No.

IN THE
Supreme Court of the United States

MAURICIO GONZALEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

Robert L. Sirianni, Jr., Esquire
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
robertsirianni@brownstonelaw.com
(o) 407-388-1900
(f) 407-622-1511

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the District Court applied the proper standard of review to find guilt and issue their judgment on Petitioner's Rule 29 motion.

Whether the Eleventh Circuit Court of Appeals reviewed the issues presented under the proper standard of review.

Whether the Eleventh Circuit Court of Appeals' statutory interpretation of the predicate offense was erroneous.

PARTIES TO THE PROCEEDINGS

The Parties to the proceedings before this court are as follows:

United States of America.

Mauricio Gonzalez.

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, CASE NO. 9:21-CR-80087-DMM-1.
USA V. GONZALEZ
JUDGMENT: GUILTY, JUDGMENT ENTERED NOVEMBER 8, 2021

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH SIRCUIT
CASE NO. 21-13950-CC
USA V. GONZALEZ
District Court AFFIRMED
REHEARING EN BANC DENIED July 7, 2023.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gonzalez respectfully requests that a Writ of Certiorari be issued to review the affirming of the lower court's judgment by the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The decision by the United States District Court is unreported but reproduced in Pet. App. 20-33. The United States Court of Appeals for the Eleventh Circuit affirmed the lower court on May 11, 2023 (Pet. App. 1-19), and later denied Petitioner's Petition for Rehearing on July 7, 2023. (Pet. App. 34-35).

BASIS FOR JURISDICTION IN THIS COURT

Mr. Gonzalez invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari accompanied by this Court's grant for an Extension of Time.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2251

(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 [18 USCS §§ 2251 et seq.], section 1591 [18 USCS § 1591], chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 1460 et seq., 2241 et seq., or 2421 et seq.], 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 [18 USCS §§ 2251 et seq., 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice) [10 USCS § 920], 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.

18 U.S.C. § 2252

(a) Any person who—

(1) knowingly transports or ships 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 mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution 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 through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction

of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title [18 USCS § 1151], knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title [18 USCS § 1151], knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines,

periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

STATEMENT OF THE CASE

A. Concise Statement of Facts pertinent to the Questions Presented.

As explained by the Eleventh Circuit Court of Appeals – on July 4, 2020 the alleged victim and Petitioner met and began a relationship. The Petitioner was initially told the alleged victim was 19 and later found out that she was 17.

During their relationship, the alleged victim and Petitioner were both aware of the other's age. Mr. Gonzalez was 39 years old at the time.

Mr. Gonzalez is now serving two concurrent 20-year sentences for this relationship. Trial before the Court began on August 14, 2018. the alleged victim was present in the United States in the summer of 2020 between July 2, 2020 and August 28, 2020. From July to September of 2020, the Petitioner asked the alleged victim for explicit photos and videos and

received them. The Petitioner stipulates the sexually explicit nature of the video and it is apparent that the video did use the internet and also traveled in international commerce. The government also introduced evidence that the Petitioner transported the Victim from the Bahamas to the United States with the intent to engage in criminal sexual activity.

On October 16, 2020, the alleged victim traveled from the Bahamas to the United States with a ticker that Petitioner paid for. On arrival, she went with the Petitioner to a hotel where she immediately performed oral sex on the Petitioner. At the conclusion of the government's case, the court denied the Petitioner's motion for a judgment of acquittal under Fed. R. Crim. P. 29 as to Counts 2 and 3 and found the Petitioner guilty of those two counts. The Court reserved ruling as to Count 1 and granted the Petitioner's request for additional time to file a written memorandum or supplemental brief.

REASONS TO GRANT THIS PETITION

I. ERRONEOUS STANDARD IN DISTRICT COURTS INVOLVING FINDINGS OF GUILT AND DENIAL OF MOTIONS FOR JUDGMENT.

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970), the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

charged." 397 U.S. at 364. In so holding, the Court emphasized that proof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability. *Id*. at 358-362. See *Davis v. United States*, 160 U.S. 469 (1895); *Brinegar v. United States*, 338 U.S. 160, 174 (1949); *Leland v. Oregon*, 343 U.S. 790 (1952); 9 J. Wigmore, Evidence § 2495, pp. 307-308 (3d ed. 1940). The standard of proof beyond a reasonable doubt, said the Court, plays a vital role in the American scheme of criminal procedure.

The constitutional standard recognized in the *Winship* case was expressly phrased as one that protects an accused against a conviction except on "proof beyond a reasonable doubt. . . ." In subsequent cases discussing the reasonable doubt standard, we have never departed from this definition of the rule, or from the *Winship* understanding of the central purposes it serves. See, e.g., *Ivan v. v. City of New York*, 407 U.S. 203, 204 (1972); *Lego v. Twomey*, 404 U.S. 477, 486-487 (1972); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); *Cool v. United States*, 409 U.S. 100, 104 (1972). In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of the element of the offense.

The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing such a fundamental and substantive constitutional standard

must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. *Bronston v. United States*, 409 U.S. 352 (1972). See also, e.g., *Curley v. United States*, 81 U.S. App. D.C. 389, 392-393, 160 F.2d 229, 232-233 (D.C. Cir. 1947). Under *Winship*, which established proof beyond a reasonable doubt as an essential part of the Fourteenth Amendment due process, it follows that, when such a conviction occurs in a state trial it cannot constitutionally stand.

For jury trials the standard of review on a motion for a judgment of acquittal is well-settled. A conviction must be sustained if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed.2d 560 (1979); *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997).

"If the court concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). With these principles in mind, the Court must uphold the jury's verdict if it finds that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560.

However, there is a stark disconnect between the established jurisprudence regarding jury trials and bench trials. For some apparent reason, a bench trial suddenly negates all established jurisprudence and suddenly the beyond reasonable doubt standard disappears.

Jared Kneitel, in The American Journal of Trial Advocacy, The Forgotten Dinner Guest: The "Beyond Reasonable Doubt" Standard in a Motion for a Judgment of Acquittal in a Federal Bench Trial (Sept. 2012), aptly sheds light on a grave shortcoming that requires this Court's attention.

> At present, there is no rule in the Federal Rules of Criminal Procedure explicitly governing a motion for a judgment of acquittal in a bench trial. Is it Rule 23[1] ("Jury or Nonjury Trial") or Rule 29[2]("Motion for a judgment of Acquittal [in a Jury Trial]") that governs the motion? Although district court judges in almost all of the reported decisions assume Rule 29 governs, there are several cases in which district court judges have turned to Rule 23 as the

---

[1] *Citing* Fed. R. Crim. P. 23(c)

[2] *Citing* Fed. R. Crim. P. 29(a)

governing statute.[3] Further, even among the authors of treatises on the Federal Rules of Criminal Procedure, there is disagreement as to what Rule governs.[4] Wright's Federal Practice and Procedure discusses a motion for a judgment of acquittal in a bench trial under Rule 29.[5] Yet Moore's Federal Practice states, "Rule 29 has no real application when a case is tried by the court since the plea of not guilty asks the court for a judgment of acquittal."'[6]

---

[3] *Citing United States v. Wassbn*, No. 06-CR-20055, 2009 WL 4758604, at *1 (C.D. Ill. Dec. 4, 2009); *United States v. Kalb*, 86 F. Supp. 2d 509, 510 (W.D. Pa. 2000)

[4] *Citing* 26 James Wm. Moore et al., Moore's Federal Practice § 629.02(3d ed. 2012) (stating Rule 29 does not apply to a nonjury trial); 2A Charles Alan Wright & Peter J. Henning, Federal Practice & Procedure: Federal Rules of Criminal Procedure § 467, at 375-76 (4th ed. 2009) (stating Rule 29's sufficiency standard should be applied by a judge determining whether or not to grant a motion for a judgment of acquittal).

[5] *Citing* Wright & Peter J. Henning, Federal Practice & Procedure: Federal Rules of Criminal Procedure § 467, at 375-76 (4th ed. 2009).

[6] *Noting* – "however, Moore's Federal Practice on Rule 23 does not address the motion for a judgment of acquittal in a bench trial. 25 Moore et al., supra note 9, §§ 623.00-623.05. Nor does Wright's Federal Practice and Procedure discuss the motion under Rule 23. 2 Wright & Henning, §§ 371-376, at 476-54"

And eleven years later the same remains true. Unlike in a Rule 29 motion in a jury trial case, a bench trial case a court will determine "whether the evidence is insufficient to sustain a conviction." *United States v. Stubler*, No. 4:06-CR-00225, 2006 U.S. Dist. LEXIS 80910 (M.D. Pa. Oct. 24, 2006) (order denying motion for judgment of acquittal); See also *United States v. Gravely*, 282 F. App'x 401, 404 (6th Cir. 2008) (applying sufficiency of the evidence standard when reviewing a motion for a judgment of acquittal after a bench trial); *United States v. Salman*, 378 F.3d 1266, 1268 n.3 (11th Cir. 2004).[7].

This departure from the reasonable doubt standard undermines traditional notions of justice and fairness that are deeply enshrined in American Jurisprudence. Petitioner posits that the presumption of innocence and beyond a reasonable doubt burden of proof is entirely negated, if during a bench trial, the judge's fact finding is centered around the sufficiency of the evidence standard.

Notably, in this case, the District Court found Petitioner guilty simultaneously with denying his Motion for Judgment. Thereby, in practice and in theory, finding him guilty by a sufficiency of the evidence. "The Court does not apply the reasonable doubt standard when determining the sufficiency of

---

[7] *Compare* "A conviction must be sustained if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed.2d 560 (1979); *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997)."

evidence…" *Walker v. Russell,* 57 F.3d 472, 475 (6th Cir. 1995). The record at trial is void of any indication that the district court weighed the evidence or actually deployed a reasonable doubt lens in their adjudication of Petitioner's case.

Thus, the District Court never found Petitioner guilty beyond a reasonable doubt on all essential elements of the crime charged. "Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078, SCDB 1992-080, 1993 U.S. LEXIS 3741 (1993); See also *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977); *Carpenters v. United States*, 330 U.S. 395, 410 (1947); see also *United States v. Piche*, 981 F.2d 706, 716 (4th Cir. 1992)(a district court may not "direct a verdict, even a partial verdict, for the government even though the evidence is overwhelming or even undisputed on the point"), cert. denied, 508 U.S. 916, 124 L. Ed. 2d 264, 113 S. Ct. 2356 (1993).

Petitioner was charged with in a three-count indictment involving: 18 U.S.C. § 2251(a) and (e); receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1); and transportation of a minor with intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a). At trial there was a partial verdict for the Government, the court reserved ruling for count 1.

On a later date, the Court on by a written order explicitly held that Petitioner was not guilty beyond a reasonable doubt of count 1, the § 2251 charge. The court noted that the requisite essential elements to be proven beyond a reasonable doubt for count one is whether the conduct involved:

> (1) [A]n actual minor, that is, a real person who was less than 18 years old, was depicted;
>
> (2) [T]he Defendant induced the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct; and
>
> (3) [E]ither (a) the Defendant knew or had reason to know that the visual depiction would be mailed or transported in interstate or foreign commerce; (b) the visual depiction was produced using material that had been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or (c) the visual depiction was mailed or actually transported in interstate or foreign commerce.

See Eleventh Circuit Pattern Jury Instruction No. 082. The Court further noted:

> Section 2251(a) provides in relevant part: "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... with the intent

> that such minor engage in, any sexually explicit conduct ***for the purpose of*** producing any visual depiction of such conduct ... shall be punished as provided under subsection (e)." (emphasis in original)."

The District Court as it relates to Count one held that Petitioner did not engage with the victim for the purpose of, as required by the statute, and did not have the requisite mens rea to find Petitioner guilty beyond a reasonable doubt.

However, for the remaining counts, the Court simply stated at trial that the Court found Petitioner guilty of the crimes charged. THE COURT: "All right. I am going to reserve ruling on Count 1. On Count 2 and Count 3, I find the Defendant guilty..." Seemingly the court viewed the evidence in the light of the legally sufficient standard, as it later on September 29th, 2021 found that Petitioner did not have the requisite mens rea. Ultimately, the court listened to the argument from counsel and simply pronounced Petitioner guilty while denying the Motion for Judgment of Acquittal. Based on the Court's own findings of fact, it is legally and factually impossible to find Petitioner guilty of the crimes charged beyond a reasonable doubt.

Petitioner was denied his right to have the government prove its case beyond a reasonable doubt, and this case presents a unique opportunity for the Supreme Court to step in and enshrine the right to due process and fair trial for criminal defendants, regardless of whether it is a jury trial or a bench trial.

And as explained in the next section, the Court of Appeals wholly failed to give adequate deference to the specific findings of fact from the trial court in the adjudication of the appellate issues presented.

II. THE ELEVENTH CIRCUIT ERRED IN ITS ANALYSIS OF PETITIONER'S CLAIMS WHEN IT FAILED TO GIVE DEFERENCE TO THE DISTRICT COURT'S FACTUAL FINDINGS AND INSTEAD MADE STATEMENTS OF FACT NOT FOUND IN THE RECORD.

Here, the appellate court substituted its own findings of fact for the trial court's specific findings of fact. Importantly, given the standard of review on appeal, Petitioner was once again denied the constitutional guarantee of the beyond a reasonable doubt standard. This occurred relevant to count 2, count 3 and sentencing.

The relevant trial court's findings of fact include:

> A.S. was 17 at pertinent times during the period of the indictment. She met the Defendant on July 4, 2020. They almost immediately entered into a sexual relationship which she viewed as romantic. While the Defendant was initially told she was 19, he found her during the summer she was 17. It is apparent that they both discussed her age in a series of text messages.

He was well aware both of the age of 18 and that significance in Florida, he talked about how the age differed in different parts of the United States, they discussed what the age limit was in Costa Rica, and so I find that he was aware that she was 17, and she lived with the Defendant for a period of time during the summer, but then returned to the Bahamas.

On September 6, 2020, the Defendant asked A.S. for pussy shots. On September 30th, A.S. sent to the Defendant via the internet a sexually explicit video of herself masturbating. The video was produced by an iPhone in the Bahamas. The Defendant stipulates to the sexually explicit nature of the video and it is apparent that the video did use the internet and also traveled in international commerce.

On A.S.'s phone there is a larger video which is the basis for the video transmitted to the Defendant. The longer video was found on A.S.'s phone and it was made in the Bahamas. She trimmed some content from the beginning and the end of what was transmitted. It was produced on A.S.'s device in the Bahamas.

On August 20, 2020, video was taken in Palm Beach County, it shows two

> people masturbating. The woman is masturbating, and they are inserting a toy into her vagina. A.S. testified she made the video with the Defendant. A male voice is heard on the video. It has been stipulated that that is also sexually explicit.
>
> On October 16, 2020, A.S. traveled from the Bahamas to the United States. The Defendant paid for her ticket. They texted back and forth before she left about his eagerness to have sex with her and the text messages are replete with sexual discussions about the fact that they had been having sex while she was in the United States and wanted to have sex when she got back -- or got to the United States from the Bahamas.
>
> On arrival, she went with the Defendant to a hotel where she immediately performed oral sex on the Defendant.

However, the appellate court opinion attached hereto is littered with findings of fact, that were chiefly relied upon to which the trial court did not make specific findings. For instance, the appellate court noted: "Viewing the record in the light most favorable to the government, there was sufficient evidence to suggest one substantial purpose in transporting A.S. was to engage in sexual activity." However, that was not the finding of the lower court. There was no indication that the trial court found that

this was the substantial purpose for the visit. In fact, the trial court called it "incidental". The appellate court's substitution of its view of the facts is wholly erroneous. Moreover, the appellate court noted that Petitioner wanted to go visit but missed his flight, again ... this was not a specific finding of fact. The district court did not make any findings of facts regarded as proof beyond a reasonable doubt, regarding any "criminal" sexual activity, or intent of F.S. 794.05 within the present case.

Notably, findings of fact made during a bench trial "deserve great deference," and even more so when "based on determinations of credibility." *Poole v. City of Shreveport*, 79 F.4th 455 (5th Cir. 2023) citing *Hess Corp. v. Schlumberger Tech. Corp.*, 26 F.4th 229 (5th Cir. 2022); see also *Leonard v. Michigan*, 256 F. Supp. 2d 723, 732 (W.D. Mich. 2003) ("It was unreasonable for the court of appeals to disregard the statements of the trial court which had the benefit of presiding over the hearings and trial.").

Even when subject to de novo review, appellate courts cannot simply disregard the trial court's findings of fact. See *Lall v. Bergh*, No. 1:09-CV-453, 2013 U.S. Dist. LEXIS 35214, at *22 (W.D. Mich. Mar. 14, 2013).[8]

---

[8] "However, while the legal application of these doctrines is subject to de novo review, factual findings made when undertaking the necessary analysis for these doctrines are not subject to de novo review ... "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity

Significantly, the Appellate Court cannot engage in a de novo review of a findings of fact before a bench trial pronouncement. The Appellate Court may not engage in de novo review of findings of fact determined by the District Judge. *United States v. Lott*, 53 F.4th 319 (11th Cir. 2022).

For count 2, Section 2252(a)(2) subjects to liability any person who "knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce . . . if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct."

Relevantly, the lower court held: On September 6, 2020, the Defendant asked A.S. for pussy shots. On September 30th, A.S. sent to the Defendant via the internet a sexually explicit video of herself masturbating. The video was produced by an iPhone in the Bahamas. The Defendant stipulates the sexually explicit nature of the video, and it is apparent that the video did use the internet and also traveled in international commerce.

Again, the appellate court considered facts, not in the district court's true findings. That's because the "knowingly" receipt and the "use of a" minor elements were not proven thus not found beyond a reasonable doubt by the district court.

---

of the trial court to judge the credibility of the witnesses who appeared before it."

The appellate court wholly failed to give any deference to the trial courts fact finding discretion. This is squarely at odds with *Purcell v. Gonzalez*, 549 U.S. 1, 127 S. Ct. 5 (2006) (concluding that the failure of "the Court of Appeals to give deference to the discretion of the District Court… was error"). "These findings were important because resolution of legal questions in the court of appeals required evaluation of underlying factual issues"… "it was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court". *Ibid*.

Moreover, during sentencing, the trial court held:

> I adopt the findings of the presentence investigation report with the exception of I granted several of the objections with respect to enhancements and also denied the obstruction objection and the pattern objection, the sexual contact exception and acceptance. The reasons were stated on the record. With that, the guidelines became offense level 37, the advisory guideline is 210 to 262 months.

The appellate court clearly engages in an analysis regarding the pattern of conduct notion, a finding the trial court explicitly refused to adopt. Later the court grounds their ruling in section F, in yet again... facts not contemplated in the district court's actual findings. Simply, the appellate court

went on their own fact-finding spree, without any discretion given to the lower court.[9]

This departure from judicial norms must be rectified and the scope and responsibility of a reviewing court needs to be defined by the highest court. This presents the Court with the unique opportunity to better define the legal landscape and preserve judicial economy and the prompt adjudication of cases, while ensuring this dangerous, circular precedent does not continue.

III. THE ELEVENTH CIRCUIT ERRED IN ITS STATUTORY INTERPRETATION ANALYSIS OF THE PREDICATE OFFENSE.

In the case below, the Court of Appeals applied the plainly err standard of review when reviewing Petitioner's claim of statutory interpretation of the predicate offense element of his convictions.

Relevant to here. 18 U.S.C. § 2423(a) subjects to liability "a person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engages in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." § 2423(a). Meanwhile the predicate offense alleged was Fla. Stat. 794.05.

---

[9] See the "sexual contact enhancement" is not applicable in this case, as 2G 1.3 (a)(3) (base offense level 2423) applies and the offense did not involve a commercial sex act. See U.S.S.G. 2G 1.3 (b)(4)(B)

Fla. Stat. 794.05 states: "[a] person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age."

For this reason, indictments alleging § 2423(a) crimes, and those charging violation of the identically worded 18 U.S.C. § 2422, routinely describe the underlying "sexual activity for which any person can be charged with a crime" by describing the conduct and citing the substantive offense. See *United States v. Jockisch*, 857 F.3d 1122, 1124 (11th Cir. 2017) (indictment charging Alabama second degree rape, sodomy and sexual abuse as the underlying predicate offenses); *United States v. Shill*, 740 F.3d 1347, 1350 (9th Cir. 2014) (charging specific provisions of Oregon law); *United States v. Tello*, 600 F.3d 1161, 1162 (9th Cir. 2010)(charging specific provisions of the California Penal Code): *United States v. Mannava*, 565 F.3d 412, 414 (7th Cir. 2009)(citing offenses chargeable under Indiana law).

Where an indictment charges crimes like § 2423(a), or § 2422(b), which depend on the violation of another statute, the indictment must identify the underlying statute. *United States v. Pirro*, 212 F. 3d. 86, 93 (2d Cir. 2000); 1 Charles Alan Wright, Federal Practice and Procedure: Criminal 3d § 124 at 549 (1999). See *Russell v. United States*, 369 U.S. 749, 759 (1962).

Identification of the predicate is necessary in order provide a definite statement of "the essential facts constituting the offense" Fed. R. Crim. P. 7(c), and to provide constitutionally sufficient notice.

"A criminal conviction will not be upheld if the indictment upon which it based does not set forth the

essential elements of the offense." *United States v. Gayle*, 967 F.2d 483, 485 (11th Cir. 1992) (en banc).

Consequently, in a situation like the present, when there is a difference in the essential elements, an exercise of statutory interpretation is required. The reasoning in *United States v. Jockisch*, 857 F.3d 1122 (11th Cir. 2017) supports the requirement that a § 2423(a) indictment must allege the underlying predicate offense, or offenses "for which any person can be charged" with the intended sexual activity.

Here, we do not have that. The term "any person" was defined in *United States v. Palmer*, 3 WHEAT 610 (1818)("the words 'any person' or persons are broad enough to comprehend every human being.. within the jurisdiction of the state"). And here, the appellate court someone found that the terms "any person" and "a person 24 years of age or older" mean the same thing. It is truly mind boggling how a court of competent jurists can come to such a conclusion. Importantly, the Florida congress knew there was a difference, so they changed the language.

As noted in Petitioner's Initial Brief on appeal, A longstanding canon of statutory interpretation instructs: "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883). Likewise, "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503

U.S. 249, 253-54 (1992). "The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1749 (2020).

The subsequent departure from statutory interpretation norms and cannons should not be ignored. Is the President of the United States an elected position for which any person can run as a candidate," ? The answer is no, a candidate must be at least 35 years old. This age requirement is specified in Article II, Section 1 of the U.S. Constitution.

Similarly, the appellate court failed to engage in meaningful discussion over the term "use of" in Count 2. Specifically, a conviction can only be upheld if "the producing of such visual depiction involves the *use of* a minor engaging in sexually explicit conduct." § 2252(a)(2) (emphasis added). The appellate court noted: Because the statute does not define "use," this Court relies on the plain meaning of the term "use" in this context, which includes the fact, state or condition of being employed. See 18 U.S.C. § 2256; Use, Oxford English Dictionary Online.

Notably, Merriam Webster defines use as "to put into action or service : avail oneself of" Use, https://www.merriam-webster.com/dictionary/use

There have been no allegations whatsoever that the minor, A.S. was put into "sexually explicit" action or service or employed in that way. The appellate court's interpretation defeats logic and the true, plain meaning of the word inside the statutory framework.

CONCLUSION

Petitioner respectfully prays that this Honorable Court addresses the erroneous deployment of statutory interpretation cannons and resolves the key terms used in Congress's statutory framework.

Respectfully submitted,

Robert L. Sirianni, Jr., Esquire
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, FL 32790
Telephone: (407) 388.1900
Facsimile: (407) 622-1511
robertsirianni@brownstonelaw.com

Counsel for Petitioner

Dated: November 3, 2023