

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROMEO VALENTIN SANCHEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article 120 of the Uniform Code of Military Justice (10 U.S.C. § 920) was broadened in 2006 to include crimes of “indecent acts.” Article 120 was reamended in 2011 to excise the indecent acts provision. Petitioner was charged and convicted of an indecent act in 2011 during the brief period it was a crime under Article 120. That same conviction was relied upon to trigger an enhanced 25 to 50 year sentence range under 18 U.S.C. § 2251(e). The question presented is: whether the Eleventh Circuit Court of Appeals erred in relying upon a now-excised provision to trigger a mandatory minimum penalty under 18 U.S.C. § 2251(e).

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Sanchez, 2:17-cr-136-FtM-99MRM
(Sep. 26, 2019)

United States Court of Appeals (11th Cir.)

United States v. Sanchez, 30 F.4th 1063 (11th Cir.
2022)

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Romeo Valentin Sanchez, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDERS BELOW

The Eleventh Circuit's published opinion affirming Petitioner's conviction and sentence is published at 30 F.4th 1063 (2022) and is provided in Appendix A. The district court's final judgment is provided in Appendix B.

JURISDICTION

The Eleventh Circuit entered judgment on April 5, 2022. This petition is timely filed pursuant to Supreme Court Rules 13.1, 13.3, and 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 18 U.S.C. § 2251 and the language of Article 120 of the Uniform Code of Military Justice (UCMJ) (also known as 10 U.S.C. § 920). The 2003 version of Article 120 is provided in Appendix C.

18 U.S.C. § 2251 states:

(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.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, 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) of this section, if such parent, legal guardian, or 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.

(c)

(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)

(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be 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 mailed; or

(B) such notice or advertisement is 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 mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, 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, abusive sexual contact involving a minor or ward, or sex trafficking of children, 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 25 years nor more than 50 years, but if such person has 2 or more prior convictions 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 the sexual

exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

The current language of Article 120 of the UCMJ

states:

(a) Rape.-Any person subject to this chapter who commits a sexual act upon another person by-

- (1) using unlawful force against that other person;
- (2) using force causing or likely to cause death or grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) first rendering that other person unconscious; or
- (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby

substantially impairing the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

(b) Sexual Assault.-Any person subject to this chapter who-

(1) commits a sexual act upon another person by-

(A) threatening or placing that other person in fear;

(B) making a fraudulent representation that the sexual act serves a professional purpose; or

(C) inducing a belief by any artifice, pretense, or concealment that the person is another person;

(2) commits a sexual act upon another person-

(A) without the consent of the other person; or

(B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to-

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) Aggravated Sexual Contact.-Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) Abusive Sexual Contact.-Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) Proof of Threat.-In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) Defenses.-An accused may raise any applicable defenses available under this

chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) Definitions.-In this section:

(1) Sexual act.-The term "sexual act" means-

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact.-The term "sexual contact" means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

(3) Grievous bodily harm.-The term "grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(4) Force.-The term "force" means-

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(5) Unlawful force.-The term "unlawful force" means an act of force done without legal justification or excuse.

(6) Threatening or placing that other person in fear.-The term "threatening or placing that other person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

(7) Consent.-

(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).

(C) All the surrounding circumstances are to be

considered in determining whether a person gave consent.

(8) Incapable of consenting.-The term "incapable of consenting" means the person is-

- (A) incapable of appraising the nature of the conduct at issue; or
- (B) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.

INTRODUCTION

When Congress promulgated the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act in April 2003, it amended 18 U.S.C. § 2251—the sexual exploitation of children—to include chapter 71 (obscenity) and Article 120 of the Uniform Code of Military Justice (UCMJ) (rape and sexual assault generally). As it read until 2006, Article 120, the criminalization of rape and sexual assault generally, was limited to penetrative crimes of forced or consent-less sexual intercourse and the rape of minors under the age of 16. In 2006, Article 120 was amended to include “indecent acts,” which were described as “indecent conduct.” Petitioner was convicted in 2011 under this amended version of Article 120 that included indecent acts. That same year, Article 120 was reamended and the indecent acts provision was excised.

The district court in Petitioner's case relied upon his Article 120 conviction to trigger the 25 to 50 year penalty range, holding that § 2251(e) requires a plain reading of the statute and any Article 120 crime qualifies to trigger the mandatory minimum. The Eleventh Circuit affirmed that enhancement.

Petitioner was convicted of several federal sex offenses for which he was sentenced to life in prison. There is no dispute that Petitioner has an Article 120 conviction, one for which he was fittingly sentenced.¹ This prior conviction, however, only qualified as a predicate conviction for a brief period as Congress amended, and reamended, Article 120 shortly before and after Petitioner's conviction. The lower courts' error in relying upon this predicate conviction modified Petitioner's

¹ Petitioner was sentenced to 15 months' of confinement, required to register as a sexual offender, and underwent a reduction in military grade. Finally

penalty range substantially: rather than a 15 to 30 year imprisonment range under § 2251(e), the erroneous reliance on Petitioner’s Article 120 offense led to an enhanced 25 to 50 year penalty range.

This case provides the Court with an opportunity to rectify a miscarriage of justice—Congress’s actions prior and subsequent to Petitioner’s conviction demonstrate that criminal convictions under the “indecent acts” provision of Article 120 were not intended to trigger the mandatory minimum sentences under § 2251(e). Given Congress’ actions, this case provides the Court with the vehicle to vacate an enhancement based upon a crime that was not meant to be included in § 2251(e).

The Court should grant certiorari.

STATEMENT OF THE CASE

In 2019, Petitioner was convicted of various sexual offenses, including the enticement and receipt of pornography from teenagers, in violation of 18 U.S.C. §§ 2422(b), 2251(a) and (e), 2252(a)(4)(B) and (b)(2), and 2260A. Several triggering offenses are included in 18 U.S.C. § 2251(e) that subject a defendant to a statutory enhancement. In this case, Petitioner's prior conviction under Article 120 of the Uniform Code of Military Justice (UCMJ) was used as the prior predicate offense under § 2251(e) to trigger a 25 to 50 year penalty range.

Prior to, and at sentencing, Petitioner made several objections to Probation's presentence report, which used his Article 120 conviction from 2011 to trigger an enhancement penalty range under § 2251(e). Petitioner's argument, in part, was that the presentence report incorrectly applied the enhancement provision under

§ 2251(e) because Congress did not expect or anticipate convictions under an “indecent acts” provision to trigger such a harsh enhancement when it amended § 2251 in 2003. Petitioner further noted that the statute was not intended to include conduct that was lesser than the serious sexual crimes listed in § 2251(e) both before and after his conviction. Especially pertinent was that the indecent acts provision was only included in the statute between 2006 and 2011—Congress reamended the statute to excise the provision out of the statute after only five years.

The government argued that the statute should be read plainly—that because § 2251(e) includes prior convictions under Article 120, Section 1591, Chapter 71, Chapter 109(a), Chapter 117, Section 920, Title 10, or under the laws of states related to aggravated sexual abuse or the sale, distribution, shipment, or transportation of

child pornography, that the broadness of the offenses were enough to show that Congress intended to include any offense under Article 120. The government also argued that the question of what is or is not a predicate offense should never be a question as *any* qualifying conviction under § 2251(e) precluded any statutory analysis.

The district court agreed with the government and stated it had to follow the plain and clear text of § 2251(e) and thus found that *any* Article 120 offense, including Petitioner's, triggered the enhanced statutory range from 15 to 30 years to 25 to 50 years. Further, the district court held that the court must presume that a legislature says in the statute what it means and that the statute in this case was clear. As such, the district court overruled Petitioner's objection and denied the reading of the statute as the defense requested.

On appeal, Petitioner argued that Congress could not have intended a conviction under an indecent acts provision to function as a triggering offense under § 2251(e). As evidence, Petitioner pointed to the 2011 amendment to Article 120 that excised “indecent acts” shortly after Petitioner’s conviction that same year. Further, Petitioner argued that the statute was ambiguous because Congress did not define Article 120 by its elements as it had done with other criminal statutes. Petitioner also argued that in a statute that included a substantial amount of crimes that were serious, innocuous crimes under the indecent acts amendment of Article 120, like Petitioner’s conviction, could not have been intended by Congress.

The government argued that any offense under Article 120 was expressly incorporated into § 2251(e), and accordingly, Petitioner’s Article 120 crime was a qualifying

predicate offense and that statutory interpretation was neither necessary nor warranted. Further, the government argued that Petitioner's contention—that there was an unwise or absurd result in his case—was mistaken.

The Eleventh Circuit affirmed the 25 to 50 year imprisonment range in Petitioner's case. The Court of Appeals held that the district court's conclusion in applying the 25 to 50 year penalty range in Petitioner's case was appropriate because it was undisputed that he had a prior conviction under Article 120. The Court rejected all of Petitioner's arguments on appeal, finding that Petitioner's Article 120 conviction under the "indecent acts provision," was a pornographic one which required him to register as a sex offender. Additionally, the Court found § 2251(e) to be unambiguous, and that the plain reading of the statute should apply.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit erred when it held that Petitioner’s Article 120 conviction under “indecent acts” triggered a 25 to 50 year enhanced sentence range under § 2251(e).

This Court has long held that if the statutory language is plain, for instance, if Congress has made its intent “clear” in the statutory text, the Court must enforce it according to its terms. *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). As in Petitioner’s case, however, the meaning of a statute may only become evident when placed in context. *See King v. Burwell*, 576 U.S. 473 (2015). When deciding whether the language is plain, the Court reads the words “in their context and with a view in their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Here, § 2251 refers to the sexual exploitation of children. Under § 2251(e), the prior convictions that trigger the mandatory minimum sentence are:

- Prior convictions under 18 U.S.C. § 2251
- Sex trafficking of children or by force, fraud, or coercion under 18 U.S.C. § 1591
- Any obscene convictions under 18 U.S.C. Chapter 71, including:
 - Possession with intent to sell, and sale, of obscene matter on federal property under 18 U.S.C. § 1460
 - Mailing obscene or crime-inciting matter under 18 U.S.C. § 1461
 - Importation or transportation of obscene matters under 18 U.S.C. § 1462
 - Mailing indecent matter on wrappers or envelopes under 18 U.S.C. § 1463
 - Broadcasting obscene language under 18 U.S.C. § 1464
 - Production and transportation of obscene matters for sale or distribution under 18 U.S.C. § 1465
 - Engaging in the business of selling or transferring obscene matter under 18 U.S.C. § 1466
 - Obscene visual representations of the sexual abuse of children under 18 U.S.C. § 1466A
- Any sexual abuse convictions under 18 U.S.C. Chapter 109A including
 - Aggravated sexual abuse 18 U.S.C. § 2241

- Sexual abuse 18 U.S.C. § 2242
- Sexual abuse of a minor, a ward, or an individual in Federal custody 18 U.S.C. § 2243
- Abusive sexual contact 18 U.S.C. § 2244
- Offense resulting in death under 18 U.S.C. § 2245
- Any transportation for illegal sexual activity or related crimes under 18 U.S.C. Chapter 117
- Rape, sexual assault, or penetrative sexual act under 10 U.S.C. § 920 (Article 120 of the Uniform Code of Military Justice)

Indeed, as seen throughout circuits across this country, the prior convictions that trigger the enhanced penalty range under § 2251(e) include crimes of sexual battery upon persons 12 years of age or older (*United States v. Miller*, 819 F.3d 1314 (11th Cir. 2016)), unlawful sexual intercourse with a minor under 16 (*United States v. Sullivan*, 797 F.3d 623 (9th Cir. 2015)), and child molestation (*United States v. Pavulak*, 700 F.3d 651 (3rd 2012)).

Petitioner’s Article 120 conviction—Petitioner sent a photograph of his penis and a woman’s buttocks to a

minor—stands out as an outlier amongst other convictions that trigger the 25-year mandatory minimum under § 2251(e). Though Petitioner’s conviction in 2011 falls under Article 120, the circumstances of the crime, as well as Congress’s amendments before and after Petitioner’s conviction, make it clear that Congress’s intent cannot have been to include “indecent acts” as a prior triggering conviction.

The 2003 amendment of § 2251(e) under the PROTECT Act included only the crimes of rape and sexual assault under Article 120. When Congress amended Article 120 to include an “indecent acts” provision, the amendment existed only for a brief period. In 2011, Congress excised the provision and returned Article 120 to its prior iteration: one which only included violent crimes of rape and sexual assault.

Petitioner’s prior conviction under the short-lived inclusion of “indecent acts,” hardly rises to the seriousness and culpability of the crimes otherwise listed in § 2251(e). Certainly, if Petitioner were convicted of the same offense prior to the 2006 amendment to Article 120, or even today, he would not have a qualifying predicate offense that would trigger an enhanced sentence under § 2251(e).

Here, the Eleventh Circuit simply erred. While the Petitioner can understand the appellate court’s holding—that § 2251(e) is clear—what is also obvious is that Petitioner’s conviction simply does not fall into the categories set forth by § 2251(e).²

² Interestingly, Petitioner’s crimes seem to fall more in line with 10 U.S.C. § 920(c)—Article 120c—which includes minor sexual crimes of indecency, including indecent viewing, indecent recording, broadcasting of an indecent recording, distribution of an indecent visual recording, forcible pandering, and indecent exposure. Specifically, indecent exposure, as defined in § 920(c) states:

The Eleventh Circuit focused on Petitioner’s Article 120 conviction—which the court stated was pornographic—in determining Petitioner’s Article 120 conviction triggered the mandatory minimum sentence in § 2251(e). Though it is undisputed Petitioner has an Article 120 conviction, the reality is his conviction simply is not an included offense in § 2251(e) as it stood in 2003 and as it stands today. Congress itself did not include his offense for more than a short period between 2006 to 2011.

This Court’s intervention is necessary to prevent a miscarriage of justice for an outcome that clearly defies the context of the statute. This case involves an enhancement under § 2251(e) that brought Petitioner’s penalty range

Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female aerola, or nipple is guilty of indecent explores shall by punished as a court martial may direct.

from 15 to 30 years to 25 to 50 years. The enhancement was triggered by a prior conviction that would not qualify if Petitioner was charged today, or any time outside of the 2006 to 2011 period that “indecent act” convictions under Article 120 qualified as § 2251(e) convictions. Simply put, Petitioner’s 25 to 50 year mandatory minimum sentence is not an appropriate calculation and the court erred in imposing and affirming such a sentence on him.

CONCLUSION

For the above reasons, Petitioner requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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