

No. 22-7851

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE POULO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner "use[d] * * * a minor * * * to engage in * * * sexually explicit conduct for the purpose of producing [a] visual depiction of such conduct," in violation of 18 U.S.C. 2251(a), when he created visual images of a five-year-old girl watching him masturbate.

RELATED PROCEEDINGS

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

United States v. Poulo, No. 20-cr-50 (Feb. 24, 2021)

United States Court of Appeals (11th Cir.):

United States v. Poulo, No. 21-10667 (Apr. 6, 2023)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not published in the Federal Reporter but is available at 2023 WL 2810689. The opinion of the district court is reported at 491 F. Supp. 3d 1244.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2023. The petition for a writ of certiorari was filed on June 21, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Florida, petitioner was convicted on five counts of sexual exploitation of a minor, in violation of 18 U.S.C. 2251(a) and (e); and one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1). Judgment 1. The district court sentenced petitioner to 2040 months of imprisonment, to be followed by a lifetime of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A10.

1. In February 2020, an undercover police officer saw petitioner post in a Kik chatroom called "breeding no age limits" that he had let a five-year-old girl enter his bedroom and touch his penis while he pretended to sleep. Pet. App. A3. Subsequently, petitioner sent the undercover officer a private message with two photos depicting a fully clothed girl who was about five years old standing in the doorway of a room looking at petitioner as he lay naked on a bed with his penis erect. Id. at A3-A4. He also sent the officer three photos of himself masturbating while the same fully clothed five-year-old watched from the doorway. Id. at A4. Two photos showed her looking directly at petitioner while he masturbated; in one photo her back was turned but she was looking at him over her shoulder. Ibid.

The Federal Bureau of Investigation searched petitioner's home and interviewed him. Pet. App. A4. Petitioner admitted to taking the photos, stated that it was arousing to him to take the photos and send them to others, and admitted that he was sexually attracted to the girl. Ibid.

2. A grand jury in the Middle District of Florida returned an indictment charging petitioner with five counts of sexual exploitation of a minor, in violation of 18 U.S.C. 2251(a) and (e); and one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1). Superseding Indictment 1-4. Following a bench trial, the district court found petitioner guilty on all counts. Pet. App. A6-A8.

The district court denied petitioner's motion for acquittal, rejecting the argument that his conduct fell outside the scope of Section 2251(a). See D. Ct. Doc. 50, at 7-16 (Sept. 30, 2020). Section 2251(a) provides that "[a]ny 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, * * * 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)." 18 U.S.C. 2251(a). The court reasoned that the word "use" in the statute should be given its ordinary meaning -- "to put into action or service: avail oneself

of,” or “to carry out a purpose or action by means of” -- such that a perpetrator can “use” a minor to engage in sexually explicit conduct by using the minor as a prop or object of desire while the perpetrator is engaged in sexually explicit conduct. D. Ct. Doc. 50, at 15 (quoting Merriam-Webster, <https://www.merriam-webster.com/dictionary/use>). The court sentenced petitioner to 2040 months of imprisonment, to be followed by a lifetime of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A10. It observed that “[petitioner’s] interpretation of [Section] 2251(a) to require the active participation of the child in the sexually explicit conduct for criminal liability is now foreclosed” by United States v. Dawson, 64 F.4th 1227 (11th Cir. 2023), petition for cert. pending, No. 22-7855 (filed June 21, 2023), which concluded that “a minor does not need to be the one engaging in the sexually explicit conduct in order to be ‘used’ under the plain meaning of the statute,” and that “an adult can ‘use’ a child as the object of sexual desire while he records himself engaging in sexually explicit conduct, like masturbating to the child while in the child’s presence.” Pet. App. A9.

ARGUMENT

Petitioner renews his contention (Pet. 22-29) that his visual images did not violate 18 U.S.C. 2251(a), based on arguments identical to the ones raised in the petition for a writ of

certiorari in Dawson v. United States, No. 22-7855 (Sept. 22, 2023). For the reasons explained in the government's brief in opposition in Dawson, that contention lacks merit and does not warrant further review. See Br. in Opp. at 8-13, Dawson, supra (No. 22-7855).^{*} At a minimum, the five-year-old here was passively engaged in sexually explicit conduct when she acted as a witness to petitioner's masturbation. And as explained in the brief in opposition in Dawson, petitioner has not identified any circuit conflict that would warrant review by this Court. Id. at 13-16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2023

^{*} Because the counsel of record in this case is also the counsel of record in Dawson, he will receive a copy of the government's brief in opposition in that case.