

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC JUNOD

— PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Eric Junod

(Your Name)

4004 East Arkona Road

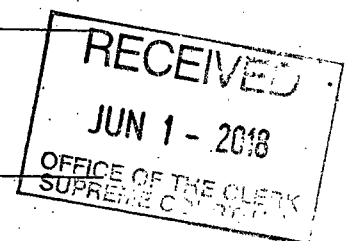
(Address)

Milan, MI 48160

(City, State, Zip Code)

N/A

(Phone Number)



QUESTION(S) PRESENTED

- 1) Whether Certiorari review is warranted where, as here, the Petitioner has demonstrated a plain error sentencing violation and a violation of his substantial rights based upon an undeniable and indefensible sentencing result notwithstanding an otherwise binding appeal waiver.
- 2) Where Certiorari review is warranted to establish a uniform application of the miscarriage of justice exception to enforcement of an otherwise binding appeal waiver.
- 3) Whether the United States Supreme Court's decision in Dimaya requires reversal where, as here, 18 U.S.C. § 2422(b)'s definition of sexual activity is unconstitutionally void for vagueness.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was FEBRUARY 28, 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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STATEMENT OF THE CASE

In August 2015, Junod met a 15-year-old girl, Minor Victim 1, or MV-1, on social media application Meet 24. Defendant was living in Holly, Michigan. Defendant and MV-1 communicated using Meet24 several times per day and through those communications, Defendant befriended MV-1 and learned her age. Defendant persuaded and coerced MV-1 into producing sexually explicit images and videos of herself and her genitalia and sending those images and videos of herself to him through the internet. Production of child pornography is a federal and state criminal offense for which any person can be charged. Meet24 is a social media application that is accessed through the internet, a means or facility of interstate or foreign commerce.

Defendant used several other social media sites to receive, trade and distribute child pornography with other users. Junod stored child pornography materials in his iPhone and DropBox account.

REASONS FOR GRANTING THE PETITION

Question Presented #1

Circuit Courts are generally in accordance in the view that appeal waivers are enforceable, without exception, unless it can be sufficiently established that a defendant's substantial rights have been violated. See e.g. United States of America v. Morales, 709 Fed. App'x 93 (2d Cir. 2018), United States v. Mascarella, 2018 U.S. App. LEXIS 4073 (6th Cir. 2018), United States v. Vobak, 2018 U.S. App. LEXIS 6193 (9th Cir. 2017).

In the instant case, Junod has undeniably established that the District Court's imposition, at sentencing of a five-point enhancement, pursuant to U.S.S.G. § 4B1.5(b) for a "pattern" of conduct based solely on conduct encompassed within the charged offense, was clearly erroneous. Critically, as well, Junod submits, the erroneous enhancement application violated his substantial rights.

U.S.S.G. § 4B1.5(b) is entitled "Repeat and Dangerous Sex Offender Against Minors" and is in Chapter 4 of the Sentencing Guidelines, which covers "Criminal History and Criminal Livelihood." Congress intended that the courts use this section to protect minors against repeat sex offenders. The Court below applied the Guideline, despite Mr. Junod's pristine criminal history. The Guideline does not apply to Mr. Junod.

The Court below also erred because there was not a pattern of activity involving the prohibited sexual conduct. Section 4B1.5(b) is applied when the following criteria are met:

- (b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither § 4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:
 - (1) The offense level shall be 5 plus the offense level determined under Chapter Two and Three....

(See Attachment)

ATTACHMENT

REASONS FOR GRANTING THE PETITION CONT.

Id. (emphasis added) The Commentary and Application Notes to U.S.S.G. § 4B1.5 provide the following relevant commentary:

4. Application of Subsection (b)

(A) Definition. -- For purposes of subsection (b), "prohibited sexual conduct" means any of the following: (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Pattern of Activity --

(i) In General. - For purposes of subsection (b), the defendant engaged in a pattern of activity involving sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.

(ii) Occasion of Prohibited Sexual Conduct. - An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

This Court can review a sentence for both procedural and substantive unreasonableness. United States v. Ruiz, 777 F.3d 315, 319 (6th Cir. 2015).

"A court will be deemed to have abused its discretion and imposed a procedurally unreasonable sentence if it failed to calculate the Guidelines range properly; treated the Guidelines as mandatory; failed to consider the factors prescribed at 18 U.S.C. § 3553(a); based the sentence on clearly erroneous facts; or failed to adequately explain the sentence." United States v. Coppenger, 775 F.3d 799, 803 (6th Cir. 2015).

As Chief Judge Jacobs of the Second Circuit Court explained, "it is more than dubious for the prohibited sexual conduct to be the very offense that is being enhanced."

Leaving aside that a pattern usually is more than two and that a normal reading of "pattern" is best supported by a pattern enhancement when there are two predicates (which may occur during the commission of the enhanced offense) plus the offense itself, the majority opinion contends that "during the course of the instant offense," U.S.S.G. § 4B1.5 cmt. N.4(B)(ii), invites counting the very offense being enhanced. Maj. Op. At 285 & nn. 22-23. The majority relies on two out-of-circuit opinions that are unpersuasive: the quoted passages, consigned to footnotes, are dicta. In those cases, each defendant committed at least two (and, in one case, more than on hundred) predicate acts actually counted to establish a pattern, separate from the offense of conviction. See United States v. Al-Chalan, 610 F.3d 945, 955 (6th Cir. 2010); United States v. Rothenberg, 610 F.3d 621, 625-27 (11th Cir. 2010).

The wording of the commentary is that a predicate 'may be considered whether the occasion [inter alia] occurred during the course of the instant offense.' U.S.S.G. § 4B1.5 cmt. n.4(B)(ii) (emphasis added). If a pattern enhancement was meant to be applied to count a predicate that is the instant offense, the Guidelines would allow the enhancement if the instant offense is a "covered sex crime" and the defendant has committed one other predicate act.

United States v. Broxmeyer, 699 F.3d 265, 301 n.6 (2d Cir. 2012) (Jacobs, C.J., dissenting) (emphasis original). As Judge Jacobs notes, it is difficult to understand why the application note would specify that an "occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion...occurred during the course of the instant offense" if the "instant offense" may itself be counted. Like Judge Jacobs, the Court should reject application of the enhancement when the pattern of activity is the crime of conviction.

The Application Note defining "pattern" as "two or more separate instances" is a plainly erroneous reading of the guideline and should be disregarded. See Stinson v. United States, 508 U.S. 36 (1993) (holding that guideline commentary "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline").

Mr. Junod's base offense was inappropriately increased by five-levels under U.S.S.G. § 4B1.5(b) solely on the district court's finding that Mr. Junod engaged in a pattern of activity. (Sentencing Transcript, RE 95, Page ID # 1112-1125) The specific activity was:

In August 2015, Junod met a 15-year-old girl, Minor Victim 1, or MV-1, on social media application Meet24. Defendant was living in Holly, Michigan. Defendant and MV-1 communicated using Meet24 several times per day and through those communications, Defendant befriended MV-1 and learned her age. Defendant persuaded and coerced MV-1 into producing sexually explicit images and videos of herself and her genitalia and sending those images and videos to him through the internet. Production of child pornography is a federal and state criminal offense for which any person can be charged. Meet24 is a social media application that is accessed through the internet, a means or facility of interstate or foreign commerce.

Defendant used several other social media sites to receive, trade and distribute child pornography material with other uses. Junod stored child pornography materials in his iPhone and DropBox account.

(Rule 11, RE 64, Page ID # 765-766;). Thus, the instant conviction includes all of Mr. Junod's online enticement and coercion of a minor during the month of August 2015.

The events relied on by the district court to find Mr. Junod guilty of a single count of Online Enticement and Coercion of a Minor of Child, were also used by the district court to find a pattern of activity. The requisite "two separate occasions" are part and parcel of the charged offense and do not, as a matter of law, constitute the pattern required for enhancement. This Court has held that it is proper to utilize the offense of conviction "as one of the two instances of prohibited sexual conduct required to support the district court's application of U.S.S.G. § 4B1.5(B)(1)." United States v. Corp, 668 F.3d 379, 392 (6th Cir. 2012). The enhancement may apply without regard to whether there exists two separate occasions that "occurred during the course of the instant offense," but the "separate occasions" cannot constitute the instant offense. In Mr. Junod's case, while there were acknowledged multiple separate occasions, all of the separate occasions were part of the plea rendered by Mr. Junod under the single count for which he was convicted. The district court in applying the five-point enhancement utilized the occasions under the conviction as both "separate occasions." This is not supported by the Guideline or by case law.

For this reason, this Court should find that the district court erroneously interpreted the guidelines and abused its discretion in applying the five-point enhancement solely on the basis of the conduct comprising the underlying charge, and require resentencing.

Junod respectfully submits that where, as here, this is an indisputable and plainly erroneous and materially impactful sentencing error, it has been established, as a matter of law as well, that Junod's substantial rights have been violated to activate the otherwise, virtually "bulletproof" enforceability of plea agreement appeal waiver. To rule otherwise would severely undermine the best miscarriage of justice review standard.

Junod asserts that the constitutional importance of this issue warrants Certiorari review at this time to best preserve constitutional integrity and the rule of law.

Junod additionally submits that the District Court similarly erred as a matter of law, in its application of a two-point enhancement pursuant to U.S.S.G. § 2G2.1(b)(6)(B) for a "pattern of conduct," based solely on conduct encompassed within the charged offense.

The district court applied a two-level enhancement pursuant to U.S.S.G. § 2G2.1(b)(6)(B), which states:

If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved...the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by two levels.

The hypocrisy of § 2G2.1 is it directs the Court to treat the delivery of physical photographs that cannot be password protected and watching child pornography on a 60" UHD television as less serious than using a 13" personal laptop computer. It happens because the guideline is an anachronism.

During the 1990's Congress directed the Sentencing Commission to increase

punishments for those who used computers to either mass distribute child pornography or to circumvent detection by the post office. Congress conflated those goals and treated all computer use the same. Within a year, the U.S. Sentencing Commission recognized the injustice the new Guideline created:

"This adjustment does not distinguish between people who email image to a single voluntary recipient, and those who establish a BBS and distribute child pornography to large numbers of subscribers...Not all computer use is equal and sentencing policy should be sensitive to these differences in culpability so that punishments are tailored to fit the circumstances of each individual's case...the difference between print and computerized porn is not in the content of the images, but the means of distribution. The seriousness of a crime involving computerized trafficking in child pornography depends in part on 1) the degree to which the computer facilitates the widespread and instantaneous distribution of images, and 2) the degree to which it decreases the likelihood that children will be exposed to the images."

See U.S. Sentencing Commission, Report to Congress, Sex Offenses Against Children at 29 (1996).

The world has changed drastically. Computers infiltrate every facet of our lives to the point that we carry one in our pocket in the form of a smart phone. They transmit videos and pictures in seconds, not days. And they give offenders who otherwise would not take the risk a false sense of security and anonymity. For this reason, 96.3 percent of offenders receive the use of a computer enhancement. See U.S. Sentencing Commission, Federal Child Pornography Offenses at 209 (2012).

As pertinent, the use of a computer does not indicate an aggravating factor much of the time. See Troy Stabenow, A Method for Careful Study, A Proposal for Reforming the Child Pornography Guidelines, 24 Fed. Sent'g Rep. 108, 122 (2011). Law enforcement now maintains a constant internet presence that monitors suspicious files and activities. Sophisticated software allows the government to examine shared files without seeking a search warrant or entering a home. In the 21st Century, a person may stumble across addiction to child pornography in the privacy of their home, as opposed to the past when it took careful planning and research to find offline material. The latter

indicates increased culpability and dangerousness Id.; U.S. Sentencing Commission, Child Pornography at 209.

The application of the Guideline creates an injustice, as it fails to distinguish Mr. Junod from a mass distributor who profits off the production and distribution of child pornography. The injustice is even more stark in Mr. Junod's case, as he lacks any criminal history which shows he lacks the culpability and dangerousness that the Guideline intended to punish.

Finally, Mr. Junod pleaded guilty to Attempted Online Enticement and Coercion of a Minor of Child, in violation of 18 U.S.C. § 2422(b). This is a violation that, in its title, acknowledges we have moved into a digital era, by recognizing that this type of offense is performed with the use of a computer. The statute indicates that anyone using "any facility or means of interstate or foreign commerce" is subject to punishment when engaging in its prohibited conduct with minor children. Allowing the government to add a two-point enhancement for the same actions that are required under offense of conviction punishes Mr. Junod twice for the same offense.

For these reasons, the Court should find that the district court erroneously interpreted the guidelines and abused its discretion in applying the two-point enhancement, and require resentencing.

Junod asserts that the constitutional importance of this issue warrants Certiorari review at this time to best preserve constitutional integrity and the rule of law.

Question Presented #2

Circuit Courts have varied in their view and in their rulings in what constitutes a sufficient degree of prejudice to activate the miscarriage of justice exception to an otherwise enforceable appeal waiver. See e.g. United States v. Teeter, 257 F.3d 14, 25 U.S. App. LEXIS 16509 (1st Cir. 2001);

United States v. Atterberry, 144 F.3d 1299, 1301 (10th Cir. 1998); United States v. Andis, 333 F.3d 886, 891 (8th Cir. 2003); United States v. Khattak, 273 F.3d 557, 562 (3d Cir. 2001) and United States v. Velez-Luciano, 814 F.3d 553 (1st Cir. 2016).

In Teeter, the Circuit Court, confronted with the miscarriage of justice exception, in a context factually analogous to the instant case, reasoned as follows:

"One court has held that a blanket assurance about the right of appeal, delivered when sentence is pronounced, cancels a preexisting waiver of appellate rights. United States v. Buchanan, 59 F.3d 914, 917-18 (9th Cir. 1995) (holding that the sentencing court's statement created "a reasonable expectation" on the defendant's part that he could appeal his sentencing notwithstanding the preexisting waiver). Other courts have disagreed, e.g., United States v. Atterberry, 144 F.3d 1299, 1301 (10th Cir. 1998); Michelsen, 141 F.3d at 872, and so do we. While broad assurances to a defendant who has waived her appellate rights (e.g., "you have a right to appeal your sentence") are to be avoided -- they muddy the waters and tend to instill false hope -- they do not affect a per se nullification of a plea-agreement waiver of appellate rights. Whether such assurances may constitute reversible error in particular cases, and if so when, are matters that may be left for another day.

We add a coda. We have endeavored to provide general guidance to the district courts and the bar concerning plea-agreement waivers of appellate rights. We caution, however, that because such waivers are made before any manifestation of sentencing error emerges, appellate courts must remain free to grant relief from them in egregious cases. When all is said and done, such waivers are meant to bring finality to proceedings conducted in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries (however harsh, unfair, or unforeseeable). Our basic premise, therefore, is that if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse the honor to waiver. As a subset of this premise, we think that the same flexibility ought to pertain when the district court plainly errs in sentencing.

In sum, we conclude that plea-agreement waivers of the right to appeal from imposed sentences are presumptively valid (if knowing and voluntary), but are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver, [257 F.3d 26] albeit on terms that are just to the government, where a miscarriage of justice occurs. In charting this course, we recognize that the term "miscarriage of justice" is more a concept than a constant. Nevertheless, some of the considerations come readily to mind: the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result. Other considerations doubtless will suggest themselves in specific cases."

Based upon the holding of Teeter, and, in light of conflicting precedent regarding the appropriate scope of what constitutes a miscarriage of justice so as to defeat an otherwise binding appeal waiver, Certiorari review is necessary to resolve the existing circuit authority split at this time.

Question Presented #3

On April 17, 2018, the United States Supreme Court ruled that where a criminal defendant is mandatorily removed pursuant to his/her conviction of an aggravated felony pursuant to the Immigration and Nationality Act, the Act's definition of an aggravated felony is impermissibly vague and is, therefore, void for vagueness.

Chief Justice John G. Roberts, in his dissent in Dimaya, has indicated that the decision could jeopardize other laws/federal statutes, including sex offenses.

In the instant case, the Petitioner respectfully submits that 18 U.S.C. § 2422(b) is impermissibly vague and prevents an ordinary person from objectively appreciating what specific conduct constitutes criminally violative activity. Without reasonably appropriate notice of what constitutes the violative activity, the Petitioner submits, the statute is void for vagueness and, accordingly, his conviction cannot stand.

The Ninth Circuit Court of Appeals in United States v. X-Citement Video Inc., 982 F.2d 1285 (9th Cir. 1992) ruled that 18 U.S.C. § 2252 was "unconstitutional on its face."¹ The Petitioner submits that the Circuit Court's reasoning is instructive at this time and lends great credence to the notion that § 2422(b) is impermissibly void for vagueness consistent with the holding in Dimaya.

¹: While the United States Supreme Court subsequently reversed the holding of the Ninth Circuit both the Circuit Court and Supreme Court's dissenting opinions remain of influence particularly in light of the holding in Dimaya.

In the instant case, Junod respectfully submits his conviction pursuant to 18 U.S.C. § 2422(b) is similarly unconstitutionally void for vagueness. 18 U.S.C. § 2422(b) states as follows:

"(b) Whoever, using the mail or any facility or means of interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life."

Several Circuit Courts have considered the question of § 2422(b)'s constitutionality and have, in addition, "touched on" the undue vagueness of § 2422(b)'s inclusion of the term "sexual activity". See e.g. United States v. Taylor, 640 F.3d 255, 257-60 (7th Cir. 2011); United States v. Shill, 740 F.3d 1347, 1351-52 (9th Cir. 2014) ; United States v. Fugit, 703 F.3d 248, 254-56 (4th Cir. 2012).

In Taylor, the Seventh Circuit stated as follows:

"Sexual activity" is not a defined term in the federal criminal code (Title 18). Chapter 117 of the code, which contains section 2422, doesn't have a definition section. The next section after section 2422 states that as used in that next section "the term 'illicit sexual conduct' means ...a sexual act (as defined in section 2246) with a person under 18 years of age." 18 U.S.C. § 2423(f). The relevant part of section 2246, which appears in Chapter 109A of Title 18, defines "sexual act" as "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years." 18 U.S.C. § 2246(2)(D). The defendant was not charged with attempting to touch the supposed girl, and of course that would be impossible in an online chat room. So if section 2422(b) criminalized a "sexual act" rather than "sexual activity", it would be reasonably clear that he could not be convicted, unless the definition of "sexual act" elsewhere in Title 18 were thought to cast no light on its meaning in section 2422(b). On the contrary, we have previously used definitions found in Chapter 109A (the chapter in which section 2246, defining "sexual act," appears) to assist in interpreting provisions in other chapters of Title 18 that punish sexual crimes. United States v. Osbourne, 551 F.3d 718, 720 (7th Cir. 2009). Section 2422(b) is one of those provisions.

We need to decide whether "sexual activity" encompasses a broader range of acts than "sexual act." If it did, one would expect the term to be defined in the statute, to indicate just how broad that range was. Is watching a pornographic movie, or a pole dancer, or a striptease artist, or Balthus's erotic paintings, or Aubrey Beardsley's pornographic

sketches, or Titian's "Rape of Europa," or "Last Tango in Paris" a "sexual activity"? How about inducing someone to watch one of these shows? Wikipedia defines "sexual activity" very broadly; the Wikipedia entry for "Human Sexual Activity" says that "sexual activity...includes conduct and activities which are intended to arouse the sexual interest of another, such as strategies to find or attract partners (mating and display [640 F.3d 258] behavior), and personal interactions between individuals, such as flirting and foreplay." "Human Sexual Activity," activity (visited April 1, 2011). Does the government think that the term "sexual activity" in 18 U.S.C. § 2422(b) includes flirting? Well, how about "flashing"? That is "sexual activity" in the literal sense, though it does not involve physical contact and so is not a "sexual act." It is generally considered a rather minor sex crime, certainly not the sort of crime for which a minimum of 10 years in prison is a proper sentence. In Indiana, for example, "a person at least eighteen (18) years of age who knowingly or intentionally, in a public place, appears in a state of nudity with the intent to be seen by a child less than sixteen (16) years of age commits public indecency, a Class A misdemeanor." Ind. Code § 35-45-4-1 (b). And the maximum prison sentence for a Class A misdemeanor is only one year. § 35-50-3-2. Yet if the government's broad conception of "sexual activity" were accepted, then by virtue of that misdemeanor law a flasher in the lobby of the federal courthouse in South Bend, if charged under 18 U.S.C. § 2422(b), would be courting a prison sentence of at least 10 years.

One possible inference from the absence of a statutory definition of "sexual activity" is that the members of Congress (those who thought about the matter, at any rate) considered the terms "sexual act" and "sexual activity" interchangeable. This inference is reinforced by the fact that until 1998 section 2422(b) used the term "sexual act," while the preceding subsection, 2422(a), used "sexual activity," even though two subsections were otherwise very similar, except that (a) concerns transporting minors across state lines rather than interstate solicitation and specifies a considerably lighter punishment (no minimum and a maximum of 20 years versus a 10-year minimum and a maximum of life in (b)). In 1998, "sexual act" in (b) was changed to "sexual activity," but the committee report uses the terms "sexual activity" and "sexual act" interchangeably indicating that the terms have the same meaning—that the purpose of the wording change from "sexual act" to "sexual activity" was merely to achieve semantic uniformity of substantively identical prohibitions, rather than to broaden the offense in (b). H.R. Rep. No. 105-557, at 10, 20 (1998), reprinted in 1998 U.S.C.C.A.N. 678, 679, 688. This implication that Congress regards "sexual activity" as a synonym for "sexual act" is further supported by the fact that the statute brackets "sexual activity" with "prostitution," which involves physical contact. We find nothing in the 1998 amendment or its discussion by members of Congress to suggest a legislative purpose of subjecting less serious sexual misconduct (misconduct involving no physical contact) to the draconian penalties in subsection (b).

Elsewhere in the vast body of federal statutory law we find scattered references to "sexual conduct," "sexual act," and "sexual activity" or "sexual activities," but the terms seems to be regarded as synonymous, as in 42 U.S.C. § 608(a)(7)(C)(iii)(IV), which defines "battered or subject o extreme cruelty" to include "being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or

activities." It would be unrealistic to suppose that Congress never uses synonyms - that every word or phrase in a statute has a unique meaning, shared by no other word or phrase elsewhere in the vast federal code.

One might think that "sexual activity" connoted a series of acts rather than a single act: for example, being a sexual predator rather than committing a single [640 F.3d 259] act of sexual predation, or being a prostitute. But that is not argued (it would make the express reference to prostitution in the statute redundant, though many statutes are littered with redundancies), and anyway there is a separate provision for enhanced punishment of sex-crime recidivists. 18 U.S.C. § 2426.

The government argues that as a matter of ordinary usage, "sexual activity" includes masturbation. True - but so does "sexual act." Yet Congress as we know defined "sexual act" as excluding sex acts that do not involve physical contact between two people. If "sexual activity" is no broader than "sexual act," it doesn't include solitary sex acts either. Congress elsewhere has defined "sexually explicit conduct" to include masturbation, but that's in a statute (18 U.S.C. § 2256(A)) that criminalizes films and videos of children masturbating. (Maybe the defendant in this case could have been charged with attempting to produce child pornography because he asked the supposed minor to masturbate for him on her webcam. See 18 U.S.C. § 2252(a)(1), (b)(1). She said she had no webcam.)

The government acknowledges that "sexual activity for which a person can be charged with a criminal offense" is explicitly defined to include producing child pornography. 18 U.S.C. § 2427. Explicitly defining sexual activity to include producing child pornography was needed only if the term "sexual activity" requires contact, since the creation of pornography doesn't involve contact between the pornographer and another person; this is further evidence that "sexual activity" as used in the federal criminal code does require contact.

Last the government cites cases in which courts have referred to masturbation as a form of sexual activity. In none was the question that this appeal presents raised. In one the court treated "sexual activity" as a synonym for "sexual acts". United States v. Lee, 502 F.3d 447, 448 (6th Cir. 2007). In two others, United States v. Root, 296 F.3d 1222, 1235-36 (11th Cir. 2002). and United States v. Tello, 600 F.3d 1161, 1163 (9th Cir. 2010). the defendant intended to have sexual intercourse with the (supposed) girl that he met in the chat room, and he actually traveled to meet her. United States v. Holt, 510 F.3d 1007, 1009 (9th Cir. 2007), a case not cited by the government, is similar to Root and Tello: the defendant traveled in order to meet and have sex with the supposed minor. The unreported decision in United States v. Wales, 127 Fed. App'x 424 (10th Cir. 2005), involved facts similar to those of this case, but again masturbation was merely presumed to be sexual activity within the meaning of section 2422(b). In our case of United States v. Cochran, 534 F.3d 631, 634 n.3 (7th Cir. 2008) - another case factually similar to the present one - the question of the meaning of the term "sexual activity" in section 2422(b) was neither raised by the appellant nor answered by the court. Finally, United States v. Womack, 509 F.2d 368, 372 n.4 (166 U.S. App. D.C. 35 (D.C. Cir. 1972)). was a pornography case; it had nothing to do with section 2422(b), and merely illustrates (as do the other cases

cited by the government) that masturbation is a form of "sexual activity" in the ordinary-language sense of the term, which judges use on occasion just as laypersons do. Masturbation is also a "sexual act" in that sense, but not in the statutory sense.

To repeat our basic point: if "sexual activity" and "sexual act" are synonymous in Title 18, as they appear to be, then "sexual activity" requires contact because "sexual act," we know, does. We cannot be certain that they are synonyms. Maybe our interpretation of section 2422(b) is no more plausible than the government's. But when there are two equally [640 F.3d 260] plausible interpretations of a criminal statute, the defendant is entitled to the benefit of the more lenient one. "[T]he tie must go to the defendant." United States v. Santos, 553 U.S. 507, 514 128 S.Ct. 2020, 170 L.Ed. 2d 912 (2008); see also Bell v. United States, 349 U.S. at 81, 83-84, 75 S.Ct. 620, 99 L.Ed. 905 (1955) (Frankfurter, J.). "This venerable rule [the 'rule of lenity,' as it is called] not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." United States v. Santos, supra, 553 U.S. at 514.

Congress will have to define "sexual activity" more broadly than "sexual act" if it wants to bring the kind of behavior engaged in by the defendant in this case within the prohibition of section 2422(b) via the fondling and child-solicitation offenses found in the Indiana criminal code, when the defendant neither made nor, so far as appears, attempted or intended physical contact with the victim. In the meantime, however, assuming the defendant's conception of the breadth of the Indiana statutes is correct, our interpretation of the federal statute will not allow the likes of the defendant to elude just punishment. For his more serious Indiana offense (child solicitation involving use of the Internet, which Indiana law treats as an aggravating circumstance), he could be sentenced to eight years in prison by an Indiana court. See Ind. Code §§35-42-4-6(b)(3), 35-50-2-6(a).

The judgment is reversed with instructions to enter a judgment of acquittal.

Reversed and Remanded."

Junod respectfully submits that the split in Circuit authority on the vagueness question concerning § 2422(b) warrants Certiorari review at this time. Junod further submits that the holding in Taylor contains the constitutionally proper analysis and decision. Until such time as Congress provides a sufficiently precise definition of sexual activity to provide an ordinary person with reasonable notice of what particular conduct is violative of that Federal statute, § 2422(b) will remain constitutionally defective and

will continue to deprive criminal defendants their due process rights and protection.¹

1. The touchstone of unconstitutional vagueness is whether a statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (internal quotation marks omitted). Section 2422(b) is impermissibly vague under both criteria. In light of the circuit split regarding the ordinary meaning of "sexual activity," § 2422(b) clearly fails to provide fair notice of what conduct is prohibited by its "illegal sexual activity" clause. The opinions of the Fourth and Seventh Circuits are diametrically opposed and cannot be reconciled. On the one hand, the Seventh Circuit has held that "sexual activity" requires interpersonal physical contact. On the other hand, the Fourth Circuit held in this case that "sexual activity" does not require interpersonal physical contact. It is axiomatic that both interpretations cannot be correct. Moreover, the fact that the competing opinions were authored by men of such extraordinary intelligence as Judge Posner and Judge Wilkinson makes § 2422(b) the very epitome of an unconstitutionally vague statute; for if it confounds these two exceptionally learned men, how much more does it presumably confound people of mere ordinary intelligence. See e.g., *Conally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 5/22/10