No. ___ - _____

In the Supreme Court of the United States

GARY L. BOYLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's decisions (as best Boyle can research) have not defined or applied in the discretionary sentencing context, and apart from any Guidelines applications, what constitutes a, "separate course of conduct." Herein, the District Court, and the 7th Circuit, found that Boyle's sexual assaults of a child - and the sharing of a video of the sexual assaults, by uploading to social media, were a separate course of conduct from state charges arising out of the same conduct, even though the victim was the same child, the crimes occurred in the same place, and the interval between the sexual assault prosecuted by the State of Illinois, and the uploading to social media of the (second) sexual assault (prosecuted in the federal District Court for the Central District of Illinois), was one day.

The District Court's finding that the State and Federal crimes were a separate course of conduct - and the affirming of that finding by the 7th Circuit, were the sole reason cited by the District Court judge for imposing a 50-year sentence consecutive to the Illinois State Court sentence of 40 years incarceration for the sexual assault that occurred the day before the production and sharing charged in the federal indictment

(19-cr-20019 CD IL). As the District Court noted in its sentencing colloquy, "If he [Boyle] manages to live to be a 126 years old (sic), then he can have that fresh air that he requests today." (Trans., USA v. Gary Boyle, 19-cr-20019, CD IL, 1-14-21).

The question presented, what defines separate course of conduct, is the inside-out of 'same course of conduct' discussed in Justice Thomas' dissenting in part in United States v. Booker, 543 U.S. 220, 315 (2005). The Guidelines, the dissent noted, referred to a common scheme or plan without placing arbitrary limits on space or time in determining 'same course of conduct.' Id. But herein the District Court and the 7th Circuit artificially and arbitrarily parsed Boyle's criminal acts without regard to the available facts or existing 7th Circuit and sister circuit's holdings on separate course of conduct, as more fully discussed herein below.

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Petitioner Gary L. Boyle respectfully petitions this Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the Seventh Circuit

OPINIONS AND ORDERS BELOW

In 19-cr-20019, CD IL, Mr. Boyle was convicted of seven counts of Sexual Exploitation of a Child, in violation of 18 U.S.C. § 2251(a) & (e), and one count of Possession of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) & (b)(2). He was sentenced in the District Court for the Central District of Illinois, the Hon. James E. Shadid, United States District Judge, on January 14, 2021, to a total term of incarceration of 600 months (50 years), to run consecutively to the sentence imposed in the Circuit Court for Macon County, Illinois, in Case No. 19-CF-300, imposing a term of incarceration of 40 years.

On appeal of his sentence to the United States Court of Appeals for the Seventh Circuit, Boyle argued, inter alia, that his sentence was

unreasonable both procedurally and substantively, in that the District Court erred in finding that the federal and state court convictions were a "separate course of conduct," and that it was unreasonable to impose a de facto life sentence on that same basis. On March 14, 2022, the 7th Circuit affirmed. United States v. Boyle, 28 F.4th 798 (7th Cir. 2022).

JURISDICTION

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

As a preliminary matter, there was no trial in this case, no preliminary hearing because Boyle was timely indicted, and no factual addendum to a plea agreement, because there was no plea agreement herein. Thus, the facts relied upon by the parties and the district court are those averred in the Indictment, in the Presentence Report, and in the parties' respective sentencing memorandums to the District Court.

On February 21, 2019, Boyle was arrested and detained in Macon County, Illinois, after the RCMP received a report from Kik, a Canadian

company marketing a smartphone messenger application that allows users to send texts, pictures, videos and more within the application. The report, dated February 14, 2019, identified child pornography images and videos uploaded by the user "amber.1516_2qz" from February 4, 2019, which was geolocated to Decatur, Illinois. On February 19, 2019, investigators determined that the IP address corresponding to the 'amber' subscriber was assigned to [Mrs.] Boyle, who was married to Gary L. Boyle.

On February 21, 2019, a federal judge authorized a search of the Boyle residence, and when agents arrived, Gary L. Boyle was present as was his wife, and Mr. Boyle's two minor daughters. Agents seized Boyle's cellular telephone; seized physical evidence of the assaults (clothing), and obtained Gary Boyle's Mirandized statement, which was entirely inculpatory. On February 22, 2019, local police filed their Sworn Statement, and thus on February 28, 2019, by Indictment, Boyle was charged in Macon County Circuit Court with Predatory Criminal Sexual Assault of a Child, in 19-CF-300; the Information charged "that between October 10, 2010 (the DOB of Boyle's daughter, A.B.) and February 3,

2019, Boyle committed an act of sexual penetration with A.B., who was under the age of 13 at the time of the offense. There is no record of the filing of any substantive pretrial motions; on July 28, 2020, Boyle entered a plea of guilty to the count noted above - 15 additional counts were dismissed as part of the state's plea agreement with Boyle. Boyle was sentenced in 19-CF-300 on September 2, 2020, to 40 years incarceration in the Illinois Department of Corrections.

On March 6, 2019, despite the pending state charges, an Indictment was filed in the U.S. District Court for the Central District of Illinois, charging, in counts 1 through 7, that on February 4, 2019, in Macon County, in the Central District of Illinois, Boyle: used, persuaded, induced, enticed and coerced a minor to engage in sexually explicit conduct, and attempted to do so for the purpose of transmitting a live visual depiction of such conduct, etc, all in violation of 18 U.S.C. § 2251(a) & (e). Boyle was charged in Count 8 of the Indictment with one count of Possession of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) & (b)(2); the Indictment alleges possession occurring on February 21, 2019, however that is the date agents seized Boyle's

cellphone; there is no information in the Indictment or any other instant pleading informing exactly when the images were obtained or saved by Boyle.

Of note is that the Indictment does not name in any fashion the child victim; the name does not appear in the transcript of the change of plea hearing before the Magistrate Judge held on September 16, 2020; not until the disclosure of the Presentence Report on January 4, 2021 (ECF 60, 19-cr-20019) are the charges contained in counts 1 - 7 of the Indictment revealed to relate to Boyle's conduct with A.B., the same child as in the Macon County prosecution. Nothing in the record of either the state case or the federal prosecution reveals just what, if any, coordination occurred between the state and federal authorities and prosecution agencies, although it is unlikely that the last offense date of the state case, being one day prior to the date charged in the first seven counts of the federal Indictment, was unnoticed by the government. In any event there is no argument that the victim, the location of the assaults, the production of the images and videos in Counts 1 - 7, were different from the state and federal cases.

Boyle entered his plea of guilty in Macon County Case No. 19-CF-300, on July 28, 2020. He was sentenced on September 2, 2020, to a term of incarceration of 40 years to the Illinois Department of Corrections.[1] Boyle then entered his pleas of guilty to each count of the federal Indictment on September 16, 2020; sentencing proceeded on January 14, 2021.

Boyle appealed, asserting that his sentence was procedurally unsound and substantively unreasonable. United States v. Boyle, 28 F.4th 798, 801 (7th Cir. 2022). Boyle argued that the district court erred in applying the Guidelines, in finding that the facts underlying the state and the federal convictions were "a separate course of conduct." However, the 7th Circuit concluded "that Boyle's state sexual abuse conviction is neither part of a "common scheme or plan" nor part of the "same course of conduct" as his federal child pornography possession conviction. The two offenses, the court of appeals concluded, involved different victims, constituted materially different conduct, and were at least somewhat separated in time. United States v. Boyle, 28 F.4th 798, 804 (7th Cir.

[1] Under applicable Illinois law Boyle is eligible for an 85% sentence.

2022). The 7th Circuit entirely sidestepped the issue of whether the first seven counts of the Indictment (relating to his conduct regarding A.B.), were the same course of conduct. But clearly, what ever the 7th Circuit concluded about Count 8 of the Indictment relative to the state court conviction, that logic did not apply to Counts 1 - 7.

Boyle further challenged the substantive reasonableness of imposing the federal sentence consecutive to the 40 year state sentence. To the appellate court's credit, it acknowledged,

> Everyone recognizes that Boyle's 50-year federal sentence—which he will only begin to serve after finishing his 40-year state sentence—effectively amounts to a life sentence. "Barring proceedings that vacate" part of Boyle's sentences, "he will die in prison" and "death in prison is not to be ordered lightly." United States v. Nania, 724 F.3d 824, 841 (7th Cir. 2013) (citation omitted); see also United States v. Patrick, 707 F.3d 815, 820 (7th Cir. 2013) ("[A] sentence of death in prison is notably harsher than a sentence that stops even a short period before."). United States v. Boyle, 28 F.4th 798, 804 (7th Cir. 2022).

However, the court of appeals ignored the terse, and inaccurate, and sole reason proffered by the district court in imposing the federal sentence consecutive to the state court sentence. The district court's entire sentencing pronouncement, including the required information, spans but

6 pages in the transcript. The only reason supplied for imposing the sentence consecutively came in a single sentence:

> And there could be no question that the conduct in 19-CF-300, the sexual predator conviction of a child under 13, for which he received 40 years, was a separate course of conduct; and, therefore, the 600 months imposed shall run consecutive to the Macon County case in 19-CF-300.
> Transcript, 19-cr-300, January 14, 2021, CD IL.

Curiously, the district court did not parse out the various counts in the Indictment to compare or contrast with the state court conviction - the court of appeals carved out the pornography count (Count 8), and concluded it was separate from the state court conduct. That conclusion was reached because the court of appeals adopted the date of the execution of the search warrant, and not the date that images on Boyle's cellphone were downloaded or received. The 7th Circuit's analysis began and ended with the nature of Boyle's conduct, "the atrocity of Boyle's offense conduct—his sexual assault of an eight-year-old girl on a video livestreamed to other child sexual predators. We affirm." United States v. Boyle, 28 F.4th 798, 799 (7th Cir. 2022).

REASONS FOR GRANTING THE PETITION

This Court, at least as far as the author of this Petition can determine, has not had many opportunities to grapple with "same course of conduct" in criminal prosecutions and sentences. Ironically, the most usual instance is where the defendant doesn't want the underlying criminal activity to be determined to be a continuous or ongoing or patterned course of conduct. See, Richardson v. United States, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); Boyle v. United States, 556 U.S. 938, 950 (2009).

Moreover, it is hard to imagine how Gary L. Boyle would have succeeded had he been obligated (in a Guidelines argument) to convince the court that some of his state-court-charged conduct was not relevant conduct, or that the state-court-charged conduct, with the same victim as the federal case, in the same location, with the same phone, during the same time span, was not the "same course of conduct." See, Edwards v. United States, 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998).

However, Davis v. United States, 140 S.Ct. 1060 (2020), provides insight into why the 7th Circuit herein got it wrong on 'separate course of conduct." As the Davis Court noted, at 140 S.Ct. 1061,

> On appeal, he argued for the first time that the District Court erred by ordering his federal sentence to run consecutively to any sentence that the state courts might impose for his 2015 state offenses. Davis contended that his 2015 state offenses and his 2016 federal offenses were part of the "same course of conduct," meaning under the Sentencing Guidelines that the sentences should have run concurrently, not consecutively. See United States Sentencing Commission, Guidelines Manual §§ 1B1.3(a)(2), 5G1.3© (Nov. 2018).

Despite finding that Davis had waived this argument and therefore it would be reviewed for plain error, the Davis court remanded for the 5th Circuit to consider the arguments! Clearly, Boyle's argument herein that the district court and the court of appeals erred in finding that his state court charged and federal court charged conduct were a "separate course of conduct" is an unreasonable application of this Court's holdings or what it would hold if presented with facts as in the instant matter.

The prosecution in this case is nothing less than a de facto multiplicitous prosecution that resulted in a sentence no one could be expected to outlive; it should be closely examined for reasonableness.

CONCLUSION

In the final analysis, this Court should grant the Petition for a Writ of Certiorari, and clarify for the lower courts what conduct, either within applicable guidelines provisions, or in the more general exercise of judicial sentencing discretion, constitutes a "separate course of conduct."

Guidance on imposing de facto life sentences under the Guidelines or in the more general exercise of sentencing discretion of courts is also necessary.

Respectfully submitted this 9th day of June 2022.

Electronically signed by: Lew A. Wasserman

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