No. 19-7260

In the
Supreme Court of the United States

DARIN KAUFMANN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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In its attempt to persuade the Court that this case presents no conflict worthy of review, the United States has asked this Court to twice overlook plain language and read-in an alternative meaning to clearly expressed terms.

First, the government asks this Court to assume that the Seventh Circuit Court of Appeals did not say what it meant or mean what it said when it "held that the categorical approach does not apply to [18 U.S.C.] § 2252(b)(2)." Pet. App. 06a; Gov. Resp. 8–11; *cf. Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016) ("[A] good rule of thumb for reading our decisions is that what they say and what they mean are one in the same."). However, there is no reason to think the Seventh Circuit misspoke. The court was explicitly addressing, and rejecting, Petitioner's argument that the categorical approach should be used to determine whether the fact of a prior conviction could be used to increase his statutory mandatory minimum sentence, and that the statute was over-broad to be considered a valid predicate offense. *See* Pet. App. 03a–05a. In doing so, it created a clear circuit split.

Instead, the government argues, the substance of the analysis employed by the Court of Appeals comports with the categorical approach because Mr. Kaufmann's prior Indiana conviction "was under a state law relating to the possession of child pornography." Gov. Resp. 9. However, after explicitly disavowing the use of the categorical approach, the Seventh Circuit further failed to articulate any workable test that comports with the constitutional requirements laid out by

this Court in *Apprendi* and *Alleyne*. *Alleyne v. United States*, 570 U.S. 99, 103, 111 n. 1 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000) (the "simple fact of a prior conviction" is a carve-out to the rule that all facts that increase a minimum or maximum penalty must be submitted to a jury). The focus on elements in the categorical approach undergirds this entire exception. *See Mathis*, 136 S. Ct. at 2252–53.

The government invites this Court to read "relates to" broadly, extending the reach of the enhancement provision "to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." Gov. Resp. 8 (quoting *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017)). However, the government pulls this understanding from the body of law that has been built up relating to Congressional preemption law, and should not be persuasive in determining when a prior conviction can serve as an enhancement trigger under 18 U.S.C. § 2242(b). Whereas preemption law deals with the federal and state's respective interests in adjudicating a given dispute, the issue at hand is whether, consistent with the guarantees of the Sixth Amendment, Congress can prescribe an enhanced sentence based on the mere fact of a conviction under a statute that has any "connection with, or reference to" possession of child pornography. Without a comparison of elements, or a simple look at the elements to see if they somehow have "a connection with, or reference to" possession of child pornography, the procedural safeguards are lost that form the basis for the exception to the

requirement that the government prove, beyond a reasonable doubt, any fact that increases the penalty for a crime. *See Alleyne*, 570 U.S. at 111 n.1; *Mathis*, 136 S. Ct. at 2253. The reason for this exception is that the elements of the prior conviction have all had their own Sixth Amendment and due process procedural safeguards and have previously been proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 488.

Mr. Kaufmann's prior Indiana conviction serves as a prime example of the perils of loosening the categorical approach. Indiana Code Section 35-42-4-4(c) required simply that the government prove that a defendant possess one of a list of objects (a picture, drawing, photograph, videotape, etc.), 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*." Ind. Code § 35-42-4-4(c) (2007) (emphasis added). There is no requirement, then, that the state prove that the individual depicted in the alleged child pornography was a) a real person, or b) actually under the age of 18.

In a second attempt to convince this Court to overlook the plain language of the statute, the government contends that *Logan v. State* "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." *See* Gov. Resp. 15–16; *Logan v. State*, 836 N.E.2d 467 (2005). However, because the state does not have to prove either of those propositions, there is

nothing in the statute that guarantees such a result. Any burden to show that the individual who is depicted is either not a real individual, or not actually underage, would be shifted to the defendant to assert in either an affirmative defense or a motion to dismiss the indictment.

Suppose, for example, that a photographer creates "simulated" child pornography by having a consenting 18-year-old pose for pornographic photographs. The photographer then digitally alters the photograph, using age-regressing software, to make the model appear to be approximately 14 years old. Then, the altered photograph is distributed. If the state does not have to prove that the individual pictured was a minor, but rather only "*appears* to be less than 16 years old," the state will not use its resources to uncover the alleged victim of the offense, and the defendant may not have the ability or knowledge to do such an investigation. Thus, the possessor of the image may be found liable for possessing it, where the creator of the image could not be held liable for creating it. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250 (2002) (ruling that virtual child pornography is protected speech). There is no way of knowing how many defendants may have been convicted in just such situations under Section 35-42-4-4(c).

Certainly, the elements of the offense have "some connection" to child pornography. But the statute indisputably sweeps wider, punishing conduct that is simply not possession of child pornography, because the statute does not require that the government make these showings to secure a conviction. The Seventh

Circuit found that the Indiana statute falls within the "heartland" of federal possession of child pornography. While it is likely that many of the convictions under the state statute punish possession of what federal law considers child pornography, the plain language of the statute and the fact that the state does not have to actually prove either key element beyond a reasonable doubt means that using this "heartland" approach could extend the enhancement to individuals who were, in fact, in possession of legal materials.

This Court has made it clear how the categorical approach applies to the Armed Career Criminal Act and similar statutes over the course of the last decade. 18 U.S.C. § 924(e); *see also Mathis*, 136 S. Ct. at 2251–2254 (reviewing the case law related to the categorical approach). This Court should grant the petition to bring clarity to what, if any, alterations to the approach are necessary when an enhancement provision specifies an increased penalty when the defendant has a prior conviction that "relates to" an enumerated offense, as does Section 2242(b).

CONCLUSION

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

Respectfully submitted,

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