

No. __ - _____

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER DARNELL DOUGLAS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN J. PAGE
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

QUESTIONS PRESENTED

- I. Whether 18 U.S.C. §2251 authorizes conviction upon proof that materials used to produce child pornography once crossed state lines at an unspecified prior occasion, when there is no evidence that the production or possession of child pornography itself caused such movement?
- II. Whether Article I, Section 8 of the United States Constitution permits Congress to impose criminal sanctions for all conduct undertaken using materials that have moved in interstate commerce, however remotely, whether or not the criminal conduct caused such movement?

PARTIES

Christopher Darnell Douglas is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

TABLE OF CONTENTS

Question Presented	ii
Parties	iii
Table of Contents	iv
Index to Appendices	v
Table of Authorities	vi
Opinions Below	1
Jurisdictional Statement.	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ.	3
This Court should decide whether 18 U.S.C. §2251(a) and the Commerce Clause authorize criminal penalties any time a defendant uses an object whose parts once crossed state lines to create illegal images.	5
Conclusion.	8

INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

<i>Bond v. United States</i> , 134 S. Ct. 2077 (2014)	4-6
<i>Lawrence on behalf of Lawrence v. Chater</i> , 516 U.S. 163 (1996)	7
<i>National Federation of Independent Business v. Sebelius</i> , 567 U.S. 519 (2012)	4
<i>United States v. Bailey</i> , 924 F.3d 1289 (5th Cir. 2019)	4
<i>United States v. Dickson</i> , 632 F.3d 186 (5th Cir. 2011)	4
<i>United States v. Douglas</i> , 2023 WL 2264199 (5th Cir. February 28, 2023)(unpublished)	1
<i>United States v. Kallestad</i> , 236 F.3d 225 (5th Cir. 2000)	4
<i>United States v. Spruill</i> , 292 F.3d 207 (5 th Cir. 2002)	4

FEDERAL STATUTES

18 U.S.C. §229	5, 6
18 U.S.C. §2251	ii, iv, 1, 3, 5, 6, 7
28 U.S.C. §1254(1)	1

FEDERAL RULES

Fed. R. Crim. P. 11	1, 2, 5
Sup. Ct. R. 13.1	1

UNITED STATES CONSTITUTION

U.S. Const. Art. 1, § 8	ii, 1, 3
-------------------------------	----------

PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Darnell Douglas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Douglas*, 2023 WL 2264199 (5th Cir. February 28, 2023)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court's judgment is also attached in the Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on February 28, 2023. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

Article I, Section 8 of the U.S. Constitution provides in part:

The Congress shall have power... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian [sic] tribes

Title 18, Section 2251(a) of the United States Code provides:

Sexual exploitation of children

(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.

Federal Rule of Criminal Procedure 11(b)(3) provides:

Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

STATEMENT

A. Facts and Trial Proceedings

In November of 2020, Petitioner began dating a girl who told him she was 17 years old. After their first sexual encounter, he learned the truth - that she was a high school freshman, below the age of consent. However, he made the criminal decision to continue their sexual relationship. When police found her at his home, he was arrested for sexual assault of a child. Further, the victim's mother found a video depicting sexually explicit conduct with Mr. Douglas, which led to the instant charge.

Pursuant to a plea agreement, Mr. Douglas was convicted on one count of violating 18 U.S.C. §2251(a) by making the video referenced above. The factual resume admitted that the defendant used materials that had crossed state lines in making the video, but no more robust connection to interstate commerce. The agreement waived his right to appeal, save for "a sentence exceeding the statutory maximum punishment," among other exceptions not relevant here.

At sentencing, the victim exercised her rights to speak regarding the appropriate punishment, and implored the judge to exercise mercy toward Mr. Douglas. Her mother, who helped alert the police to the illegal relationship, likewise urged the judge by written statement to impose supervised release rather than imprisonment. The court imposed 192 months imprisonment, a 14-year downward variance from the Guideline sentence of 360 months. It also imposed five years of supervised release, including a term that required Probation's preapproval approval each time he wished to contact his child, a boy who will be about 16 when Petitioner is released.

B. Appellate Proceedings

On appeal, Petitioner contended that the factual resume failed to admit a constitutional offense. Specifically, he argued: 1) that 18 U.S.C. §2251 should be construed to require either recent movement of materials from which child pornography had been generated, or movement of these materials as a result of the defendant's conduct, and 2) that if these statutes could not be so construed, they exceeded Congressional power to regulate interstate commerce under Article I,

Section 8 of the Constitution. He cited *Bond v. United States*, 134 S. Ct. 2077 (2014), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)(Roberts, J., concurring), in support of these contentions. Petitioner showed that the claim was not barred by the appeal waiver under Fifth Circuit law, *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002), but conceded that it was foreclosed on the merits, see *United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000). He also argued that the conditions of supervised release were plainly more restrictive than necessary insofar as they limited contact with his own son.

The court below applied plain error and rejected these arguments. See [Appx. A]. It specifically rejected his challenge to this conviction as foreclosed by circuit precedent. See [Appx. A](citing *United States v. Bailey*, 924 F.3d 1289, 1290 (5th Cir. 2019); *United States v. Dickson*, 632 F.3d 186, 192 (5th Cir. 2011); *United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000)).

REASONS FOR GRANTING THE WRIT

This Court should decide whether 18 U.S.C. §2251(a) and the Commerce Clause authorize criminal penalties any time a defendant uses an object whose parts once crossed state lines to create illegal images.

Federal Rule of Criminal Procedure 11 requires that the admissions made by the defendant in connection with a plea establish a prosecutable offense. *See* Fed. R. Crim. P. 11(b)(3). In Petitioner’s district, these admissions are called the “factual resume.”

Petitioner’s factual resume admits that parts of the phones used to produce the prosecutable material had moved in international commerce. It does not admit that the offense itself caused the movement of these parts, nor that the movement of the phones was recent, nor any other fact establishing that the offense involved the buying, selling, or movement of any commodity. Petitioner contended below that the factual resume was therefore insufficient to establish a violation of 18 U.S.C. §2251.

Section 2251 of Title 18 authorizes conviction when the defendant produces a sexually explicit visual depiction of a minor, “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....” 18 U.S.C. §2251(a).¹ To be sure, the statute may be read to include conduct that has little or nothing to do with the movement of commodities in interstate commerce, such as the production of child pornography with a telephone that crossed state lines years ago for entirely innocent purposes. Under this view of the statutes, Petitioner’s conduct represented a federal offense. But *Bond v. United States*, 572 U.S. 844 (2014), suggests that this is not the proper reading.

Bond was convicted of violating 18 U.S.C. §229, a statute that criminalized the knowing possession or use of “any chemical weapon.” *Bond*, 572 U.S. at 8520853; 18 U.S.C. §229(a). She

¹Other portions of the same statutory Subsection authorize conviction only when the defendant’s offense conduct is more closely related to interstate commerce, as when the depiction itself travels in interstate commerce, or in the channels of such commerce. Those parts of the statute are not at issue here.

placed toxic chemicals – an arsenic compound and potassium dichromate – on the doorknob of a romantic rival. *See id.* at 852. This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 859-860. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.*

Notably, §229 defined the critical term “chemical weapon” broadly as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.” 18 U.S.C. §229F(8)(A). Further, it criminalized the use or possession of “any” such weapon, not of a named subset. 18 U.S.C. §229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

The Government’s reading of section 229 would “‘alter sensitive federal-state relationships,’” convert an astonishing amount of “traditionally local criminal conduct” into “a matter for federal enforcement,” and “involve a substantial extension of federal police resources.” [*United States v.]Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, “hardly” a poisoning “in the land would fall outside the federal statute’s domain.” *Jones [v. United States]*, 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond’s conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond’s crime with a federal prosecution for a chemical weapons attack.

Bond, 572 U.S. at 863

As in *Bond*, it is possible to read §2251(a) to reach the conduct admitted here: use of an object that once moved across state lines to commit a criminal act, without proof that the crime caused the instrumentality to move across state lines, nor even proof that the instrumentality moved across state lines in the recent past. But to do so would intrude deeply on the traditional state

responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, or to the interstate movement of commodities.

It is plain that Congress intended the "interstate movement" requirement to bind §2251 to federal interests in interstate commerce. This prong of the statute should therefore be read in a way that accomplishes this purpose. The better reading of the phrase "produced ... using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer" therefore requires a meaningful connection to interstate commerce. Such a reading would require either: 1) proof that the defendant's offense caused the materials to move in interstate commerce, or, at least, 2) proof that the relevant materials moved in interstate commerce at a time reasonably near the offense.

The court below rejected these claims, however, because it found them foreclosed by its own precedent. *See* [Appx. A]. The broad reading of the §2251 afforded by the court below, and its remarkable intrusion on areas of state criminal law, can therefore only be remedied by this Court. This Court should grant certiorari in an appropriate case, and hold the instant Petition if this case is not the appropriate vehicle. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163, 167-168 (1996).

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court issue an order granting the writ of *certiorari* to review the decision below.

Respectfully submitted this 30th day of May 2023.

/s/ Kevin Joel Page
Kevin J. Page
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746