No. 22-7237

IN THE SUPREME COURT OF THE UNITED STATES

ERIC GRZYWINSKI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to plain-error relief on his claim that aggravated sexual assault of a child, in violation of Texas Penal Code Ann. § 22.021(a)(1)(B)(iii) and (2)(B) (West 2019), does not qualify as an offense "relating to * * * abusive sexual contact involving a minor" under 18 U.S.C. 2251(e).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Grzywinski, No. 19-cr-578 (Oct. 25, 2021)

United States Court of Appeals (5th Cir.):

United States v. Grzywinski, No. 21-11135 (Jan. 5, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 57 F.4th 237.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2023. The petition for a writ of certiorari was filed on April 4, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of

attempting to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e). Pet. App. B1. The district court sentenced him to 45 years of imprisonment, to be followed by five years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A7.

1. From June to August 2019, petitioner repeatedly sent text messages asking Jane Doe, a 15-year-old girl, to send him sexually explicit photographs of herself. Pet. App. A2. And he received such photographs from her in return for lewd photographs that he sent Doe. See Gov't C.A. Br. 2. Petitioner had solicited similar images from other children and had posted them on Twitter. See ibid.

A federal grand jury indicted petitioner on one count of attempting to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e), and one count of committing a felony offense against a minor while subject to registration as a sex offender, in violation of 18 U.S.C. 2260A. See Indictment 1-3. Petitioner pleaded guilty to the former count, and the government dismissed the latter count. See Pet. App. B1.

2. A violation of Section 2251 is by default punishable by 15 to 30 years of imprisonment. See 18 U.S.C. 2251(e). That statutory range increases to 25 to 50 years of imprisonment, however, if the defendant has a previous conviction "under the laws of any State relating to," inter alia, "abusive sexual contact involving a minor or ward." Ibid. And here, the Probation Office

determined that petitioner qualified for that enhancement because of his previous conviction for aggravated sexual assault of a child, in violation of Texas Penal Code Ann. § 22.021 (West 2019). See Pet. App. A2.

At sentencing, petitioner's counsel "did not object" to the enhancement and "acknowledged that [petitioner] was facing" the increased statutory penalty. Pet. App. A2. The district court adopted the findings in the Probation Office's presentence report, see ibid., and sentenced petitioner to 45 years of imprisonment, to be followed by five years of supervised release, see id. at B2-B3.

3. The court of appeals affirmed. Pet. App. A1-A7.

On appeal, petitioner argued for the first time that his Texas conviction for aggravated sexual assault of a child did not trigger an enhanced sentence under Section 2251(e). Pet. App. A4. He premised his argument on application of a "categorical approach," under which a state offense would trigger the enhancement only if the elements of the state offense match (or are narrower than) the corresponding elements of a federal predicate. Id. at A5. Petitioner argued that the Texas statute here fails that requirement, on the theory that "the relevant predicate crime in § 2251(e) ('abusive sexual contact involving a minor or ward') applies only to victims under age 16, whereas the Texas statute applies to victims under age 17." Id. at A4.

Noting petitioner's acknowledgement that he had failed to preserve his claim in district court, the court of appeals reviewed the claim for plain error. Pet. App. A3. The court of appeals found "no error, plain or otherwise," in the sentence imposed. Id. at A7. The court observed that Congress has defined the term "minor," for purposes of the chapter within which Section 2251 is located, to mean a person under the age of 18. Id. at A5 (quoting 18 U.S.C. 2256(1)). And the court accordingly rejected petitioner's contention that the term "abusive sexual contact involving a minor" covers only victims under the age of 16. Id. at A4.

The court of appeals also found petitioner's reliance on Esquivel-Quintana v. Sessions, 581 U.S. 385 (2017), to be misplaced. See Pet. App. A6-A7. In Esquivel-Quintana, this Court construed the term "sexual abuse of a minor," as used in a separate immigration statute, 8 U.S.C. 1101(a)(43)(A), to cover only victims under the age of 16. See 581 U.S. at 398. The court of appeals explained that, because the immigration statute in Esquivel-Quintana did not define the term "'minor,'" this Court "had to infer its generic definition from statutory context and analogous state laws." Pet. App. A6 (citation omitted). The court of appeals emphasized that the statute here, in contrast, expressly defines the term "minor." Ibid. (citation omitted)

ARGUMENT

Petitioner contends (Pet. 5-12) that his state conviction for aggravated sexual assault of a child, in violation of Texas Penal Code Ann. § 22.021(a)(1)(B)(iii) and (2)(B) (West 2019), does not qualify as a predicate for a sentence enhancement under 18 U.S.C. 2251(e). The court of appeals correctly rejected that contention, and its decision neither conflicts with a decision of this Court nor implicates any conflict in the courts of appeals that would warrant this Court's review. Moreover, the plain-error posture of this case would in any event make it an unsuitable vehicle for addressing the question presented. The petition for a writ of certiorari should be denied.

1. Section 2251(a) prohibits enticing a minor to engage in sexually explicit conduct for the purpose of producing child pornography. See 18 U.S.C. 2251(a). Section 2251(e) sets forth a default punishment of 15 to 30 years of imprisonment for a violation (or attempted violation) of that provision. See 18 U.S.C. 2251(e). That penalty increases to 25 to 50 years of imprisonment, however, if the defendant has a "prior conviction * * * under the laws of any State relating to," inter alia, "abusive sexual contact involving a minor or ward." Ibid.

Petitioner asserts (Pet. 11) that Section 2251(a) requires a court to apply a "categorical approach," under which his Texas conviction can serve as a Section 2251(e) predicate only if the elements of the Texas offense match (or are narrower than) the

corresponding elements of the generic offense of "abusive sexual contact involving a minor or ward." 18 U.S.C. 2251(e); see Descamps v. United States, 570 U.S. 254, 261 (2013) (describing categorical approach). Petitioner argues that his Texas offense does not qualify as a predicate crime under the categorical approach on the theory that the Texas offense covers victims under the age of 17, while "abusive sexual contact involving a minor or ward" covers only victims under the age of 16. See Pet. App. A4.

Petitioner's argument lacks merit, because Section 2251(e) is not limited to victims under the age of 16. Section 2251(e) appears in Chapter 110 of Title 18 of the U.S. Code. And Congress has provided that, "[f]or the purposes of [Chapter 110], the term * * * 'minor' means any person under the age of eighteen years." 18 U.S.C. 2256(1). The term "minor" in Section 2251(e) includes any person who is less than 18 years old -- not just those who are less than 16 years old.

Contrary to petitioner's contention (Pet. 6-7), this Court's decision in Esquivel-Quintana v. Sessions, 581 U.S. 385 (2017), does not establish otherwise. In Esquivel-Quintana, the Court considered the meaning of the term "sexual abuse of a minor" in an immigration statute, 8 U.S.C. 1101(a)(43)(A). "Section 1101(a)(43)(A) does not expressly define sexual abuse of a minor," and "interpret[ing] that phrase using the normal tools of statutory interpretation," the Court concluded that "the age of the victim [must] be less than 16." Esquivel-Quintana, 581 U.S. at 391, 398.

The statute here, however, does define the term "minor," and "the normal tools of statutory interpretation" would thus yield a different result. See, e.g., Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 776 (2018) ("'When a statute includes an explicit definition, [a court] must follow that definition,' even if it varies from a term's ordinary meaning.") (citation omitted)

2. Petitioner asserts (Pet. 6-7) that the decision below conflicts with the Ninth Circuit's decision in United States v. Jaycox, 962 F.3d 1066 (2020). Jaycox involved a separate federal statute prohibiting the receipt (rather than the creation) of child pornography, which likewise enhances a defendant's sentencing range if the defendant has a prior conviction under state laws relating to "abusive sexual conduct involving a minor or ward." 18 U.S.C. 2252(b)(1); see 18 U.S.C. 2252(a)(2).

The Ninth Circuit concluded that a California statute criminalizing "sexual conduct between a minor, defined as an individual under the age of eighteen, and an individual at least three years older," did not qualify as a predicate offense under that provision. Jaycox, 962 F.3d at 1070. It did so in substantial reliance on Esquivel-Quintana and circuit precedent "defining sexual abuse of a minor based on the elements of 18 U.S.C. § 2243, which includes that a victim must be younger than sixteen." Id. at 1069 (describing United States v. Sullivan, 797 F.3d 623 (9th Cir. 2015), cert. denied, 578 U.S. 1024 (2016)); see id. at 1069-1070 (citing Sullivan, 797 F.3d at 637).

Although the decision in Jaycox is in considerable tension with the decision below, it did not involve the same sentence-enhancement provision and thus may not bind a future Ninth Circuit panel. And while Jaycox did not consider the statutory definition of "minor," see 962 F.3d at 1069-1070 -- the term used in both sentence-enhancement provisions -- a future panel might do so. Cf. Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); United States v. Kirilyuk, 29 F.4th 1128, 1134 (9th Cir. 2022) ("Prior precedent that does not 'squarely address' a particular issue does not bind later panels on the question. * * * Thus, cases are 'not precedential for propositions not considered,' * * * or for matters that are 'simply assumed.'") (citations omitted).

3. This case would, moreover, be an unsuitable vehicle for addressing the question presented. Because petitioner did not raise his present contention in district court, it is reviewable only for plain error. See Pet. App. A3; Fed. R. Crim. P. 52(b). To prevail on plain-error review, petitioner must show (1) an "error" (2) that is "plain," (3) that affected his "'substantial rights,'" and (4) that "had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" Greer v. United States, 141 S. Ct. 2090, 2096-2097 (2021) (citations omitted).

Petitioner cannot satisfy those prerequisites. The court of appeals determined both that the district court did not err and that any such error was not plain. See Pet. App. A3 ("[P]lain error review applies."); id. at A7 ("We see no error, plain or otherwise, in the district court's decision.") (emphasis added). And even assuming that it were clear or obvious that the statutory definition of "minor" should be disregarded, the lower courts did not err -- let alone plainly so -- for two additional reasons.

First, Section 2251(e), by its terms, does not require a state crime to be an exact match with, or narrower than, the federal predicate. Instead, Section 2251(e) requires only a conviction "under the laws of any State relating to * * * abusive sexual contact involving a minor or ward." 18 U.S.C. 2251(e) (emphasis added). The Texas statute prohibiting aggravated sexual assault of a child, at a minimum, "relat[es] to * * * abusive sexual contact involving a minor or ward." Ibid.

Second, even if the statute required an exact match, the modified categorical approach -- applicable to "divisible" statutes that set forth alternative elements, thereby defining multiple crimes, see Mathis v. United States, 579 U.S. 500, 505 (2016) -- would apply in this case. If a statute is divisible, "a court may determine which particular offense the [defendant] was convicted of by examining" a limited class of documents, such as "the charging document," the "plea agreement," or "'some comparable judicial record' of the factual basis for the plea."

Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (citation omitted). And the Texas statute prohibiting aggravated sexual assault of a child is divisible.

A defendant may be convicted under the statute only if the jury finds (or the defendant admits) one of several aggravating factors -- one of which is that "the victim is younger than 14 years of age." Tex. Penal Code Ann. § 22.021(a)(2)(B) (West 2019). The Texas state courts have long held that those aggravating factors set forth alternative elements and thus define multiple crimes. See, e.g., Pierce v. State, 733 S.W.2d 314, 318 (Tex. App. 1987) ("The elements of the offense of aggravated sexual assault applicable here are: a person commits an offense if the person (1) intentionally or knowingly (2) causes the sexual organ of a child to contact the sexual organ of another person including the actor, and (3) the child is younger than fourteen years of age."); see also Gov't C.A. Br. 23-25 & n.13 (collecting cases). And federal courts of appeals have accordingly recognized that the Texas statute is divisible, triggering the application of the modified categorical approach. See, e.g., United States v. Madrid, 805 F.3d 1204, 1207-1208 (10th Cir. 2015), abrogated on other grounds by Beckles v. United States, 137 S. Ct. 886 (2017); United States v. Figueroa-Vargas, 827 Fed. Appx. 731 (9th Cir. 2020).

When a statute is divisible, and the modified categorical approach applies, "a court may determine which particular offense the [defendant] was convicted of by examining" a limited class of

documents, such as "the charging document," the "plea agreement," or "'some comparable judicial record' of the factual basis for the plea." Moncrieffe, 569 U.S. at 191 (citation omitted). And here, Texas conviction documents confirm that petitioner was convicted of sexually assaulting a child who was under the age of 14 years. The indictment charged that, "at the time of the commission of this offense, the child was younger than 14 years of age," Gov't C.A. Unopposed Mot. to Supp. Appellate R. Attach. 27; the plea included an admission that the "child was younger than 14 years of age," id. at 26; and the judgment identified petitioner's offense as "aggravated sexual assault, child under 14." Id. at 22 (capitalization omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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