

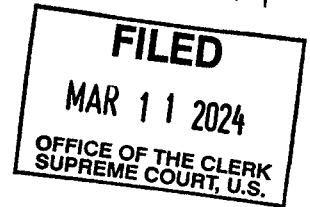
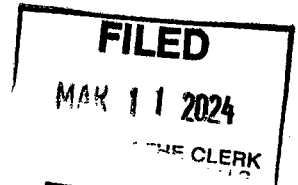
ORIGINAL

No. _____

23-7061

IN THE

SUPREME COURT OF THE UNITED STATES



Cody Dillon Hogan — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eleventh Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Cody Dillon Hogan, Reg. No. 17061-509

(Your Name)

FCI Forrest City Low, P.O. Box 9000

(Address)

Forrest City, Arkansas 72336

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Proximate causation. This Court has opined that holding possessors of illegal pornography liable for the conduct of many other independent actors may be severe enough to raise Eighth Amendment concerns. Hogan was issued a mandatory restitution order, but the Government demonstrated victims' losses over the totality of time and even before Hogan's objective involvement. Does due process or the Eighth Amendment require that restitution bear a temporal proximity between a victim's losses and a defendant's conduct?
2. Due process. 18 U.S.C. § 2259(b)(2)(B) imposes a mandatory minimum restitution upon defendants that are "convicted of trafficking in child pornography". Hogan was charged and convicted exclusively upon a production charge which is not included in the statute's definition for trafficking. However, the district court still enforced a mandatory minimum restitution against Hogan. Does due process allow a court to impose a mandatory minimum restitution under 18 U.S.C. § 2259(b)(2)(B) when a defendant was not convicted of trafficking in child pornography?
3. Conflicting interpretation. The Eleventh Circuit, which affirmed Hogan's conviction, has adopted a broad and literal reading of "induce", holding that conduct of mere arrangement or causation "fits squarely within the definition". However, the D.C. Circuit has held that to include terms such as "arrange" or "cause" within the ambit of the word "induce" is "erroneous" and "highly prejudicial". Other circuits have also supported similarly narrowed interpretations. What is the correct interpretation and scope of "induce" in 18 U.S.C. § 2251(a)?
4. Statutory interpretation. 18 U.S.C. § 2251(a) proscribes attempting to induce a minor to engage in sexual conduct for the purpose of producing a visual depiction of that conduct. Hogan was found guilty of attempted production, despite never trying to communicate with, record, or access a minor. Does the verb "induce" in 18 U.S.C. § 2251(a) encompass exclusive communications with an adult in a bilateral transaction to purchase and receive made-to-order illegal pornography being produced and sold by the other party?
5. Substantive due process. Congress has stated that "even fraudulent offers to buy or sell" child pornography "help to sustain the illegal market"; "no actual material need exist". 18 U.S.C. § 2252A(a)(3)(B) proscribes pandering purported material "intended to cause another to believe" it is child pornography. Hogan's attempted production conviction rests upon what he believed through interactions with a sting agent. Does substantive due process tolerate the government engaging in harmful and illegal activity which sustains the child pornography market they prosecute?

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:

RELATED CASES

- United States v. Hogan, No. 3:20:cr-00143-BJD-MCR-1, U.S. District Court for the Middle District of Florida. Judgement entered Nov. 3, 2022.
- United States v. Hogan, No. 22-13887, U.S. Court of Appeals for the Eleventh Circuit. Decided Oct. 5, 2023. Petition for rehearing denied Dec. 13, 2023.

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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 10/05/2023.

☐ 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: 12/13/2023, and a copy of the order denying rehearing appears at Appendix B.

☐ 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. § 2251(a)

• 18 U.S.C. § 2259

STATEMENT OF THE CASE

Hogan was involved in an internet-based adult-intermediary child pornography sting operation. In the operation, Hogan communicated exclusively with a government agent posing as another adult. The government agent played the role of a producer and seller of child pornography.

On October 29, 2020, Hogan was indicted in the Middle District of Florida, Jacksonville Division, for one count of attempted production of child pornography in violation of 18 U.S.C. § 2251(a) and (e). See D.C. Doc. 1. The indictment specified that Hogan's acts were done "for the purpose of producing" child pornography. See *id.* at 1.

On June 15, 2021, Hogan entered a guilty plea via plea agreement to the one-count indictment. See D.C. Docs. 40, 95. The plea agreement's personalization of elements specified that Hogan acted for the purpose of "causing the production of" child pornography. See D.C. Doc. 40 at 18.

On November 1, 2022, during a second and final sentencing hearing, Hogan was sentenced to 240 months imprisonment followed by a life-term of supervised release. Additionally, due to the illegal pornography that Hogan possessed in the Eastern District of Arkansas, the Middle District of Florida imposed a restitution order with a mandatory minimum of \$3,000 per victim identified pursuant to 18 U.S.C. § 2259(b)(2)(B). See D.C. Docs. 104, 105, 133. Final judgement was entered on November 3, 2022.

Hogan filed for appeal to the Eleventh Circuit Court of Appeals, and was appointed counsel. Appellate counsel requested

to withdraw from the appeal and filed an Anders brief. See App. Doc. 28. Hogan filed his own pro-se brief. See App. Doc. 47. The panel agreed with counsel's assessment that the appeal had no merit, and thus affirmed the district court's judgement and allowed counsel to withdraw on October 5, 2023. See App. Doc. 48-1.

Hogan filed for rehearing and rehearing en banc. The Eleventh Circuit denied rehearing and rehearing en banc on December 13, 2023.

Hogan now petitions the Honorable Supreme Court for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. Questions involving restitution.

This Honorable Court has previously taken issue with Congress's restitution scheme regarding illegal pornography, and sent them back to the drawing board. See Paroline v. United States, 572 U.S. 434 (2014). Following Paroline, Congress passed the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018. The Act added a \$3,000 mandatory minimum restitution to the already mandatory restitution scheme. See 18 U.S.C. § 2259(b)(2)(B).

In practice, this revision to the restitution scheme now treads a line which this Court previously opined "is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment". See Paroline at 455.

The mandatory minimum restitution imposed on new offenders following the Act involves a demonstration of losses by the victims' over a totality of time - even exceeding the temporal proximity by which a particular defendant's conduct has any bearing on a victim's demonstrated losses from the past. This has granted a prosecutorial power to restitution which has a broader sweep than proximate causation itself, and allows defendants to be held liable for the conduct of past independent actors. Further, as demonstrated by Hogan's case, the mandatory minimum restitution is even being applied when a defendant has not been "convicted of trafficking in child pornography", as mandated by the statute. See 18 U.S.C. § 2259(b)(2).

This mandatory restitution scheme is being applied to every

18 U.S.C. Chapter 110 offender across the United States. Therefore, this is an issue of national importance.

II. Questions involving interpretation.

The application of 18 U.S.C. § 2251(a), which is often grounded in precedent involving § 2422(b) due to its similar actus reus verbs, lacks consistency among the circuits. As the Seventh Circuit has noted, "one can discern three lines of thought" in how the law is applied - and the Eleventh Circuit is among its harshest interpreters. See United States v. McMillan, 744 F.3d 1033, 1036 (7th Cir. 2014).

The Eleventh Circuit holds that conduct of mere causation or arrangement "fits squarely within the definition of 'induce'". See United States v. Murrell, 368 F.3d 1283, 1287 (11th Cir. 2004); United States v. Lee, 603 F.3d 904, 913 (11th Cir. 2010); United States v. Lanzon, 639 F.3d 1293, 1299 (11th Cir. 2011) (involving arrangement); United States v. Ruggiero, 791 F.3d 1281, 1284-1285 (11th Cir. 2015) ("§ 2251(a) requires only that a defendant arrange"). "But construing statutory language is not merely an exercise in ascertaining 'the outer limits of [a word's] definitional possibilities'". FCC v. AT&T, 562 U.S. 397 (2011) (quoting Dolan v. Postal Service, 546 U.S. 481, 486 (2006)). "[C]ourts must follow ordinary meaning, not literal meaning. ... Time and time again, this Court has rejected literalism in favor of ordinary meaning." Bostock v. Clayton Cty., 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting).

The Third Circuit adopted a narrow definition of "induce" that the Eleventh Circuit acknowledged in Murrell but rejected.

See United States v. Heinrich, 57 F.4th 154 (3rd Cir. 2022).

The D.C. Circuit has rebuked the Eleventh Circuit's broad interpretation. See United States v. Laureys, 653 F.3d 27, 37-42 (D.C. Cir 2011) (Brown, J., dissenting). Additionally, the D.C. Circuit has held that to include the verbs "cause" and "arrange" within the ambit of "induce" is "erroneous" and "highly prejudicial". See United States v. Hite, 769 F.3d 1154, 1166-1167 (D.C. Cir. 2014). Further, the D.C. Circuit expressed that such a broad interpretation would allow defendants to be convicted "without necessarily finding" a sufficient intent. See *id* at 1167.

The Eleventh Circuit has found an "intent to receive" established when a defendant "solicited and paid for the creation of a pornographic video" from an agent posing as a adult intermediary, just as in Hogan's case. See United States v. Leija, 833 Fed. Appx. 477, 479 (11th Cir. 2020). Consequentially, just as in Hogan's case, the Eleventh Circuit holds conduct which establishes a mere intent to receive child pornography is sufficient specific intent for an attempted production charge, even though production has a much higher penalty. See *id*.

In the Ninth Circuit, a defendant like Hogan who "solicits the production of made-to-order child pornography" could be charged as a possessor with no mandatory minimum. See United States v. Autery, 555 F.3d 864, dissent n.3 (9th Cir. 2008). See also 18 U.S.C. § 2252A(a)(5)(B).

With the lack of uniformity, the previously understood boundaries for the production statute and the producer label have been broken and burried in the past. See United States v. X-Citement Video,

513 US 64, n.2 (1994) (stating that producers are those who confront their "victim personally"). See also United States v. Petrov, 747 F.2d 824, 827, 829 (2nd Cir. 1984) (stating "Section 2251(a) does not purport to proscribe the entire process that creates child pornography; instead it is narrowly drawn to reach only those people who deal with children directly" and citing a Congressional Report which states the law "require[s] that a producer also be directly involved in inducing the child to pose for the photography in question before violating the Act"); Rodriguez v. Color Clark Laboratories, 921 F.2d 347, 349-350 (1st Cir. 1990) (stating "the Petrov majority's observation was correct"); United States v. Carroll, 227 F.3d 486, n.2 (5th Cir. 2000) (government conceded that § 2251 "requires that the defendant ... induce ... the minor himself"); United States v. Fletcher, 634 F.3d 395, 403 (7th Cir. 2011) (stating "§ 2251(a) targets the very source of the harm," the creator, who "not only contributes to but is directly responsible for the exploitation of the child").

This Honorable Court has relied on many principles, which are applicable here, in its unanimous decision in Abuelhawa v. United States, 556 U.S. 816 (2009). Hogan was charged as an attempted producer rather than a more befitting solicitor or attempted receiver. However, "prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes." *Id.* at n.3. Hogan's conviction rests upon the theory that his conduct was done for the purpose of causing the production of illegal pornography. However, "[w]here a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the conduct of the

other"; "adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature". Id at 820.

Production cases in the child pornography market have consistently been on the rise throughout the United States year after year. However, there is a rift in the circuits as to the particular shape and scope of § 2251(a) today, and there is an explicit conflict between the D.C. Circuit and the Eleventh Circuit. Though application of the law in the context of adult intermediary stings has, as the Seventh Circuit noted in *McMillan*, trickled down to "three lines of thought", a particular defendant may be unaware as to what interpretive version of the law they will face due to the broad venue at hand. After all, the broad venue of the production statute allowed Hogan to be prosecuted in a far-flung district he had never been to before in his life; an area viewed as one of the harshest and broadest interpreters of child protection laws. Therefore, and especially due to the harsh 15 year mandatory minimum penalty involved, this is an issue of national importance in need of guidance by this Supreme Court.

III. Question involving substantive due process.

"A false choice is put when it is said that either the defendant's conduct does not fall within the statute or he must be convicted." Sherman v. United States, 356 US 369, 381 (1958). Federal courts have "an obligation that goes beyond the conviction of the particular defendant before the court"; they have "the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts'".

Id at 380 (quoting McNabb v. United States, 318 US 332, 341 (1943)). "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." Id.

The child pornography market is unlike any other criminal market. In its uniqueness, Congress has observed that "no actual materials need exist" for conduct to be harmful to society, and that "even fraudulent offers ... help to sustain the illegal market for this material". See H.R. REP. NO. 108-66, Title V at 62 (2003). It was with this in mind that Congress, through the enactment of the PROTECT Act, codified 18 U.S.C. § 2252A(a)(3)(B) - commonly known as the pandering provision.

As relevant here, the provision makes criminal any person who knowingly advertises, promotes, or distributes any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains, child pornography.

However, many prosecutions today within the market of child pornography involve this exact conduct by government agents. Ultimately in Hogan's case, an email with a broken video file was distributed to him by a government agent. The agent intended to cause Hogan to believe that the video file attached to the email was indeed child pornography. After all, the agent negotiated and procured money from Hogan because they posed as a producer and seller of child pornography involving their fictitious daughter. By ultimately making a sale of their purported illegal material by whatever means they choose to employ, the agent makes a conviction perfect for attempt liability - as attempt can be sustained on

what is believed, even through fraud, rather than what actually is. As in Hogan's case, agents will often make statements that risk blurring the harms of abuse or play on otherwise innocent motives to ultimately make their fraudulent sale. See D.C. Doc. 8-1 at 10 (agent compares sexual abuse of their fictitious daughter to teaching by saying "my ex was active and I watched him.. 'teach'"); Id at 13 (agent states "I loved watching her learn with him"); Id at 12 (agent claims to be a waitress barely making financial ends meet); Id at 15 (agent tells Hogan "I def need some help it's christmas time").

Congress enacted high penalties to the child pornography laws for the purpose of eradicating the market entirely. Further, Congress made the totality of the conduct described above, which helps to sustain the illegal market even when the offers are fraudulent, felonious for "any person". See 18 U.S.C. § 2252A(a). By the nature of seeking prosecution through sting operations in this manner, agents of the government are knowingly acting with the intent to cause their targets to believe that child pornography is at hand, and will advertise, promote, or distribute purported illegal material to secure convictions. This violates the law, and by engaging in market sustaining activity, the intent of Congress to eradicate the market is being contravened by those tasked with enforcing the law.

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. [...] To

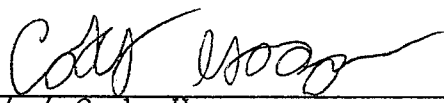
declare that in the administration of the criminal law the end justifies the means-to declare that the Government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution.' ... [T]he court should not lend its aid in the enforcement of the criminal law when the government itself was guilty of misconduct. ... If the federal court permits such evidence, the intended product of deliberately illegal Government action, to be used to obtain a conviction, it places its imprimatur upon such lawlessness and thereby taints its own integrity." United States v. Payner, 447 US 727, 745-746 (1980) (quoting Olmstead v. United States, 277 US 438 (1928) (Brandeis, J., dissenting)).

The child pornography market has consistently seen annual increases in prosecution across the United States. A considerable degree of these prosecutions are founded upon activity exclusive to structured government operations, many of which involve the problematic conduct described above that appears to break the law. Therefore, this is a matter of national importance, as it implicates an entire subset of the child pornography market's prosecution across the United States. Further, as the matter involves the rule of law, integrity of the courts, and the fair and honorable administration of justice, an exercise of the Court's supervisory power may be necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



/s/ Cody Hogan

Date: 03/08/2024