IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

_____

No. _____

JOHN G. STROMING,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

_____

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

_____

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March 15, 2021

QUESTION PRESENTED

Whether prior convictions for crimes of child molestation can be admitted into evidence where – because of differences in the age and gender of the victims – they do not show propensity to commit the particular crime charged.

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TABLE OF AUTHORITIES

Petitioner, John G. Stroming, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit Court of Appeals entered in this proceeding on January 22, 2021.

OPINION BELOW

The decision of the Second Circuit, United States v. Stroming, ___ Fed. Appx. ___, 2021 WL 222124 (2d Cir. 2021), appears in the Appendix hereto.

JURISDICTION

The judgment of the Second Circuit was entered on January 22, 2021. This petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

RULES INVOLVED

Fed. R. Evid. 403:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 414(a):

> In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

STATEMENT OF THE CASE

Petitioner John G. Stroming [hereinafter "Stroming"] was charged by superseding indictment with sexual exploitation of a child, in violation of 18 U.S.C. §2251; felony offense involving a minor by a registered sex offender, in violation of 18 U.S.C. §2260A; and possession of child pornography, in violation of 18 U.S.C. §2252. The government moved in limine for admission of evidence of Stroming's prior convictions for crimes involving child molestation and the defense moved, in limine, for exclusion of this evidence. The court ruled that the evidence could come in.

This, in fact, was the very first evidence the government introduced at trial, before any testimony by witnesses. It introduced certified copies of Stroming's prior convictions for child molestation crimes – a 1999 conviction for possession of child pornography, and 2011 convictions for second degree rape and criminal sexual act. The court then instructed the jury what the elements of those crimes were under New York State law.

The other evidence at trial was that, in 2008, Stroming was living with his friend, the friend's daughter, and the friend's 19-month-old grandson. Stroming slept in the living room on a blue couch with an afghan. The daughter was troubled when she would come out of her room in the morning

to find Stroming with her son on the couch. She ultimately moved her son out of his separate room into her room. She never noticed any redness or marks on her son's buttocks or rectum, and her son did not appear to be in any distress. Stroming eventually moved out of that home.

In 2010, Stroming's niece – who knew the friend's daughter – watched a video cassette she purportedly found in his room and took it, along with a handheld camcorder she also found, to the police. The video showed, among other things, a man rubbing his penis on a toddler's buttocks and what appeared to be semen on the toddler's back. The niece recognized the blue couch in the video as the one in her friend's home, and recognized the toddler as her friend's son. The video also contained images of preteens and younger teens walking down the street in bathing suits, and clips of children engaged in sexual acts. The police copied that video onto a DVD and the original was destroyed.

The man's penis in the video bore a dark birthmark or mole. Stroming had such a mark on his penis, which the police photographed in 2017. The toddler's mother and his grandfather both identified the child in the video, as well as the blue couch and an afghan placed over it. The grandfather also testified to having seen the mark on Stroming's penis,

although he vacillated about whether he had mentioned this fact to anyone before the trial.

Stroming told the police that he was the man in the video. He said he shot the video with a small handheld camcorder at his friend's home. He denied that the child in the video was his friend's grandson, asserting that it was a little girl, not a little boy, because he wasn't homosexual. Stroming also made these statements in a letter to his friend.

At the conclusion of the two day trial, the jury convicted Stroming as charged. Stroming's motions for a judgment of acquittal under Fed. R. Crim. P. 29(a), and for a new trial pursuant to Fed. R. Crim. P. 33 (based in part on the admission of the prior convictions) were denied. The court imposed a total sentence of 35 years – 25 years (the mandatory minimum) on the sexual exploitation of a child count, to be followed by a consecutive ten year sentence (the mandatory minimum) on the felony offense by a registered sex offender charge, and a ten year concurrent sentence on the possession of child pornography charge. Stroming currently is serving a state sentence, and accordingly will not begin serving the 35 year federal sentence until 2027, when he is 68 years old. The Second Circuit affirmed the judgment of the district court by Summary Order.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal law that has not been, but should be, settled by this Court.

Prior convictions for crimes of child molestation cannot be admitted into evidence where – because of differences in the age and gender of the victims – they do not show propensity to commit the particular crime charged.

Fed. R. Evid. 414(a) provides:

> In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

While evidence that tends to show that a defendant has a propensity to commit crimes ordinarily is excluded, Rule 414 makes an exception where past acts of child molestation are introduced in a child molestation case. However, the court still must find that the evidence is relevant, and that, pursuant to Rule 403, its probative value is not substantially outweighed by a danger of unfair prejudice.

The government moved in limine to allow the admission into evidence of certified copies of Stroming's prior convictions for possessing an obscene sexual performance by a child (1999), and rape in the second degree and criminal sexual act in the second degree (2011). The defense moved in limine to exclude this evidence.

The court allowed the government to introduce this evidence. The court found that the three convictions were all "child molestation" cases. It concluded that the evidence was probative of Stroming's "propensity to commit the charged crimes," and was not unfairly prejudicial. It reasoned that the priors were not remote enough to cast doubt on their relevance, and were not "any worse than the charged conduct so as to inflame the jury." The convictions, the court found, were "consistent with a sexual interest in children and propensity to molest them."

In allowing the introduction of this evidence, the court abused its discretion. Although under Rule 414 evidence of other instances of child molestation is admissible to show a propensity to commit child molestation crimes, the court must nonetheless still determine whether its probative value is substantially outweighed by the danger of unfair prejudice. Rule 414 "does not require the district courts to evaluate such evidence with a 'thumb on the scale in favor of admissibility.'" United States v. Spoor, 904 F.3d 141, 154 (2d Cir. 2018), *cert. denied*, 139 S.Ct. 931 (2019), *quoting* Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 155-56 (3d Cir. 2002).

The other convictions here were not probative of Stroming's propensity to commit the charged crimes. Although the court found that the

other convictions were relevant because they showed "a sexual interest in children," this is necessarily always true whenever Rule 414 comes into play. The question should be, what did these acts have in common with the charged conduct, and the answer here is not much, other than the fact that all of the conduct, proven and alleged, was appalling.

In determining the probative value of prior act evidence, courts should consider factors such as the similarity of the acts, the closeness in time, the frequency of the prior acts, whether there were intervening circumstances, and whether the prior act evidence was necessary "beyond the testimonies already offered at trial." Spoor, 904 F.3d at 154 (citation omitted). Using this rubric, it is clear that Stroming's prior convictions were not probative of his propensity to molest a toddler nor to produce pornography by filming himself.

Stroming's 2011 convictions for rape and criminal sexual act involved a teenaged girl. The charges in the instant case involved sexual acts with a 19-month old boy. While both situations involve children, that is the sum total of the similarities between them. Indeed, it does not appear that there is a single case from any jurisdiction where a prior act of molestation perpetrated on a child of a different gender was held probative of propensity.

Nor does there appear to be any support for the proposition that an act of molestation perpetrated on a teenager is probative to show propensity to molest a toddler. The Second Circuit's conclusion – that the objections to this propensity evidence amounted to "hairsplitting," Slip. Op. at 3 – failed to address the profound differences between the prior and charged offenses.

In other cases where evidence of other child molestation has been found to meet the Rule 403 standard for admissibility, there have been much more marked similarities. For example, in United States v. Schaffer, 851 F.3d 166 (2d Cir.), *cert. denied*, 138 S.Ct. 469 (2017), the past conduct showed "a pattern of illegal conduct that involved having minor girls visit him alone and try on swimsuits as a precursor to sexual assault." Id. at 182. The fact that the defendant's prior victims were nine- and 13-year-old girls made it more likely, not less, that he would have a sexual interest in the 15-year-old girl victim. Id. at 183.

Similarly, in United States v. Larson, 112 F.3d 600 (2d Cir. 1997), the defendant was charged with transporting a minor with the intent to engage in criminal sexual conduct. The defendant abused the victim from the time the victim was 13 years old until he was 15 years old, taking the boy to his cabin, enticing him with the prospect of water-skiing and swimming, plying

him with liquor, and then sexually abusing the boy. Evidence that the defendant had abused another boy, from age 12 to 16, was admissible to show propensity. The Court emphasized that the prior acts "closely paralleled the events complained of by [the victim], taking place in the same geographic locations, with [the defendant] using the same enticements for both boys, plying both with alcohol, and engaging both in similar progressions of sexual acts." Id. at 605.

The Spoor Court held that evidence that the defendant had relatively recently abused boys similar in age to the boys in the pornographic videos at issue was relevant to show his attraction to boys and his motive to make pornography. It also connected him to the child pornography found on his hard drives, which he had denied were his, and relevant as well to show that the videos were intended to elicit a sexual response in the viewer, another fact he denied. Spoor, 904 F.3d at 155. Notably, in Spoor, the government also had sought to introduce evidence that the defendant had sexually abused two girls in the past, but the district court excluded that evidence because "the risk of undue prejudice from this evidence outweighed its marginal probative value."

In United States v. Vickers, 708 Fed. Appx. 732 (2d Cir. 2017), *cert. denied*, 138 S.Ct. 1342 (2018), the other crimes evidence showed defendant's pattern of luring adolescent boys from broken homes into trusting relationships, and then sexually abusing them. And in United States v. Davis, 624 F.3d 508 (2d Cir. 2010), the defendant was charged with, inter alia, sexual exploitation of his four-year-old stepdaughter. His prior convictions for sexual assault of his 12-year-old daughter and his eight-year-old niece were admissible because probative of his propensity for victimizing young female relatives.

What is clear from the case law is that "the prior offenses must be similar enough to the charged offense to be probative of the defendant's propensity to commit that specific offense." United States v. Luger, 837 F.3d 870, 874 (8th Cir. 2016). Stroming's convictions for sexually assaulting a teenaged girl are not probative of his propensity to assault a male toddler. And his conviction, some nine years prior to the acts alleged here, for possessing child pornography does not make it more likely that he would film himself sexually assaulting a toddler.

The unfair prejudice from the introduction of this evidence cannot be overstated. 'Unfair prejudice' in this context means "an undue tendency to

suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Old Chief v. United States, 519 U.S. 172, 180 (1997)(citation omitted). Hearing – the very first thing at trial – that Stroming had done very bad things to children before necessarily made it more likely that the jury immediately and irrevocably would take against him.

Over the objection of the defense, the court then read the elements of those crimes to the jury:

> Okay, members of the jury, I'm going to read to you in regard to Exhibit 1, a copy of a 1999 possession of obscene performance, that is Exhibit 1, New York State Penal Law, Section 263.11 provides: A person is guilty of possessing an obscene sexual performance by a child when, knowing the character and content thereof, he knowingly has in his possession or control, any obscene performance which includes sexual conduct by a child less than 16 years of age.
>
> Exhibit 8, New York State Penal Law Section 130.300 -- 130.30(1) provides: A person is guilty of rape in the second degree when, being 18 years old or more, he or she engages in sexual intercourse with another person less than 15 years old.
>
> * * *
>
> In connection with the Government's Exhibit 8 which I just talked about, New York Penal Law Section 130.45(1) provides: A person is guilty of a criminal sexual act in the second degree when, being 18 years old or more, he engages in oral sexual conduct or anal sexual conduct with another person less than 15 years of age.

The court did not give any contemporaneous limiting instruction. Cf. Schaffer, 851 F.3d at 183-84 ("In fact, the district court's cautionary instructions to the jury, which it gave both at the time the government introduced the videos and immediately prior to the commencement of deliberations, further reduced the risk of unfair prejudice.")

So before the jury heard one iota of testimony from any witness, it was told that Stroming had possessed an obscene sexual performance by a child, had had sexual intercourse with a child, and had engaged in oral or anal sex with a child. That the child was a girl, and that she was a teenager, while not making those prior convictions any less stomach-turning, were not told to the jury.

Indeed, in its charge to the jury at the close of the case, the court stated that there was "evidence received during the trial that the defendant engaged in other conduct which was similar in nature to the acts charged in the indictment." The court continued:

> In a criminal case in which the defendant is accused of sexual exploitation of a minor and possession of child pornography as alleged in Counts 1 and 3 of the indictment, evidence of the defendant's commission of other – another offense of a similar nature is admissible and may be considered for its bearing on whether the defendant committed the offenses for which he is charged in this indictment.

Although the court charged that "evidence of another offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the indictment," and that "the defendant is not on trial for any act, conduct, or offense not charged in this indictment," this could not undo the unfair prejudice that resulted from admitting these convictions and from telling the jury that these were for conduct "similar in nature" to the pending charges.

The government put particular emphasis on Stroming's prior convictions in its closing argument:

> The defendant had the sexual interest in children necessary to commit this crime. You heard he was convicted of possessing child pornography in 1999, and convicted of rape in the second degree and criminal sex act in the second degree in 2011. Ms. Sullivan, can you please pull up Government's Exhibit 1. Government's Exhibit 1 is a certified copy of the defendant's conviction from 1999, and the judge instructed you that he is convicted of possessing an obscene sexual performance by a child, which means that he knowingly had in his possession any obscene performance, which includes sexual conduct by a child less than 16.
>
> Ms. Sullivan, can you please pull up Government's Exhibit 8. Government's Exhibit 8 is a certified copy of the defendant's convictions for rape in the second degree and criminal sex act in the second degree, which the judge explained means that, being 18 years old or more, the defendant engaged in sexual intercourse with another person less than 15, and that, being 18 years old or more, the defendant engaged in oral or anal sexual contact with a person less than 15 years old. So he's possessed child pornography and he's raped a child under the age of 15, and here, he just combined them, and made his own child pornography.

The government returned to this theme again in its closing argument:

> We know he has a sexual interest in children. Part one is the secret recording of children in public, including the girls you saw in that clip just walking down the street in their bathing suits. The defendant has a prior conviction for exactly the same thing. Possessing child pornography.

In its rebuttal, the government revisited the prior convictions:

> We've talked about the defendant's prior convictions and defense counsel just told you that that's how we started this case, in an effort to paint the defendant in a certain way. Well, the judge is going to tell you that you can consider the defendant's prior commission of another offense of a similar nature for its bearing on whether the defendant committed these offenses. That's admissible evidence here, that's something you can legally consider. That's something you should consider, and it's one of the many things that shows you that this defendant is guilty.

The fact of the matter is that the prior convictions were not probative of Stroming's propensity to molest a 19-month-old boy and film the assault, because – although broadly all are child molestation offenses – the crimes were markedly dissimilar, and the unfair prejudice resulting from admission of this evidence infected the entire trial. This Court should hold that evidence of a prior child molestation conviction is inadmissible to show propensity where the victim's gender is different in the prior and charged crime, and the age of the victim is substantially different.

Conclusion

For the foregoing reasons, Petitioner John G. Stroming respectfully requests that this Petition for Writ of Certiorari be granted.

March 15, 2021

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