No. 20-5833

IN THE

SUPREME COURT OF THE UNITED STATES

Scott Francis Fortier — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals - 8th circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Scott Fortier OID 258784
(Your Name)
Lino Lakes correctional Facility
7525 4th Ave
(Address)

Lino Lakes MN 55014
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

1a. Does creating a visual depiction of sexual conduct of a minor need to be the dominant or specific purpose; one of the dominant or specific purposes; or is it enough that it occurs at all (one of infinite purposes)?

1b. Has the mens rea or specific intent element of 18 U.S.C. 2251 been interpreted too broadly to include impulsive or inadvertent acts rather than only those acts for which the actor possessed criminal intent or a dominant purpose of committing the forbidden act?

1c. What is the illegal or forbidden act under 18 U.S.C. 2251(a)? Is it illegal to make a visual depiction of a minor engaged in sexually explicit conduct; or is it illegal to engage the minor in sexually explicit conduct because one plans or wants to create a visual depiction of that conduct?

2a. When is specific intent established for the purpose of 18 U.S.C. 2251? Does it need to exist at the onset of the sexual conduct or can it exist as a result of the sexual conduct after such conduct has begun?

2b. If specific intent must be established for the purpose of 18 U.S.C. 2251 at the start or onset of sexual conduct, what constitutes the start of sexual conduct?

3. Is 18 U.S.C. 2251 unconstitutionally vague and therefore in violation of the vagueness doctrine due to its oddly written and confusing language as well as the use of the word "uses" which has led to arbitrary prosecutions due to the legislatures delegation of authority to judges being so extensive?

4. Is a person "used" for the purpose of 18 U.S.C. 2251(a) if they are photographed or videotaped?

5. Is jury instruction #15 too confusing? Specifically element 3 which is supposed to place intent on the purpose for engaging a minor in sexual conduct, but appears to place intent on whether or not the visual depiction was created purposefully?

6. Is 18 U.S.C. 2251 unconstitutional as applied to Mr. Fortier because his case solely involved intrastate conduct using an iPhone which was not purchased for the purpose of creating pornography, rendering its prohibition an unconstitutional

extension of the Commerce Clause?

7. As the use of cellular devices with cameras and the propensity for those using them to frequently and impulsively record everyday happenings grows, will the current interpretation of 18 U.S.C. 2251 make anyone, including those in high school or college who are under the age of 18 or in a legal romantic or sexual relationship with someone under the age of 18, criminally responsible and subject to a federal sentence of 15-30 years or more anytime they photograph or videotape themselves or those individuals under the age of 18 they are involved with engaging in sexual conduct? ; or is 18 U.S.C. 2251enforced unfairly and purposed only for certain individuals - and if so, what type of discrimination is used to decide who is held criminally responsible and who is immune to the statute? Also, with whom does this critical decision lie?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of All parties to the proceeding in the court whose judgement is the subject of this Petition is as follows:

RELATED CASES

UNITED STATES OF AMERICA V. SCOTT FRANCIS FORTIER;

District Court File No.: 17-CR-96

8th Circuit Court File No.: 18-3517

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is I do not have access to this info.

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is I do not have access to this info.

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 5-18-20, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2251(a): Any person who employs, coerces, persuades, induces or entices any minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct using materials that had been mailed, shipped or transported across state lines or in foreign commerce by any means.

STATEMENT OF THE CASE

On January 20, 2017, Scott Fortier was charged by complaint with production of child pornography, in violation of 18 U.S.C. 2251(a) & (e). On April 17, 2017, the government filed an indictment charging 4 counts of production and 1 count of possession of child pornography in violation of 18 U.S.C. 2252(a)(4)(b).

Subsequently, a two-count superseding indictment was filed, which charged a single count of production of child pornography based on the 4 videos charged in the earlier indictment. Count 2 charged Mr. Fortier with possession of child pornography. Count 1 charges Fortier with using a minor to engage in sexually explicit conduct for the purpose of producing a video. The 4 videos involved were all alleged to have been produced on September 10, 2016, with 2 involving a 17 year old female (C.J) and 2 involving a 15 year old female (S.K.)

The matter proceeded to a jury trial from January 23, 2018 through January 25, 2018. At trial the parties entered into the following stipulations with respect to count 1:

1. That the recordings charged in count 1, paragraphs A and B of the superseding indictment, depict a real human being, C.J.;

2. That the recordings charged in count 1, paragraphs C and D of the superseding indictment, depict a real human being, S.K.;

3. That C.J. and S.K. were both under 18 at the time the recordings charged in count 1 were recorded;

4. That the recordings charged in count 1, paragraphs A and B of the superseding indictment, depict C.J. engaging in sexually explicit conduct;

5. That the recordings charged in count 1, paragraph D of the superseding indictment, depict S.K. engaging in sexually explicit conduct;

6. That Mr. Fortier was the male depicted in the recordings charged in count 1 of the superseding indictment;

7. That Mr. Fortier created all of the recordings charged in count 1 of the superseding indictment; and

8. That the recordings charged in count 1 of the superseding indictment were produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce by any means.

At trial the government elicited testimony from both C.J. and S.K. that they had met each other while attending and eventually working at Circle R Ranch, a summer horse camp.

Fortier worked at Circle R Ranch for 5 summers beginning in 1997 when he was 18, after also attending as a camper. Fortier continued to volunteer for a day or two at a time some summers through 2014. He would also often visit friends and his girlfriend who worked there on their Saturday nights off. C.J. knew of Fortier from her years as a camper and first spoke to Fortier during the summer of 2014 while she was working as a junior counselor. Fortier and C.J. began communicating in the fall of 2014 when she was 15 and the relationship became sexual a few months after she turned 16. Fortier and C.J. engaged in sex 3 times in the spring of 2015. In August of 2015, C.J. claimed to some fellow employees at Circle R Ranch that Fortier must have "spiked her drink or something or she never would have done it". She later recanted and even told investigators for this case that she made it up because her friend judged her.

In August of 2016 (one year later), Fortier encountered C.J. for the first time since that allegation while visiting some friends who worked at Circle R Ranch while they were off duty. C.J. approached Fortier, apologized and asked for a hug. She asked if they could start talking again. A few weeks later C.J. asked Fortier if she could stop by his house for a few hours and soon after she arrived, Fortier and C.J engaged in sex. A few weeks later, Fortier visited Circle R Ranch again on a Saturday. Fortier introduced himself to some staff members including S.K. who he also added on Facebook.

A few weeks later on September 9, 2016, Fortier invited some friends over to his house. With such short notice, nobody else responded besides C.J. She was at the Mall of America with S.K. and said she would check with her. The girls decided to go to Fortier's house and decided to stay overnight. They each told their moms that they were sleeping at the other's house.

C.J. testified that the night began with social activities such as "hanging out and drinking". At some point in the evening, things became sexual. C.J. testified that she, S.K. and Mr. Fortier got into the hot tub naked where they played truth or dare and Fortier touched C.J.'s breasts and performed oral sex on S.K. The government

elicited testimony that S.K. did not want Fortier to touch her sexually, but she did not object because she was scared. C.J. testified that later she, S.K. and Fortier took a shower together after exiting the hot tub and she observed Fortier "penetrating" S.K. Again, the government elicited testimony from S.K. that this conduct was unwelcome and scared her.

As the night wore on, C.J. decided to have sex with Fortier and asked him to go into his bedroom with her. According to C.J, she saw Mr. Fortier reach for his phone during the sex and believed he was going to use it to record their encounter. C.J. claimed she told Mr. Fortier "no" but "he said it's fine or something like that". Two short iPhone created videos were introduced at trial which comprised the conduct alleged in paragraphs (a) and (b) of count 1 of the superseding indictment. Also introduced at trial were transcripts of the conversation which occurred during those videos. The transcripts detail a discussion between Mr. Fortier and C.J. regarding matters such as their sexual positions and C.J.'s comfort level, but there is no discussion about recording a video where C.J. objects to it.

After his sexual encounter with C.J., Mr. Fortier and C.J. returned to the upstairs bedroom where S.K. had since fallen asleep. She woke up and they were there. They went out to the garage where Fortier had a cigarette and S.K. threw some darts.

The government introduced multiple photos and videos of S.K. in the garage where she was either partially or fully naked while throwing darts, though these were not charged as they did not meet the definition of sexually explicit conduct. Fortier, S.K. and C.J returned to the upstairs bedroom and at some point C.J left to go sleep on the couch. S.K. testified that she does not recall what happened in the bedroom, likely because she was impaired by alcohol and may have passed out.

The government introduced 2 videos which correspond with paragraphs (c) & (d) of the superseding indictment. S.K. testified that while she did not remember the events depicted in the videos, she recognized herself as the girl in the recordings. The government elicited testimony from S.K. that she was not awake when Mr. Fortier was having sex with her.

On December 14, 2016, a search warrant was executed at Mr. Fortier's house after C.J. reported her sexual encounters with Mr. Fortier to the Todd County Sheriff's Department. Among other things, officers seized Mr. Fortier's iPhone, a compact disc, a microSD card, 4 laptop computers and 3 security cameras from the basement and upstairs recreation room. Deputy O'Hara, who assisted in executing the warrant but has since been relieved of duty testified that the compact disc contained images he recognized from previous child pornography investigations. He further testified that "child pornography" was found on one of Mr. Fortier's laptop

computers, but not the same files found on the compact disc.

FBI task force Officer Dale Hanson testified that he forensically examined the electronic evidence seized from Mr. Fortier's house. Officer Hanson testified that the microSD card contained over 10,000 images including over 4,000 images he considered child pornography and 36 had been viewed. The compact disc contained over 600 files, including around 300 he believed to be child pornography. There was no evidence that any of those files had been viewed. Hanson testified that some of the files in the charged indictment had been on the laptop computer at one time but had been deleted.

The government also introduced evidence regarding Mr. Fortier's relationship with his former girlfriend, A.R. The government elicited testimony from A.R. that Mr. Fortier's "sexual appetite" was "strong" and that the two of them had recorded their sexual encounters before.

At the close of the government's case, Mr. Fortier moved for a judgement of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). The district court denied the motion. Mr. Fortier then testified in his own defense.

With respect to the night of September 9, 2016 and morning of September 10, 2016, Mr. Fortier largely **agreed with the government witnesses. He invited C.J. and S.K over to his house, they drank alcohol, things turned sexual. He denied trying to have sex with C.J. or S.K. so that he could take a video and that** his highly intoxicated state made it difficult to remember exactly what happened. He explained: "I don't know what I was thinking when I took the videos [of C.J.]. I was really drunk. I obviously took them, but it wasn't something that was planned. I didn't do it because I was trying to have sex with her so that I could take a video, but I obviously took the videos". With respect to S.K., who Mr. Fortier claimed was awake during the encounter, he opined that the videos may have been the product of an accidental recording while using the iPhones flash in the camera app as a flashlight, but had no recollection of recording them: "I didn't purposely take the videos [of S.K.]. The next day when I saw the video, both videos, in fact, I saw them and thought, wow, that's a nice surprise, but I didn't know that I had taken those videos. It was not on purpose".

With respect to the child pornography found on his storage devices, Mr. Fortier explained that he had downloaded a tremendous amount of pornography that he was not able to view prior to downloading due to his downloading medium. Once the files were downloaded and extracted, Mr. Fortier came to learn that some of the files appeared to be of children. Mr. Fortier began to delete the files using a special

program on his computer to permanently delete files, but it was very slow. He sought advice from some friends and the internet on how to get rid of unwanted files and learned if he moved the files to a memory card, they would be permanently deleted from his computer and then he could erase them from the memory card. Mr. Fortier said he was surprised that the files were still on the memory card because "I honestly thought that it was all gone.....I thought that that card had been deleted too."

Mr. Fortier was convicted of both counts. The presentence report calculated an offense level of 55 with a corresponding life sentence for this first time offender. The statutory maximum sentence of his offense conviction was 600 months imprisonment, with a mandatory minimum term of 180 months due to his conviction on count 1. The district court imposed concurrent sentences of 300 months on count 1 and 240 months on count 2, with 10 years' supervised release on each count. An appeal followed.

Fortier argued on appeal that the court erred in denying his motion for acquittal as to count 1. He argued that the government did not offer sufficient evidence to demonstrate that he engaged S.K. or C.J. in sexually explicit conduct "for the purpose of" producing child pornography.

He also argued that the district court admitted a substantial amount of evidence that had marginal probative value but was highly prejudicial and should have been excluded.

Lastly, Fortier asserted that 18 U.S.C 2251(a) is unconstitutional as applied to him because interstate commerce was not truly affected by his conduct.

The 8th circuit denied Mr. Fortier's appeal as well as a timely filed petition for rehearing. This petition for Writ of Certiorari followed.

REASONS FOR GRANTING PETITION

1a. Does creating a visual depiction of sexual conduct of a minor need to be the dominant or specific purpose; one of the dominant or specific purposes; or is it enough that it occurs at all (one of infinite purposes)?

1b. Has the mens rea or specific intent element of 18 U.S.C. 2251 been interpreted too broadly to include impulsive or inadvertent acts rather than only those acts for which the actor possessed criminal intent or a dominant purpose of committing the forbidden act?

1c. What is the illegal or forbidden act under 18 U.S.C. 2251(a)? Is it illegal to make a visual depiction of a minor engaged in sexually explicit conduct; or is it illegal to engage the minor in sexually explicit conduct because one plans or wants to create a visual depiction of that conduct?

2a. When is specific intent established for the purpose of 18 U.S.C. 2251? Does it need to exist at the onset of the sexual conduct or can it exist as a result of the sexual conduct after such conduct has begun?

2b. If specific intent must be established for the purpose of 18 U.S.C. 2251 at the start or onset of sexual conduct, what constitutes the start of sexual conduct?

These questions are closely related and therefore will be addressed together. The court has misinterpreted the statute 2251(a) or at the very least interpreted it far too broadly. As The Honorable Judge Patrick J. Schiltz made record of for the 8th circuit during pretrial line 21: "This statute is very oddly written...it does not make it illegal to create a visual depiction". He later adds "The key is what was Mr. Fortier's purpose in having sex with the girls, not what his purpose was in recording the sex.....the reason you're using the minor [to engage in the sex] is to produce a visual depiction of that."

Judge Schiltz is interpreting 2251(a) correctly at this point, however he later begins to sway from the language of the statute.

Judge Schiltz next states "A defendant could begin a sexual encounter with a minor without any intent to record it but during the course of the sexual encounter the

defendant could get the idea to record it and start recording it. If he was recording it with the forbidden intent, that is, to create a visual depiction, then the intent element would be met." This statement places the intent back on the act of recording which Judge Schiltz earlier determined was not the illegal act under 2251(a). This statement is in fact circular as it suggests the intent element is met if someone records the sexual act with the intent of using a minor to engage in sex for the purpose of recording it. It does not focus on or prove the forbidden intent exists. In order to do that you would have to know what the "person" was thinking and that the sex was happening at least partially for the reason of making a video, not the opposite of making a video for the purpose of recording sex acts.

Judge Schiltz may be correct that the "forbidden" intent could arise later but the question remains as to when specific intent must be established for the purpose of 2251a. Is some sort of premeditation needed that would show criminal intent or is a heat of the moment or impulsive act enough? Specific intent would require the former whereas the latter would constitute general intent since the intent is placed on the reason for engaging in the sexual conduct. Regardless, more evidence would be needed to show that recording the acts became one of the dominant purposes of the sexual conduct. Without that evidence, what remains is two separate but connected acts. The defendant can be both using a minor to engage in sexual acts and be purposefully taking a video, but the act of taking a video is not enough to prove that the main reason or even one of the main reasons the sex was happening was so that a video could be taken which according to Judge Schiltz is what needs to be proven. The overarching act of sex or sexual acts is not compromised or changed due to the video, much as a concertgoer who impulsively pulls their phone out to record a video they hadn't planned to take is not all of a sudden attending the concert for the purpose of taking a video simply because a video or videos were taken, even if they had done the same thing on other occasions. The same could be said of a parent attending a child's soccer game. Taking a photo does not change their intent or reason for attending the game.

Someone very well could attend a concert and bring a camera or even a phone with them purposefully so they could take videos. Proof of this act, for this specific reason, would show intent, much like proof someone crawled into bed with a phone or camera so they could take videos or pictures of a sex act could show intent. Even bringing a camera into bed for any reason could show intent. However there are many other reasons a cell phone could be present since cell phones are rarely kept out of reach, so that alone cannot speak to intent.

Congress very well could have written a law stating that "a person is guilty if they purposefully photograph or film a minor engaging in sexual conduct" to cover the

kind of impulsivity seen here, but it did not. Instead, in 2251(a), Congress requires that the recording of the video be one of the dominant reasons a defendant is engaging in sex in order to show the state of mind of the actor was towards purposefully exploiting a minor.

2251(a) was enacted in order to severely punish those individuals who purposefully exploit children by using, employing, coercing, inducing, enticing, or persuading them to engage in sexually explicit conduct for the specific purpose of producing a visual depiction of such conduct. Lower courts have since expanded the meaning to state that "producing a visual depiction of the conduct does not have to be the sole purpose of engaging the minor in the sexual conduct, but must be one of the dominant purposes". (U.S. v. Raplinger 8th circuit)

Congress initially passed this law after exploring and determining that child pornography affected interstate commerce since many people who have an interest in child pornography will search the internet for images. When they develop a desire to have more images they may begin to produce their own images as a means to trade with others thus creating a market for those who are purposefully targeting children for exploitation. It was likely that congress intended to punish those who had a mind towards using children unfairly for their benefit, hence the specific intent required by 2251(a).

The government, in an attempt to show intent has passed off theory as fact in multiple instances and the 8th circuit court of appeals has repeated these in its decision. Much of this theory had an aim towards proving videos were taken on purpose rather than why the sexual conduct was taking place. Though evidence cannot be reweighed, it is important to separate fact from theory when weighing whether specific intent existed for the forbidden act or not. For instance, this court on page 5, paragraph 1 states that ..."Fortier instructs C.J. to change positions--possibly, as he suggests, for a more enjoyable experience, or maybe as the government posits, for a better camera angle. The fact that the camera angles matched those of earlier recordings allowed the jury to draw the inference.....no accident....

The first issue here is that the jury heard the audio of the video. In the video C.J. makes reference to pain and Fortier reacts by telling her to turn around, then asks her if that's better which she responds to with a yes. The conversation continues with Fortier telling her to "come off it more" and that she has "more control". The audio speaks for itself and a jury would have to ignore the factual evidence to believe the government theory of a better camera angle.

The next issue with this same statement is that the jury was not shown any earlier

recordings. If they had been, they would have seen that the videos did not match other recordings beyond the fact that some, not all included "close ups" of genitals as would be expected if a participant was holding a recording device. This was another government argument/opinion.

Finally, this paragraph brings us back to the issue of whether the videos were taken on purpose or not and the next two paragraphs in the ruling discuss this even further. The government claims that Fortier testified that the four videos were taken by accident but that is not fact. Fortier testified that the phone was in the bed with the camera flash already on when he and C.J. changed positions. At that point he must have reached over and picked up the phone to record but doesn't remember doing so. He testified that he was very intoxicated that evening and opined that he most likely took the video on purpose but after it started, accidently pressed the button stopping and starting the video since the videos were just seconds apart and that is easy to do on an iPhone since the volume button on the side of the phone will act as a camera button and is often inadvertently pressed while simply holding the phone or trying to take a photo or video. The videos with S.K are a different story. The first video was taken by accident while trying to use the flash as a flashlight. The government explained to the jury that Fortier pointed to S.K.'s vagina, however the video evidence, which moves very quickly, showed Fortier's hand move down toward her buttocks. The position of his hand and his fingers showed his pointer finger extended out at a different angle then the rest of his open hand, not in a "point" as the government theorizes. Again, a jury would have to ignore this video evidence which is fact and instead take the government at their version in order to follow the government theory that Fortier was for some reason pointing at S.K.'s vagina for a video he was assumingly producing for his own private collection. As for the second video of S.K., Fortier did not remember recording that video and opined that he may have taken it while using the light since he was picking his phone up and setting it down to focus the light.

The government also states that Fortier only took photos and videos of nudity and sexual conduct that night. This is true, however a jury would have to ignore the fact that S.K. was naked in full or part for almost the entire night so any photos or videos from that night would be very likely to have nudity. If Fortier had a plan to get videos to add to a collection he could have recorded all night, downloaded footage from the security cameras in his living room and basement, brought his phone which he testified was in a waterproof case to the hot tub or shower and could have made much longer videos of 2 sexual encounters. Encounters which lasted over 20 minutes each.

The government also discusses multiple times that Fortier added the videos to his

collection. They mention a hidden calculator app and a hidden email folder. The charged videos were never in the calculator app, they were never in the email folder and they were not saved with the other "homemade" files. They were on a SD card which Fortier testified was used for files he was getting rid of. Government theory aside, the evidence shows that these files were not important to him. Instead it shows the initial surprise, where he thought to keep them by moving them to his computer until he gave it more thought and decided to move them away from his other videos to a memory card, where he planned to delete the videos which were taken impulsively, with no forethought or plan. Videos that were taken due to sexual conduct, rather than sexual conduct which took place for the sake of making videos.

For these reasons, more clarity is needed around the purpose requirement and the level and focus of intent for the purpose of 18 U.S.C. 2251, as well as when a sexual encounter begins.

18 U.S.C. 2256(2) is helpful in determining what defines sexually explicit conduct: Sexually explicit conduct means actual or simulated sexual intercourse, including [genital-genital] [oral-genital] [anal-genital] [oral-anal] whether between persons of the same or opposite sex; [bestiality] [masturbation] [sadistic or masochistic abuse] [lascivious exhibition of the genitals or pubic area of any person]. As soon as any of the above acts begin, that is the onset of a sexual act and that should be the moment intent must be established for a statute so punitive in nature by carrying a mandatory minimum of 15 years. To say, as Judge Schiltz did, that intent can be established partway through the encounter removes the intent from the reason the person is engaging the minor in sex and instead punishes an impulsive act derived out of the sexual act itself. The sexual act cannot be taking place for the purpose of creating a picture or video if the already occurring sexual act sparked the action of taking the video, much like it would be impossible to say that a campfire was born out of a forest fire if that forest fire was sparked by that very same campfire.

3. Is 18 U.S.C. 2251 unconstitutionally vague and therefore in violation of the vagueness doctrine due to its oddly written and confusing language as well as the use of the word "uses" which has led to arbitrary prosecutions due to the legislatures delegation of authority to judges being so extensive?

4. Is a person "used" for the purpose of 18 U.S.C. 2251(a) if they are photographed or videotaped?

5. Is jury instruction #15 too confusing? Specifically element 3 which is supposed to place intent on the purpose for engaging a minor in sexual conduct, but appears to place intent on whether or not the visual depiction was created purposefully?

The statute, as well as the jury instructions are confusing, misleading and often misinterpreted as is the case here where four videos were taken. There has been a lot of focus on whether the videos were taken on purpose or not, even to the point where this court upheld the jury ruling because "the jury believed the videos were taken on purpose". However, whether the videos were taken on purpose or not does not impact 2251(a). "A defendant must engage in the sexual activity with the specific intent to produce a visual depiction. It is not sufficient simply to prove that a defendant purposefully took a picture" Accord United States v. Crandon, 173 F.3d 122, 129 (3rd Cir. 1999) (considering standard of proof for application of USSG 2G2.2(c)(1)'s "for the purpose of" clause).

Despite the ruling above, the 8th circuit, in its ruling, declared that the sole dispute is over one of the statute's men's-rea requirements. "the one at issue here is whether Fortier "used" the girls with a particular "purpose" in mind: to "produc[e]" a "visual depiction of [the sexually explicit] conduct." (Applying a similarly worded provision.)

This is where the court begins the move away from the original language and intent of the statute and the misapprehension starts. A statute must be defined by the words in it. In this case the word "to" is often left out. Without that word, a person is guilty if they use a minor engaging in sexual conduct to produce a video. It removes the focus of the men's-rea requirement on the reason for the sexual conduct and broadens it to mean that taking a video on purpose satisfies the requirement. But 2251(a) is not violated by filming a minor engaged in sexually explicit conduct, even if purposeful. This court later states the jury instruction "This specific intent requirement was met if there was sufficient proof that one of Fortier's "dominant purposes" was to create a visual depiction of his sexual acts with the girls". [Page 4, paragraph 2]. This even further broadens and even misleads a jury to believe that the issue is whether the videos were taken on purpose or not. Even this court, in its review states: "If the only evidence shows something different -- like he recorded them on his iPhone by complete accident then we must reverse Fortier's exploitation conviction." [Page 4 paragraph 2]

However, reading the statute as it is written puts the requirement where it should be: a person is guilty if they use a minor "to" engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct. The word "to" is very important because it shows the intent of congress to require some sort of forethought or premeditation and that the forbidden act is using a minor to engage in sex when done for the purpose or reason of recording that act. For example, if a video or photo is taken of a minor engaged in sexually explicit conduct upon a

defendant walking in on someone already engaging in sexual conduct, it would not meet the requirements since the defendant did not engage the minor in the act but instead acted impulsively, unless it can be proven that the conduct was taking place for the purpose of creating a video. Similarly if a defendant was using a minor to engage in sexual explicit conduct for the purpose of pleasure as in this case, and picked up a phone impulsively and took a video, whether purposefully or not, this type of impulsivity does not meet the burden required for specific intent. In fact, the production of the video is in reaction to the sexual act, not the reason for it. To say otherwise can only be due to the vagueness of what constitutes "using" and the difficulty even a Federal Judge had in pinpointing the forbidden act and requisite intent required. Therefore, a reasonable jury who understood the "oddly written" statute could not have convicted Mr. Fortier as there was insufficient evidence to support the government theory.

Mr. Fortier would nonetheless be guilty of sexual misconduct in the state of Minnesota for the sex act and could likely be charged with Minnesota's "using a minor in a sexual performance" statute which has different language than 2251(a) and punishes the act of recording a minor engaging in any sexual performance with a penalty of up to 10 years imprisonment compared to this statutes minimum mandatory of 15 years and maximum of 30 years.

Many examples of what would meet the intent requirement were included in the initial brief, and many others exist including conversations ahead of time, posing as a peer in order to get photos, paying children through gifts or money in exchange for their cooperation, or even setting up hidden cameras in bathrooms or other private areas but nothing like that exists here because there was no intent, especially at the onset of the sexual encounter. In addition, the other language in 2251 punishes those who entice, induce, coerce or employ a minor to engage in a sex act for the purpose of producing a visual depiction of that act. It is likely that the word "use" also would mean that one uses another with a specific aim much as they would entice or coerce someone. Again, the word "use" is too broad and has led to arbitrary prosecutions due to the legislature's delegation of authority to judges being so extensive.

Even more, if the lower courts are not deemed to have been given too much authority on the matter, but their interpretation is incorrect, the 2nd element needed for conviction would not hold true and the stipulation that Fortier agreed to in that he "used a minor to engage in sexual conduct" would have been agreed to under an incorrect determination of the meaning of the word "use" and the prior ruling that a minor who is photographed is used for the purpose of 2251.

6. Is 18 U.S.C. 2251 unconstitutional as applied to Mr. Fortier because his case

solely involved intrastate conduct using an iPhone which was not purchased for the purpose of creating pornography, rendering its prohibition an unconstitutional extension of the Commerce Clause?

18 U.S.C. 2251 is unconstitutional as applied to Mr. Fortier. Though district courts have held numerous times that it is enough that an item is shipped in interstate commerce before it was purchased, prior rulings have been on items that had a primary use towards producing child pornography or even visual depictions in general. Unlike photo paper, Polaroid cameras, digital cameras or camcorders, the primary purpose of an iPhone is to make phone calls or text message. Using apps or other features like the camera are secondary functions and therefore this deserves to be revisited. Purchasing the other items comes with a mind towards making videos or photos and child pornography categorically fits. Having these items handy during sexual conduct shows more of a mind towards the required intent whereas a cell phone is many times an extension of the person, and with them everywhere they go including the bathroom or even the bedroom. For this reason, the Commerce Clause is far too broad and enters into dangerous territory and overreach. An iPhone certainly could be used to produce child pornography, but like with the Mann Act, there should be an additional intent standard to show that interstate commerce was used with the specific intent of producing child pornography. Otherwise it is and should be a state issue. Other courts, such as the dissenting opinion in the 9th circuit decision in U.S. v. Laursen have opined that the broadness of this clause could make anyone, even a teenager, guilty of child exploitation anytime they film themselves or a partner.

7. As the use of cellular devices with cameras and the propensity for those using them to frequently and impulsively record everyday happenings grows, will the current interpretation of 18 U.S.C. 2251 make anyone, including those in high school or college who are under the age of 18 or in a legal romantic or sexual relationship with someone under the age of 18, criminally responsible and subject to a federal sentence of 15-30 years or more anytime they photograph or videotape themselves or their partner engaging in sexual conduct? ; or is 18 U.S.C. 2251 enforced unfairly and purposed only for certain individuals - and if so, what type of discrimination is used to decide who is held criminally responsible and who is immune to the statute? Also, with whom does this critical decision lie?

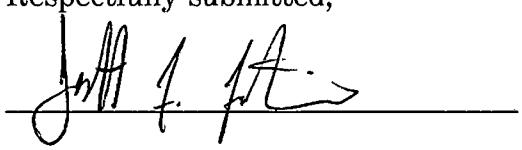
In fact this statute is violated millions of times daily by teenagers and young adults. Other statutes like treason, murder, bank robbery, insider trading and tax evasion to name just a few are not charged on a "when we feel like it basis" because they are serious crimes and anyone who violates those statutes is held criminally responsible when caught. This is not the case with 18 U.S.C. 2251. The original intent by

congress was to punish those individuals with a mind toward exploiting children by targeting them to engage in sex or sexual activity for the main or specific purpose of creating pornography. Over time this statute has been adjusted to fit what judges think it should punish. First, in (U.S. v Raplinger), the specific purpose element was expanded to include "one of the dominant purposes" which Judge Schiltz further broadened as "one of many purposes". Next, it was decided that one uses a minor if they photograph or videotape them (jury instructions). However, if that's what congress had intended they could have written the statute in plain language to say just that. Adopting the above ruling would mean: any person who photographs or videotapes a minor to engage in sexual conduct for the purpose of making a video of such conduct is guilty of 18 U.S.C. 2251. Congress again could have written: Any person who knowingly photographs or video records a minor engaging in any sexual act is guilty of 18 U.S.C. 2251. But it did not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 8-10-20