No. _____

SUPREME COURT OF THE UNITED STATES

MATTHEW J. O'NEAL PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 18 U.S.C. § 2252A(a)(5)(B) and § 2252A(b)(2), possession of an image of child pornography of a prepubescent minor or a minor who had not attained 12 years of age ordinarily carries a penalty of not more than 20 years imprisonment.

Section 2252A(b)(2), however, provides in relevant part that

> 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 ... imprisoned for not less than 10 years nor more than 20 years.

This case involves the proper interpretation and scope of the "relating to" language in §2252A(b)(2). The Sixth Circuit has given that statutory language such an expansive reading that it encompasses conduct under a state statute that does not meet the generic offense of sexual abuse. The questions presented are:

I. Whether the Sixth Circuit erred by expanding the scope of the "relating to" language in 18 U.S.C. §2252A(b)(2) to include conduct under a state statute that does not fall within the generic offense of sexual abuse?

II. Whether a 10-year mandatory minimum sentence that is triggered by an inchoate misdemeanor conviction constitutes cruel and unusual punishment in violation of the Eighth Amendment?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are those listed in the caption of the case.

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The Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky is reproduced at App. 5a-16a. *See United States v. O'Neal*, 2019 WL 2077778, at *1 (W.D.KY 2019) (unpublished).

JURISDICTION

The district court had original jurisdiction under 18 U.S.C. §3231.

The Sixth Circuit had jurisdiction pursuant to 18 U.S.C. §3742 and 28 U.S.C. §1291 and issued its opinion on November 16, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is timely filed in conformance with the Court's Miscellaneous Order issued on March 19, 2020. *See* 589 U.S. _____.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are found at App.21a-24a.

STATEMENT OF THE CASE

Petitioner, Matthew J. O'Neal, was charged with one count of possessing child pornography in violation of 18 U.S.C. §2252A(a)(5)(B) and §2252A(b)(2) on or about May 30, 2018. (District Court Record (R.) 6, Indictment, Page ID# 18). On

June 10, 2019, he pleaded guilty to the charge without a plea agreement. (R.41, Order, Page ID# 123; R.75, Transcript (TR) of Guilty Plea, Page ID# 516).

Under the 2018 Sentencing Guidelines, Mr. O'Neal's total offense level was 30. He had 1 criminal history point which resulted in a criminal history category of I. The guideline range was 97 to 121 months. (R.50, Presentence Investigation Report (PSR), Page ID# 225-27, 230).

Possession of child pornography ordinarily carries a penalty of not more than 20 years imprisonment because the offense here involved a minor under 12 years of age. *See* 18 U.S.C. §2252A(a)(5)(b) and (b)(2). (App. 21a). However, in 2012, Mr. O'Neal, was convicted of a misdemeanor in Kentucky state court (attempted first degree sexual abuse - Ky.Rev.Stat. (KRS) §510.110 and KRS §506.010)) which increased the penalty range to a mandatory minimum of 10 years and a maximum of 20 years. (App. 22a-24a; R.50, PSR, Page ID# 226-27, 230). *See* 18 U.S.C. §2252A(b)(2). (App. 21a).

The parties briefed the issue of whether the prior misdemeanor could be used for a §2252A(b)(2) sentence enhancement. The government argued that Mr. O'Neal's prior conviction for attempted first degree sexual abuse "relat[es] to ... sexual abuse" as provided in §2252A(b)(2). The government advocated a broad interpretation of §2252A(b)(2)'s "relates to" language and contended that Kentucky's first degree sexual abuse statute (KRS §510.110) is divisible. The

government maintained that ***all*** attempts to violate KRS §510.110 "relate to" sexual abuse and thus trigger §2252A(b)(2)'s enhanced penalties. (R.31 U.S. Brief, Page ID# 59-66; R.37, U.S. Reply, Page ID# 101 (emphasis original).

In applying the modified categorical approach, the government argued that the Kentucky Presentence Report (PSR) could be used as a *Shepard* document and showed that Mr. O'Neal was "propositioning young boys to engage in sex acts, which clearly relates to sexual abuse." (R.31 U.S. Brief, Page ID# 59-62; R.37, U.S. Reply, Page ID# 104 citing R.33, PSR - Sealed Document).[1]

Mr. O'Neal responded that he pleaded guilty to a misdemeanor – attempted first degree sexual abuse – in Kentucky state court in 2012. He was sentenced to 12 months conditionally discharged (unsupervised probation KRS §533.020(3)). He argued that Kentucky's first degree sexual abuse statute (KRS §510.110) (App. 22a-23a) is broader than the generic offense of sexual abuse which is defined in *United States v. Mateen*, 806 F.3d 857, 861 (6th Cir. 2015). (R.34, Defendant's Response, Page ID# 79-80).

Mr. O'Neal noted that neither the state court indictment nor the judgment indicated the particular elements of the offense to which he pleaded guilty. (R.34,

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[1] The Kentucky PSR is filed under seal in the district court (R.33, Sealed Document, Page ID# 73-75) and is also filed under seal in this Court. *See* Supplemental Appendix (App. 25a-26a).

Defendant's Response, Page ID# 78). Moreover, the state court plea agreement is silent as to the factual basis for the guilty plea and there is no plea colloquy. *Id.* at 83-84. Mr. O'Neal argued that the government was improperly relying on the Kentucky PSR which was nothing more a police investigative report that was in the prosecutor's file. *Id.* at 84.

The district court, relying on *Mateen*, *supra*, ruled that under the categorical approach the prior misdemeanor conviction "relat[es]" to "sexual abuse" and could be used to enhance the penalty under §2252A(b)(2) to a 10 year mandatory minimum. (App. 5a-16a).

The government urged the district court to impose the mandatory minimum sentence of 10 years. (R.57, U.S. Sentencing Memorandum (Memo), Page ID# 284). Mr. O'Neal moved for a downward variance or departure to 36 months. (R.58, Defendant's Sentencing Memo, Page ID# 288). He pointed out that Kentucky's sexual abuse statute is broader than the generic definition of sexual abuse because it could be violated without causing injury and the conviction was for attempted first degree sexual abuse which moved the offense even further away from the generic offense. Thus, under the categorical approach the prior misdemeanor conviction could not be used to trigger a §2252A(b)(2) sentence enhancement. *Id.* at 288-89.

Counsel noted that the outcome would not change under the modified categorical approach because it was impossible to determine from the *Shepard*

documents the subsection of Kentucky's sexual abuse statute to which Mr. O'Neal pleaded guilty. (Defendant's Sentencing Memo, Page ID# 289).

At sentencing, the court declined to reconsider its ruling that the prior misdemeanor conviction could be used to enhance the penalty under §2252A(b)(2). (R.77, TR Sentencing, Page ID# 532-35, 538-43). As to imposing the 10-year mandatory minimum, the court said, "I think in this case, if I didn't think that was the law, I wouldn't go there because I think it maybe overpunishes you in this case for what's going on." *Id.* at 538.

The district court noted that the number of images involved "is on the low end of what I normally see." (R.77, TR Sentencing, Page ID# 586).

> And if we didn't have a mandatory minimum, I don't know that I would go to the guideline sentence in this case. I might have gone below that. I don't think I would have gone to 36, but I think I would have gone below what the guidelines came out to, which was less than 120 in this case.

Id. at 587. The court continued, "I am sympathetic that of those people who come before this Court, he's on the lower end of the spectrum in his involvement in it than most others ..." *Id.*

Mr. O'Neal was sentenced to the mandatory minimum of 10 years, a 10 year term of supervised release, and restitution of $2500 to each of three victims. (R.67, Judgment, Page ID# 404-03, 406; R.77, TR Sentencing, Page ID# 588-89).

On appeal, the Sixth Circuit recognized that "relat[e] to" is a "broad phrase" which "requires only that the state statute be associated with sexual abuse[.]'" (App. 1a) (citations and internal quotation marks omitted).

The parties agreed that "the conduct least related to sexual abuse, but criminalized under Kentucky's first-degree sexual abuse statute, is knowingly masturbating in the presence of a minor." (App. 2a). *See* KRS §§ 510.110(1)(c)(2), 510.110(1)(d). (App. 22a). In the court's view, that conduct relates to sexual abuse because masturbation is "for the purpose of sexual or libidinal gratification." (App. 2a) (citation omitted).

The Sixth Circuit further opined:

> Whether or not the minor provides the mental stimulus for the masturbation, exposing a minor to sexually explicit acts is hurtful and damaging. Even if the minor is unaware of the masturbation (perhaps because the child is asleep), such conduct creates serious risks anyway because the child could wake up or find out about it after the fact.

App. 2a. Mr. O'Neal argued that *Mateen's* generic offense of sexual abuse requires "physical contact" or "intent to cause harm for the purpose of sexual gratification" but the Sixth Circuit said *Mateen* was merely describing the elements of the state statute at issue and that did not change *Mateen's* general definition of sexual abuse. (App. 3a).

The Sixth Circuit recognized that *Mellouli v. Lynch*, 575 U.S. 798, 135 S.Ct. 1980, 1990 (2015) "shows that the statutory context of 'relates to' may limit its

reach." (App. 4a). The court, however, found that "[n]othing in §2252A(b)(2) shows that Congress qualified the scope of the sexual abuse offenses listed in that statute and what 'relat[es] to them." *Id.* Accordingly, the district court's judgment was affirmed. (App. 4a).

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has expanded the scope of the "relates to" language in 18 U.S.C. §2252A(b)(2) past the breaking point. So much so that the statutory language encompasses conduct under a state statute that does not fall within the generic offense of sexual abuse. The instant case is a clear example of how far a court can and will stretch a statute's "relates to" language.

This Court recognized in *Mellouli v. Lynch*, 575 U.S. 798, 135 S.Ct. 1980 (2015) that there are limits to a statute's "relates to" language. Those words are "broad" and "indeterminate" and when "extend[ed] to the furthest stretch of [their] indeterminacy ... stop nowhere." "[C]ontext," therefore, may "tu[g] ... in favor of a narrower reading." *Id.* at 1990 (citations omitted). Thus, *Mellouli* urges caution in determining the scope of a statute's "relating to" language. But that cautionary approach, however, has gone unheeded by the Sixth Circuit because its construction of the "relating to" language in §2252A(b)(2) extends the reach of those words to conduct that is clearly beyond the scope of the generic offense of sexual abuse.

Mellouli shows that the question presented is not limited to Mr. O'Neal's case because other federal statutes contain "relates to" or similar language. Those statutes pertain to criminal and civil matters. *See e.g.,* 5 U.S.C. §§ 8312(b)(1)(A)-(C) ("relating to"); 8 U.S.C. §1227(a)(2)(B)(i) ("relating to"); 18 U.S.C. §1028A(c)(1-11) ("relating to"); 18 U.S.C. §1961 ("relating to"); 18 U.S.C. §§2252(b)(1) and (b)(2) ("relating to"); 18 U.S.C. §§2252A(b)(1) and (b)(2) ("relating to"); 18 U.S.C. §2721(b)(4) (in connection with"); 18 U.S.C. §3500(b) ("relates to") and §(c) ("relate to"); 18 U.S.C. §3632(d)(4)(D) ("relating to"); 21 U.S.C. §§2516(1)(a) and (b) ("relating to"); and 29 U.S.C. §1144(a) ("relate to"). Thus, the issue here is not an isolated one that is unlikely to arise in the future.

This case is an appropriate one for a grant of *certiorari* because it presents a direct and straightforward issue on a clear record. Thus, granting *certiorari* will allow the Court to provide guidance on an issue that is likely to recur and it will also ensure consistent results in the interpretation and application of statutes containing "relates to" language.

This case also presents the issue of whether *Shepard v. United States*, 544 U.S. 13 (2005) permits a presentence report (PSR) to be used as a document in applying the modified categorical approach. Here, the Kentucky PSR here is merely a police report because it is only a narration of the police investigation in this case. *Shepard* specifically excludes police reports from the category of documents that

can be used in a modified categorical approach analysis. This case presents a clear opportunity to address the issue of whether a PSR can be used a *Shepard* document.

In addition, this case presents an issue that implicates the presumption of a guideline sentence's reasonableness and the Eighth Amendment's prohibition against cruel and unusual punishment. The instant case warrants review because it presents the question of whether the Eighth Amendment is violated when a prior conviction for an inchoate misdemeanor triggers an enhanced mandatory minimum sentence of 10 years.

ARGUMENT

I. The Sixth Circuit improperly expanded the scope of the "relating to" language in 18 U.S.C. §2252A(b)(2) to include conduct under a state statute that does not fall within the generic offense of sexual abuse.

"Based on the language of section 2252(b)(2) and the approaches of our sister circuits," the Sixth Circuit "define[d] the generic federal offense of 'sexual abuse' using its common meaning." *Mateen*, 806 F.3d at 861.[2] Since the penalty provisions for §2252 and §2252A which appear in Chapter 110 of Title 18 of the United States Code do not define "sexual abuse," that term is given "its ordinary and natural meaning." *Id.* (citations omitted). The Sixth Circuit found that the term "Sexual is

[2] Although *Mateen* discusses §2252(b)(2)'s "relating to" language ("or under the laws of any State relating to …sexual abuse…") it is identical to the language in §2252A(b)(2). *Mateen* thus applies with equal force to this §2252A(b)(2) case.

commonly understood to mean 'of or relating to the sphere of behavior associated with libidinal gratification.'" *Mateen*, 806 F.3d at 861 (citations omitted). Furthermore, "Abuse, according to its common meaning, is 'to use or treat so as to injure, hurt, or damage.'" *Id.* (citations omitted). Thus,

> sexual abuse, consistent with its common meaning, connotes the use or treatment of so as to injure, hurt, or damage for the purpose of sexual or libidinal gratification. This definition is in accord with the plain meaning of the statutory terms and the decisions of our sister circuits.

Mateen, 806 F.3d at 861.

To explain how a state statute might fit within the generic offense of sexual abuse, the Sixth Circuit noted that the definition of "prior sex offense conviction" in 18 U.S.C. §2426, which prescribes the penalties for repeat offenders, is met by a "conviction under State law for any offense consisting of conduct that would have been an offense" under designated federal statutes "if the conduct occurred within federal territorial jurisdiction." *Mateen*, 806 F.3d at 861. *See also* 18 U.S.C. §2426(b)(1)(B).

> Thus, when a sentence enhancement based on a state conviction requires the state statute to mirror the federal one, the enhancement statute is explicit. Section 2252(b)(2)'s 'relating to' language, however, requires only that the state statute be associated with sexual abuse.

Mateen, 806 F.3d at 861.

In Mr. O'Neal's case, the Sixth Circuit in construing §2252A(b)(2) concluded that the statute's 'relating to' language "requires only that the state statute be

associated with sexual abuse." (App. 1a). The court maintained that "[n]othing in §2252A(b)(2) shows that Congress qualified the scope of the sexual abuse offenses listed in that statute and what 'relat[es] to' them." (App. 4a). Thus, the Sixth Circuit placed no limits on the scope of §2252A(b)(2)'s "relating to" language. Moreover, the court's opinion is in direct conflict with the generic offense of sexual abuse which defines "abuse" as "to use or treat so as to ***injure, hurt, or damage***." *Mateen*, 806 F.3d at 861 (emphasis added). As shown below, the Sixth Circuit's analysis stretches §2252A(b)(2)'s "relating to" language far beyond the breaking point because it includes conduct that does not violate the underlying state law and falls outside the generic offense of sexual abuse.

In 2011, Mr. O'Neal was charged in Kentucky state court with one count of attempted unlawful transaction with a minor, and two counts of prohibited use of electronic communications to procure a minor to engage in sex acts, all felonies. (App. 17a). The unlawful transaction charge was amended to attempted first degree sexual abuse - a Class A misdemeanor that carries a maximum sentence of 12 months in jail. *See* KRS §506.010, §510.110, and §532.090(1). (App. 22a-24a). Mr. O'Neal pleaded guilty in 2012 to that charge and the remaining counts were dismissed. He was sentenced to 12 months conditionally discharged for 2 years. (App. 18a-20a).

In 2019, Mr. O'Neal pleaded guilty in federal court to possession of child pornography (18 U.S.C. §2252A(a)(5)). His sentence is governed by §2252A(b)(2)

which states in relevant part that if a person who violates §2252A(a)(5) "has a prior conviction ... under the laws of any State relating to ... sexual abuse ... such person shall be ...imprisoned for not less than 10 years nor more than 20 years." (App. 21a).

To determine if Mr. O'Neal's prior misdemeanor conviction qualifies for a §2252A(b)(2) sentence enhancement, a reviewing court takes a categorical approach and only looks to the offense's statutory definition rather than the underlying facts. *Taylor v. United States*, 495 U.S. 575, 600 (1990). If the statute is divisible, *i.e.,* it contains alternative elements, a modified categorical approach is applied to determine which of those elements "played a part in the defendant's prior conviction." *Descamps v. United States*, 570 U.S. 254, 260 (2013). *See also Mathis v. United States*, 136 S.Ct. 2243, 2256 (2016).

> Where the prior conviction resulted from a guilty plea, [courts] look to documents that identify what facts the defendant 'necessarily admitted' by pleading guilty. ... Such documents may include the 'charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.'

United States v. Mitchell, 743 F.3d 1054, 1063 (6th Cir. 2014) quoting *Shepard v. United States*, 544 U.S. 13, 16 (2005) (other citation omitted). *See also Descamps*, 570 U.S. at 257.

Kentucky's first degree sexual abuse statute (KRS §510.110) provides in relevant part (App. 22a-23a):

(1) A person is guilty of sexual abuse in the first degree when:
(a) He or she subjects another person to sexual contact by forcible compulsion; or
(b) He or she subjects another person to sexual contact who is incapable of consent because he or she:
1. Is physically helpless;
2. Is less than twelve (12) years old; or
3. Is mentally incapacitated; or
(c) Being twenty-one (21) years old or more, he or she:
1. Subjects another person who is less than sixteen (16) years old to sexual contact; or
2. Engages in masturbation in the presence of another person who is less than sixteen (16) years old and knows or has reason to know the other person is present; or
3. Engages in masturbation while using the Internet, telephone, or other electronic communication device while communicating with a minor who the person knows is less than sixteen (16) years old, and the minor can see or hear the person masturbate; or
(d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she, regardless of his or her age, subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact or engages in masturbation in the presence of the minor and knows or has reason to know the minor is present or engages in masturbation while using the Internet, telephone, or other electronic communication device while communicating with a minor who the person knows is less than sixteen (16) years old, and the minor can see or hear the person masturbate.

With the exceptions of §§(1)(c)(2) and (3) and §(1)(d), KRS §510.110 requires the offender to have "sexual contact" with the victim, *i.e.*, "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]" KRS §510.010(7). (App. 23a).

Sections (1)(c)(2) and (1)(d) of KRS §510.110 can be violated if a person masturbates in the presence of a sleeping child or someone under 18 years of age

who is sleeping or masturbates in a room where the child is present but is playing a game and is unaware of the person's conduct. (App. 22a). The same is true where someone under 18 is so absorbed in using an electronic device that he or she is unaware of that conduct. *Id.*

The foregoing examples show that Kentucky's sexual abuse statute (KRS §510.110) is broader than the generic offense of sexual abuse because they do not involve "the use or treatment of so as to injure, hurt, or damage for the purpose of sexual or libidinal gratification." *Mateen*, 806 F.3d at 861. Since the Kentucky statute is broader than the generic offense it does not categorically qualify as a predicate offense for a §2252A(b)(2) enhancement. Moreover, Mr. O'Neal was convicted of *attempted* first degree sexual abuse – an inchoate offense. *See* KRS §506.010 (App. 23a-24a). So there would have been no injury or hurt to the minor.

The district court found that "the crimes listed under §510.110 relate to the generic definition of sex abuse, causing the enhanced penalties under §2252A(b)(2) to be triggered." (App. 9a). Relying on *Mateen*, 806 F.3d at 861, the court ruled that §2252A(b)(2)'s "relating to" language "requires only that the state statute be associated with sexual abuse" and that language should be interpreted "broadly." *Id.* at 9a -10a.

The Sixth Circuit followed suit and stated, "Sexual abuse covers actions that injure, hurt, or damage for the purpose of sexual or libidinal gratification ... And

relat[e] to is a broad phrase ... one that requires only that the state statute be associated with sexual abuse." (App. 1a-2a). This standard, however, does not place any reasonable limits on §2252A(b)(2)'s "relates to" language and it is in direct conflict with *Mateen's* generic offense of sexual abuse.

The Sixth Circuit did not dispute the parties' agreement that "the conduct least related to sexual abuse, but criminalized under Kentucky's first-degree sexual abuse statute, is knowingly masturbating in the presence of a minor. *See* K.R.S. §§ 510.110(1)(c)(2), 510.110(1)(d)." (App. 2a). The court found that such conduct "related to" sexual abuse because masturbation is "for the purpose of sexual or libidinal gratification." *Id.* quoting *Mateen*, 806 F.3d at 861.

Again citing *Mateen*, 806 F.3d at 861, the court determined that "masturbating in a minor's presence constitutes action that "hurt[s] or damage[s]" the child" because

> [w]hether or not the minor provides the mental stimulus for the masturbation, exposing a minor to sexually explicit acts is hurtful and damaging. Even if the minor is unaware of the masturbation (perhaps because the child is asleep), such conduct creates serious risks anyway because the child could wake up or find out about it after the fact.

(App. 2a). That analysis stretches §2252A(b)(2)'s "relates to" language beyond all bounds.

What if the child does not wake up or never learns of the conduct. How can it reasonably be said that the child has been "injure[d], hurt, or damage[d]" by the

conduct? *Mateen*, 806 F.3d at 861. None of those results transpire if the masturbation occurs while the minor is sleeping. Thus, one is hard pressed to say that masturbation is "hurtful and damaging" where the minor is completely unaware of it. Moreover, a court cannot claim to only consider the least culpable conduct under the statute and then add "what ifs" to it.

Furthermore, masturbating while a minor is sleeping is not "sexual contact" as defined by Kentucky law. *See* KRS §510.010(7). (App. 23a). No matter how broadly §2252A(b)(2)'s "relating to" language is stretched that conduct does not "relate to" the sexual abuse of another person. It is merely an act of self-gratification by the actor which does not "injure, hurt, or damage" the child. *Mateen*, 806 F.3d at 861. For such conduct to fall within §2252A(b)(2) shows not only that Kentucky's sexual abuse statute is broader than the generic offense but also that the Sixth Circuit has expanded the statute's "relates to" language far beyond the breaking point.

In giving §2252A(b)(2)'s "relating to" language a broad reading, the Sixth Circuit made reference to *Mellouli v. Lynch, supra*, but brushed aside its concern that a statute's "relates to" language can easily be construed beyond its reasonable limits. In *Mellouli*, this Court considered the limits of the "relating to" language in 8 U.S.C. §1227(a)(2)(B)(i). *Mellouli* was subject to deportation because of a state court misdemeanor conviction for possession of drug paraphernalia (four Adderall pills in a sock). 135 S.Ct. at 1983.

The Court rejected the argument that "*any* drug offense renders an alien removable, without regard to the appearance of the drug on a §802 schedule." *Mellouli*, 135 S.Ct. at 1991 (emphasis original). "[T]he Government's construction of the federal removal statute stretches to the breaking point, reaching state-court convictions, like Mellouli's, in which no controlled substance (as defined in §802) figures as an element of the offense." *Id.* at 1990 (internal quotation marks omitted).

The Sixth Circuit considered *Mellouli* inapposite because Congress limited the scope of the statute's "relating to" language to controlled substances as defined in 21 U.S.C. §802. App. 4a; *Mellouli*, 135 S.Ct. at 1990-91; 8 U.S.C. §1227 (a)(2)(B)(i). *Mellouli's* reasoning, however, fully applies to Mr. O'Neal's case.

This Court recognized in *Mellouli*, that the words "relating to" in §1227(a)(2)(B)(i) are "broad" and "indeterminate." 135 S.Ct. at 1990 (citations omitted). Furthermore, "those words, extended to the furthest stretch of their indeterminacy ... stop nowhere. Context, therefore, may tug ... in favor of a narrower reading." *Id.* (citations, internal quotation marks and brackets omitted). In the context of Mr. O'Neal's case, the Sixth Circuit has stretched §2252A(b)(2)'s "relating to" language to the point of encompassing conduct that does not fall within the generic offense of sexual abuse.

Notwithstanding *Mellouli's*, 135 S.Ct. at 1990, recognition of the limits of a statute's "relating to" language, the Sixth Circuit determined that "a state law may

sweep more broadly than a federal offense yet still be categorically 'related to" that offense." (App. 3a). To justify its expansion of §2252A(b)(2)'s "relating to" language, the Sixth Circuit cited decisions of other courts of appeals but those cases are pre-*Mellouli* and show no recognition of its concern about how far a statute's "relating to" language can be stretched.

For example, in *United States v. Stults*, 575 F.3d 834 (8th Cir. 2009), the court rejected the defendant's argument that his prior state court conviction for attempted sexual assault did not qualify him for a 10 year mandatory minimum under 18 U.S.C. §2252(b)(2). The Eighth Circuit noted that the phrase "relating to" in §2252(b)(2) "carries a 'broad' 'ordinary meaning,' *i.e.,* 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with....' *Stults*, 575 F.3d at 845 citing *United States v. Weis*, 487 F.3d 1148, 1152 (8th Cir. 2007) quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).[3]

Stults is inapposite to Mr. O'Neal's case because the Eighth Circuit did not address whether the relevant Nebraska statute (sexual assault in the second degree - Neb.Rev.Stat, §28-320(1)) was broader that the generic offense of sexual abuse. Moreover, the Nebraska statute is vastly different than Kentucky's first degree

[3] *Morales*, 504 U.S. at 378, 383, involved a preemption issue in which the Supreme Court construed the words "relating to" in the Airline Deregulation Act of 1978 (49 U.S.C. §1305(a)(1)).

sexual abuse statute because it does not include masturbation in the proscribed conduct. *Stults*, 575 F.3d at 846, n. 4.

In *United States v. Hubbard*, 480 F.3d 341, 343 (5th Cir. 2007), the defendant was convicted in state court of attempting to make lewd or indecent proposals for sexual relations to someone he believed to be 14 year old girl. He was subsequently convicted in federal court of transmitting child pornography over the internet. *Id.* The Fifth Circuit upheld the use of the prior conviction to trigger the 15 year mandatory minimum in §2252A(b)(1) which contains the same "relating to" language in §2252A(b)(2). *Id.* at 351.

Once again, a statute's "relating to" language was recognized to have a broad meaning. *Hubbard*, 480 F.3d at 347. And even if the generic terms of "aggravated sexual abuse," "sexual abuse," or "abusive sexual conduct" in §2252A(b)(1) "were not intended to require a state offense to mirror an offense under 18 U.S.C. §§ 2241, 2242, or 2243," *id.* at 349, Hubbard sought physical, sexual contact with a minor. *Id.* at 343. That is far different conduct than that required for a conviction under Kentucky's sexual abuse statute because KRS §510.110(1)(c)(2) and (3) and (d) do not require physical contact between the offender and the victim and thus encompass a much broader range of conduct than *Mateen's* generic offense. *Hubbard* therefore is inapposite here.

In *United States v. Wiles*, 642 F.3d 1198 (9th Cir. 2011), the court upheld the use of the defendant's prior state court conviction for attempted sexual assault as a predicate offense for a §2252A(b)(1) sentence enhancement. The court found that the §2252A(b)(1)'s "relating to" language "must be read broadly to encompass convictions for attempt, where the completed offense would qualify as a predicate offense." *Wiles*, 642 F.3d at 1201. The state's sexual assault statute required that the defendant subject another person to "sexual contact" without consent. *Id.* at 1201. *See also Weis*, 487 F.3d at 1152 (touching the victim with the intent to have sexual intercourse "falls well within the broad meaning of 'relating to ... abusive sexual conduct'" in §2252(b)(1)). *Wiles* and *Weis* have no bearing on Mr. O'Neal's case because the Kentucky sexual abuse statute is broader than the generic offense of sexual abuse.

The common thread running through *Stults*, *Hubbard*, *Wiles*, and *Weis* is that they broadly construe the words "relating to" in §2252 and §2252A. But *Mellouli* makes clear that there are limits on the scope of a statute's "relating to" language. That issue is not confined to §2252 and §2252A. Rather it extends to any statute in which that language is found. *See. e.g.,* 8 U.S.C. §1227(a)(2)(B)(i).

Mr. O'Neal's case demonstrates how far the "relating to" language can be stretched because he was convicted only of attempted first degree sexual abuse. There is no completed act which causes injury, hurt, or damage. Consequently, such

conduct is even further away from "relating to" sexual abuse. Nevertheless the Sixth Circuit found that even attempting an act that would constitute sexual abuse "relates to" sexual abuse. (App. 3a). Here again, the Sixth Circuit's analysis not only contravenes the generic offense which requires that the victim sustain "injury, hurt, or damage" but also expands §2252A(b)(2)'s "relates to" language to include inchoate offenses.

The Sixth Circuit's overly broad reading of §2252A(b)(2)'s "relates to" language criminalizes a broader range of conduct than the generic offense of sexual abuse including conduct that does not injure, harm or damage the victim. *See e.g., Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009) (California offense of unlawful sexual intercourse with a minor was not categorically an aggravated felony under 8 U.S.C. §1101(a)(43)(A) because it criminalized a broader range of conduct than 18 U.S.C. §2243 and criminalized conduct that "is not necessarily abusive"). Thus, the categorical approach shows that Kentucky's sexual abuse statute is broader than the generic offense and is not a predicate offense for a §2252A(b)(2) sentence enhancement.

Given their analyses under the categorical approach neither the district court nor the Sixth Circuit addressed the modified categorical approach (App. 2a, 14a - 15a), that is used to determine "which element[s] played a part in the defendant's conviction." *Descamps*, 570 U.S. at 261; *Mathis*, 136 S.Ct. at 2253–54. If the statute

under review lists alternative elements and is therefore divisible, then under the modified categorical approach it may look to the *Shepard* documents to determine which alternative version of the offense is at issue. *United States v. Davis*, 751 F.3d 769, 775 (6th Cir. 2014) (citations and internal quotation marks omitted); *Mathis*, 136 S.Ct. at 2256-57. As shown, below, Mr. O'Neal would prevail even under the modified categorical approach.

In the district court, the government submitted state court records to show that Mr. O'Neal violated KRS §510.110(1)(c)(1) (being 21 years old or older, he attempted to subject another person who is less than 16 years old to sexual contact). Those *Shepard* documents included: the indictment (App. 17a); Commonwealth's offer on a guilty plea (App. 18a); and the judgment and sentence (App. 19a-20a). However, the *Shepard* documents do not show what Mr. O'Neal did to violate KRS §510.110. The indictment merely charges Mr. O'Neal with offenses to which he did not plead guilty. (App. 17a).

The Commonwealth's offer on a plea of guilty only shows that the charge of attempted unlawful transaction was amended to attempted first degree sexual abuse, a Class A misdemeanor to which Mr. O'Neal pleaded guilty and was sentenced to 12 months conditionally discharged for 2 years. The other charges were dismissed. (App. 18a).

The state court judgment likewise sheds no light on the conduct underlying the crime of attempted first degree sexual abuse. It merely parrots the original charges and notes that Mr. O'Neal pleaded guilty to attempted first degree sexual abuse. The judgment shows Mr. O'Neal's sentence and the dismissal of Counts 2 and 3 of the indictment. (App. 19a-20a).

The *Shepard* documents do not show either the facts that Mr. O'Neal admitted or the specific section of KRS §510.110 that was violated. There is no statement of the underlying facts in any of documents to show exactly what Mr. O'Neal did to violate the statute. In addition to the foregoing *Shepard* documents, the government submitted a two page excerpt from the Kentucky presentence report (PSR). *See* Supplemental Appendix, (App. 25a-26a).

The PSR is not a *Shepard* document. *Shepard* identified an exclusive list of documents or "records of the convicting court" that can be used to determine the section of a divisible statute under which a defendant previously pleaded guilty. *Shepard*, 544 U.S. at 23. Those documents are

> limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

Shepard, 544 U.S. at 26 (emphasis added). *Shepard* "authorized sentencing courts to scrutinize a ***restricted*** set of materials" ... to determine the basis of the defendant's prior conviction. *Descamps*, 570 U.S. at 262 (emphasis added).

In *United States v. Wynn*, 579 F.3d 567, 575 (6th Cir. 2009), the defendant successfully argued that factual recitations in a PSR

> do not fall under *Taylor's* 'narrow exception,' and that the government's attempt to use [the PSR] invites the very harm that *Taylor* sought to prevent: re-litigation in the present judicial proceeding of the facts underlying the defendant's prior conviction.

Id. at 579 F.3d at 575. *See United States v. Braun*, 801 F.3d 1301, 1306 (11th Cir. 2015) ("Under *Shepard* and *Descamps*, a sentencing court may not rely on a Presentence Report from an unrelated proceeding in place of a *Shepard* document. It is not a charging document, a plea agreement or colloquy, or a comparable judicial record."). *Wynn* stands for the proposition that "a court may not consider the underlying facts of an offense contained in a presentence report." *United States v. Armes*, 953 F.3d 875, 884 (6th Cir. 2020). *See United States v. Bartee*, 529 F.3d 357, 361 (6th Cir. 2008) and *United States v. Jones*, 453 F.3d 777, 780 (6th Cir. 2006).

Other court have followed the Sixth Circuit's path. *See e.g., United States v. Turbides-Leonardo*, 468 F.3d 34, 39 (1st Cir. 2006) ("a presentence report in a subsequent case ordinarily may not be used to prove the details of the offense conduct that underlies a prior conviction"); *United States v. Rosa*, 507 F.3d 142, 156 (2d Cir. 2007) (same); *United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir. 2005) (same); *United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012) (same); *United States v. Boykin*, 669 F.3d 467, 469 (4th Cir. 2012) ("plain error ...

to use the PSR in determining that the relevant offenses occurred on separate occasions.").

"[D]eclaring PSRs to be non-*Shepard* documents, is consistent with *Shepard's* decree that *Taylor* 'require[s] that evidence of [a] generic conviction be confined to records of the convicting court' ... because a PSR prepared for a federal district-court sentencing can never be a record of a convicting state court." *Wynn*, 579 F.3d at 576–77 quoting *Shepard*, 544 U.S. at 23. *See also United States v. Ferguson*, 681 F.3d 826, 832-33 (6th Cir. 2012). There is "no reason that a state PSR should be permissible under *Shepard* when a federal PSR would not be." *United States v. Gardner*, 649 F.3d 437, 445 (6th Cir. 2011).

The Kentucky PSR is merely a police report which is not a *Shepard* document. *Shepard*, 544 U.S. at 16, specifically held that a sentencing court may not look to police reports "to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for [a] generic [offense]." The Kentucky PSR begins by stating, "According to the files of the Commonwealth Attorney" and then narrates the police investigation of the case. (R.33, Sealed Document at 74; Supplemental App. 25a-26a). Thus, the Kentucky PSR on its face is either a police report or a prosecutor's investigative report neither of which is a *Shepard* document.

The Kentucky PSR does not purport to describe any *Shepard* document and it does not contain any admission of criminal conduct by Mr. O'Neal. (R. 33, Sealed

Document at 74; Supplemental App. 25a-26a). Police reports are inherently unreliable as compared to true *Shepard* documents because they are not judicial records and are developed for investigatory purposes. The PSR does not describe the misdemeanor offense to which Mr. O'Neal pleaded guilty and it does not set forth the elements of that offense. *Id.*

Although courts cannot "consider the underlying facts of an offense contained in a presentence report," *Armes*, 953 F.3d at 884, that is precisely what the PSR offers and what the government intended it to do. (R.31, U.S. Brief at 62; R.37, U.S. Reply at 104).[4] In sum, the Kentucky PSR is not a *Shepard* document. It does not establish a predicate offense which qualifies for a §2252A(b)(2) sentence enhancement and should not have been used at Mr. O'Neal's sentencing. This case presents a clear opportunity to address the issue of whether a PSR can be used a *Shepard* document.

II. A 10 year mandatory minimum sentence that is triggered by a prior conviction for an inchoate misdemeanor constitutes cruel and unusual punishment in violation of the Eighth Amendment.

[4] Some of the conduct described in the PSR occurred when Mr. O'Neal was 19 or 20 years old. (Supplemental App. 25a). If that were the case, he would not be old enough to be convicted under KRS §510.110(1)(c)(1) (which the government asserts is the prior crime of conviction). (R.31, U.S. Brief at 62). Indeed, the judgment states that Mr. O'Neal was "Twenty (20) and Twenty-one (21) years old" when the crimes alleged in the indictment occurred. (App. 19a).

Possession of child pornography (18 U.S.C. §2252A(a)(5)) carries a penalty of "not more than 20 years" if the offense involves images of a prepubescent minor or a minor who had not attained 12 years of age." *See* 18 U.S.C. §2252A(b)(2). (App. 21a). Mr. O'Neal, however, was subject to a penalty range of 10 to 20 years because the district court found that he had a prior conviction "under the laws of any State relating to ... sexual abuse[.]" *See* 18 U.S.C. §2252A(b)(2). (App. 21a). That conviction was for an inchoate misdemeanor – attempted first degree sexual abuse – for which he was sentenced to 12 months in jail conditionally discharged for 2 years. (App. 18a-20a).

Mr. O'Neal's mandatory 10 year sentence violates the Eighth Amendment because it is triggered by a conviction for an inchoate misdemeanor for which no imprisonment was imposed and is grossly disproportionate given the circumstances of his case.

In addressing the issue on appeal, the Sixth Circuit said, "[W]e have upheld plenty of mandatory-minimum sentences in the face of Eighth Amendment challenges before" and "a sentence within the statutory maximum set by statute generally does not constitute cruel and unusual punishment." (App. 4a).

"If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness." *Gall v. United States*, 552

U.S. 38, 51 (2007) citing *Rita v. United States*, 551 U.S. 338, 347, 351 (2007). The presumption, however, must yield to the dictates of the Constitution.

The Eighth Amendment's prohibition of cruel and unusual punishment "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (other citation and internal quotation marks omitted). "The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 (2010).

To determine whether an offender's sentence violates the Eighth Amendment the Court follows the "narrow proportionality principle" articulated in Justice Kennedy's concurring opinion in *Harmelin v. Michigan*, 501 U.S. 957, 996-1009 (1991). Under this approach, the "Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime. *Id.* at 1001 quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983). *Harmelin's* "narrow proportionality" rule applies to non-capital sentences. *Ewing v. California*, 538 U.S. 11, 20 (2003).

When reviewing a sentence, a court "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as the discretion that trial courts possess in sentencing convicted criminals." *Solem*, 463 U.S. at 290. *See also Harmelin*, 501

U.S. at 999 (Kennedy, J., concurring). Notwithstanding that deference, courts must still conduct a proportionality analysis which

> should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Solem, 463 U.S. at 292. Proportionality review requires consideration of all circumstances in a particular case. *Graham*, 560 U.S. at 59.

> Before an appellate court concludes that a sentence is grossly disproportionate based on an as-applied challenge, the court first must determine that a threshold comparison of the gravity of the offense and the severity of the sentence leads to an inference of gross disproportionality.

United States v. Cobler, 748 F.3d 570, 575 (4th Cir. 2014) (citations and internal quotation marks omitted).

Possession of child pornography is a serious offense but Mr. O'Neal's 10 year mandatory minimum sentence is "grossly disproportionate" to the conduct underlying his conviction. The source of that disproportionality is not only the prior misdemeanor conviction which triggered the mandatory minimum sentence but it is also the district court's inability to consider the ordinary sentencing factors mandated by 18 U.S.C. §3553(a).

Mr. O'Neal was previously convicted of a misdemeanor – attempted first degree sexual abuse. (App. 18a-19a). The government's theory was that he was convicted under KRS §510.110(1)(c)(1) (being 21 years old or older, he attempted

to subject another person who is less than 16 years old to sexual contact). (R. 31, U.S. Brief, Page ID# 62). (App. 22a).

However, as Argument I demonstrates, the record does not show the specific nature of Mr. O'Neal's conduct or the specific section of KRS §510.110 it violated. What is clear is that he was convicted of an inchoate offense – attempt – under Chapter 506 of the Kentucky Penal Code which means that he did not actually subject another person to sexual contact. The prior conviction did not involve the completed act of a substantive offense. Thus, the seriousness of the offense is on the low end of the spectrum. Yet, for purposes of a §2252A(b)(2) sentence enhancement it has the same effect as if the conviction were for a violent felony such as first degree rape or first degree sodomy. *See* KRS §510.040 and KRS §510.070, respectively. Thus, a 10 year mandatory minimum sentence for possession of child pornography is "grossly disproportionate" to that offense when the sentence enhancement is triggered by a misdemeanor conviction for an inchoate offense.

The district court recognized that 10 years imprisonment was unjust and unwarranted but it was obligated to impose that mandatory minimum sentence. The court noted that Mr. O'Neal is "on the lower end of the spectrum in his involvement" in the offense and based on the circumstances of his case it would not have imposed the 10 year mandatory minimum sentence." (R. 77, TR Sentencing at 587). The district court said, "if I didn't think that was the law, I wouldn't go there because I

think it maybe ***overpunishes*** you in this case for what's going on." *Id.* at 538. (emphasis added). The court further stated, "[I]f we didn't have a mandatory minimum, I don't know that I would go to the guideline sentence ... I think I would have gone below what the guidelines came out to, which was less than 120 in this case." *Id.* at 587.

The range of sentences in §2252A(b)(2) reflects Congress's recognition that there is a qualitative difference in conduct violating §2252A(a)(5). That difference should be reflected in the offender's sentence to prevent it from being "grossly disproportionate" to the crime and the circumstances of the case. A mandatory minimum sentence, however, precludes a court from taking into account any qualitative difference in the conduct underlying an offense.

"[N]o penalty is *per se* constitutional." *Solem*, 463 U.S. at 290. That principle applies to Mr. O'Neal's 10 year sentence. Moreover, Eighth Amendment judgments "should be informed by objective factors to the maximum possible extent." *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) quoting *Coker v. Georgia*, 433 U.S., 584, 592 (1977) (plurality). The core principle underlying sentencing is that it must be tailored to fit the individual circumstances of the offender and the offense.

To implement that principle, "[d]istrict courts must determine in each case what constitutes a sentence that is 'sufficient, but not greater than necessary,' 18 U.S.C. §3553(a), to achieve the overarching sentencing purposes of retribution,

deterrence, incapacitation, and rehabilitation." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1903 (2018) quoting *Tapia v. United States*, 564 U.S. 319, 325 (2011); 18 U.S.C. §§3553(a)(1) and (a)(2). The district court "must make an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 39.

> It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.

Gall, 552 U.S. at 52 *quoting Koon v. United States*, 518 U.S. 81,113 (1996). *See also Pepper v. United States*, 562 U.S. 476, 487–88 (2011).

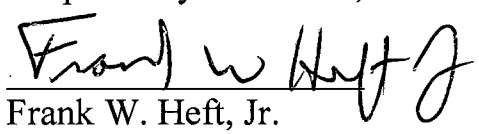
The factors set forth in §3553(a) are intended to advance individualized sentencing by requiring consideration of the defendant's "history and characteristics," "the nature and circumstances of the offense," "the seriousness of the offense," "just punishment," "adequate deterrence," public protection, providing "the defendant with needed educational or vocational training, medical care or other correctional treatment," and avoiding "unwarranted sentence disparities." *See* 18 U.S.C. §3553(a)(1) and (2)(A- D), and (6). A mandatory minimum sentence nullifies the §3553(a) factors and runs counter to the goal of individualized sentencing. A mandatory minimum sentence is therefore more deserving of constitutional scrutiny and this case presents the court with a clear-cut opportunity to consider the issue of whether a mandatory minimum sentence can violate the Eighth Amendment even if

it falls within the applicable guideline range and is presumed reasonable. Accordingly, Mr. O'Neal respectfully submits that *certiorari* should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,



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