No. 24-5082

IN THE

Supreme Court of the United States

Adam Sprenger,

Petitioner

v.

United States of America,

Respondent.

On Petition For Writ of Certiorari

To The Seventh Circuit Court of Appeals

Petition For Writ of Certiorari

Adam Sprenger

52874-424

Federal Correctional Institution

P.O. Box 1000

Oxford, WI 53952

Questions Presented

1. [Brief explanation of question] A defendant who him or herself alone engages in sexually explicit conduct without a minor's engagement is indicted for a violation of 18 U.S.C. § 2251(a).
   Question: Have the federal courts misinterpreted and misapplied 18 U.S.C. § 2251(a) et. seq. to en encompass conduct neither proscribed nor enumerated in 18 U.S.C. § 2251(a) et. seq.?

2. [Brief explanation of question] A defendant stipulates to a stipulated offense conduct (as if he or she were convicted of the other offense) in a plea agreement. Subsequent to this, there is a change in law.
   Question: Can a stipulation to a stipulated offense conduct in a plea agreement remain enforceable after a change in law?

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- United States of America v. Sprenger, 2024 U.S. App. LEXIS 2030 (7th Cir. 2024). Judgment entered Jan. 30, 2024.

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The Basis For Jurisdiction

The jurisdiction of the United States district court for the Northern District of Illinois was founded upon 18 U.S.C. § 3231. A grand jury sitting in the aforementioned district charged Petitioner Adam Sprenger (hereinafter "Petitioner") by indictmen with two counts of sexual exploitation of children in violation of 18 U.S.C. § 2251(a); one count of transporting child pornography in violation of 18 U.S.C. § 2252A(a)(1); and one count of possesion of child pornography in violation of 18 U.S.C § 2252A(a)(5)(B).

The jurisdiction of the United States Court of Appeals for the Seventh Circuit is founded upon 28 U.S.C. § 1291, and 18 U.S C. § 3742. This Court therefore has jurisdiction over Petitioner's Writ pursuant to 28 U.S.C. § 1254; Durham v. United States, 401 U.S. 481, 483 (1971).

Constitutional Provisions

Fifth Amendment

No person shall be held to answer for a capital, or othersise 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 offense 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.

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, 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 actaully been transported or transmitted using any means or facility of interstate of foreign commerce or mailed.

§ 2256. Definitions for chapter

For the purposes of this chapter [18 USCS §§ 2251 et seq.], the term—

(1) "minor" means any person under the age of eighteen years;

(2) (A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person;

(B) For purposes of subsection 8(B) [(8)(B)] of this section, "sexually explicit conduct" means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) "computer" has the meaning given that term in section 1030 of this title [18 USCS § 1030];

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

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

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"—

(A) means a person—

(i) (I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

HISTORY:

Added Feb. 6, 1978, P. L. 95-225, § 2(a), 92 Stat. 8; May 21, 1984, P. L. 98-292, § 5, 98 Stat. 205; Oct. 18, 1986, P. L. 99-500, Title I, § 101(b), 100 Stat. 1783-74; Oct. 30, 1986, P. L. 99-591, Title I, § 101(b), 100 Stat. 3341-74; Nov. 7, 1986, P. L. 99-628, § 4, 100 Stat. 3510; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle N, Ch 1, §§ 7511(c), 7512(b), 102 Stat. 4485, 4486; Sept. 30, 1996, P. L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 2)], 110 Stat. 3009-27; April 30, 2003, P. L. 108-21, Title V, Subtitle A, § 502(a)–(c), 117 Stat. 678; Oct. 13, 2008, P. L. 110-401, Title III, § 302, 122 Stat. 4242; Dec. 7, 2018, P.L. 115-299, § 7(c), 132 Stat. 4389.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed matter "(8)(B)" has been inserted in para. (2)(B) to indicate the reference probably intended by Congress.

This section, enacted as 18 USCS § 2253 by Act Feb. 6, 1978, P. L. 95-225, 98 Stat. 8, was redesignated as 18 USCS § 2255 by Act May 21, 1984, P. L. 98-292, § 5(b), 98 Stat. 205 and further redesignated as 18 USCS § 2256 by Act Oct. 18, 1986, P. L. 99-500, Title I, § 101(b), 100 Stat. 1783-74, and Act Oct. 30, 1986, P. L. 99-591, Title I, § 101(b), 100 Stat. 3341-74.

P. L. 99-500 (H.J. Res. 738) was signed by the President on October 18, 1986. Subsequently, it was discovered that certain provisions had been omitted from the bill, and a corrected version thereof was signed by the President on October 30, 1986, as P. L. 99-591.

Amendment Notes

1984.

Act May 21, 1984, redesignated this section, formerly 18 USCS § 2253, as section 2255, and, in para. (1), substituted "eighteen" for "sixteen"; in para. (2), in subpara. (D), substituted "sadistic or masochistic" for "sado-masochistic", and deleted "(for the purpose of sexual stimulation)" following "abuse", and in subpara. (E), substituted "lascivious" for "lewd"; in para. (3), deleted ", for pecuniary profit" following "advertising"; and substituted para. (4) for one which read: " 'visual or print medium' means any film, photograph, negative, slide, book, magazine, or other visual or print medium.".

1986.

Acts Oct. 18, 1986 and Oct. 30, 1986, redesignated this section, formerly 18 USCS § 2255, as 18 USCS § 2256.

Act Nov. 7, 1986, in para. (3), deleted "and" following the concluding semicolon and in para. (4), substituted "; and" for the concluding period.

Such Act further purported to add para. (5) to 18 USCS § 2255; however, such amendment was executed to this section to conform to the probable intent of Congress, inasmuch as Acts Oct. 18, 1986 and Oct. 30, 1986 renumbered § 2255 as § 2256.

1988.

Act Nov. 18, 1988, in para. (4), deleted "and" following the semicolon, in para. (5), substituted the semicolon for the concluding period, and added paras. (6) and (7).

1996.

Act Sept. 30, 1996, in para. (5), inserted ", and data stored on computer disk or by electronic means which is capable of conversion into a visual image", in para. (6), deleted "and" after the concluding semicolon, in para. (7), substituted the concluding semicolon for a period, and added paras. (8) and (9).

2003.

Act April 30, 2003, substituted para. (2) for one which read:

"(2) 'sexually explicit conduct' means actual or simulated—

"(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

"(B) bestiality;

"(C) masturbation;

"(D) sadistic or masochistic abuse; or

"(E) lascivious exhibition of the genitals or pubic area of any person;",

in para. (8), substituted subpara. (B) for one which read: "(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;", in subpara. (C), substituted the concluding period for "; or", and deleted subpara. (D) which read: "(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or

contains a visual depiction of a minor engaging in sexually explicit conduct; and", and added paras. (10) and (11).

2008.

Act Oct. 13, 2008, in para. (5), deleted "and" following "videotape," and inserted ", and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format".

2018.

Act Dec. 7, 2018, in para. (2), in subparas. (A)(v) and (B)(iii), substituted "anus, genitals," for "genitals".

Other provisions:

Confirmation of intent of Congress in enacting §§ 2252 and 2256 of Title 18, United States Code. For provisions declaring and confirming intent of Congress in enacting this section, see Act Sept. 13, 1994, P.L. 103-322, Title XVI, § 160003(a), which appears as a note to 18 USCS § 2252.

Statement of the Case

Petitioner pled guilty to production and possession of child pornography charges pursuant to a plea agreement. Petitioner appealed his convittion for production of child pornography on the basis that Howard held that the admitted conduct was no longer sufficient to provide the factual basis for the production conviction.

Petitioner stipulated to conduct in count 2 of the indictment that alleged a separate production charge. Petitioner twice appealed the sufficiency of the factual basis for the stipulation, arguing that since Howard, the conduct to which Petitioner stipulated did not constitute a violation of production of child pornography pursuant to 18 § U.S.C. § 2251(a).

After resentencing, the Seventh Circuit Court of Appeals specifically declined to determine whether the stipulated conduct constitutes a violation of 18 U.S.C. § 2251(a).

18 U.S.C. § 2251(a) carries a mandatory minimum sentence of fifteen years for a first time offender.

Petitioner was subsequently sentenced to 19 years, only one year less that his original sentence for possesion of child pornography, based in part on the stipulated conduct, which may or may not be a violation of 18 U.S.C. § 2251(a).

Arguments for Allowance of Writ

I. Have the federal courts misinterpreted and misapplied 18 U.S.C. § 2251(a) et. seq. to encompass conduct neither proscribed nor enumerated in 18 U.S.C. § 2251(a) et. seq.?

A. Why This Question is of Great Importance

To be clear, the Petitioner is not challenging the validity of either 18 U.S.C. § 2251(a) or 18 U.S.C § 2256. To the contrary, the Petitioner agrees with the Court when it said "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." New York v. Ferber, 458 U.S. 747, 757 (1982); cf. Osborne v. Ohio, 495 U.S. 103 (1990).

18 U.S.C. § 2251(e) specifies that "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." This is a baseline 15 year mandatory minimum. Yet, neither the courts, nor the Attorney General's Office, is quite sure of how to define the terms "visual depiction" or "lascivious exhibition" in the statutory scheme of 18 U.S.C. § 2251 et seq.

No one is quite certain how to define these terms, and yet 18 U.S.C § 2251(a) carries a mandatory minimum sentence of 15 years. See, United States v. Wells, 834 F.3d 1251 (10th Cir. 2016); United States v. Wolf, 890 F.2d 241, 243 (10th Cir. 1989) (the term "lascivious exhibition is not defined by statute."). Yet, the Petitioner is not arguing that either 18 U.S.C. § 2251(a) or 18 U.S.C. § 2256 is overbroad or vague; since this was foreclosed by Ferber, 458 U.S. 747 (1982).

This question is of great importance because if the courts misinterpret the statutes, or if the courts skew both 18 U.S.C. § 2251(a) and 18 U.S.C. § 2256 beyond their breaking point, then these errors have caused hundreds of wrongful convictions. These errors have also likely endangered children. This error has troubling results; upholding convictions in some cases based on the same conduct that produces aquittals in other cases. The Respondent prosecutes approximately 2,000 defendents per year under 18 U.S.C. § 2251 et. seq., which the federal courts are currently misreading. This error raises serious Due Process concerns. Perhaps most troubling, is by expanding these statutes beyond their breaking point (and beyond the scope of their express texts), the federal courts have incentivized diversion of scarce resources away from cases involving the most serious forms of child abuse. The Petitioner argues that, following statutory interpretation, the Court can correct these errors.

B. Statutory Interpretation - Broadly

This Court instructs the Petitioner, that to "determine the scope of a statute, we look first to its language." United States v. Turkette, 452 U.S. 576, 580 (1981). Turkette concludes by holding, "if the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." (emphasis in original) (internal quotation marks and citations omitted).

The relevant part of 18 U.S.C. § 2251(a) reads:

> "Any person who employs, uses, persuades, induces, entices, or coerces any minor to 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 added).

When words are grouped in a serial list, as is the case of 18 U.S.C. § 2251(a) just cited, then those words, "should be given related meaning." Dole v. Steelworkers, 494 U.S. 26, 36 (1990).

A conviction under 18 U.S.C. § 2251(a) requires the government to prove beyond a reasonable doubt three elements: (1) the victim was less than 18 years old; (2) the defendent used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct; and (3) the visual depiction was produced using materials that had been

transported in interstate or foreign commerce.

Put most simply, 18 U.S.C. § 2251(a) requires some action (enumerated in the six verbs of the statute) by the offender to cause the minor's direct engagement in sexually explicit conduct. This statute, and 18 U.S.C. § 2256, should not be read to have a jaringly different meaning than intended by Congress. The "noscitur a sociis" canon has force here and should constrain the interpretation of both "visual depiction," and "lascivious exhibition."

The Petitioner's interpretation of both 18 U.S.C. § 2251(a) and 18 U.S.C. § 2256 has the virtue of consistency with the comprehensive scheme that Congress created to combat child pornography. See, 98 Stat. 204, H.R. Rep. No 536, 98th Cong. 1st Sess. 3 (1983). Laws dealing with a single subject, or "in a matter," "should if possible be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 252-53 (2012).

Here, Congress crafted a comprehensive scheme to prohibit the production (18 U.S.C. § 2251(a)), the receipt, possession, and distribution (18 U.S.C. § 2252) of child pornography. See, United States v. Maxwell, 446 F.3d 1210, 1216, 17 (11th Cir. 2006). This statutory scheme broadly covers material depicting a minor engaged in sexually explicit conduct. It is not enough for any defendent to be the only one who is engaged in sexually explicit conduct. The plain and contextual reading of 18

U.S.C. § 2251(a) and 18 U.S.C. § 2256 requires "any minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct."

Yet, the federal courts' interpretations of 18 U.S.C. § 2251(a), with few exceptions (See, United States v. Howard, 968 F.3d 717, 718 (7th Cir. 2020) as an example of this exception) creates an odd statutory mismatch, penalizing the production of materials that is not, by statutory definition (See, 18 U.S.C. § 2256(B)(8)(A)) child pornography; Since "child pornography" by definition, "means any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256 (B)(8)(A).

This Court in Williams held that the meaning of broad statutory language is "narrowed by the commonsense canon of noscitur a sociis - which counsels that a word is given more precise content by the neighboring words with which it is associated." United States v. Williams, 553 U.S. 285, 294 (2008), McDonnell v. United States, 570 U.S. 550, 568-69 (2016). The federal courts should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." Yates v. United States, 574 U.S. 528, 543 (2015) (citing Gustafon v. Alloyed Co., 513 U.S. 561, 575 (1995)).

C. Statutory Interpretation - Specifically

Accordingly, the phrase "lascivious exhibition" in 18 U.S.C. § 2256(2)(A)(v) must be construed in its statutory context within the limits of § 2256 and 18 U.S.C. § 2251(a). The Petitioner maintains that to be in violation of 18 U.S.C. § 2251(a), any defendent must employ, use, persuade, induce, entice, or coerce any minor to "engage in... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." (emphasis added; citing 18 U.S.C. § 2251(a)).

18 U.S.C. § 2256(2)(A) defines "sexually explicit conduct" in an enumerated list, which "means actual or simulated - (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of the anus, genitals, or pubic area of any person."

Taken in the context of the statutory scheme enacted by Congress, 18 U.S.C. § 2256's definitions give contextual meaning to the express language found in the statutes themselves. 18 U.S.C. § 2256's definitions are "for the purposes of this chapter [18 U.S.C. §§ 2251 et. seq.]."

That is to say, the definitions in 18 U.S.C. § 2256 only have meaning in the context of a particular statute within the statutory scheme enacted by Congress. Therefore, it would be an improper skewing (and a misinterpretation of 18 U.S.C. § 2251 (a)), to divorce "sexually explicit conduct" from (1) the definitions provided in 18 U.S.C. § 2256(2)(A)(i)-(v); and (2) to divorce "sexually explicit conduct" from its immediate referent in 18 U.S.C. § 2251(a), which is "any minor to engage in."

The federal courts (with few exceptions) have divorced the phrase "sexually explicit conduct" from its statutory context in 18 U.S.C. § 2251(a) by holding that a minor need not him or herself be engaged in the sexually explicit conduct. See, United States v. Howard, 968 F.3d 717, 718 (7th Cir. 2020) (for the exception); but see, United States v. McCall, 833 F.3d 560, 564 (5th Cir. 2016) (holding to the notion that there is no standard requiring that the minor affirmatively commit a sexual act); a holding directly contradicting the plain and contextual meaning of "sexually explicit conduct" in 18 U.S.C. § 2251(a). The contextual cues of 18 U.S.C. § 2251(a) make it clear that Congress intended to penalize any person who produced a visual depiction of "any minor" engaged in "sexually explicit conduct", and not just any visual depiction.

In support of this interpretation of the contextual meaning of "sexually explicit conduct" in 18 U.S.C. § 2251(a) as defined by 18 U.S.C. § 2256(2)(A)(i)-(v), the Petitioner points to this Court's own dicta, saying that, "let us be clear about what sort of pictures are at issue here. They are not the sort that will likely be found in a catalog of the National Gallery or the Metropolitan Museum of Art. Sexually explicit conduct, as defined in the statute, does not include mere nudity, but only conduct that consists of sexual intercourse... between persons of the same or opposite sex, bestiality, masturbation, sadistic or masochistic abuse, and lascivious exhibition of the genitals or pubic area. What is involved, in other words, is not the clinical, the artistic, nor even the risque, but hardcore pornography." (United States v. X-citement Video, 513 U.S. 64, 84 (1982) (emphasis in original) (internal citations and quotation marks omitted).

When a visual depiction portrays a fully clothed minor in a natural pose, and in a natural setting, and when that visual depiction does not meet the criteria set forth in 18 U.S.C. § 2256, that visual depiction is by definition not child pornography. It still may be "child erotica," but child erotica is protected speech under the First Amendment. (See, United States v. Vosburgh, 602 F.3d 512, 520 n7 (3rd Cir. 2010). If a defendent were to be in possession of child erotica, this would not meet the definition of child pornography in 18 U.S.C. § 2256.

What about when there is no sexual suggestiveness or coyness, or nudity, or a minor engaging in sexually explicit conduct? A defendent in this situation would not be in violation of 18 U.S.C. § 2251(a) by the definitions in 18 U.S.C. § 2256.

Therefore, for a defendent to be in violation of 18 U.S.C. § 2251(a), the visual depiction must meet the statutory definitions in 18 U.S.C. § 2256 with respect to "sexually explicit conduct" and "lascivious exhibition."

Lascivious exhibition means the indecent exposure of the anus, genitals, or pubic area, in order to incite lust. If the visual depiction does not meet a single one of these factors, it should not be considered lascivious: the focal point is on the minor's genitalia, anus, or pubic area; the setting of the depiction is sexually suggestive; unnatural pose or inappropriate attire; and did the depiction elicit lust.

Sexually explicit conduct includes "simulated" acts. What does "simulated" mean in the context of 18 U.S.C. § 2256(2)(A)?

18 U.S.C. § 2257(A) defines "simulated sexually explicit conduct" as follows: "conduct engaged in by performers that is depicted in a manner that would cause a reasonable viewer to believe that the performers engaged in actual sexually explicit conduct, even if they did not in fact do so. It does not mean.. ...sexually explicit conduct that is merely suggested." 28 C.F.R. § 75.1(o) (emphasis added). See, Adam Walsh Child Protection and Safety Act of 2006 (hereinafter "Walsh Act"), Pub. L. No. 109-248, § 503, 120 Stat. 587.

Where a minor is in a fully natural pose while sleeping, and where that same minor is fully clothed, it cannot be said, under the definition above, that the minor was engaged in simulated sexually explicit conduct; let alone actual sexually explicit conduct. Therefore, a defendant could not be in violation of 18 U.S.C. § 2251(a) in the situation described above according to the clear statutory definition; because the minor was not engaged in actual or simulated sexually explicit conduct.

D. Due Process Concerns

A defendant has a Constitutional protection against being "deprived of life, liberty, or property, without due process of law." U.S. Constitution, Fifth Amendment (emphasis added). Where federal courts either misinterpret or misapply 18 U.S.C. § 2251(a) to conduct that is not proscribed by the statute or by statutory definitions in 18 U.S.C. §§ 2256 and 2257 (A), then that defendant has been deprived his or her Due Process rights. Further, where there is a change in substantive law, and a sentencing court disregards (or otherwise ignores) the change in law, a defendant's Due Process rights are violated. North Carolina v. Pearce, 395 U.S. 711, 723 (1969).

Therefore, the courts must get the definitions correctly interpreted, and correctly applied to defendants, so that a case like the Petitioner's does not arise in the future. For the federal courts to get the interpretation and application of 18 U.S.C. §§ 2251(a), 2256, and 2257(A) wrong even once, has a substantial probability of violating that defendant's Due Process rights. Therefore, the Petitioner asks this Court to grant Writ to clarify for all federal courts what the correct interpretation and application of 18 U.S.C. § 2251(a) et. seq. should be, specifically as it relates to "sexually explicit conduct," "lascivious exhibition," and "a minor to engage in."

II. Can a stipulation to a stipulated offense conduct in a plea agreement remain enforceable after a change in law?

A. Why this question is of great importance

This Court in Ricketts said, "this Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements. ...the values that underlie commercial contract law, and that govern the relation between economic actors, are not coextensive with those that underlie the Due Process clause, and that govern the relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution." Ricketts v. Adamson, 483 U.S. 1, 16 (1987) (emphasis added).

The Petitioner is asking this Court to address in a comprehensive way the rules of construction appropriate for the dispute as to the question: "Can a stipulation to a stipulated offense conduct in a plea agreement remain enforceable after a change in law?" This question directly relates to the Due Process clause.

B. Plea Agreements and this Court

In Lafler, this Court noted that, "criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions ...are the result of guilty pleas." Lafler v. Cooper, 566 U.S. 156, 170 (2012) (emphasis added) (citing Missouri v. Frye, 566 U.S. 134 (2012)) (2012)). It is of the utmost importance, then, to ensure that if a change in law occurs, that the plea agreement and the stipulations contained therein be carefully examined to determine whether (or to what extent) a change in law affects such a stipulation.

C. Stipulations in Civil Contracts

In both Ruhlin and Tompkins, this Court has stated the proposition that a contract cannot remain enforceable where there is a stipulation in the contract which was affected by a change in state law (which governs commercial contract law; See, Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009)) (2009)). Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938); Erier R. Co. v. Tompkins, 304 U.S. 64 (1938).

D. The Analogy between civil and criminal contracts

This Court in Ricketts said that this Court "has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements." Ricketts v. Adamson, 483 U.S. 1, 16 (1987). The Petitioner is arguing by way of analogy that when a change in law occurs, any stipulation which is affected by that change in law should not remain enforceable, since a plea agreement "must be construed in light of the rights and obligations created by the Constitution;" Ricketts at 16, specifically the Due Process clause of the Fifth Amendment.

Since it is the case that in civil law, a change in law affecting a stipulation in a contract between two or more commercial actors, it should be the case that in criminal law, a stipulation to a stipulated offense conduct (to 18 U.S.C. § 2251(a)) should not remain enforceable after the change in law for the following reasons.

E. Why the stipulation should not remain enforceable

1. Analogy from 28 U.S.C. § 2255 holding of this Court

In Sanders, this Court held that "the applicant may nevertheless be entitled to a new hearing upon a showing [of] an intervening change in law." Sanders v. United States, 373 U.S. 1, 10 (1963) (emphasis added). This holds true even "when the prior determination was made on direct appeal from the applicant's conviction, instead of ...an earlier § 2255 proceeding." Kaufman v. United States, 394 U.S. 217, 230 (1969) (emphasis added).

It follows, then, that when a defendant like the Petitioner is faced with a change in law, that change should merit consideration of the question as to whether the stipulation can still remain enforceable after the change in law.

2. Howard and 18 U.S.C. § 2251(a)

For any defendant who was convicted improperly of violating 18 U.S.C. § 2251(a), it should follow that this change in law should also affect any and all stipulations of a violation of 18 U.S.C. § 2251(a) in a plea agreement. According to U.S.S.G. § 1B1.2(c), "A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s)." (emphasis added).

Therefore, Howard holds that, "the government staked its entire case for conviction on a mistaken interpretation of the statute [18 U.S.C. § 2251(a)]. ...If Howard's reading of the statute is correct, the judgment... must be vacated." United States v. Howard, 968 F.3d 717, 724 (7th Cir. 2020). The defendant in Howard was correct in his interpretation of 18 U.S.C. § 2251(a) and his conviction for a violation of 18 U.S.C. § 2251(a) was vacated.

Therefore, given the holding in Howard, and given the contextual interpretation of U.S.S.G. § 1B1.2(c) of treating a stipulation that specifically establishes the commission of additional offenses "shall" (or must) be treated "as if" the defendant had been convicted of a violation of 18 U.S.C. § 2251(a) (as the Petitioner himself stipulated to as to Count 2 in the plea agreement).

The language in § 1B1.2(c) must follow the canon of statutory construction, and this Court's holding, that "we are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded every word." Regions Hospital v. Shalala, 552 U.S. 448, 467 (1998) (citing Market Co. v. Hoffman, 101 U.S. 112, 115-116 (1879)).

That is to say, § 1B1.2(c) contains nondiscretionary and compulsory language in it. A plea agreement containing a stipulation that specifically establishes the commission of a violation of 18 U.S.C. § 2251(a) (Count 2) shall be treated "as if" the defendant had been convicted of a violation of 18 U.S.C. § 2251(a). The Petitioner therefore argues that this stipulation is not merely for sentencing purposes, as it raises the Guidelines Range Calculation, which affects a defendant's liberty, and by virtue of this, her or his Due Process rights as well.

3. The stipulation to violating 18 U.S.C. § 2251(a) affected the Guidelines Calculation

If a district court errs by applying the stipulated offense guideline , this is more than enough to show that the error was prejudicial. This is true even though the Guidelines are only advisory. They nonetheless provide the critical starting point for the district court's analysis. Peugh v. United States, 569 U.S. 530, 536 (2013). The necessary negative effect on the fairness, integrity, and public reputation of the judiciary when defendants are sentenced based on an incorrect guideline range leads to the conclusion that this is plain error, and therefore substantiall substantially affects a defendant's Due Process rights.

Rosales-Mireles v. United States, 138 S.Ct. 1897, 1903 (2018) (holding that in the ordinary case a failure to correct plain U.S.S.G. error that affected a defendant's substantial rights would seriously affect the fairness, integrity, and public reputation of the judicial proceeding).

Under no set of circumstances, if anyone employs the straightforward and contextual interpretation of 18 U.S.C. §§ 2251(a) and 2256, can any trier of fact conclude that a defendant violates § 2251(a) without the minor's engagement in sexually explicit conduct. Therefore, if a change in law occurs where a defendant's actions do not constitute a violation of § 2251(a), the district courts err in applying the guideline for the stipulation (since the stipulation would also be affected by the change in law). The improperly applied stipulation which effectively increased the Base Offense Level by five points.

4. The base offense level and Due Process

A Guidelines-calculation error frequently will satisfy the plain error standard, "because this error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." Molina-Martinez v. United States, 578 U.S. 189, 198 (2016).

Additionally, "without some indication to the contrary, an incorrect guideline calculation resulting in a higher sentence will seriously affect the fairness, integrity, or public reputation of judicial proceedings, and warrant relief." Rosales-Mireles v. United States, 138 S.Ct. 1897, 1903 (2018).

In a case in which a defendant is subject, under a correct guideline calculation (before any adjustments for acceptance of responsibility and timely notice of plea) to a Guidelines Range of 135-168 months (in Criminal History Category I) is substantially affected by an error in an improper guideline calculation to a Guidelines Range of 235-293 months (in Criminal History Category I).

The maximum penalty for a violation of 18 U.S.C. § 2252A(a)(5)(B) is 240 months (possession of child pornography). That any defendant would be subject to an improper guideline calculation, due to misapplication of the stipulation which should not be applied after a change in law which demonstrates that the defendant does not violate 18 U.S.C. § 2251(a), that was a stipulation in accord with § 1B1.2(c), should be corrected.

To be clear, where there is a change in laws that makes a defendant's conduct no longer a violation of 18 U.S.C. § 2251(a), the stipulation to that offense "as if" the defendant had committed a violation of § 2251(a) should not remain enforceable.

Conclusion

For the foregoing reasons, the Petitioner asks the Court to grant his Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals.