No. 24-5852

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED
OCT 17 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Alexander Kawleski
Petitioner

vs

United States of America
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

By: Alexander Kawleski
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pro se

QUESTION(S) PRESENTED

(1) Did the Seventh Circuit Court of Appeals and the District Court err when the Government's case rested on Tracy Brown's testimony that she unexpectedly found a flash drive containing child pornography in the Petitioner's house and took it to the police, when after trial, two new witnesses revealed that Brown had made statements to them that contradicted her testimony, and in a post-trial interview, Brown herself made inculpatory statements to the police that contradicted her testimony?

(2) Did the lower courts err in not granting a new trial based upon the revelation of the new witness testimony and contradictory statements made by the government's main witness?

(3) Does the Petitioner meet the knowing prong of 18 U.S.C. § 2251a when it was the witness that made a copy of child pornography which was subsequently handed over to law enforcement, and the Petitioner had destroyed the only known copy years ago?

(4) Under Title 18 U.S.C. § 2251£a·, is there proper Fair Notice, as set forth by this Court in Fasulo v United States, 272 U.S. 620 (1926), that a crime of purely intrastate production of a minor engaging in sexually explicit conduct, or child pornography, was defined by Congress as a federal offense?

(5) Where does the trail of Interstate Commerce end, and thus Congress' Constitutional authority to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes" cease?

(6) Have the lower courts misapplied the "aggregate Effects" doctrine under Gonzales v Raich, 545 U.S. 1 (2005) to 18 U.S.C. § 2251(a), where intrastate challenges were denied relief where the statutes do not mention intrastate activities?

(7) Does Congress have the Constitutional authority to regulate purely intrastate activity, and does the decision in Gonzales v Raich surpass the powers attributed to the federal government by the founders?

(8) Does the simple determination that an item had been passed in interstate commerce at some point give the federal government authority to regulate localized, intrastate activities?

(9) In order to be convicted under 18 U.S.C. § 2252(a)(1) does a criminal defendant have to be physically responsible for "producing" the visual representations on a flash drive, or can another person perform this act without the accused knowledge, then the accused be held criminally accountable for the actions of the other?

(10) Under Loper Bright Enterprises, et al. v Gina Raimondo, Secretary of Commerce, et al., 144 S. Ct. 2244 (2024), does the United States Attorney's office have the authority to interpret that a flash drive, manufactured by PNY in New Jersey, and purchased years earlier, gives the jurisdictional nexus to allow for criminal prosecution under 18 U.S.C. 2252(a)(1)?

(11) Does a criminal defendant have a Constitutional right under the Sixth Amendment, assistance of counsel till their criminal judgment is final as defined by Linkletter v Walker, 85 S.Ct.

1731 (1965)(Footnote #5); Allen v Hardy, 106 S. Ct. 2078 (1986)(Footnote #1); Teague v Lane, 109 S. Ct. 1060 (1989) (Footnote #1); and Gonzales v Thäler, 132 S. Ct. 641?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State of Wisconsin
Circuit Court of Wood County . . .

Case No. 2019CF00094
DA Case no. 2019WD000325

Wood County Circuit Court Branch 3
400 Market Street
P.O. Box 8095
Wisconsin Rapids, WI 54495-8095

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SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

The opinion of the United States Court of Appeals for the Seventh Circuit in case no. 21-1279 appears at Appendix A, and it is unknown if the opinion has been reported.

The opinion of the United States District Court appears at Appendix B, and it is unknown if it has been reported.

JURISDICTION

The date on which the United States Court of Appeals for the Seventh Circuit decided my case was July 19, 2024.

No Petition for rehearing was filed in my case.

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

The United States District Court had jurisdiction under 18 U.S.C. § 3231.

The United States Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article I, § 8, Clause 3
Interstate Commerce Clause

Title 18 United States Code

§ 2251(a)

§ 2252(a)(5)(B)

§ 2256(8)

Title 21 United States Code

§ 801(5)

Title 5 United States Code

§ 501, 120 Statute 623

STATEMENT OF THE CASE

On January 24, 2019, Tracy Brown, a citizen complaintant, met with Wisconsin Rapids Detective David Bailey. Brown told the Detective she'd spent the previous night at the home of Alexander Kawleski, her on-again-off-again boyfriend. Brown said the morning after Kawleski left for work, she browsed through a camera in his bedroom, trying to find images of other women, and noticed a cup full of various thumb drives and flash drives next to a computer, which included some that "looked familiar." There was one flash drive she did not recognize. Wanting to know what was on it, she decided to steal it. Once home, she called up a friend and they both viewed its contents together via FaceTime. On the flash drive, she saw a video of Kawleski sexually assaulting a minor Brown recognized, secret shower videos of the same minor, and one of a different minor. She then went to the Wisconsin Rapids Police Department and asked to meet with a detective. Once she explained what happened, she handed him the flash drive. Regarding how Brown came into possession of the video in question, the above description is only one version.

A Grand Jury originally indicted Kawleski on one count of using a minor to engage in sexually explicit conduct for the purpose of producing a video, in violation of 18 U.S.C. § 2252(a)(1). A superceding indictment added 14 additional counts of attempting to violate the same statute, and one count of possessing sexually explicit images of minors, in violation of 18 U.S.C. § 2252(a)(4).

Kawleski took the case to trial in July of 2019, and a jury found Kawleski guilty of all counts.

Version Number Two:

Weeks later, after the jury returned a verdict of guilt, two witnesses came forward disputing where, when and how Tracy Brown had gained possession of the flash drive and how she'd learned of its contents. These witnesses cast doubt on whether the flash drive was in Kawleski's posession in January 2019, contradicting Brown's testimony.

Witness number one was Jeremy Cecil, Brown's ex-boyfriend nad the father of their child. He contacted the U.S. Attorney's Office, believing Brown had lied "regarding the how and when she obtained the USB flash drive." In his interview, Cecil explained that in the summer of 2018, Brown had called to tell him that Kawleski had given her an Apple Tower computer and "saved on this computer were videos of [Kawleski] with underage girls." Cecil said he also spoke to Brown after she testified and she "made reference to a flash drive and that there was some kind of issue with the flash drive during the trial." The conversation left Cecil with the impression that Brown had copied the videos from the computer onto the flash drive she'd given to police in 2019.

In a followup interview with defense, Cecil added even more details, such as Cecil's conversation with about Kawleski giving her the computer took place roughly a year to eighteen months before his arrest, sometime in late 2016, and that Brown needed "to talk to him" and described the images she found as Minor A "flashing" Kawleski.

Also present when Brown called was Cecil's then-girlfriend, Amanda Hintz, and in their post-trial conversation Brown had told Cecil that she had "had that evidence for a long time" and, when he

confronted her about providing false testimony, she responded with: "it doesn't matter, he is still guilty."

Version Number Three:

Meanwhile, defense counsel contacted Amanda Hintz, Cecil's then-girlfriend. Hintz remembered that she was home with Cecil when Brown called him about some kind of issue with Kawleski and took the call outside. Hintz did not ask for further details concerning the call. Hintz was certain that Brown called in July 2016, because she was pregnant with their now three year old child. Hintz went on to admit she and Brown had spoken more recently, in early 2019. Brown had called Hintz "crying". Brown told Hintz that she earlier purchased a flash drive and now needed it for something, but "when she plugged the flash drive into the computer she discovered the child pornography." Brown also said she'd turned the flash drive over to the police that day and was calling Hintz "because she was sick and did not know how to handle the situation."

The court granted in part a Motion 29 filed by the defense, and set aside 14 of the 16 counts, agreeing that the government had not proven Kawleski's attempt to create child pornography "involved use of the flash drive."

Kawleski was found guilty by jury trial in July of 2019, and sentenced to 216 months on January 28, 2021.

REASONS FOR GRANTING THE PETITION

Ground One

The district court should have ordered a new trial when evidence came to light that the Government's star witness lied on the stand. The five newly discovered statement mattered. The newly discovered evidence would have altered the outcome of the case because Brown was such an important witness.

These circumstances echo those in United States v Simpson, 864 F.3d 830 (7th Cir. 2017). There, evidence discovered after trial revealed that defense counsel had failed to investigate three witnesses who would testify that one or both of the government witnesses had said that the defendant was taking the fall for them and that the defendant did not deal herion. In concluding that the defendant had sketched a colorable ineffective assistance of counsel claim, the Appellate Court explained that the district court had erred in finding that the new witness' testimony could not affect the trial's outcome simply because no hearsay exception applied.

just as in Simpson, the Petitioner's conviction rested on a particular witness's word (Brown).

"[A] witness's credibility can be vital to the strength of the prosecution's case"; particularly "so when the testimony is not verifiable." See United States v Banks, 546 F.3d 507 (7th Cir. 2008).

Here no other witness or evidence could corroborate Brown's story. Brown testified that she found the flash drive while alone in the Petitioner's house. The other two individuals involved in

the flash drive's purported "discovery" in January 2019 don't enter the scene until after Brown's find. Brown didn't FaceTime her friend while snooping through the Petitioner's belongings. Brown didn't even testify that she showed her friend the flash drive; only that they reviewed its contents together at Brown's house.

The case agent can speak only to events following Brown's arrival at the police station. They even conceded that several dates on the flash drive are inaccurate. Given the weight that Brown's word had to carry, the newly discovered evidence, which suggests her testimony is fabricated, is material.

These statements would have created reasonable suspicion that someone other than the Petitioner (namely Brown) was responsible for "producing" the images on the flash drive and even "possessing it in January 2019.

With the benefit of Cecil's and Hintz's testimony, the scope of defense counsel's cross-examination would have been significantly broader, and the defense would have been able to thoroughly discredit Brown's testimony and render it wholly unbelievable. With Brown's credibility crippled, defense counsel would have calculated differently the risk of having the Petitioner testify in his own defense. Without any direct proof that the Petitioner produced or possessed the flash drive, couple with the evidence that Brown was an untrustworthy source, the jury would have weighed the evidence differently and would have acquitted.

Furthermore, the new evidence would have injected reasonable doubt into who "produced" and "possessed" the videos and on the flash drive.

To convict Petitioner on Counts 1 and 16, the jury had to find that he saved the edited videos to the flash drive given to police, and that he was in possession of it in January 2019. There was no testimony at trial as to who copied the files to the drive. There was only the government's star witness, Brown, that claimed she picked out a flash drive that she did not recognize at the Petitioner's house, checked it out at her home, then took it to police. The conviction to Count 16 was only by the jury crediting Brown's story. And it could only convict on Count 1 by inferring that, because the Petitioner had originally filmed the conduct and Brown claimed to have found the flash drive at his house, the Petitioner must have been the one who saved the edited video files to that flash drive.

The new evidence tells a different story. Crediting Cecil's version of events, as of July 2016, Brown knew that Kawleski had taken photographic images featuring Minor A. Hintz confirmed the date. When Brown finally did go to the police, she did not turn in the computer, but rather, a different storage device, a flash drive, that according to Hintz Brown bought "earlier". Buy the time she turned over the drive she had already had "had that evidence a long time." Critically, when Cecil confronted Brown about the snag in her two versions of her story, she did not tell him he was mistaken. She only said "it does not matter, he is still guilty".

The testimony of both Cecil and Hintz would have rendered Brown's claim about finding the flash drive at the Petitioner's house incredible. Brown testified that she picked up a flash drive from the Petitioner's house on January 24, 2020, where Hintz would testify that "on the same day" Brown told her that she found pornography on a flash drive that she had bought "earlier". On top of that, Brown told Cecil that she had the evidence a long time. If the jury heard that the flash drive turned over to the police belonged to Brown, and not the Petitioner, and that Brown had bought the flash drive earlier, and held the evidence for a long time, there is a reasonable probability that the jury would not credit Brown's testimony that she happened upon the flash drive and that the Petitioner was the one in possession of the drive when found.

With the new evidence, the defense would have knocked out, not just bruised, Brown's credibility. Although the defense attacked Brown's credibility, counsel's cross-examination was nearly as fulsome as it could have been. At trial counsel had no reason to ask Brown whether she had purchased the flash drive she turned into police, whether she had access to the Petitioner's media years earlier, or whether she had previously found child pornography on the Petitioner's media. This was not a situation where all the facts were known and could have been challenged on cross. And even if defense counsel had gone down that road, he would have been hamstrung to draw out inconsistencies without another witness to contradict her testimony. With a further line of questioning counsel could have built a tenable and compelling story for the jury that Brown had the device at some point before

the winter of 2015-2016 and that the date alterations were due to her tampering with it. Counsel could have proven proven the unreliability of Brown's testimony.

Even assuming the statements are hearsay and therefore "inadmissible as substantive evidence", they still would have been admissable under Rule 613 "as an aid in judging the credibility of the trial testimony inconsistent with the previous statement". 1 Kenneth S. Brown, et al., McCormick on Evidence § 34 (8th ed., West Jan. 2020 Update). After laying the proper foundation, the defense would have been able to present forensic evidence to prove those inconsistencies. e.g. United States v DeMarco, 784 F.3d 388, 394 (7th Cir. 2015)(Rule 613(b) expressly permits the use of extrinsic evidence to impeach a witness). Armed with all this evidence, the defense would have proven it was Brown who "produced" and "possessed" the flash drive that held evidence used to convict the Petitioner. In this sense the Petitioner did not meet the knowing prong of the statute as he had destroyed his only "known" copy years earlier.

In the end, the cumulative effect on this additional evidence would have has a significant impact on whether the jury viewed Brown as credible. And because the case against the Petitioner rises and falls on
whether the jury found Brown credible, the new evidence would change the outcome of the trial.

At this point, with Brown's testimony on the rocks, the Petitioner would have taken the stand in his own defense. If the defense had known that Brown's testimony could be so robustly attacked and undermined as described herein, then the Petitioner

would have testified. As outlined in his proffer, the Petitioner's decision not to present a case-in-chief at trial was a difficult one because he had an important story to tell: he believes he destroyed all the videos years before Brown brought her flash drive to police.

Previously, the defense had no witness to call who could undermine Brown. The defense was left to make a decision: (i) leaving him to stay silent, depriving the jury of his defense and (ii) putting the Petitioner on the stand to tell his story with no supporting testimony from another witness and exposing him to cross-examination. With the newly discovered evidence, Petitioner's story fits into the broader picture. Now, the jury would hear that the Petitioner believed there was just one flash drive that contained those videos and he destroyed it a long time ago. Brown knew about the videos for years, she used the knowledge as leverage over the Petitioner, and she then lied to police as to the origin of the drive.

Although the Court ultimately affirmed the denial of a new trial, and the Court of Appeals affirmed the decision, because of the lack of evidence that the Petitioner "produced" the specific videos on the drive, only the video(s) themselves and Brown's claim that she found the flash drive at the Petitioner's house.

There is no evidence that the Petitioner himself "produced" the videos onto the flash drive, only the videos themselves, in which he destroyed the only know copy years ago, and the testimony of Brown which is sketchy at best.

All of the points discussed here bear on how the district court and the court of appeals misjudged the newly discovered evidence. From these newly obtained statements, the jury would have heard affirmative evidence that Brown was far from truthful - and her story at trial cannot be reconciled with the stories she has since told. Armed with all her statements, the defense would have decimated Brown's credibility on cross. Then the defense would have called the Petitioner to the stand to tell his side to the jury. In the end, this all adds up to a necessity for a new trial. The District Court and the Court of Appeals failed to see the evidence in this manner, and thus abused their discretion.

The previous decisions should be reversed and remanded.

Ground Two

Justice Thomas has forewarned that Congress is overstepping their Constitutional authority and is treading on the rights of the States and the People.

This Petitioner for Writ of Certiorari is an opportunity to return the power of prosecution for a purely local crime back to the States. This case involves another person, other than the Petitioner, who "produced" the evidence on a flash drive, held on to it for years, then offered it as evidence of a crime. There is no nexus to an interstate market, nor is there any aspect of commerce. The federal government only contended that the flash drive was made by PNY and was manufactured in New Jersey. Since there was no logical or tangible effect on interstate commerce, the federal government lacked the jurisdictional power to prosecute this case. They simply relied on testimony of an unreliable source.

Under the separation of powers designated by the United States Constitution, it is the duty of the United States Supreme Court to rule as to whether a statute passed by Congress is indeed Constitutional, or whether it has surpassed the limited authority Congress has been assigned to regulate purely federal concerns.

"In the end, it remains the role of [the Supreme Court] to decide whether a particular legislative choice is Constitutional." F.E.C. v Ted Cruz, 596 US 289, 142 S. Ct. 1637 (2022)(Opinion by Justice Roberts); See also Sable Communications of Cal. v F.C.C., 492 US 115, 109 S. Ct. 2729

In theDistrict Court opinion filed 05/22/20 the Court noted:

> "As even defense counsel has acknowledged, Kawleski's conduct in this case was "outragous," "terrible" and "moral[ly] reprehensib[le]." Dkt 57, at 114; Dkt. 71 at 11. But the question before the court isn't whether Kawleski engaged in dispicable conduct, it is whether a rational jury could find that the government proved all the elements of the federal crime, including the element that the crime involved an item that traveled in interstate or foreign commerce. The government failed to do so..."
> (Case 3:19-CR-00025, Document 74, page 8, ¶ 2)

This is an important fact, especially considering that the flash drive was not purchased or possessed by the Petitioner according to the new statements made by the government's star witness, Brown. Although the statute is vague as to who purchases or possesses an item that flowed through interstate commerce, then when the item is used in commission of a crime, it surely can not mean that anyone, at any time could have purchased the item after flowing through the interstate market. In this case the Petitioner did not purchase, possess or even have access to the flash drive that contained contraband video(s) for years. It was purchased and retained by Brown to use as leverage.

Granting this Writ would aid in reining in Congressional overreach with the Commerce Clause, such as in this case, and it is up to the United States Supreme Court to overturn Gonzales v Raich, 545 U.S. 1 (2005). Justice Thomas reiterated this standing in Standing Akimbo, LLC. v United States, 142 S. Ct. 919 (2021), coming to the conclusion that this issue must be heard and corrected.

"Before one can be punished for violation of a statute, it must be shown, that his offense is plainly within the statute." Fasulo v United States, 272 U.S. 620 (1926)

This has been reiterated time and time again through our country's history. the Framers wanted a fair system which would notify the public as to criminal offenses passed by Congress.

"There are no constructive offenses." McNally v United States, 483 U.S. 350 (1987).

Every statute presented to the American people must use clear common language so that the average person may read a statute, or portion thereof, and understand it's meaning. Because of our wide diversity through the country, such as educational differences, economic class structure, language barriers and unequal access to simple information due to technological limitations in underdeveloped or poor areas, Congress must be exceptionally careful to word each statute with a clear intent.

The Petitioner's indictment states the statutes he was charged, and later convicted of was 18 U.S.C. § 2251(a) for Count 1, which reads:

"Any person who employs, uses, persuades, induces, entices, or coerces any minor 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 transmitting a live 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 facilities 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 actually been transported in or transmitted using any means or facility of interstate or foreign commerce or mailed."

Or, as the United States Court of Appeals for the 11th Circuit has stated, "the most natural reading of this provision [18 U.S.C. § 2251(a)] is that jurisdiction extends to child pornography (1) produced with the intent that it eventually travel in interstate commerce; (2) produced with materials that have traveled in interstate commerce; or (3) that has traveled in interstate commerce." United States v Smith, 459 F.3d 1276 (2006);

It is important to note that simple intrastate production is not referenced in 18 U.S.C. § 2251(a), which the Petitioner was convicted under.

To use the simplified interpretation in Smith, under Section (1), jurisdiction could not be proper as there was never any intent for the material to be transported in interstate commerce. Further, under Section (3), jurisdiction was not proper because the produced materials (videos) had never traveled in interstate commerce.

Finally, under Section (2), it states that as long as the image was produced with materials that have traveled in interstate commerce prosecution may proceed. This particular section has been challenged in various courts. There were multiple rulings which stated it was an unconstitutional application of the Commerce Clause to regulate activity.

18 U.S.C.S. §§ 2251(a) and 2252A(a)(5)(B) are unconstitutional as applied to simple intra-state production and possession of images of child pornography, or visual depictions of minors engaging in sexually explicit conduct, when such images and visual depictions were not mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, nor intended for interstate distribution or economic activity of any kind, including the exchange of pornographic recordings for other prohibited material; statutes as applied to facts on which each count of indictment was based exceeded powers of Congress under Commerce Clause of U.S. Constitution. See United States v Matthews, 300 F. Supp. 2d 1220 (N.D. Ala. 2004), aaf'd, 143 Fed. Appx. 298, (11th Cir. 2005), vacated, remanded, 184 Fed. Appx. 868 (11th Cir. 2006).

For 2252(a)(4)(B)(simple intrastate possession) it was decided:

18 U.S.C.S. §§ 2252(a)(4)(B) was unconstitutional under U.S. Constitution Article I, § 8, Clause 3, as applied to a mother's simple intrastate possession of a pornographic photo of her daughter where photo had not been mailed, shipped, or transported interstate and was not intended for interstate distribution.

See United States v McCoy, 323 F.3d 1114, 2003 CDOS 2483, 2003 Daily Journal DAR 3129 (CA Cal. 2003).

See also United States v Stewart, 348 F.3d 1132 (9th Cir. 2003), "[A]t some level, everything owned is composed of something that once traveled in commerce. This cannot mean that everything is subject to federal regulation under the Commerce Clause, else that Constitutional limitation would be entirely meaningless. Congress's power has limits, and Courts must be mindful of these limits so as not to obliterate the distinction between what is national and what is local and create a completely centralized government."

The Courts were simply following the language of Congress as noted in United States v Lanier,117 S. Ct. 1219 (1997):

"The legislature possesses the power to define crimes and their punishment." And "[F]ederal crimes are defined by Congress, not by the Courts."

Then came the Supreme Court's ruling in Gonzales v Raich, 545 US 1 (2005) which stated that the Commerce Clause gives Congress the authority to regulate the national market for marijuana including the authority to proscribe the purely intrastate production, possession, and sales of this controlled substance. Because they ruled that Congress may regulate these intrastate activities based on their aggregate effect on interstate commerce, the courts began applying this stander to local intrastate production of child pornography under 18 U.S.C.§ 2251(a).

The "Aggregate Effects" Doctrine

The Supreme Court of the United States has held that "Congress may regulate, among other things, activities that have a substantial aggregate effect on interstate commerce," See Wickard v Filburn, 317 US 111, 125 (1942). this includes "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," See Gonzales v Raich, 545 US 1, 17 (2005), so long as those activities are economic in nature. See United States v Morrison, 529 US 598, 613.

Justice Thomas' dissenting opinion in Morrison, Section B states in part:

> "The majority also inconsistently contends that regulating respondents' conduct is both incidental and essential to a comprehensive legislative scheme. Ante, at 22, 24-25. I have already explained why the CSA's ban on local activity is not essential. Supra, at 64. However, the majority further claims that, because the CSA covers a great deal of interstate commerce, it "is of no moment" if it also "ensnares some purely intrastate activity." Ante, at 22. So long as Congress cast its net broadly over an interstate market, according to the majority, it is free to regulate interstate and intrastate activity alike. This cannot be justified under either the Commerce Clause or the Necessary and Proper Clause. If the activity is purely intrastate, then it may not be regulated under the Commerce Clause. And if the regulation of the intrastate activity is purely incidental, then it may not be regulated under the Necessary and Proper Clause."

This "aggregate doctrine", as applied, violates Due Process and protection against government interference with fundamental rights and individual liberty interests, and the rights to have each element of a crime proven beyond a reasonable doubt.

This purely intrastate incident of production of child pornography can in no way be construed as commerce or any type

of economic activity since it was not ever in interstate commerce, nor was it intended to be.

The incident of production of child pornography was not economic nor a gainful activity, but a purely private activity with no intentions of selling, buying, bartering, trading or tranporting for any purpose.

The statute in which Raich was convicted under the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq., which states in part:

> "(5) Controlled substances manufactured and distributed interstate cannot be differentiated from controlled substances manufactured intrastate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

This statute has a tangible link to intrastate commerce in the statute itself. Contary to being unable to tell the difference in locally manufactured controlled substances, it would be much easier for law enforcement to make the distinction between purely intrastate and interstate versions of child pornography. Law enforcement has databases that can be used to identify interstate child pornography, while purely intrastate versions of child pornography quite often have a local victim easy to identify, victims which will not be in the interstate database.

In the recent US Supreme Court case Standing Akimbo, LLC, et al., v United States, 141 S. Ct. 2236 (2021) Justice Thomas wrote:

> "Whatever the merits of Raich when it was decided, federal policies of the past 16 years have greatly undermined its reasoning." And,
> "If the government is now content to allow States to act "as laboratories""and try novel social and economic experiments," then it might no longer have authority to intrude on "[t]he States' core police powers...to define criminal law and to protect the health, safety and welfare of their citizens."

Congressional/Legislative Findings

The Congressional Findings for 18 U.S.C. § 2251(a), Child Pornography Prevention Act, July 27, 2006, P.L. 109-248, Title V, § 501, 120 Stat. 623, provides:

"Congress makes the following findings:

(1) The effect of the interstate production, transportation, distribution, receipt, advertising, and possession of child pornography on the interstate market in child pornography:

(A) The illegal production, transportation, distribution, receipt, advertising and possession of child pornography, as defined in Section 2256(8) of Title 18, United States Code, as well as the transfer of custody of children for the production of child pornography, is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole."

Under the above stated Act of July 27, 2006, it continues with the following:

"(B) A substantial interstate market in child pornography exists, including not only a multimillion dollar industry, but also a nationwide network of individuals openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving other child pornography in return."

There are no reports or citations to support the findings of there being a multimillion dollar industry. Monies can be exchanged for these items, but in fact each picture or video that an individual might be searching for can be found for free on various websites. This industry is no different than others. Intellectual property interests get lost on the internet. Pictures and videos get copied and posted elsewhere. Then anyone that comes across the image is able to download the image not only in secret, but for free, not affecting any market, not trading for them, nor exchanging money.

Under the above stated Act of July 27, 2006, it continues

with the following:

"(D) Intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce because:

(i) Some persons engaged in the production, transportation, distribution, receipt, advertising, and possession of child pornography conduct such activities entirely within the boundaries of one state. These persons are unlikely to be content with the amount of child pornography they produce, transport, distribute, receive, advertise, or possess. These persons are therefore likely to enter the interstate market in child pornography in search of additional child pornography, therefore stimulating the demand in the interstate market in child pornography.

(ii) When the persons described in subparagraph (D)(i) enter the interstate market in search of additional child pornography, they are likely to distribute the child pornography they already produce, transport, distribute, receive, advertise or possess to persons who will distribute additional child pornography to them, thereby stimulating supply in the interstate market in child pornography.

(iii) Much of the child pornography that supplies the interstate market in child pornography is produced entirely within the boundaries of one state, is not traceable, and enters the interstate market surreptitiously. This child pornography supports demand in the interstate market in child pornography and is essential to its existence."

In United States v Morrison, 529 US 598 (2000) the United States Supreme Court stated in part:

"In contrast with the lack of congressional findings that we faced in Lopez, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. See, e.g., H.R. Conf. Rep. No. 103-711, p 385 (1994); S. Rep. No. 103-138, p 40 (1993); S. Rep. No. 101-545, p 33 (1990). But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause regulation. As we stated in Lopez, "'[S]imply because Congress may conclude that a particular activity aubstantially affects interstate commerce does not necessarily make it so." 514 US at 557, n 2, 131 L Ed 2d 626, 115 S Ct 1624 (quoting Hodel, 452 US, at 311, 69 L Ed 2d 1, 101 S Ct 2352 (Renquist, J. concurring in judgement)). Rather, "'[w]hether particular operations affect interstate

commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" 514 US, at 557, n 2, 131 L Ed 2d 626, 115 S Ct 1624 (quoting Heart of Atlanta Motel, 379 US, at 273, 13 L Ed 2d 258, 85 S Ct 348 (Black, J. concurring)).

In NOW v Scheidler, 114 S Ct 798, 510 US 249, 260 (1994), the United States Supreme Court stated in part:

"We previously have observed that a 'statement of congressional findings is a rather thin reed upon which to base' a statutory construction."

Also in Scheidler, the Supreme Court went on to state:

"We also think that the quoted statement of Congressional findings is rather a thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of the Act." See H. J. Inc. v Northwestern Bell Telephone Co., 492 U.S. 229, 248, 109 S Ct 2893 (1989).

The term "intrastate" is neither mentioned nor implied in the statute, and there are no reports or citations to support the implications of economic motive. With the advent of the internet, anyone with a computer and a connection can easily access these images and videos anonymously, and for free.

In Morrison, 529 U.S. @ 674, (2000), it states in part:

"[t]he existence of congressional finding is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."

Federal and State Seperation of Powers

The Supreme Court's Commerce Clause jurisprudence emphasizes that, in assessing the constitutionality of Congress's exercise of its commerce authority, a relevant factor is whether a particular federal regulation trenches on an area of traditional state concern. See Morrison, 529 U.S. at 611, 615-16, 120 S. Ct. at 1750-51, 1753; Lopez, 514 U.S. at 561 n.3. 564-68, 115 S. Ct. at 1631 n.3, 1632-34. The Supreme Court has expressed concern that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." Morrison, 529 U.S. at 615, 120 S. Ct. at 1752; see also Raich, 545 U.S. at 35-36, 125 S. Ct. at 2216-17 (Scalia, J., concerring); Lopez, 514 U.S. at 557, 567-68, 115 S. Ct. at 1628-29, 1634; id. at 577, 115 S. Ct. at 1638-39 (Kennedy, J., concurring)(Stating that if Congress were to assume control over areas of traditional state concern, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. the resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power" (citation omitted)). Coupled with this consideration, the Supreme Court recognizes that the Constitution "withhold[s] from Congress a plenary police power." Lopez, 514 U.S. at 566, 115 S. Ct. at 1633; see also Morrison, 529 U.S. at 618-19, 120 S. Ct. at 1754; cf. Comstock, 560 U.S. at 126 , 130 S. Ct. at 1964 (Kennedy, J., concerring)(stating that the police power "belongs to the States and the States alone").

If accepted, and the conviction upheld in the instant case, reasoning would allow for Congress to regulate any crime as long as the nationwide, aggregated impact of that crime in any way effects interstate commerce through employment, production, transit or consumption, even if the crime wholly was contained within the boundaries of one state.

In the dissenting opinion of Taylor, Justice Thomas states:

"Finally, today's decision weakens logstanding protections for criminal defendants. the criminal law imposes especially high burdens on the government in order to protect the rights of the accused. The Government may obtain a conviction only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which (the accused) is charged." Winship, 397 U.S. at 364. those elements must be proved to a jury. Amdt. 6; see Alleyene, 570 U.S. at 99 (opinion of Thomas, J.)(slip op., at 3). Given the harshness of criminal penalties on "the rights of the individuals," the Court has long recognizedthat penal laws "are to be construded strickly " to ensure that Congress has indeed decided to make the conduct at issue criminal. United States v Wiltberger, 5 Wheat. 76, 95 (1820) (Marshall, C. J.). Thus before a man can be punished as a criminal under the federal law his case must be plainly and unmistakenly within the provisions of some statute." United States v Gradwell, 243 U.S. 476, 485 (1917). When courts construe criminal statutes, then, they must be especially careful. And when a broad reading of a criminal statute would upset federalism, courts must be more careful still. "(U)nless Congress

"conveys its purpose clearly," we do not deem it" to have significantly changed the federal-state balance in the prosecution of crimes." Jones v United States, 529 U.S. 848, 858 (2000)(internal quotation marks omitted)". - end Justice Thomas' quote.

Allowing for the Government to forego its burden to prove, beyond a reasonable doubt, that the Petitioner's intrastate production and possession of child pornography affected interstate commerce, will allow Congress to reach the sort of purely local crimes such as this; those crimes which the States prosecute.

In summary, the Petitioner's conviction and sentence should be set aside because "Congress cannot punish felonies generally." Cohens v Virginia, 6 Wheat. 264, 428 (1821).

"A criminal act committed wholly within a State "cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." United States v Fox, 95 U.S. 670, 672 (1878);

In the historic confirmation to the United States Supreme Court in 2022, Ketanji Brown Jackson brings to the High Court her insight into the limits of federal power under the Commerce Clause. While she was a US District Judge in D.C. she wrote an opinion in Osvatics v Lyft, 535 F.Supp.3d 1 (D.C. Cir. 2021). This opinion defined the difference of purely intrastate and interstate commerce. She explains there is a legitimate limitation to government's reach using the phrase "interstate commerce". She denied the expansion under this opinion due to minimal interstate incursion.

Ground Three

In the recent Supreme Court case Loper Bright Enterprises, et al., v Raimondo, Secretary of Commerce, et al., 144 S. Ct. 2244 (June 28, 2024) it was decided that government agencies do not the power to delegate interpretive authority to agencies. This would include the Department of Justice and the United States Attorney's Office.

In this instant case, the United States Attorney's Office made the decision that a prosecution jurisdiction was proper due to a PNY flash drive that was manufactured in New Jersey, bought and possessed by someone other than the Petitioner (government witness Brown), and was not known to be in existence by the Petitioner. This is a broad interpretation of the statute, and under Loper is not allowed. These responsibilities are the courts, and the courts alone.

Loper gives the following instructions:

> "Even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the court and give it to the agency. Congress expects courts to handle technical statutory questions." and,
>
> "Delegating ultimate authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguties is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch." and,
>
> "Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgement free from influence of the political branches. They were to construe the law with clear heads and honest hearts, not with an eye to policy preferences that had not made it into the statute."

Ground Four

The Sixth Amendment to the Constitution of the United States guarantees that an accused will not stand alone in Court without effective assistance of counsel through ALL stages of the criminal proceedings against him. See: Uhited States v Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L Ed. 2d 1169 (1967); The right to counsel attaches once judicial proceedings have been initiated against him. See also: Edwards v United States, 321 U.S. 769, 64 S.Ct. 523, 88 L Ed. 1064 (1944); And: Fuller v Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L Ed. 2d 642 (1974) "An indigent accused is entitled to free counsel 'when he needs it', that is, during every stage of criminal proceedings against him."

With the additional issues the petitioner raises, including questionable conduct by State Police and Federal Officers, Certiorari to the Supreme Court is a critical stage in the criminal process, no less crucial than the Appellate process, and the purpose of the Sixth Amendment is to insure that the accused will not suffer adverse judgement or lose the benefit of procedural protection because of his ignorance of law and criminal procedure. United States v Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740 (3rd Cir. 1979);

The 6th Amendment to the United States Consitution states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

In the plain language reading this text, the following rights are guaranteed:

1. Speedy Trial.
2. Public Trial.
3. Impartial Jury.
4. District wherein the crime was committed.
5. Informed of the nature and cause of the accusation.
6. To be confronted with the witnesses against him.
7. Process for obtaining witnesses.
8. Assistance of counsel for defense.

Whether each of these taken individually, or if they are so intertwined in a state in which they cannot be untangled from each other, they each fall under the opening phrase "in all criminal prosecutions".

"All" (adv.) is defined as: "to the full or entire extent: wholly"; (As quoted in Merriam Webster's Dictionary, 2014, page 30);

It is imperative the Court be consistent in the interpretation of the finality of criminal prosecution. In the previous U.S. Supreme Court cases Linkletter v Walker, 85 S.Ct. 1731, 381 U.S. 618 (1965)(Footnote #5); Allen v Hardy, 106 S.Ct. 2078, 478 U.S. 255 (1986)(Footnote #1); and Teague v Lane, 109 S.Ct. 1060, 489 U.S. 288 (1989)(Footnote #3); they each state:

> "By final we mean where the judgement of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed."

The United States Supreme Court has defined the finality of a judgement in Gonzales v Thaler, 132 S.Ct. 641 L. Ed. 2d 619, 565 U.S. 134:

"The Antiterrorism and Effective Death Penalty Act [AEDPA] of 1996's statute of limitations for federal prisoners seeking postconviction relief under 28 U.S.C.S. § 2255(f)(1) begins the 1-year statute of limitations from the date on which the judgement of conviction becomes final. The federal judgement becomes final when the United States Supreme Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or, if a petitioner does not seek certiorari, when the time for filing a certiorari expires. The argument that, if a petitioner declines to seek certiorari, the limitations period starts to run on the date the court of appeals issues its mandate, has been rejected." (Sotomayer J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ.);

"Thedirect review process for purposes of 28 U.S.C.S. § 2255(f)(1) either 'concludes' or 'expires,' depending on whether the petitioner pursues or forgoes direct appeal to the United States Supreme Court." (Sotomayer, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ.);

"The text of 28 U.S.C.S. § 2244(d)(1)(A), which marks the finality or the expiration of the time for seeking such review, consists of two prongs. Each prong-the 'conclusion of direct review' and the 'expiration of the time seeking such review' relates to a distinct category of petitioners. For petitioners who pursue direct review all the way to the United States Supreme Court, the judgement becomes final at the 'conclusion of direct review'-when the Supreme Court affirms a convictoin on the merits or denies a petition for certiorari. For all other petitioners, the judgement becomes final at the 'expiration of the time for seeking such review'-when the time for pursuing direct review in this Court, or in state court, expires. Where a petitioner did not appeal to the State's highest court, his judgement became final when his time for sekeing review with the State's highest court expired." (Sotomayer, J., joined by Roberts, CH.J., and Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ.);

The 8th Circuit, in Smith v Bowersox, 159 F.3d. 345 (1998), agreed with this definition of finality by the Supreme Court.

See also: Fed. R. Crim. Proc. Rule 44(a):

Right to and Appointment of Counsel:

"A defendant who is unable to obtain counsel is entitled to counsel appointed to represent the defendant at every stage of the proceeding from the initial appearance through appeal, unless the defendant waives this right."

IN this instant case the Petitioner received a letter from the Federal Defender Services of Wisconsin, Inc. on August 15, 2024 regarding counsel withdrawing services. Although the letter states the deadlines for filing a writ of certiorari to the Supreme Court, there are no directions as to how and what to argue. There is further timelines presented about a 2255 motion (1 year), although there are no instructions here either.

Counsel did not offer to assist with the case until the judgement is final, which would have been after certiorari. This violates the Sixth Amendment as stated herein.

This Court should reset the time to file a writ of certiorari, appoint counsel, and allow for a new filing while represented by counsel.

See Exhibit "A", letter from Federal Defender Services of Wisconsin, Inc.

CONCLUSION

This Writ brings the question of whether the district court and the Court of Appeals erred when the Government's case rested on Brown's testimony that she unexpectedly found a flash drive containing child pornography in the Petitioner's house and took it to the police, then, after trial, two new witnesses revealed that Brown made statements to them that contradicted testimony, and the lower courts failed to grant a new trial based upon new evidence.

Even the District Court Judge had problems with the credibility of Brown. In the Court transcripts (Appendix page 32, lines 1-5) the Court stated:

> "[A]nd so -- and the attack on Tracy Brown's credibility was sort of the centerpiece of your defense, so all that was on the table, and you tried to impeach her credibility, with some success in my view. I thought, I don't know, her story does not ring true in every detail"

It has been proven that there is reasonable probability that Brown was the one that "produced" the media that the government relied upon for prosecution. This happened years ago and she retained the copy to use as leverage, without the Petitioner knowing it's existence. The flash drive had no been possessed, in the control of, or even purchased by the Petitioner. As such, he does not meet the knowing prong of 18 U.S.C. § 2251 or 2252.

The government overstepped their Constitutional and within Congressional authority to prosecute a purely local crime, which did not meet the elements of the Petitioner using interstate materials in the commission of the crime.

The previous Supreme Court decision, Gonzales v Raich is outdated and Justice Thomas has pointed out that it creates overreach by the federal government. It is time for this case to be overturned and the power to police local crimes be returned to the States where it belongs.

The case needs to be remanded and reviewed as to if the government improperly made a factual determination through the interpretation of the Commerce Clause according to the new Supreme Court case Loper Bright v Raimondo.

Under the Sixth Amendment the Petitioner was entitled to assistance of counsel through all stages of the criminal proceedings against him. This includes the Appeal that counsel bailed on, and preparation of a Writ of Certiorari to this Court. With this in mind, the case should be remanded, counsel appointed and a new Writ to be perfected and filed with assistance of counsel, as the Constitution guarantees.

Prayer

Wherefore the Petitioner prays this Honorable Court hear this Writ of Certiorari.

Alex Kawleski
Alexander Kawleski
11504-090

Service

The Petitioner now certifies and declares that he has served the Solicitor General of the United States with a of the Writ.

Executed: 10/18/2024

Alex Kawleski
Alexander Kawleski
11504-090