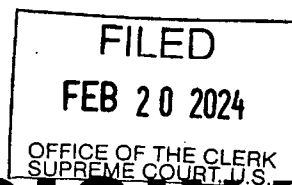


23-6896

No. _____



ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Anthony Rimas — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For the First Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony Rimas
(Your Name)
630-50-509
Federal Satellite Low Elkton
P.O. Box 10
(Address)

Lisbon, OH 44432
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Has the Sentencing Commission overstepped its congressional authority granted it under 28 U.S.C. § 994 when, with no specific congressional directive given, the Commission expanded the definition of 'minor', already codified under 18 U.S.C. § 2256(1), to include undercover law enforcement officers posing as a person under the age of 18 years?

Can the Sentencing Commission use its own amendment process to change unambiguous definitions Congress has already codified instead of seeking and being granted a specific congressional directive to do so?

Can U.S.S.G. § 2G2.2(c)(1) be applied based on the Sentencing Commissions definition of 'minor' when only an undercover law enforcement officer posing as a person who has not attained the age of 18 years is involved?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 28, 2023.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2256(1)

"minor" means any person under the age of eighteen years

28 U.S.C. § 994(a)

The Commission by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System-

U.S.S.G. § 1A1.1 Authority

The Guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

U.S.S.G. § 2G2.2 Application Notes(1)

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purpose of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

Rule 52(b)

Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Sentencing Commission Amendment 664

See Appendix C

STATEMENT OF THE CASE

This case arose from an investigation conducted by Homeland Security Investigations, The New Hampshire Internet Crimes Against Children Task Force and the Nashua Police Department. During the course of the investigation, law enforcement officers using undercover profiles in the persona of a 14 year old female communicated with a male individual later identified as Anthony Rimas, Appellant here, on various on-line applications ("apps"). During various chats with the undercover persona, Rimas solicited the individual to engage in sexual activity. He also requested the under cover, posing as a 14 year old girl, take a photo engaging in sexually explicit conduct.

Based on the content of the communication and the identification of Rimas as the soliciting party through various search warrants and subpoenas on telecommunication carriers and internet service providers, law enforcement obtained a search warrant for Rimas' home and person. The warrant was executed on March 11, 2021. Law enforcement seized multiple electronic devices. Subsequent forensic examination of the drives showed they contained child pornography.

Rimas was named in a single-count information filed July 20, 2021. The information charged Rimas with receipt of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(B) and (b)(1). Appellant waived indictment and plead guilty to the information on September 2, 2021. Appellant's Plea Agreement contained a waiver provision covering both direct appeal and collateral review.

Rimas' sentencing hearing was held on April 11, 2022. Leading up to the hearing. Probation prepared its first Presentence Investigation Report ("PSR"), using Guideline USSG § 2G2.2, and calculated Rimas' Guidelines Sentencing Range at 108-135 months. In response to the first PSR counsel objected to a 2 level enhancement for distribution as no distribution or intent to distribute took place. Probation agreed with counsel on this objection which brought Rimas' Guidelines

Sentencing Range to 87-108 months. However Probation the applied cross-reference § 2G2.2(c)(1) in the second PSR and calculating Rimas' Guidelines Sentencing Range to 135-168 months. Probation applied the cross-reference which states, "If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct for the purpose of transmitting a live visual depiction of such conduct, apply 2G2.1.". Probations rational to apply the cross-reference should apply was Rimas' chats/attempts to get photos from the undercover posing as a 14 year old girl. This new Guidelines calculation, which defense counsel objected, was carried through to the final PSR.

Rimas maintained the following objections to and through sentencing:

(1) the cross-reference of section § 2G2.2(c)(1) should not apply; (2) Rimas should not receive a 2-level enhancement for distribution and (3) the court should apply its customary 2-level downward variance for ubiquity of computer use. At sentencing the court only sustained defense counsel's objection to the 2-level enhancement for distribution and calculated Rimas' Guidleines Sentencing Range at 108-135 months. The district court sentenced Rimas to 108 months of imprisonment, 8 year term of supervised release, and imposed a \$100 special assessment and a \$5000 assessment under the Justice for Victims of Trafficking Act of 2015. A timely notice of appeal of the sentence was filed by defense counsel on April 18, 2022.

Rimas was appointed counsel for appeal under the guidelines of the Criminal Justice Act, 18U.S.C. § 3006A. Appeal counsel filed an Anders brief on April 14, 2023 arguing no non-frivolous argument for appeal could be made due to Rimas' waiver of appeal. Rimas the filed a pro se supplemental brief on June 14, 2023 raising a host of claims some for the first time as well as claims properly preserved at sentencing. Defense counsel properly preserved the claim that the

application of the cross-reference § 2G2.2(c)(1) should not apply. Rimas argued the application of the cross-reference is an error of constitutional dimensions because the Sentencing Commission overstepped its congressional authority when it expanded the definition of 'minor' to include undercover law enforcement officers posing as a minor through the Commissions Amendment 664. This expanded definition by the Commission is in contrast to the definition codified by Congress under 18 U.S.C. § 2256(1) which defines 'minor' only as "'minor' means any person under the age of 18 years". The First Circuit Court of Appeals ruled there were no non-frivolous or colorable issues and that Rimas' claims do not meet the plain error standard and dismissed Rimas' direct appeal on November 18, 2023

REASONS FOR GRANTING THE PETITION

It should be decided if the Sentencing Commission overstepped the authority delegated to it by Congress under 28 U.S.C. § 994. This overstep of delegated authority has led to both probation and the courts to unintentionally miscalculate certain Guideline ranges under U.S.S.G. § 2G2.2. The Commission overstepped the authority delegated to it by Congress when the Commission, with no specific congressional directive, expanded Congress' definition of 'minor', which Congress had already defined, under 18 U.S.C. § 2256(1). 18 U.S.C. § 2256 is titled "Definitions for Chapter". § 2256 is comprised of the definitions Congress codified and intended to be used under Chapter 110 of the United States Code. Chapter 110 contains 18 U.S.C. § 2252A, the statute Rimas pled guilty to. § 2252A has its sentences calculated under § 2G2.2. This would make the definition of 'minor' under § 2256(1) the definition Congress intended to be used under § 2G2.2. § 2256(1) states: "'minor' means any person under the age of eighteen years;". A straight forward unambiguous definition not in need of clarification. The Commission greatly expanded the definition of 'minor' under § 2G2.2 Application Notes(1) as: "'Minor' means (A) and individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purpose of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age or 18 years." See Appx. C at 15 (Amendment 664).

§ 2G2.2(c)(1) was applied to Rimas' Guideline range calculation due to Probation relying on the Commission's definition of 'minor' under § 2G2.2 Application Note(1), which includes undercover officers posing as a 'minor', and not the definition codified under § 2256(1). § 2G2.2(c)(1) states: "If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement,

a minor to engage in sexually explicit conduct for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if resulting offense level is greater than that determined above." See Appx. C at 14-15 (Amendment 664). The application of 2G2.2(c)(1) to Rimas' Guidelines was based of Rimas' conversations and request for an explicit picture from an undercover officer posing as a minor. By relying on the Commissions expanded 'minor' definition an unintentional error took place in Rimas' Guidelines range calculation, as well as any other similarly situated defendant who's Guideline range relied on the Commissions expanded definition of 'minor'. "A plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under rule 52(b)." Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018).

This error should also deem Rimas' appeal waiver, as well as defendants similarly situated, unenforceable as applied to this error. "a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceeding." Rosales-Mireles, 138 S. Ct. at 1910 (citing Hollander-Blumoff, The Psychology of Procedural Justice in the Federal Courts, 63 Hastings L. J. 127, 132-134(2011)). "The mere fact Rosales-Mireles' sentence falls within the correct Guidelines range does not preserve the fairness, integrity, or public reputation of the proceedings." Rosales-Mireles, 138 S. Ct. at 1910 (footnote omitted).

The Sentencing Commission has created this error when it overstepped the the authority delegated it by Congress under 28 U.S.C. § 994(a) which states: "The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any federal statute shall promulgate and distribute to all courts of the United

States and to the United States Probation System-". 28 U.S.C. § 994(a) (emphasis added). The Commission then restates the limits of the authority delegated it under its own Guideline U.S.S.G § 1A1.1 which states: "The Guidelines, policy statements and **commentary** promulgated or amended pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code:" U.S.S.G. § 1A1.1 (emphasis added). The Supreme Court has also confirmed the limits of the Commissions delegated authority. "Congress has undoubted power to regulate the practice and procedure of federal court authority and make rules not **inconsistent with** statutes or constitution of the United States." Mistretta v. United States, 488 U.S. 361, 387 (1989) (citing Sibbach V Wilson & Co., 312 U.S. 1, 9-10) (footnote omitted) (emphasis added). Congress, the Supreme Court, and the Sentencing Commission all agree the Commission does not have the authority, delegated or otherwise, to override a congressional statute without a specific congressional directive.

Did the Commission receive a specific congressional directive to expand the definition of 'minor'? No it did not. The Commission expanded the definition of 'minor' through Guideline Amendment 664. Before Amendment 664 § 2g2.2 had a very similar definition to that in § 2256(1). Pre Amendment 664 definition was: "'Minor' means an individual who had not attained the age of 18 years." See Appx. C at 12 (Amendment 664). The Commission gives the following reason for Amendment 664: "Reason for Amendment: This amendment implements the directives to the Commission regarding child pornography and sexual abuse offenses in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, ('the PROTECT Act'), Pub. L. 108-21. See Appx. C at 1. (Amendment 664). The Commission specifically addresses the expansion of the 'minor' definition as well, "In response to the increase in the use of undercover officers in child pornography investigations, the amendment

expands the definition of 'minor'". See Appx. C at 3 (Amendment 664). The Commission does not cite a single congressional directive given to the Commission to expand the definition of 'minor' found under § 2256(1). This is because the PROTECT Act did not direct the Commission to do so. The Commission only cites the Amendment as the authority to expand the definition. This is well outside of the authority the Commission has been delegated by Congress.

Through Amendment 664 the Commission also added other definitions to § 2G2.2. The Commission added 'computer', 'image', and 'interactive computer service'. With these definitions the Commission stayed within its delegated authority and deferred to the definitions Congress had previously codified. "'computer' has the meaning given that term in 18 U.S.C. § 1030(e)(1)", "'Images' means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8)", "'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)). See Appx. C at 14-15 (Amendment 664). With these definitions the Commission has shown it is aware of the limits of its delegated authority, even when it feels a definition is not broad enough. "The Commission concluded that the term 'computer' did not capture all types of internet devices." See Appx. C at 3 (Amendment 664). The Commission stayed within the bounds of its authority deferring to the codified definition of 'computer' under § 1030(e)(1) instead of expanding the definition to meet its needs as it did with the definition of 'minor'. Instead the Commission added another codified definition, the definition of 'interactive computer services', to achieve its desired outcome. Why would the Commission treat two definitions, 'minor' and 'computer', completely different? Why would the Commission expand the definition of 'minor' without a directive from Congress and defer to Congress' definition of 'computer' when the Commission felt both definitions were not broad enough?

Both the courts and Probation rely on the Sentencing Commission for Guideline ranges and commentary on how to apply each Guideline to properly calculate a defendant's Guideline range. When the Sentencing Commission oversteps its authority delegated it by Congress the Commission can be inadvertently and unintentionally creating situations where a defendant's Guideline range will be calculated incorrectly. "[w]hen a defendant is sentenced under an incorrect Guidelines range-whether or not the defendant's ultimate sentence falls within the correct range-the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." Rosales-Mireles, 138 S. Ct. at 1907. (citing Molina-Martinez 194 L. Ed. 2d 44 at 454). The Sentencing Commission should explain under what authority it was allowed to expand the definition of 'minor' already codified by Congress under § 2256(1). The expansion of the 'minor' definition has resulted in sentences that are longer than necessary and are not merely harmless errors. "[a]n error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than necessary to fulfill the purpose of incarceration. To a prisoner, this prospect of additional time behind bars is not some theoretical or mathematical concept. [A]ny amount of actual jail time is significant, and ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration." Rosales-Mireles, 138 S. Ct. at 1907 (citations and quotation marks omitted).

The Sentencing Commission should not be allowed to circumvent the limits of its authority delegated by Congress. Should the Commission feel a term, a phrase, or a section Congress has codified is not broad enough and should be expanded the Commission should petition Congress for a specific directive to meet its goals. The Commission should not be allowed to use its own amendment process as a magic wand to correct issues that lay outside of its authority delegated it by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Anthony Rimas', is written over a horizontal line.

Anthony Rimas

Date: February 29, 2024