

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW STEVEN HACKNEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether 18 U.S.C. § 2251 and § 2252(a)(5)(B) authorize convictions upon proof that materials used to produce or possess 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?

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?

LIST OF PARTIES

Matthew Steven Hackney is the petitioner; he was the defendant-appellant below.

The United States of America is the respondent; it was the plaintiff-appellee below.

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PRAYER

Petitioner Matthew Steven Hackney respectfully prays that this Court grant his petition for certiorari.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Hackney*, No. 23-20127, 2023 WL 5821785 (5th Cir. Sept. 8, 2023) (unpublished), and is provided in the Appendix to the Petition.

JURISDICTION

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on September 8, 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

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.

Title 18, Section 2252A(a)(5)(B) of the United States Code provides:

(a) Any person who—

* * *

(5) either

* * *

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or 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 that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

shall be punished as provided in subsection (b).

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 OF THE CASE

A. Facts and Trial Proceedings

Matthew Steven Hackney pleaded guilty to one count of violating 18 U.S.C. § 2251(a) by producing visual depictions of a child engaged in sexually explicit conduct, where the visual depiction so produced was transmitted using any means and facility of interstate or foreign commerce, and such visual depiction was produced using materials that had been shipped or transported in interstate or foreign commerce; one count of violating 18 U.S.C. § 2252(a)(2)(B) by distribution of materials containing child pornography; one count of violating that same statute by reason of receipt of materials containing the same; and one count of possession of materials containing child pornography where such material had been shipped and transported using any means and facility of interstate and foreign commerce, or which were produced using materials which have been mailed, shipped and transported in and affecting interstate and foreign commerce, by any means, including by computer (in this case, Hackney's cellular telephone and its storage card), in violation of 18 U.S.C. § 2252A(a)(5)(B) & (b)(2). As regards the interstate commerce, the factual resume simply alleged that he produced the images with objects that had traveled in or affected interstate commerce (his cellular phone) and that he possessed the images on another device (a storage card) that had also been manufactured outside the State of Texas. The court accepted the plea and, at a later sentencing hearing, imposed 336 months of imprisonment with respect to count 1 (production of child pornography), and separate, lesser terms of imprisonment to be served for each of the other counts of conviction, plus concurrent terms of supervised release for each such count.

B. Appellate Proceedings

On appeal, Petitioner contended that the factual resume failed to admit a constitutional offense with regard to Count 1 (production of child pornography) or Count 4 (possession of child pornography). Specifically, he argued: 1) that both 18 U.S.C. § 2251 and 18 U.S.C. § 2252A(a)(5)(B) 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*, 572 U.S. 844 (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 conceded that it was foreclosed on the merits, *see United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000).

The court below applied plain error and rejected these arguments, as foreclosed by circuit precedent. *See* Appx. A (citing *United States v. Bailey*, 924 F.3d 1289, 1290 (5th Cir. 2019)).

REASONS FOR GRANTING THE PETITION

This Court should decide whether 18 U.S.C. § 2251(a), § 2252A(a)(5)(B) 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).*

The factual basis recited by the prosecutor in Petitioner's case, and admitted by the Petitioner, stated that the cellular phone used to produce, and the storage disk used to possess, the prosecutable material had moved in interstate commerce. Hackney did not admit as part of that factual basis that the offense itself caused the movement of these objects used in committing the offense, nor that the movement of the objects was recent, nor any other fact establishing that the offense involved the buying, selling, or movement of any commodity. Petitioner contended below on appeal that the factual resume was therefore insufficient to establish a violation of 18 U.S.C. § 2251 or § 2252A(a)(5)(B) in a manner consistent with the Constitution.

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 Similarly, Section 2252A(a)(5)(B) authorizes conviction when the

¹ Other 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

defendant knowingly possesses “any computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or 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 that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.” 18 U.S.C. § 2252A(a)(5)(B). To be sure, each 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 or its storage on a computer disk that crossed state lines years ago for entirely innocent purposes. Under this view of the statutes, Petitioner’s conduct represented the charged federal offenses. 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 852-853; 18 U.S.C. § 229(a). She 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.*

itself travels in interstate commerce, or in the channels of such commerce. Those parts of the statute are not at issue here.

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) and § 2252A(a)(5)(B) and 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 and § 2252A(a)(5)(B) to federal interests in interstate commerce. This prong of the statutes 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" and the phrase "possesses . . . [any material containing child pornography] that has been mailed, or shipped or 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 that was produced using materials that have been mailed, or 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 and § 2252A(a)(5)(B) 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's review is needed because the court below has decided an important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(c). 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.

Date: October 19, 2023

Respectfully submitted,

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