

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES FREI,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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PRAYER

Petitioner James Frei prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in petitioner's case dated May 3, 2021 is attached to this petition as Appendix A. *United States v. Frei*, 995 F.3d 561 (6th Cir. 2021). The United States Court of Appeals for the Sixth Circuit's order denying petition for en banc review as Appendix B. District Court's judgment is attached as Appendix C. The Order Appointing Counsel is attached as Appendix D.

JURISDICTION

The Court of Appeals entered its order denying petition for rehearing en banc on June 3, 2021. This petition for writ of certiorari is filed within one hundred-fifty days of that order. Sup. Ct. R. 13.1, 13.3. (See also Supreme Court Order dated March 19, 2020 extending deadline for petition for writ of certiorari to 150 days; See also Supreme Court Order dated July 19, 2021 rescinding March 19, 2020, but allowing 150-day deadline for lower court judgment, orders denying discretionary review, and orders denying timely petitions for rehearing issued prior to July 19, 2021). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution provides that “[n]o person shall be nor be deprived of life, liberty, or property, without due process of law...” USCS Const. Amend. 5

The jury instructions in the case involved 18 U.S.C. § 2251(a) which states the following:

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

18 U.S.C.S. § 2251.

STATEMENT OF THE CASE

On March 8, 2017, Petitioner (hereinafter “Petitioner” or “Mr. Frei”) was indicted on four counts of production of child pornography, in violation of 18 U.S.C. 2251(d) (Counts 1-4), one count of online enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b) (Count 5), and two counts of traveling in interstate commerce to have sex with a minor (Counts 6-7), in violation of 18 U.S.C. 2423(b) and one count of transporting child pornography in interstate and foreign commerce in violation of 18 U.S.C. §§ 2252A(a)(1) and 2252A(b) (Count 9).

On February 5, 2019, the Government filed joint proposed jury instructions and proposed joint jury verdict form (Proposed Joint Jury Instructions, RE 56, Page ID # 218-260; Proposed Joint Jury Verdict Form, RE 57, Page ID # 261-264).

The jury instructions in this case involved relevant to this petition for Counts One through Four were pursuant to 18 U.S.C. § 2251(a) which states the following:

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

18 U.S.C.S. § 2251.

On February 5, 2019, Mr. Frei filed his proposed supplemental instructions for Counts One through Four, 18 U.S.C. § 2251(a) (Using a Minor to Engage in Sexually Explicit Conduct to Produce a Visual Depiction). Mr. Frei requested that the definition of “for the purpose of” in Sixth Circuit Pattern Jury Instruction No. 16.01 (2) (C) have the below additional two sentences added, which were in bold in the original proposal as follows:

(2) Now I will give you more detailed instructions on some of these terms.

(C) The term “for the purpose of” means that the defendant acted with the intent to create visual depictions of sexually explicit conduct, and that the defendant knew the character and content of the visual depictions. **The defendant must have engaged in the sexually explicit conduct with the specific intent to produce a visual depiction. It is not enough for the government to simply prove that the defendant purposely produced the visual depiction.**

A three-day jury trial was conducted from February 12-14, 2019.

Detective Michael Adkins of the Metropolitan Nashville Police Department Sex Crime Section, received a cyber tip from the National Center for Missing and Exploited Children that had

been reported by Facebook. The May 2016 cyber tip was that the Petitioner had traveled across state lines to engage in sexual activity with T.B., who was a minor at the time.

In response to the cyber tip, Detective Adkins interviewed T.B. and she identified the Petitioner in a photograph lineup.

On August 3, 2016, Detective Adkins later interviewed the Petitioner while executing a search warrant on his residence. The Petitioner's cellular telephone was seized pursuant to the search warrant.

The Government introduced Facebook chat messages between T.B. and the Petitioner where they discussed meeting up for sexual encounters that occurred on May 8, 2016, May 17, 2016, and June 5, 2016.

Detective Adkins testified about Petitioner's admissions of sexual activity with T.B. and he verified those admissions with video and pictures. Detective Adkins also testified about Petitioner's recorded admissions of multiple sexual encounters with T.B. and those admissions were admitted into evidence.

On cross examination Detective Adkins testified that the videos and images seized from Petitioner's phone were not a studio-type production with video cameras, lights, tripods, or assistants. Detective Adkins testified that Petitioner was cooperative with him and admitted to traveling from North Carolina for a sexual encounter with T.B. Detective Adkins did not ask Petitioner whether he traveled to Tennessee from North Carolina for the purpose of producing sexually explicit photos.

T.B. met Petitioner James Frei in a Facebook group for teenagers online. T.B. and Mr. Frei communicated through Facebook over a thirty to sixty-day period about meeting or sexual relationships and met about three times. Of all of the lengthy communications, Petitioner only

once asked T.B. about taking a picture of her when they were together and she thought he meant “normal pictures.”

On May 8, 2016 T.B. and Petitioner had sex multiple times, including at a park. The government introduced photographs of these sex acts.

The Government also introduced testimony regarding and photographs of T.B. and Petitioner engaging in sexual relations in a hotel room on June 3, 2016. T.B. testified about sexual relations with the Petitioner on June 5, 2016 and June 6, 2016. During one of the sexual acts, Petitioner requested T.B. to state what she was doing and to “look at the camera.”

Through Metropolitan Nashville Police Detective Chad Gish, the Government introduced video and photographic exhibits of the interactions, including sex acts between T.B. and the Petitioner on May 8, May 17, June 3, and June 5, 2016.

The parties argued the proposed jury charge for Counts One through Four regarding the definition of “for the purpose of” in 18 U.S.C. 2251(d) in the charge conference. The District Court rejected Petitioner’s requested language in the definition of “for the purpose of,” but proposed to add the following language to this Circuit’s Pattern Jury Instruction No. 16.01 (2) (C): “[t]he government must show that making a visual depiction was **a** purpose for causing a minor to engage in sexually explicit conduct.” (Emphasis added by counsel in bold). Both parties objected to the court’s suggested additional language for different reasons and so the court used this Court’s Pattern Instruction in full.

The Court instructed the jury as follows: “[t]he term ‘for the purpose of’ means that the defendant acted with the intent to create visual depictions of sexually explicit conduct, and that the defendant knew the character and content of the visual depictions.”

At the conclusion of the trial the jury found Mr. Frei guilty on all counts.

After the sentencing hearing, the District Court, in granting a variance, sentenced Mr. Frei to a below guideline sentence of three hundred eighteen months on Counts One through Seven. The sentence on Count Nine was 240 months, and ran concurrently with all of the other counts for an effective sentence of three hundred eighteen (318) months with lifetime supervision.

The Judgment was entered on January 21 2020. (Judgment, RE 94, Page ID # 648-655).

Mr. Frei filed his timely appeal on January 30, 2020 to the United States Court of Appeals, Sixth Circuit. On May 3, 2021, the Court issued its opinion denying Frei's contention that the district court improperly instructed the jury on the "for the purpose of" definition because the Sixth Circuit pattern jury instructions are inconsistent with 18 U.S.C. § 2251(a). Frei filed a petition for rehearing and en banc review on May 17, 2021. The Sixth Circuit denied the petition for rehearing on June 3, 2021.

REASONS FOR GRANTING THE WRIT/ARGUMENT

- I. Supreme Court review is warranted because this court has never ruled on the proper mens rea requirement and a proper jury instruction on the *mens rea* required to find that a defendant has sexually abused a minor for *the purpose of producing a visual depiction* under 18 U.S.C. § 2251(a) and there is a Circuit split on the proper jury instructions.**

Petitioner, James Frei, requests that this Court grant this petition for writ of certiorari pursuant to Rule 10(a) of the Supreme Court rules since the Sixth Circuit's ruling is in conflict with other Circuits.

- A. Circuits split on the mens rea required to find that a defendant has sexually abused a minor for *the purpose of producing a visual depiction* under 18 U.S.C. 2251(a).**

1. Sixth Circuit Pattern Jury Instructions

The Sixth Circuit Pattern Jury Instruction No. 16.01 (1) (A) on the “purpose” element states as follows:

(A) First: That the defendant [employed] [used] [persuaded] [induced] [enticed] [coerced] a minor to [engage in] [assist another person to engage in] sexually explicit conduct for the purpose of producing a visual depiction of that conduct.

S2 Modern Federal Jury Instructions-Criminal 16.01 (2021).

The Sixth Circuit Pattern Jury Instruction No. 16.01 (2) (C) defines “for the purpose of” as used by the district court in the Petitioner’s jury trial and approved by the Sixth Circuit as follows:

(C) The term “for the purpose of” means that the defendant acted with the intent to create visual depictions of sexually explicit conduct, and that the defendant knew the character and content of the visual depictions.

S2 Modern Federal Jury Instructions-Criminal 16.01 (2021).

2. Eighth Circuit Pattern Jury Instructions

The Eighth Circuit Pattern Jury Instruction No. 6.18.2251(a) on the “purpose” element states as follows:

Three, the defendant acted with the purpose of [producing a visual depiction of such conduct] [transmitting a live visual depiction of such conduct];

S2 Modern Federal Jury Instructions-Criminal 6.18.2251(a) (2021).

The Eighth Circuit Pattern Jury Instruction No. 6.18.2251(a) does not define “with the purpose of.”

3. Ninth Circuit Pattern Jury Instructions

The Ninth Circuit Pattern Jury Instruction No. 8.181 states on the “purpose” element states as follows:

Second, the defendant

[[employed] [used] [persuaded] [coerced] [name of victim] to take part in sexually explicit conduct]

or

[had [name of victim] assist any other person to engage in sexually explicit conduct]

or

[transported [name of victim] [[across state lines] [in foreign commerce] [in any Territory or Possession of the United States]] with the intent that [name of victim] engage in sexually explicit conduct]

for the purpose of producing a visual depiction of such conduct

S3 Modern Federal Jury Instructions-Criminal 8.181 (2021).

The Eighth Circuit Pattern Jury Instruction No.8.181 (2021) does not define “for the purpose of.”

4. Fifth Circuit Pattern Jury Instructions

The Fifth Circuit Pattern Jury Instruction No. 2.84 states on the “purpose” element states as follows:

Second: That the defendant acted with the purpose of producing a visual depiction [transmitting a live visual depiction] of such conduct;

S1 Modern Federal Jury Instructions-Criminal 2.84 (2021).

The Fifth Circuit Pattern Jury Instruction No. 2.84 (2021) does not define “with the purpose of.”

5. Eleventh Circuit Pattern Jury Instructions

The Eleventh Circuit Pattern Jury Instruction No. 82 states on the “purpose” element states as follows:

(2) the Defendant [employed] [used] [persuaded] [induced] [enticed] [coerced] the minor to engage in sexually explicit conduct for the purpose of producing a [visual depiction, e.g., video tape] of the conduct;

S3 Modern Federal Jury Instructions-Criminal 82 (2021).

The Eleventh Circuit Pattern Jury Instruction No. 82 does not define “for the purpose of.”

6. The Second, Third, Fourth, Seventh, Tenth, D.C., and Federal Circuits

The Second, Third, Fourth Seventh, Tenth, D.C., and Federal Circuits do not use any pattern jury instructions for 18 U.S.C. § 2251.

B. The District Court’s instruction as approved by the Sixth Circuit on the definition of “for the purpose of” is inconsistent with the plain language of the 18 U.S.C. § 2251 and the Circuits are split on the mens rea requirement.

Jury instructions violate due process if the instructions fail to give effect to every element of the offense. *Middleton v. McNeil* , 541 U.S. 433, 437, 124 S. Ct. 1830, 1832 (2004). Not every ambiguity arises to a due process violation, but only those that infect the entire trial. *Id.* “If the charge as a whole is ambiguous, the question is whether there is a ‘reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.”” *Middleton v. McNeil* , 541 U.S. 433, 437, 124 S. Ct. 1830, 1832 (2004), citing *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198 (1990)).

The Sixth Circuit decision below conflicts with other Circuits regarding the correct jury instructions in defining the specific intent requirement for conviction of 18 U.S.C. § 2251(a). The Sixth Circuit found that “[t]he Pattern Jury Instruction addresses the elements of § 2251(a) and includes a specific-intent requirement that the defendant “acted with the *intent* to create visual depictions of sexually explicit conduct, and that the defendant *knew* the character and content of

the visual depictions." Sixth Circuit Pattern Instruction 16.01." (Emphasis added in opinion). *United States v. Frei*, 995 F.3d 561, 566 (6th Cir. 2021).

Petitioner contends that the above instruction regarding the intent element is not consistent with the statute and is not consistent with the interpretation of other circuits on this element.

The Sixth Circuit Pattern Instruction 16.01(2) (C) definition does not define the specific intent required for the jury to find that the defendant committed the sex act(s) with the minor for the purpose of creating a depiction. The instruction gives no workable definition on whether the jury must find specific intent that Petitioner persuaded the minor to engage in the sexual conduct for the "sole purpose," "a substantial purpose," "some *de minimis* purpose" or simply "a or any purpose" **to produce** a video or photographic depiction of the act for conviction. The instruction did not inform the jury whether it must find that the defendant committed the sex act for "the purpose," or "a purpose," or some purpose in between those extremes.

Title 18 U.S.C. Section 2251(a) states the following:

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

18 SCS § 2251(a) (**Emphasis added in bold by counsel**).

Questions of statutory interpretation are reviewed under a three-step analysis, which is as follows: (1) a natural reading of the full text; (2) the common-law meaning of the statutory terms and (3) the consideration of the statutory and legislative history for guidance. *United States v. Wright*, 774 F.3d 1085, 1088 (6th Cir. 2014), citing *Elgharib v. Napolitano*, 600 F.3d 597, 601 (6th Cir. 2010). If the statutory language is not clear, the court may examine legislative history. *Id.* at 601.

C. Case law from Other Circuits on “for the purpose of” element.

“A general rule of construction of criminal statutes provides that where a statute does not specify a heightened mental element such as specific intent, general intent is *presumed* to be the required element” *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992), quoting *United States v. Brown*, 915 F.2d 219, 225 (6th Cir. 1990). “A specific intent crime requires additional ‘bad purpose.’” *United States v. Kimes*, 246 F.3d 800, 807 (6th Cir. 2001).

In an early case, the Ninth Circuit held that “[s]ection 2251(a) does not require the *actual* production of a visual depiction, merely the enticement of minors ‘*for the purpose of producing*’ a visual depiction of sexually explicit conduct.” *United States v. Smith*, 795 F.2d 841, 846 (9th Cir. 1986) (Emphasis in italics in original). The fact that the defendant “took the pictures and mailed the undeveloped film for processing and printing” was “sufficient proof of that purpose to allow a jury to find a violation of section 2251(a).” *United States v. Smith*, 795 F.2d 841, 846 (9th Cir. 1986).

The Fourth Circuit has specified that “a defendant must engage in the sexual activity with the **specific intent to produce a visual depiction**; it is not sufficient simply to prove that the defendant purposefully took a picture.” *United States v. Palomino-Coronado*, 805 F.3d 127, 131 (4th Cir. 2015). (**Emphasis Added in bold**). The Fourth Circuit does “not require that a defendant

be single-minded in his purpose to support a conviction under § 2251(a).” *United States v. Palomino-Coronado*, 805 F.3d 127, 131 (4th Cir. 2015). See also *United States v. Lebowitz*, 676 F.3d 1000, 1013 (11th Cir. 2012). (“Whether some other sexual encounter would have occurred even without recording equipment is irrelevant.”)

The Fourth Circuit has considered the factual circumstances to determine if there was sufficient evidence to conclude that “**a purpose**” of a defendant’s sexual activity with the minor was to produce child pornography. *United States v. Blank*, 659 F. App’x 727, 728 (4th Cir. 2016). (**Emphasis added in bold by counsel**). In *Blank*, the Court considered the amount of time of instruction for poses compared to length of the encounter, the number and type of photos taken, whether the pictures were viewed and/or shown, and the references to the victim as “little miss porn star,” and the attempts to hide the viewing and delete them in considering the sufficiency of the evidence. *Id.* at 728.

The Fourth Circuit recently clarified that the “statute requires the government to prove that creating a visual depiction was ‘**the** purpose’ of an accused for engaging in sexual conduct, not merely ‘**a** purpose’ that may happen to arise at the same instant as the conduct.” *United States v. McCauley*, 983 F.3d 690, 695 (4th Cir. 2020). (**Emphasis added in bold by counsel**). “The language “*the* purpose” requires that the filming be at the very least a significant purpose in the sexual conduct itself, not merely incidental.” *United States v. McCauley*, 983 F.3d 690, 695 (4th Cir. 2020), citing *United States v. Sirois*, 87 F.3d 34, 39 (2d Cir. 1996); *United States v. Raplinger*, 555 F.3d 687, 693 (8th Cir. 2009) (“the purpose” as “one of the *dominant*” motives or purposes under § 2251(a)).

The Eleventh Circuit distinguished the mens rea of “purpose” from “knowledge” where “[p]urpose’ refers to the desire that a particular result will occur.” *Tilton v. Playboy Entm’t Grp.*,

Inc., 554 F.3d 1371, 1377 (11th Cir. 2009), citing *United States v. Campa*, 529 F.3d 980, 1009-10 (11th Cir. 2008).

The Seventh Circuit has affirmed a conviction considering photographs of a victim's genital area as sufficient evidence for a jury to conclude that the photographs were for the purpose of eliciting a sexual response in the perpetrator. *United States v. Al-Awadi*, 873 F.3d 592, 601 (7th Cir. 2017) (subjective intent and motive of the creator of the photograph can be a relevant consideration). Therefore, "the jury was justified in finding that Al-Awadi used CV1 to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct." *Id.*

The D.C. Circuit has held that "that the government must show that the purpose of producing a visual image was a defendant's dominant motive for using, inducing, or coercing a minor's sexual conduct." *United States v. Torres*, 436 U.S. App. D.C. 363, 370, 894 F.3d 305, 312 (2018).

To be sure, all circuits have rejected that the illegal sex acts must be for the *sole* purpose of producing a visual depiction, but "the purpose of" adopting by other circuits is greater than mere intent to produce a visual depiction of the sexually explicit conduct and knowing the character and content of the visual depictions.

D. The Impact of an Incorrect Jury Instruction on the Mens Rea under 18 U.S.C. § 2251.

The mandatory minimum sentence of fifteen years of incarceration imposed for conviction under § 2251(a) necessitates that the mens rea set forth in the statute not be broadened by an inconsistent jury instruction. The Due Process Clause demands consistency across the circuits on instructing the jury of the necessary intent required for the finding of conviction. Thus, it is crucial to ensure defendant rights by giving the jury clear and consistent instructions on the law or, in the

alternative, granting limiting instructions in cases such as Mr. Frei's when the jury is incensed by the subject matter at issue in these cases. It is equally important to the sanctity of jurors' civic duty that they be given accurate standards to apply the law to the facts of the case when deciding guilt or innocence. The potential for wrongful convictions under § 2251(a) due to the dispositive issue of defining "for the purpose" as "for a purpose" is not merely possible but likely under the Sixth Circuit's 16.01 jury instruction.

This Court has highlighted the importance of correct jury instructions in criminal cases:

The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them. Cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights. ... (citations omitted). Absent such extraordinary situations, however, we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.

Francis v. Franklin, 471 U.S. 307, 342 n.9 (1985).

Therefore, to ensure the uniformity of application of the law so that jurors in every circuit can deliberately carry out their duty, the instructions they are given in a case concerning 18 U.S.C. § 2251(a) must first be consistent with the plain language of the statute charged.

The Sixth Circuit's holding in *Frei* allows for a jury to find defendant guilty if the video depiction was "a purpose" for the sexual conduct; no matter how incidental.¹ The improper

¹¹ The minimum penalty under 18 U.S.C. § 2251 further underscores the requisite seriousness of intent.

United States v. McCauley, 983 F.3d 690, 696 (4th Cir. 2020)

instruction at best severely hampered the strength of Frei's argument to the jury and arguably forced him to make arguments inconsistent with the jury instruction.

E. Comparison of “for the purpose of” as used in VICAR.

A statute with similar language to § 2251 is 18 U.S.C. § 1959, Violent crimes in aid of racketeering activity, which states as follows:

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or **for the purpose of** gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

18 USCS § 1959 (**Emphasis added by counsel in bold**).

The Sixth Circuit has stated that the VICAR “‘purpose’ element is met if the jury could find that an “animating purpose” of the defendant's action was to maintain or increase his position in the racketeering enterprise.” *Cf. United States v. Faulkenberry*, 614 F.3d 573, 586 (6th Cir. 2010). *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014).

The Sixth Circuit's case law on “for the purpose of” in VICAR cases are instructive as the language is very similar. At the very least, 18 U.S.C. § 2251 seems to require that the “purpose” must be an “animating purpose,” or “a general purpose.” This means the sexual conduct must be an “animating” or “general” purpose to produce the visual depiction. It cannot be merely incidental. Appellant contends that specific intent necessary to establish “purpose” in § 2251 is even greater than in VICAR cases as the Congressional intent of Congress is that VICAR is to be “liberally construed.” See above *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992)

(adopting “integral” aspect of membership test for purpose element, RICO and VICAR are to be liberally construed by Congressional explanation).

The Ninth Circuit interprets the VICAR “purpose” element to mean that the defendant’s purpose does not have to be solely, exclusively, or even primarily motivated, by a desire to gain entry, or maintain or increase status within, the criminal organization. *United States v. Banks*, 514 F.3d 959, 968 (9th Cir. 2008). The Ninth Circuit does explain that a defendant’s purpose does not fall into the scope of VICAR if it is merely incidental, but must be within his “general” purpose, or, in the alternative, the violence committed must be in some way “integral to gang membership.” *Id.* at 968-969. See also *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992) (adopting “integral” aspect of membership test for purpose element, RICO and VICAR are to be liberally construed by Congressional explanation).

This VICAR interpretation of the “purpose” element is consistent with the Fourth, Eleventh and D.C. circuit case law in § 2251 cases as cited above.

CONCLUSION

For the foregoing reasons, Petitioner James Frei respectfully prays that the Court grant certiorari to review the judgment of the Sixth Circuit.

Date: October 22, 2021.

Respectfully submitted,

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