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

APPENDIX

Appendix E

Appendix F

Appendix G

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0651n.06

Case No. 20-5006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MATTHEW J. O'NEAL, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BEFORE: NORRIS, SUTTON, and KETHLEDGE, Circuit Judges.

SUTTON, Circuit Judge. Matthew O'Neal pleaded guilty to possessing child pornography. 18 U.S.C. § 2252A(a)(5)(B). The child pornography statute imposes a ten-year mandatory-minimum sentence if the defendant has a prior conviction "under the laws of any State relating to . . . sexual abuse." *Id.* § 2252A(b)(2). The district court found that O'Neal's Kentucky conviction for attempted first-degree sexual abuse qualified. We affirm.

What does it mean for a state law to "relat[e] to . . . sexual abuse"? *Id.* Sexual abuse covers actions that "injure, hurt, or damage for the purpose of sexual or libidinal gratification." *United States v. Mateen*, 806 F.3d 857, 861 (6th Cir. 2015). And "relat[e] to" is a "broad" phrase, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quotation omitted), one that requires "only that the state statute be associated with sexual abuse," *Mateen*, 806 F.3d at 861; *see also United*

States v. Sinerius, 504 F.3d 737, 743 (9th Cir. 2007); *United States v. McGarity*, 669 F.3d 1218, 1262 (11th Cir. 2012).

Both phrases considered, a state conviction counts under the statute if it is "associated with" actions that "injure, hurt, or damage for the purpose of sexual or libidinal gratification."

That's not the end of it. The "categorical approach" guides the matching inquiry. *United States v. Parrish*, 942 F.3d 289, 295–96 (6th Cir. 2019). Instead of just looking at the facts of O'Neal's prior conviction, we consider the range of conduct criminalized by the Kentucky law to see if convictions under the law categorically relate to sexual abuse. *See Taylor v. United States*, 495 U.S. 575, 600 (1990). If the least culpable conduct proscribed by the statute relates to sexual abuse, the entire statute does. *Perez v. United States*, 885 F.3d 984, 987 (6th Cir. 2018).

What conduct generally criminalized under the state law, then, least relates to sexual abuse? The parties agree 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). Does that conduct relate to sexual abuse? Is it associated with actions that "injure, hurt, or damage for the purpose of sexual or libidinal gratification"? *Mateen*, 806 F.3d at 861.

We think so. Masturbation is "for the purpose of sexual or libidinal gratification." *Id.* And masturbating in a minor's presence constitutes action that "hurt[s] or damage[s]" the child. *Id.* Why? 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.

Through it all, the key point is that the federal statute requires only that the state law "relate to" sexual abuse. Masturbating in the presence of a child, whether the child is awake or asleep, whether the child participates or not, "relates to" sexual abuse.

In challenging this conclusion, O'Neal claims that *Mateen* shows that sexual abuse requires "physical contact" or "intent to cause harm for the purpose of sexual gratification." Appellant's Br. 12, 15. But this part of *Mateen* merely described the elements of the Ohio crime at issue in that case. 806 F.3d at 863. That the elements of this Ohio crime were sufficient to "relate to" sexual abuse in *Mateen* does not establish what is necessary in other cases. And the elements of that Ohio statute don't change the general definition of sexual abuse provided in *Mateen* and applied here. *Id.* at 861.

Keep in mind that, even if Kentucky's sexual abuse statute can be violated in ways that make it broader than the generic definition of sexual abuse, that shows only that there is not a perfect match. But a perfect match is not required to satisfy the "relates to" scope of the law. That's unlike the Armed Career Criminal Act, which does not contain a "relates to" clause. *See Parrish*, 942 F.3d at 296. Under today's statute, a state law may sweep more broadly than a federal offense yet still be categorically "related to" that offense. Other circuits have invoked the point in holding that a state statute "relates to" sexual abuse even if it doesn't require actual harm. *See United States v. Stults*, 575 F.3d 834, 845 (8th Cir. 2009); *see also United States v. Hubbard*, 480 F.3d 341, 347 (5th Cir. 2007); *United States v. Wiles*, 642 F.3d 1198, 1201–02 (9th Cir. 2011).

O'Neal adds that his prior state conviction was for *attempted* sexual abuse, making it harder to show that his conviction related to sexual abuse. But *attempting* to masturbate in the presence of a minor is still "associated with" its intended outcome. It would distort common sense to say that attempting an act that would constitute sexual abuse does not *relate* to sexual abuse.

If attempts did not relate to their intended outcome, how else could their relationship be explained? We are not alone, again, in drawing this conclusion. *See Hubbard*, 480 F.3d at 345–46; *Stults*, 575 F.3d at 844–46; *Wiles*, 642 F.3d at 1202.

Mellouli v. Lynch, 135 S. Ct. 1980, 1990 (2015), it is true, shows that the statutory context of "relates to" may limit its reach. At issue was the Immigration and Nationality Act, which says that prior state convictions "relating to a controlled substance (as defined in section 802 of Title 21)" authorize deportation. 135 S. Ct. at 1984 (quoting 8 U.S.C. § 1227(a)(2)(B)(i)). The Court reasoned that the otherwise broad scope of the phrase "relating to a controlled substance" was narrowed by the parenthetical that followed it. *Id.* at 1990–91. It then held that a state conviction for possession of drug paraphernalia, potentially including possession of a sock used to store drugs, exceeded the reach of the statute. *Id.* at 1983–84, 1991. But that is a distant cry from this case. Nothing 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. *See* 18 U.S.C. § 2252A(b)(2); *see also United States v. Sullivan*, 797 F.3d 623, 640 (9th Cir. 2015). And nothing in the statute suggests that masturbating in front of a child does not "relate to" sexual abuse.

One loose end dangles. O'Neal separately argues that his sentence, a ten-year mandatory minimum, violates the Eighth Amendment's prohibition on "cruel and unusual punishment[]." U.S. Const. amend. VIII. But we have upheld plenty of mandatory-minimum sentences in the face of Eighth Amendment challenges before. *See, e.g.*, *United States v. Hughes*, 632 F.3d 956, 959 (6th Cir. 2011). And a "sentence within the statutory maximum set by statute generally does not constitute cruel and unusual punishment." *Austin v. Jackson*, 213 F.3d 298, 302 (6th Cir. 2000) (quotation omitted). Nothing about this case alters that conclusion here.

We affirm.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CIVIL ACTION NO. 5:18-CR-00022-TBR

UNITED STATES OF AMERICA, PLAINTIFF

v.

MATTHEW J. O'NEAL, DEFENDANT

MEMORANDUM OPINION AND ORDER

On August 14, 2018, Matthew O'Neal was charged with one count of possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2). [R. 10 (Federal Indictment).] On March 19, 2019, O'Neal appeared for a Change of Plea Hearing. At the Hearing, the Court directed the parties to brief the following issues:

(1) Whether O'Neal's prior misdemeanor conviction for 1st Degree Attempted Sexual Abuse (15-year-old victim) triggers the enhanced penalties under 2252A(b)(2); and

(2) Whether 2252A(b)(2)'s enhanced penalty for "offense involv[ing] a prepubescent minor or a minor who had not attained 12 years of age" has a knowledge element. That is, does the United States need to prove mens rea as to the type of child pornography involved in the offense in order to establish a violation of 2252A(a)(5)(B)?

[R. 30 (Court Order).] The Court will address each issue in turn.

Also before the Court is the United States' ("the Government") Motion for Leave to File Sealed Document. [R. 32.] Without an opposing response from O'Neal, and the Court being otherwise sufficiently advised, the Government's Motion for Leave to File Sealed Document, [R. 32], is **GRANTED**.

I. The Enhanced Penalties Under § 2252A(b)(2)

A violation of 18 U.S.C. § 2252A(a)(5)(B) calls for a custody sentence of "not more than 10 years." 18 U.S.C. § 2252A(b)(2). However, if the defendant "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 . . . such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years." *Id.* Prior to the federal charge at hand, on March 26, 2012, O'Neal pleaded guilty in Calloway Circuit Court to criminal attempt to first degree sexual abuse in violation of K.R.S. §§ 510.110 and 506.010. [R. 31-1 (Judgment/Sentence).] The Government argues that this state charge triggers enhanced penalties pursuant to § 2552A(b)(2). [R. 31 at 2-7.] O'Neal disagrees.

As the Sixth Circuit has explained:

> When deciding whether a prior state-law conviction triggers an enhanced sentence, we begin with a categorical approach. We look first to the "fact of conviction and the statutory definition of the prior offense"—not the facts underlying the conviction—to determine the nature of the crime. If the state crime of conviction has the same elements as the generic offense—"the offense as commonly understood"—then the prior conviction can serve to enhance the federal sentence.

United States v. Mateen, 806 F.3d 857, 859–60 (6th Cir. 2015) (internal citations omitted). However, if the state statute at hand is divisible, i.e., "comprises multiple, alternative versions of the crime," the Court may engage in the "modified categorical approach." *Descamps* v. *United States*, 570 U.S. 254, 262-64 (2013). If not all of the crimes listed in the state statute match the generic offense, "a court needs a way to find out which the defendant was convicted of." *Id.* at 264. Thus, the "job" of the modified categorical approach is to "identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." *Id.* "Put another way, the purpose of the modified categorical approach is simply to determine of what elements the defendant was convicted *so that* the court can apply the categorical approach."

United States v. Davis, 751 F.3d 769, 776–77 (6th Cir. 2014) (citing *Descamps*, 133 S. Ct. at 2281).

A. The Categorical Approach

The statute enhancement at issue here applies to an offender with a prior state conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252A(b)(2). The Sixth Circuit has defined sexual abuse consistent with its common meaning, stating that "sexual abuse . . . connotes 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.

Turning to the state conviction, O'Neal pleaded guilty to attempted first degree sexual abuse in violation of K.R.S. §§ 510.110 and 506.010.[1] Section 510.110 provides:

(1) A person is guilty of sexual abuse in the first degree when:

---

[1] K.R.S. § 506.010 is the Kentucky statute for criminal attempt. It provides:

> (1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.
>
> (2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.
>
> (3) A person is guilty of criminal attempt to commit a crime when he engages in conduct intended to aid another person to commit that crime, although the crime is not committed or attempted by the other person, provided that his conduct would establish complicity under KRS 502.020 if the crime were committed by the other person.
>
> (4) A criminal attempt is a:
>
> (a) Class C felony when the crime attempted is a violation of KRS 521.020 or 521.050;
>
> (b) Class B felony when the crime attempted is a Class A felony or capital offense;
>
> (c) Class C felony when the crime attempted is a Class B felony;
>
> (d) Class A misdemeanor when the crime attempted is a Class C or D felony;
>
> (e) Class B misdemeanor when the crime attempted is a misdemeanor.

Ky. Rev. Stat. Ann. § 506.010.

(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;
3. Is mentally incapacitated; or
4. Is an individual with an intellectual disability; 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;
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.

(2) Sexual abuse in the first degree is a Class D felony, unless the victim is less than twelve (12) years old, in which case the offense shall be a Class C felony.

Ky. Rev. Stat. Ann. § 510.110.

Under the categorical approach, the Court must determine whether the Kentucky statute by its nature and elements, "relat[es]" to "sexual abuse," as defined above. *See Mateen*, 806 F.3d at 862 (citing *Taylor v. United States*, 495 U.S. 575, 599 (1990)). The Government argues that under the Sixth Circuit's broad interpretation of "relating to," all the crimes listed under Kentucky's sex abuse statute relate to sex abuse. [R. 31 at 4.] O'Neal retorts that the Kentucky

statute is broader than the generic definition of sex abuse. [R. 34 at 5-6.] The Court finds 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.

The Government cites the Sixth Circuit's findings in *United States v. Mateen,* for the contention that "relating to" is to be interpreted broadly. [R. 31 at 4 (citing *Mateen*, 806 F.3d at 860).] Thus, the Government concludes "all of the conduct listed in K.R.S. § 510.110 'relates to' sexual abuse, as each section of the Kentucky statute relates to sexual conduct that is nonconsensual by virtue of force, age, or mental incapacitation, and therefore abusive." [*Id.*] In *Mateen*, the Sixth Circuit held that the defendant's prior Ohio conviction for gross sexual imposition qualified as a conviction relating to "sexual abuse," and, thus, affirmed the lower court's finding that the § 2252 sentencing enhancement should be applied. 806 F.3d at 859. The Court referenced the findings of the Ninth, Eleventh, and Fourth circuits in defining "relating to," stating:

> Other circuits have broadly interpreted the phrase "relating to" as triggering sentence enhancement for "any state offense that stands in some relation, bears upon, or is associated with that generic offense." *United States v. Sullivan,* 797 F.3d 623, 638 (9th Cir.2015) (quoting *Sinerius,* 504 F.3d at 743); *Barker,* 723 F.3d at 322–23 (quoting *Sinerius* with approval); *United States v. McGarity,* 669 F.3d 1218, 1262 (11th Cir.2012) (same); *see also United States v. Colson,* 683 F.3d 507, 511–12 (4th Cir.2012) ("Numerous courts of appeals agree that Congress chose the expansive term 'relating to' in § 2252(A)(b)(1) to ensure that individuals with a prior conviction bearing some relation to sexual abuse ... receive enhanced minimum and maximum sentences."); *Sonnenberg,* 556 F.3d at 671 (adopting "stand in some relation" formulation).

Mateen, 806 F.3d at 860. The Sixth Circuit agreed with its sister circuits, stating that unlike sentence enhancement statutes that require the state statute to "mirror" the federal statute, "[s]ection 2252(b)(2)'s 'relating to' language, however, requires only that the state statute be associated with sexual abuse." *Id.* at 861. Finding that each section of the Ohio statute "proscribes sexual contact that is non-consensual by virtue of force, threats of force, impairment,

or age, and therefore abusive," the Sixth Circuit held that all possible violations of Ohio's sexual imposition statute relate to sexual abuse. *Id.* at 862-63.

In response, O'Neal gives two examples of violations of § 510.110 he claims do not relate to the generic definition of sex abuse. First, O'Neal argues "both 510.110 (c)(2) and (d) are both broader than the generic definition, as an individual could masturbate in the presence of a sleeping child, or a child who is not paying attention to the sexual conduct, and not cause any injury to the child." [R. 34 at 5.] Second, O'Neal contends that since an *attempted* crime does not necessarily include an injury, "any injury that may be sustained by a victim of Sex Abuse First Degree, would not likely be sustained by a victim of an attempt." [*Id.*] In support, O'Neal cites to the Sixth Circuit's findings in *United States v. Armstead*, a case involving a potential sentencing enhancement under the Armed Career Criminal Act (ACCA), in which the defendant was indicted for aggravated child abuse but pleaded guilty only to attempted child abuse. 467 F.3d 943, 949 (6th Cir. 2006). As the defendant only pleaded guilty to *attempted* child abuse, the Court in *Armstead* limited its examination of the state indictments "to the elements of the charges that are essential to defendant's plea of guilty to attempted child abuse." *Id.* (citing *United States v. Arnold,* 58 F.3d 1117, 1124 (6th Cir. 1995)). This precluded consideration of the clause of the indictment that alleged that the victim child suffered bodily injury because *attempted* child abuse does not necessarily include such injury. *Id.* at 952. As there was no other evidence of violent conduct before the district court, the Sixth Circuit held that "the finding of a crime of violence based on the indictments alone was error." *Id.* at 949.

The Court agrees with the Government that, in the more recent case of *Mateen*, the Sixth Circuit has aligned itself with several other circuits in interpreting the sentencing enhancement's "relating to" language broadly. *Mateen*, 806 F.3d at 862-63; *United States v. Bennett*, 823 F.3d

1316, 1324–25 (10th Cir. 2016) (finding that "relating to" is "expansive" in the section 2252A(b)(2) context); *United States v. Sullivan*, 797 F.3d 623, 638 (9th Cir. 2015) (holding that "relating to" "mandates the enhancement for any state offense that stands in some relation, bears upon, or is associated with that generic offense"); *United States v. Barker*, 723 F.3d 315, 323 (2d Cir. 2013) (same); *United States v. McGarity*, 669 F.3d 1218, 1262 (11th Cir. 2012) (same); *United States v. Colson*, 683 F.3d 507, 511-12 (4th Cir. 2012) (same).[2] In *Mateen*, the Sixth Circuit found that the language of § 2252(b) created a "broad sweep" that engulfed all of the possible violations of Ohio's gross sexual imposition statute. 806 F.3d at 863. Essentially, the Court adopted the Supreme Court's definition of "relating to": "The ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' Black's Law Dictionary 1158 (5th ed. 1979)—and the words thus express a broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Intuitively, one would think that this Kentucky statute involving sexual conduct that is nonconsensual by way of force, age, or mental incapacitation would relate to the common meaning of sexual abuse.

In opposition of this intuition, O'Neal provides two examples of how the elements of the Kentucky statutes to which he pleaded guilty are broader than the federal definition of sexual abuse. Both examples encapsulate the notion that the elements of the statutes do not require an injury, making the state statute broader than the Sixth Circuit's definition of sex abuse—which requires that the abuse "injure, hurt, or damage." *Mateen*, 806 F.3d at 861. True, the Sixth

[2] Other courts interpreted *Mateen* in this fashion as well. *See United States v. Geasland*, 694 F. App'x 422, 438 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 699, 199 L. Ed. 2d 574 (2018) (citing *Mateen* as an example of a court applying the categorical approach while interpreting "relating to" broadly); *Bennett*, 823 F.3d 1316, 1324–25 (citing *Mateen* in support of the assertion that "'relating to" remains broad in this context").

Circuit came to a similar conclusion in *Armstead* when it precluded consideration of the charges in the state indictment that described the child victim's injury due to the fact that a conviction of attempted child abuse does not necessarily include injury. *Armstead,* 649 F.3d at 444. However, as highlighted by the Government, *Armstead* involved a different federal statute. In *Armstead,* the defendant was convicted of being a previously convicted felon in violation of 18 U.S.C. § 922(g), and "[t]he presentence report concluded that Armstead's offense level should be increased pursuant to § 4B1.2 of the Guidelines because he had been previously convicted of a 'crime of violence.' *See* U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a)." *Armstead,* 467 F.3d at 945. In executing the categorical approach, the Sixth Circuit first decided "whether the statutory definition, by itself, supports a conclusion that the defendant was convicted of a crime of violence." *Id.* at 947. In contrast, under the statute currently at issue, § 2252A(b)(2), rather than deciding whether the statutory definition supports a conclusion that defendant *was convicted* of sexual abuse, the Court merely has to decide whether the Kentucky statute by its nature and elements "relat[es]" to sexual abuse. Thus, the Court finds that the analysis in *Armstead* is distinguishable from the analysis at hand.

Furthermore, several other circuits that also adopted the broad interpretation of "relating to" in the context of § 2252(b)(2) have held that "[a] prior conviction 'relates to' aggravated sexual abuse, sexual abuse, or abusive sexual contact 'whether or not the statute under which [the defendant] was convicted required actual harm.'" *United States v. Stults,* 575 F.3d 834, 845 (8th Cir. 2009) (citing *United States v. Weis,* 487 F.3d 1148, 1152 (8th Cir.2007)); *see also United States v. Wiles,* 642 F.3d 1198, 1201 (9th Cir. 2011) ("An attempt conviction 'clearly "stands in some relation to" or "pertains to" the crimes of aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor' and therefore qualifies as a predicate offense under

§ 2252(b)(1)."); *United States v. Hubbard*, 480 F.3d 341, 347 (5th Cir. 2007) (holding that prior state law convictions for which the sentencing enhancement is imposed are not limited to offenses involving sexual contact between a defendant and victim). Thus, under the broader interpretation of "relating to," the Court finds that the absence of a requirement of harm or injury would not prevent the elements of K.R.S. § 510.110 from being related to the offense sexual abuse as defined above.

The Court also acknowledges that O'Neal cites to the Sixth Circuit's findings in *United States v. Gardner* toward the end of his discussion of *Armstead*. [R. 34 at 6.] Although O'Neal provides no explanation for this citation, the Court assumes O'Neal references *Gardner* for its finding that because the defendant pled only to "sexual battery," which did not require that the victim be a minor, "the references in the indictment suggesting the victim was a minor are not 'essential to the offense to which [Gardner] entered his plea.'" *Gardner*, 649 F.3d 437, 444 (6th Cir. 2011). As argued by the Government, the Court agrees that *Gardner* is distinguishable from the case at hand in that it applied *Armstead*'s holding in a § 2252A(b) case involving a statute missing an element concerning the victim's age rather than an element concerning injury or harm. Though, perhaps more importantly, in *Gardner*, the Sixth Circuit's execution of the categorical approach appears contradictory to that which occurred in the more recent case of *Mateen*. In *Gardner*, the Sixth Circuit instructed that the analysis began with "examining whether the statute of conviction falls within the four corners of the federal statute." 649 F.3d at 443. Conversely, in *Mateen*, the Sixth Circuit merely requires that the state conviction "relat[es] to" the federal offense. 806 F.3d at 860. As the Sixth Circuit's finding in *Mateen* is more recent,

and better aligns with that of other circuits, the Court will follow the instruction in *Mateen* over *Gardner*.[3]

In sum, the Court finds that K.R.S. § 510.110, in conjunction with K.R.S. § 506.010, by its nature and elements, "relat[es]" to "sexual abuse," as defined above. Thus, O'Neal's prior misdemeanor conviction for 1st Degree Attempted Sexual Abuse triggers the enhanced penalties under § 2252A(b)(2).

B. The Modified Categorical Approach

As the Court has found that O'Neal's prior misdemeanor conviction for 1st Degree Attempted Sexual Abuse triggers the enhanced penalties under § 2252A(b)(2), it is not necessary to engage in the modified categorical approach outlined above. *Descamps*, 570 U.S. at 263 (referring to the modified approach "not as an exception, but instead as a tool" which "merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute"). The Court acknowledges that the parties dispute this issue—specifically whether the Court may consult the excerpt from the state presentence report tendered by the Government. However, the Court notes that even if it did consider the facts laid out in the state presentence report and found the relevant subsection of the Kentucky sexual abuse statute to be K.R.S. § 510. 110(c)(1), as requested by the Government, the Court would still be left with the

[3] It is also unclear as to whether the Sixth Circuit's underlying reasoning in *Gardner* is still proper after the Sixth Circuit's subsequent holding in the 2014 opinion in *United States v. Mateen* ("2014 *Mateen*"). (2014 *Mateen* is a different opinion from the *Mateen* case mentioned above, as 2014 *Manteen* was published one year prior.) In *Gardner*, the Court held that "[t]he statute of conviction does not require, as an element of the offense, that the complaining witness be a minor; thus, the statute itself does not justify a sentence enhancement." 649 F.3d at, 443. However, three years later in 2014 *Mateen*, the Court held only the third listed conduct category, i.e., "abusive sexual conduct involving a minor," requires that the victim be a minor in order to trigger the sentencing enhancement. *United States v. Mateen*, 764 F.3d 627, 630-31 (6th Cir. 2014). Thus, the Court found that a prior state conviction relating to aggravated sexual abuse or sexual abuse triggers the sentencing enhancement even if the conviction did not involve a minor victim. *Id.* at 630-32. As the Sixth Circuit did not specify in *Gardner* that the state conviction was for "sexual conduct involving a minor," the holding that the statute did not justify an enhancement because it did not require that the victim be a minor appears to contradict the subsequent holding in 2014 *Mateen*.

question of whether an *attempt* to commit such sexual abuse under state law is related to the federal definition of sexual abuse. Of course, this is the exact question the Court just resolved above under the categorical approach. Thus, the Court does not find much use for this "tool," otherwise known as the modified approach, in this instance.

II. Whether § 2252A(b)(2) has a Knowledge Element

As to the second issue before the Court, concerning whether the Government needs to prove mens rea as to the type of child pornography involved in the offense in order to establish a violation of § 2252A(a)(5)(B), the parties appear to agree. The Government argues that the Court is not required to find that O'Neal knew that the child pornography in his possession contained images of minors under the age of twelve years old in order to accept O'Neal's guilty plea. [R. 31 at 7-10.] In response, O'Neal agrees, stating: "At a minimum, it would seem that it must be proven that Mr. O'Neal had knowing possession of the memory card, and its contents. Whether he had specific knowledge that a minor in a particular image was in fact under twelve would not seem necessary." [R. 34 at 12.] Thus, as the matter is not disputed, the Court finds that it is not necessary to find that O'Neal knew that the child pornography in his possession contained images of minors under the age of twelve years old in order to accept his guilty plea.

Despite stating that proof of his knowledge that the minors in the images were under the age of twelve "would not seem necessary," O'Neal requests that he be given the opportunity to inspect the "images and mediums involved (the memory card and card reader)" in order to clarify what specific admissions, if any, he is prepared to make. [R. 34 at 13.] O'Neal argues that "[a]t that point, the discussion regarding whether enough facts have been admitted to support the increased potential maximum sentence will be more clearly defined." [*Id.*] The Court will discuss this issue during the phone conference on May 7, 2019.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED**:

(1) The Government's Motion for Leave to File Sealed Document, [R. 32], is **GRANTED**.

(2) O'Neal's prior misdemeanor conviction for 1st Degree Attempted Sexual Abuse triggers the enhanced penalties under § 2252A(b)(2);

(3) The parties agree that the Court is not required to find that O'Neal knew that the child pornography in his possession contained images of minors under the age of twelve years old in order to accept O'Neal's guilty plea.

IT IS SO ORDERED.

Thomas B. Russell

Thomas B. Russell, Senior Judge
United States District Court

May 6, 2019

cc: Counsel of Record

Direct Submission

COMMONWEALTH OF KENTUCKY
CALLOWAY CIRCUIT COURT
Indictment No. 11-CR-00095
SEALED INDICTMENT

COMMONWEALTH OF KENTUCKY,

Ct. 1: Attempted Unlawful Transaction With a Minor, 1st Degree, Illegal Sex Act Under 16
KRS: 530.064(1)(a) UOR: 0381121
Class C Felony

VS.

App

Cts. 2-3: Prohibited Use of Elec. Comm. System to Procure a Minor to Engage in Sex Acts
KRS: 510.155(1) UOR: 0109700
Class D Felonies

MATTH [redacted] NEAL DOB: [redacted]
[redacted]
Murray, KY 40271 SSN: [redacted]

12-16- [illegible] D.C.

THE GRAND JURY CHARGES:

Ct. 1: That between June 14-19, 2010, in Calloway County, Kentucky, the above-named Defendant committed the offense of Attempted Unlawful Transaction With a Minor, 1st Degree, Illegal Sex Act Under 16, when he knowingly and unlawfully solicited sexual contact from a minor less than 16 years old, in violation of KRS 530.064(1)(a).

Ct. 2: That between June, 2010 and August, 2010, in Calloway County, Kentucky, the above-named Defendant committed the offense of Prohibited Use of Electronic Communications System to Procure a Minor to Engage in Sex Acts, when he used a computer for the purpose of procuring a minor for sexual acts, in violation of KRS 510.155.

Ct. 3: That between January, 2010 and August, 2010, in Calloway County, Kentucky, the above-named Defendant committed the offense of Prohibited Use of Electronic Communications System to Procure a Minor to Engage in Sex Acts, when he used a computer for the purpose of procuring a minor for sexual acts, in violation of KRS 510.155.

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY

/ TRUE BILL

M. O'Neal Indictment 1

Attachment C

ONEAL-000278

AOC 491.1 Rev. 9-03 Doc Code: COP		Case No. 11-CR-00095
Commonwealth of Kentucky Office of the Commonwealth's Attorney 42nd Judicial District Calloway and Marshall Counties	Commonwealth's Offer on a Plea of Guilty	Court: CIRCUIT County: CALLOWAY

COMMONWEALTH OF KENTUCKY, PLAINTIFF,

VS.

MATTHEW O'NEAL, DEFENDANT.

1. **CHARGES:** **PENALTY:**

Ct. 1: Attempted Unlawful Transaction with a Minor, 1st Degree — Class C Felony
Cts. 2-3: Prohibited Use of Electronic Communication System to Procure Sexual Performance by a Minor — Class D Felonies

2. **AMENDED CHARGES (IF APPLICABLE):** **PENALTY:**

Ct. 1. Attempted Sexual Abuse, 1st Degree — Class A Misdemeanor
Cts. 2 & 3: Merge with Count 1.

3. **FACTS OF THE CASE:**

See indictment as amended.

FILED AND NOTED OF RECORD
THIS 1-23, 2012
CALLOWAY CIRCUIT/DISTRICT
BY _____ D.C.

4. **RECOMMENDATIONS ON A PLEA OF GUILTY:**

Ct. 1: 12 months, conditionally discharged for 2 years.
The Defendant shall have no contact or communication with the victims. Sex Offender treatment and sex offender registration as mandated by law. The Defendant shall stay away from any unrelated minors and will not go on the premises of any Calloway County or Murray City Schools.
Restitution, if any, by separate order. Forfeit all items seized.

5. **REASON FOR AMENDED CHARGE IF APPLICABLE:**

6. **OFFERED** this the 17th day of January, 2012.

C Mark Blankenship
Commonwealth's Attorney or Assistant

Defendant's Attorney

Defendant

Prosecuting Witness/Victim

Approved by K. Nall, KSP
Police Officer

Attachment D

AOC-445 Doc. Code: JSPG Commonwealth of Kentucky Court of Justice	JUDGMENT AND SENTENCE ON PLEA OF GUILTY (MISDEMEANOR)	Case No. 11-CR-00095 CIRCUIT COURT CALLOWAY COUNTY

COMMONWEALTH OF KENTUCKY

v.

MATTHEW J. O'NEAL DEFENDANT

ENTERED
THIS 3.27., 2012
CALLOWAY CIRCUIT/DISTRICT
BY [illegible] D.C.

Date of Birth: [redacted]

Social Sec. No.: XXX-XX[redacted]

The defendant at arraignment entered a plea of NOT GUILTY to the following charges contained in the indictment/information: **(1) Criminal attempt to first degree unlawful transaction with a minor; (2) Prohibited use of electronic communications system to procure a minor to engage in sex acts; (3) Prohibited use of electronic communications system to procure a minor to engage in sex acts**, which offenses were committed **between January and August, 2010**, when the defendant was **Twenty (20) and Twenty-one (21) years old.** The defendant's date of birth is [redacted] And on the day of **January 23, 2012** having appeared in open court with his attorney **Mike Ward**, by agreement with the attorney for the Commonwealth he withdrew his plea of not guilty and entered a plea of **GUILTY.** Finding that the defendant understands the nature of the charges against him including the possible penalties, that the defendant knowingly and voluntarily waives his right to plead innocent, to be tried by a jury, to compel the attendance of witnesses in his behalf, to confront and cross examine witnesses and to appeal his case to a higher court, and finding further that the defendant understands and voluntarily waives his right not to incriminate himself, his right to be represented by an attorney at each stage of the proceedings against him and, if necessary, to have an attorney appointed to represent him, and finding that the plea is voluntary, the Court accepts the plea.

On **March 26, 2012** the defendant appeared in open court with his attorney **Mike Ward** and the court inquired of the defendant and his attorney whether they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his attorney the opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the court having informed the defendant and his attorney of the factual contents and conclusions contained in the written report of the presentence investigation prepared by the Division of Probation and Parole and provided defendant's attorney with a copy of the report although not the sources of confidential information, the defendant ☑ agreed with the factual contents of said report ☐ was granted a hearing to controvert the factual contents of the report. Having given due consideration to the written report by the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion:

☑ that the defendant is eligible for probation, probation with an alternative sentencing plan, or conditional discharge as hereinafter ordered on AOC-455.

No sufficient cause having been shown why judgment should not be pronounced, it is ADJUDGED BY THE COURT that the defendant is guilty of the following charge(s):

Ct. 1 Criminal attempt to first degree sexual abuse (amended) - (12 months)
Ct. 2 Dismissed
Ct. 3 Dismissed

and is sentenced to:

☑ imprisonment for a maximum term of **Twelve (12) months in the county jail, conditionally discharged as stated in the attached Order of Conditional Discharge.** (No fine imposed on KRS Chapter 31 indigent defendant).

IT IS FURTHER ORDERED THAT the defendant's bond is released.

I, Linda Avery, Clerk of the Calloway Circuit Court hereby certify that the above [illegible] is a true and correct copy as found of record in my office this the 27th day of March, 2012
CLERK
BY: [illegible] D.C.

Attachment A

ONEAL-000275

☑ Pursuant to KRS 17.510(2) defendant has been convicted of a sex crime and has been informed of duty to register with the appropriate local Probation and Parole office for a period of 20 years.

☑ It is hereby ORDERED restitution, if any, is to be paid pursuant to separate Order.

DEFENDANT may not be released from probation or parole supervision until restitution has been paid in full and all other aspects of probation have been successfully completed.

☐ Counsel is hereby removed as counsel of record, except for filing one shock probation motion, unless otherwise arranged by contract;

☑ Pursuant to KRS 532.352 the Defendant is ordered to pay costs of incarceration to the Calloway County Detention Center in the amount of $60.00.

It is further ORDERED that the defendant be delivered to the custody of the Department of Corrections at such location within this Commonwealth as Corrections shall designate.

DATED this the 26th day of March, 2012.

Dennis R Foust

DENNIS R. FOUST, JUDGE
Calloway Circuit Court

COPY DISTRIBUTION:

Defendant
Defendant's Attorney
Prosecutor
Probation & Parole
Department of Corrections
Jail
Sheriff (2 Certified copies if defendant sentenced to death or confinement)
Principal, _____School (If defendant is youthful offender)

SHERIFF'S RETURN

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Eighth Amendment, United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 2252A

(a) Any person who ... (5) either ...
(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

18 U.S.C. § 2252A(b)(2)

Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction 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 aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

Ky.Rev.Stat. (KRS) § 510.110 Sexual Abuse in the First Degree

(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;
3. Is mentally incapacitated; or
4. Is an individual with an intellectual disability; 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;

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.

(2) Sexual abuse in the first degree is a Class D felony, unless the victim is less than twelve (12) years old, in which case the offense shall be a Class C felony.

Ky.Rev.Stat. (KRS) § 510.010 - Definitions for Chapter

The following definitions apply in this chapter unless the context otherwise requires:

(7) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party;

Ky.Rev.Stat. (KRS) § 506.010 - Criminal Attempt

(1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.

(3) A person is guilty of criminal attempt to commit a crime when he engages in conduct intended to aid another person to commit that crime, although the crime is not committed or attempted by the other person, provided that his conduct would establish complicity under KRS 502.020 if the crime were committed by the other person.

(4) A criminal attempt is a:

(a) Class C felony when the crime attempted is a violation of KRS 521.020 or 521.050;

(b) Class B felony when the crime attempted is a Class A felony or capital offense;
(c) Class C felony when the crime attempted is a Class B felony;
(d) Class A misdemeanor when crime attempted is Class C or D felony;
(e) Class B misdemeanor when crime attempted is misdemeanor.