No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID EARL BOYD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

/s/ Christy Posnett Martin

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APPENDIX A

2024 WL 3427053
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff—Appellee,
v.
David Earl BOYD, Defendant—Appellant.

No. 23-10695
|
FILED July 16, 2024

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:22-CR-271-1

Attorneys and Law Firms

Daniel Gordon, Brian W. McKay, Esq., Assistant U.S. Attorney, U.S. Attorney's Office, Dallas, TX, for Plaintiff—Appellee.

Christy Martin, Assistant Federal Public Defender, Federal Public Defender's Office, Dallas, TX, for Defendant—Appellant.

Before Haynes, Willett, and Oldham, Circuit Judges.

Opinion

Per Curiam: [*]

***1** A jury convicted David Earl Boyd of child sex exploitation and possession of child pornography. The district court gave Boyd two life sentences. He now challenges his sentence on the grounds that the three-year-old he abused was not a "toddler" but a "preschooler." We affirm.

I.

Boyd violently abused his own three-year-old and six-year-old grandchildren to make sadistic pornographic images while he was babysitting them. Boyd was caught when his son turned him into the FBI. In addition to the pornography he produced using his own grandchildren, Boyd also possessed 11,000 images of child pornography on his cell phone. Of those images, "326 images depict[ed] infants or toddlers, 175 images depict[ed] sadistic or masochistic conduct, and 26 images depict[ed] bestiality involving minors." ROA.978.

At the time he committed these felonies, Boyd was already a registered sex offender. A federal grand jury indicted him on two counts of sexual exploitation of a child in violation of 18 U.S.C. § 2251(a), one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), and one count of penalties for registered sex offenders in violation of 18 U.S.C. § 2260A. A jury convicted him on all counts. Boyd's guilt is uncontested in this appeal.

Prior to sentencing, Boyd's presentencing report recommended that he receive a four-level enhancement under U.S.S.G. § 2G2.1(b)(4)(B) for producing sexually explicit material that depicted an "infant or toddler." Boyd objected to the enhancement on the ground that some regulatory and medical authorities define "toddler" to be a person who is 36 months old or younger. When Boyd sadistically abused his youngest grandchild, he argues, the child was older than 36 months and hence not a "toddler."

The district court overruled his objection and sentenced Boyd to life imprisonment on both counts of child sex exploitation and 240 months on the child pornography count (all of which ran concurrently). Then the district court imposed an additional 120-month sentence on the § 2260A count (to run consecutively). The district court explained:

> You asked for mercy and leniency. I think I've done that, but I showed the leniency and the mercy to the appropriate party, which is the people of the United States and to the victims that you have in a trail behind you. I think you richly deserve this life sentence that I have just imposed or just stated.

ROA.727.

Boyd timely appealed.

II.

The question presented for decision [1] is whether the district court erred in applying a four-level offense-level increase because Boyd's three-year-old granddaughter was a

"toddler" under U.S.S.G. § 2G2.1(b)(4)(B). Because Boyd timely objected, we review de novo the sentencing court's application of the Guidelines and its factual conclusions for clear error. *See United States v. Barfield*, 941 F.3d 757, 761 (5th Cir. 2019).

A.

***2** Beginning with the text, § 2G2.1(b)(4)(B) provides for an enhancement if the offense involves material depicting "an infant or toddler." The Guidelines do not define the term "toddler." In such a situation, we look to the term's "ordinary meaning." *United States v. Buendia*, 73 F.4th 336, 339 (5th Cir. 2023) (quotation and citation omitted).

Dictionaries coalesce around the general meaning of the term "toddler." A toddler is "one who toddles, *esp.* a young child." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2695 (2d ed. 1934; 1950). Similarly, the American Heritage Dictionary defines "toddler" as "[o]ne who toddles, especially a young child learning to walk." *Toddler*, AMERICAN HERITAGE DICTIONARY, https://perma.cc/CF29-R5FF (last visited Jun. 19, 2024). Which is in accord with the Oxford English Dictionary definition of "toddler" as "[a] person who toddles (in various senses)" and "[a] young child; (now) *spec.* a child who is learning to walk." *Toddler*, OXFORD ENGLISH DICTIONARY, https://perma.cc/V8JG-ZFUN (last visited Jun. 19, 2024). None of these sources imposes a bright-line cutoff for aging out of "toddler" status.

When the Sentencing Commission wanted to impose a bright-line cutoff, it knew how to do so. For example, in a different subsection of § 2G2.1(b), the Commission provided offense-level increases when "the offense involved a minor who had (A) not attained the *age of twelve years* ... or (B) attained the *age of twelve years* but not attained the *age of sixteen years*." U.S.S.G. § 2G2.1(b)(1) (emphasis added). [2] Such bright-line cutoffs are conspicuously absent from § 2G2.1(b)(4).

And we do not need to guess why. In its "Reason for Amendment," the Sentencing Commission explained that it added "infant or toddler" to resolve a circuit split regarding "whether the 'vulnerable victim' enhancement in § 3A1.1(b) applied to victims who were vulnerable only because they were very young (*i.e.*, infants or toddlers)." *United States v. Nichols*, 943 F.3d 773, 774 (6th Cir. 2019) (citing U.S.S.G. § 2G2.1, amend. 801, effective Nov. 1, 2016). And § 3A1.1(b), like § 2G2.1(b)(4)(B), provides no bright-line cutoffs for vulnerability. In fact, the Commission's Reason for Amendment cited several cases involving victims who were far older than 36 months. *See, e.g.*, U.S.S.G. § 2G2.1, amend. 801, effective Nov. 1, 2016 (citing, *inter alia, United States v. Burgess*, 684 F.3d 445, 454 (4th Cir. 2012), which involved a five-year-old victim).

***3** Our precedent reinforces this conclusion. In *United States v. Jenkins*, 712 F.3d 209 (5th Cir. 2013), we held the "vulnerable victim" enhancement for infants and toddlers has no bright-line age cutoff. *See id.* at 214. And we relied favorably on the Ninth Circuit's decision in *United States v. Wright*, 373 F.3d 935 (9th Cir. 2004), which held: "[T]he traits and characteristics associated with infancy and the toddler stage can exist independently of age, and ... the factors of extreme youth and small physical size recognize a vulnerability beyond 'age' per se ...." *Id.* at 943; *see Jenkins*, 712 F.3d at 213 (relying on *Wright*).

The district court did not err in applying § 2G2.1(b)(4)'s toddler enhancement here. Boyd's three-year-old granddaughter plainly had the traits and characteristics associated with a toddler, including extreme youth and small physical size. She still wore diapers. Boyd was babysitting the child when he sadistically abused her. And we have no basis in the text of the Guidelines or our precedent for imposing a bright-line 36-month cutoff for § 2G2.1(b)(4).

B.

For his part, Boyd agrees that the ordinary meaning of "toddler" is "a person who toddles, especially a young child learning to walk." Blue Br. at 10 (citation omitted). But he contends that definition is too vague and that it is the province of our court to clarify it. *Ibid.* He urges us to hold that "toddlerhood" terminates at exactly "the age of 36 months." *Id.* at 8.

To support that argument, Boyd points to the Social Security Administration's regulations for disability benefits, noting that 20 C.F.R. § 416.926a(g)(2)(ii) and (iii) define "[o]lder infants and toddlers" as "age 1 to attainment of age 3" and "[p]reschool children" as "age 3 to attainment of age 6." He also argues that elsewhere in the disability benefits context, such as the Individuals with Disabilities Education Act ("IDEA"), the term "at-risk infant or toddler" refers to an individual under 3 years of age. *See* 20 U.S.C. § 1432(1). He

also contends that some medical definitions cut off "toddler" at 36 months. Blue Br. at 10–11.

This is entirely irrelevant. The Social Security Administration's approach to disability benefits says nothing whatsoever about the Sentencing Commission's approach to the production of child pornography. IDEA is likewise irrelevant at best. All of Boyd's authorities merely show that if either Congress or the Commission wanted to impose a bright-line cutoff for the definition of a toddler in the criminal-sentencing context, both institutions knew how to do it. In the absence of such a cutoff, our court is powerless to rewrite § 2G2.1(b)(4) to impose one. *See, e.g., Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 476–79 (5th Cir. 2021).

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2024 WL 3427053

Footnotes

* This opinion is not designated for publication. See 5th Cir. R. 47.5.

1 Boyd raises two additional arguments that he recognizes are foreclosed, so we need not address them here. *See* Blue Br. at 2. He merely wishes to preserve those objections for possible further review. *Id.* at 2 n.1.

2 Chapter 2, part G of the Guidelines (covering in pertinent part "sexual exploitation of minors, and obscenity") is replete with other examples of bright-line cutoffs. For example, § 2G3.2 covers "obscene telephone communications for a commercial purpose" and "broadcasting obscene material." *Ibid.* The Guidelines impose an offense-level increase "[i]f a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night." § 2G3.2(b)(1). And § 2G3.1 covers "importing, mailing, or transporting obscene matter" and "transferring obscene matter to a minor." *Ibid.* In the case where those offenses result in a "pecuniary gain," the district court must increase the offense level using bright-line cutoffs from U.S.S.G. § 2B1.1, which covers "Theft, Property Destruction, and Fraud" offenses. *See* § 2G3.1(b)(1)(A).

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

v.

DAVID EARL BOYD

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:22-CR-271-Y(1)
Aisha Saleem, assistant U.S. attorney
John J. Stickney, attorney for the defendant

On February 23, 2023, the defendant, David Earl Boyd, was found guilty by a jury on counts one, two, three, and four of the four-count indictment. Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE CONCLUDED	COUNT
18 U.S.C. § 2251(a)	Exploitation of Children	May 2, 2022	1
18 U.S.C. § 2251(a)	Exploitation of Children	May 2, 2022	2
18 U.S.C. § 2252A(a)(5)(B)	Possession of Child Pornography	March 28, 2022	3
18 U.S.C. § 2260A	Penalties for Registered Sex Offenders	May 2, 2022	4

The defendant is sentenced as provided in pages two through four of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The Court concludes that the defendant is indigent and the $5,000 assessment required under 18 U.S.C. § 3014 for counts one, two, and three of the four-count indictment should be, and it is, waived.

The Court concludes that the defendant does not have the current financial resources or future earning capacity to pay an assessment under 18 U.S.C. § 2259A (The Amy, Vicky, and Andy Act). Thus, the assessment for counts one, two, and three of the four-count indictment shall be $0, per count.

The defendant shall pay immediately a special assessment of $400.00 for counts one, two, three, and four of the four-count indictment.

The defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed June 27, 2023.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed June 28, 2022.

IMPRISONMENT

The defendant, David Earl Boyd, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of Life as to each of counts one and two of the four-count indictment; and 240 months as to count three of the four-count indictment, all to run concurrently; and 120 months as to count four of the four-count indictment, to run consecutively, for a total of Life plus 120 months.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 10 years per count as to counts one, two, and three of the four-count indictment; and 3 years as to count four of the four-count indictment, all terms to run concurrently, for a total of 10 years of supervised release.

The defendant, while on supervised release, shall comply with the standard conditions recommended by the U. S. Sentencing Commission at §5D1.3(c) of the United States Sentencing Commission Guidelines Manual, and shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004;

report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Federal Bureau of Prisons;

take notice that the mandatory drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse;

comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense;

have no contact with the victim(s), including correspondence, telephone contact, or communication through third parties except under circumstances approved in advance by the probation officer and not enter onto the premises, travel past, or loiter near the victims' residences, places of employment, or other places frequented by the victims;

have no contact with minors under the age of 18, including by correspondence, telephone, internet, electronic communication, or communication through third parties, with the exception of the defendant's own children. The defendant's contact with his children will be limited to occasions when the probation officer is informed in advance of the defendant's intent to have that contact and the probation officer approves it. The defendant shall not have access to or loiter near school grounds, parks, arcades, playgrounds, amusement parks or other places where children may frequently congregate, except as may be allowed upon advance approval by the probation officer;

not use any computer other than the one the defendant is authorized to use without prior approval from the probation officer;

participate and comply with the requirements of the Computer and Internet Monitoring Program, contributing to the cost of the monitoring in an amount not to exceed $40 per month. The defendant shall consent to the probation officer's conducting ongoing monitoring of his computer/computers. The monitoring may include the installation of hardware and/or software systems that allow evaluation of computer use. The defendant shall not remove, tamper with, reverse engineer, or circumvent the software in any way. The defendant shall only use authorized computer systems that are compatible with the software and/or hardware used by the Computer and Internet Monitoring Program. The defendant shall permit the probation officer to conduct a preliminary computer search prior to the installation of software. At the discretion of the probation officer, the monitoring software may be disabled or removed at any time during the term of supervision;

not use any software program or device designed to hide, alter, or delete records and/or logs of the defendant's computer use, internet activities, or files stored on the defendant's computer;

submit to periodic, unannounced examinations of his computer/computers, storage media, and/or other electronic or internet-capable devices, performed by the probation officer at reasonable times and in a reasonable manner based on reasonable suspicion of contraband evidence of a violation of supervision. This may include the retrieval and copying of any prohibited data and/or the removal of such system for the purpose of conducting a more thorough inspection. The defendant shall provide written authorization for release of information from the defendant's internet service provider;

not possess, have access to, or utilize a computer or internet connection device, including, but not limited to Xbox, PlayStation, Nintendo, or similar device, without permission of the probation officer. This condition requires preapproval for categories of computer or internet access or use; it does not require separate pre-use approval every time the defendant accesses or uses a computer or the internet;

participate in outpatient mental-health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least $25 per month;

neither possess nor have under his control any pornographic matter or any matter that sexually depicts minors under the age of 18 including, but not limited to, matter obtained through access to any computer and any matter linked to computer access or use;

participate in sex-offender treatment services as directed by the probation officer until successfully discharged, which services may include psycho-physiological testing to monitor the defendant's compliance, treatment progress, and risk to the community, contributing to the costs of services rendered (copayment) at the rate of at least $25 per month;

pay any remaining balance of restitution in the amount of $45,000.00, as set out in the Judgment; and

provide to the probation officer complete access to all business and personal financial information.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

The defendant is ordered to make restitution, in the amount of $45,000.00. Restitution shall be paid to the U. S. District clerk, 501 West 10th Street, Room 310, Fort Worth, TX 76102-3673, for disbursement to:

Restore the Child in Trust for "April"
Restore the Child, PLLC
2552 North Proctor Street, Suite 85
Tacoma, Washington 98406
$5,000.00
ATTN: April

Deborah A. Bianco, in trust for "Maureen"
P.O. Box 6503
Bellevue, Washington 98008
$10,000.00
ATTN: Maureen

Deborah A. Bianco, in trust for "Pia"
P.O. Box 6503
Bellevue, Washington 98008
$5,000.00
ATTN: Pia

Deborah A. Bianco, in trust for "Mya"
P.O. Box 6503
Bellevue, Washington 98008
$5,000.00
ATTN: Mya

Deborah A. Bianco, in trust for "Ava"
P.O. Box 6503
Bellevue, Washington 98008
$5,000.00
ATTN: Ava

Deborah A. Bianco, in trust for "Jack"
P.O. Box 6503
Bellevue, Washington 98008
$5,000.00
ATTN: Jack

Deborah A. Bianco, in trust for "Kauzie"
P.O. Box 6503
Bellevue, Washington 98008
$5,000.00
ATTN: Kauzie

Tanya Hankins in Trust for "John Doe 4" of the 8 Kids Series
P.O. Box 1091,
Tacoma, Washington 98401
$5,000.00
ATTN: 8 Kids Series

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States marshal

BY _____
deputy marshal