UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ADAM SPRENGER, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
2024 U.S. App. LEXIS 2030
No. 23-2104
January 30, 2024, Decided
January 22, 2024*, Submitted
*

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Rehearing denied by United States v. **Sprenger**, 2024 U.S. App. LEXIS 7275 (7th Cir. Ill., Mar. 27, 2024)

Editorial Information: Prior History

{2024 U.S. App. LEXIS 1}Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 18 CR 105. John J. Tharp, Jr., Judge.United States v. **Sprenger**, 14 F.4th 785, 2021 U.S. App. LEXIS 30031 (7th Cir. Ill., Oct. 6, 2021)

Disposition:
AFFIRMED.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Helene B. Greenwald, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL.
For ADAM **SPRENGER**, Defendant - Appellant: Lisa Lundell Wood, Attorney, LISA WOOD LAW, LLC, Chicago, IL.

Judges: Before FRANK H. EASTERBROOK, Circuit Judge, DIANE P. WOOD, Circuit Judge, THOMAS L. KIRSCH II, Circuit Judge.

Opinion

ORDER

Adam **Sprenger** pleaded guilty to producing and possessing child pornography. He was sentenced to 30 years' imprisonment. On his initial appeal we vacated the production conviction as inconsistent with *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020), but held that the possession conviction remains valid. We remanded for resentencing. *United States v.* ***Sprenger***, 14 F.4th 785 (7th Cir. 2021).

In addition to pleading guilty to producing and possessing child pornography, **Sprenger** stipulated that the district court could consider the conduct alleged in a separate production charge, though only for the purpose of sentencing. Under the stipulation **Sprenger** admitted to the following:

> He lived with Victim B's mother and took four videos of Victim B, who was 13 years old, while she was sleeping. In the first**{2024 U.S. App. LEXIS 2}** video, he "pulled back the blanket that was covering Victim B and focused the camera on Victim B's clothed buttocks and vagina"; his

"erect penis was visible as he masturbated over Victim B." In the second video, he "reached with his hand and made physical contact with Victim B's clothed vagina." In the third, he "made physical contact with Victim B's clothed vagina and buttocks," and in the last, he "ejaculated onto Victim B's clothed buttocks."14 F.4th at 789 (citations to record omitted). Our opinion left unresolved the question whether such conduct constitutes the production of child pornography under *Howard*. See 14 F.4th at 794 & n.2.

The district judge resentenced **Sprenger** to 19 years, a reduction of 11 years from the original sentence. The judge concluded that the stipulated conduct amounts to the production of child pornography under 18 U.S.C. §2251(a) and *Howard*. He immediately added:

> It should be understood, however, that what we're talking about is a guideline calculation. Whether or not this conduct under the guideline calculation constitutes an offense that should count as another offense that the guideline calculation takes into account and, you know, you go through the grouping rules and everything else, ultimately is absolutely**{2024 U.S. App. LEXIS 3}** immaterial to my evaluation of the appropriate sentence to impose here. Whether or not the conduct technically satisfies the definition of production under 2251(a) or not, the conduct is the conduct, and it was abhorrent, reprehensible conduct that, you know, again, regardless of whether it constituted technically a violation of that particular statute doesn't change the nature, doesn't mitigate the seriousness and reprehensibility of that conduct, and doesn't really change the nature of that conduct.
>
> It's undeniable that Mr. **Sprenger** was taking advantage through physical contact of Victim B's genitalia for his own sexual gratification. Whether that's a violation of 2251(a) or not, that's the conduct that the Court's sentence is going to be based on, or the Court's sentence is going to include consideration of that conduct. And ultimately, as will be discussed further, the question of whether this conduct technically satisfies the requirements of 2251(a) will not be material to the Court's determination of the appropriate sentence.The 11-year reduction in Sprenger's sentence gives force to the judge's statement that **Sprenger** was being sentenced for possession, not for possession plus production.

Sprenger's**{2024 U.S. App. LEXIS 4}** principal appellate argument is that the district judge erred in concluding that the stipulated conduct constitutes the production of child pornography. But **Sprenger** was convicted of possession alone, and the district judge forcefully declared that the appropriate classification of the stipulated conduct did not affect the sentence. This is not a passing remark but is the sort of considered and detailed explanation that makes it unnecessary-indeed, inappropriate-to decide a substantive question of first impression in this circuit. See *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009); *United States v. Asbury*, 27 F.4th 576, 581 (7th Cir. 2022). Because the sentence is independent of the conduct's appropriate legal classification-and because the judge unquestionably was entitled to consider the conduct for its bearing on Sprenger's behavior, character, and risk of recidivism-we need not address this matter further.

Sprenger's second appellate argument is that the district judge should have allowed him to hire a second recidivism expert at public expense. See 18 U.S.C. §3006A(e)(1). The judge approved funds for one such expert, whose opinion was not as favorable to **Sprenger** as counsel wished. **Sprenger** hoped for a more favorable evaluation from a second expert (or perhaps a re-evaluation by the first expert). The**{2024 U.S. App. LEXIS 5}** district judge thought that one expert on the subject suffices, and we conclude that the judge did not abuse his discretion. **Sprenger** does not explain why he believes the first report defective or why a second would produce a more accurate evaluation. No more need be said.

Affirmed

CIRHOT

APPENDIX B-2

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ADAM SPRENGER, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
14 F.4th 785; 2021 U.S. App. LEXIS 30031
No. 19-2779
October 6, 2021, Decided
February 25, 2021, Argued

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:18-cr-00105-1 - John J. Tharp, Jr., Judge.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Helene B. Greenwald, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL.

For ADAM SPRENGER, Defendant - Appellant: Johanna M. Christiansen, Attorney, Thomas W. Patton, Attorney, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Peoria, IL.

ADAM SPRENGER, Defendant - Appellant, Pro se, Pekin, IL.

Judges: Before EASTERBROOK, WOOD, and KIRSCH, Circuit Judges.

CASE SUMMARY Circuit court saw no reason to disagree with the parties and accepted their contentions that the district court plainly erred in accepting defendant's guilty plea to a production of child pornography charge and that defendant was therefore entitled to withdraw his plea to that offense.

OVERVIEW: HOLDINGS: [1]-In a case in which defendant pleaded guilty to production and possession of child pornography pursuant to a plea agreement, the circuit court saw no reason to disagree with the parties and accepted their contentions that the district court plainly erred in accepting defendant's guilty plea to the production charge and that defendant was therefore entitled to withdraw his plea to that offense; [2]-However, the circuit court rejected defendant's argument that he was entitled to withdraw the entire plea agreement on plain error review based on the production charge's invalidation. Withdrawal of the remainder of the plea agreement would not be necessary to protect the fairness of judicial proceedings and would thus be inconsistent with the standards for plain error correction.

OUTCOME: Vacated in part and affirmed in part.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Guilty Pleas
Criminal Law & Procedure > Guilty Pleas > Appeals
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions

Where a defendant did not challenge the validity of his guilty plea in the district court, the federal appellate court reviews the district court's acceptance of the defendant's guilty plea for plain error. Under plain error review, the appellate court must show: (1) an error (2) that is plain today, (3) that affected his substantial rights and (4) seriously affected the fairness, integrity or public reputation of the proceedings. The appellate court determines plain error based on the law existing at the time of appeal.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > Elements
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > Penalties

18 U.S.C.S. § 2251 mandates a minimum of 15-years imprisonment for 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.

Computer & Internet Law > Criminal Offenses > Child Pornography
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > Elements
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > Penalties

With regard to production of child pornography, 18 U.S.C.S. § 2251(a) requires that the offender create images that depict a minor, and not the offender alone, engaged in sexually explicit conduct.

Criminal Law & Procedure > Guilty Pleas > Changes & Withdrawals
Criminal Law & Procedure > Guilty Pleas > Sufficiency of Allocution
Criminal Law & Procedure > Guilty Pleas > Knowing & Intelligent Requirement
Criminal Law & Procedure > Guilty Pleas > Voluntariness

When a defendant enters a guilty plea to multiple counts and one plea is subsequently invalidated, the appellate court considers whether the defendant's plea to the remaining counts represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. There is no absolute right to withdraw a guilty plea, and a defendant seeking to do so faces an uphill battle after a thorough colloquy under Fed. R. Crim. P. 11.

Criminal Law & Procedure > Sentencing > Concurrent Sentences
Criminal Law & Procedure > Sentencing > Consecutive Sentences
Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences
Criminal Law & Procedure > Sentencing > Multiple Convictions

Under the sentencing package doctrine, interdependent sentences create a coherent sentencing package, and the reversal on appeal of one count may render the underlying package voidable. But the sentencing package doctrine generally applies to sentences with interdependent, consecutive counts, and not to concurrent sentences.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions

When an appellate court exercises its discretion to remedy plain error, its discretion ought to be exercised only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Contracts Law > Performance > Impossibility of Performance > Frustration of Purpose
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals

Under the frustration of purpose doctrine, a party to a plea agreement may, in certain circumstances, seek to vacate the plea agreement if its purpose for entering into the plea agreement has been frustrated.

Opinion

Opinion by: KIRSCH

Opinion

Kirsch, *Circuit Judge*. Adam **Sprenger** pled guilty to production and possession of child pornography pursuant to a plea agreement. He now seeks to withdraw his guilty plea and invalidate the entire agreement on the ground that the legal theory upon which his production conviction rests is invalid. When **Sprenger** initially entered into the plea agreement, his admitted conduct was sufficient to provide the factual basis for his production conviction. He contends that's no longer the case, and thus, he is entitled to withdraw his plea to that offense. The government agrees with **Sprenger** on this point, as do we, so we vacate his production conviction.**{2021 U.S. App. LEXIS 2}**

We do not agree with **Sprenger**, however, that he is likewise entitled to withdraw his plea to the separate possession offense based on his now-invalid production conviction. The plea agreement still provides an adequate factual basis for the possession conviction, which supports that Sprenger's plea to the possession offense remains knowing and voluntary notwithstanding the invalidity of the production conviction. We therefore affirm Sprenger's possession conviction, leaving the still-valid portions of the plea agreement intact.

I

Adam **Sprenger** was indicted on four charges relating to the production, transportation, and possession of child pornography: count 1 charged production of child pornography with respect to Victim A, in violation of 18 U.S.C. § 2251(a); count 2 also charged production of child pornography but with respect to Victim B; count 3 charged transportation of child pornography, in violation of 18 U.S.C. § 2252A(a)(1); and count 4 charged possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). On February 15, 2019, **Sprenger** pled guilty to count 1 (the production offense involving Victim A) and count 4 (the possession offense), pursuant to a plea agreement he voluntarily entered into with the government. **Sprenger** also**{2021 U.S. App. LEXIS 3}** stipulated to committing count 2 (the production offense involving Victim B); this stipulation was solely for sentence-computation purposes. The plea agreement entitled **Sprenger** to a dismissal of counts 2 and 3 in exchange for his pleading guilty to counts 1 and 4.

Sprenger admitted to several facts in the plea agreement: With respect to counts 1 and 2, the production offenses involving Victims A and B respectively, **Sprenger** admitted that he used the victims "to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." R. 38 at 2, 6. Specifically, he admitted the following as to count 1: He traveled from Illinois to a hotel in Wisconsin along with Victim A, who was 14 years old. When they were in a hotel room there, he "used a Samsung Galaxy cellular phone to take at least seven photographs of Victim A while she was sleeping." *Id.* at 3. In one of these photos, he "photographed his naked, erect penis next to Victim A's face," and in another, he "photographed his own face, with his tongue sticking out, next to Victim A's clothed groin." *Id.* And as to count 2, he admitted: He lived with Victim B's mother and took four videos of Victim B, who**{2021 U.S. App. LEXIS 4}** was 13 years old, while she was sleeping. In the first video, he "pulled back the blanket that was covering Victim B and focused the camera on Victim B's clothed buttocks and vagina"; his "erect penis was visible as he masturbated over Victim B." *Id.* at 6. In the second video, he "reached with his hand and made physical contact with Victim B's clothed vagina." *Id.* In the third, he "made physical contact with Victim B's clothed vagina and buttocks," and in the last, he "ejaculated onto Victim B's clothed buttocks." *Id.* at 6-7.

With respect to count 4, the possession offense, **Sprenger** admitted that he possessed over 1,000 images and videos of child pornography across multiple devices. The child pornography he possessed included "images and videos of children, some as young as toddlers, being forced to engage in oral, vaginal, and anal intercourse," and also "sadomasochistic images and lascivious exhibition of minors' genitals." *Id.* at 5-6. Included in these images was the photo he took of "his naked, erect penis next to Victim A's face," and the one of "his own face, with his tongue sticking out, next to Victim A's clothed groin." *Id.* at 4. Likewise included were the four videos involving**{2021 U.S. App. LEXIS 5}** Victim B, in which he "filmed himself masturbating over Victim B as she slept, making physical contact with Victim B's clothed vagina and buttocks, and ejaculating onto Victim B's clothed buttocks." *Id.* at 5.

Sprenger agreed in the plea agreement that these facts "establish[ed] his guilt beyond a reasonable doubt." *Id.* at 2. The district court thus inquired about these factual admissions at the change of plea hearing before accepting Sprenger's guilty plea. During the change of plea colloquy, the district court confirmed that **Sprenger** had carefully reviewed the factual basis set forth in the plea agreement and that he was satisfied that everything in the factual basis was accurate:

> THE COURT: Okay. Now, do you understand, again, in this plea agreement that you've entered into with the government that [the agreement's] factual basis is essentially a written confession of why you're guilty of the charge in Count One, why you're guilty of the charge in Count Four, and also confesses to committing other conduct that will be considered at sentencing in this case? Do you understand that's the nature of what the factual basis is?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: All right. And understanding**{2021 U.S. App. LEXIS 6}** that's essentially a written confession to conduct that will support the convictions in this case, are you completely satisfied that everything that is set forth in that factual stipulation in the plea agreement is completely 100 percent accurate?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Before you signed the plea agreement, did you have the opportunity to go through the factual basis very carefully?
>
> THE DEFENDANT: I did, Your Honor.
>
> THE COURT: And did you go through it very carefully?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Along the way, before final izing [sic] the plea agreement, did you have the opportunity to make changes to that factual basis to correct anything that you thought was not perfectly accurate?
>
> THE DEFENDANT: I didn't need to.
>
> THE COURT: All right. But you had that opportunity?
>
> THE DEFENDANT: I did, yes.
>
> THE COURT: And you found from the get-go that it was completely accurate?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: All right. So you have no quibbles at all with the factual statements that are made

in that factual basis?

THE DEFENDANT: No, Your Honor.R. 72 at 30-31. Based on Sprenger's responses to these questions, the very detailed factual stipulation included in the{2021 U.S. App. LEXIS 7} plea agreement, and the government's proffer of what the evidence would show at trial, the district court determined that there was a sufficient factual basis to support Sprenger's guilty plea to counts 1 and 4.

Before sentencing, the Probation Office prepared a Presentence Investigation Report ("PSR") which contained, in pertinent part, a summary of Sprenger's offense conduct for his count 1 and count 4 convictions and count 2 stipulation. The PSR parroted details from the plea agreement's factual basis. Subsequently, at the sentencing hearing, the district court asked Sprenger's counsel, "are there any statements of fact included in the PSR that you're objecting to?" R. 74 at 4. Sprenger's counsel responded, "No, Judge." *Id.* The district court then sentenced **Sprenger** to 30-years imprisonment on count one and 20-years imprisonment on count four, to run concurrently. **Sprenger** preserved in the plea agreement the right to appeal the validity of his guilty plea and the sentence imposed.

II

Sprenger now challenges his guilty plea on appeal, asserting that his guilty plea was not knowing and voluntary and must therefore be vacated. **Sprenger** expressly preserved the right to appeal the validity{2021 U.S. App. LEXIS 8} of his guilty plea, so he did not waive the challenge he raises on appeal. See *United States v. Dowthard*, 948 F.3d 814, 817 (7th Cir. 2020). But because **Sprenger** did not challenge the validity of his guilty plea in the district court, we review the district court's acceptance of Sprenger's guilty plea for plain error. *Id.* Under plain error review, **Sprenger** must show: "(1) an error (2) that is plain today, (3) that affected his substantial rights and (4) seriously affected the fairness, integrity or public reputation of the proceedings." *Id.* at 818. We determine plain error based on the law existing at the time of appeal. *United States v. Williams*, 946 F.3d 968, 971 (7th Cir. 2020).

Sprenger argues the district court's acceptance of his guilty plea was plainly erroneous. In support of this argument, he first contends that, given our recent decision in *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020), there is no longer a sufficient factual basis to establish that he committed the count 1 offense to which he pled guilty, meaning his count 1 conviction is invalid. He next asserts that since his guilty plea was premised on his now-invalid count 1 conviction, the remainder of the parties' plea agreement is likewise invalid. Consequently, he claims he is entitled to withdraw not just his count 1 plea, but also his count 4 plea and count 2 stipulation. We address{2021 U.S. App. LEXIS 9} Sprenger's arguments in turn.

A

We first consider the validity of Sprenger's plea to the offense charged in count 1-production of child pornography with respect to Victim A, in violation of 18 U.S.C. § 2251(a). The statute underlying Sprenger's count 1 conviction mandates a minimum of 15-years imprisonment for "[a]ny 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." § 2251(a), (e). **Sprenger** argues his count 1 conviction is invalid because, although he produced images involving Victim A in which he himself engaged in sexually explicit conduct, those images are not child pornography since they do not show Victim A engaged in sexually explicit conduct herself, as required by § 2251(a). We agree, as does the government.

In the plea agreement, **Sprenger** admitted that the following facts establish he is guilty of committing

the offense charged in count 1: he took photographs of Victim A while she was sleeping and in them, he photographed his naked, erect penis next to Victim A's face, and his own face, with tongue sticking out, next to Victim A's clothed groin. He also admitted in the plea agreement**{2021 U.S. App. LEXIS 10}** that he used Victim A to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. At the change of plea hearing, the district court inquired about the sexually explicit conduct in these photographs and both **Sprenger** and the government agreed that "the sexually explicit conduct was not of victim A but was of Mr. **Sprenger**." R. 72 at 32-34. Notwithstanding, the district court concluded, and the parties agreed, that there was a factual basis to support Sprenger's count 1 plea.

We have since decided that Sprenger's conduct, as admitted in the plea agreement and at the change of plea colloquy, does not constitute the production of child pornography within the meaning of § 2251(a). In *Howard*, we held that § 2251(a) requires that the offender create images that depict a minor, and not the offender alone, engaged in sexually explicit conduct. 968 F.3d at 721. In that case, we read § 2251(a)'s language as requiring "the government to prove that the offender took one of the [statute's] listed actions to cause *the minor* to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct." *Id.* (emphasis in original). And given the defendant in *Howard* created images**{2021 U.S. App. LEXIS 11}** of himself masturbating next to a clothed, sleeping minor, we vacated his conviction because the images he created were not child pornography as they showed only him and not the minor engaged in sexually explicit conduct. *Id.* at 718, 724. So too here. Because the photographs **Sprenger** took depicted himself but not Victim A engaged in sexually explicit conduct, Sprenger's conduct does not qualify as a violation of § 2251(a).

Accordingly, it is clear today that the district court plainly erred in accepting Sprenger's plea to count 1. **Sprenger** has therefore satisfied the first two requirements for plain error correction. **Sprenger** contends, and the government agrees, that **Sprenger** has also met the other two requirements. Indeed, the government acknowledges that there is more than a reasonable probability **Sprenger** would not have pled guilty to count 1 had he known of *Howard*, and hence, the error with count 1 affected Sprenger's substantial rights and seriously affected the fairness, integrity, or public reputation of the proceedings. We see no reason to disagree with the parties and accept their contentions that the district court plainly erred in accepting Sprenger's count 1 plea and that **Sprenger** is therefore**{2021 U.S. App. LEXIS 12}** entitled to withdraw that plea.

B

Given Sprenger's count 1 conviction is invalid, we next consider whether that invalidates the remainder of the parties' plea agreement. When a defendant enters a guilty plea to multiple counts and one plea is subsequently invalidated, we consider whether the defendant's plea to the remaining counts "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); see *McKeever v. Warden SCI-Graterford*, 486 F.3d 81, 86 (3d Cir. 2007) ("We decline to adopt a rule that renders a multi-count plea agreement per se invalid when a subsequent change in the law renders a defendant innocent of some, but not all, of the counts therein and reject the argument that such a plea could never be entered by a defendant voluntarily and intelligently."). But as we have indicated previously, "there is no absolute right to withdraw a guilty plea ... and a defendant seeking to do so faces an uphill battle after a thorough Rule 11 colloquy." *United States v. Bradley*, 381 F.3d 641, 645 (7th Cir. 2004) (quotations and citation omitted). In fact, we have an "obligation to ensure that guilty pleas are not lightly discarded because of the presumption of verity accorded the defendant's admissions in a Rule 11 colloquy." *Id.* (cleaned up). **Sprenger** nevertheless argues that**{2021 U.S. App. LEXIS 13}** his entry into the remaining portions of the plea agreement was not knowing and voluntary because had he known about *Howard* and had he and the government not

been mistaken about the nature of his count 1 charge, which he alleges was an essential element of the plea agreement, he would not have stipulated to count 2 or pled guilty to count 4. **Sprenger** relies on our decision in *United States v. Bradley* to support his argument that the entire plea agreement is invalid given the parties' mutual mistake regarding the nature of count 1. See 381 F.3d at 643. We are not persuaded.

In *Bradley*, the defendant was indicted for possession of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and use and carrying of a firearm during and in relation to a drug trafficking crime (specifically, the possession of cocaine base with intent to deliver), in violation of 18 U.S.C. § 924(c). *Id.* The defendant pled guilty to both the drug trafficking and firearms charges pursuant to a plea agreement. *Id.* However, although the indictment identified possession of cocaine base with intent to deliver as the predicate for the § 924(c) firearms offense, the plea agreement's factual basis for the § 924(c) offense stated that possession of marijuana was the**{2021 U.S. App. LEXIS 14}** predicate. *Id.* Moreover, during the change of plea hearing, the government similarly stated that possession of marijuana was the predicate when describing the nature of the § 924(c) offense. *Id.* at 644.

The defendant did not dispute the accuracy of the government's statements at the change of plea hearing, and no one addressed that the indictment charged a different predicate offense than the one the defendant admitted to in the plea agreement and at the change of plea hearing. *Id.* But after the district court accepted the defendant's plea of guilty to both counts of the indictment, the defendant moved to withdraw his entire guilty plea before sentencing. *Id.* He argued that his plea to the § 924(c) firearms offense was invalid because of a misrepresentation or mistake as to the defendant's criminal culpability on the § 924(c) offense, and that the entire plea agreement was voidable based on that misrepresentation or mistake. *Id.*

The district court denied the defendant's motion, but on appeal we determined that the district court abused its discretion because both parties were mistaken about the nature of the § 924(c) charge throughout the plea process. *Id.* at 644-46. We reasoned that, because the government charged the possession of cocaine**{2021 U.S. App. LEXIS 15}** base with intent to deliver as the § 924(c) predicate, possession of cocaine base (not marijuana) with intent to deliver became an essential element of the § 924(c) charge. *Id.* at 646. In this way, the two charges became interdependent. The government could not convict Bradley of the § 924(c) charge without also convicting him of the § 841(a)(1) charge as alleged in the indictment. See *United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994) ("even if an adequate § 924(c) charge need not indicate by name a particular drug trafficking offense, by the way it framed the indictment in this case, the government narrowed the legitimate scope of the weapons charge to Willoughby's use of a firearm in connection with the distribution of cocaine"). We held that, because there was not a meeting of the minds on all the essential elements of the § 924(c) charge due to mutual mistake, the defendant was entitled to withdraw his § 924(c) plea as it was not made knowingly and intelligently. *Bradley*, 381 F.3d at 647-48. We then concluded that the defendant was entitled to withdraw his plea to the § 841(a)(1) drug trafficking offense, which was tainted by the § 924(c) plea. *Id.* at 648.

This case is distinguishable. The charges in *Bradley* were interdependent, which is not the case here. In *Bradley*, to prove the defendant guilty of the § 924(c) charge, the government was required to prove**{2021 U.S. App. LEXIS 16}** the § 841(a)(1) charge described in the indictment, which was an essential element of the § 924(c) charge (and, therefore, of the entire indictment and subsequent plea agreement). Because of the interdependence of the two charges, we held that the ambiguity as to the nature of one charge entitled the defendant to withdraw his plea on the other, imputing the mistake concerning the § 924(c) guilty plea to the § 841(a)(1) plea. *Id.*

In this case, on the other hand, no such interdependence exists. Sprenger's count 1 offense is not a predicate for his count 4 offense, nor does the government need to establish specific production facts to prove the possession violation, so any change in the validity of Sprenger's count 1 guilty plea does not affect an essential element of count 4. And although there is no longer a sufficient factual basis to support Sprenger's count 1 conviction post-*Howard*, the possession offense does not depend on the same factual basis. See *United States v. Novak*, 841 F.3d 721, 729 (7th Cir. 2016) (holding that a sufficient factual basis for guilty plea existed after defective legal theory was removed). With respect to the possession offense, **Sprenger** admitted the essential elements of that charge. Notably, even though **Sprenger** notes in his appellate briefing that**{2021 U.S. App. LEXIS 17}** some of the images and videos he possessed either do not or might not constitute child pornography today in light of our decision in *Howard* (including but not limited to the images relevant to Sprenger's count 1 and count 2 production charges which involved Victims A and B respectively),1 **Sprenger** concedes that "no direct challenge can be made to [his] conviction for possession of child pornography" post-*Howard*, because that conviction "was based primarily on his possession of videos and images that he did not create." Appellant's Br. at 33. Additionally, at oral argument, Sprenger's counsel admitted that there was an adequate factual basis to sustain Sprenger's count 4 conviction even post-*Howard*. Since Sprenger's count 4 conviction is unaffected by *Howard*, this case does not present the same concerns that existed in *Bradley*.

Nor does the "sentencing package doctrine" render Sprenger's plea deal voidable. Under that doctrine, interdependent sentences create a coherent sentencing package, and the reversal on appeal of one count may render the underlying package voidable. *United States v. Shue*, 825 F.2d 1111, 1114 (7th Cir. 1987). But the "sentencing package doctrine generally applies to sentences with interdependent, consecutive counts,**{2021 U.S. App. LEXIS 18}** and not to concurrent sentences." *McKeever*, 486 F.3d at 87. Sprenger's sentences for counts 1 and 4 were concurrent and, for the reasons already stated above, not interdependent.

Furthermore, given that *Howard* does not call into question Sprenger's count 4 conviction, we are not convinced that **Sprenger** would not have pled guilty to count 4 had he known of *Howard*. As noted, there was overwhelming evidence to support that **Sprenger** possessed child pornography beyond the images he produced involving Victims A and B. Consequently, even if **Sprenger** was aware of *Howard*, he would have had little to gain by going to trial on count 4 and would have lost the benefit of having received a reduced guidelines calculation for his acceptance of responsibility. We are also not convinced that **Sprenger** would not have stipulated to count 2 post-*Howard*. The parties vigorously debate in their briefing whether, post-*Howard*, the conduct **Sprenger** stipulated to with respect to his count 2 production charge amounts to a § 2251(a) violation.2 Even if the district court erred in accepting Sprenger's count 2 stipulation, we could not say that its acceptance of the plea agreement as to count 4 affected Sprenger's substantial rights, as required on**{2021 U.S. App. LEXIS 19}** plain error review.

Moreover, withdrawal of the remainder of the plea agreement would not, contrary to Sprenger's assertions, be necessary to protect the fairness of judicial proceedings and would thus be inconsistent with our standards for plain error correction. See *United States v. Taylor*, 909 F.3d 889, 893 (7th Cir. 2018) (noting that when we exercise our discretion to remedy plain error, our discretion "ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings") (internal quotations and citation omitted). In exchange for Sprenger's pleading guilty to counts 1 and 4, where count 1 carried a 15-year mandatory minimum and 30-year maximum sentence and count 4 carried a 20-year maximum sentence, the government agreed to dismiss counts 2 and 3. But now that count 1 is invalid post-*Howard*, **Sprenger** is left with only the count 4 possession conviction, which carries a shorter maximum sentence than a production conviction,

while the government has given up the opportunity to seek a potential conviction on the count 2 production offense, which, as explained, might not be foreclosed by *Howard*. If anyone got the better end of the deal here, it was likely **Sprenger**, not the{**2021 U.S. App. LEXIS 20**} government.

Given **Sprenger** seems to be the party who benefited from count 1's invalidation, we asked the government at oral argument if it was sure it didn't want us to void the plea agreement, as **Sprenger** requests, so that the parties could go back to the pre-plea negotiation stage. Though the government replied that it could seek to void the entire plea agreement under the frustration of purpose doctrine, it stated it wasn't seeking to do that here, so we take that as a waiver of that opportunity.3 See *Howard*, 968 F.3d at 723.

Sprenger counters that the government benefited from the parties' count 1 error because the conduct underlying Sprenger's § 2251(a) charges largely drove his guidelines range and sentence, so if those charges were not included in the guidelines calculation, his guidelines range would have been lower. While we acknowledge Sprenger's concerns that he may have received a lower sentence today, post-*Howard*, than he originally received, we need not vacate Sprenger's entire plea agreement to correct any errors in his sentence; a remand for resentencing on count 4-the count still valid post-*Howard*-is adequate to remedy any sentence disparity in light of count 1's invalidation. See *McKeever*, 486 F.3d at 88 (collecting cases{**2021 U.S. App. LEXIS 21**} showing that "it is within the bounds of due process to resentence a defendant on remaining counts after some, but not all counts, are vacated"). We reject Sprenger's argument that he is entitled to withdraw the entire plea agreement on plain error review based on count 1's invalidation.

For these reasons, we Vacate the judgment on Sprenger's count 1 production conviction, Affirm the judgment on Sprenger's count 4 possession conviction, and Remand to the district court to revisit Sprenger's sentence as needed.

Footnotes

1

We need not and do not reach the parties' dispute over whether Victim B engaged in sexually explicit conduct such that Sprenger's stipulated conduct constitutes the production of child pornography within the meaning of § 2251(a) post-*Howard*. **Sprenger** was not convicted on count 2; he merely stipulated to that offense for sentence-computation purposes.

2

While **Sprenger** never physically touched Victim A in the videos relevant to his count 1 production charge, **Sprenger** did make physical contact with Victim B in the videos related to his count 2 production charge. In stipulating to count 2, **Sprenger** admitted in the plea agreement that in the videos he created involving Victim B, he made physical contact with Victim B's clothed buttocks and vagina while she was sleeping, and ejaculated onto her clothed buttocks. Though **Sprenger** asserts the exact nature of his physical contact with Victim B is unclear from the record, he recognizes "[i]t is possible" his contact with Victim B was more than momentary. Appellant's Br. at 32. This leaves open the possibility that Sprenger's count 2 conduct constitutes a § 2251(a) violation whereas his count 1 conduct doesn't. Cf. *Howard*, 968 F.3d at 723 n.3 (suggesting in dicta that a video showing a defendant "masturbating very close to [a victim's] face while she sleeps and perhaps momentarily touching her lips with his penis," could perhaps "be characterized as an attempt at oral sex, which might qualify as engaging the child in sexually explicit conduct"). But again, we do not decide whether, post-*Howard*, the count 2 conduct **Sprenger** stipulated to constitutes the production of child

pornography within the meaning of § 2251(a).
3

We do not suggest that the government is per se entitled to void the plea agreement under these circumstances. We note only that under the frustration of purpose doctrine, a party to a plea agreement may, in certain circumstances, seek to vacate the plea agreement if its purpose for entering into the plea agreement has been frustrated. See *United States v. Bunner*, 134 F.3d 1000, 1004 (10th Cir. 1998).

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ADAM SPRENGER, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
2024 U.S. App. LEXIS 7275
No. 23-2104
March 27, 2024, Decided

Editorial Information: Prior History

{2024 U.S. App. LEXIS 1}Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 18 CR 105. John J. Tharp, Jr., Judge.United States v. **Sprenger**, 2024 U.S. App. LEXIS 2030, 2024 WL 340691 (7th Cir. Ill., Jan. 30, 2024)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Helene B. Greenwald, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL.
For ADAM **SPRENGER**, Defendant - Appellant: Lisa Lundell Wood, Attorney, LISA WOOD LAW, LLC, Chicago, IL.

Judges: Before FRANK H. EASTERBROOK, Circuit Judge, DIANE P. WOOD, Circuit Judge, THOMAS L. KIRSCH II, Circuit Judge.

Opinion

ORDER

Defendant-Appellant filed a petition for rehearing and rehearing en banc on March 12, 2024. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX A

CIRHOT

Additional material from this filing is available in the Clerk's Office.