows is less than sixteen (16) years of age or who appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child pornography, a Class D felony.

I.C. § 35-42-4-4(c) (2007).

Setting aside all overlapping content, Kaufmann urges us to engage in an element-by-element comparison. In other words, he argues that the categorical approach ought to apply to § 2252(b) and, accordingly, that the provision's "relating

to" language does not broaden the scope of enhancement-triggering offenses.

Kaufmann's position runs into a critical problem: his arguments are incompatible with our decision in *United States v. Kraemer*—a case we decided after the parties submitted their briefs here.

In *Kraemer*, we held that the categorical approach does not apply to § 2252(b)(2) because the "relating to" language in that provision broadens the state criminal convictions that support an enhancement. 933 F.3d at 683. We determined that Kraemer's conviction for first-degree sexual assault under a Wisconsin law was a prior conviction "'relating to' abusive sexual conduct involving a minor." *Id.* at 684 (quoting § 2252(b)(2)). Even though the state law swept more broadly than the federal law—by setting the victim's maximum age at thirteen years while the federal law set the victim's maximum age at twelve years—the state conviction still triggered the sentencing enhancement. *Id.*

In reaching this conclusion, we reasoned that "relating to" in § 2252(b)(2) "retains its usual broad meaning." *Id.* at 682 (contrasting the usual broad meaning of "relating to" with the limited meaning of "relating to" in the Immigration and Nationality Act's removal provision). That is, it means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Id.* at 679 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)). We further explained that Congress typically uses this phrase "to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *Id.* (quoting *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017)).

As in *Kraemer*, the state statute of conviction here indisputably bears a connection to a topic enumerated in § 2252(b). Indeed, the Indiana statute addresses the same harm—sexual exploitation of minors—that the enhancement provision targets. And the state statute addresses that harm by criminalizing conduct that federal law deems possession of child pornography: knowing possession of images depicting sexual conduct by actual minors. There is no doubt, then, that under *Kraemer*, Kaufmann's convictions under Indiana Code § 35-42-4-4 are ones "relating to … possession … of child pornography."

Kaufmann does not argue that the Indiana statute bears no connection to, or falls outside the "heartland" of, federal possession of child pornography. *Kraemer*, 933 F.3d at 684. Instead, he asserts that *Kraemer* was wrongly decided and presses for the categorical approach.

Regardless whether Kaufmann's Indiana convictions would trigger an enhancement under the categorical approach, his prior convictions support an enhancement under *Kraemer*. And we adhere to our *Kraemer* decision today. Kaufmann's state convictions thus qualify as predicates for the enhanced mandatory minimum sentence, and we reject Kaufmann's challenge.

III. CONCLUSION

Following our decision in *Kraemer*, Kaufmann's prior state convictions trigger the sentencing enhancements of § 2252(b). The district court's sentencing decision based on the enhanced fifteen-year mandatory minimum is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CAUSE NO.: 1:15-CR-59-TLS
	)	
DARIN KAUFMANN,	)	

OPINION AND ORDER

The Defendant, Darin Kaufmann, pled guilty to receipt of material involving sexual exploitation of a minor, in violation of 18 U.S.C. § 2252(a)(2), and to possession with intent to view material involving sexual exploitation of a minor, in violation of 18 U.S.C. § 2252(a)(4)(B). The probation officer drafted a Presentence Investigation Report (PSR) in preparation for sentencing. This Opinion and Order resolves the Defendant's objections to the PSR.

BACKGROUND

On November 20, 2015, the Government filed a two-count Indictment [ECF No. 1]. Count 1 charged the Defendant with receipt of materials involving the sexual exploitation of a minor, pursuant to 18 U.S.C. § 2252(a)(2). Count 2 charged the Defendant with possession with intent to view materials involving the sexual exploitation of a minor, pursuant to 18 U.S.C. § 2252(a)(4)(B). A Notice of Penalties [ECF No. 2] was also filed on November 20, 2015, in which the Government notified the Defendant of mandatory minimum sentences based upon previous qualifying convictions. On May 6, 2016, the Defendant changed his plea to guilty and the Magistrate Judge entered a Report and Recommendation (R & R) [ECF No. 28], and on May 23, 2016, this Court accepted the recommended disposition and adjudged the Defendant guilty, [ECF No. 30].

In the PSR [ECF No. 34], the probation officer included the statutory mandatory minimum sentences for Count 1 and Count 2, pursuant to 18 U.S.C. § 2252(b)(1)–(2), due to the Defendant's previous conviction, (PSR ¶¶ 39, 88–89). On July 26, 2016, the Defendant lodged his objections.[1] [ECF No. 36.] The Government filed its Response [ECF No. 38] on August 3, 2016. The Defendant's Reply [ECF No. 39] was dated September 12, 2016.

ANALYSIS

Under the Sixth Amendment and the Due Process Clause, an accused has the right to proof of each element of a crime beyond a reasonable doubt. *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013) (first citing *United states v. Gaudin*, 515 U.S. 506, 510 (1995); then citing *In re Winship*, 397 U.S. 358, 364 (1970)). The Defendant objects that the Court's use of his previous qualifying conviction violates his Sixth Amendment and Due Process rights. Relying upon *Alleyne*, the Defendant argues that the Indictment did not charge him with the previous qualifying conviction that triggered the statutory mandatory minimum sentences, nor was the existence of that conviction proved beyond a reasonable doubt. *See Alleyne*, 133 S. Ct. at 2155 ("[A]ny fact that increases the mandatory minimum is an 'element' that must be submitted to the jury."). However, *Alleyne* left unchanged a narrow exception to this rule: a prior conviction that enhances a mandatory minimum sentence does not need to be proved beyond a reasonable doubt because it is not an element of the crime, only a sentencing factor. *See Almendarez-Torres v. United States*, 523 U.S. 224, 240–47 (1998); *see also Alleyne*, 133 S. Ct. 2160 n.1.

The statutory provisions relevant to the Defendant's sentencing state that:

[1] The Defendant filed an opposition to the R & R, but the R & R was adopted on May 23, 2016. [ECF No. 30.] Accordingly, the Defendant's Objection to the R & R was not timely filed. Fed. R. Crim. P. 59(b)(2) (noting that "within 14 days after being served with a copy [of the R & R] . . . a party may serve and file specific written objections" to the R & R). Given the time of filing and the substantive arguments raised therein, the Court treats the Defendant's Opposition as an objection to the PSR. *See id.* 32(f).

> (b)(1) Whoever violates . . . paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction . . . under the laws of any State relating to . . . the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, . . . such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years;
>
> (2) Whoever violates . . . paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if . . . such person has a prior conviction . . . under the laws of any State relating to . . . the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252(b)(1)–(2). The Court finds that *Almendarez-Torres* controls this issue. The existence of a prior conviction under § 2252(b) is not an element of either crime enumerated in § 2252(a). Rather, the existence of a prior conviction is a sentencing factor that increases the crimes' mandatory minimum sentences. Accordingly, the Government was not required to charge the Defendant's qualifying prior conviction in the Indictment itself. *Alleyne*, 133 S. Ct. 2160 n.1; *Almendarez-Torres*, 523 U.S. at 247. The Defendant has a prior conviction under Indiana state law for the possession of child pornography (PSR ¶ 39), which is a crime "under the laws of any State relating to . . . possession . . . of child pornography." § 2252(b)(1)–(2). The probation officer's reliance upon this prior conviction to increase the mandatory minimum sentence, and thus the low end of the guideline range, was proper.

As an alternative argument, the Defendant cites to *Mathis v. United States*, 136 S. Ct. 2243 (2016). In *Mathis*, the Supreme Court provided instructions for how to determine when a prior conviction qualifies as a predicate offense under the Armed Career Criminal Act's (ACCA) mandatory enhancement provisions. *Id.* at 2248 (noting that a crime is a predicate offense under the ACCA when "its elements are the same as, or narrower than, those of the generic offense").

Because *Mathis* only analyzed the ACCA, the Court declines to extend its holding to the statute at issue here.

CONCLUSION

For the reasons stated above, the Defendant's objections to the PSR are OVERRULED.

SO ORDERED on September 22, 2016.

s/ Theresa L. Springmann
THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CAUSE NO.: 1:15-CR-59-TLS
	)	
DARIN KAUFMANN,	)	

OPINION AND ORDER

The Defendant, Darin Kaufmann, filed a Motion to Reconsider [ECF No. 42] on October 6, 2016. He asks this Court to reconsider its Order [ECF No. 40] that overruled his objections to the Presentence Investigation Report (PSR).

BACKGROUND

On November 20, 2015, the Government filed a two-count Indictment [ECF No. 1]. Count 1 charged the Defendant with receipt of materials involving the sexual exploitation of a minor, pursuant to 18 U.S.C. § 2252(a)(2). Count 2 charged the Defendant with possession with intent to view materials involving the sexual exploitation of a minor, pursuant to 18 U.S.C. § 2252(a)(4)(B). On May 6, 2016, the Defendant changed his plea to guilty and the Magistrate Judge entered a Report and Recommendation (R & R) [ECF No. 28], and on May 23, 2016, this Court accepted the recommended disposition and adjudged the Defendant guilty [ECF No. 30]. In the PSR [ECF No. 34], the probation officer included the sentencing enhancements for Counts 1 and 2, pursuant to 18 U.S.C. § 2252(b)(1)–(2), due to the Defendant's prior conviction, (PSR ¶¶ 39, 88–89, ECF No. 34.). On July 26, 2016, the Defendant lodged his objections.[1] [ECF No.

[1] The Defendant filed an opposition to the R & R, but the R & R was adopted on May 23, 2016. [ECF No. 30.] Accordingly, the Defendant's Objection to the R & R was not timely filed. Fed. R. Crim. P. 59(b)(2) (noting that "within 14 days after being served with a copy [of the R & R] . . . a party may serve and file specific written objections" to the R & R). Given the time of filing and the substantive

36.] The Government filed its Response [ECF No. 38] on August 3, 2016. The Defendant's Reply [ECF No. 39] was dated September 12, 2016.

The Court overruled the Defendant's objections on September 22, 2016, finding that the use of his previous qualifying conviction did not violate his Sixth Amendment and Due Process rights, and declining to extend the Supreme Court's jurisprudence regarding mandatory enhancement provisions under the Armed Career Criminal Act (ACCA). (Op. & Order 2–4, ECF No. 40.) Thereafter, the Defendant filed a Motion for Reconsideration [ECF No. 42] on October 6, 2016, in which he provided additional authority for extending the Supreme Court's categorical approach to his case. The Government filed its Response [ECF No. 45] on January 9, 2017, and the Defendant's Reply [ECF No. 47] was entered on January 31, 2017.

ANALYSIS

The Defendant argues that his prior conviction under Indiana law for "Possession of Child Pornography" (PSR ¶¶ 39–44) cannot be used to enhance his sentence under the United States Supreme Court's line of cases establishing the categorical approach, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Taylor v. United States*, 495 U.S. 575 (1990). There are two permissible ways for a federal sentencing court to determine if a prior conviction qualifies as a statutory enhancement: the "categorical approach" and the "modified categorical approach." *See Mathis*, 136 S. Ct. at 2251–54; *Descamps v. United States*, 133 S. Ct. 2276, 2283–85 (2013). The categorical approach is the primary method for considering whether a previous conviction qualifies as a predicate offense. In the context of the Armed Career Criminal Act (ACCA), a predicate offense must be a "violent

arguments raised therein, the Court treated the Defendant's Opposition as an objection to the PSR. *See id.* 32(f).

felony,"[2] and in order to determine if a prior conviction qualifies the sentencing court "looks at the elements of the statute of conviction to determine if it has as an element the use, attempted use, or threatened use of physical force against the person of another." *United States v. Yang*, 799 F.3d 750, 752 (7th Cir. 2015) (quotation marks omitted). The court may only use two tools for this task—the statute's text and the judgment. *Id.* If the statute sets out elements, then the sentencing court must decide, based on those alone, if the statute describes a qualifying predicate offense for a statutory enhancement. *Id.* The sentencing court is not permitted to look to outside materials in making this determination. *Id.*

By contrast, a statute will sometimes be "divisible" because it lists alternative methods of committing one offense (elements *in the alternative*). *Mathis*, 136 S. Ct. at 2256; *Yang*, 799 F.3d at 753 (emphasis added). Some of the alternative methods may qualify as a predicate offense under the relevant statute, but some may not. If not all the statute's alternatives would qualify and the judgment merely identifies the statute of conviction, then the court uses the modified categorical approach. *Yang*, 799 F.3d at 753. Under the modified categorical approach, the sentencing court is permitted to look to outside documents,[3] such as "charging documents, plea agreements, jury instructions, plea and sentencing transcripts, and findings of fact and conclusions of law from a bench trial" for the limited purpose of determining which alternative

[2] Under the ACCA, a "'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that—"

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another* . . . .

18 U.S.C. § 924(e)(2)(B)(emphasis added). The italicized portion of the statute, known as the residual clause, was held unconstitutional. *Johnson*, 135 S. Ct. at 2557–58, 2563.

[3] These are referred to as "*Shepard* documents" after *Shepard v. United States*, 544 U.S. 13 (2005).

served as the basis of the defendant's conviction. *Id.*[4] In considering this, the sentencing court is only deciding whether the actual statute of conviction qualified under the relevant statute's enhancement provisions. *Id.* Once more, the sentencing court is prohibited from looking beyond the crime's elements to determine the facts underlying the defendant's conviction. *Id.*

The Supreme Court's categorical approach has been discussed mostly with the ACCA's mandatory enhancement provisions. *Mathis*, 136 S. Ct. at 2248 (noting that a crime is a predicate offense under the ACCA when "its elements are the same as, or narrower than, those of the generic offense"). But the Supreme Court has "appl[ied] the categorical approach outside the ACCA context—most prominently, in immigration cases." *Id.* at 2251 n.2 (citing *Kawashima v. Holder*, 565 U.S. 478, 482–83 (2012)). Here, the Defendant's sentencing involves a federal sex crime statute, and both parties assume that the categorical approach applies. (*See* Gov't Resp. 5–6, ECF No. 45; Def.'s Br. 5, ECF No. 42.) Their briefing focused on a Third Circuit case that expressly applied the categorical approach to sentencing under a federal sex offender statute. *United States v. Dahl*, 833 F.3d 345, 350 (3d Cir. 2016) ("[T]he categorical approach is not unique to ACCA . . . and both ACCA and the repeat [sex] offender statute use the terms 'conduct' and 'conviction' in a similar manner.") (citations omitted).

In *Dahl*, the defendant was charged and pleaded guilty to five separate counts involving federal sex offenses.[5] Additionally, the defendant "had several prior Delaware convictions related to sexual activity with minors" that "were the equivalent of convictions for federal

[4] If the underlying judgment is so ambiguous that the court cannot even identify what the statute of conviction was, then the sentencing court may employ the modified categorical approach and use *Shepard* documents to determine that statute. *Yang*, 799 F.3d at 755.

[5] "[T]hree counts of attempted use of an interstate commerce facility to entice a minor to engage in sexual conduct in violation of 18 U.S.C. § 2422(b); one count of attempted enticement of a minor to travel in interstate commerce to engage in sexual activity, in violation of 18 U.S.C. § 2422(a); and one count of transfer of obscene material to a minor, in violation of 18 U.S.C. § 1470." *Dahl*, 833 F.3d at 347 n.1.

aggravated sexual abuse under 18 U.S.C. § 2241." *Id.* at 347–48. The sentencing court found that these prior convictions qualified as predicate offenses ("sex offense convictions"), which subjected the defendant to the enhancements under 18 U.S.C. § 2426 and U.S.S.G. § 4B1.5(a). *Id.* On appeal, the defendant argued that these prior convictions did not qualify as predicate offenses under the categorical approach, and the Third Circuit agreed. *Id.* at 348–49 (noting that "both ACCA and the repeat offender statute use the terms 'conduct' and 'conviction' in a similar manner"). Applying the categorical approach, the Third Circuit found that Delaware law "swe[pt] more broadly than federal aggravated sexual abuse" and that his prior convictions could not enhance his sentence. *Id.* at 354–57.[6]

However, the Supreme Court and the Seventh Circuit have not expressly extended the categorical approach to sentencing for sex crime offenses. *Cf. United States v. Foley*, 740 F.3d 1079, 1087 (7th Cir. 2014) (noting that the categorical approach does not determine whether a prior conviction for a sex crime satisfies Federal Rule of Evidence 413); *United States v. Goodpasture*, 595 F.3d 670, 672 (7th Cir. 2010) (applying categorical approach to determine if prior state conviction for "law or lascivious act involving a person under the age of 14" was predicate offense under the ACCA); *Gaiskov v. Holder*, 567 F.3d 832, 835–36 (7th Cir. 2009) (applying categorical approach to determine if state law "sexual abuse of a minor" was predicate offense under federal immigration law). As such, this Court is not required to apply the categorical approach to the Defendant's sentencing, but even if it does the Court still arrives at the same result.

[6] "Neither party contend[ed] the modified categorical approach [wa]s applicable," but the Third Circuit alternatively found that "any division of the statutes requires 'sexual contact,' which under Delaware law [wa]s more expansive than the federal 'sexual act'" and thus led to the same result. *Id.* at 357.

In this case, the Defendant was charged under a federal law for possession and distribution of "material involving the sexual exploitation of minors"—18 U.S.C. § 2252(a), which penalizes "any person who"

> (2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if–
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> ***
>
> (4)(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if–
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (ii) such visual depiction is of such conduct;

The criminal penalty for a violation of § 2252(a)(2) is imprisonment "not less than 5 years and not more than 20 years," whereas a violation of § 2252(a)(4)(B) is imprisonment "not more than 10 years." 18 U.S.C. § 2252(b)(1)–(2). The relevant statutory enhancements state that if the defendant "has a prior conviction . . . under the laws of any State relating to . . . the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography," then the sentence is enhanced: "not less than 15 years nor more than 40 years" in the case of subsection (a)(2), and "not less than 10 years nor more than 20 years" in the case of subsection (4)(B). *Id.*

The PSR calculated the Defendant's sentence under the above-listed enhancements because he had a prior conviction for "Possession of Child Pornography" under Indiana law.

(PSR ¶¶ 39–44.) At the time of the Defendant's conviction, "[a] person who knowingly or intentionally possesse[d]" certain media[7] "that depicts or describes sexual conduct by a child who the person knows is . . . or who appears to be less than sixteen (16) years of age, . . . commits possession of child pornography, a Class D felony." Ind. Code § 35-42-4-4(c).[8] Focusing on the categorical approach, the Government argues that the federal and state laws criminalize the same conduct, while the Defendant argues that the Indiana law "is broader than the [f]ederal definition" of possession of child pornography because the state law criminalizes pornography that portrays someone "*who appears to be under the age of sixteen (16).*" (Def.'s Br. 5.)

The Court finds that the Defendant's argument misreads the statute. Section 35-42-4-4(c) proscribes only those pornographic images and media that depict *children* that are actually "less than sixteen (16) years of age" or "appear[] to be" less than that age. Use of the word "child" in section 35-42-4-4(c) limits the class of persons of whom it is criminal to possess pornographic depictions in Indiana. Although the statute only contains the word "child" once, in conjunction with "knows," *ejusdem generis* also compels interpreting the word "child" in conjunction with "appears to be." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 223 (2008) (quoting *Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991)) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."). The use of the word "child" as the class of persons this law applies

[7] Certain media enumerated under the statute include "(1) a picture; (2) a drawing; (3) a photograph; (4) a negative image; (5) undeveloped film; (6) a motion picture; (7) a videotape; (8) a digitized image; or (9) any pictorial representation." Ind. Code. 35-42-4-4(c).

[8] Effective July 1, 2014, the Indiana child pornography statute was amended, in relevant part, to designate this offense a "Level 6 felony," rather than a "Class D" felony, and to make the relevant age "eighteen (18) years of age." *See* Pub. L. 168-2014, sec. 69. Otherwise, the relevant portion of the Indiana child pornography statute is unchanged from when the Defendant was convicted. *See* Pub. L. 216-2007, sec. 43; Pub. L. No. 148, sec. 5.

to necessarily excludes the other class of persons from this law's application—adults. Accordingly, section 35-42-4-4(c) does not criminalize the possession of pornographic material that depicts an adult, even if that adult looks so youthful in appearance as to appear less than sixteen.[9]

Contrary to the Defendant's arguments, the Indiana statute is narrower, not broader, than the federal law, because the latter only criminalizes the possession of materials that depict "any person under the age of eighteen years." 18 U.S.C. § 2256(1). Applying the categorical approach to determine the elements of the Defendant's state conviction, the Court finds that his prior conviction was one for possession of child pornography. As such, it is a predicate offense that may be used to enhance his sentence under 18 U.S.C. § 2252(b)(1) & (2).

CONCLUSION

For the reasons stated above, the Motion to Reconsider [ECF No. 40] is DENIED and the Defendant's objections to the PSR are OVERRULED.

SO ORDERED on February 8, 2017.

s/ Theresa L. Springmann
CHIEF JUDGE THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT

[9] Indeed, the Defendant's argument was premised merely on hypotheticals. (*See* Def.'s Reply 2, ECF No. 47 (arguing that the law criminalized a husband's possession of a "partially nude photograph" of his "adult wife . . . in a youthful nurse['s] outfit" because she "appeared to be under the age of (16) sixteen.").) He submitted no Indiana precedent, and the Court is not aware of any, that supports the proposition that a criminal defendant can be charged with the possession of child pornography under section 35-42-4-4(c) when the depicted subject is a legal adult who looks like a child.