No. _____

In the

Supreme Court of the United States

Adam Donald Bennett,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Brandon E. Beck
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
1205 Texas Ave. #507
Lubbock, Texas 79401
(806) 472-7236
brandon_beck@fd.org

QUESTIONS PRESENTED

I. Is a Texas deferred adjudication a "prior conviction" for purposes of the sentencing enhancement in 18 U.S.C. § 2251(e)?

II. Does the Texas crime of indecency with a child by exposure relate to generic aggravated sexual abuse, sexual abuse, or abusive sexual contact with a minor, given the broad definition of "child" in Texas and given that the Texas offense is a non-contact offense that does not even require that the child be aware of the exposure?

III. Can a district court rely solely on facts gleaned from a presentence investigation report to establish guilt for an offense that resulted in a grand jury "no bill," absent some explanation for the grand jury's decision?

IV. Was the district court's statutory maximum sentence of 600 months substantively unreasonable when the district court did not give adequate weight to the extraordinary history of abuse imposed on Petitioner as an adolescent?

PARTIES TO THE PROCEEDING

Petitioner is Adam Donald Bennett, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Bennett*, 824 F. App'x 236 (5th Cir. 2020)
- *United States v. Bennett*, No. 4:19-cr-00096-A-1 (N.D. Tex. Aug. 28, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Adam Donald Bennett seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is *United States v. Bennett*, 824 F. App'x 236 (5th Cir. 2020). It is reprinted in Appendix A to this Petition. The district court did not issue a written opinion.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on August 17, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This petition involves 18 U.S.C. § 2251(a) & (e):

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or

foreign commerce or in or affecting interstate or foreign commerce or mailed.

...

Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one 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, abusive sexual contact involving a minor or ward, or sex trafficking of children, 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 25 years nor more than 50 years, but if such person has 2 or more prior convictions 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 the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

STATEMENT OF THE CASE

Adam Bennett, Petitioner, pleaded guilty to inducing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct, in violation of 18 U.S.C. § 2251(a) and (e). His statutory sentencing range was enhanced under § 2251(e) because of a prior Texas deferred adjudication for Texas indecency with a child by exposure, which the sentencing court construed as both a "conviction" and relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor.

On August 23, 2019, the district court sentenced Petitioner to 600 months imprisonment, followed by a lifetime of supervised release—the absolute statutory maximum for his crime. It did so with little or no regard for the important fact that Petitioner himself was the victim of serial sexual assault as an adolescent.

Petitioner raised several claims on appeal, most of which were foreclosed by Fifth Circuit precedent. Petitioner now carries those claims to this Court, which involve important issues of statutory interpretation that have frustrated courts for years.

.

REASONS FOR GRANTING THIS PETITION

There are three, independently sufficient reasons why the district court plainly erred when it applied the prior-conviction enhancement under 18 U.S.C. § 2251(e). First, a prior offense that resulted in deferred adjudication is not a "conviction" under either Texas or federal law. Second, even if a conviction, the Texas offense of indecency with a child by exposure does not relate to aggravated sexual abuse, sexual abuse, or abusive sexual contact with a minor in light of this Court's holding in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (5th Cir. 2017). Third, even if a conviction, the Texas offense of indecency with a child by exposure does not relate to aggravated sexual abuse, sexual abuse, or abusive sexual contact with a minor because it is a non-contact offense that does not even require the victim to be aware of the exposure.

As to the sentence, the district court erred when it found no-billed conduct and ignored the extraordinary abuse inflicted on Petitioner as an adolescent to arrive at a statutory maximum sentence.

I. Courts lack guidance on whether to look to state or federal law to determine whether a prior case's resolution is a "conviction." Under either source, a Texas deferred adjudication should not qualify as a "prior conviction" for the purposes of the sentencing enhancement in 18 U.S.C. § 2251(e).

The sentencing enhancement provision in this case applies when the defendant "has one prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor . . . ." 18 U.S.C. § 2251(e). Mr. Bennett contends that his prior Texas deferred adjudication, relied on

by the district court to enhance his sentence, was not a "conviction" for purposes of the § 2251(e) enhancement.

A. Standard of Review

The issue of whether a prior state deferred adjudication is a "prior conviction" for the purposes of a sentencing enhancement is a question of law ordinarily reviewed *de novo*. *See United States v. Mills*, 843 F.3d 210, 213 (5th Cir. 2016). But because the issue was not raised by objection below, review is for plain error. *See United States v. Garza-Lopez*, 410 F.3d 268-72 (5th Cir. 2005). Under plain error review, Mr. Bennett must show (1) error, that is (2) plain, that (3) affected his substantial rights, and that (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Ramos Ceron*, 775 F.3d 222, 225 (5th Cir. 2014).

B. *United States v. Ary*, 892 F.3d 787 (5th Cir. 2018) was wrongly decided when it held that Texas deferred adjudication is a "conviction" under both Texas and federal law.

1. Congress intended federal courts to look to state law when deciding whether a prior offense is a "conviction" under 18 U.S.C. § 2251(e).

Ordinarily, federal courts assume that Congress, when enacting a statute, "does not intend to make its application dependent on state law." *NLRB v. Nat. Gas Utility Dist. of Hawkins Cty.*, 402 U.S. 600, 603 (1971). This assumption, however, is set aside when "a plain indication to the contrary" is present in the text of the statute. *See id.* Here, Congress expressed its intent that federal courts defer to state law when assessing a "conviction" based on its inclusion of the phrase "under the laws of any State," which modifies "conviction." 18 U.S.C. § 2251(e).

The Fifth Circuit, in *Ary*, even acknowledged that this is a legitimate reading of the text of a statute but declined to decide the question in light of its view that Mr. Ary's prior offense would also be construed as a conviction under state law. *Ary*, 892 F.3d at 789-90 (explaining that although the language "suggests that we should consult state law to determine whether a deferred adjudication qualifies as a prior conviction," indecency with a child is counted as a "prior conviction under the [Texas] enhancement scheme for repeat and habitual offenders"). In *Ary*, the Fifth Circuit was wrong to decline to reach the question of which law governs the interpretation because it was incorrect that such a prior offense would have been viewed as a "conviction" in Texas.

2. Contrary to *Ary*'s holding, Mr. Bennett's prior offense falls under the general rule in Texas that a deferred adjudication is not a conviction.

The general rule in Texas is that a deferred adjudication is not a conviction. *United States v. Mondragon-Santiago*, 564 F.3d 357, 368 n.9 (5th Cir. 2009) (citing *Hurley v. State*, 130 S.W.3d 501, 506 (Tex. App.—Dallas 2004, no pet.)) ("Under Texas law, deferred adjudication probation is neither a conviction nor a sentence."). While it is true that Texas Penal Code § 12.42(g) provides an exception that a prior deferred adjudication for indecency with a child *can* be a conviction for purposes of a sentencing enhancement, the exception is expressly limited to Texas cases brought under Texas Penal Code § 12.42(c)(2). Tex. Pen. Code § 12.42(g) ("for purposes of Subsection (c)(2) ..."). Because the Texas legislature specifically limited the deferred-adjudication exception to subsection (c)(2) rather than imposing a global exception,

the general rule applies outside the limited § 12.42(c)(2) context. Thus, a prior deferred adjudication—even for indecency with a child—is not a conviction here because the instant offense is not a Texas offense under subsection § 12.42(c)(2).

3. Even if this Court were to look to federal law, a Texas deferred adjudication is not a conviction.

If this Court were to overlook the plain language of § 2251(e) and instead, as the Eighth Circuit has done in *United States v. Gauld*, apply federal law when determining whether a prior Texas deferred adjudication is a conviction, this Court should still conclude that it is not a conviction. *See generally United States v. Gauld*, 865 F.3d 1030 (8th Cir. 2017) (en banc). The best cases supporting Mr. Bennett's view are *Deal v. United States*, 508 U.S. 129 (1993) and *United States v. Dotson*, 555 F.2d 134 (5th Cir. 1977).

In *Deal*, considering mandatory-minimum sentencing enhancements, the Supreme Court held that "[a] judgment of conviction includes both the adjudication of guilt and the sentence." *Deal*, 508 U.S. at 132. Moreover, the Court observed, "we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction." *Id.* In Texas, deferred adjudication expressly does *not* include an adjudication of guilt:

> . . . the judge may, after receiving a plea of guilty or no contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt and place the defendant on deferred adjudication community supervision.

Tex. Code Crim. Pro. Art. 42A.101(a). Moreover, it does not *necessarily precede* the entry of a final judgment:

> On expiration of a period of deferred adjudication community supervision imposed under this subchapter, if the judge has not proceeded to an adjudication of guilt, the judge shall dismiss the proceedings against the defendant and discharge the defendant.

Tex. Code Crim. Pro. Art. 42A.111(a). Thus, under *Deal*, Texas deferred adjudication cannot be a "conviction" for purposes of federal law. This is also consistent with prior Fifth Circuit precedent. *See United States v. Dotson*, 555 F.2d 134, 135 (5th Cir. 1977) (upholding the district court's dismissal of a false statement on a firearms application where the defendant had received a deferred adjudication); *see also United States v. Garcia*, 917 F.2d 1370, 1375 (5th Cir. 1990) ("Under Texas law, successful probation of a deferred adjudication is not deemed to be a conviction.").

It is undisputed that Mr. Bennett's prior offense never resulted, at the time the sentencing enhancement was applied, in an adjudication of guilt. (ROA.146). Thus, under *Deal* and *Dotson*, the district court should not have treated the prior offense as a conviction if *Ary* was indeed incorrectly decided. Accordingly, the district court erred by treating Mr. Bennett's prior deferred adjudication as a prior conviction for the purposes of applying the sentencing enhancement in 18 U.S.C. § 2251(e).

4. If *Ary* was wrongly decided, the district court's clear and obvious error affected Mr. Bennett's substantial rights.

In order to establish the third prong of plain error review—that the error affected a defendant's substantial rights—the defendant must show a "reasonable probability that, but for the error, the outcome of the proceeding would have been

different." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018). Mr. Bennett can easily make that showing here because his 50-year sentence would have been capped, by law, at 30 years if the statutory enhancement were not applied. *See* 18 U.S.C. § 2251(e); *see also Nelson v. Colorado*, 137 S. Ct. 1249, 1252 (2017).

5. If *Ary* was wrongly decided, this Court should exercise its discretion because the sentencing enhancement seriously affected the fairness of the proceedings.

The district court's clear and obvious error not only affected Mr. Bennett's substantial rights, it also seriously affected the fairness, integrity, and public reputation of the proceedings. Here, the district court imposed the statutory maximum sentence of 50 years. Had the erroneous enhancement not been applied, the statutory maximum would have been 30 years under 18 U.S.C. § 2251(e). Given that the district court's error increased Mr. Bennett's sentence by at least 20 years and given courts' "permissiveness" in construing the fairness prong for sentences exceeding the statutory maximum, this Court should exercise its discretion to vacate Mr. Bennett's sentence and remand for resentencing. *United States v. Williams*, 602 F.3d 313, 319-20 (5th Cir. 2010) ("Given this excess over the statutory maximum and the permissiveness with which the court has construed the fairness prong, we hold that the sentence in this case affects the fairness, integrity, or public reputation of judicial proceedings.").

II. Even if a conviction, the Texas crime of indecency with a child by exposure cannot relate to generic aggravated sexual abuse, sexual abuse, or abusive sexual contact with a minor. This is both because of the broad definition of "child" in Texas and because the Texas offense is a non-contact offense that does not even require that the child be aware of the exposure.

The Texas offense of indecency with a child by exposure does not relate to aggravated sexual abuse, sexual abuse, or abusive sexual contact for two reasons: (1) the Texas age requirement is broader than the generic meaning of "minor"; and (2) the Texas offense is a non-contact offense that does not even require the victim to be aware of the exposure.

A. Standard of Review

The issue of whether a prior conviction triggers an enhancement provision is a question of law ordinarily reviewed *de novo*. *See United States v. Mills*, 843 F.3d 210, 213 (5th Cir. 2016). But because the issue was not raised by objection below, review is for plain error. *See United States v. Garza-Lopez*, 410 F.3d 268-72 (5th Cir. 2005). Under plain error review, Mr. Bennett must show (1) error, that is (2) plain, that (3) affected his substantial rights, and that (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Ramos Ceron*, 775 F.3d 222, 225 (5th Cir. 2014).

B. *United States v. Zavala-Sustaita*, 214 F.3d 601 (5th Cir. 2000) was wrongly decided when it held that Texas indecency with a child is sexual abuse.

In addition to being a "conviction," 18 U.S.C. § 2251(e) only applies if the prior offense relates to, *inter alia*, aggravated sexual abuse, sexual abuse, or abusive sexaul contact involving a minor. 18 U.S.C. § 2251(e). This argument is currently foreclosed

by *United States v. Zavala-Sustaita*, 214 F.3d 601 (5th Cir. 2000) and is made here to preserve it for further review.

In *United States v. Zavala-Sustaita*, the Fifth Circuit held that a prior Texas conviction for indecency with a child is sexual abuse of a minor. 214 F.3d 601, 607 (5th Cir. 2000). In reaching its conclusion, the Fifth Circuit considered the "clear language" of the federal definition of aggravated felony, the "nature" of the state offense, and "the lack of authority supporting a contrary view." *Id.* at 607. Although it has yet to be recognized by the Fifth Circuit, Mr. Bennett contends that *Zavala-Sustaita* was overruled, at least in part, by the Supreme Court's decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (5th Cir. 2017). Moreover, Mr. Bennett contends that *Esquivel-Quintana*'s impact is felt in 18 U.S.C. § 2251(e).

1. There was error.

In *United States v. Wikkerink*, the Fifth Circuit applied the categorical approach when evaluating whether a prior conviction in Louisiana for aggravated incest was a qualifying "prior conviction" under 18 U.S.C. § 2252A(b)(1) or a "sex offense conviction" under U.S. Sentencing Guidelines Manual § 4B1.5(a). 841 F.3d 327, 331-32 (5th Cir. 2016). Because the statute did not define "sexual abuse," the court looked to the generic form of the offense, asking whether the prior conviction was too broad to support the enhancement. *Id.* at 332. As the generic offense, the Fifth Circuit adopted its definition of "sexual abuse" from Black's Law Dictionary: "an illegal or wrongful sex act, esp. one performed against a minor by an adult." *Id.* at 332-33. Under this analysis, which courts have likewise applied to 18 U.S.C.

§ 2251(e), the central question becomes whether the Texas indecency with a child statute criminalizes a broader swath of conduct than the generic definition allows. *See Descamps v. United States*, 570 U.S. 254, 258 (2013). It does.

Texas defines indecency with a child as follows:

> A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, the person:
>
> (1) engages in sexual contact with the child or causes the child to engage in sexual contact; or
>
> (2) with intent to arouse or gratify the sexual desire of any person:
>
> (A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or
>
> (B) causes the child to expose the child's anus or any part of the child's genitals.

Tex. Pen. Code § 21.11(a). When applying the categorical approach, courts look to the statute's minimum culpable conduct when comparing it to the generic form of the offense. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (5th Cir. 2017) ("[W]e presume that the state conviction rested upon the least of the acts criminalized by the statute, and then we determine whether the conduct would fall within the federal definition of the crime." (internal quotations omitted)); *see also United States v. Johnson*, 681 F. App'x 735, 739 (11th Cir. 2017) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013). Here, the Texas offense is entirely age-specific: it does not require a lack of consent or the use of force, only that the victim be younger than

seventeen-years-old. Tex. Penal Code § 21.11(a). Thus, the minimum culpable conduct, under the Texas offense, is indecency by exposure with a sixteen-year-old. This sweeps more broadly than generic sexual abuse because age-specific sexual abuse must be against a victim younger than sixteen.

In *Esquivel-Quintana*, this Court considered the generic meaning of "minor" for purposes of "sexual abuse of a minor" in the INA, concluding that "for a statutory rape offense to qualify as sexual abuse of a minor under the INA based solely on the age of the participants, the victim must be younger than 16." 137 S. Ct. 1562, 1570 (2017). In doing so, the Court reversed a lower court ruling that a California statutory rape conviction was "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43) and thus an aggravated felony under the INA. *Id.* at 1572-73.

In *Shroff v. Sessions*, the Fifth Circuit recognized that *Esquivel-Quintana*'s definition of generic sexual abuse of a minor extends beyond the narrow context of statutory rape to other offenses such as online solicitation of a minor. 890 F.3d 542, 545 (5th Cir. 2018). While the Fifth Circuit noted that "*Esquivel-Quintana* did not rule broadly on the generic definition of sexual abuse of a minor," its holding does extend to offenses that "similarly criminalize[] conduct based solely on the age of the participants." *See* 890 F.3d at 545. The Texas crime of indecency with a child—like statutory rape and online solicitation—is such an offense because its criminality entirely depends on the age of the victim. Tex. Pen. Code § 21.11(a). Because the Texas offense applies when the victim is sixteen and generic sexual abuse does not, a prior conviction for Texas indecency with a child cannot relate to sexual abuse.

This is true even though the phrase "of a minor" only modifies "sexual contact," not "sexual abuse." *See generally Lockhart v. United States*, 136 S. Ct. 968 (2016). Unlike the prior conviction in *Lockhart*, which could be committed against a person of any age, Texas indecency with a child cannot be committed against an adult because it lacks a consent or force component. At first blush, this would appear to make the Texas statute narrower than the generic offense and, in some ways, it is. But upon closer examination, it is also broader in that the conduct prohibited by Texas Penal Code § 21.11, even if consensual and without force, is always illegal under Texas law if against a sixteen-year-old and is not always illegal under the generic version of sexual abuse.

2. The error was plain.

Even the Fifth Circuit has sensed that there may be tension with these cases and the Supreme Court's decision in *Esquivel-Quintana*. *See United States v. Stinnett*, 707 F. App'x 821, 822 n.1 (5th Cir. 2018) (unpub.) ("The parties do not raise and therefore we express no opinion on the effect, if any, of *Esquivel-Quintana* [] on our prior holdings."). In *Shroff*, the court observed that *Esquivel-Quintana* indeed "establish[ed] an age requirement that renders [online solicitation with a minor] overbroad." *Shroff*, 890 F.3d at 545. Mr. Bennett contends that the error described above is plain because *Esquivel-Quintana* and *Shroff* have overruled prior cases which have held that indecency with a child by exposure is sexual abuse.

3. The error affects Mr. Bennett's substantial rights.

In order to establish the third prong of plain error review—that the error affected a defendant's substantial rights—the defendant must show a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018). Mr. Bennett can easily make that showing here because his 50-year sentence would have been capped, by law, at 30 years if the statutory enhancement were not applied. *See* 18 U.S.C. § 2251(e).

4. This Court should exercise its discretion because the district court's error seriously affected the fairness, integrity, or public reputation of the proceedings.

The district court's clear and obvious error not only affected Mr. Bennett's substantial rights, it also seriously affected the fairness, integrity, and public reputation of the proceedings. Here, the district court imposed the statutory maximum sentence of 50 years. Had the erroneous enhancement not been applied, the statutory maximum would have been 30 years under 18 U.S.C. § 2251(e). Given that the district court's error increased Mr. Bennett's sentence by at least 20 years and given courts' "permissiveness" in construing the fairness prong for sentencing exceeding the statutory maximum, this Court should exercise its discretion to vacate Mr. Bennett's sentence and remand for resentencing. *United States v. Williams*, 602 F.3d 313, 319-20 (5th Cir. 2010) ("Given this excess over the statutory maximum and the permissiveness with which the court has construed the fairness prong, we hold

that the sentence in this case affects the fairness, integrity, or public reputation of judicial proceedings.").

C. A prior Texas conviction for indecency with a child by exposure cannot relate to aggravated sexual abuse, sexual abuse, or abusive sexual contact of a minor because it is a non-contact offense and the child need not even be aware of the exposure. [foreclosed by *Contreras v. Holder*, 754 F.3d 286 (5th Cir. 2014)]

1. The district court's error was plain and obvious.

In *Contreras v. Holder*, the Fifth Circuit adopted its earlier definition of "sexual abuse" from *Zavala-Sustaita*—"an illegal or wrongful sex act, esp. one performed against a minor by an adult"—and further held that "a sexual act does not require physical contact with a minor to be abusive, since psychological harm may occur even without such contact and can be equally abusive." 754 F.3d 216, 294 (5th Cir. 2014). Here, Mr. Bennett asserts that *Contreras v. Holder* was wrongly decided because indecency with a child, in its minimally culpable form, is a non-contact offense and non-contact offenses do not relate to generic sexual abuse.

Under the categorical approach, the minimum culpable conduct is a non-contact offense with a sixteen-year-old, described in § 21.11(2)(A): "exposes the person's [i.e. offender's] anus or any part of the person's [i.e. offender's] genitals, knowing the child is present." *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (5th Cir. 2017) ("[W]e presume that the state conviction rested upon the least of the acts criminalized by the statute, and then we determine whether the conduct would fall within the federal definition of the crime." (internal quotations omitted)).

This non-contact offense is broader than the generic definition of sexual abuse because it lacks an act "against" a minor.

This must be true because the Texas offense does not even require that the minor be aware of the offender's exposure. *Harris v. State*, 359 S.W.3d 625, 631 (Tex. Crim. App. 2011) ("The child need only be 'present' for the offense to be effectuated; the child does not even have to be aware of the exposure."); *Uribe v. State*, 7 S.W.3d 294, 297 (Tex. App.—Austin 1999, pet. ref'd) ("Requiring the State to prove that the victim saw the accused's exposed genitals or understood the nature of the victimization would undermine the purpose of the statute and, in addition, afford less protection to certain children, such as those who are very young, blind, or severely mentally challenged."). Thus, it is entirely possible to commit the Texas crime of indecency with a child by exposure without inflicting any physical *or psychological* harm on the minor victim. And because Texas defines and prosecutes its crimes so broadly, this minimum culpable conduct is not sexual abuse, much less aggravated sexual abuse or abusive sexual contact. *See* 18 U.S.C. § 2251(e).

2. If *Contreras* was wrongly decided, the district court's clear and obvious error affected Mr. Bennett's substantial rights.

In order to establish the third prong of plain error review—that the error affected a defendant's substantial rights—the defendant must show a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018). Mr. Bennett can easily make that showing here because his 50-year sentence would have

been capped, by law, at 30 years if the statutory enhancement were not applied. *See* 18 U.S.C. § 2251(e).

3. If *Contreras* was wrongly decided, this Court should exercise its discretion because the sentencing enhancement seriously affected the fairness of the proceedings.

The district court's clear and obvious error not only affected Mr. Bennett's substantial rights, it also seriously affected the fairness, integrity, and public reputation of the proceedings. Here, the district court imposed the statutory maximum sentence of 50 years. Had the erroneous enhancement not been applied, the statutory maximum would have been 30 years under 18 U.S.C. § 2251(e). Given that the district court's error increased Mr. Bennett's sentence by at least 20 years and given courts' "permissiveness" in construing the fairness prong for sentences exceeding the statutory maximum, this Court should exercise its discretion to vacate Mr. Bennett's sentence and remand for resentencing. *United States v. Williams*, 602 F.3d 313, 319-20 (5th Cir. 2010) ("Given this excess over the statutory maximum and the permissiveness with which the court has construed the fairness prong, we hold that the sentence in this case affects the fairness, integrity, or public reputation of judicial proceedings.").

III. The district court had an inadequate factual basis to conclude that Mr. Bennett committed two offenses for which he had been no-billed.

At sentencing, the district court found, by a preponderance of the evidence, that conduct described in paragraph 45 of the PSR occurred even though the alleged conduct resulted in two "no bills" before a state grand jury. The district

court then took the no-billed conduct into account when sentencing Mr. Bennett to the statutory maximum. Mr. Bennett asserts that no-billed allegations lack indicia of reliability, contrary to the Fifth Circuit's holding in *United States v. Fields*, 932 F.3d 315 (5th Cir. 2019).

A. Standard of Review

Because the issue was not raised by objection below, review is for plain error. *See United States v. Garza-Lopez*, 410 F.3d 268-72 (5th Cir. 2005). Under plain error review, Mr. Bennett must show (1) error, that is (2) plain, that (3) affected his substantial rights, and that (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Ramos Ceron*, 775 F.3d 222, 225 (5th Cir. 2014).

B. Discussion

1. The error was plain.

In the federal system, factual findings supporting an increased sentence must be made by at least the preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 156 (1997) (*per curiam*); *United States v. Johnson*, 648 F.3d 273, 277 (5th Cir. 2011); USSG § 6A1.3(a). At least two authorities require that sentencing determinations be supported by information bearing reasonable indicia of reliability: the due process clause and USSG §6A1.3. *See Johnson*, 648 F.3d at 277 (cautioning that "without sufficient indicia of reliability, a court may not factor in prior arrests when imposing a sentence. This comports with the due process requirement that sentencing facts must be established by a preponderance

of the evidence.") (citing *Watts*, 519 U.S. at 156; USSG § 6A1.3(a) (requiring that information considered by the court in sentencing "ha[ve] sufficient indicia of reliability to support its probable accuracy.")). Factual findings pertaining the defendant's prior criminal conduct, like findings about the instant offense or relevant conduct, must also be based on reasonably reliable information. *See Harris*, 702 F.3d at 231 ("If the factual recitation [about an unadjudicated arrest] lacks sufficient indicia of reliability, then it is error for the district court to consider it at sentencing—regardless of whether the defendant objects or offers rebuttal evidence.").

Some information never carries such indicia. A "bare arrest record," for example, does not provide an adequately reliable basis for the court to determine the defendant's conduct by a preponderance of the evidence. The unsworn declarations of attorneys are likewise insufficiently reliable. *See United States v. Johnson*, 823 F.2d 840, 842 (5th Cir. 1992). Nor are a Probation Officer's conclusory statements an adequately reliable basis for factual findings. *See United States v. Dabeit*, 231 F.3d 979, 983 (5th Cir. 2000) ("The PSR . . . cannot just include statements, in hope of converting such statements into reliable evidence, without providing any information for the basis of the statements."); *United States v. Elwood*, 999 F.2d 814, 817-18 (5th Cir. 1993) ("Bald, conclusionary statements do not acquire the patina of reliability by mere inclusion in the PSR."); *Harris*, 702 F.3d at 230 (cautioning "that mere inclusion in the PSR does not convert facts

lacking an adequate evidentiary basis with sufficient indicia of reliability into facts a district court may rely upon at sentencing.").

"Generally, a PSR 'bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.'" *Harris*, 702 F.3d at 230 (*United States v. Nava*, 624 F.3d 226, 231 (5th Cir. 2010) (quoting *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007)). "A district court, therefore, 'may adopt the facts contained in a [PSR] without further inquiry *if those facts have an adequate evidentiary basis with sufficient indicia of reliability* and the defendant does not present rebuttal evidence *or otherwise demonstrate that the information in the PSR is unreliable.*'" *Id.* (quoting *Trujillo*, 502 F.3d at 357 (internal citations omitted by *Harris*)) (emphasis added).

Here, the PSR recited the information found in a CPS report regarding alleged prior abuse. But after this information had been collected by law enforcement, the grand jury "no-billed" the defendant. For that reason, the PSR lacked "an adequate evidentiary basis" to conclude by a preponderance of the evidence that the defendant had undertaken this conduct. Alternatively, the no-bill "otherwise demonstrate(d) that the information in the PSR [wa]s unreliable."

A no-bill is a judicial finding that the defendant *likely did not* commit the acts of which he was accused. Under Texas law, "[a] grand jury is to return a true bill when it determines that there is probable cause to believe that the accused committed the offense." *Harris County DA's Office v. R.R.R.*, 928 S.W.2d 260, 264 (Tex. App.—Houston [1st Dist.] 1996)(citing *Lloyd v. State*, 665 S.W.2d 472, 475

(Tex. Crim. App. [Panel Op.] 1984); *Ex parte Cain*, 592 S.W.2d 359, 362 (Tex. Crim. App. 1980) (*en banc*) (op. on reh'g). It follows that a "grand jury's refusal to indict strongly suggests that probable cause was missing" upon presentation of all the available evidence. *R.R.R.* 928 S.W.2d at 264. Here, the district court relied on no evidence that surfaced after the grand jury proceedings. And there is no reason to believe that the incident report (and the information discussed therein) was unavailable to the grand jury.

Probable cause is an exceedingly light standard of proof. Certainly, it falls well below the reasonable doubt standard. *Lloyd*, 665 S.W.2d at 475 ("The grand jury determines probable cause not guilt beyond a reasonable doubt."). Indeed, and perhaps most critically for our purposes, under Texas law "probable cause requires more than mere suspicion but *far less evidence than* that needed to support a conviction or even that needed to support a finding by *a preponderance of the evidence*." *Hughes v. State*, 24 S.W.3d 833, 838 (Tex. Crim. App. 2000); *accord Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997).

The process by which indictment is obtained, moreover, offers enormous advantages to the State. "The grand jury is not limited to evidence which would be admissible at trial when it determines whether to present an indictment." *Ex parte Thomas*, 956 S.W.2d 782, 786 (Tex. App.—Waco 1997) (citing *In re P.A.C.*, 562 S.W.2d 913, 916 (Tex. Civ. App.—Amarillo 1978); *In re D.W.M.*, 556 S.W.2d 390, 392 (Tex. Civ. App.—Waco 1977), *rev'd on other grounds*, 562 S.W.2d 851 (Tex. 1978)). Accordingly, it may rely on hearsay recitations of a complaining

witness's account. *See Lloyd, 665 S.W.2d* at 475. ("Once again we note that a grand jury determines probable cause; the appearance of the complaining witness before the grand jury is not by any means always necessary."). Further, the defendant has no right to testify, and no right to be heard through counsel. *See Moczygemba v. State*, 532 S.W.2d 636, 638 (Tex. Crim. App. 1976). And the prosecutor is not required to present exculpatory evidence. *Gallegos v. State*, 2006 Tex. App. LEXIS 9988, *11 (Tex. App.—El Paso 2006) ("...the State has no duty to present exculpatory evidence to a grand jury.") (citing *United States v. Williams*, 504 U.S. 36, 51 (1992); *In re Grand Jury Proceedings*, 129 S.W.3d 140, 143-44 (Tex. App.—San Antonio 2003, writ denied); *Matney v. State*, 99 S.W.3d 626, 629 (Tex. App.—Houston [1st Dist.] 2002, no pet.)). It follows that if the grand jury issues a "no bill"—in spite of all the light standard of proof, and the State's advantages in that forum—there is likely a grave problem with the State's proof.

The use of a no-billed offense to increase the defendant's sentence could be compared to two other kinds of offenses: (1) those that generate acquittals; and (2) those that a prosecutor simply declines to pursue. The Supreme Court has authorized the use of acquitted conduct in connection with the defendant's sentence. *See Watts*, 519 U.S. at 156. It reasoned that "an acquittal in a criminal case does not preclude the Government from re-litigating an issue when it is presented in a subsequent action *governed by a lower standard of proof*." *Watts*, 519 U.S. at 156 (quoting *Dowling v. United States*, 493 U.S. 342, 349 (1990)) (emphasis added). And the Fifth Circuit has found—in an unpublished case—that

an acquittal does not demonstrate the unreliability of the State's allegations. *See United States v. Marroquin-Salazar*, 595 F. App'x 430, 431 (5th Cir. 2015) (unpub.).

But a no-billed charge is entirely different. The standard of proof employed in a federal sentencing is not lower, but rather higher, than the standard employed in a Texas grand jury proceeding. *See Hughes*, 24 S.W.3d at 838 ("probable cause requires more than mere suspicion but far less evidence than that needed to support a conviction or even that needed to support a finding by a preponderance of the evidence."); *compare Watts*, 519 U.S. at 156 ("[t]he Guidelines state that it is 'appropriate' that facts relevant to sentencing be proved by a preponderance of the evidence.") (quoting USSG §6A1.3). Accordingly, a federal court's finding that the defendant committed a no-billed offense is directly contrary to that of a prior grand jury. The same is not true when a federal court uses acquitted conduct in sentencing.

The use of a no-billed offense is likewise quite different from one that is simply never pursued by the district attorney. An uncharged offense may be used in support of an above-range sentence. *See* USSG §4A1.3(a)(2)(E). But a prosecutor deciding whether to bring charges may be motivated by many factors other than the strength of the evidence. She may decide that the office's resources are better spent on different crimes, that the defendant is little risk to the public, or that the case is simply hard to prove. No legal process compels charges when the district attorney believes that probable cause is present. By contrast, a Texas

grand jury is obliged to indict upon presentation of probable cause. *See R.R.R.*, 928 S.W.2d at 264 ("[a] grand jury is to return a true bill when it determines that there is probable cause to believe that the accused committed the offense."). It is a judicial proceeding whose results are entitled to weight, not an exercise of executive discretion. Thus, no-billed conduct should not be considered in a federal sentencing hearing.

2. The error affected Mr. Bennett's substantial rights.

In order to establish the third prong of plain error review—that the error affected a defendant's substantial rights—the defendant must show a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018). It goes without explanation that the allegations described in paragraph 45 of the PSR are very serious. (ROA.147). Given the seriousness of the accusation, there is no reason to believe that the defendant's statutory-maximum sentence would have been exactly the same had the district court excluded the alleged conduct.

3. This Court should exercise its discretion because the sentencing enhancement seriously affected the fairness of the proceedings.

The district court's clear and obvious error not only affected Mr. Bennett's substantial rights, it also seriously affected the fairness, integrity, and public reputation of the proceedings. Here, the district court imposed the statutory maximum sentence of 50 years. Had the district court not found the conduct described in paragraph 45 of the PSR, such a lengthy sentence would not, in fairness, be

appropriate. This Court should exercise its discretion to vacate Mr. Bennett's sentence and remand for resentencing.

IV. The district court's sentence was substantively unreasonable because it imposed a 50-year statutory maximum sentence without adequate consideration of Mr. Bennett's history and characteristics.

A. Standard of Review

Courts review claims of substantive unreasonableness under an abuse of discretion standard. *United States v. Dominguez-Alvarado*, 695 F.3d 324, 327 (5th Cir. 2012). Here, counsel for Mr. Bennett properly preserved this claim by making a timely objection when the district court imposed its sentence. (ROA.125).

B. Discussion

Within-Guidelines sentences, unlike non-Guidelines sentences, are entitled to a presumption of reasonableness. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 360-361 (5th Cir. 2009). That presumption, however, is rebuttable. *See United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006). To determine the reasonableness of a sentence, courts examine whether the sentence failed to "account for a factor that should have received significant weight," gave "significant weight to an irrelevant or improper factor," or represented "a clear error of judgment in balancing the sentencing factors." *United States v. Nikonova*, 480 F.3d 371, 376 (5th Cir. 2007). In the present case, the sentence represents a failure to accord significant weight to Mr. Bennett's history and characteristics.

The district court was clearly concerned with the seriousness of the allegations against Mr. Bennett: "You're one of the most dangerous I've run into from the

standpoint of dealing with youngsters, and I hope that never happens again, and I'm going to impose a sentence that I hope will prevent it from happening again ...." (ROA.117). In its concern, however, the district court lost sight of the extraordinary abuses that Mr. Bennett suffered as a child at the hands of his church pastor, as described in the PSR:

> The defendant spent a large amount of time at Oak Hills Community Church in Argyle, Texas. In 1996, the church hired a new pastor, Jon Gerrit Warnshuis (Warnshuis). The defendant reported Warnshuis spent one year "grooming" him, and in 1996 he sexually molested the defendant for the first time. He reported the abuse began as "innocent touching" and progressed to mutual sodomy and oral sex. From age 13 to 18, the defendant engaged in a sexual relationship with Warnshuis. The defendant felt Warnshuis "singled" him out due to his social isolation and lack of social skills. He noted Warnshuis also mentally and verbally abused him on a regular basis. In 2001, the defendant reported Warnshuis to the pastor of the church who reported the abuse to law enforcement. The defendant later learned several of his friends were also sexually abused by Warnshuis. Warnshuis was convicted of the sexual abuse of the defendant and other boys.
>
> Texas Department of Criminal Justice records verified in 2001, Warnshuis was convicted of multiple counts of Indecency With a Child, Sexual Abuse of a Minor, and Aggravated Sexual Abuse of a Minor involving multiple underage boys. He is currently incarcerated and scheduled for release on November 11, 2041.

(ROA.149). Additionally, at his guilty plea hearing, Mr. Bennett described how these events had caused him to suffer from posttraumatic stress disorder, or PTSD. (ROA.81-82). This was also noted by U.S. Probation in the PSR. (ROA.151) ("[T]he defendant was sexually abused from ages 13 to 18 by a pastor at his church. He reported he suffered from depression and post-traumatic stress disorder as a result

of the abuse."). These events are not described here to excuse Mr. Bennett's conduct, but they do provide important contextual insights that § 3553(a) requires courts to consider at sentencing in order to arrive at a sentence that is "sufficient, but not greater than necessary" to achieve the statutory sentencing purposes. 18 U.S.C. § 3553(a).[1]

Yet the district court made no reference to any of these events at sentencing. (*See* ROA.104-28). The district court never mentioned or addressed the defendant's background, and the statutory maximum sentence of 50 years suggests that it received effectively no weight. (*See* ROA.104-28). Moreover, the district court referred to Mr. Bennett's "convictions," in the plural, when Mr. Bennett had, at most, one prior conviction.[2] Thus, because the district court gave undue weight to a single characteristic—Mr. Bennett's prior alleged conduct—the sentence should be reversed as substantively unreasonable.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender

---

[1] Mr. Bennett notes that the PSR describes him as having "engaged in a sexual relationship" with his pastor when Mr. Bennett was an adolescent. A more apt description would be that his pastor "raped" or "sexually assaulted" him during this time period.

[2] Although foreclosed, as described above, Mr. Bennett maintains that his prior deferred adjudication probation is not a "conviction" under Texas or federal law.

Northern District of Texas

Brandon Beck

Brandon Beck
Assistant Federal Public Defender
Federal Public Defender's Office
1205 Texas Ave. #507
Lubbock, TX 79424
Telephone: (806) 472-7236
E-mail: brandon_beck@fd.org

Attorney for Petitioner