23-6005

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EHAB SADEEK - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. In the admitted absence of established circuit precedent, was it plain error for the appellate court to affirm Petitioner's 405-month sentence based on a five-level "...pattern of activity" enhancement pursuant to USSG § 4B1.5(b)(1) contrary to this Court's holding in *United States v. Wooden?*

II. The agreed stipulation of facts presented at Petitioner's bench trial did not establish "use of force or fear" in the course of the offense. Was it plain error for the appellate court to affirm a cross reference enhancement under USSG § 2A3.1 based solely on erroneous facts presented at sentencing from the PSR writer?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix ___A___ to the petition and has been designated for publication but is not yet reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit decided Petitioner's appeal on August 8, 2023. This Petitioner for writ of certiorari is timely filed and the jurisdiction of this Court in invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statutory Provisions

STATEMENT OF THE CASE

Introduction

In *Wooden v. United States*, S. Ct., No 20-5279 (2022), the Court grappled with the following question - Are offenses committed as part of a single criminal spree but sequentially in time "committed on occasions different from one another" for purposes of a sentencing enhancement under the Armed Career Criminal Act? In answer to this question, the Court held: "Wooden's ten burglary offenses arising from a single criminal episode did not occur on different occasions and thus count as only one prior conviction for the purposes of ACCA." This important decision begs the question: Does the same reasoning and analysis hold true under the U.S. Sentencing Guidelines? Without question this Court has historically held that minimum sentences imposed by statute are mandatory while sentences imposed by reference to the Sentencing Guidelines are advisory. Mr. Sadeek respectfully asks this Court to determine if the "pattern of prohibited sexual activity" imposed under U.S.S.G. § 4b1.5(b) in a "single criminal episode" involving a single victim requires the same "different occasions" scrutiny applied in *Wooden*, and to find that this Guideline is Constitutionally vague in violation of Due Process. He also asks this Court to determine applicability of USSG § 2G1.3(c)(3) to § 2A3.1 - a cross reference with regard to "use of force" based solely on judge found facts presented by the PSR writer at sentencing and not stipulated or presented as part of the trial.

It is understood that the Court is under no obligation to hear certain cases, however the issues presented here have national significance and could further define the application of Sentencing Guidelines commentary being incorrectly applied as controlling law. The questions of law and fact presented that are of Constitutional magnitude effecting significant liberty interests.

Background

The indictment alleged in Count One that the Petitioner violated 18 U.S.C. § 2422(b) for enticement of a minor to engage in "illegal sexual activity" in violation of Texas Penal Code, 22.021; alleged in Count Two that the Petitioner violated 18 U.S.C. § 2423(b) for travel with intent to engage in illicit sexual conduct; and alleged in Count Three that the Petitioner violated 18 U.S.C. § 1470 for transfer of obscene materials to a minor. After a stipulated bench trial, the district judge found the Petitioner guilty of all counts, contrary to his plea. A judgment was entered on May 9, 2022, and an amended judgment entered on June 9, 2022 after a restitution hearing. The Petitioner was sentenced to imprisonment for 405 months on Counts One and Two, and 120 months on Court Three to run concurrently with each other for a total of 405 months. The Petitioner was ordered to pay $42,153.82 in restitution, and he was ordered to pay a Justice for Victims of Trafficking Act assessment of $5,000.00 for each of Counts One through Three to be assessed consecutively for a total of $15,000.00.. The Petitioner timely filed a notice of appeal.

Mr. Sadeek raised three issues on appeal:

I - Count Three of the indictment alleged the Petitioner violated 18 U.S.C. § 1470 for transfer of obscene materials to a minor. The JVTA states that it applies to a person convicted of only one of the following offenses: (1) "under chapter 77 [18 USCS §§ 1581 et seq.] (relating to peonage, slavery, and trafficking in persons)"; (2) "chapter 109A [18 USCS §§ 2241 et seq.] (relating to sexual abuse)"; (3) "chapter 110 [18 USCS §§ 2251 et seq.] (relating to sexual exploitation and other abuse of children)"; (4) "chapter 117 [18 USCS §§ 2421 et seq.] (relating to transportation for illegal sexual activity and related crimes)"; or (5) "section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) (relating to human smuggling)." The offense of transfer of obscene materials to a minor is codified under chapter 71, 18 U.S.C. §§ 1460-1470, relating to obscenity. This offense is not listed as one of the specific offenses under the JVTA. The district court, therefore, erred by assessing a special monetary assessment of $5,000.00.

II - The offenses in the case at bar occurred only over the course of a less than 24 hours rather than over a lengthy period of time and were also part of a single criminal episode involving the same victim. Therefore this did not establish a pattern of prohibited criminal conduct as required by the Guidelines. USSG § 4B1.5 is located in Part B, Chapter 4 of the Guidelines which covers recidivist adjustments to punish a pattern of criminal conduct occurring over a substantial period of time and also with multiple victims in Career Offender and

Criminal Livelihood cases. Therefore, the district judge reversibly erred in denying the Petitioner's objection to the 5 levels added to the combined adjusted offense level of 39 pursuant to the enhancement added based on application of USSG § 4B1.5(b)(1) because the offenses were part of a single criminal episode with a single victim occurring over a period of less than 24 hours. By affirming Petitioner's 405 month sentence, the Court of Appeals legally erred for the same reason.

III - The May 2, 2022 final Presentence Investigation Report improperly applied a cross reference of USSG § 2G1.3(c)(3) to § 2A3.1 resulting in a base offense level of 30. The Petitioner objected to this cross reference and argued he neither forced the K.B - the victim - to commit sexual acts nor placed K.B. in fear during the commission of the offense. There was insufficient and unreliable evidence given to prove the offense was carried out with the use of force or by threatening or placing the victim in fear as required by 18 U.S.C. §§ 2241, 2242. The application of this cross-reference enhancement was based solely on the recommendation of the PSR writer and imposed by the court over Petitioner's objections. Interestingly, even though the government was a party to the factual stipulation agreement submitted for trial, there is no mention of the use of any force or fear - meaning that nothing regarding the use of force or fear during the commission of the offense was submitted by the government during the stipulated bench trial.

On September 8, 2023, the Fifth Circuit affirmed the 405-month sentence upholding the 5-level enhancement under U.S.S.G. § 4b1.5(b) concluding that the facts found by the judge based solely on the PSR writers assertion during the sentencing proceeding indicated that Mr. Sadeek "engaged in at least two (2) instances of prohibited sexual conduct with K.B.," and also applied a cross reference under USSG § 2G1.3(c)(3) to § 2A3.1 concluding that the offense involved the use of force or fear.

REASONS FOR GRANTING THE PETITION

Vagueness - Section 2422(b)

Count One of the indictment alleged that Sadeek violated 18 U.S.C. § 2422(b) by "using a facility and means of interstate and foreign commerce, did knowingly persuade, induce, entice *and* coerce (the actual statute uses the disjunctive *or* coerce) Minor Victim One, (MV1) an individual who had not attained the age of eighteen (18) years, to engage in *sexual activity for which the defendant could be charged with a criminal offense,* (again, the indictment deviates from the actual statute which states: *to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so*), that is Aggravated Sexual Assault of a Child, Section 22.011, of the Texas Penal Code..."

Even though Mr. Saddeek was arrested and charged, he was not indicted nor convicted under Texas law for the offenses asserted in the federal indictment. Also, the term "sexual activity" is not defined in the federal criminal code, rendering the statute constitutionally vague. Quoting former 7th Circuit Justice Posner in *United States v. Taylor,* 640 F.3d 255 (7th Cir. 2011),

> "For a federal statute to fix the sentence for a violation of a broad category of conduct criminalized by state law, such as "*any sexual activity for which any person can be charged with a criminal offense,*" is a

> questionable practice. Congress cannot know in advance what conduct the state will decide to make criminal: if Indiana made leering a crime, and "sexual activity" were defined as broadly as the U.S. Attorney asks us to define it in this case, a minor offense would subject the offender to a 10-year minimum prison sentence." (emphasis added).

Further, this Court has held that vague laws are a nullity.

> "In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019)

Section 2422(b) is Constitutionally vague because it fails to "...give ordinary people fair warning about what the law demands of them." (no federal definition for the vague term "illegal sexual activity."). It is therefore a "nullity."

U.S.S.G. § 4b1.5(b) - "Pattern of Prohibited Activity" Enhancement

Addressing the "different occasions" inquiry in the context of the ACCA , this Court concluded in *Wooden* - decided a mere 2-months after Petitioner's June 9, 2022 sentencing -

"The ordinary meaning of the word "occasion" does not require occurrence at precisely one moment in time. For example, an ordinary person would describe Wooden as burglarizing ten units "on one occasion" but would not say "on ten occasions, Wooden burglarized a unit in the facility." And indeed "Wooden committed his burglaries on a single night, in a single uninterrupted course of conduct." The history of the ACCA confirms this understanding, as Congress added an "occasions clause," which requires that prior crimes occur on "occasions different from one another." This interpretation is also consistent with

the purpose of the ACCA, which is to address the "special danger" posed by the "armed career criminal"—a concern not presented by the situation of a single criminal episode."

This instant case does not involve the ACCA, but rather the "pattern of prohibited sexual conduct" imposed under the U.S. Sentencing Guidelines. At Petitioner's sentencing, the district court imposed a 5-level sentence enhancement pursuant to USSG § 4B1.5(b)(1) because the PSR writer asserted that there was a pattern of activity involving prohibited sexual conduct. The Petitioner, through counsel, objected to this enhancement, but was overruled by the sentencing judge, which was then upheld and affirmed by the Fifth Circuit on appeal.

The offense in this case occurred in May 2020 and over a less than a 24 hour period of time and as part of a single uninterrupted criminal episode with the same victim. USSG § 4B1.5 is located in Part B, Chapter 4 of the Guidelines which covers recidivist adjustments to punish a pattern of criminal conduct occurring over a substantial period of time in Career Offender and Criminal Livelihood cases - unlike this instant case where there is no prior criminal history for a similar offense.

At the stipulated bench trial, the district court judge relied on the stipulation of facts - agreed by all the parties - to find the Petitioner guilty of the offenses. Then, at sentencing, he simply overruled all the Petitioner's objections after both sides presented their positions regarding the sentencing enhancements.

USSG § 4B1.5(b)(1) states as follows:

> (b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither § 4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual Conduct:
>
> (1) The offense level shall be 5 plus the offense level determined under Chapters Two andThree. However,if the resulting offense level is less than level 22, the offense level shall be level 22, decreased by the number of levels corresponding to any applicable adjustment from § 3E1.1.

Comment Note 2 to § 4B1.5 states as follows regarding what is a covered sex Crime:

> Covered Sex Crime as Instant Offense of Conviction.
> For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e.: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this note.

The Petitioner was convicted of Count One that alleged the Petitioner violated 18 U.S.C. § 2422(b) for enticement of a minor. Enticement of a minor is a covered sex crime for purposes of § 4B1.5 because that offense is listed under chapter 117 which includes 18 U.S.C. § 2422, however it only applies once it

becomes a completed offense. For example, the indictment alleged that the Petitioner enticed the victim to engage in "...any sexual activity for which any person can be charged with an offense." Here, that offense was Texas Penal Code, 22.021. So in order for this offense to apply under U.S.S.G. § 4b1.5(b), it had to be in the course of completing the offense, i.e., part of the same criminal episode.

The Petitioner was convicted of Count Two that alleged the Petitioner violated 18 U.S.C. § 2423(b) for travel with intent to engage in illicit sexual conduct (undefined in the indictment). Travel with intent to engage in illicit sexual conduct is a covered sex crime for purposes of § 4B1.5 because that offense is listed under chapter 117 which includes 18 U.S.C. § 2423. The Petitioner was convicted of Count Three that alleged the Petitioner violated 18 U.S.C. § 1470 for transfer of obscene materials to a minor. This offense does not constitute a covered sex crime for purposes of § 4B1.5 because that offense is not included under: (1) chapter 109A of title 18, United States Code; (2) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (3) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (4) 18 U.S.C. § 1591. The offense of transfer of obscene materials to a minor is codified under chapter 71, 18 U.S.C. §§

1460-1470, relating to obscenity. This offense is not listed as one of the above specific offenses, so Count Three is not a covered sex crime for purposes of § 4B1.5.

Comment Note 4 to § 4B1.5 states as follows regarding what is a pattern of activity:

> (B) Determination of Pattern of Activity.
>
> (i) In General. For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.
>
> (ii) Occasion of Prohibited Sexual Conduct. An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

The final Presentence Investigation Report (PSIR) at ¶ 41 added 5 levels to the combined adjusted offense level of 39 pursuant to the enhancement in USSG § 4B1.5(b)(1). The Petitioner objected to this enhancement and argued: (1) the offenses in the case at bar occurred only in May 2020 in less than 24 hours involving a single victim rather than over a lengthy period of time; and (2) 4B1.5 is located in Part B, Chapter 4 of the Guidelines which covers recidivist adjustments to punish a pattern of criminal conduct occurring over a substantial

period of time in Career Offenders and Criminal Livelihood cases, but the Petitioner's case occurred only over a day and a half in May 2020 and so was not a substantial period of time. The district judge at sentencing recognized that the case at bar concerned "two separate days of sexual assault" for a single victim that all occurred in less than 24 hours. The first sexual encounter occurred on the day the Petitioner arrived in the victim's town and the second sexual encounter occurred early the next day. The district judge inquired if the government had a case that authorized this 5-level enhancement for merely one month of activity with a single victim. The district court was aware of cases applying this enhancement for multiple victims or for offenses occurring over large period of time but agreed it was an issue of law to be decided by the Fifth Circuit.

The Fifth Circuit admits this is an undecided issue of law.

> "This court has not addressed the meaning of "separate occasions" in the context of § 4B1.5(b)(1). Other circuits have applied the plain meaning of § 4B1.5 and concluded that the enhancement applies in cases where the prohibited activity occurred on consecutive days, so long as there were at least two separate instances of prohibited conduct. United States v. Telles, 18 F.4th 290, 303 (9th Cir. 2021) (concluding that the enhancement applied where the victim was sexually abused on two separate occasions—the first night of the defendant's trip and then again the second night of his trip); see also United States v. Wandahsega, 924 F.3d 868, 886-87 (6th Cir. 2019) (upholding a finding of a pattern of prohibited sexual conduct where the evidence established that the defendant had "touched [the victim's] genitals more than one time on different days"); United States v. Fleetwood, 457 F. App'x 591, 591-92 (8th Cir. 2012) (holding that sexual abuse occurring three times during a three-day trip and "at least two or three" times thereafter was "at least five separate occasions" for purposes of § 4B1.5(b)(1))."

On Appeal, the government, in a footnote, references *Wooden,* by stating:

> "Granted, the Supreme Court has interpreted the meaning of "occasions different from one another" in the context of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). See Wooden v. United States, 142 S. Ct. 1063, 1068-71 (2022).There, the Court endorsed a "multi-factored" inquiry over the government's approach of marking an "occasion" based on the moment in time the final element of a distinct offense is committed. See id. Insofar as Sadeek may attempt to rely on Wooden or any comparison to the ACCA's occasions clause in this case, he has waived those claims by failing to raise them in the district court or in his opening brief. See United States v. McRae, 795 F.3d 471, 479 (5th Cir.2015) (arguments not raised at district court or in opening brief are waived). And, regardless, the *Wooden* Court recognized that offenses committed "a day or more apart, or at a significant distance" are correctly treated "as occurring on separate occasions." Wooden, 142 S. Ct. at 1071 (internal quotation omitted)."

Appellee Brief, App. Doc. 37, pg. 27, footnote 7.

So the government correctly asserted in it's Appellate brief that this Court's analysis in *Wooden* would have applicability, but argued that the issue was waived.

It was plain error and violated Due Process for the Fifth Circuit to affirm the application of this constitutionally vague 5-level Guideline enhancement contrary to this Court's important holding in *Wooden* and in the absence of Circuit precedent.

Cross reference USSG § 2G1.3(c)(3) to § 2A3.1

In his challenge to the district court's 405-month sentence, Petitioner argues that the district court made an erroneous, factually false guideline calculation when it applied the cross-reference to § 2A3.1 followed by the Fifth

Circuit erred in affirming the sentence. Petitioner contends that the cross reference was inappropriate because the record does not support a factual finding that he used force or threats or placed the victim in fear nor was this part of the "agreed" stipulation of facts presented at Petitioner's stipulated bench trial. In fact, when negotiating the stipulation agreement, Petitioner'e counsel confirmed with the government that this case did not involve the use of force or fear, nor was there any physical harm to the victim and that the government did not intend to present such. Then at sentencing, the government does and about-face and introduces a presentence report (PSR) asserting that the case involved force and fear, prompting the district court judge to impose the erroneous Guideline.

The guideline provision for enticement of a minor in violation of § 2422(b) is generally § 2G1.3(a)(3) and establishes a base offense level of 28. See § 2G1.3(a)(3). But § 2G1.3(c) contains three cross-references that apply under circumstances meriting a more severe sentencing framework. See § 2G1.3(c)(1)-(3). The district court applied the third cross-reference, which States:

> If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined [under Section 2G1.3(a)].

U.S.S.G. § 2G1.3(c)(3).

The Petitioner originally pleaded not guilty, but then entered into an agreement with the government to proceed by way of a *Stipulated Bench Trial.* On November 18, 2021, the stipulated bench trial commenced. Neither the Petitioner nor the government presented any additional factual circumstances as part of the bench trial. See Appendix __B____ - Stipulation of Certain Facts for the Purposes of Trial. This *Stipulation* agreement provides relevant procedural history and factual resume as understood and agreed by all parties to the agreement. No further factual evidence was presented - either by stipulation or testimony by the government concerning the use of force or fear against the victim during commission of the offense.

At sentencing, the government pulled a bait-and-switch. The government's psychotherapist witness at sentencing testified that he reviewed the victim's Google Hangout chats with the Petitioner, as well as the SANE interview, the Children's Advocacy Center (CAC) interview, and two reports from case agents. He admitted that the victim chatted in a sexual manner with approximately 80 adults and provided her home address to approximately five men. He stated that in the CAC interview, the victim claimed the Petitioner pleaded with the her over and over again for her address, but he was unaware that this claim was inconsistent with the victim in the chats providing her home address unsolicited to the Petitioner and five other men. When asked where in the records was there support for the victim's claim at the CAC interview that she finally gave in and

provided her address, the witness was unable to provide a record reference. He further stated that at the CAC interview she claimed that the Petitioner told her to keep their relationship a secret, but he did not realize that the chats never indicate the Petitioner told her to keep their relationship a secret. He also testified that she told the Petitioner to not tell his sister about their plans. When cross examined, he could not explain why the victim claimed the Petitioner wanted her to keep their relationship a secret when the chats revealed the Petitioner never asked her to keep this a secret. He further admitted that after this sexual encounter took place, the victim wanted the Petitioner to return to her and requested the Petitioner bring her some food but to wait until she told him when he could safely return to the back yard without her grandfather seeing the them. To be clear, the victim asked the Petitioner to see her again after the first sexual encounter - unlike someone forced to perform sexual acts and placed in fear during the commission of those acts. There was no factual, forensics, or physical evidence presented at trial nor sentencing to corroborate the PSR writers assertion that "force or fear" was used during the commission of the offense. It was therefore plain error for the district court to rely solely on unconfirmed facts delineated in the PSR at sentencing to incorrectly apply the "force or fear" cross reference and further error for the Fifth Circuit to affirm it on appellate review

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 11/03/2023