

No. _____

IN THE
Supreme Court of the United States

RICHARD GEASLAND,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the Seventh Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the plain-error standard of review, may a federal appellate court find that the error is not plain because the court could, theoretically, adopt a legal standard under which the claim would fail?

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PETITION FOR A WRIT OF CERTIORARI

Richard Geasland respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 694 Fed. App'x 422 (7th Cir. 2017). (App. 1-24.)

JURISDICTION

The Seventh Circuit issued its opinion on August 16, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The underlying legal issue (that the Seventh Circuit reviewed for plain error) is about 18 U.S.C. § 2252 (b)(2), which states in relevant part:

Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if . . . such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

STATEMENT OF THE CASE

Geasland pled guilty to possession of child pornography. At sentencing, one issue was in dispute. The government argued that the court had to apply a mandatory-minimum 10-year sentence for child-pornography defendants who have previously been convicted of certain sex offenses. The defense argued that although Geasland's prior conviction, for first-degree sexual assault of a minor under Wisconsin law, might look like it could serve as a predicate, the statute of conviction in effect at that time is not, in fact, a categorical match with any federal sex crime. *See* 18 U.S.C. § 2252(b)(2).

In making this argument, Geasland emphasized that the statute of conviction covered simple battery to a minor's "intimate parts," which encompassed a broader swath of conduct than any federal sex crime. *See State v. Olson*, 335 N.W.2d 433, 436–37 (Wis. Ct. App. 1983) (twisting and pulling minor victim's penis); *State v. Bonds*, 477 N.W.2d 265, 267 (Wis. 1991) (related statutory provision covering twisting adult victim's nipple).

Ultimately, the district court ruled for the government, and applied the 10-year minimum. At sentencing, the district court calculated Geasland's guideline range as 51–63 months' imprisonment. But because the mandatory minimum applied, the court sentenced him to 120 months. It observed that "[t]his would be a very hard sentencing decision if not for the mandatory minimum."

On appeal, Geasland emphasized a different point of distinction between the state statute of conviction and the comparator federal sex crimes. He again cited *Olson* and *Bonds*, but he also pointed out that there was a clear age discrepancy between the state and federal sex

crimes. The relevant federal statutes cover minors *under* 12, while the Wisconsin statute at issue (from 1984) covered minors *12 and under*. The government did not dispute that this was a distinction between the relevant state and federal law, and that there were additional distinctions between the relevant state law and other strict-liability sexual-assault laws. The government instead argued that the court of appeals was not required to apply the strict categorical analysis mandated in Armed-Career-Criminal-Act cases like *Taylor v. United States*, 495 U.S. 575, 599–602 (1990), and *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). The government argued that under a more relaxed analysis, the court of appeals could find that Geasland’s prior conviction constituted a mandatory-minimum predicate offense.

The Seventh Circuit determined that *if* the strict categorical approach of *Taylor* and *Mathis* applies to § 2252(b)(2), with the federal counterpart offenses as comparitors, Geasland would prevail: “At this point, there is no dispute that the Wisconsin offense of which Geasland was convicted is broader than its federal counterpart to the extent that the victim of the state offense could be as old as 12, whereas the federal statute caps the victim’s age at 11. The age mismatch between the two statutes is obvious, in retrospect, and it would be dispositive for purposes of the plain error analysis assuming that there necessarily must be 1:1 correspondence between the elements of the state and federal offenses.” *Geasland*, 694 Fed. App’x at 435.

But the court of appeals declined to say whether federal law requires this sort of 1:1 correspondence.¹ It applied the plain-error standard of review, finding that although Geasland had argued that his prior conviction was not a § 2252(b)(2) predicate offense at the district court level, the argument was different enough on appeal that plain-error review was appropriate. Then it found that to establish plain error, Geasland would have to show “that there is no alternative [legal] rationale pursuant to which section 2252(b)(2) might have required him to be sentenced to a term of no less than 10 years.” *Geasland*, 694 Fed. App’x at 435. It surveyed other circuit decisions and found that some other circuit courts had not applied the categorical approach to § 2252(b)(2) questions. Thus, it held that there was no plain error here. *Geasland*, 694 Fed. App’x at 440.

¹ For what it’s worth, the Seventh Circuit previously used what seemed to be 1:1 correspondence. See *United States v. Osborne*, 551 F.3d 718, 721 (7th Cir. 2009) (“Given the lack of a definition in § 2252, we think it best to say that, as a matter of federal law, sexual behavior is ‘abusive’ only if it is similar to one of the crimes denominated as a form of ‘abuse’ elsewhere in Title 18. This is the approach the Supreme Court took in *Begay v. United States*, 553 U.S. 137 (2008), to the definition of a ‘violent felony’ under 18 U.S.C. § 924(e)(2)(B)(ii).”).

REASON FOR GRANTING REVIEW

- I. This Court should grant review to clarify that under plain-error review, the appellant need not show that there is no plausible legal theory under which he would lose.**

A federal court of appeals “should correct a plain forfeited error affecting substantial rights if the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Olano*, 507 U.S. 725, 736 (1993). This Court has refined the plain-error standard over the years, and it is currently considering a case regarding this standard. *Rosales-Mireles v. United States*, 16–9493 (U.S.). The Court has never suggested that an appellant facing the plain-error standard of review must show that there is no plausible legal theory under which he would lose.

In this case, the Seventh Circuit did not find that it *could not* ascertain the legal standard applicable to § 2252(b)(2).² Geasland pointed out that the Seventh Circuit previously held that the section at least required close similarity with a federal sex offense. *Osborne*, 551 F.3d at 721. This Court recently held that the Due Process Clause requires recidivist sentencing statutes to have clear, consistent standards for which prior offenses count as predicates. *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding that ACCA’s “residual clause” is unconstitutionally vague). And this Court also recently clarified that the Sixth Amendment bars sentencing courts from taking the factual circumstances of a prior offense

² It is, of course, the province of the courts to say what the law is. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

into account in the determination of whether it is a recidivist-sentence-enhancement predicate. *Mathis*, 136 S. Ct. at 2252. Thus, Geasland argued, although there was no precisely on-point opinion out of this Court or the Seventh Circuit, under existing precedent, it was clear that Geasland's prior offense was not a § 2252(b)(2) predicate. Neither the federal sex offenses nor any other law that could be used as a clear, consistent, elements-focused comparator for § 2252(b)(b) would encompass a strict-liability state offense with an age cut-off of 13, and which included simple battery to any intimate part (including nipples and buttocks).

The Seventh Circuit did not agree or disagree with this proposition. It simply found that since some circuit courts have applied a flexible standard to the determination of what is a § 2252(b) predicate (mostly pre-*Johnson* and *Mathis*), the court would not actually assess Geasland's argument. According to the Seventh Circuit, under plain-error review, the lack of perfect clarity and consistency in the law was enough to defeat Geasland's legal argument. *Geasland*, 694 Fed. App'x at 435, 440.

The Seventh Circuit's interpretation of the plain-error-review standard is anomalous. This Court has never suggested that an appellant must convince the appellate court that there is no other plausible legal standard—right or wrong—under which he would lose. The question is whether under the correct legal standard, there was a plain error. In *Olano*, this Court's seminal case on the plain-error standard, the underlying legal question was not conclusively established, yet everyone—the parties and the Court—assumed that the error could be plain. See 507 U.S. at 738 (“The Government supposes

that there was indeed an ‘error’ in this case, on the premise that Rule 24(c) is nonwaivable, and we assume without deciding that this premise is correct.”) (citation omitted).

This issue may not be “cert worthy” on its own, giving the unusual nature of the Seventh Circuit opinion. But this Court has a plain-error case pending now, and thus the Court will likely reaffirm or re-center the plain-error standard of review in its upcoming term. And that newly articulated (or rearticulated) standard in *Rosales-Mireles v. United States*, 16–9493, should be used by the Seventh Circuit to decide whether a petitioner must eliminate *all* alternative rationales, including those not within Circuit precedent, before it can establish plain error.

Thus, to the extent that this Court does not actually take up Geasland’s case, the Court should hold it in abeyance until *Rosales-Mireles* is decided. Then, it should grant the petition and remand the case to the Seventh Circuit to analyze Geasland’s argument under whatever standard this Court articulates in *Rosales-Mireles*.

CONCLUSION

For the reasons stated, Geasland asks this case to hold his case in abeyance until *Rosales-Mireles* is decided. Then, he asks the Court to grant the petition for certiorari review.

Dated this 13th day of November, 2017.

Respectfully submitted,

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