No. 21-5346

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

GENARD TONEY — PETITIONER
(Your Name)

8th Cir. Court of Appeals vs.
United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

8th Circuit court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GENARD TONEY
(Your Name)

P.O Box 6000 FCI-Gilmer
(Address)

Glenville, WV 26351-6000
(City, State, Zip Code)

(Phone Number)

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

U.S. vs. Gerard Toney 8th Circuit

Case NO. 17-CR-03135-SRB

Appeal Case NO. 20-1710

RELATED CASES

Unprecedent case 18 U.S.C. 2251(a)2(e)
18 U.S.C. 2252(a)2(b)

'Pattern of Activity' enhancement 4B1.5 (b)(1)

QUESTION(S) PRESENTED

1.) Whether the Courts Erred in Applying the 5-Level 'Pattern of Activity' - Enhancement From 4B1.5(b)(1) when the Defendant Had Not Engaged in Prohibited Sexual Conduct "with a minor", Resulting in a Substantively Unreasonable sentence of 360 Months Imprisonment and Lifetime Supervision.

2.) Whether an individual can be Convicted under 18 U.S.C. 2251(a)+(e), solely Conversating to an Adult intermediary through Cellular Phone. text messaging only, without any Prohibited Sexual Conduct directly "with a minor" as the natural language of the statute reads, without any mention of an - Adult Intermediary present.

3.) Unconstitutional cruel and unusual punishment - TONEY recieved 360 months (30 yrs) imprisonment For asking an Adult For a picture, in comparison to cases with extremely worse conduct such as cases with physical sexual rape of a minor repeatedly, or murder, where an individual gets half, or less than half of the time. TONEY recieved. TONEY's sentence is an example of Cruel and Unusual Punishment.

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Due Process Fifth Amendment

18 U.S.C. 225(a)+(e) , 5-level 'Pattern of Activity' enhancement 4B1.5(b)(1)

Ex Post Facto

Separation of Powers

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 6/1/2021 6-2-2021

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 7/1/2021, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

STATEMENT OF THE CASE

The Defendant received a substantively unreasonable sentence of 360 months - imprisonment and lifetime supervision when the District Court improperly applied the 5-level 'Patton of Activity' enhancement 4B1.5(b) in guideline calculations, which its application note requires a Finding that on at least two separate occasions, the defendant engaged in Prohibited sexual conduct "with a minor" in order to apply the increased punishment. This Enhancement was improperly applied because the Prohibited sexual conduct "was not with a minor" but was confined to Adults who exercise custody, care, or supervisory control of the minor. The Finding of "with a minor" is completely absent From the Factual basis and the record before the District Court.

The Governments interpretation of 18 U.S.C. 2251(a) stretches the statute beyond the natural reading of its terms. 'Adult Intermediary' is completely devoid of mention under 2251(a), as well as in its elements, provisions, and legislative history. Any statutory ambiguity must be resolved in defendants Favor under the rule of lenity.

The language of a statute must be given its plain and ordinary meaning. A court may not construe a criminal statute to penalize conduct it does not clearly proscribe. (Supreme Court, 139 S. Ct. 2319, 2019)(U.S v. Davis)

REASONS FOR GRANTING THE PETITION

To Vacate conviction and resentence in order to correct this sentencing-error and for Defendant to be resentenced to a reasonable term of months, with an amended guideline calculations that do not include a 5-level 'Pattern of Activity' enhancement and that does not include 18 U.S.C. 225(a),(c) charge. This error is in violation of Due Process, of expanding the statute and the language of the Enhancement, in which the Governments interpretation stretches the statute beyond the natural reading of its terms. Adult Intermediary is devoid of Mention.

18 U.S.C. 225(a) is an "offense against a minor" contained in Chapter 110.

Based on the Factual basis and the record before the court in this case. There's no indication that TONEY in any way has engaged in any sort of "offenses specifically against a minor child" (Sent. Tr. 10-14 pg. 6).

By Congress not expanding the class of people beyond minors for this specific enhancement, it is clear that this 5-level 'pattern of activity' enhancement under § 4B1.5(b)(1) does not apply when a defendant's prohibited sexual acts are with parents and guardians of minors.

In *United States v. Pappas*, 715F.3d 225 (8th Cir.2013), the Defendant Pappas sexually abused his step-daughter over five years. The defendant pled guilty to both sexual exploitation of a child in violation of 18 U.S.C. §§2251(a) & 2251(e), along with the charge of knowingly possessing and attempted to possess visual depictions of a minor engaged in sexually explicit conduct in violation 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2). The PSR recommended a five level enhancement because Pappas had engaged in a pattern of activity involving prohibited sexual conduct as required by § 4B1.5(b)(1). {Id. at 227}.

At sentencing Defendant Pappas objected to two (2) enhancements including the five level enhancement under § 4B1.5(b)(1). The district court overruled his objections. {Id. at 228}. Defendant Pappas appealed and argued in part that the district court erred in applying a five level enhancement under § 4B1.5(b)(1). The *Pappas* Court started off again by referring to the commentary language in the application notes by stating that "[a] 'pattern of activity' under § 4B1.5(b)(1) **must** include at least two separate occasions of prohibited sexual **contact with a minor**. § 4B1.5, cmt. n. 4(B)(1)." {Id at 229} (emphasis added).

This Court in *Pappas* went on to state "that the 'plain-language' of the application note in § 4B1.5(b)(1) shows that it applies where a defendant engaged in prohibited sexual activity 'on at least two separate occasions...**with a minor.**'" {Id. at 229} (emphasis added). In determining whether the 5-level enhancement was properly applied by the district court in *Pappas*, this Court again looked only at the actions of the defendant to see whether they were 'with a minor' and whether such actions were repeated by either separate acts and/or separate minor victims. "The evidence in this case shows that Pappas abused K.D. for approximately five years and made two separate videos of the sexual abuse. **His conduct** shows a 'pattern of activity involving prohibited sexual conduct.'" {Id.} (emphasis added).

By finding Pappas had engaged in prohibited sexual conduct with a minor on separate occasions, this Court affirmed the district court's application of the five level enhancement required by § 4B1.5(b) for defendant Pappas. {Id. at 230} Since Appellant Toney's conduct was only with parents and guardians of minors, and because the Appellant did not have any prohibited sexual conduct with any minor, no five level enhancement under § 4B1.5(b) should have been applied to him.

Appellant Toney also appeals his Final Judgment on the grounds that his sentence of 360-months imprisonment followed by lifetime supervision is substantively unreasonable when Appellant never had any prohibited sexual conduct with a minor.

In *United States v. Peck*, 486 F.3d 885 (8th Cir. 2007), Defendant Peck also appealed on the grounds that his sentence was unreasonable. The Court in *Peck* noted that "[t]he Supreme Court recently held at 'a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the sentencing guidelines'.... Because the district court properly calculated the advisory sentencing guidelines range for Peck, and because it sentenced Peck within that range, Peck's sentence is cloaked in a presumption of reasonableness." {Id. at 891)

If the District Court in Appellant Toney's case improperly applied the five level enhancement as required by the application note of § 4B1.5(b), then the District Court improperly calculated the Appellant's sentencing guidelines. As such, the District Court's sentencing of Appellant Toney to 360 months imprisonment and lifetime supervision no longer has the presumption of reasonableness when compared to other defendants.

Comparing the Appellant's 360-month prison sentence and lifetime supervision for prohibited sexual conduct that lacked any conduct with a minor, with those sentences for perpetrators who did have repeated prohibited sexual conduct with minors, Appellant argues his sentence is substantively unreasonable. In *United States v. Gibson*, 830 F.3d 512 (8th Cir.2016), Defendant Gibson admitted to sex trafficking of a child and was sentenced to 144 months. Appellant

Toney admitted to enticement of minors and to receipt and distribution of child pornography and was sentenced to 360 months without having any *conduct with a minor*.

In *United States v. Sharpfish*, 408 F.3d 507 (8th Circuit, 2005) The district court commented at Sharpfish's sentencing that "[t]hese are horrible crimes" {Id. at 512} in the defendant's use of force in committing his aggravated sexual abuse of a minor (his own daughter) as well as another minor, yet only sentenced the defendant to a term of 262 months imprisonment. In *United States v. Wardlow*, 830 F.3d 817 (8th Cir. 2016) Defendant Wardlow was a 'regular' client of the minor child prostitute and then promoted himself to transporting her for purposes of prostitution. Defendant Wardlow was sentenced to 250 months imprisonment while the Appellant, who had no contact with any minor child, received a 360-month sentence with lifetime supervision.

In *United States v. Lovato*, 868 F.3d 681 (8th Cir.2017) Defendant Lovato sexually abused a minor child for over a period of eight and half years with some of the abuse consisting of raping the minor child multiple times, and Defendant Lovato was sentenced to a term of 180 months imprisonment. In this appeal, there is no evidence Appellant Toney had prohibited sexual conduct with any minor and there is no evidence Appellant Toney sexually abused any minor, yet he was sentenced to 360 months for prohibited sexual conduct with parents and guardians.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gerard Toney

Date: 7-22-2021