No. 20-6057

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID LEE EMMERT, JR. -- PETITIONER

vs.

UNITED STATES OF AMERICA -- RESPONDENT(S)

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

PETITION FOR WRIT OF CERTIORARI

David Lee Emmert, Jr.
USP Marion
P.O. Box 1000/13155-030
Marion, IL 62959

QUESTION PRESENTED

As of right now, immigration cases use the Esquivel-Quintana standard exposure to statutory penalty for "any" prior felony of "sexual abuse of a minor" (nullified if based on a broader age-group). But Child Pornography cases use unsettled split decisions below that overwhelmingly enhance for the same or similar prior conviction by eschewing the age-based metric for the "related to" modifier.

A) Petitioner therefore asks, "Whether equal protection of the liberty interest is offended when two classes of criminal defendants (Immigration and Child Pornography) are given disparate treatment under due process," where ...

1. Both defendants have the same or similarly situated prior state-court statutory rape conviction;

2. Each defendant is exposed to a mandatory federal baseline enhancement that does not define "sexual abuse of a minor" in that enhancement's chapter in the criminal code; but

3. The Immigration defendant walks free, and the child pornography defendant gets a 10-year mandatory minimum enhancement?

LIST OF PARTIES

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

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IN THE

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For a case from the federal courts, the opinion of the United States court of Appeals at Appendix I to the petition and in unpublished.

For a case from the federal courts, the date on which the United States Court of Appeals decided my case was April 8, 2020.

A timely petition for rehearing was denied by the United States Courts of Appeals on the following date: May 15, 2020, and a copy of the order denying rehearing appears at Appendix K.

An extension of time to file the petition for a writ of certiorari was granted to and including Oct 24, 2020 on Aug 24, 2020 in Application No. 20-1179 A8.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V OF THE CONSTITUTION (DUE PROCESS OF LAW)

"No person shall be ... deprived of life, liberty, or property, without due process of law;"

EQUAL PROTECTION OF LAW APPLICABLE TO THE FEDERAL GOVERNMENT

The Fourteenth Amendment guarantees that "[n]o State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." While there is no corresponding provision applicable to the federal government, the Fifth Amendment Due Process Clause applies the same limitation to the federal government. Bolling v. Sharpe, 347 U.S. 497 (1954).

18 U.S.C. § 2252(b)(2)

"Whoever violates ... subsection (a)(4) shall be fined under this title or imprisoned not more than 10 years, or both, but ... if such person has a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years."

STATEMENT OF THE CASE

In 2012, a jury convicted Petitioner Emmert (who suffers from a genetic disorder known as Jacobson's Syndrome),* of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). See [APPENDIX A]. A Presentence Investigation Report (PSI), was prepared and erroneously found that Petitioner qualified for enhancement under 18 U.S.C. § 2252(b)(2). Petitioner objected to the PSI and at sentencing, asserting, among other things, that this age-specific offense "when I was 17" (and the victim may also be 17), in violation of Illinois Statute 720 Ill. Comp. Stat. 5/11-1.20 (1989), did not qualify for enhancement purposes. On advise of counsel, Petitioner withdrew concerns about the categorical recycling of a state-court prior that -- while illegal -- did not appear "abusive" in the statutory language. Petitioner was sentenced to a more severe 10-year mandatory minimum, the judge saying "because I'm giving you the [20-year] max, I'm not going to review your PSI objections," for his simple possession charge.

Petitioner appealed, arguing that evidence of his prior, unrelated state offense when he was 17 was inadmissible at trial under Federal Rule of Evidence, Rule 414. United States v. Emmert, 825 F.3d 906 (8th Cir. June 15, 2016). The Eighth Circuit affirmed. [APPENDIX B].

Petitioner next filed a timely § 2255 motion in which he

* Jacobson's is a chromosomal disorder that presents on the autism scale.

asserted multiple grounds for relief. Due in part to his disability, the court was unclear what claims Emmert was asserting, and directed Emmert to amend his pleading, granted Emmert's request for counsel in light of his disability, and directed counsel to file an amended petition. Drawing from facts in his original 300+ page § 2255, Emmert filed his own amendment that consisted of only one claim, based on Mathis v. United States, 136 S.Ct. 2243 (2016). Emmert (through a paralegal) argued that his Illinois conviction's "means of committing the offense" (to include, among other things, the age difference of a "minor" in the state (16 or 17 depending on the circumstances), and a "minor" in the feds (17) are "broader means" of committing a prior sex offense). He also raised the argument he was categorically a juvenile under 18 U.S.C. § 1531, et seq. at the time, but the state statute swept more braodly to include 17-year-old offenders. Petitioner plead the facts in his original motion, and his amendment plead the law of Mathis, which opened the discussion up to the endpoint decision of Esquivel-Quintana v. Sessions, 198 LED2d 22 (May 30, 2017). Petitioner's § 2255 motion was denied and his application was denied. [APPENDIX E]. Petitioner timely reminded the District Court that it overlooked the Mathis/Esquivel-Quintana issue in a motion under Rule 59(e). The district court again declined the argument of why the Illinois age-based conviction was overbroad. [APPENDIX G]. A subsequent application to the Eighth Circuit Court of Appeals was also denied. [APPENDIX I]. In his C.O.A. application, Petitioner asked the Court to overturn the silence

and speculation of the District Court concerning Esquivel-Quintana.

Relevant to his § 2255, Petitioner pointed out that "sexual abuse of a minor" is not defined in the federal baseline statute of either the immigration statute, nor in Petitioner's child pornography statute. The Eighth Circuit denied relief (declining to comment on an age-specific former statutory rape conviction for which he received such a drastic mandatory boost to his sentence).

Mr. Emmert timely filed a petition for rehearing, which the Eighth Circuit denied on May 15, 2020, and issued the mandate on May 22, 2020. [APPENDIX M]. "[T]his Court has jurisdiction under [28 U.S.C.] § 1254(1) to review denials of applications for certificates by a circuit judge or a panel of a court of appeals." Hohn v. United States, 524 U.S. 236, 253 (1998).

REASONS FOR GRANTING THE PETITION

I.

A. In 1989, petitioner plead guilty to the elements of criminal sexual assault as it is defined by Illinois' Statute 720 Ill. Comp. Stat. 5/11-1.20 (1989) (formerly numbered Ill. Rev. Stat. 1989, Ch. 38, Para. 12-13). In Illinois, criminal sexual assault was defined as when ...

... a person commits an act of sexual penetration and:

(1) uses force or threat of force;

(2) that the victim knows is unable to understand the nature of the act or is unable to give knowing consent;

(3) is a family member of the victim, and the victim is under 18 years of age; or

(4) is 17 years of age or over and holds a position of trust, authority or supervision in relation to the victim, and the victim is at least 13 years of age but under 18 years of age.

As clearly indicated above, Illinois Statute 720 Ill. Comp. Stat. 5/11-1.20 encompasses conduct that is broader than the state statutes listed in § 2252(b)(2) "related to" sexual abuse of a minor, because both individuals can be 17 years old (both juveniles under federal law), be related by marriage (step-sister/brother), and be consensual). It is legal for two 17-

year-olds to engage in intercourse in Illinois, 720 Ill. Comp. Stat. § 5/12-15(b)-(c), 5/12-16(d), but if the parents of those two teens marry, then it is illegal. 720 Ill. Comp. Stat. § 5/11-1.20.

Four years ago, Emmert's direct appeal was decided just eight days before Mathis was issued by the Supreme Court. Correspondence with counsel specifically referred to Mathis but erroneously concluded it was "inapplicable" to Emmert's situation. [APPENDIX C].

In effort of not waiving or defaulting on any of his constitutional rights, i.e., his Fifth Amendment right to due process (and equal protection) of law, Petitioner challenged the erroneous enhancement in a § 2255 motion [APPENDIX D]. On November 25, 2019, the District Court denied Petitioner's § 2255 motion [APPENDIX E]. Petitioner filed a timely Rule 59(e) motion, which was denied just four days later, [APPENDIX G], erroneously stating his initial amendment did not "relate back" to any claim made in the original and timely § 2255 motion. Moreover, the District Court concluded that even if the claims had been timely, they would have been without merit, or would have resulted in harmless error. Id.

Petitioner now asks this Honorable Court to review his claim that his prior conviction under Illinois Statute 720 Ill. Comp. Stat. 5/11-1.20 no longer qualifies for enhancement purposes pursuant to 18 U.S.C. § 2252(b)(2). Specifically, age-based statutory rape offenses have been abrogated by reading together Mathis ("alternative means" vs. "elements" categorical

approach), and Esquival-Quintana (prior sex offenses based on broader age limits cannot trigger a federal enhancement).

Petitioner's claim found expression in the Equal Protection Clause because Illinois sex offense statute punishes conduct of minors defined differently in different situations: When a state court prior conviction includes non-abusive consentual sex between 17-year-olds it is categorically outside the federal enhancement's intent. Petitioner felt that if an immigration defendant can walk free for having a statutory rape conviction, then why would a possession of child pornography defendant with the same or similar prior conviction receive a 10-year mandatory minimum sentence for essentially the same age-based statute?

Petitioner asserts that it would be a fundamental miscarriage of justice to leave the erroneous enhancement in place. Further, there is no equal protection of the law in criminal due process when one class of offenders is given disparate leniency and the other disparate punishment for the same or similarly situated past conviction. This especially when Immigration is the highest recividism class of defendants (according to the United States Sentencing Commission statistics), and Child Pornography is among the lowest-recidivism as a class of defendants. ("The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders," at 11, Table 4: "Rearrest Rates for Recidivism Study Offenders by Offense of Conviction.")

B. While there is no corresponding "equal protection"

provision applicable to the federal government, the Fifth Amendment Due Process Clause applies the same limitation to the federal government. Bolling v. Sharpe, 347 U.S. 497 (1954). In socioeconomic cases, the standard most frequently used imposes on the challenging party the burden of proving that the classification between parties is not "rationally related to furthering a legitimate government interest." Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

But when a particular group (lowest-recidivism sex offenders), by class, is regularly treated as inferior (to highest-recidivism immigration cases), by class, special judicial solicitude is appropriate. Strauder v. West Virginia, 100 U.S. 303 (1880). This concern is enhanced when the discrimination visited on the class is pervasive in the society. It is argued that government must treat persons on the basis of merit and not on the basis of immutable traits or stereotypes. See, Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

The most challenging aspect of fundamental equal protection of a liberty interest involves stricter review of classifications burdening the exercise of rights derived from the Equal Protection Clause itself. When government classification significantly burdens equality of access to criminal justice, strict scrutiny will be used even though there is no independent right.

There is an ordinary presumption of constitutionality based on the assumption that federal laws are structured fairly. How

those laws get carried out and become Circuit precedent is troubled and troubling.

In cases like those at bar, equal protection is implicated when challenging the widely disparate treatment between immigration federal baseline enhancments (for "any" prior "sex abuse of a minor" felony); and a simple possession of child pornography baseline enhancement statute (for a prior felony "related to ... sex abuse of a minor"), that is essentially the same or similarly situated statutory rape offense.

The exact relationship of equal protection and due process in cases involving access to criminal justice remains problematical. (Indeed, it typically involves indigency, sex, and race.) The Supreme Court has reiterated that both clauses are implicated. Due process applies because of its demand for a fair opportunity to obtain an adjudication on the merits; equal protection applies because of the differential treatment of two classes of defendants. Evitts v. Lucey, 469 U.S. 387 (1985).

Justice Powell said that equal protection "does not require absolute equality or precisely equal advantages," when rejecting strict scrutiny for a school funding property tax case. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

But in the criminal justice context, there is no corresponding decision by this Court concerning such disparate treatment of Immigration cases, and child pornography cases with the same or similarly situated former sex offenses. But the issue is ripe because on the one hand, the immigration defendant will walk free, undeported; but the former sex offender will

receive a whopping 10-20 mandatory minimum enhancement. In light of the costs of criminal justice visited on "guilty" former sex offenders, and "not-guilty" immigration defendants the law could hardly be considered rational unless it furthers some substantial goal of government.

This Court should also consider what level of scrutiny to use based on the nature of the classifying trait and the importance of the interest burdened as well as the severity of the burden on the fundamental liberty interest. See, Martinez v. Bynum, 461 U.S. 321 (1983) (non-criminal state tuition case).

CIRCUIT SPLIT

II

After the Supreme Court decided both Mathis (2016), and Esquivel-Quintana (2017), it did not take long for the prevalent circuit splits to deepen against low-recidivism child pornography defendants.

On July 31, 2019, the Seventh Circuit decided United States v. Kraemer, No. 18-2454, which upheld the categorical approach of United States v. Osborne, 551 F.3d 718 (7th Cir. 2009), in name only; a kind of "neutered" categorical approach using a "broad, ordinary meaning" of sexual abuse of a minor by the modifier "related to". This is the decision Petitioner's District Court relied upon (apart from any current authoritative decision of the Eighth Circuit): One which puts a thumb on the scale of the categorical approach. The District Court was silent on the treatment of categorical comparison of a 17-year-old state offender who would be a juvenile in the federal arena.

Two things stand out about Kraemer and the cases cited therein by Petitioner's denial:

(1) Most of them were decided prior to Mathis and Esquivel-Quintana; and

(2) All relied on the flawed, outdated statistics since debunked by the current published studies noted in the briefings in Packingham v. North Carolina, ___ U.S. ___, No. 15-1194

(2017). (Notably, research from the University of North Caronlina, Chapel Hill, and Arizona State University.)

Packingham recognized that despite law enforcement reports repeating "higher rates of recidivism than other offenders" (which might claim a compelling government interest in treating child pornography offenders more harshly than immigration cases), there is actually no support outside the statistics mentioned in the Supreme Court decision of Smith v. Doe, statistics now known to be faulty. Basically, Kraemer and Petitioner's District Court are still operating under the false assumption that most sex offenders will offend again, where only about 5.3% commit another sex offense. 100 Crim. L. Rep. (BNA) 486, March 8, 2017. The disparate treatment of the classes is therefore unjust.

On the other side of the divide, in March of 2019 the Second Circuit handed down United States v. Kroll, No. 16-4310; and the Ninth Circuit decided United States v. Schopp, No. 16-30185 on September 16, 2019. The Alaska case involved the federal baseline enhancement 18 U.S.C. §§ 2251(e) & 3559(e) (that used the same "related to" a state prior conviction language, saying it encompasses state offenses that are a categorical match to the federal offense of production of child pornography, but state offenses involving the production of child pornography that do not include an element from other forms of child abuse do not apply. The New York case involved a "prior sex conviction" under 18 U.S.C. § 3559(e), and embraced the categorical approach over the "conduct specific" or "broad

ordinary meaning" approach ("related to" prior state-court sex offenses).

In deciding Schopp, the Ninth Circuit compared it to another § 2252(b)(2) case like Petitioner's, United States v. Sullivan, 797 F.3d 623 at 635 (9th Cir. 2015) (pre-Mathis). While recognizing that, in 2015, "relating to ... sexual abuse" unlike the federal removal statute in Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (citing to limiting parenthetical of the Controlled Substancies Act), the Schopp court found Mathis and Esquivel-Quintana dispositive because "sexual exploitation of children" is not defined in either § 2252, nor 2251. It said "Supreme Court and Ninth Circuit cases have concluded that the phrase 'relating to,' under certain circumstances, warrants a broader comparison of state offenses to the federal generic crime at issue ... [but California statutes in a case] defined 'sexual conduct' more broadly than the federal definitions of 'child pornography' and 'sexually explicit conduct'." Specifically, Schopp (unlike its precedents) recognized Esquivel-Quintana's conclusion that '[s]ection 2243, which criminalizes '[s]exual abuse of a minor or ward,' contains the only definition of that phrase in the United States Code."

We have at least two Circuits deciding to stick with the definitions of "abusive sexual conduct involving a minor" found in Chapter 109A, just as Esquival-Quintana had done. But the Immigration defendant's analysis uses one standard ("sexual abuse of a minor" by age-only), and the Child Pornography

defendant's case uses another (most enhancements affirmed by rhetorical gymnastics that stretch "relating to" beyond age-based due process).

The above examples serve to illustrate the confusion of equal protection under the law implicating due process concerns between treating immigration (highest-recidivism) cases with the categorical approach, and child pornography defendants (lowest recidivism) with a different, "thumb on the scale" categorical approach: One that eschews the statutory definitions of Chapter 109A used in immigration cases, for the broad dictionary meanings. Therefore Petitioner asks this Court to address the question of equal protection under the law as it applies to due process for these low-recidivism sex offenses. Many circuits affirm child pornography defendant's mandatory minimums by citing to debunked statistics mentioned three years ago in the briefs of Packingham.

Children are defined by their need to be protected. But not at the expense of using them as a fear tool in a sort of Machiavellian zealot ethic. The public safety issues mentioned in Kraemer (H.R. Rep. No. 105-557 at 12), cited by Petitioner's District Court relied on the DOJ report that has since been debunked. In other words, equal protection of the liberty interest is offended when two classes of criminal defendants are given disparate treatment under due process standards based on class-based animus distinctions between their similarly situated prior convictions.

CONCLUSION

The petition for a write of certiorari should be granted.

Respectfully submitted,

David Lee Emmert, Jr.

Date: 7-15-2020

Under penalty of perjury pursuant to 28 U.S.C. § 1746, I hereby swear and verify that the foregoing is true and correct.

Prepared By:
Eric Welch, paralegal