No.

in the

Supreme Court

of the

United States

Term,

JOHN CHARLES FORTNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

18 U.S.C. § 2260A is a penalty provision which provides for an additional 10 year consecutive sentence if the defendant is: (1) required to register under SORNA, (2) commits a felony offense for a listed set of federal crimes, and (3) that listed offense "involve[s] a minor." Does the plain language of 18 U.S.C. § 2260A require that the underlying listed offense involve an actual minor?

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits the following cases which are directly related to this Petition:

none

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The Petitioner, John Fortner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on November 25, 2019.

OPINION BELOW

The Sixth Circuit's opinion in this matter was published, 943 F.3d 1007, and is attached hereto as Appendix 1. The district court's opinion is unpublished, and attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on November 25, 2019. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2260A provides:

> Whoever, being required by Federal or other law to register as a sex offender, commits a felony offense involving a minor under section 1201, 1466A, 1470, 1591, 2241, 2242, 2243, 2244, 2245, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425, shall be sentenced to a term of imprisonment of 10 years in addition to the imprisonment imposed for the offense under that provision. The sentence imposed under this section shall be consecutive to any sentence imposed for the offense under that provision.

STATEMENT OF THE CASE

In August of 2017, Petitioner John Charles Fortner responded to an online ad from a person looking to discuss "taboo" subjects. The ad was actually placed by an undercover agent. The agent and Fortner began communicating, which eventually led the agent (who was posing as a mother of three underage children) offering Fortner sexual access to the "children." Another undercover agent (again posing as a parent of underage children) also began communicating with Fortner. There were no actual minors; but Fortner believed there were. On August 21, 2017, Fortner agreed to meet with one of the "parents" and engage in sexual acts with the (fictitious) children. Once Fortner met with the agent, he was arrested. Fortner had a prior sex offense conviction that required him to register under the Sex Offender Registration and Notification Act (SORNA).

Because of this conduct, on October 19, 2017, an indictment was returned by a grand jury sitting in the Southern District of Ohio naming Fortner in two counts: one count of using the internet to attempt to entice a person under 18 to engage in sexual activity, in violation of 18 U.S.C. § 2422(b); and one count of, as a registered sex offender, committing count one "involving a minor child", in violation of 18 U.S.C. § 2260A.

Before trial, Fortner moved to dismiss count two, arguing that, as his case involved a "fictitious minor" and not a real child, he could not have violated 18 U.S.C. § 2260A. On March 26, 2018, the district court denied this motion, finding

that "the phrase 'involving a minor' was intended by Congress to mean, in a broader sense, that the offense 'relates to' a minor in some way, not that an actual minor be the victim of the offense." (R.28, Order PAGE ID # 113-114) The court further found that, as Congress's goal was to "protect minors," this was a reasonable reading of the statute. (R.28, Order PAGE ID # 116)

On June 8, 2018, Fortner plead guilty to the charges in the indictment. In exchange for this conditional plea, the United States agreed to allow him to appeal the district court's decision regarding the dismissal of count two. Further, the parties agreed that, pursuant to Rule 11(c)(1)(C), the appropriate sentence to be imposed was 240 months. On February 14, 2019, the district court accepted this agreement, and sentenced Fortner to 120 months on count one, and a consecutive 120 months on count two.

Fortner appealed his sentence to the Sixth Circuit Court of Appeals, raising one issue: whether the plain language of 18 U.S.C. § 2260A required that the underlying qualifying offense committed by the defendant involve an actual minor for the enhancement to apply. The Sixth Circuit rejected this argument in a published decision released on November 25, 2019. The court found:

> The statute, it is true, also has a limiting qualification—that the underlying crime must "involv[e] a minor." But the import of that phrase is to ensure that the enhancement covers convictions involving minors, sifting convictions that always involve minors, see, e.g., 18 U.S.C. § 2251 (sexual exploitation of children), from convictions that may or may not involve minors, see, e.g., 18 U.S.C. § 2421 (sex trafficking); 18 U.S.C. § 1201 (kidnapping). The

phrase did not purport to eliminate all attempt crimes, as the reach-extending term "involve" suggests. A conviction arising from an attempt to have sex with a minor "involves" a minor no matter whether it arose from a sting operation (as here) or it related to a real child. A closer look at § 2422(b), the provision Fortner violated, points in the same direction. To commit the offense, a defendant must knowingly (the mental state), persuade, induce, entice, or coerce (the action), any individual who has not attained the age of 18 years (the intended victim), to engage in prostitution or other criminalized sexual activity (another action). A defendant also violates this provision if he "attempts" to engage in this behavior, id., coverage that extends to attempts that involve purported but non-existent children. See *United States v. Roman*, 795 F.3d 511, 516 (6th Cir. 2015). To attempt this conduct, a defendant must have the requisite mental state and take a "substantial step" towards completing the offense, whether the targeted child is real or not. See United States v. Wesley, 417 F.3d 612, 618 (6th Cir. 2005). Attempt convictions under the statute thus often extend to individuals who try to persuade undercover agents posing as children (or posing as having access to children) to engage in sexual conduct. Roman, 795 F.3d at 516. Even though the perpetrator fails to engage in all of the conduct needed to complete the offense, he still violates the attempt prohibition. Id.; see, e.g., United States v. Hughes, 632 F.3d 956, 958 (6th Cir. 2011). Because this crime always involves a minor, convictions under it always lead to the enhancement if the defendant commits the offense while under a reporting requirement.

(Appendix 1, pp.3-4)

REASONS FOR GRANTING THE WRIT

1. The plain language of 18 U.S.C. § 2260A requires a sentencing court to find that the underlying offense involve an actual minor

This Court should grant certiorari review to correct the Sixth Circuit's misinterpretation of 18 U.S.C. § 2260A. The plain language of the statute, and the definition of the term "minor" in related statutes both lead the conclusion that for the 10-year consecutive sentence to apply, the underlying offense must involve an actual minor.

A. The plain language of the statute requires the result urged by the Petitioner

Fortner first submits that the plain language of the penalty provision requires that the United States prove that the underlying offense involved an actual minor.

"In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Artis v. D.C.*, -- U.S. ---, 138 S. Ct. 594, 603 (2018) (internal citation omitted). "[O]ur inquiry into the meaning of the statute's text ceases when 'the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Matal v. Tam*, 137 S. Ct. 1744, 1756, 198 L. Ed. 2d 366 (2017), citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). A court is to start with the assumption that the ordinary meaning of the statutory language expresses Congress' intent. *Marx v. General Revenue Corp.*, – U.S.–, 133 S. Ct. 1166, 1173 (2013).

18 U.S.C. § 2260A provides that if a defendant required to register under SORNA "commits a felony offense involving a minor" for specific, enumerated offenses, then a ten year consecutive sentence applies. § 2260A itself does not define the word "minor," therefore, the ordinary meaning of the term applies. The ordinary meaning of the term "minor" can only mean that the offense involved a person under the age of 18 years old. Merriam-Webster defines a "minor" as "not having reached majority" or "a person who is not yet old enough to have the rights of an adult." https://www.merriam-webster.com/dictionary/minor Therefore, to have an offense "involving a minor," the case must necessarily be committed against an actual person not yet old enough to have the rights of an adult. To hold otherwise would be to distort the stated intent of Congress, and the ordinary meaning of the words Congress chose.

In denying this direct, common sense reading of the statute, the Sixth Circuit sidestepped this issue. The court held that, because some of the enumerated underlying offenses could be committed by an "attempt", this warranted a conclusion that the phrase "involving a minor" also was meant by Congress to capture "fictitious minor" offenses. As argued in section C, this engraftment of attempt cannot work, as 18 U.S.C. § 2260A is a mere penalty provision which relies wholly on the status of the defendant. Therefore, the Sixth Circuit's decision to ignore the plain language argument, and the import of Congressional intent, is fatal to their analysis.

"The Court's role [ ] is not to substitute its judgment for that of Congress." *Shelby*

Cty., Ala. v. Holder, 570 U.S. 529, 570, 133 S. Ct. 2612, 2638 (2013). The Sixth Circuit's decision, engrafting "fictitious minors" into 18 U.S.C. § 2260A, does just that. This Court should grant certiorari to overturn the Sixth Circuit's erroneous reading of the statute.

B. The Adam Walsh Child Protection and Safety Act, of which 18 U.S.C. § 2260A is a part, specifically defines the term "minor" to mean a real person

Additional support for the Fortner's position comes from the statutes promulgated alongside 18 U.S.C. § 2260A, each of which define "minor" that is consistent with Fortner's reading of the statute.

"A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655, 660, 126 L. Ed. 2d 615 (1994). Further, "the commonsense canon of noscitur a sociis—[ ] counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294, 128 S. Ct. 1830, 1839, 170 L. Ed. 2d 650 (2008).

These two statutory construction principles compel the result request by Fortner. 18 U.S.C. § 2260A was promulgated in 2006 as part of Public Law 109-248, the Adam Walsh Child Protection and Safety Act. 42 U.S.C. § 16911, which was part of the same legislation, defines "minor" as follows "[t]he term 'minor' means an individual who has not attained the age of 18 years." ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006, PL 109–248, July 27, 2006, 120 Stat

587. Further, 18 U.S.C. § 2256, which is part of Chapter 110 of Title 18 (the same Chapter as 18 U.S.C. § 2260A), provides "[f]or the purposes of this chapter, the term- - (1) 'minor' means any person under the age of eighteen years." 18 U.S.C.A. § 2256 (West).

Thus, although 18 U.S.C. § 2260A itself does not provide a definition for the term "minor," the company it keeps certainly does. This Court should find that, as to this enhancing statute, the United States had to prove that the underlying offense involved an individual who had not yet turned 18 years.

C. The Sixth Circuit erred in analyzing this statute under an "attempt" theory of liability, as 18 U.S.C. § 2260A is a penalty provision statute

The Sixth Circuit's decision ultimately rested on the determination that, because a defendant could be convicted of an attempt as to some of the underlying offenses (such as 18 U.S.C. § 2251(e), for example), and because attempts in those cases did not require the presence of an actual minor, no actual minor was required for an 18 U.S.C. § 2260A enhancement. ("As a matter of general statutory context, the statute incorporates many "attempt" crimes in the sixteen enumerated offenses." (Appendix 1, p.5)) However, this analysis misses what is required for a § 2260A enhancement.

18 U.S.C. § 2260A is not a "stand alone" statute, but merely a penalty provision. This Court has delineated that some statutes contain only "sentencing factors", not designed as elements of an offense on their own, but merely designed to increase punishment for other, substantive offenses. In *Almendarez-Torres v.*

United States, 523 U.S. 224, 118 S. Ct. 1219 (1998), this Court determined that a statute which enhanced the maximum sentences based upon the fact of a prior conviction was a sentencing factor, so the prior conviction did not need to be proven as an element to a jury.

However, even though such penalty provision statutes are common, they must be proven on their own terms, with a sentencing court making findings as to each requirement for the enhancement. For instance, 18 U.S.C. § 922(g) prohibits certain persons from possessing a firearm. 18 U.S.C. § 924(e) provides that, if the United States proves a § 922(g) offense, and the defendant has three prior qualifying convictions for a violent felony or a serious drug offense, then enhanced penalties apply. *Quarles v. United States*, 139 S. Ct. 1872, 1875, 204 L. Ed. 2d 200 (2019).

18 U.S.C. § 2260A is akin to 18 U.S.C. § 924(e). Just as the Court noted as to § 924(e) in *Almendarez-Torres*, 18 U.S.C. § 2260A is entitled "Penalties for registered sex offenders." Thus, regardless of the facts relating to the underlying qualifying offense, § 2260A has its own elements which must be proven. These include (1) the duty to register as a sex offender, (2) a felony conviction (among a list of enumerated offenses) that (3) "involves a minor." *United States v. Charles*, 895 F.3d 560, 564 (8th Cir. 2018). Thus, the additional requirement that the underlying offense involve a minor is not surplusage, but a factor uniquely relating to § 2260A, no different than the term "serious drug offense" contained in § 924(e).

Finally, the Sixth Circuit was wrong to rely on attempts, as an "attempt" requires some action by Fortner. "'[A]ttempt' as used in common parlance connote action rather than mere intent." *United States v. Resendiz-Ponce*, 549 U.S. 102, 102, 127 S. Ct. 782, 784 (2007). The statute at question has no "action" element; it is a mere status enhancement, imposed upon the meeting of certain conditions which are present. Thus, a defendant cannot "attempt" to commit 18 U.S.C. § 2260A. The Sixth Circuit's reasoning falls apart at this juncture.

In sum, this Court should grant certiorari, and reverse the Sixth Circuit's decision. Congressional intent is to require that an actual minor be involved in the underlying offense for the penalty provision of 18 U.S.C. § 2260A to apply.

CONCLUSION

Fortner requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and vacate the 18 U.S.C. § 2260A enhancement.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER November 25, 2019

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0287p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN CHARLES FORTNER,

Defendant-Appellant.

No. 19-3162

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:17-cr-00243-1—Michael H. Watson, District Judge.

Decided and Filed: November 25, 2019

Before: SUTTON, NALBANDIAN, and READLER, Circuit Judges.

COUNSEL

ON BRIEF: Kevin M. Schad, FEDERAL PUBLIC DEFENDER, Cincinnati, Ohio, for Appellant. Kimberly Robinson, UNITED STATES ATTORNEY'S OFFICE, Columbus, Ohio, for Appellee.

OPINION

SUTTON, Circuit Judge. The government charged John Charles Fortner with (1) attempting to coerce a minor into illegal sexual activity and (2) violating a provision that adds ten years to a defendant's sentence if he is required to register as a sex offender and commits certain federal offenses involving a minor. Fortner pleaded guilty to the first count. He moved to dismiss the other charge on the ground that his underlying offense did not "involve a minor"

because it concerned an attempt crime that did not involve real children. The district court disagreed. Because the court correctly interpreted the statute, we affirm.

On August 5, 2017, an undercover FBI agent working with the Bureau's Cyber Crimes Task Force posted an ad on Craigslist. Posing as a mother of three children, the officer advertised that she wanted to talk about "taboo" subjects with an "open-minded" counterpart. ROA 15 at 5. John Charles Fortner sent the agent an e-mail asking if he could have sex with her children. Fortner assured the officer that he was the "furthest from being a cop." *Id.* He also asked the agent if she could put him in touch with others who would be open to similar conduct. The agent gave Fortner the contact details for another undercover officer. He contacted the other officer that day and asked whether he could engage in sexual activity with the officer's daughter.

Fortner and the two officers communicated regularly for the next few weeks. He sent them links to child pornography and asked graphic questions about what he could do with their children. Fortner also requested photographs of one officer's child. The officer sent a photo of her undercover persona instead. Fortner, appreciative and confident, replied "[c]ool, you don't look too much like a cop, lol." *Id.* at 7.

As his bond with the "parents" grew, Fortner asked to meet in person and to meet the children. After working out some logistics, Fortner and one officer agreed to meet at a restaurant. If the introductions went well, the officer promised, Fortner could take things further. On August 21, the officer picked Fortner up from a gas station. At the restaurant, the officer and Fortner discussed his criminal past (two prior convictions related to child sex abuse) and what he could do with the officer's child. After Fortner confirmed that he wanted to engage in sexual conduct with the child, the officer arrested him.

The government charged Fortner with two counts: attempting to coerce a minor and committing a felony offense involving a minor while required to register as a sex offender. 18 U.S.C. §§ 2422(b), 2260A. Fortner moved to dismiss the second count, arguing that he did not commit an offense involving a minor because the children he sought to coerce were not real children. The district court denied the motion.

This appeal presents a straightforward question: Does a sex offender commit an "offense involving a minor" if, in the course of a sting operation, he attempts to commit a sex crime with a pretend child? We think he does.

Start with the text. "Whoever," it says, "being required by Federal or other law to register as a sex offender, commits a felony offense involving a minor under [a specified federal offense], shall be sentenced to a term of imprisonment of 10 years." *Id.* § 2260A. The enhancement has two threshold requirements, and Fortner meets both of them. He committed one of the enumerated offenses, here attempted solicitation of a minor. *Id.* § 2422(b). And he committed the offense while required to register as a sex offender.

The statute, it is true, also has a limiting qualification—that the underlying crime must "involv[e] a minor." But the import of that phrase is to ensure that the enhancement covers convictions involving minors, sifting convictions that always involve minors, *see, e.g.*, 18 U.S.C. § 2251 (sexual exploitation of children), from convictions that may or may not involve minors, *see, e.g.*, 18 U.S.C. § 2421 (sex trafficking); 18 U.S.C. § 1201 (kidnapping). The phrase did not purport to eliminate all attempt crimes, as the reach-extending term "involve" suggests. A conviction arising from an attempt to have sex with a minor "involves" a minor no matter whether it arose from a sting operation (as here) or it related to a real child.

A closer look at § 2422(b), the provision Fortner violated, points in the same direction. To commit the offense, a defendant must knowingly (the mental state), persuade, induce, entice, or coerce (the action), any individual who has not attained the age of 18 years (the intended victim), to engage in prostitution or other criminalized sexual activity (another action). A defendant also violates this provision if he "attempts" to engage in this behavior, *id.*, coverage that extends to attempts that involve purported but non-existent children. *See United States v. Roman*, 795 F.3d 511, 516 (6th Cir. 2015). To attempt this conduct, a defendant must have the requisite mental state and take a "substantial step" towards completing the offense, whether the targeted child is real or not. *See United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005). Attempt convictions under the statute thus often extend to individuals who try to persuade undercover agents posing as children (or posing as having access to children) to engage in sexual conduct. *Roman*, 795 F.3d at 516. Even though the perpetrator fails to engage in all of the

conduct needed to complete the offense, he still violates the attempt prohibition. *Id.*; *see, e.g.*, *United States v. Hughes*, 632 F.3d 956, 958 (6th Cir. 2011). Because this crime always involves a minor, convictions under it always lead to the enhancement if the defendant commits the offense while under a reporting requirement.

Cementing this conclusion, a neighboring statute distinguishes crimes that involve "actual minors" from those that do not. *See* 18 U.S.C. § 2252A(a)(3)(B)(ii), (c)(2), (e). Section 2252A prohibits a person from knowingly advertising material that contains visual depictions of "an actual minor engaging in sexually explicit conduct." *Id.* § 2252A(a)(3)(B)(ii). The same provision also allows defendants charged under certain subsections to raise the affirmative defense that "the alleged child pornography was not produced using an actual minor or minors." *Id.* § 2252A(c)(2). Because Congress enacted these provisions before it enacted § 2260A, Pub. L. No. 108-21 §§ 502, 503, 120 Stat. 625 (2003); Pub. L. No. 109-248, § 702, 120 Stat. 648 (2006), it had the option to, but chose not to, distinguish offenses that involved "actual minors." Section 2256(8) points in the same direction. It defines an "identifiable minor" separately from "a minor," showing once again that Congress understood the difference between crimes that involve real children and those that do not and understood the difference between attempt crimes and completed crimes. 18 U.S.C. § 2256(8); *cf. BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 537 (1994).

The only other circuit court to address the question reached a similar conclusion. The Eleventh Circuit held that a defendant committed a federal offense involving a minor when he attempted to coerce a fictitious child to engage in sexual activity. *United States v. Slaughter*, 708 F.3d 1208, 1214–16 (11th Cir. 2013). The court reasoned that § 2422(b) permits the government to convict a defendant who attempts to coerce a minor on the "mere belief that a minor was involved." *Id.* at 1215. And it saw nothing in "the plain language of § 2260A that negates the plain language of § 2422(b)." *Id.* That left one possible conclusion: "[A] violation of § 2260A [does not] require the involvement of an actual minor." *Id.*

Gauged by this interpretation of § 2260A, Fortner loses. The statute incorporates attempt offenses involving minors. Fortner's attempt involved a minor because the intended victim of the offense was a child. Absent Fortner's decision to target minors, the government could not convict him under § 2422(b). Fortner knowingly tried to coerce minors into illegal sexual activity and took "substantial steps" toward completing the crime. That's a federal offense and an offense "involving a minor."

Fortner questions how a conviction can involve a non-existent child and still be a crime "involving a minor." But context is everything in interpretation. As a matter of general statutory context, the statute incorporates many "attempt" crimes in the sixteen enumerated offenses, which means real victims of any sort frequently are not needed. *See, e.g.*, 18 U.S.C. §§ 2251(e), 2423(e). As a matter of specific statutory context, laws designed to root out child predation frequently cover attempt crimes against non-existing children precisely to avoid completed crimes against existing children. *See, e.g.*, *Slaughter*, 708 F.3d at 1216; *United States v. Cunningham*, 191 F. App'x 670, 671–72 (10th Cir. 2006); *United States v. Rhodes*, 253 F.3d 800, 802–03 (5th Cir. 2001). Once one comes to grips with the possibility for—the need for—attempt crimes in this area, there is nothing linguistically unusual about calling an unsuccessful attempt to abuse a minor a crime that involves a minor.

Nor does this interpretation render "involving a minor" superfluous. The phrase still has plenty of work to do. It limits § 2260A's ten-year sentencing increase to those registered sex offenders who target minors. Offenders who target adults, like some kidnappers and like some sex traffickers, do not suffer the same consequence. Congress understandably singled out sex offenders who prey on children for additional punishment.

What we have said already explains why § 2260A is not unconstitutionally vague and why the rule of lenity has no role to play. It's hard to take seriously the idea that Fortner, or someone in his situation, would not appreciate the risks that came with this conduct given this statutory landscape. He acknowledges that the attempt statute plainly barred his conduct. And § 2260A incorporates that statute, including its attempt prohibitions. Fortner, it is true, may not have known that his conduct would violate this provision. But "ignorance of the law is no defense." *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971). The rule of

lenity comes into view when, after considering all available sources, the court is left in equipoise. *Barber v. Thomas*, 560 U.S. 474, 488 (2010). That is not this case.

We affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America

v. Case No. 2:17-cr-243

John Charles Fortner

ORDER

On October 19, 2017, the grand jury returned an indictment charging defendant in Count 1 with using a facility of interstate commerce to attempt to persuade, induce, or entice an individual who had not attained the age of 18 years to engage in sexual activity in violation of 18 U.S.C. §2422(b). Defendant was charged in Count 2 with committing the offense alleged in Count 1 while he was required to register as a sex offender, in violation of 18 U.S.C. §2260A. A complaint filed on August 21, 2017, was based on an affidavit indicating that defendant engaged in communications with a task force officer who represented himself as being the mother of three minor children. See Doc. 1.

This matter is before the court on defendant's motion to dismiss Count 2. Defendant argues, as a matter of statutory interpretation, that the language of §2260A requires proof that he committed a listed offense which involved an actual minor. As the issue raised by defendant is a question of law, the court can consider defendant's motion under Fed. R. Crim. P. 12((b)(1)("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.").

The starting point for issues of statutory construction is the plain language of the statute. United States v. Roman, 795 F.3d 511, 515 (6th Cir. 2015). If the statutory language is "clear and

unambiguous," then the court "will usually proceed no further." United States v. Bailey, 228 F.3d 637, 638 (6th Cir. 2000). In applying criminal laws, courts must follow the plain and unambiguous meaning of the statutory language absent an extraordinary showing that Congress intended otherwise. Salinas v. United States, 522 U.S. 52, 57 (1997). Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Perrin v. United States, 444 U.S. 37, 42 (1979). If the language in the statute is not clear, courts may resort to the legislative history to ascertain the meaning of the language. United States v. Boucha, 236 F.3d 768, 774 (6th Cir. 2001).

Defendant argues that the §2260A charge in Count 2 should be dismissed. Because this provision incorporates §2422 as a predicate offense, the court will also examine that provision.

Section 2260A provides in relevant part:

> Whoever, being required by Federal or other law to register as a sex offender, commits a felony offense involving a minor under section ... 2422 ... shall be sentenced to a term of imprisonment of 10 years in addition to the imprisonment imposed for the offense under that provision.

§2260A. For purposes of this section, the term "minor" means "any person under the age of eighteen years[.]" 18 U.S.C. §2256(1). The language "involving a minor" was included as a requirement for the enhancement because some of the general offenses listed in §2260A also encompass offenses where the offense is committed against any person. See U.S.C. §1201 (kidnapping), §2241 (aggravated sexual abuse), §2242 (sexual abuse), §2244 (abusive sexual contact), §2245 (sexual offenses resulting in death), §2421 (transportation), and §2422 (coercion and enticement).

Defendant contends that the phrase "involving a minor" means that an actual minor must be involved in the commission of the offense. However, §2260A contains no explicit language requiring that the predicate offense be committed against an "actual minor." Rather, the language of §2260A requires that the predicate felony offense under §2422 be one "involving a minor."

Terms such as "involving" and "relating to" have been construed as broadening the scope of the provision under consideration. In United States v. McKenney, 450 F.3d 39, 42 (1st Cir. 2006), the court examined the Armed Career Criminal Act's definition of "serious drug offense" which included offenses under state law "involving manufacturing, distributing, or possession with the intent to manufacture or distribute, a controlled substance[.]" 18 U.S.C. 924(e)(2)(A)(ii). The court noted that the dictionary definitions for the word "involving" included "to relate closely" or to "connect closely," and rejected defendant's argument that the term "involving" should be narrowly interpreted as including only an offense which "has as an element" or "actually entails in the particular case" the actual commission of the offense of distributing, manufacturing, or possessing controlled substance. Id. at 42 and n. 8. See also Taylor v. United States, 495 U.S. 575, 600 (1990)(distinguishing between a crime "that 'has as an element'" a given characteristic and one "that, in a particular case, involves" that characteristic); United States v. Bynum, 669 F.3d 880, 886 and n. 4 (8th Cir. 2012)(the term "involving" in §924(e)(2)(A)(ii) is "an expansive term that requires only that the conviction be 'related to or connected with' drug manufacture, distribution, or possession, as opposed to

including those acts as an element of the offense.")(citing cases); United States v. King, 325 F.3d 110, 115 (2d Cir. 2003)(noting "Congress's use of the expansive word 'involving'" in construing §924(e)(2)(A)(ii)); United Steelworks of America, AFL-CIO-CLC v. Commonwealth Aluminum Corp., 162 F.3d 447, 451 (6th Cir. 1998)(noting that the grievance procedure "broadly encompasses matters involving the interpretation and application of all provisions" of the collective bargaining agreement).

Also instructive are cases which construe the term "related to," which is one of the definitions of "involving." In United States v. Mateen, 806 F.3d 857, 860 (6th Cir. 2015), the court rejected defendant's argument that the enhancement under the child pornography provisions in 18 U.S.C. §2252(b)(2) for a prior state conviction "relating to" sexual abuse should be narrowly construed by incorporating the elements of the offense of sexual abuse, 18 U.S.C. §2242. The court noted that other circuits had "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.'" Id. (quoting United States v. Sullivan, 797 F.3d 623, 638 (9th Cir. 2015)). The Supreme Court in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992), interpreted the phrase "relating to" in an inclusive fashion, defining it as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with."

The court concludes that the phrase "involving a minor" was intended by Congress to mean, in a broader sense, that the offense "relates to" a minor in some way, not that an actual minor be the

victim of the offense.

Looking to the predicate offense under §2422(b) alleged in Count 1, §2422(b) provides in relevant part:

> Whoever, using ... any facility or means of interstate ... commerce,... knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in ... any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

§2422(b). Unlike 18 U.S.C. §2242(a), which prohibits the coercion and enticement of "any individual," §2242(b) prohibits the coercion or enticement of "any individual who has not attained the age of 18 years[.]" This language substantially mirrors the definition of "minor" found in §2256(1), that being "any person under the age of eighteen years[.]" §2256(1).

However, the Sixth Circuit and many other circuits have held that, because of the language "attempts to do so" in §2422(b), a conviction under that section does not always require that the defendant communicate directly with an actual person under the age of 18 years. Rather, a defendant can also violate §2422(b) by communicating solely with an adult intermediary, including an undercover officer playing the role of a decoy parent with fictional minor children, so long as the defendant's communications with that intermediary are intended to persuade, induce, entice, or coerce the minor child's assent to engage in prohibited sexual activity. See Roman, 795 F.3d at 516-517 (citing cases). The Sixth Circuit in Roman concluded that this interpretation was supported by the "unambiguous" language of §2422(b). Id. at 516. The court noted that "'Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the

performance of the sexual acts themselves.'" Id. (quoting Bailey, 228 F.3d at 639). The court further observed that the focus of §2422(b) "always remains on the defendant's subjective intent because the statute is 'designed to protect children from the act of solicitation itself.'" Id., (quoting United States v. Hughes, 632 F.3d 956, 961 (6th Cir. 2011)). Thus, a conviction under §2422(b) does not require that the defendant actually communicate with a real minor under the age of 18 years.

The opinion of the Eleventh Circuit in United States v. Slaughter, 708 F.3d 1208 (11th Cir. 2013) is the only circuit decision which has addressed the merits of the issue raised by defendant.[1] The Eleventh Circuit concluded that §2260A was not ambiguous, and that there is "nothing in the plain language of §2260A that negates the plain language of §2422(b)." Id. at 1215-16. The court found that because a violation of §2422(b) does not require an actual minor due to the attempt clause, a violation of §2260A does not require the involvement of an actual minor when that violation is predicated on an attempt offense under §2422(b). Id. The court noted, as further support for this conclusion, that in the chapter where §2260A is located, Congress included the phrase "actual minor" three times in 18 U.S.C. §2252A(a)(33)(B)(ii), (c)(2) and (e), provisions criminalizing trafficking in child pornography. Id. at 1215-16 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)("Where Congress includes

[1] The Ninth and First Circuits have issued decisions upholding a defendant's conviction under §2260A where there was no actual child victim based on a plain error analysis without deciding the statutory interpretation question. See United States v. Walizer, 600 F. App'x 546, 547 (9th Cir. 2015); United States v. Jones, 748 F.3d 64, 72 (1st Cir. 2014).

particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Eleventh Circuit also observed that the congressional goal of protecting minors victimized by sexual crimes supported the court's interpretation of §2260A, stating, "We cannot say that this stated purpose would be furthered by treating a recidivist sex offender better simply because he enticed somebody he believed to be a child, rather than an actual child." Id. at 1216. The court concluded:

> Viewed together, the text, structure and purpose of the statute make plain the meaning of §2260A's test: the provision assigns additional punishment for offenses committed against minors by registered sex offenders, and when a §2260A conviction is predicated on a violation of §2422, a defendant may be convicted even where his conduct did not involve an actual minor.

Id.

Defendant relies on United States v. Dahl, 81 F.Supp.3d 405 (E.D.Pa. 2015), the only opinion holding that a conviction under §2260A requires that an actual minor be involved in the predicate §2422(b) offense. The Dahl court looked first to the language of §2260A and concluded that the "involving a minor" language clearly and unambiguously meant an actual minor due to the definition of a "minor" found in §2256(1), that being a person under the age of 18 years. Id. at 407. However, the definition of a "minor" in §2256(a) is basically echoed in §2422(b), which requires that the defendant persuade, induce, entice or coerce "any individual who has not attained the age of 18 years[.]" The definition of "minor" in §2256(1) does nothing to distinguish §2260A from §2422(b). The

Dahl court also stated that §2260A "uses the narrower language 'involving a minor[.]'" See id. at 408. As discussed above, many other courts, including the Sixth Circuit, have construed the term "involving" as indicating a broader reach.

The court in Dahl also rejected the government's argument that because Congress included the term "actual minor" in §2252A, governing child pornography, the failure to include that term in §2260A must have been deliberate. The court noted that the term "actual minor" was added to §2252A in 2003 in response to the Supreme Court's ruling in Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239-40 (2002) that the potential application of that prohibition to photographs of adults posing as minors or to photographs created by computer imaging violated the First Amendment, and that §2422(b) did not involve child pornography or free speech issues. Id. at 408-409. The court commented that when Congress amended the child pornography provisions in 2003, it did not expand the definition of a minor in §2256(a) to include an undercover agent posing as a minor. Id. at 409. This misses the point of the government's argument that when Congress enacted §2260A in 2006, it had previously required in §2252A that an actual minor be involved in the offense, yet did not include similar language in §2260A.

The Dahl court also noted that, unlike §2422(b), §2260A does not have an attempt clause. Id. at 407-408. More importantly, there is also no language in §2260A which excludes attempt offenses as predicate offenses. Section §2260A covers a registered sex offender who "commits a felony offense involving a minor under section ... 2422[.]" It refers in general to "§2422" as a

predicate offense, and does so without distinguishing between §2422(b) offenses committed by communication with an actual minor and §2422(b) attempt offenses committed by communication with an adult.

The Dahl court also relied on the Third Circuit's opinion in United States v. Tykarsky, 446 F.3d 458 (3rd Cir. 2006). The court noted that the Tykarsky court's use of the term "actual minor" in its discussion of §2422(b) somehow indicated that the use of the term "minor" in §2260A is "properly understood to refer to a real person under eighteen." Dahl, 81 F.Supp.3d at 409. Despite this cryptic analysis, the decision in Tykarsky that a §2242(b) offense does not require an actual minor does not support the position of the Dahl court. The court in Tykarsky stated, "After examining the text of the statute, its broad purpose and its legislative history, we conclude that Congress did not intend to allow the use of an adult decoy, rather than an actual minor, to be asserted as a defense to §2422(b)." Tykarsky, 446 F.3d at 466. The court further noted that interpreting §2422(b) to require the involvement of an actual minor "would render the attempt provision largely meaningless because, as a practical matter, little exists to differentiate those acts constituting 'enticement' and those constituting 'attempted enticement.'" In United States v. Hackworth, 483 F. App'x 972, 977 (6th Cir. 2012), the Sixth Circuit quoted this language from Tykarsky in concluding that the focus under §2422(b) "should be on the defendant's subjective intent, not the actual age of the victim."

The court notes that interpreting the phrase "involving a minor" in §2260A as requiring that the §2422(b) offense be

committed against an actual minor would conflict with the "unambiguous" language of §2422(b), see Roman, 795 F.3d at 516, that permits a defendant to be convicted based upon his attempt to persuade, induce, entice or coerce a minor child's assent to engage in prohibited sexual activity by communicating with an adult intermediary. Interpreting §2260A as requiring a predicate offense against an actual minor would also undermine Congress's clear choice in §2422(b) to penalize attempts such as solicitation through an adult intermediary in the same manner as solicitations made to an actual minor.

The court agrees with the analysis of the Eleventh Circuit. The language of §2260A is unambiguous and does not require that a predicate offense under §2422(b) be committed against an actual minor. In light of this conclusion, the court need not examine the legislative history of these provisions.

Because the court has found no ambiguity in the provisions of §2260A and §2422(b), the court need not consider defendant's argument that the rule of lenity should be applied in this case. "The rule of lenity only applies if, 'after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.'" United States v. Morales, 687 F.3d 697, 701 (6th Cir. 2012)(quoting Barber v. Thomas, 560 U.S. 474, 488 (2010)(quotation marks and citations omitted)). Likewise, "the 'grammatical possibility' of a defendant's interpretation does not command a resort to the rule of lenity if the interpretation proffered by the defendant reflects 'an implausible reading of the congressional purpose.'" Abbott v.

United States, 562 U.S. 8, 28 (2010). Here, the interpretation of §2260A advocated by the defendant does conflict with the congressional purpose In behind these provisions.

In accordance with the foregoing, defendant's motion to dismiss Count 2 of the indictment (Doc. 22) is denied.

Date: March 26, 2018

s/James L. Graham
James L. Graham
United States District Judge