No. 19-7260

IN THE SUPREME COURT OF THE UNITED STATES

DARIN KAUFMANN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's prior Indiana conviction for possession of child pornography, in violation of Indiana Code § 35-42-4-4(c) (2007), is a conviction "under the laws of any State relating to * * * possession * * * of child pornography" for purposes of the recidivist sentencing enhancements for the federal offense of possessing child pornography, 18 U.S.C. 2252(b)(1) and (2).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ind.):

United States v. Kaufmann, No. 15-cr-59 (July 30, 2018)

United States Court of Appeals (7th Cir.):

United States v. Kaufmann, No. 18-2742 (Oct. 9, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 940 F.3d 377. The opinions and orders of the district court (Pet. App. 8a-11a, 12a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2019. The petition for a writ of certiorari was filed on January 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of receiving material involving sexual exploitation of a minor, in violation of 18 U.S.C. 2252(a)(2), and one count of possessing with intent to view material involving sexual exploitation of a minor, in violation of 18 U.S.C. 2252(a)(4)(B). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-7a.

1. In 2014, petitioner provided live-in care to an elderly man in exchange for room and board. Pet. App. 2a; Presentence Investigation Report (PSR) ¶ 5. That living arrangement ended when local police officers arrested petitioner for stealing approximately $1000 from the man. Pet. App. 2a; PSR ¶ 6.

Following petitioner's arrest, the victim's family were packing petitioner's belongings when they discovered several photographs of naked children and a videocassette under petitioner's bed. Pet. App. 2a; PSR ¶ 7. Law-enforcement officers obtained a warrant to search petitioner's computers, and a forensic examination of the computers revealed more child-pornography images and videos. Pet. App. 2a; PSR ¶ 9. Petitioner admitted that he had downloaded the child pornography from the internet and had transferred child-pornography files to an external hard drive.

PSR ¶¶ 10-11. In total, law enforcement recovered from petitioner's computers 740 images and 84 videos of child pornography, including images depicting bondage and adults with infants, and videos depicting men having sex with prepubescent children. PSR ¶ 12.

A federal grand jury in the Northern District of Indiana returned an indictment charging petitioner with one count of receiving materials involving sexual exploitation of a minor, in violation of 18 U.S.C. 2252(a)(2), and one count of possessing with intent to view material involving sexual exploitation of a minor, in violation of 18 U.S.C. 2252(a)(4)(B). Pet. App. 2a; Indictment 1-2. Petitioner pleaded guilty to both counts without a plea agreement. Pet. App. 2a; PSR ¶¶ 1-2.

2. A conviction for receiving child pornography under 18 U.S.C. 2252(a)(2) carries a default statutory sentencing range of 5 to 20 years of imprisonment, and a conviction for possessing child pornography under 18 U.S.C. 2252(a)(4) carries a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 2252(b)(1) and (2). Those sentencing ranges increase, however, if the offender has "a prior conviction * * * under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children." Ibid. The enhanced sentencing range

for receiving child pornography under 18 U.S.C. 2252(a)(2) is 15 to 40 years of imprisonment and for possessing child pornography under 18 U.S.C. 2252(a)(4) is 10 to 20 years of imprisonment. Ibid.

In its presentence report, the Probation Office calculated petitioner's initial advisory Guidelines range as 168 to 210 months of imprisonment, based on a total offense level of 31 and a criminal history category of V. PSR ¶ 89. Because petitioner had a 2008 Indiana conviction on two counts of possessing child pornography, however, the Probation Office determined that petitioner qualified for enhanced sentences under Section 2252(b)(1) and (2), including a statutory-minimum sentence of 15 years of imprisonment on the receiving count. Pet. App. 9a; PSR ¶¶ 39, 88-89. Accordingly, the Probation Office calculated a final Guidelines range of 180 to 210 months of imprisonment. PSR ¶ 89; see Sentencing Guidelines § 5G1.2(b) (2016).

Petitioner objected to the presentence report, arguing among other things that his prior Indiana child-pornography conviction could not be used to enhance his sentence under Section 2252(b) because the Indiana offense encompasses the possession of materials that do not fit "the 'generic definition' of child pornography." D. Ct. Doc. 39, at 1 (Sept. 12, 2016); see id. at 1-5; D. Ct. Doc. 36 (July 25, 2016). The district court overruled petitioner's objections, Pet. App. 8a-11a, and denied petitioner's motion for reconsideration, id. at 12a-19a. The court explained

that, under a categorical approach that looked to whether the Indiana crime's elements cover conduct that would not fit the definition of a federal-law predicate offense, petitioner's prior Indiana conviction triggers Section 2252(b)'s enhanced sentencing ranges because Indiana's definition of child pornography "is narrower, not broader" than the federal definition. Id. at 19a.

At sentencing, the district court adopted the Guidelines calculations in the presentence report, determining that petitioner's advisory Guidelines range was 180 to 210 months of imprisonment, Sent. Tr. 6, and sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release, id. at 14, 17; Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-7a. Relying on its recent decision in United States v. Kraemer, 933 F.3d 675 (7th Cir. 2019), the court rejected petitioner's contention that the applicability of a Section 2252(b) enhancement turns on a "categorical approach" under which a prior state conviction would trigger the enhancement "[o]nly if the state offense is the same as or narrower than" the comparable federal offense. Pet. App. 4a; see id. at 2a, 6a. "Rather," the court explained, "the words 'relating to' in § 2252(b) expand the range of enhancement-triggering convictions" to encompass prior convictions that have a connection with or reference to the topics listed in the statute. Id. at 2a; see id. at 6a. And the court observed that petitioner did not argue that the Indiana law "bears no connection to, or

falls outside the 'heartland' of, federal possession of child pornography." Id. at 7a (quoting Kraemer, 933 F.3d at 684). Because the court found that "the state statute of conviction here indisputably bears a connection to a topic enumerated in § 2252(b)," the court determined that petitioner's prior Indiana conviction triggered the enhanced statutory sentences set forth in Section 2252(b). Ibid.

ARGUMENT

Petitioner contends (Pet. 9-25) that the lower courts erred in determining that his prior conviction for possessing child pornography, in violation of Indiana Code § 35-42-4-4(c) (2007), is a conviction "under the laws of any State relating to * * * [the] possession * * * of child pornography" for purposes of 18 U.S.C. 2252(b)(1) and (2). The court of appeals' decision does not conflict with any decision of this Court or implicate any circuit conflict that warrants this Court's review. In any event, this case would be an unsuitable vehicle for considering when a prior child-pornography conviction triggers an enhanced sentence under Section 2252(b)(1) and (2) because petitioner's prior Indiana conviction would trigger an enhanced sentence even under petitioner's preferred interpretation of federal law.

1. The lower courts correctly determined that petitioner's prior Indiana child-pornography conviction was a conviction "under the laws of any State relating to * * * possession * * * of

child pornography" that triggers the sentencing enhancements in 18 U.S.C. 2252(b)(1) and (2).

For the purposes of Section 2252(b), the term "'child pornography'" is defined as "any visual depiction * * * 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); see Pet. App. 4a. At the time of petitioner's conviction, Indiana Code § 35-42-4-4(c) (2007) prohibited the knowing or intentional possession of various types of "pictorial representation[s]" that "depict[] or describe[] 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 lack[] serious literary, artistic, political, or scientific value."

Because a Section 2252(b) enhancement applies whenever a defendant has a prior state conviction "relating to" certain offenses, including the possession of child pornography, the court of appeals correctly considered whether the Indiana statute under which petitioner was previously convicted has "a connection with, or reference to," the possession of child pornography within the

meaning of federal law. Pet. App. 6a; see Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1197 (2017) (explaining that "Congress characteristically employs the phrase to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates"). As the court of appeals observed, the Indiana statute of conviction "indisputably bears a connection to" the possession of child pornography within the meaning of Section 2252(b). Pet. App. 7a. The Indiana statute "addresses the same harm" contemplated by Section 2252(b), i.e., sexual exploitation of minors, by criminalizing the same conduct described in Section 2252(b), i.e., the "knowing possession of images depicting sexual conduct by actual minors." Ibid. Indeed, as in the court below, petitioner "does not argue that the Indiana statute bears no connection to, or falls outside the 'heartland' of, federal possession of child pornography." Ibid. (citation omitted).

2. Petitioner contends (Pet. 10) that, contrary to "every other Circuit that has considered the issue," the court of appeals refused to apply the categorical approach "as outlined by this Court in Taylor v. United States, 495 U.S. 575 (1990) and Descamps v. United States, 570 U.S. 254 (2013)." But notwithstanding some potential terminological confusion, see Pet. App. 6a, the court in substance adopted a categorical approach.

This Court's categorical-approach precedents require a sentencing court to determine whether a particular sentencing enhancement applies by "look[ing] 'only to the statutory

definitions of the prior offenses,'" rather than "'the particular facts underlying the prior convictions'" or "'the label a State assigns to [the] crime[s].'" Shular v. United States, 140 S. Ct. 779, 783 (2020) (quoting Taylor, 495 U.S. at 600, and Mathis v. United States, 136 S. Ct. 2243, 2251 (2016)) (second and third set of brackets in original). That is precisely what the court of appeals did here, looking only to the language of the Indiana statute of conviction to determine whether petitioner's conviction was under a state law relating to the possession of child pornography -- not to the facts of petitioner's prior offense (which it never mentioned). Pet. App. 7a; see id. at 5a-7a.[1]

When the court of appeals stated that "the categorical approach does not apply to § 2252(b)(2)," Pet. App. 6a (citing United States v. Kraemer, 933 F.3d 675, 683 (7th Cir. 2019)), it was not "eschew[ing] any elemental examination of the purported predicate offense completely," Pet. 9-10. It was instead simply declining to adopt a "'categorical' approach" under which a prior

[1] Petitioner errs in suggesting (Pet. 12) that the court of appeals' approach "amounts to nothing more than a repackaging of the 'ordinary case' analysis" that the Court rejected in Johnson v. United States, 135 S. Ct. 2551 (2015) (citation omitted). In Johnson, the Court held that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague because it tasks courts with "imagin[ing] [the] 'ordinary case' of a crime" and then evaluating whether that "judge-imagined abstraction" poses an "indetermina[te]" level of risk. 135 S. Ct. at 2257. The court of appeals did not undertake an "ordinary case" analysis here, but instead considered whether the Indiana statute as a whole criminalizes conduct that is "relating to" "conduct that is federal law deems possession of child pornography." Pet. App. 7a; see id. at 5a-7a.

state conviction triggers a Section 2252(b) enhancement only if the state statute is "the same as or narrower than the [relevant] federal offense," Pet. App. 3a-4a -- i.e., an approach in which Section 2252(b)'s "'relating to' language does not broaden the scope of enhancement-triggering offenses," id. at 5a-6a.

In so doing, the court of appeals was aligning itself -- not placing itself "at odds" (Pet. 10) -- with the approach its sister circuits have taken to Section 2252(b) and similar statutes. See Kraemer, 933 F.3d at 680 ("Our sister circuits likewise have understood the words 'relating to' to have a broadening effect on the scope of the penalty enhancement."); see, e.g., United States v. Mayokok, 854 F.3d 987, 992-993 (8th Cir. 2017) (reasoning that under Section 2252(b)(1) the question is "not whether the statutes criminalize exactly the same conduct, but whether the full range of conduct proscribed * * * relates to the 'possession . . . of child pornography'"); United States v. Bennett, 823 F.3d 1316, 1322 (10th Cir.) ("We have held, as have the other circuits, that 'relating to' has a broadening effect on [18 U.S.C.] 2252A."), cert. denied, 137 S. Ct. 319 (2016); United States v. Mateen, 806 F.3d 857, 860 (6th Cir. 2015) (agreeing with the "[o]ther circuits [that] have broadly interpreted the phrase 'relating to' as triggering sentence enhancement for 'any state offense that stands in some relation, bears upon, or is associated with that generic offense.'") (citation omitted), cert. denied, 136 S. Ct. 1688 (2016); United States v. Sullivan, 797 F.3d 623, 638 (9th Cir.

2015) (declining to find "that a prior conviction triggers a sentencing enhancement under § 2251(e) or § 2252(b)(2) only if the statutory definition of the prior offense is equivalent to a federal generic definition"), cert. denied, 136 S. Ct. 2408 (2016); United States v. Barker, 723 F.3d 315, 322-323 (2d Cir. 2013) (per curiam) ("In the context of sentencing enhancements, 'relating to' has been broadly interpreted to apply not simply to state offenses that are equivalent to sexual abuse, but rather to any state offense that stands in some relation to, bears upon, or is associated with the generic offense.") (citation, brackets, internal quotation marks, and ellipsis omitted); United States v. Colson, 683 F.3d 507, 511-512 (4th Cir. 2012) ("Numerous courts of appeals agree that Congress chose the expansive term 'relating to' in [18 U.S.C.] 2252A(b)(1) to ensure that individuals with a prior conviction bearing some relation to sexual abuse, abusive conduct involving a minor, or child pornography receive enhanced minimum and maximum sentences.").

3. As petitioner observes (Pet. 16-17), the Ninth Circuit's decision in United States v. Reinhart, 893 F.3d 606 (2018), employed a different interpretation of "relating to." In that case, the Ninth Circuit concluded that a state statute is one "relating to" the possession of child pornography, within the meaning of Section 2252(b)(2), only if the State's definition of child pornography is a categorical match for the federal definition in 18 U.S.C. 2256(8). See Reinhart, 893 F.3d at 610-616. But

Reinhart itself is in sharp tension with the Ninth Circuit's earlier decision in United States v. Sullivan, supra.

In Sullivan, the Ninth Circuit determined in the context of considering whether a state conviction was for an offense "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," 18 U.S.C. 2252(b)(2), that Section 2252(b)(2) "do[es] not require" a prior state conviction to be "categorically the same as any particular federal offense." 797 F.3d at 637-638. The court explained that Section 2252(b)(2) requires "only that the state conviction is one categorically 'relating to' such federal offenses." Ibid. And in accord with the approach of the court of appeals here and with other circuits, Sullivan "define[d] the phrase 'relating to' in * * * § 2252(b)(2) broadly" for the purpose of making that determination. Id. at 640.

In contrast, Reinhart concluded that "a narrower reading of 'relating to'" should apply to Section 2252(b)(2) when the object of the prepositional phrase is "child pornography." 893 F.3d at 613; see id. at 616. Reinhart acknowledged the discordance between that conclusion and Sullivan in a footnote, but stated that the opinions' conflicting definitions of "relating to" are "appropriate" because Section 2252(b)(2) "contains some clauses of defined terms that require a narrow reading of 'relating to,' and some of undefined terms that require a broad reading." 893 F.3d at 616 n.5. That distinction, however, is analytically unsound.

Even if that rationale might justify adopting different interpretations of the term "relating to" in different statutory provisions, "[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning." United States v. Davis, 139 S. Ct. 2319, 2328 (2019) (brackets in original) (quoting Cochise Consultancy, Inc. v. United States ex rel. Hunt, 139 S. Ct. 1507, 1512 (2019)).

The Ninth Circuit's inconsistent interpretations of the phrase "relating to" in Section 2252(b)(2) have coexisted for less than two years. Although that court denied en banc review in Reinhart itself, C.A. Doc. 48, Reinhart, supra, No. 16-10409 (Oct. 29, 2018), in a future case, it may revisit its analysis and adopt a construction of the statute that avoids "attribut[ing] different meanings to the same phrase." Cochise, 139 S. Ct. at 1512 (citation omitted). For now, the discrepancy between the approach taken in Reinhart and the approach taken in Sullivan and in the court below does not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 902 (1957) (per curiam) ("It is primarily the task of a [c]ourt of [a]ppeals to reconcile its internal difficulties.").

4. In any event, this case would be a poor vehicle for considering the question presented because petitioner would receive no benefit from a decision adopting his preferred approach. Petitioner contends (Pet. 19-25) that if his preferred approach were adopted, he would not be classified as a recidivist on the

theory that Indiana Code § 35-42-4-4 (2007) can apply to visual representations that do not depict "actual minors" and whose production did not require the use of "an actual minor victim." But that contention lacks merit, because Indiana courts have recognized that the First Amendment would preclude any conviction for such conduct under the statute.[2]

In New York v. Ferber, 458 U.S. 747 (1982), this Court rejected a First Amendment challenge to a state law that prohibited the production and dissemination of sexually explicit material made using children under the age of 16. Id. at 750-751. The Court recognized "that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child" and determined that, in order "to dry up the market for this material," States were justified in imposing "severe criminal penalties on persons selling, advertising, or otherwise promoting the product," whether or not the materials were obscene. Id. at 758-761. In Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), however, the Court struck down under the First Amendment a federal law prohibiting the

[2] Petitioner alternatively contends (Pet. 20) that, if the Court does not adopt his preferred construction of Section 2252(b), it should instead require that a State's definition of child pornography categorically match a "'generic' definition of child pornography." But petitioner does not provide such a definition nor offer any ground for ascribing a different meaning to the term "child pornography" in Section 2252(b) than the definition provided in 18 U.S.C. 2256(8) "[f]or the purposes of th[at] chapter," i.e., 18 U.S.C. 2251 through 2260A. 18 U.S.C. 2256.

possession of two categories of "virtual child pornography": computer-generated images and images depicting adults who are at least 18 years old but appear to be minors. See 535 U.S. at 241; id. at 261 (O'Connor, J., concurring in the judgment in part and dissenting in part). Because the production of such images does not involve the exploitation of actual children, the Court reasoned that the government interests that supported the state law at issue in Ferber could not justify the federal ban on virtual child pornography. See id. at 249-251.

Before petitioner's 2008 conviction under Indiana Code § 35-42-4-4(c) (2007), the Indiana Court of Appeals acknowledged in Logan v. State, 836 N.E.2d 467 (2005), that, in light of Free Speech Coalition, Indiana Code § 35-42-4-4(c) (2002) "[wa]s overbroad, but not substantially so," because it "applie[d] to written descriptions of child pornography, virtual child pornography, and pornography showing youthful-looking adults." Logan, 836 N.E.2d at 472. The court further explained that, under Ferber, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Ibid. (quoting Ferber, 458 U.S. at 773-774). Although Logan left "for another day consideration of specific abuses of the application of" Section 35-42-4-4, ibid., its analysis indicates that Indiana courts would refuse to apply that statute to child pornography that did not depict actual children and whose production did not

require the use of any actual child victims. Accordingly, no "realistic probability" exists "that the State would apply its statute to conduct that falls outside" the federal definition of child pornography, the Indiana statute is categorically the same as, or narrower than, its federal analogue. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

MAY 2020

[3] The two unpublished Indiana Court of Appeals decisions cited by petitioner (Pet. 24-25) are not to the contrary. In Romero v. State, 904 N.E.2d 395, 2009 WL 865661 (Ind. Ct. App. 2009) (Tbl.), the defendant did not challenge the age of the depicted children, and the court did not consider the issue. Id. at *3. And in Howell v. State, 990 N.E.2d 523, 2013 WL 3526403 (Ind. Ct. App. 2013) (Tbl.), the court reasoned that a detective's testimony that "the girls in the images [at issue] appeared to be of 'pubescent' or under legal age * * * was sufficient to support a reasonable inference by the trial court that the laptop contains sexual images of children." Id. at *2 (citation omitted).