NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA GLEN BOX,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Eighth Circuit erred when it failed to properly apply the categorical approach to determine whether Mr. Box's prior Arkansas convictions for possession of child pornography qualified as predicate offenses under 18 U.S.C. § 2252A(b)?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Box, 960 F.3d 1025 (8th Cir. 2020)

United States v. Mayokok, 854 F.3d 987 (8th Cir. 2017)

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

On June 2, 2020, the court of appeals entered its opinion and judgment affirming the district court's finding that Joshua Glen Box's previous Arkansas convictions for possession of child pornography qualified as prior convictions "relating to" the possession of child pornography under 18 U.S.C. § 2252A(b). *United States v. Box*, 960 F.3d 1025 (8th Cir. 2020). A copy of the opinion is attached at Appendix ("App.") 1a-3a.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2020. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following statutory provisions:

Ark. Code Ann. § 5-27-601(15):

(15) "Sexually explicit conduct" means actual or simulated:

(A) Sexual intercourse;

(B) Deviate sexual activity;

(C) Bestiality;

(D) Masturbation;

(E) Sadomasochistic abuse for the purpose of sexual stimulation; or

(F) Lewd exhibition of the:

(i) Genitals or pubic area of any person; or

(ii) Breast of a female.

Ark. Code Ann. § 5-27-602:

(a) A person commits distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child if the person knowingly:

(1) Receives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers, or agrees to offer through any means, including the Internet, any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct; or

(2) Possesses or views through any means, including on the Internet, any photograph, film, videotape, computer program or file, computer-generated

image, video game, or any other reproduction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.

(b) Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child is a:

(1) Class C felony for the first offense; and

(2) Class B felony for any subsequent offense.

(c) It is an affirmative defense to a prosecution under this section that the defendant in good faith reasonably believed that the person depicted in the matter was seventeen (17) years of age or older.

18 U.S.C. § 2252A:

(a) Any person who—

(2) knowingly receives or distributes—

(A) any child pornography 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 by any means, including by computer; . . .

(5) … (B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; . . .

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) 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 this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or 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,

such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or 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, 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. § 2256(2)(A):

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person; . . . .

STATEMENT OF THE CASE

1. Joshua Glen Box pleaded guilty to one count of receiving child pornography in violation of 18 U.S.C. §§ 2252A(a)(2) and (b)(1), and one count of possessing child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2). He was sentenced to 180 months in prison for each count to run concurrently after the court determined that his prior Arkansas convictions for possession of child pornography qualified as predicate offenses under 18 U.S.C. § 2252A(b). Mr. Box argued on appeal that the district court committed procedural error by applying the § 2252A(b) enhancement for having a prior conviction that relates to child pornography because it failed to properly apply the categorial approach. If the court had agreed with him, Mr. Box's statutory range would have been between 5- and 20-years' imprisonment for receipt of child pornography and between 0 and 20 years for possession of child pornography, rather than between 15 and 40 years and 10 to 20 years, respectively. This, in turn, resulted in a guideline range of 180 months' imprisonment. Without the enhancement, Mr. Box's total offense level would be 30, with a criminal history category of II, resulting in a range of 108 to 135 months.

2. Mr. Box appealed his sentence to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231.

3. Mr. Box argued that his 2015 Arkansas convictions for possession of child pornography did not qualify for the 10- and 15-year mandatory minimum sentences that § 2252A(b) requires when the defendant has a conviction under state law relating to the possession or receipt of child pornography. He argued that the statutory elements of his prior convictions do not sufficiently overlap with 18 U.S.C. § 2256, defining child pornography, to result in a predicate offense under § 2252A(b). While Mr. Box acknowledged that a panel of the Court of Appeals for the Eighth Circuit had previously applied the broad ordinary meaning of the phrase "relating to" in determining that the § 2252(b) enhancement applied, *United States v. Mayokok*, 854 F.3d 987 (8th Cir. 2017), he asserts that the language in the statute and the related textual restrictions favor a narrower reading.

4. In its opinion, the Eighth Circuit ruled that the district court properly determined that "[Mr.] Box's convictions under the Arkansas child pornography statute qualified as prior convictions that triggered the statutory minimum sentence under § 2252A(b)(1)." *United States v. Box*, 960 F.3d 1025, 1027 (8th Cir. 2020); 1a. It found that a statute that encompassed the possession of material that depicted a minor engaged in conduct that involved physical contact with the unclothed breast of a female, related to the possession of child pornography under the federal statute. *Id.* at 1026-27. It summarized that it was unnecessary for the state statute to criminalize the same conduct, as long as the full range of conduct proscribed under the state statute *relates to* the possession of child pornography. *Id.* at 1027.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should declare that the Court of Appeals for the Eighth Circuit erred when it failed to properly apply the categorical approach to determine whether Mr. Box's prior Arkansas convictions for possession of child pornography qualified as predicate offenses under 18 U.S.C. § 2252A(b).

Mr. Box requests review by this Court as there is a split among the circuits as to whether a determination of a qualifying offense under 18 U.S.C. § 2252A(b) is analyzed under a broad or narrow categorical approach. The Eighth Circuit found that a prior state conviction related to the possession of child pornography under the federal statute so long as "the full range of conduct proscribed under [the state statute] *relates to* the 'possession . . . of child pornography' as that term is defined under federal law." *Box*, 960 F.3d at 1027 (citing *Mayokok*, 854 F.3d at 992-93). He continues to assert that under federal law, child pornography does not include lascivious exhibition of the female breast and the state statute "punished more conduct than its federal counterpart." 18 U.S.C. §§ 2256(8)(A), (2)(A)(v). Thus, he submits that the statutory elements of his prior convictions do not sufficiently overlap with 18 U.S.C. § 2256, defining child pornography, to result in a predicate offense under § 2252A(b).

Ordinarily, the statutory sentencing range for receipt of child pornography is 5 to 20 years, and for possession of child pornography is 0 to 20 years. However, the existence of related prior convictions increases those penalties to 15 to 40 years for receipt, and 10 to 20 years for possession. 18 U.S.C. § 2252A(b). Here, the portion of the federal sentencing statute at issue applies when an individual has a prior state conviction "relating to" the possession or receipt of child pornography. 18 U.S.C.

§ 2252(b)(2). To ascertain the generic federal definition, courts look to the federal definition of "child pornography." *See* 18 U.S.C. §§ 2256(2) and (8). That federal definition is compared to the elements in Mr. Box's Arkansas convictions for possession of child pornography under Ark. Code Ann. § 5-27-602.

This Court employs a categorical approach to determine whether a prior conviction triggers a mandatory minimum sentence. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (reasoning that the categorical approach must apply to determine when a prior conviction can enhance a sentence, observing that by "focusing on the legal question of what a conviction necessarily established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law."). "Under this approach, the sentencing court looks to the fact of conviction and the statutory definition of the prior offense and determines whether the full range of conduct encompassed by the state statute qualifies to enhance the sentence." *United States v. Sonnenberg*, 556 F.3d 667, 670 (8th Cir. 2009) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)). Thus, the issue is whether Mr. Box's convictions qualify as "a conviction . . . under the laws of any State relating to . . . the . . . possession [or] receipt of child pornography," under §§ 2252A(b)(1) or (b)(2), which involves the use of a minor engaging in lascivious exhibition of the genitals or pubic area. *See United States v. McGrattan*, 504 F.3d 608 (6th Cir. 2007). If that range encompasses conduct categorically broader than that provided for by the § 2252A(b) listed offense, here

child pornography, which is defined generically by § 2256's definition of child pornography, the prior conviction cannot qualify as a § 2252A(b) predicate.

On August 3, 2015, Mr. Box was convicted of five counts of possession of child pornography in violation of Ark. Code Ann. § 5-27-602. Arkansas defines sexually explicit conduct as "actual or simulated" sexual intercourse, deviate sexual activity, bestiality, masturbation, sadomasochistic abuse for the purpose of sexual stimulation, or lewd exhibition of the genitals or pubic area of any person or breast of a female. Ark. Code Ann. § 5-27-601(15). The federal counterpart to that state law at § 2252A(a)(2) criminalizes receipt of child pornography while § 2252A(a)(5)(B) criminalizes its possession. Viewed broadly, some similarity exists between the two because they both list some of the same acts, such as intercourse, bestiality, and masturbation. However, the state statute makes criminal certain depictions of sexual conduct that 18 U.S.C. § 2256(8), and its incorporated descriptions of "sexually explicit conduct" in § 2256(2)(A), do not. For example, under Arkansas law, sexually explicit conduct includes lewd exhibition of the genitals or pubic area of any person or breast of a female, while the federal definition of sexually explicit conduct demands "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v).

Mr. Box asserts that the language of the statute and related textual restrictions favor a narrower reading. Here, the applicable focus in § 2252A is "child pornography" and the definition includes "sexually explicit conduct," which is

"defined in chapter 110's definitional provision, § 2256."[1] *See Reinhart*, 893 F.3d at 614. "Accordingly, applying well-established statutory principles, where there are federal definitions in chapter 110 that apply to the relevant 'child pornography' clause in [§ 2252A], . . . [t]hese definitions provide a basis in the statutory text that requires a narrower reading of 'relating to.'" *Id.* (citing *Sullivan*, 797 F.3d at 639 (holding statutory text may favor a narrower reading of "relating to"). "'Relating to' . . . has meaning [that] is anchored to the federal definition of 'child pornography.'" *Reinhart*, 893 F.3d at 616. In *Reinhart*, the Ninth Circuit reasoned that this was "akin to *Mellouli* where, because of the statutory text and historical context, 'relating to' was given a narrower reading and the Supreme Court applied the usual categorical approach." *Id.* (citing *Mellouli*, 135 S. Ct. at 1990–91).

Mr. Box argues that the Eighth Circuit in *Mayokok*, 854 F.3d 987 (the case upon which the Eighth Circuit based its decision in the instant case) incorrectly determines that a broader rather than a narrower application of the categorical analysis is warranted. This Court's decision in *Mellouli*, 135 S. Ct. 1980, compels a

[1] The Court of Appeals for the Ninth Circuit explains why its holding in *Reinhart* is distinguishable from *United States v. Sullivan*, 797 F.3d 623 (9th Cir. 2015) and *United States v. Sinerius*, 504 F.3d 737 (9th Cir. 2007), where it found that the state convictions related to the federal definition. 893 F.3d at 613. In those cases, the court analyzed the terms "sexual abuse" and "abusive sexual conduct," but the definition for the federal crime fell in a different chapter than the charged offense. *Id.* However, the *Reinhart* court was able to apply the federal definition of 'child pornography' because it fell in chapter 110, the same statutory chapter as the sentencing enhancement provision at § 2252(b)(2). *Id.* Likewise, in the instant case, the statute defining child pornography is also found in chapter 110. *See* 18 U.S.C. §§ 2256(2) and (8).

different conclusion. In *Mellouli*, this Court reaffirmed that the categorical approach involves a narrow analysis of "relating to."

> In *Mellouli*, the federal immigration statute, 8 U.S.C. § 1227(a)(2)(B)(i), used "relating to" referring "to a controlled substance," and the statute included a parenthetical to clarify that "controlled substance" was defined as in § 802 of title 21, a federal drug schedule. *Id.* at 1984 (citing 8 U.S.C. § 1227(a)(2)(B)(i)). Accordingly, the Court held that the immigration provision, 8 U.S.C. § 1227(a)(2)(B)(i), limited the meaning of "controlled substance" to the referenced federal definition. *Id.* at 1990–91. Despite the words "relating to" in the federal immigration provision, the usual categorical approach applied. *See id.*

Reinhart, 893 F.3d at 614.

The Ninth Circuit pointed out that the Eighth Circuit's decision in *Mayokok* recognized that the state statute punished more conduct than would be punishable under federal law, which would render it overbroad. *Id.* (citing *Mayokok*, 854 F.3d at 991–93). However, although *Mayokok* stated it employed the categorical approach to determine whether a prior conviction triggers a mandatory minimum sentence under § 2252(b)(1), it "then dismissed the categorical approach and reframed the inquiry as whether the 'full range of conduct' under the state statute of conviction '*relates to* the possession . . . of child pornography' as that term is defined under federal law." *Id.* at 615, n. 4 (citing *Mayokok*, 854 F.3d at 993) (emphasis in original). The Ninth Circuit determined that the *Mayokok* court erred by failing to address the specific federal definitional provision at § 2256. *Id.*

Further, in *McGrattan*, the Court of Appeals for the Sixth Circuit vacated a 15-year sentence in a case that involved an over-inclusive prior child-pornography conviction. 504 F.3d 608. There, the defendant had pleaded guilty to receiving and

distributing child pornography, in violation of § 2252A(a)(2), and the court sentenced him under § 2252(A)(b)(1)'s mandatory-minimum statute because he had an Ohio conviction for possessing material showing a minor in a state of nudity that constituted lewd exhibition of the genitals. *Id.* at 611. However, the Ohio statute defined nudity to include lewd depictions of nudity that did not involve the genitals. *Id.* at 615. Therefore, because it was possible to be convicted under Ohio law "based on lewd exhibitions of nudity that do not involve an 'exhibition of the genitals or pubic area of any person,'" the prior conviction did not categorically constitute child pornography as defined by § 2256(8). *Id.*

Mr. Box recognizes that other courts of appeal have found similarly to the Eighth Circuit. *See United States v. Portanova*, 961 F.3d 252, 254 (3d Cir. 2020) (concluding that under a looser categorical approach, § 2252(b)(1)'s "'relating to' language does not require an exact match between the state and federal elements of conviction, and therefore the statute "relates to" nudity.); *United States v. Colson*, 683 F.3d 507, 511 & n.2 (4th Cir. 2012) (holding that conviction under state statute that extended to lewd exhibitions of buttocks and female breasts qualified as prior conviction under § 2252A(b)(1))

However, Mr. Box maintains that his convictions for possession of child pornography must categorically be child pornography under federal law in order to enhance his sentence. An examination of Ark. Code Ann. § 5-27-602 and its definitional statute, found at Ark. Code Ann. §5-27-601, reveal examples of sexual conduct that constitute possession of child pornography that are not considered child

pornography under the § 2256 definition of "sexually explicit conduct." Therefore, the Arkansas statute is overbroad and does not qualify under § 2252A(b)(1) or (b)(2). Under the Arkansas definition, it clearly covers lewd exhibition of a breast, which need not include the genitals or pubic area. The lower court's error in applying the § 2252A(b) enhancement requires re-sentencing because it was a significant procedural error that prejudiced Mr. Box by increasing his statutory range.

CONCLUSION

For the foregoing reasons, Petitioner Joshua Glen Box. respectfully requests that this Court grant the petition for a writ of certiorari and accept this case for review.

DATED: this 27th day of August, 2020.

Respectfully submitted,

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