No. 22-5491

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN MICHAEL WARD,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was the U.S. District Court for the Western District of Louisiana's interpretation of 18 U.S.C. § 2251(a) vague and overbroad, and did Petitioner's attorney render ineffective assistance of counsel for failing to argue the Court's interpretation of § 2251(a) being overbroad and vague, and for having Petitioner sign a waiver foregoing appeal?

PARTIES TO THE PROCEEDING

The petitioner is John Michael Ward, the defendant and defendant-appellant in the courts below. The respondent is the United States of America, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, John Michael Ward, ("Ward") respectfully petitions for a writ of certiorari to the U.S. District Court for the Western District of Louisiana in U.S.A v. Ward, USDC No. 2:19-CR-00224-01 *Appendix "A"*.

OPINIONS BELOW

The judgment of the U.S. District Court for the Western District of Louisiana is reported at U.S.A. v. Ward, USDC No. 2:19-CR-00224-01. *Appendix "A"*. The U.S. Fifth Circuit Court of Appeals' Order denying review of that decision is reported at United States of America v. John Michael Ward, No. 22-30225. *Appendix "B"*.

JURISDICTIONAL STATEMENT

The judgment and opinion of the U.S. District Court for the Western District of Louisiana was entered on July 2, 2021. The U.S. Fifth Circuit Court of Appeal denied review of that decision on July 19, 2022. (Case No. 22-30225, Appendix "B".) This Court's jurisdiction is pursuant to 28 .U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, Cl. 3 to the United States Constitution provides, in pertinent part:

> The Congress shall have the power ... To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...

to have the Assistance of Counsel for his defense

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

On July 17, 2019, John Michael Ward was indicted by a federal grand jury with four counts of production of child pornography. (Rec. Doc. 1) Pursuant to a written plea agreement, Ward entered a plea of 'guilty' to counts one and two of the indictment for the production of child pornography, in violation of 18 U.S.C. § 2251(a). (Rec. Docs. 23-25). Ward was sentenced on February 21, 2020, to 360 months as to each count, and the sentences were to run consecutively. (Rec. Doc. 33). On February 26, 2021, Ward timely filed a Motion To Vacate, Set Aside, Or Correct Sentence in the Federal District Court for the Western District of Louisiana, under 28 U.S.C. § 2255. (Rec., Doc. 46).

On July 2, 2021, while Ward was housed at the Elayn Hunt Correctional Center, in St. Gabriel, Louisiana, the Honorable Judge James D. Cain, Jr. denied Ward's Motion. (Rec., Doc. 54). The denial was mailed to Ward, addressed to his address at the Elayn Hunt Correctional Center, while Ward was intransit to his permanent assignment at the Louisiana State Penitentiary, at Angola, Louisiana.

During this period of time, Louisiana was under heavy Covid protocols and restrictions, and access to the prison law library was seriously hindered. Ward was unable to receive the assistance he needed and, as a result, did not notify the Court of his transfer, relying on the Louisiana Department of Corrections to forward any-and-all mail

addressed to him, to his new assignment. This did not happen. The denial was returned to the U.S. District Court, and was never given to Ward.

Ward first learned of the denial by Judge Crain after Ward requested a status check from the Clerk of Court for the Federal District Court, on March 30, 2022. Once Ward learned that his Motion to Vacate, Set Aside, Or Correct Sentence had been previously denied, Ward filed Notice Of Appeal, entitled "Notice of Intent to Appeal" in the Federal District Court for the Western District of Louisiana, on April 19, 2022. (Rec., Doc. 58). At the same time, he filed a Motion to File Out of Tme Appeal, entitled "Motion to Reopen Case. (Rec., Doc. 59).

On July 19, 2022, Judges Stewart, Haynes, and Ho, of the U. S. Fifth Circuit Court of Appeals, Dismissed Ward's Out-of-Time Appeal for "want of jurisdiction." (Case No. 22-30225 Appendix "B")

REASONS FOR GRANTING THE PETITION

The government initiated federal prosecution against Ward on the grounds that the "visual depiction was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce, by any means, including by computer...," one of three conditional clauses in 18 U.S.C. § 2251(a) that subject an offender to federal prosecution and the sole clause of the three that could be applied to Ward in order to initiate federal prosecution against him.

In construing the meaning of the aforementioned clause that constitutes a federal

offense, the government interpreted the clause apart from the context of the statute, thus leaving said clause open to a broad range of application, an application that, in this case, extends the violation of said clause not to an act of the offending party, but to an act involving parties unrelated to the offense, to wit, the manufacturer of the materials (a Sony digital video camera) and the local retail outlet. The manufacturer and the local retail outlet alone engaged in mailing, shipping, or transporting materials "in or affecting interstate or foreign commerce." Ward engaged in *intrastate* commerce when he purchased the video camera at a local retail outlet. The government enlarged the interpretation, thus extending the range of said clause by holding one responsible for interstate or foreign commerce, or the affecting thereof, for an act not directly related to, prior to any involvement of, and outside the control of the offender, and "a penal statute is not to be enlarged by interpretation, but also not unmindful of the fact that a statute, because it is penal, is not to be narrowed by construction so as to fail to give full effect to its plain terms as made manifest by its text and its context" (*Lamar v. United States*, 241 U.S. 103, at 112 (196)).

According to the "context," said clause is not "narrowed" by limiting the actual offense to the offender, but as the statute links the direct offense to the offender in every other element of the statute, one is reasonable to conclude that said clause also links the direct offense to the offender. If the governments interpretation is correct, said clause would be the only element within the statute where a direct link to the offender is not

necessary. As such, according to the context of the entire statute, a reasonable conclusion is that the government enlarged the scope of said clause in order to gain a federal indictment, as was the case in *Jones v. United States*, 529 U.S. 848 (2000).

In *Jones v. United States*, the defendant was indicted for setting an "owner-occupied residence" on fire in violation of Title 18:844(1). However, the Court (and the statute) made it clear that an "owner-occupied residence not used for any commercial purpose does not qualify as property 'used in' commerce or commerce affecting activity, arson of such a dwelling is not subject to federal prosecution." The Court rejected "the government's argument that the Indiana residence involved in this case was constantly 'used' in at least three 'activities affecting commerce': (1)it was 'used' as collateral to obtain and secure a mortgage from an Oklahoma lender, who, in turn, 'used' it as security for the loan; (2) it was 'used' to obtain from a Wisconsin insurer a casualty insurance policy, which safeguarded the interests of the homeowner and the mortgage; and (3) it was 'used' to receive natural gas from sources outside Indiana." "The Court related," Section 844(1)'s use-in-commerce requirement is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." Like *Jones v. United States*, supra., 18 U.S.C. § 2251(a)'s "produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce" is "most sensibly read to mean" "materials" that have been "mailed, shipped, or transported" directly to the offending party and "not merely a

passive, passing, or past connection to." And also like ***Jones***, supra., where the Supreme Court concluded, "were the Court to adopt the government's expansive interpretation, hardly a building in the land would fall outside Title 844(1)'s domain, and the statute's limiting language 'used in,' would have no office" (Jones), nor would there be "hardly" any materials that "would fall outside" 18 U.S.C. § 2251(a)'s "domain." Such an "expansive interpretation" of said clause in § 2251(a), as extending commercial activity between the manufacturer and the local retail outlet, would also weaken, if not eliminate entirely, the need for the other two conditional clauses that constitute a federal offense, because almost all materials have traveled, in some way, "in or affecting interstate or foreign commerce."

Further, the conclusion that said clause in § 2251(a) extends only to activity as it directly relates to the offender, and not "merely a passive, passing, or past connection to commerce" (Jones), is also supported by the language found in the Congressional findings found under Title 18:2251 (Pub. L. 109-248, Title V, § 501, July 27, 2006, 120 Stat 623, (1)(D)(i); (1)(D)(iii)). "Some persons engaged in the production...of child pornography conduct such activity entirely within the boundaries of one State ..." (1)(D)(i), and "most of the child pornography that supplies the interstate market in child pornography conduct such activity entirely within the boundaries of one State..." "(1)(D)(iii). In order to produce entirely within the boundaries of one State," a reasonable conclusion from the above quoted text from the Congressional findings is that materials

purchased from local retail outlets constitutes as intrastate and not as interstate or foreign commerce. To conclude that, as the government concluded, materials purchased "entirely within the boundaries of one State" are considered as "in or affecting interstate or foreign commerce" because the materials were manufactured outside the State and sent to a local retail outlet is to be at odds with the plain language of the Congressional Findings. The plain understanding observe that materials that were purchased or received locally do not fall within the category of materials that "have been mailed, shipped, or transported in or affecting interstate or foreign commerce.

The government enlarged said clause in 18 U.S.C. § 2251(a), as Ward was not in violation of the other two conditional clauses, beyond the scope of the plain reading of the text within its context in order to make an offense, most properly within the jurisdiction of the State, an offense subject to federal prosecution. As such, Ward does not deny the commission of a crime; however, the crime was not subject to federal prosecution and therefore did not lie within the jurisdiction of the United States District Court to try Ward's case.

The government claims that Ward's claims are meritless. (Rec., Doc. 51, p.1). The government's dismissal of Ward's ineffective counsel claim appears to be on the basis that because his jurisdiction claim is meritless, therefore his ineffective assistance of counsel claim has no merit either, since "The attorney cannot be ineffective for failing to raise a meritless claim." (Rec., Doc. 51, p.6)

The government's position that Ward's jurisdictional claim is meritless appears to be based on the Fifth Circuit Court of Appeal's rejection of similar claims. Ward recognizes the precedent set forth in these Fifth Circuit Court cases, but also recognizes that greater weight should be given to the U.S. Supreme Court precedent. Although Ward does not cite U.S. Supreme Court cases concerning the "jurisdictional hook" in 18 U.S.C. § 2251(a)'s "materials" clause, he does cite the U.S. Supreme Court cases concerning the scope of the commerce clause. The U.S. Supreme Court's interpretation of the scope of the commerce clause is truly the foundation for deciding whether or not a "jurisdictional hook" has merit. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 311 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 273 ([W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this court.") *United States v. Lopez,* 514 U.S. 549, n.2 (1995)(quoting *Hodel* and *Heart of Atlanta*). Ward's claim concerning jurisdiction is valid and not meritless because the U.S. Supreme Court, as shown below in Ward's Motion to Vacate, has historically rejected statutes, clauses, or interpretation both for exceeding the scope of the Commerce Clause, and/or for ambiguity.

The government's interpretation of the "materials" clause in 18 U.S.C. § 2251(a), or

the clause itself, goes beyond the scope of the Commerce Clause, therefore invalidating said "jurisdictional hook." *United States v. Lopez*, 514 U.S. 549, 552-553 ("The constitution delegates to Congress the power '[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.' Art. 1, § 8, cl. 3)." In *Maryland v. Wirtz*, 392 U.S. 183 (1968), the U.S. Supreme Court clarified the reach of congress' "power to regulate" via the Commerce Clause.

> "First, Congress may regulate the use of the channels of interstate commerce. See *Darby*, 312 U.S., at 114; *Heart of Atlanta Motel*, supra, at 256 ('[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question' (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities ... Finally, Congress' commerce authority includes the power to regulate these activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U.S., at 37, i.e., those activities that substantially affect interstate commerce. *Wirtz*, supra, at 196, n.27"

Therefore, in order for Ward's actions to fall within "congress' commerce authority," the government must show that (1) Ward used or intended to use the "channels of interstate commerce" for "immoral and injurious" purposes; (2) Ward or his actions posed a threat to "the instrumentalities of interstate commerce, or persons or things in interstate commerce,"; or (3) Ward's activities "substantially" affected "interstate commerce."

Ward's actions did not introduce into the "channels of commerce" any "immoral or

injurious" materials. The visual depictions were not transported or transmitted "by any means or facility ... including by computer." (18 U.S.C. § 2251(a)), nor was that Ward's intent. Ward did purchase a Sony digital camcorder at a local retail outlet. However, purchasing a camcorder device, which is not immoral or injurious in-and-of itself and where there is no law against purchasing such a device, is not a means of introducing "immoral or injurious" materials into the "channels of commerce." At the very least, the government would have to establish that Ward possessed knowledge or intent that such materials, i.e., the visual depictions, would be "transported" or "transmitted" "in or affecting" interstate commerce. Ward had no knowledge or intent of such activities. In fact, the visual depictions were deleted by Ward prior to his knowledge that he would be arrested or prosecuted, and the visual depictions had to be forensically retrieved from the hard drive of the digital camcorder.

Neither Ward nor his actions posed any threat to the "instrumentalities of interstate commerce." Because Ward had no knowledge or intent of using the visual depictions in commerce of any kind, and because his only exchange with commerce was the purchase of a camcorder from a local retail outlet years before said activities occurred, anyone would be hard-pressed to see how Ward's purchase "substantially" affected interstate commerce. For the government to say that "the government need only show that the camera traveled in interstate commerce" is highly oversimplified, and there is much more required to establish Congressional commerce authority.

By extending the range to include past connections to interstate commerce, the government's interpretation of the "materials" clause "would effectually obliterate the distinction between what is national and what is local ..." (*Lopez,* 514 U.S. 549, 556-557, quoting *Jones & Laughlin Steel,* supra., at 37). *Annotated U.S. Constitution; Procedural Due Process, Generally* ("Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subject to the arbitrary exercise of government power.") Ibid. ("The appropriate framework for assessing procedural rules in the field of criminal law is determining whether the procedure is offensive to the concept of fundamental fairness.")

The government claims that because the camcorder was manufactured outside the state, that this fact is all that is needed to establish the 'jurisdictional hook.' (Rec., Doc. 51, p.1). If this principle were applied in an "evenhanded" way to all federal statutes, then *all* crimes where materials that had a connection to interstate commerce at any time in the past, used in or for the commission of the crime, could be subject to a federal prosecution. In today's modern era, nearly *all* crimes would involve some material with such a past connection to interstate commerce, so there would be virtually no crime crime that Congress would not have the power to regulate.

The U.S. Supreme Court has repeatedly ruled against cases where the "distinction between what is national and what is local" has been obliterated. *Jones v. United States,* 529 U.S. 848 (2000)("Were the Court to adopt the Government's expansive

interpretation, hardly a building in the land would fall outside § 844(1)'s domain ... Judges should hesitate to treat statutory terms in any setting as surplusage, particularly when the words describe an element of a crime.")

As stated in Ward's Motion to Vacate, the government's argument in *Jones*, supra, used a "passive, passing or past connection to commerce" that, if adopted, would result in the lines between federal and state being obliterated. See also *Lopez*, 514 U.S. 549, 563-564 ("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement ... Thus, if we accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.")

In support of the argument that 18 U.S.C. § 2251(a)'s "materials" interstate connection should not extend to out-of-state manufacturers (unless the connections to interstate commerce discussed above in *Maryland v. Wirtz*, supra. can be established) the U.S. Supreme Court decided in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), that "When defendant's had made their purchases ... the poultry was trucked to their slaugterhouses [sic] in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended."

As the above cases have shown, the U.S. Supreme Court has continually supported the important distinction "between what is national and what is local." By enlarging a statute's reach by interpretation so that nearly any connection, no matter how indirect, to

interstate commerce will subject a person to federal prosecution, goes against the well-established, historical practice of preserving the distinction between federal and state jurisdiction. Though the government's oversimplified "jurisdictional hook" may exceed the scope of the Commerce Clause and "obliterate" the distinction between federal and state jurisdiction, the government's interpretation is feasible only because the "materials" clause itself is ambiguous.

While the other two clauses - one concerning knowing or having reason to know, and the other concerning the actual transportation or transmission of the visual depiction - are given additional definitions under § 2251(a), there is no such additional definition for the "materials" clause. The "materials" clause in § 2251(a) is the least defined from its context. "Materials" is a very broad term and can be applied to anything. Further, the "materials" clause is open-ended concerning the relation of the person to interstate commerce. No clarity is found in the clause or in an added definition to inform one as to whether a direct or indirect connection to interstate commerce is intended. Criminal statutes should be well-defined to avoid ambiguity. *Winters v. New York*, 333 U.S. 507, 515 (1948)("The standards of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanction for enforcement."). *Pierce v. United States*, 314 U.S. 306, 311 (1941)("...a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.")

§ 2251(a)'s "materials" clause is not "defined with appropriate definiteness," and at least two interpretations are feasible: (1) that the interstate connection to "materials" extends to any past connection, regardless of whether a person obtained them in local commerce; and (2) that the interstate connection to "materials" extends only to a person who directly obtained them in interstate commerce. In such a case "...Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the Court's duty is to adopt the latter." *United States v. Lopez*, 514 U.S. 549 (1995); *Staples v. United States*, 511 U.S. 600, 619, n.17 (1994)(rule of lenity requires that "ambiguous criminal statute[s] ... be construed in favor of the accused.").

Concerning the first possible interpretation/construction, which the government has adopted, "grave and doubtful constitutional questions" are raised. In light of the scope of Congress' commerce authority, the practice of maintaining the distinction between federal and state jurisdiction, and the ambiguity of the "materials" clause, Ward's claims concerning jurisdiction are not "meritless" or "frivolous."

The government calls Ward's claim concerning jurisdiction "meritless," and as such contends that "the attorney cannot be considered ineffective for failing to raise a meritless claim." (Rec., Doc. 51, p.7). Because Ward has sought to show that his jurisdictional claim is valid, and not "meritless" in the foregoing argument, he will not repeat it here. Because Ward's jurisdictional claim has merit, his counsel did not "fail to

raise a meritless claim; rather, counsel failed to raise a claim that has merit.

The government referred to *Strickland v. Washington*, 466 U.S. 668 (1984), stating "with regard to the prejudice prong, 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Rec., Doc. 51, p.5)." The government also relied on *Harrington v. Richter*, 562 U.S. 86, 110 (2011), where it was stated "The likelihood of a different result must be substantial, not just conceivable." (Rec., Doc. 51, p.5); however, the "likelihood of a different result" is not always the standard needed to meet the prejudice prong when a plea bargain is involved. *Lee v. United States*, 582 U.S. ____ (2017), 137 S.Ct. 1958, 198 L.Ed.2d 476. The *Lee* Court further stated:

> "Where a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain. That is because, while we ordinarily 'apply a strong presumption of reliability to judicial proceedings,' 'we cannot accord any such presumption' to judicial proceedings that never took place."

Lee, supra, quoting *Roe v. Flores-Ortega*, 528 U.S. 470 at 482-483.

The government, however, did point out that "in the context of a guilty plea, [Ward] must establish that absent his attorney's objectively unreasonable actions, [Ward] would have proceeded to trial and would not have pleaded guilty." (Rec., Doc. 51, p.6). Nevertheless, the government claimed that "[Ward] has not presented any evidence to refute his statements or to show that absent his attorney's actions, he would have proceeded to trial and not plead guilty." (Rec., Doc. 51, p.8). This assessment appears to

be the result of the government's belief that Ward's claims are "meritless" and "frivolous," and therefore Ward's arguments do not provide sufficient evidence that his attorney prejudiced him against going to trial. As Ward related in his Motion to Vacate, "'but for counsel's errors, he would not have pleaded guilty...' (*Hill v. Lockhart*, 474 U.S. 52, at 59 (1985)), but rather, Ward would have asserted his innocence in regards to a federal crime." (Ward, Application for Writ of Habeas Corpus, p.17).

Ward's attorney prejudiced him against trial by failing to explore a valid defense when one was available, and further prejudiced him against an appeal by encouraging him to sign a waiver. In *Garza v. Idaho*, 586 U.S. ____ (2019), 139 S.Ct. 738, 203 L.Ed.2d 77, the U.S. Supreme Court ruled that a presumption of prejudice exists when counsel denies the right to appeal. With *Garza* in view, Ward's counsel encouraging him to waive his appeal - not as part of the plea bargain, but rather counsel's own waiver - is highly suspect.

The actions or lack of actions by Ward's counsel show ineffective assistance of counsel.

CONCLUSION

The government's interpretation of 18 U.S.C. § 2251(a) was overbroad, and resulted in Ward being unduly charged with a federal crime. His attorney's unwarranted insistence that Ward sign a waiver of appeal – not as part of the plea bargain, but rather for counsel's own benefit – was ineffective assistance of counsel, and prejudiced Ward.

Ward's conviction should be reversed, his sentences should be vacated, and he should be discharged from federal custody, leaving him with only the State conviction and sentences.

Respectfully Submitted,

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Dated: 9 August, 2022