APPENDIX

APP-1

NOT RECOMMENDED FOR PUBLICATION

No. 23-3817

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE NORTHERN DISTRICT OF
DERRICK MURPHY,	)	OHIO
	)	
Defendant-Appellant.	)	

ORDER

Before: COLE, GRIFFIN, and NALBANDIAN, Circuit Judges.

Derrick Murphy, a federal prisoner proceeding through counsel, appeals the district court's judgment against him on a charge of enticing and coercing a minor to engage in criminal sexual activity. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). As discussed below, we affirm.

Criminal prosecutions against Murphy for distinct offenses began in the spring of 2021. On April 28, he was charged with conspiracy to possess a controlled substance with the intent to distribute. And on May 11, he was charged in a criminal complaint with sex trafficking of an unnamed female minor. On June 10, a grand jury indicted Murphy on the charge of sex trafficking as well as on a charge of transporting a minor.

When the victim, later identified as NR, stopped cooperating, Murphy was charged in the current proceeding with enticement and coercion of a minor by information in April 2023. At a change of plea hearing that month, the government described the factual basis for the offense as follows. In December 2020, Murphy messaged NR in response to her ads offering commercial sex. He engaged in sexual activity with her and subsequently discovered that she was a minor. In

March 2021, Murphy repeatedly asked her about specific sex acts that she had done or that he wanted her to do, and he began repeatedly requesting that she film herself and send him the video of her participating in a "threesome." During this time, Murphy often paid for NR's food and personal needs and offered to take her on a trip, but sometimes he refused to pay for certain expenses because she had not sent the requested video. On April 25, 2021, NR, then 17 years old, used her cellphone to send Murphy a video of her engaged in a sex act with a man. Acknowledging that he had committed the conduct charged, Murphy entered an open plea.[1]

Murphy's presentence report proposed an initial total offense level of 40, the sum of a base offense level of 32, *see* USSG §§ 2G1.3(c)(1) and 2G2.1(a), and two-level enhancements for committing a sexual act, *see* USSG § 2G2.1(b)(2)(A), using a computer to commit the offense, *see* USSG § 2G2.1(b)(6)(B)(i), committing the offense against a vulnerable victim, *see* USSG § 3A1.1(b)(1), and obstructing justice, *see* USSG § 3C1.1. Because Murphy by then had pleaded guilty in the drug-related action, two more levels were added as a multiple-count adjustment. *See* USSG § 3D1.4. After a three-level reduction for acceptance of responsibility, his final total offense level was 39. The intersection of his offense level and his criminal history category of I yielded a sentencing guidelines range of 262 to 327 months in prison. Murphy objected to the base offense level and to each of the enhancements.

At a consolidated sentencing hearing, the government presented Police Detective Peter Swartz as the sole witness. Swartz testified that he met NR in November 2020 in Toledo, Ohio, after her mother in Georgia had reported her missing and posts of NR were discovered on various websites for escort services and commercial sex. Calls between NR and Murphy thereafter were heard on a wiretap in the narcotics case and led an investigator to believe that NR was being trafficked. Murphy would ask about her earnings, tell her how much to earn, and ask if she was "tricking."

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[1] On appeal, Murphy additionally concedes that NR engaged in prostitution under his direction and that she gave her earnings to him.

In March and April 2021, Swartz located escort website advertisements for NR in Toledo and in Detroit, Michigan. On May 6, 2021, Swartz interviewed NR when she again was recovered as a runaway. NR confirmed that she had met Murphy when she was 16, that he was her pimp and had taken care of her for three months before requiring her to engage in commercial sex, and that he would transport her to Detroit to do so. Murphy set the prices for her services and took all the money that she made. A few times, Murphy became violent, hitting NR when he claimed she falsely denied having rent money that she was supposed to contribute and when she informed Murphy that she did not want to film a threesome.

Summarizing chat messages downloaded from Murphy's cellphones, Swartz testified that Murphy frequently asked about NR's clients and for a video of a threesome. Murphy reminded NR of her failure to provide the video when she requested a car and hotel room to see clients, when he promised to buy them plane tickets, and when she wanted to see him. On another occasion, he promised to "cut off" his other sex workers once NR turned 18. NR in turn told Murphy that she loved him. She reiterated her feelings for him in a chat with her mother, contrasting her love for him with the hurt resulting from arguments with her mother and claiming that she never gave him a dollar. In other chat messages with Murphy, NR indicated that she was drinking alcohol and using controlled substances, specifically marijuana.

Swartz stated that after Murphy's arrest in the drug-related case on April 27, 2021, Murphy made numerous calls from jail. Recordings indicated that on April 30 he spoke to a sex worker (SB) and NR, asking NR to make $500 a week so she could stay at his house, an amount of rent that Swartz viewed as high for the area. More calls occurred on the evening of May 11, 2021, the day that Murphy was charged with sex trafficking. The first two calls were to NR, and the third was between Murphy, SB, and NR. A fourth was to NR and her mother, and a fifth call was between Murphy and NR's mother. The final call was between Murphy, Murphy's sister Vanetta, and NR's mother, establishing that Murphy would not reach out again directly and that he wanted Vanetta to be the go-between. Swartz described the initial calls on May 11 as a fishing expedition

by Murphy, even though Murphy apparently knew that the identity of the unnamed female in the complaint was NR, and also as an attempt by Murphy to make NR feel bad and to manipulate her.[2]

Swartz last discussed Facebook posts in June 2021 by DS, Murphy's top sex worker, with whom Murphy had been in a relationship "for many, many years."[3] The posts included defense counsel's notes from an interview with NR, which Murphy had mailed to DS. DS accused NR of lying to the police about Murphy, and she made comments such as "Shaking my head. She ain't cool. Somebody going to fuck her up one day. She playing a dangerous game." and "I can't wait to catch her. I'm beating that head in." After the Facebook posts, NR ceased cooperating with the prosecution, telling them that she was being "constantly threatened." Swartz opined that the purpose of the posts was to intimidate NR. However, DS, who had never met NR, told Swartz that she made the posts because she was angry with NR. Swartz speculated that DS could have viewed NR as a rival.

The district court overruled Murphy's objections. The court reasoned that the vulnerable-victim enhancement applied because, when NR was 16 years old or younger, she had a falling out with her mother, could no longer live at home, and "was engaging in these acts for money in order to live day-to-day to support herself." And the court reasoned that the obstruction-of-justice enhancement was supported by Murphy's series of jail calls on May 11, 2021, and his efforts to involve NR's mother. The court sentenced Murphy to 140 months in prison, to be served

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[2] During argument in support of the enhancement for obstruction of justice, the government referred to the jail calls that were played in court and pointed out that Murphy directed several women to call NR. In a call with NR's mother, Murphy told the mother that she "could go to court, and . . . say it didn't happen" and that she should tell NR to listen to her. Murphy later told Vanetta that he had talked to the mother and it would all be okay. In his three-way call with Vanetta and the mother, Murphy said, "You two—[the mother]'s helping me with my case. I'm gonna introduce you. You talk because I don't want to be involved in quote, unquote, 'witness tampering.'"

[3] The presentence report referred to a jail call on May 11 from Murphy to DS, instructing her to set up a three-way call with NR. During that call, Murphy allegedly criticized NR for talking to the police and indicated that her statements would be posted on Facebook. In his objections, Murphy denied telling NR that her statements would be posted.

consecutively to the prison term of 180 months in the drug-related action, for a total prison term of 320 months, which was within the guidelines range as adjusted for both actions.

On appeal, Murphy first argues that his sentence is procedurally unreasonable. He contends that the district court erred by applying the vulnerable-victim and obstruction-of-justice enhancements. Murphy attempts to "incorporate[] by reference" other arguments raised "at the sentencing hearing and [in] the relevant documents," such as his other objections. Murphy also argues that his sentence is substantively unreasonable.

Generally, we review a district court's sentencing decision for procedural and substantive reasonableness under the abuse-of-discretion standard. *United States v. Cunningham*, 669 F.3d 723, 728 (6th Cir. 2012).

Procedural reasonableness requires the court to "properly calculate the guidelines range, treat that range as advisory, consider the sentencing factors in 18 U.S.C. § 3553(a), refrain from considering impermissible factors, select the sentence based on facts that are not clearly erroneous, and adequately explain why it chose the sentence." *United States v. Rayyan*, 885 F.3d 436, 440 (6th Cir. 2018) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). A district court may apply an enhancement only when it is supported by a preponderance of the evidence. *United States v. Cabbage*, 91 F.4th 1228, 1232 (6th Cir. 2024).

Substantive reasonableness focuses on whether a "sentence is too long (if a defendant appeals) or too short (if the government appeals)." *Rayyan*, 885 F.3d at 442. A claim of substantive unreasonableness is "a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual." *Id.* Sentences that fall within the applicable guidelines range, like Murphy's, are afforded a presumption of substantive reasonableness. *See United States v. Price*, 901 F.3d 746, 749 (6th Cir. 2018).

PROCEDURAL REASONABLENESS

As an initial matter, we note that Murphy "incorporates by reference the arguments raised at the district court" concerning the base-offense level and the enhancements for committing a sexual act and using a computer. Such incorporation by reference, without more, "does not comply

with the Federal Rules of Appellate Procedure," *Northland Ins. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452 (6th Cir. 2003); *see also* Fed. R. App. P. 28(a)(8), and thus renders those issues forfeited, *see Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 240 n.3 (6th Cir. 2003).

Vulnerable-Victim Enhancement

Relying on out-of-circuit precedent in *United States v. Nielsen*, 694 F.3d 1032, 1034-35 (9th Cir. 2012), Murphy argues that the district court erred by imposing the vulnerable-victim enhancement.

The two-level vulnerable-victim enhancement applies "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." USSG § 3A1.1(b)(1). Application Note 2 defines "vulnerable victim" as

> a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct); and (B) who is *unusually* vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

(Emphasis added). The commentary further provides that an enhancement is not warranted if "the factor that makes the person a vulnerable victim," such as the victim's age, "is incorporated in the offense guideline." *Id.* The "application of the enhancement is 'highly fact-specific and must take into account the totality of the circumstances.'" *United States v. Volkman*, 797 F.3d 377, 398 (6th Cir. 2015) (quoting *United States v. Amedeo*, 370 F.3d 1305, 1317 n.10 (11th Cir. 2004)).

In *Volkman*, we recognized the tension between the guideline and the application note, which adds the term "unusually," and declined to resolve it because the defendant's "conduct fell within the parameters of both." *Id.* This is true here as well. As described above, NR was a minor, a runaway (due to conflicts with her mother), and a substance abuser. NR therefore was particularly susceptible to engaging in commercial sex in exchange for Murphy's provision for her material needs and his attention to her. *See United States v. Willoughby*, 742 F.3d 229, 241 (6th Cir. 2014) (upholding § 3A1.1(b)(1) enhancement when the minor victim "was a homeless runaway with a history of abuse and neglect"); *see also United States v. Muslim*, 944 F.3d 154,

168 (4th Cir. 2019) (upholding § 3A1.1(b)(1) enhancement because of homelessness). Therefore, the district court properly applied the enhancement.

Obstruction-of-Justice Enhancement

Murphy argues that the obstruction-of-justice enhancement does not apply because he did not threaten or intimidate NR, and he did not post NR's allegations on Facebook or make disparaging remarks about her.

The two-point obstruction-of-justice enhancement applies

> [i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense . . . .

USSG § 3C1.1. Obstructive conduct includes, but is not limited to, "threatening, intimidating, or otherwise unlawfully influencing a . . . witness . . . or attempting to do so," as well as "suborning, or attempting to suborn perjury . . . if such perjury pertains to conduct that forms the basis of the offense of conviction." *Id.*, cmt. n.4(A), (B).

We conclude that the district court properly applied the enhancement because Murphy attempted to suborn perjury by telling NR's mother that she "could go to court and . . . say it didn't happen," and attempted to unlawfully influence NR by instructing her mother to tell NR to listen to her. *See United States v. Sykes*, 65 F.4th 867, 890 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 576 (2024).

SUBSTANTIVE REASONABLENESS

Murphy contends that his sentence is not substantively reasonable because his prison term is above the statutory minimum and the district court did not order that term to run concurrently with his prison term in the drug-related case. Murphy had argued below that a lower sentence was appropriate in light of his minimal criminal history, his job skills, and his desire to change his life and become a productive citizen.

Murphy's prison term is presumptively substantively reasonable because it is within the applicable guidelines range. *See Price*, 901 F.3d at 749. And he has failed to demonstrate that the

district court put too little weight on his positive characteristics and too much on other § 3553(a) factors. At sentencing, the district court began by discussing the nature and circumstances of the offense, the need for deterrence, and Murphy's history. *See* 18 § 3553(a)(1), (a)(2)(B). The court acknowledged that Murphy earned his GED and "was able to be successful" doing legitimate work as a remodeler before falling into his current lifestyle and exploiting NR "in about the worst way imaginable." The court commented that Murphy's good qualities were not "on display" when he committed the "shocking" conduct in both cases. Next, the court considered that a prison term within the guidelines range, which included the multi-count adjustment, would be lower than consecutive prison terms based on separate guideline ranges for the two cases, which the court could have imposed. Concluding that the need to afford deterrence and promote respect for the law required it to look at the sentence in the aggregate, the court reasonably chose to impose the aforementioned consecutive prison terms, producing a total term near the high end of the range. *See* 18 U.S.C. § 3553(a)(2)(A) and (B).

Finally, the district court acted within its discretion by imposing consecutive sentences. *See* 18 U.S.C. § 3584(b); *United States v. Morris*, 71 F.4th 475, 483 (6th Cir. 2023). As discussed above, the court weighed the § 3553(a) factors and made clear its rationale for imposing consecutive sentences. *See Morris*, 71 F.4th at 483.

For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

United States v Corp 234 F3d 325 (6th Cir 2001)

Editorial Information: Subsequent History

Related proceeding at United States v. Corp, 2012 U.S. App. LEXIS 2510 (6th Cir.) (6th Cir. Mich., 2012)

Editorial Information: Prior History

{2001 U.S. App. LEXIS 1} Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 99-00115. Gordon J. Quist, District Judge.

Disposition:

REVERSED Corp's conviction and sentence.

Counsel ARGUED: Elena N. Broder-Feldman, JENNER & BLOCK, Washington, D.C., for Appellant.

Richard S. Murray, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellee.

ON BRIEF: Elena N. Broder-Feldman, Julie M. Carpenter, JENNER & BLOCK, Washington, D.C., for Appellant.

Richard S. Murray, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellee.

Judges: Before: KRUPANSKY, WELLFORD, and BOGGS, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed from the judgment of the United States District Court for the Western District of Michigan at Grand Rapids, challenging his conviction for possession child pornography on the ground that 18 U.S.C.S. § 2252(a)(4)(B) was unconstitutional on its face because it exceeded Congress's Commerce Clause authority, and that defendant's offense did not have a sufficient nexus with interstate commerce.While federal child pornography statute was not unconstitutional, there was insufficient nexus between defendant's crime and interstate commerce. Defendant did not distribute the pictures and victim was near her majority.

OVERVIEW: Defendant pled guilty to possession of child pornography in violation of 18 U.S.C.S. § 2252(a)(4)(B). On appeal, defendant claimed that § 2252(a)(4)(B) was unconstitutional on its face because it exceeded Congress's Commerce Clause authority, and that there was an insufficient nexus with interstate commerce. Upon review, defendant's conviction and sentence was reversed. There was an insufficient nexus between defendant's crime and interstate commerce to hold defendant accountable under § 2252(a)(4)(B). Defendant was not involved, nor intended to be involved, in the distribution or sharing with others of the pictures in question. The alleged victim was not an "exploited child" nor a victim in any real and practical sense, and was only months from reaching her majority. Defendant was not alleged to be a pedophile nor was he alleged to have been illegally sexually involved with other minors. Clearly, defendant was not the typical offender feared by Congress that would become addicted to pornography and perpetuate the industry via interstate connections. Consequently, the government failed to make a showing that defendant's activity substantially affected interstate commerce.

OUTCOME: Defendant's conviction and sentence reversed. There was an insufficient nexus between defendant's crime and interstate commerce to hold defendant accountable under the federal child pornography statute. Defendant was not involved, nor intended to be involved, in the distribution or

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sharing with others of the pictures in question, and the victim was not an "exploited child" and was only months away from reaching her majority.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > Elements

18 U.S.C.S. § 2252(a)(B)(4) provides that an offender will be punished if he knowingly possesses one or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including computer, if (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > General Overview

For purposes of 18 U.S.C.S. § 2252, a "minor" is any person under the age of eighteen years.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Governments > Legislation > Interpretation

A constitutional challenge to a statute is a question of law, which an appellate court reviews de novo.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

Due respect for the decisions of a coordinate branch of the government demands that the court's invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Transportation Law > Interstate Commerce > Federal Powers

The Lopez decision is the starting point for determining whether a particular statute constitutes an unconstitutional exercise of Congress's Commerce Clause power.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Congress may properly regulate three broad categories of activity under the Commerce Clause: (1) use of the channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) activities that substantially affect interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation >

General Overview
Civil Procedure > Jurisdiction > Jurisdictional Sources > Statutory Sources

A jurisdictional element is only sufficient to ensure a statute's constitutionality when the element either limits the regulation to interstate activity or ensures that the intrastate activity to be regulated falls within one of the three categories of congressional power.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > General Overview
Governments > Federal Government > U.S. Congress
Transportation Law > Interstate Commerce > Federal Powers

In a Commerce Clause challenge, a court must consider (1) whether the prohibited activity is commercial/economic in nature; (2) whether there is an express jurisdictional element in the statute; (3) whether Congress made specific findings about the prohibited activity's affect on interstate commerce; and (4) whether Congress's findings could be interpreted to establish a general federal police power or whether there is a sufficient link between the regulated activity and interstate commerce.

Opinion

Opinion by: HARRY W. WELLFORD

Opinion

{236 F.3d 325} HARRY W. WELLFORD, Circuit Judge. Patrick J. Corp pleaded guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), conditioned on Corp's ability to appeal the constitutionality of his conviction. On this appeal, Corp claims that § 2252(a)(4)(B) is unconstitutional on its face because it exceeds Congress's Commerce Clause authority, and it is also unconstitutional as applied in this case because this offense does not have a sufficient nexus with interstate**{2001 U.S. App. LEXIS 2}** commerce. For the following reasons, we find that there is an insufficient nexus between this crime and interstate **{236 F.3d 326}** commerce to hold Corp accountable under the federal statute. Thus, we **REVERSE**.

I. FACTUAL BACKGROUND

The facts below are taken from the presentence investigation report, to which the government takes no exception, and from the undisputed facts set out in the parties' briefs.

Corp, then a twenty-three year old resident of Big Rapids, Michigan, population of about 12,600, brought film to be developed at the Southland Pharmacy in Big Rapids. Being suspicious because of Corp's alleged comment that "these are sick" when he dropped off the film and because of the sexual content of the photographs, pharmacy employees contacted the local police. 1 The photographs were pornographic shots of young females. The police department investigated and contacted the principal of a high school in Reed City (population of about 2,400) to ascertain the possible identity of the females in the pictures.

{2001 U.S. App. LEXIS 3} Two of the females were identified as Sandra Sauntman, then 17 years old, and another younger female, both enrolled at the school. 2 Corp first began dating Sauntman when she was about seventeen. It was subsequently discovered, however, that another female in the pictures was Corp's then 26-year-old wife, Heather, with whom Corp has a young child. The pictures showed Heather engaging in sexual activity with Sauntman, but Heather was not a defendant in this case.

On or about April 8, 1999, police obtained and executed a search warrant at Corp's home and obtained the pictures in question from a photo album in Corp's bedroom. The photographs recovered had been taken sometime in late 1998 and on March 1, 1999, shortly before Sauntman attained her majority on April 7, 1999. 3 There is no allegation**{2001 U.S. App. LEXIS 4}** that Corp distributed the photographs, nor any indication that he gave copies to others, nor that he invited others to observe these photographs. 4 Corp stated in his motion to dismiss that in September of 1999, Sauntman "voluntarily posed for the photographs and does not want Defendant prosecuted." She ratified that assertion at the sentencing hearing. 5

{2001 U.S. App. LEXIS 5} Corp was eventually charged in a four-count indictment with three counts of producing child pornography in violation of 18 U.S.C. § 2251(a), and with one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Federal jurisdiction was based on the fact that the photographic paper on which the pornography was produced was manufactured out-of-state, specifically in Germany. The § 2252(a)(4)(B) count charged that:

> On or about April 8, 1999, in the Southern Division of the Western District of Michigan, **{236 F.3d 327}**
>
> PATRICK JOHN CORP
>
> did knowingly, intentionally and unlawfully possess one or more visual depictions. . ., the production of which involved the use of a minor engaged in sexually explicit conduct and which visual depictions were of such conduct, and which were produced using materials which had been shipped and transported in interstate and foreign commerce, that is Agfa photographic paper.

Corp moved to dismiss the indictment, arguing that the origin of the photographic paper outside the state of Michigan was an insufficient nexus with interstate commerce based upon **United States v. Lopez**, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995).**{2001 U.S. App. LEXIS 6}** The district court denied Corp's motion on the grounds that the language in the statutes covering possession and production of child pornography "ensures that each defendant, on a case-by-case basis, will be found to have [a] sufficient nexus with interstate commerce at least through use of development materials which have traveled in interstate commerce." (Citing **United States v. Bausch**, 140 F.3d 739, 741 (8th Cir. 1998), **cert. denied**, 525 U.S. 1072, 142 L. Ed. 2d 667, 119 S. Ct. 806 (1999), and **United States v. Robinson**, 137 F.3d 652, 655 (1st Cir. 1998)).

After the denial of Corp's motion, the parties reached a conditional plea agreement in which Corp agreed to plead guilty to the single possession count (18 U.S.C. § 2252(a)(4)(B)), and the government agreed to dismiss the three production counts. The government also agreed to support the lowest sentence within the guideline range found applicable by the court, and stipulated that the circumstances of the case were outside the "heartland" of such cases without "necessarily supporting a downward departure." The government further agreed**{2001 U.S. App. LEXIS 7}** to allow Corp to appeal the district court's denial of his motion to dismiss for lack of a sufficient interstate nexus.

Corp was sentenced to five months imprisonment, plus supervised release and a $ 100 special

assessment. The district court commented:

> You know, I tend to agree with your gut reaction to this. This is an awful stretch, it seems to me, of the interstate commerce clause. And I don't think it would hurt anyone to get that clarified. . . .
>
> . . .
>
> I think all the parties agree that the case is outside the heartland of the statute which is intended to punish people who engage in sexual abuse of minors by either abusing the minors or having pictures of such activity or sexual acts by minors.The district court, at the same time, noted Corp's criminal background, including assault and battery convictions, but emphasized that Corp was "not a pedophile."

Corp now appeals his conviction. 6

II. ANALYSIS

Corp argues that**{2001 U.S. App. LEXIS 8}** § 2252(a)(B)(4) is unconstitutional on its face and as applied in this case because it exceeds Congress's Commerce Clause powers. 7 That section provides that an offender will be punished if he

> knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, **or which was produced using materials which have been mailed or so shipped or {236 F.3d 328} transported, by any means** including computer, if-
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (ii) such visual depiction is of such conduct. 18 U.S.C. § 2252(a)(B)(4) (emphasis added). For purposes of § 2252, a "minor" is "any person under the age of eighteen years." 8 18 U.S.C. § 2256(1). The expression "child pornography" is frequently used in connection with legislation of this type. In **Smith v. Daily Mail**, 443 U.S. 97, 100, 61 L. Ed. 2d 399, 99 S. Ct. 2667 (1979), a fourteen-year-old juvenile involved in a shooting of another**{2001 U.S. App. LEXIS 9}** juvenile was referred to by the Court as a "child."

A constitutional challenge to a statute is a question of law, which this court reviews **de novo**. **United States v. Smith**, 182 F.3d 452, 455 (6th Cir. 1999), **cert. denied**, 120 S. Ct. 2201 (2000); **United States v. Knipp**, 963 F.2d 839, 842-43 (6th Cir. 1992). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate**{2001 U.S. App. LEXIS 10}** a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." **United States v. Morrison**, 529 U.S. 598, 120 S. Ct. 1740, 1748, 146 L. Ed. 2d 658 (2000); **see also United States v. Rodia**, 194 F.3d 465, 469 (3d Cir. 1999), **cert. denied**, 529 U.S. 1131, 146 L. Ed. 2d 958, 120 S. Ct. 2008 (2000) (recognizing that "we must respect Congress's ample discretion to determine the appropriate exercise of its Commerce Clause authority").**A. Lopez** and its Progeny

Corp relies principally on **United States v. Lopez**, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), in making a Commerce Clause challenge to the statute at issue. Indeed, **Lopez** is the starting point for determining whether a particular statute constitutes an unconstitutional exercise of Congress's Commerce Clause power. **See Morrison**, 120 S. Ct. at 1748-49 (discussing the impact of **Lopez**).

In **Lopez**, the Supreme Court struck down the Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) ("GFSZA"), which punished those who knowingly possessed a firearm within**{2001 U.S. App. LEXIS 11}** a school zone. In finding that the statute was unconstitutional, the **Lopez** Court explained that Congress may properly regulate three broad categories of activity under the Commerce Clause: (1) use of the channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) activities that substantially affect interstate commerce. **Lopez**, 514 U.S. at 558-59. The GFSZA fell under the third of these categories, because the possession of a gun, being purely intrastate activity, purportedly had a substantial effect on commerce. **Id.** at 559. The Court held the statute to be unconstitutional because, among other things, the statute contained "no jurisdictional element that would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." **Id.** at 561.

After the conviction in the instant case and after the filing of briefs on appeal, the Supreme Court decided **United States v. Morrison**, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000),**{2001 U.S. App. LEXIS 12}** which struck down the civil remedy provision of the Violence Against Women Act ("VAWA"). In that case, petitioner Christy Brzonkala, a student at Virginia Tech, allegedly was assaulted and repeatedly raped during the fall semester of her freshman year by **{236 F.3d 329}** some members of the school's varsity football team. After pursuing administrative remedies without success, Brzonkala sued her assailants and the university in federal court pursuant to § 13981, which provided that "[a] person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured." Congress placed some limitations on § 13981, stating that "nothing in this section entitles a person to a cause of action . . . for random acts of violence unrelated to gender or for acts that cannot be demonstrated . . . to be motivated by gender." 42 U.S.C. § 13981(e)(1). Furthermore, the statute provides that it does not cover any state-law claim "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." 42 U.S.C. § 13981(e)(4).

The Supreme Court applied the **Lopez** framework in addressing**{2001 U.S. App. LEXIS 13}** the constitutionality of § 13981, and suggested that four questions be raised in deciding a Commerce Clause controversy:

> 1) Is the prohibited activity commercial or economic in nature?;
>
> 2) Is there an express jurisdictional element involving interstate activity which might limit the statute's reach?; 3) Did Congress make findings about the effects of the prohibited conduct on interstate commerce?; and4) Is the link between the prohibited activity and the effect on interstate commerce attenuated?**See Morrison**, 120 S. Ct. at 1750-51. First, the court noted that the conduct being controlled by § 13981 (gender-motivated violence) was "not, in any sense of the phrase, economic activity." **Id.** at 1751. The Court determined that cases upholding Commerce Clause regulation of intrastate activity have done so "only where that activity is economic in nature." **Id.** Second, the Court found that, like the GFSZA, the statute contained no explicit "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." **Id.**

The Court acknowledged that, **{2001 U.S. App. LEXIS 14} unlike** the GFSZA, § 13981 did enjoy the support of congressional findings regarding the serious impact of gender-motivated violence on interstate commerce. **Id.** at 1752. The Court warned, however, that the existence of congressional findings, standing alone, is not sufficient to sustain the constitutionality of legislation, and that simply because Congress finds that a particular activity affected interstate commerce does not make it so.

Id. The Court quoted a footnote in **Lopez** to support its premise that whether a certain activity sufficiently affects interstate commerce "is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." **Id.** (quoting **Lopez**, 514 U.S. at 557 n.2 (citing **Heart of Atlanta Motel v. United States**, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964))). The Court further stated:

> Our decision in **Lopez** rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated . . . . We rejected the "costs of crime" and "national productivity" arguments [which were supported by congressional**{2001 U.S. App. LEXIS 15}** findings] because they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they might relate to interstate commerce." **Id.** 120 S. Ct. at 1751. The Court then concluded that the existence of congressional findings to justify the enactment of VAWA was "not sufficient, by itself, to sustain the constitutionality of [the] Commerce Clause legislation." **Id.** at 1752.

B. Decisions from Other Circuits

Several courts have addressed the constitutionality of § 2252(a)(4)(B), and all have upheld the statute's validity pursuant to the **Lopez** framework. We shall address these cases in turn.

{236 F.3d 330} In **United States v. Robinson**, 137 F.3d 652 (1st Cir. 1998), the defendant was convicted under § 2252(a)(4)(B) based on his possession of fifty photographs depicting boys in their mid-to-late teens in nude poses and sexual acts. All of the photographs included descriptive information about the boys, **e.g.**, names, ages, dates on which the photographs were taken. **Robinson**, 137 F.3d at 653. The pictures were made using a Kodak camera and Kodak**{2001 U.S. App. LEXIS 16}** film, both of which were manufactured outside the state of Massachusetts. **Id.** The First Circuit upheld § 2252(a)(4)(B) as a category three regulation -- one that regulates those activities that substantially affect interstate commerce. **Id.** at 656. The court placed great importance on the fact that § 2252(a)(4)(B) contains a jurisdictional element, unlike the GFSZA. The court found that "the jurisdictional element . . . requires an answer on a case-by-case basis to the question whether the particular possession of child pornography affected interstate commerce." **Id.** The **Robinson** court also found that "by outlawing the purely intrastate possession of child pornography . . . Congress can curb the nationwide demand for these materials." 9 **Id.** (citing **United States v. Winningham**, 953 F. Supp. 1068 (D. Minn. 1996)).

{2001 U.S. App. LEXIS 17} In **United States v. Bausch**, 140 F.3d 739, 741 (8th Cir. 1998), **cert. denied**, 525 U.S. 1072, 142 L. Ed. 2d 667, 119 S. Ct. 806 (1999), the defendant was convicted under § 2252(a)(4)(B) based on his possession of pictures of two girls, ages fifteen and sixteen, depicting the girls in nude poses and sexual acts. **Bausch,** 140 F.3d at 740. The girls were models for Bausch's drawings, and Bausch used the photographs in the girls' absence. **Id.** The camera used by Bausch was made in Japan. **Id.** In upholding the statute, the **Bausch** court relied on the reasoning in **Robinson** but did not engage in any further in-depth analysis. Like in **Robinson,** the court focused on the fact that § 2252(a)(4)(B) contained a jurisdictional element unlike the constitutionally infirm GFSZA. "Thus, the statute ensures, through a case-by-case inquiry, that each defendant's pornography possession affected interstate commerce." **Id.** at 741.

Finally, in **United States v. Rodia**, 194 F.3d 465 (3d Cir. 1999), **cert. denied,** 529 U.S. 1131, 146 L. Ed. 2d 958, 120 S. Ct. 2008 (2000), the Third Circuit**{2001 U.S. App. LEXIS 18}** upheld the statute, albeit using different reasoning. The defendant pled guilty to the possession of child pornography, which included the possession of three Polaroid photos of naked boys in various sexually explicit poses. **Rodia**, 194 F.3d at 469. The court recognized that "unlike the statute in question in Lopez,

this statute has a jurisdictional element or 'hook'--that is, a clause that purports to ensure that the law only covers activity that has a substantial effect on interstate commerce." **Id.** at 468. In a split decision, the court rejected the position adopted by the other courts that the jurisdictional "hook" in the statute automatically ensures its constitutionality. The court reasoned that "[a] jurisdictional element is only sufficient to ensure a statute's constitutionality when the element either limits the regulation to interstate activity or ensures that the intrastate activity to be regulated falls within one of the three categories of congressional power." **Id.** at 473. With respect to § 2252(a)(4)(B), the court surmised that "as a practical matter, the limiting jurisdictional factor is almost useless**{2001 U.S. App. LEXIS 19}** here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute." **Id.** The court concluded:

> A hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute **{236 F.3d 331}** ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce. **See Lopez**, 514 U.S. at 561, 115 S. Ct. 1624 (implying that jurisdictional elements are useful only when they can ensure, through a case-by-case inquiry, that the regulated activity affects interstate commerce); **United States v. Jones**, 178 F.3d 479, 480 (7th Cir. 1999) (noting that the jurisdictional element of § 844(i), even if proven by the government, did not establish a substantial connection to interstate commerce; and therefore, looking beyond the jurisdictional element to assess the statute constitutionality; **United States v. Pappadopoulos**, 64 F.3d 522, 527 (9th Cir. 1995)**{2001 U.S. App. LEXIS 20}** (illustrating that a statutorily imposed requirement of a jurisdictional nexus to interstate commerce will not insulate the statute from judicial review). **Id.** 194 F.3d at 472-73. We agree with this reasoning in **Rodia.** The statute facially has an extremely wide sweep. Although commentators have generally spoken in terms of film or computers, the statutory terms have no such limitation. A painter using a model who was just under 18, even if it was his wife, would fall afoul of the statute if the paints, brushes, or canvas had traveled in interstate commerce, even long before enactment of the act.

After rejecting the argument that the statute is saved by the mere inclusion of a jurisdictional element, the court looked to the other considerations in the **Lopez** inquiry and sought to determine "whether Congress had a rational basis for believing that the intrastate possession of pornography has a substantial effect on interstate commerce." **Id.** at 474. The court discussed the origin of Congress's effort to regulate child pornography and emphasized Congress's findings that the industry has a profound effect on commerce. **Id.** at 474-75. The court then**{2001 U.S. App. LEXIS 21}** discussed the relationship between intrastate and interstate pornography and concluded:

> In this case, we think that Congress could have rationally reasoned as follows: Some pornographers manufacture, possess, and use child pornography exclusively within the boundaries of a state, and often only within the boundaries of their own property. It is unrealistic to think that those pornographers will be content with their own supply, hence they will likely wish to explore new or additional pornographic photos of children. Many of those pornographers will look to the interstate market as a source of new material, whether through mail order catalogs or through the Internet. Therefore, the possession of "home grown" pornography may well stimulate a further interest in pornography that immediately or eventually animates demand for interstate pornography. It is also reasonable to believe the related proposition that discouraging the intrastate possession of pornography will cause some of these child pornographers to leave the realm of child pornography completely, which in turn will reduce the demand for pornography. **Id.** at 477.

Further, the court stated that "another way{2001 U.S. App. LEXIS 22} to describe the nexus between intrastate and interstate activity here is in terms of the notion of addiction," quoting from senate reports explaining that child pornography is addictive and, in time, escalates to more deviant behavior in the user. **Id.** at 478. Rodia argued that child pornography has no relation to commerce because most child pornographers do not possess the pornography for commercial purposes. The court rejected that argument, commenting that the statute is not invalidated by the fact that some of the group is engaged in non-commercial activity. **Id.** at 480.

C. Application of the Law to the Facts of this Case

In addressing the constitutionality of § 2252(a)(4)(B), we must apply the framework **{236 F.3d 332}** of **Lopez** in light of the later case of **Morrison**. As we have stated, those cases have established that we must consider (1) whether the prohibited activity is commercial/economic in nature; (2) whether there is an express jurisdictional element in the statute; (3) whether Congress made specific findings about the prohibited activity's affect on interstate commerce; and (4) whether Congress's findings could be interpreted to establish{2001 U.S. App. LEXIS 23} a general federal police power or whether there is a sufficient link between the regulated activity and interstate commerce. **See United States v. Gregg**, 226 F.3d 253, 2000 WL 12681550, at *7 (3d Cir. 2000) (recognizing that the four-part inquiry in **Morrison** is the Supreme Court's "most recent communique on **Lopez**'s third category of regulation").

The government argues that Congress intended to criminalize commercial activity involved in child pornography. 10 Congress has indicated that "child exploitation" is operated by "elements of organized crime" with a "nationwide network . . . openly advertising their desire to exploit children." Child Abuse Victims Right Act of 1986, P.L. 99-591 § 702, 100 Stat. 3341-74 (1986). As a consequence of those findings, the government argues that "Congress found the manufacture and distribution of child pornography to be a commercial enterprise." Furthermore, the government argues, § 2252(a)(4)(B) contains a jurisdictional element that ensures that the activity being prohibited has a sufficient nexus with interstate commerce, unlike the statutes invalidated in **Lopez** and **Morrison{2001 U.S. App. LEXIS 24}** which contained no such element. 11

While we are faced with serious questions about the constitutionality of the Act under the Commerce Clause power of Congress, we choose not to declare the Act facially unconstitutional. **{2001 U.S. App. LEXIS 25}** Instead, we assume, along with the **Rodia** and **Robinson** courts, that **Morrison** and **Lopez** have required that the jurisdictional components of constitutional statutes are to be read as meaningful restrictions. Furthermore, we do not determine the aggregate effect on interstate commerce of the purely intrastate dealing in child pornography. Instead, we conclude that Corp's activity was not of a type demonstrated **substantially** to be connected or related to interstate commerce on the facts of this case. Under the undisputed circumstances here, Corp was not involved, nor intended to be involved, in the distribution or sharing with others of the pictures in question. Sauntman was not an "exploited child" nor a victim in any real and practical sense in this case. In the other cases that have addressed this issue, the courts were faced with the much more threatening situation where an adult was taking advantage of a much younger child or using the imagery for abusive or semi-commercial purposes. **See Rodia**, 194 F.3d at 469 (stating that the defendant had been charged with abusing children); **Bausch**, 140 F.3d at 740 (finding that**{2001 U.S. App. LEXIS 26}** the subjects in the photographs were fifteen and sixteen-year-old girls, and the pictures were being used by the defendant in their absence and perhaps for commercial purposes); **Robinson**, 137 F.3d at 653 (finding that the subjects were teenage boys and the pictures contained detailed descriptions of each one).

{236 F.3d 333} Was the activity in this case related to explicit and graphic pictures of children engaged in sexual activity, particularly children about fourteen years of age or under, for commercial or exploitive purposes? Were there multiple children so pictured? Were the children otherwise sexually abused? Was there a record that defendant repeatedly engaged in such conduct or other sexually abusive conduct with children? Did defendant move from place to place, or state to state, and repeatedly engage in production of such pictures of children? These questions are relevant to a determination on a case-by-case basis about whether the activity involved in a certain case had a substantial effect on commerce.

Corp was not alleged to be a pedophile nor was he alleged to have been illegally sexually involved with minors other than Sauntman, who was merely months**{2001 U.S. App. LEXIS 27}** away from reaching majority. Clearly, Corp was not the typical offender feared by Congress that would become addicted to pornography and perpetuate the industry via interstate connections. Under these circumstances, the government has failed to make a showing that Corp's sort of activity would substantially affect interstate commerce. Having reached this conclusion, we need not decide whether the conduct in this case was commercial activity within the meaning of **Morrison**.

Accordingly, we **REVERSE** Corp's conviction and sentence on the grounds that, reviewing the undisputed and unusual facts of this case, we are not persuaded that Corp's activity has a sufficient nexus with interstate commerce.

Footnotes

1

Corp purportedly stated that "I know these are sick." Corp denied making that remark, however, claiming instead that he indicated the pictures were of a personal nature and he wanted them "counted from the back side" so the developers would not view them. **See** Presentence Investigation Report, J/A 116.

2

We are concerned in this case only with Sauntman, who testified at Corp's sentencing hearing and who is now of legal age. The other minor female was not portrayed either in the nude or engaged in any sexual activity.

3

These dates are stated in defendant's brief in support of his motion to dismiss.

4

The government's brief opposing defendant's motion to dismiss stated its concession that "it does not expect to show that Defendant intended or did distribute the images in question in interstate commerce."

5

The presentence report indicated that the Assistant United States Attorney handling the case believed Sauntman "blames the government and is supporting Mr. Corp." Further, it indicated that Sauntman believes she has been "showcased as a victim by the FBI, but not treated like a victim. . . she denies she has suffered any psychological harm as a result of the offense." She also stated that "we never expected anyone else to even know about this; this was strictly something personal."

6

APP-3

UNITED STATES OF AMERICA, vs. JUSTIN WAYNE MATTHEWS, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION
300 F. Supp. 2d 1220; 2004 U.S. Dist. LEXIS 2809
Case No. CR-02-S-549-M
February 2, 2004, Decided
February 2, 2004, Filed; February 3, 2004, Entered

Editorial Information: Subsequent History

Affirmed by United States v. Matthews, 143 Fed. Appx. 298, 2005 U.S. App. LEXIS 20422 (11th Cir. Ala., 2005)Vacated by, Remanded by United States v. Matthews, 184 Fed. Appx. 868, 2006 U.S. App. LEXIS 15543 (11th Cir. Ala., 2006)

Disposition:

{2004 U.S. Dist. LEXIS 1} Defendant's motion to dismiss GRANTED, conviction of Justin Wayne Matthews pursuant to plea agreement vacated and indictment dismissed.

Counsel For JUSTIN WAYNE MATTHEWS, defendant: P Russell Steen, Birmingham, AL.

U. S. Attorneys: Alice H Martin, US Attorney, James E Phillips, US ATTORNEY'S OFFICE, Birmingham, AL.

U. S. Attorneys: US Marshal, UNITED STATES MARSHAL'S OFFICE, Birmingham, AL.

U. S. Attorneys: US Probation, UNITED STATES PROBATION OFFICE, Birmingham, AL.

Judges: C. Lynwood Smith, Jr., United States District Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was indicted on a two-count indictment charging sexual exploitation of children in violation of 18 U.S.C.S. § 2251(a), and possession of child pornography in violation of 18 U.S.C.S. § 2252A(a)(5)(B). He conditionally pleaded guilty. Before the court was defendant's motion to reconsider his motion to dismiss the indictment.Federal sexual exploitation of children and possession of child pornography statutes, as applied to the facts on which each count of the indictment was based, exceeded the powers of Congress under the Commerce Clause of the U.S. Constitution.

OVERVIEW: Defendant made a video tape recording of himself engaged in consensual, sexual acts with a minor. He then was 22, and the juvenile female was 16. The motion challenged the authority of Congress to regulate intrastate possession of a home-made videotape depicting defendant engaged in sexual acts with a minor. The government premised jurisdiction on the fact that the camera and tape medium used by defendant previously had traveled in interstate and foreign commerce. The court concluded that 18 U.S.C.S. §§ 2251(a), 2252A(a)(5)(B) were unconstitutional as applied to simple intra-state production and possession of images of child pornography, or visual depictions of a minor 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 exchange of the pornographic recording for other prohibited material. It held that 18 U.S.C.S. §§ 2251(a), 2252A(a)(5)(B), as applied to the facts, exceeded the powers of Congress under the Commerce Clause of the U.S. Constitution.

OUTCOME: Defendant's motion to dismiss was granted, his conviction pursuant to plea agreement was vacated, the indictment was dismissed, and defendant was discharged.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > General Overview

See 18 U.S.C.S. § 2251(a).

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > General Overview

A "minor" is defined by 18 U.S.C.S. § 2256(1) as any person under the age of 18 years, while the term "visual depiction" includes undeveloped film and videotape. 18 U.S.C.S. § 2256(5). The phrase "sexually explicit conduct" is defined by 18 U.S.C.S. § 2256(2) as meaning, among other things, sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, and masturbation.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > General Overview

See 18 U.S.C.S. § 2252A(a)(5)(B).

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > General Overview

See 18 U.S.C.S. § 2256(8)(A).

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Congress can regulate three broad categories of activity pursuant to its powers under the Commerce Clause: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those intra-state activities having a "substantial" relation to interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations
Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > General Overview
Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > Prohibition of Commerce
Governments > Native Americans > Authority & Jurisdiction

International Trade Law > Authority to Regulate > General Overview

See U.S. Const. art. I, § 8, cl. 3.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Constitutional Law > Congressional Duties & Powers > General Overview
Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > General Overview
Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > Prohibition of Commerce
Constitutional Law > Congressional Duties & Powers > Commerce Clause > Limitations
Governments > Federal Government > General Overview
Governments > Federal Government > U.S. Congress
Transportation Law > Interstate Commerce > Federal Powers
Transportation Law > Interstate Commerce > General Overview
Transportation Law > Interstate Commerce > State Powers

While the U.S. Constitution permits Congress to regulate any instrumentality or channel of interstate commerce, the Constitution permits Congress to regulate only those intrastate activities which have a substantial effect on interstate commerce, and such regulation of purely intrastate activity reaches the outer limits of Congress's commerce power. To hold otherwise would convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states. This the Constitution does not permit.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Transportation Law > Interstate Commerce > State Powers

The U.S. Supreme Court has established what is now the controlling test for determining whether an intra-state activity substantially affects interstate commerce in the Morrison decision, as follows: (1) whether the regulatory statute enacted by Congress implicates activities that have something to do with "commerce," or any sort of economic enterprise, however broadly one might define those terms; (2) whether the statute contains an "express jurisdictional element which might limit its reach" to intra-state activities having "an explicit connection with or effect on interstate commerce;" (3) whether congressional findings in the statute or its legislative history support the conclusion that the intra-state activity in question has a substantial effect on interstate commerce; and (4) whether the link between the intra-state activity and its effect on interstate commerce is "attenuated."

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Civil Rights Law > Civil Rights Acts > Violence Against Women Act
Transportation Law > Interstate Commerce > Federal Powers

The U.S. Supreme Court has rejected the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The U.S. Constitution requires a distinction between what is truly national and what is truly local.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > General Overview

Although some, if not most, child pornography may certainly be the product of commercial enterprise, it does not follow that all child pornography is the product of, or intended for distribution in, a market

pandering to other perverts. The exploitation of a minor in home-produced video recordings of sexual acts is, unquestionably, despicable; but when it is done with no intention to sell, distribute, or exchange the tapes thus produced it is not "commerce."

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

The mere possession of an object is not "commerce."

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Transportation Law > Interstate Commerce > State Powers

A criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms, cannot be sustained by that line of cases flowing from Wickard which upholds regulations of intra-state activities that arise out of or are connected with a commercial transaction, and which, when viewed in the aggregate, substantially affects interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Governments > Courts > Authority to Adjudicate
Transportation Law > Interstate Commerce > Federal Powers
Transportation Law > Interstate Commerce > State Powers

It is incumbent upon the judiciary to ultimately answer the question whether particular intra-state operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > General Overview

No aggregation of local effects is permissible to elevate a non-economic intra-state activity's insubstantial effect on interstate commerce into a substantial one in order to support federal jurisdiction. While the exploitation of a minor in home-made child pornography is detestable, and deserving of strong criminal condemnation, it is not "commerce" or "economic activity" subject to congressional regulation in the absence of any evidence indicating that the pornographer intended to mail, sell, distribute, or exchange the images within an interstate market.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > Prohibition of Commerce

The court has a duty to recognize meaningful limits on the commerce power of Congress.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
International Trade Law > General Overview

Just because some of the elements that go together to compose an object have moved in interstate commerce at some time or another--e.g., the camera used to record a visual image; the film, tape, diskette, or other medium on which the image is recorded; and the photographic paper, television screen, or computer monitor upon which the image is subsequently replicated--it does not follow ipso facto that Congress can constitutionally regulate the object produced through incorporation of such constituents

when the production and possession of the object occur solely within a single state. Instead, the intra-state object itself must move in the United States mail, or through use of the channels and instrumentalities of interstate or foreign commerce, or be shown to have a "substantial" effect on interstate commercial activities that unquestionably are subject to congressional regulation.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview
Governments > Federal Government > U.S. Congress
Transportation Law > Interstate Commerce > Federal Powers

Simply because a type of antisocial conduct (which any state could validly proscribe) can fairly be described as a "national" problem in the sense that many (or even all) states experience more instances of it than are desirable or desired, does not mean that this of itself suffices to bring such conduct within the scope of Congress's Commerce Clause power. Plainly it does not. Ever since a time well before the Constitutional Convention, there have been every year in each of the several states more murders than desirable or desired, but it is nevertheless plain that the Commerce Clause does not authorize Congress to enact legislation punishing any and all murders throughout the nation.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > General Overview
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Obscenity
Criminal Law & Procedure > Criminal Offenses > Fraud > Computer Fraud > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > Elements
International Trade Law > General Overview

18 U.S.C.S. §§ 2251(a), 2252A(a)(5)(B) are unconstitutional as applied to simple intra-state production and possession of images of child pornography, or visual depictions of a minor 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 exchange of the pornographic recording for other prohibited material.

Opinion

Opinion by: C. Lynwood Smith, Jr.

Opinion

{300 F. Supp. 2d 1222}MEMORANDUM OPINION

This case is before the court on defendant's motion to reconsider his motion to dismiss the indictment. 1 The motion challenges the authority of Congress to regulate intrastate possession of a home-made video tape depicting defendant engaged in sexual acts with a minor.

{2004 U.S. Dist. LEXIS 2}I. BACKGROUND

Justin Wayne Matthews made a video tape recording of himself engaged in various, consensual,

sexual acts with a minor on some uncertain date during July or August of 2002. 2 Matthews then was twenty-two years of age, and the juvenile female was sixteen. 3

The government filed a two-count indictment charging Matthews with sexual exploitation of children in violation of 18 U.S.C. § 2251(a), and possession of child**{2004 U.S. Dist. LEXIS 3}** pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The government does not allege that any of the "*actual images of child pornography* produced by defendant in the conduct charged in the indictment were mailed, shipped, or transported in interstate commerce," 4 nor does the government contend that defendant intended to sell, distribute, or exchange the tape or copies of it. Rather, federal jurisdiction is premised upon the fact that the camera used by defendant, 5 and the tape medium upon which images and sounds were recorded, 6 previously had traveled in interstate and foreign commerce. 7

{2004 U.S. Dist. LEXIS 4}{300 F. Supp. 2d 1223}II. DISCUSSION

No decent citizen condones sexual relations between an adult and a minor, or the exploitation of minors for the satisfaction of deviate sexual desires. That is why Alabama, like many other states, has criminalized the conduct charged in this indictment. 8 Thus, the question of whether Justin Wayne Matthews should be subject to criminal sanctions for his actions is not the issue confronting this court. 9

Rather, the fundamental question raised by defendant's motion is whether Congress exceeded its powers under the Commerce Clause of the United States Constitution when enacting statutes which, when applied to facts such as those presented here, make the simple *intra*-state production and possession of visual depictions of a minor engaging in sexually explicit conduct a federal offense, even though those images were not mailed, shipped, or transported **{300 F. Supp. 2d 1224}** in interstate or foreign commerce by any means, including by computer, and there is no evidence that the visual depictions were intended**{2004 U.S. Dist. LEXIS 6}** for interstate distribution or economic activity of any kind, including exchange of the pornographic tape recording for other prohibited materials.

A. Count One & 18 U.S.C. § 2251(a)

Count One of the indictment is based upon 18 U.S.C. § 2251(a), 10 which provides that:

> *Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in*, or who has a minor assist any other person to engage in, or who transports any minor in 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 producing any visual depiction of such conduct*, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, [or] *if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer*, or if such visual depiction has actually been transported in interstate or foreign**{2004 U.S. Dist. LEXIS 7}** commerce or mailed.*Id.* (emphasis supplied to reflect relevant portions of the conduct charged in Count One).

A "minor" is defined by 18 U.S.C. § 2256(1) as "any person under the age of eighteen years," while the term "visual depiction" includes "undeveloped film and videotape." 18 U.S.C. § 2256(5). The phrase "sexually explicit conduct" is defined by 18 U.S.C. § 2256(2) as meaning, among other things, "sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, . . . [and] masturbation . . . ."

B. Count Two & 18 U.S.C. § 2252A(a)(5)(B)

Count Two of the indictment is based upon 18 U.S.C. § 2252A(a)(5)(B), 11 which makes it a federal offense for any person to

> *knowingly possess*[] any book, magazine, periodical, film, *videotape*, computer disk, or any other material *that contains an image of child* **{2004 U.S. Dist. LEXIS 8}** *pornography that* has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that *was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means*, including by computer.*Id.* (emphasis supplied to reflect relevant portions of the conduct charged in Count Two).

The term "child pornography" is defined by 18 U.S.C. § 2256(8)(A) as meaning

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . . .

C. The Protection of Children Against Sexual Exploitation Act of 1977

The statutes upon which the charged offenses are based**{2004 U.S. Dist. LEXIS 9}** were enacted as part of **{300 F. Supp. 2d 1225}** the Protection of Children Against Sexual Exploitation Act of 1977 ("1977 Act"), Pub. L. No. 95-225, 92 Stat. 7 (1978), 18 U.S.C. § 2251 *et seq.* The 1977 Act is a comprehensive scheme that prohibits the production, receipt, possession, transmission, and sale of child pornography.

During the process of enacting the 1977 Act, the Department of Justice expressed concern that the legislation was "jurisdictionally deficient." *See* S. Rep. No. 95-438 at 25 (DOJ response to request of Senate Judiciary Committee for Department's view of the proposed legislation), *reprinted in* 1978 U.S.C.C.A.N. 40, 60, *also available at* 1977 WL 9660. Writing on behalf of the Department, then-Assistant Attorney General Patricia M. Wald stated:

> The bill would cover a purely intrastate photographing and distribution operation on the theory that commerce is "affected" in that the processing of the film or photographs utilize materials that moved in interstate commerce . . . . *In our opinion, the investigation or prosecution of purely local acts of child abuse should be left to local authorities with federal involvement confined* **{2004 U.S. Dist. LEXIS 10}** *to those instances in which the mails or facilities of interstate commerce are actually used or intended to be used for distribution of the film or photographs in question.*S. Rep. No. 95-438 at 26, 1978 U.S.C.C.A.N. at 61 (emphasis supplied).

As originally enacted, the provisions now codified in 18 U.S.C. §§ 2251and 2252 included a requirement that visual depictions of child pornography actually move (or proof that they were intended for movement) in interstate or foreign commerce. The relevant portions of the original version of the 1977 Act read as follows:

> **Section 2251. 18 U.S.C. 2251. Sexual exploitation of children.**
>
> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), *if such person knows* or has reason to know *that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or*

print medium **{2004 U.S. Dist. LEXIS 11}** *has actually been transported in interstate or foreign commerce or mailed.*

. . .

Section 2252. 18 U.S.C. 2252. Certain activities relating to material involving the sexual exploitation of minors.

(a) Any person who--,

(1) *knowingly transports or ships in interstate or foreign commerce* or mails, *for the purpose of sale or distribution for sale*, any obscene visual or print medium, if--,

(2) *knowingly receives for the purpose of sale or distribution for sale*, or knowingly sells or distributes for sale, *any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed*, if--,

{300 F. Supp. 2d 1226} shall be punished as provided in subsection (b) of this section.

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; or

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct;Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 7-8 (1978) (emphasis supplied).

{2004 U.S. Dist. LEXIS 12} 1. **1984** amendments

The 1977 Act was amended by the Child Protection Act of 1984. The amendments were prompted by the Supreme Court's decision in *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), which upheld the constitutionality of a New York statute, and found that the state's interest in protecting children outweighed a need for protection of child pornography under the First Amendment. *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204; *see also* H.R. Rep. 98-536, at 1-2, *reprinted in* 1984 U.S.C.C.A.N. 492, 492-93, *available at* 1983 WL 25391. 12 The 1984 amendments sought to eliminate the requirements of the 1977 Act to prove "obscenity" and "commercial purpose," as well as to raise the age of protection of children under the Act from sixteen to eighteen years. *See* H.R. Rep. 98-536, at 5, *reprinted in* 1984 U.S.C.C.A.N. 492, at 496.

{2004 U.S. Dist. LEXIS 13} 2. 1988 amendments

The Child Protection and Obscenity Enforcement Act of 1988 further amended the 1977 Act by providing that the movement of child pornography prohibited by the statute encompassed movement accomplished "by any means including by computer." Pub. L. No. 100-690, § 7511(b), 102 Stat. 4485, 4485 (1998). 13

3. 1990 amendments

Two years later, 18 U.S.C. § 2252 was amended as part of the Child Protection Restoration and Penalties Enhancement Act of 1990, to include child pornography that contained "materials" that had moved in interstate or foreign commerce. Pub. L. No. 101-647, § 323(b), 104 Stat. 4816, 4819.

4. 1998 amendments

Congress**{2004 U.S. Dist. LEXIS 14}** again amended the 1977 Act in 1998, expanding the jurisdictional basis of 18 U.S.C. § 2251, and encompassing *materials used in the production of visual depictions* that had "been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer." Pub. L. No. 105-314, § 201(a), 112 Stat. 2974, 2977 (1998) (codified at 18 U.S.C. § 2251(a)). This amendment brought § 2251 in line with analogous possession statutes -- *i.e.*, 18 U.S.C. §§ 2252(a)(4)(B), 2252A(a)(4)(B), and 2252A(a)(5)(B) -- which contained equivalent jurisdictional language. The amendment also extended the coverage of the statute to cases in which proof of the interstate transportation of visual depictions, or proof of the pornographer's knowledge as to interstate transportation, is absent. *See* H.R. Rep. 105-557, at 26-27 (1998), *reprinted at* 1998 WL 285821.

D. Congressional Power to Regulate *Intra*-state Acts

Congress can regulate three broad categories of activity pursuant to its powers under the Commerce Clause: 14 (1) the **{300 F. Supp. 2d 1227}** channels of interstate commerce; 15 (2) the instrumentalities**{2004 U.S. Dist. LEXIS 15}** of interstate commerce; 16 and (3) those *intra*-state activities having a "substantial" relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S. Ct. 1624, 1629-30, 131 L. Ed. 2d 626 (1995). Given the facts and stipulations presented in this case, the parties have correctly focused their arguments upon the third category. 17 *See, e.g., United States v. McCoy*, 323 F.3d 1114, 1118 (9th Cir. 2003) (analyzing § 2252(a)(4)(B) under category three); *United States v. Kallestad*, 236 F.3d 225, 228-31 (5th Cir. 2000) (same); *United States v. Angle*, 234 F.3d 326, 337 n.12 (7th Cir. 2000) (same).

As the Eleventh Circuit observed in *United States v. Ballinger*, 312 F.3d 1264 (11th Cir. 2002), while the Constitution permits Congress to regulate

> "*any* instrumentality or channel of interstate commerce, the Constitution permits Congress to regulate only those intrastate activities which have a *substantial* effect on interstate commerce, and such regulation of purely intrastate activity reaches the outer limits of Congress' commerce power. **{2004 U.S. Dist. LEXIS 17}**
>
> To hold otherwise . . . would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567, 115 S. Ct. 1624. This the Constitution does not permit. *Id.; see also Maryland v. Wirtz*, 392 U.S. 183, 197, n.27, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968) (the Constitution does not permit Congress to use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities).*Ballinger*, 312 F.3d at 1270 (emphasis in original) (holding that federal church arson act did not apply to purely *intra*-state arson with no substantial effect on interstate commerce).

1. The *Morrison* test for determining whether an activity has a "substantial relation" to interstate commerce

The Supreme Court established what is now the controlling test for determining whether an *intra*-state activity *substantially* affects interstate commerce in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000): *i.e.*, (1) whether the regulatory statute enacted by Congress implicates**{2004 U.S. Dist. LEXIS 18}** activities that have something to do with "commerce," or any sort of economic enterprise, however broadly one might define those terms; (2) whether the statute contains an "express jurisdictional element which might limit its reach" to *intra*-state activities having "an explicit connection with or effect on interstate commerce"; (3) whether **{300 F. Supp. 2d 1228}** congressional findings in the statute or its legislative history support

the conclusion that the *intra*-state activity in question has a *substantial* effect on interstate commerce; and (4) whether the link between the *intra*-state activity and its effect on interstate commerce is "attenuated." *Id.* at 610-13, 120 S. Ct. at 1749-51. Each of these factors is examined below.

a. Whether the statute relates to an activity that has something to do with "commerce," or any sort of economic enterprise

In *Morrison*, the Supreme Court found that Congress exceeded its Commerce Clause power when enacting a provision of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender-motivated violence. In so holding, the Court rejected "the argument**{2004 U.S. Dist. LEXIS 19}** that Congress may regulate *noneconomic, violent criminal conduct* based solely on that conduct's *aggregate effect* on interstate commerce. *The Constitution requires a distinction between what is truly national and what is truly local." Morrison*, 529 U.S. at 617-18, 120 S. Ct. at 1754 (citing *Lopez*, 514 U.S. at 567-68, 115 S. Ct. at 1634) (emphasis supplied).

Although some, if not most, child pornography may certainly be the product of commercial enterprise, it does not follow that *all* child pornography is the product of, or intended for distribution in, a market pandering to other perverts. The exploitation of a minor in home-produced video recordings of sexual acts is, unquestionably, despicable; but when it is done with no intention to sell, distribute, or exchange the tapes thus produced it is not "commerce."

Further, the mere possession of an object is not "commerce." *See United States v. Kallestad*, 236 F.3d 225, 231 (5th Cir. 2000) (Jolly, J., dissenting) ("I can think of no activity less commercial than the simple local possession of a good produced for personal use only."). If mere possession of a prohibited object**{2004 U.S. Dist. LEXIS 20}** rendered activity "commercial" in character, and thereby subject to congressional regulation under the Commerce Clause, then the *Lopez* decision would have been different. In *Lopez*, the Supreme Court rejected the government's contention that possession of a gun in a local school zone is an economic activity that might, through repetition elsewhere, substantially affect interstate commerce. *See* 514 U.S. at 563-67, 115 S. Ct. at 1632-34.

(i) The aggregation theory of *Wickard v. Filburn*

The government relies upon *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), as support for the statutes on which the indictment is based. In *Wickard*, an Ohio farmer named Roscoe Filburn challenged the constitutionality of the Agricultural Adjustment Act of 1938, which imposed penalties on farmers who produced agricultural commodities in excess of marketing quotas established for their farms by the Secretary of Agriculture. The economic theory undergirding the Act was the so-called "law" of supply and demand, which explains how the price of goods or commodities sold in an open market is determined by the variables of supply and**{2004 U.S. Dist. LEXIS 21}** demand. In general, the price of goods tend to rise when the quantity demanded exceeds the quantity supplied; conversely, prices tend to fall when the quantity supplied exceeds the quantity demanded. The purpose of the regulatory scheme embodied in the 1938 Act was that of controlling the volume (*supply*) of agricultural commodities placed into the streams of national and foreign commerce, thereby supporting the *prices* paid to producers.

> The general scheme of the Agricultural Adjustment Act of 1938 as related to **{300 F. Supp. 2d 1229}** wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the

next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms.*Id.* at 115, 63 S. Ct. at 84 (emphasis supplied) (footnotes omitted).

Filburn, who owned and operated a small Ohio farm on which he maintained**{2004 U.S. Dist. LEXIS 22}** a herd of dairy cattle (selling milk) and a flock of chickens (selling poultry and eggs) violated the Act in the following respects:

> It had been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. . . .
>
> In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for [Filburn's] 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $ 117.11 in all.*Id.* at 114-15, 63 S. Ct. at 84.

Filburn argued that Congress**{2004 U.S. Dist. LEXIS 23}** exceeded its powers under the Commerce Clause when enacting a statute that regulated commodities produced wholly within one state for the personal use and consumption of the producer, and not for sale in interstate or foreign markets. In rejecting Filburn's argument, the Supreme Court explained:

> The effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.
>
> The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. *That* [Filburn's] *own contribution to the demand for wheat may be trivial by itself is not enough to remove him from* **{2004 U.S. Dist. LEXIS 24}** *the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.*
>
> It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary **{300 F. Supp. 2d 1230}** purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense

competes with wheat in commerce. . . .317 U.S. at 127-28, 63 S. Ct. at 90-91 (citations and footnote omitted) (emphasis supplied).**{2004 U.S. Dist. LEXIS 25}**

Unlike *Wickard*, there is no evidence in the case before this court suggesting that defendant's home-production and possession of the video recording that is the basis for indictment had any plausible impact on the supply, demand, or price of child pornography in the national "market" for such perversions. There is no evidence that defendant sold, distributed, or exchanged copies of his recording to anyone, in or out of the State of Alabama, or that he intended to do so. Consequently, his *intra*-state production and possession of the recording cannot be described as "commerce" under any construction of that term. It follows, therefore, that *Wickard's* aggregation analysis does not apply.

In both *Lopez* and *Morrison*, the Supreme Court carefully limited the precedential reach of the *Wickard* decision. The *Lopez* Court held that "a criminal statute that by its terms has nothing to do with '*commerce*' or any sort of *economic enterprise*, however broadly one might define those terms," cannot be sustained by that line of cases flowing from *Wickard* which "uphold[s] regulations of [intra-state] activities that arise out of or are connected with a commercial**{2004 U.S. Dist. LEXIS 26}** transaction, [and] which[, when] viewed in the aggregate, substantially affects interstate commerce." 514 U.S. at 561, 115 S. Ct. at 1630-31 (emphasis supplied); *see also id.* at 560, 115 S. Ct. at 1630 ("Where [intra-state] economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

Moreover, the *Morrison* Court clearly stated that, "in every case where we have sustained federal regulation [of intra-state activity] under the aggregation principle in *Wickard*, . . . the regulated activity was of an apparent *commercial* character." 529 U.S. at 611 n.4, 120 S. Ct. at 1750 n.4 (citation omitted) (emphasis supplied).

(ii) *United States v. Rodia*

When *Wickard's* aggregation analysis is laid aside, the government falls back upon the Third Circuit's opinion in *United States v. Rodia*, 194 F.3d 465 (3d Cir. 1999). In that case, which pre-dates *Morrison*, the Third Circuit upheld a Commerce Clause challenge to § 2252(a)(4)(B), even while conceding that the language contained in the 1990 amendments to the Protection of Children Against Sexual**{2004 U.S. Dist. LEXIS 27}** Exploitation Act of 1977 (and at issue in that case) was not supported by congressional findings. 194 F.3d at 474. The *Rodia* court rationalized that Congress "could have" concluded -- although, in fact, it had not done so -- that the intra-state possession of home-made pornography "may well stimulate a further interest in pornography that immediately or eventually animates demand for interstate pornography." 194 F.3d at 477.

This court is reluctant to engage in such fictionalization of congressional intent in order to reach the result that intra-state possession of home-made child pornography **{300 F. Supp. 2d 1231}** is "economic activity." Indeed, after *Morrison*, the analysis in *Rodia* falls short, because only speculation and conjecture support the conclusion that home-made child pornography is "commercial" or "economic" in nature. *See United States v. McCoy*, 323 F.3d 1114, 1121 (9th Cir. 2003).

b. Whether the statute contains an "express jurisdictional element which might limit its reach" to activities having "an explicit connection with or effect on interstate commerce"

Prior to *Morrison*, the "jurisdictional hook" of 18 U.S.C. §§ 2251**{2004 U.S. Dist. LEXIS 28}** (a)and 2252A(a)(5)(B) had been viewed by some courts as sufficient to render those statutes constitutional. 18 The Third Circuit, however, expressed doubt that the jurisdictional provision in an analogous statute, § 2252(a)(4)(B), added any substance to a Commerce Clause analysis. *See United States v.*

Rodia, 194 F.3d at 472-73.

> As a practical matter, the limiting jurisdictional factor is almost useless here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute. At all events, it is at least doubtful in this case that the jurisdictional element adequately performs the function of guaranteeing that the final product regulated substantially affects interstate commerce.*Id.* at 473.

{2004 U.S. Dist. LEXIS 29} Following the Supreme Court's decision in *Morrison*, other circuits have similarly questioned the efficacy of the "jurisdictional hook" at issue here. *See United States v. Holston*, 343 F.3d 83, 89 (2d Cir. 2003); *United States v. McCoy*, 323 F.3d 1114, 1125-26 (9th Cir. 2003); *United States v. Corp*, 236 F.3d 325, 331 (6th Cir. 2001); *United States v. Angle*, 234 F.3d 326, 337 (7th Cir. 2000). *But see United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000).

In the present case, the "jurisdictional hook" attaches -- if it grips at all -- to the fact that the video camera and tape had moved in foreign and interstate commerce prior to the date on which those objects were used to record the visual depictions of defendant and a minor engaging in sexual acts. This so-called "limiting" jurisdictional provision is, as the Third Circuit pronounced, for all practical purposes useless, because it utterly fails to guarantee "that the final product regulated [the pornographic *images* recorded on the tape] substantially affects interstate commerce." *Rodia*, 194 F.3d at 472. This court**{2004 U.S. Dist. LEXIS 30}** therefore agrees with the majority of the circuit courts of appeals cited above, which are aligned in their doubt as to the effectiveness of the jurisdictional language contained in the statutes at issue here.

c. Whether congressional findings in the statutes upon which the contested prosecution is based, or their legislative history, support the judgment that the charged conduct has a substantial effect on interstate commerce

Congress undisputedly declared commercial child pornography to be a national evil when enacting the Protection of Children Against Sexual Exploitation Act of 1977 by such findings as these:

> -- Child pornography and child prostitution have become highly organized, **{300 F. Supp. 2d 1232}** multimillion dollar industries that operate on a nationwide scale;
>
> -- The use of children as prostitutes or as the subjects of pornographic materials is very harmful to both the children and the society as a whole;
>
> -- Such prostitution and the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce; and
>
> -- Existing federal laws dealing with prostitution and**{2004 U.S. Dist. LEXIS 31}** pornography do not protect against the use of children in these activities and . . . specific legislation in this area is both advisable and needed.*See* S. Rep. No. 95-438, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 40, 42-43. Congress expressly stated its concern that the child pornography "industry" operated on a "nationwide scale," with sale and distribution occurring "to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce." *Id.* For such reasons, the contested statutes survive a facial challenge.

The mere existence of such legislative findings, however, "is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation" *as applied* to the facts presented here. *Morrison*, 529 U.S. at 614, 120 S. Ct. at 1752. It is incumbent upon the judiciary to ultimately answer the question whether "particular [intra-state] operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them." *Id.* (quoting *Lopez*, 514 U.S. at 557

n.2, 115 S. Ct. at 1629 n.2 (in turn quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964)**{2004 U.S. Dist. LEXIS 32}** (Black, J., concurring)).

As applied to defendant Matthews, the statutes at issue exceed congressional authority under the Commerce Clause. Prosecution of the defendant in no way addresses the concerns expressed by Congress when enacting §§ 2251and 2252A(a)(5)(B). It has been stipulated that no actual images of the child pornography recorded on the video tape forming the basis for each count of the indictment were mailed, shipped, or transported in interstate or foreign commerce. Moreover, there is no evidence indicating that defendant *intended* to sell, distribute, or exchange the video tape in any market: state, national, or foreign. To the contrary, the fact that the tape was seized in defendant's bedroom during execution of a state search warrant on October 30, 2002, *some three to four months after the recorded events*, indicates that defendant retained possession of the tape with no intention to sell, distribute, or exchange it within the national pornography industry that was of concern to Congress. 19 No legislative findings exist with respect to the interstate effects of the strictly intra-state, non-commercial, production and possession of the video tape at issue**{2004 U.S. Dist. LEXIS 33}** here. As such, the court cannot find that the intra-state conduct for which defendant has been prosecuted had a "substantial" effect on interstate commerce, based upon legislative history or congressional pronouncements.

d. Whether the link between the charged conduct and its effect on interstate commerce is attenuated

As previously observed, the aggregation principle enunciated in *Wickard v. Filburn* does not assist the government in creating **{300 F. Supp. 2d 1233}** a link, "substantial" or otherwise, between the charged conduct and its effect on interstate commerce. "No aggregation of local effects is permissible to elevate a non-economic [intra-state] activity's insubstantial effect on interstate commerce into a substantial one in order to support federal jurisdiction." *United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002). While the exploitation of a minor in home-made child pornography is detestable, **{2004 U.S. Dist. LEXIS 34}** and deserving of strong criminal condemnation, it is not "commerce" or "economic activity" subject to congressional regulation in the absence of any evidence indicating that the pornographer intended to mail, sell, distribute, or exchange the images within an interstate market.

> To allow Congress to regulate local crime on a theory of its aggregate effect on the national economy would give Congress a free hand to regulate any activity, since, in the modern world, virtually all crimes have at least some attenuated impact on the national economy. [] Furthermore, it would transfer to Congress a general police power that the Constitution denies the federal government and reposes in the states.*Ballinger*, 312 F.3d at 1271 (citing *United States v. Morrison*, 529 U.S. at 615, 618, 120 S. Ct. at 1752-53, 1754).

The State of Alabama makes it a crime to engage in the acts charged in this federal indictment. 20 "When Congress criminalizes conduct already denounced as criminal by the States, it affects a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3, 115 S. Ct. at 1631 n.3.**{2004 U.S. Dist. LEXIS 35}** The tension between state and federal jurisdiction over this matter is only exacerbated when one considers that the federal statute defines "minor" as "any person under the age of eighteen years," 21 while the Alabama Code extends criminal liability when the depicted minor is "a person under the age of 17 years." 22

If Congress can regulate the making and possession of child pornography under the facts presented in this case, then there is nothing outside the purview of congressional**{2004 U.S. Dist. LEXIS 36}** regulation, "even in areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S. at 564, 115 S. Ct. at 1632. Despite Congress's admirable

goal of stamping out the reprehensible activity surrounding the creation of child pornography, the court is mindful of its "duty to recognize meaningful limits on the commerce power of Congress." *Lopez*, 514 U.S. at 580, 115 S. Ct. at 1640 (Kennedy, J., concurring). As applied to the facts presented here, the prosecution of defendant under §§ 2251(a)and 2252A(a)(5)(B) cannot withstand scrutiny.

E. Post-*Morrison* Cases

Prior to *Morrison*, the circuit courts of appeals were aligned in upholding the constitutionality of the federal child pornography statutes. *See United States v. Rodia*, 194 F.3d 465, 476 (3d Cir. 1999) (§ 2252(a)(4)(B)); *United States v. Robinson*, 137 F.3d 652, 656 (1st Cir. 1998) (§ 2252(a)(4)(B)). Since the *Morrison* decision, the circuit courts of appeals are divided on the issue presented, with the Eleventh Circuit yet to weigh in. *Compare United States v. Holston*, 343 F.3d 83 **{300 F. Supp. 2d 1234}** (2d Cir. 2003)**{2004 U.S. Dist. LEXIS 37}** (upholding § 2251(a) on both facial and as-applied challenges lodged by defendant who made several video tapes depicting himself engaged in sexually explicit acts with two minors); *United States v. Buculei*, 262 F.3d 322 (4th Cir. 2001) (upholding § 2251(a) on an as-applied challenge); *United States v. Hoggard*, 254 F.3d 744, 746 (8th Cir. 2001) (same, § 2251); *United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000) (same, § 2252(a)(4)(B)); *United States v. Angle*, 234 F.3d 326, 338 (7th Cir. 2000), *cert. denied*, 533 U.S. 932, 121 S. Ct. 2556, 150 L. Ed. 2d 722 (2001), *appeal after remand*, 315 F.3d 810 (7th Cir. 2003) (§ 2252(a)(4)(B)) *with United States v. McCoy*, 323 F.3d 1114, 1122-23 (9th Cir. 2003) (finding § 2252(a)(4)(B) unconstitutional as applied to defendant's "intrastate possession of home-grown child pornography not intended for distribution or exchange"); *United States v. Corp*, 236 F.3d 325 (6th Cir 2001) (finding § 2252(a)(4)(B) unconstitutional as applied where defendant was not involved in the distribution of the pictures in question**{2004 U.S. Dist. LEXIS 38}** or sharing them with others, and his act of photographing minor engaging in sexual activity was purely intrastate and consensual).

In *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), the Ninth Circuit held that 18 U.S.C. § 2252(a)(4)(B) -- which criminalizes the possession of visual depictions of a minor engaging in sexually explicit conduct, when the images were produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce -- was unconstitutional as applied to a mother who possessed a photograph showing herself and her young daughter partially unclothed, with their genital areas exposed. The photograph was intended for home use, and not sale, distribution, or exchange. Nevertheless, as in the case of the video camera and tape used by defendant herein, the photo was made with a camera and film that had traveled in interstate commerce. Section 2252(a)(4)(B) contains a jurisdictional element allowing prosecutions where the pornographic material "was produced using materials which have been mailed or . . . shipped or transported" in interstate commerce. 18 U.S.C. § 2252(a)(4)(B). **{2004 U.S. Dist. LEXIS 39}** 23 The court found that this language provided "no support for the government's assertion of federal jurisdiction." *McCoy*, 323 F.3d at 1126.

McCoy illustrates the principle that, just because some of the elements that go together to compose an object have moved in interstate commerce at some time or another -- *e.g.*, the camera used**{2004 U.S. Dist. LEXIS 40}** to record a visual image; the film, tape, diskette, or other medium on which the image is recorded; and the photographic paper, television screen, or computer monitor upon which the image is subsequently replicated -- it does not follow *ipso facto* that Congress can constitutionally regulate *the object* produced through incorporation of such constituents when the production and possession of the object occur solely within a single state. Instead, *the intra-state object itself* must move in the United States mail, or through use of the channels **{300 F. Supp. 2d 1235}** and instrumentalities of interstate or foreign commerce, or be shown to have a "substantial" effect on

interstate commercial activities that unquestionably are subject to congressional regulation.

Likewise, in this case, the government would have the court substitute an issue of unquestioned national concern, child pornography, for the constitutional requirement that the government demonstrate that the video tape produced and possessed wholly within one state had a "substantial" effect on interstate commerce. This the court cannot do. In highlighting the difference between intra-state conduct having a "substantial" effect on interstate**{2004 U.S. Dist. LEXIS 41}** commerce, and conduct that multiple states have addressed as internal matters, the Ninth Circuit quoted *United States v. Bird*, 124 F.3d 667 (5th Cir. 1997), in which the Fifth Circuit observed:

> Simply because a type of antisocial conduct (which any state could validly proscribe) can fairly be described as a "national" problem in the sense that many (or even all) states experience more instances of it than are desirable or desired, [does not mean that] this of itself suffices to bring such conduct within the scope of Congress's Commerce Clause power. Plainly it does not. Ever since a time well before the Constitutional Convention, there have been every year in each of the several states more murders than desirable or desired, but it is nevertheless plain that the Commerce Clause does not authorize Congress to enact legislation punishing any and all murders throughout the nation.*McCoy*, 323 F.3d at 1123 n.18 (quoting *Bird*, 124 F.3d at 678 n.13).

The dissent in *McCoy* asserted that as-applied challenges cannot be brought under the Commerce Clause, relying upon a single sentence from *Lopez*: "Where a general regulatory**{2004 U.S. Dist. LEXIS 42}** statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *McCoy*, 323 F.3d at 1134 (citing *Lopez*, 514 U.S. at 558, 115 S. Ct. at 1629). Subsequently, another Ninth Circuit panel explained how the sentence from *Lopez* was taken out of context by the dissenter in *McCoy*, saying that the sentence can only mean that, "where a general regulatory statute governs a large enterprise, it does not matter that its components have a *de minimis* relation to interstate commerce on their own. What does matter is that the components could disrupt the enterprise, and could thus interfere with interstate commerce." *United States v. Stewart*, 348 F.3d 1132, 1141 (9th Cir. 2003). In any event, the Eleventh Circuit has not been so constricted following the Supreme Court's decision in *Lopez*, and has declared on an as-applied challenge that a federal statute exceeded the power of Congress under the Commerce Clause. *See United States v. Ballinger*, 312 F.3d 1264 (11th Cir. 2002).

Recently, the Ninth Circuit reaffirmed its holding in **{2004 U.S. Dist. LEXIS 43}** *McCoy* in a case involving a Commerce Clause challenge to a machine gun statute. *See United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003). In *Stewart*, the court held that 18 U.S.C. § 922(o) was unconstitutional as applied to a defendant who possessed a machine gun that was made from component parts assembled at his home. Judge Kozinski, writing for the court, pointed out that

> at some level, of course, everything we own 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.*Id.* at 1135 (emphasis in original). The court analogized Stewart's circumstances **{300 F. Supp. 2d 1236}** to that of *McCoy*, where "McCoy's photographs, which were intended 'for her own personal use,' did not 'compete with other depictions exchanged, bought or sold in the illicit market for child pornography and did not affect their availability or price.'" *Id.* at 1138. Stewart, crafting his own guns, and working out of his own home, functioned outside the commercial gun market. **{2004 U.S. Dist. LEXIS 44}** The court explained that, unlike wheat,
>
> which is a staple commodity that Filburn would probably have had to buy, had he not grown it himself, there is no reason to think Stewart would ever have bought a machine gun from a

commercial source, had he been precluded by law from building one himself . . . . Thus, the link between Stewart's activity and its effect on interstate commerce is simply too tenuous to justify federal regulation. *Id.* (footnote omitted). And, so it is here.

The Sixth Circuit has likewise concluded, under analogous facts, that § 2252(a)(4)(B) was unconstitutional as applied to a defendant who was not involved in the distribution of (or sharing with others) the pictures in question. The defendant was engaged in the strictly intra-state act of photographing a minor engaging in consensual sexual activity. *See United States v. Corp*, 236 F.3d 325 (6th Cir. 2001).

A number of circuit courts of appeals have affirmed the constitutionality of the federal child pornography statutes after *Morrison*. Most of these cases fall in one of two categories. The first category encompasses cases in which it was established that the defendants**{2004 U.S. Dist. LEXIS 45}** either possessed visual depictions of minors engaged in sexually explicit activity with the intent to transport in interstate commerce, or the images actually had moved in interstate commerce. That is, each involved commercial child pornography that had been, or was intended to be, traded in the illicit interstate market Congress sought to reach. *See United States v. Adams*, 343 F.3d 1024 (9th Cir. 2003) (upholding statute against facial challenge where defendant downloaded commercial child pornography from the internet); *United States v. Buculei*, 262 F.3d 322, 330 (4th Cir. 2001) (upholding § 2251(a) under as-applied challenge where defendant intended to transport visual depictions in interstate commerce from Maryland to New York); *United States v. Angle*, 234 F.3d 326, 329-30 (7th Cir. 2000) (Indiana defendant ordered child pornography video tapes from Colorado vendor).

The second category comprises those cases in which courts have upheld constitutional challenges merely by relying on pre-*Morrison* precedent. *See, e.g., United States v. Hoggard*, 254 F.3d 744, 746 (8th Cir. 2001) ("This panel is bound by the reasoning**{2004 U.S. Dist. LEXIS 46}** in [*United v. Bausch*, 140 F.3d 739 (8th Cir. 1998)].").

The exceptions are *United States v. Holston*, 343 F.3d 83 (2d Cir. 2003) (upholding § 2251(a) on both facial and as-applied challenges made by defendant who made several videotapes depicting himself engaged in sexually explicit acts with two minor girls), and *United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000) (no evidence demonstrating that defendant's pictures moved in interstate commerce, merely that the film did). In *Holston*, the court found no significance to the fact that defendant neither shipped the materials interstate, nor intended to benefit commercially from his conduct. 343 F.3d at 91. The *Holston* court, however, did note the holdings in *McCoy* and *Corp* as based on "somewhat unique facts." *Id.* at 88 n.2.

In *Kallestad*, defendant was convicted of violating 18 U.S.C. § 2252(a)(4)(B) after agents found a large number of nude photos and films of women, some of whom **{300 F. Supp. 2d 1237}** were minors, in defendant's home. 236 F.3d at 226. Defendant had advertised in the Austin, Texas *American Statesman***{2004 U.S. Dist. LEXIS 47}** newspaper for the models, and the photographs were made in defendant's Austin home. *Id.* The film on which the photographic images were recorded was manufactured in some state other than Texas. *Id.* The *Kallestad* majority expanded *Wickard*'s scope and gave insufficient weight to the *Morrison* factors. *See McCoy*, 323 F.3d at 1130. Rather than first asking whether the intra-state activity at issue was "economic" in nature and, if so, then applying *Wickard* to determine whether its effect on interstate commerce was "substantial," the *Kallestad* majority used *Wickard* to support its conclusion that the regulated activity was economic (*i.e.*, put the proverbial cart before the horse). As stated in Judge Jolly's dissent:

> Today, the majority has embraced logic the *Morrison* court eschewed. The majority holds that Congress can indeed regulate non-economic, intrastate criminal conduct (possession of child

pornography), simply because "this reach into local intrastate conduct was a necessary incident of a congressional effort to regulate a national market." It so holds, despite the Morrison Court's observation that "thus far in our Nation's**{2004 U.S. Dist. LEXIS 48}** history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."

The majority never asserts that simple possession of self-generated child pornography is an economic activity. Indeed, simple possession for personal purposes cannot possibly be so classified. Instead, the majority's opinion relies on the fall-back principle of *Wickard v. Filburn* to establish that Congress can reach even non-economic intrastate activity. The majority undertakes such an application of *Wickard*, even though *Morrison* explicitly reminds us that "in every case where we have sustained federal regulation under *Wickard's* aggregation principle, the regulated activity was of an apparent commercial character." Because I can think of no activity less commercial than the simple local possession of a good produced for personal use only, I believe that section 2252(a)(4) is unconstitutional as applied to Kallestad's conduct.*Kallestad*, 236 F.3d at 232 (Jolly, J., dissenting) (citations omitted). Judge Jolly's dissent in *Kallestad* is more consistent with the teachings of *Morrison* than the majority's opinion.

{2004 U.S. Dist. LEXIS 49}III. CONCLUSION

Upon careful reconsideration of the stipulations, evidence, and briefs, the court concludes that 18 U.S.C. §§ 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 a minor 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 exchange of the pornographic recording for other prohibited material. In reaching that conclusion, this court finds persuasive the rationale of the Ninth Circuit in *United States v. McCoy*, 24 and the unique facts presented in this case analogous to the facts of *McCoy* and *United States v. Corp.* 25 Accordingly, this court reaches a similar conclusion, and holds that 18 U.S.C. §§ 2251(a)and 2252A(a)(5)(B), *as applied* to the facts on **{300 F. Supp. 2d 1238}** which each Count of the indictment is based, exceed the powers of Congress under the Commerce Clause of the United**{2004 U.S. Dist. LEXIS 50}** States Constitution.

Defendant's conviction pursuant to plea agreement, therefore, is due to be vacated and the indictment dismissed. An appropriate order will be entered contemporaneously herewith.

DONE this 2nd day of February, 2004.

C. Lynwood Smith, Jr.

United States District Judge

ORDER

Upon reconsideration, and in accordance with the memorandum opinion entered contemporaneously herewith, defendant's motion to dismiss 1 is GRANTED, and the conviction of Justin Wayne Matthews pursuant to plea agreement is vacated, the indictment is dismissed, and defendant is discharged.

DONE this 2nd day of February, 2004.

C. Lynwood Smith, Jr.

United States District Judge

Footnotes

1

Following arraignment, defendant filed a motion to dismiss the indictment (doc. no. 27), but the magistrate judge to whom this case was assigned for pretrial proceedings recommended denial of the motion (doc. no. 32), and this court initially adopted the magistrate's report and recommendation (doc. no. 40). Defendant subsequently entered conditional pleas of guilty to both counts, reserving the right to challenge the court's jurisdiction, and to appeal the denial of his motion to dismiss on the basis of jurisdiction, among other issues. *See* Fed. R. Crim. P. 11(a)(2); doc. no. 37 (plea agreement) at 2; doc. no. 51 (transcript of Rule 11 plea colloquy) at 3 and 20. Prior to sentencing, however, defendant filed the present motion (doc. no. 41), asking this court to reconsider the order denying his motion to dismiss. The court granted the motion to reconsider (doc. no. 52), and conducted an evidentiary hearing to fully develop the factual underpinnings of the constitutional challenge.

2

See Gov. Ex. 1 (tape recording) and doc. no. 57 (transcript of Aug. 27, 2003 evidentiary hearing) (hereinafter "**Tr.**"), at 26 (acts consensual) and 35 (minor affirmed recording occurred in "either July or August" of 2002).

3

See doc. no. 51 (transcript of Rule 11 plea colloquy) at 34 (minor sixteen years old) and Tr. at 30 (minor's date of birth was June 19, 1986). The recording was made about 2:00 am. in the living room of the home in which the minor resided with her mother and father, while both parents were sleeping. Tr. at 33-34.

4

Tr. at 8-9 (stipulation of parties) (emphasis supplied).

5

See doc. no. 55 (Government's Notice of Anticipated Stipulations) and Tr. at 2-5.

6

Tr. at 5-8; *see also id.* at 9-18 (testimony of technical service representative for Sony Magnetic Products of America).

7

Thus, Count One of the indictment charges that:

> In or about July 2002, within the Northern District of Alabama, the defendant, JUSTIN WAYNE MATTHEWS, did employ, use, persuade, induce, and entice a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, said visual depiction which was produced using materials that had been mailed, shipped, and transported in interstate and foreign commerce, in violation of Title 18, United States Code, Section 2251(a).Doc. no. 1, at 1. In like manner, Count Two of the indictment charges, in pertinent part, that:
>
> On or about the 30th day of October, 2002, within the Northern District of Alabama, the defendant, JUSTIN WAYNE MATTHEWS, did knowingly possess material that contained images of child pornography, as defined in Title 18, United States Code, Section 2256(8)(A)and

(C), that had been mailed, shipped, and transported in interstate and foreign commerce and that was produced using materials that had been mailed, shipped and transported in interstate and foreign commerce, in violation of Title 18, United States Code, Section 2252A(a)(5)(B).Doc. no. 1, at 1-2. It probably should be noted that defendant "introduced" himself to the minor depicted in the tape recording during computer-generated "conversations" that occurred in electronic "chat rooms" hosted by an internet service provider known as America Online ("AOL"). *See, e.g.*, Tr. at 19-20. By means of such computer-generated blandishments, as well as some subsequent telephone conversations, *id.* at 25, 27-28, defendant enticed and persuaded the young woman to meet him at various times and places for the purpose of engaging in sexual relations. The parties stipulated that AOL communications originating in Alabama are transmitted to Virginia, and from Virginia to the ultimate recipient, even if the ultimate recipient resides in Alabama. Tr. at 41. Even so, the government did *not* charge defendant with a violation of 18 U.S.C. § 2422, which provides, in part:

Whoever, *using* the mail or *any facility or means of interstate or foreign commerce*, . . . 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, imprisoned not more than 15 years, or both.18 U.S.C. § 2422(b) (emphasis supplied).

8

See generally "The Alabama Child Pornography Act," codified at Alabama Code § 13A-12-190 *et seq.* (1975) (1994 Replacement Vol.). Section 13A-12-191, for example, makes it a "Class B" felony for any person to produce, possess, display, or distribute any materials containing a visual depiction of a person under the age of seventeen years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast or genital nudity, or "other sexual conduct." Class B felonies are punishable by not less than two, nor more than twenty, years of imprisonment, § 13A-5-6(a)(2), and a fine of not more than $ 10,000, § 13A-5-11(a)(2).

9

In view of the testimony elicited from two other minors called by the government to testify at the evidentiary hearing about "relevant conduct" under U.S.S.G. § 1B1.3, to the effect that each was under the age of sixteen years on the date sexual relations with defendant occurred, it was (and still is) possible for defendant to be prosecuted by the State of Alabama for Rape in the second degree ("statutory rape") under Ala.Code § 13A-6-62(a)(1), which also is a "Class B" felony.

10

See supra note 7.

11

See supra note 7.

12

Congress noted that very few prosecutions had occurred since enactment, and the 1977 Act consequently required "some modification" H.R. Rep. 98-536, at 2, *reprinted in* 1984 U.S.C.C.A.N. 492, 493, *available at* 1983 WL 25391.

13

The Child Protection and Obscenity Enforcement Act of 1988 was enacted as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 1, 102 Stat. 4181, 4181. *See generally* Bradley Scott Shannon, *The Jurisdictional Limits of Federal Criminal Child Pornography Law*, 21 U. Haw. L. Rev. 73 (1999).

14

The Constitution delegates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3.
15

"The channels of interstate commerce include interstate highways, shipping lanes, rivers, lakes, canals, railroad track systems, the mail, telegraph lines, air traffic routes electronic and all other *modes of interstate or foreign movement* of commerce." *United States v. Ballinger*, 312 F.3d 1264, 1269 (11th Cir. 2002) (emphasis in original) (citation omitted).
16

"The instrumentalities of interstate commerce are those '*persons or things*' that *move* in interstate commerce, including all cars and trucks, ships, aircraft and anything else that travels across state lines, as do interstate shipments." *Id.* (emphasis in original) (citation omitted).
17

See Defendant's Motion to Dismiss (doc. no. 27); Government's Response to Defendant's Motion to Dismiss (doc. no. 29); Defendant's Motion to Reconsider the Court's Order for Motion to Dismiss (doc. no. 41); Government's Response to Defendant's Motion to Reconsider the Court's Order for Motion to Dismiss (doc. no. 46).
18

The court looked at analogous cases analyzing various sections of the Protection of Children Against Sexual Exploitation Act of 1977, as amended, containing the same jurisdictional language. *See, e.g., United States v. Bausch*, 140 F.3d 739, 741 (8th Cir. 1998) (stating that § 2252(a)(4)(B) ensures that each defendant's pornography possession affected interstate commerce on a case-by-case basis); *United States v. Robinson*, 137 F.3d 652, 656 (1st Cir. 1998) (same).
19

See generally doc. no. 58 (transcript of evidentiary hearing held Sept. 5, 2003), at 5-26.
20

See supra note 8. *See also supra* note 9 (other state crimes that could be charged, based upon defendant's acts with two other juvenile females).
21

18 U.S.C. § 2256(1) (2003). The term "minor" was originally defined to mean "any individual who has not attained age sixteen." As observed in Part III.C.1 *supra*, however, this provision was amended in 1984, extending protection of minors up to eighteen years of age.
22

Ala. Code § 13A-12-191 *et seq.*
23

The statute makes it illegal for any person to:

> knowingly possess 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has shipped or transported in interstate or foreign commerce, *or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer*, if--
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct . . . .18 U.S.C. § 2252(a)(4)(B) (emphasis supplied).
24

323 F.3d 1114 (9th Cir. 2003).
25

236 F.3d 325 (6th Cir. 2001).
1

See doc. nos. 27 and 41

APP-4

JUAN ESQUIVEL-QUINTANA, Petitioner v. JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL
SUPREME COURT OF THE UNITED STATES
581 U.S. 385; 137 S. Ct. 1562; 198 L. Ed. 2d 22; 2017 U.S. LEXIS 3551; 85 U.S.L.W. 4296; 26 Fla. L. Weekly Fed. S 607
No. 16-54.
May 30, 2017, Decided
February 27, 2017, Argued

Notice:

The LEXIS pagination of this document is subject to change pending release of the final published version.

Editorial Information: Prior History

{2017 U.S. LEXIS 1}ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUITEsquivel-Quintana v. Lynch, 810 F.3d 1019, 2016 U.S. App. LEXIS 646 (6th Cir.) (6th Cir., Jan. 15, 2016)

Disposition:

Reversed.Summary

Overview: ISSUE: Whether a conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old qualified as sexual abuse of a minor under the INA. HOLDINGS: [1]-Absent some special relationship of trust, consensual sexual conduct involving a younger partner who was at least 16 years of age did not qualify as sexual abuse of a minor under the INA; [2]-In the context of statutory rape offenses focused solely on the age of the participants, the generic federal definition of ``sexual abuse of a minor'' under 8 U.S.C.S. § 1101(a)(43)(A) required the age of the victim to be less than 16; [3]-Because Cal. Penal Code § 261.5(c) did not categorically fall within the generic federal definition of sexual abuse of a minor, a conviction pursuant to it was not an aggravated felony under § 1101(a)(43)(A).
Outcome: Judgment reversed. 8-0 Decision.

CASE SUMMARY In context of statutory rape offenses focused solely on participants' age, generic federal definition of ``sexual abuse of a minor'' under 8 U.S.C.S. § 1101(a)(43)(A) required age of victim to be less than 16. Because Cal. Penal Code § 261.5(c) did not categorically fall within that definition, conviction pursuant to it was not an aggravated felony.

OVERVIEW: ISSUE: Whether a conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old qualified as sexual abuse of a minor under the INA. HOLDINGS: [1]-Absent some special relationship of trust, consensual sexual conduct involving a younger partner who was at least 16 years of age did not qualify as sexual abuse of a minor under the INA; [2]-In the context of statutory rape offenses focused solely on the age of the participants, the generic federal definition of ``sexual abuse of a minor'' under 8 U.S.C.S. § 1101(a)(43)(A) required the age of the victim to be less than 16; [3]-Because Cal. Penal Code § 261.5(c) did not categorically fall within the generic federal definition of sexual abuse of a minor, a conviction pursuant to it was not an aggravated felony under § 1101(a)(43)(A).

OUTCOME: Judgment reversed. 8-0 Decision.

LexisNexis Headnotes

Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies

The Immigration and Nationality Act (INA), 66 Stat. 163, provides that any alien who is convicted of an aggravated felony after admission to the United States may be removed from the country by the Attorney General. 8 U.S.C.S. § 1227(a)(2)(A)(iii). One of the many crimes that constitutes an aggravated felony under the INA is sexual abuse of a minor. 8 U.S.C.S. § 1101(a)(43)(A). A conviction for sexual abuse of a minor is an aggravated felony regardless of whether it is for a violation of Federal or State law. 8 U.S.C.S. § 1101(a)(43). The INA does not expressly define sexual abuse of a minor.

Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies

8 U.S.C.S. § 1227(a)(2)(A)(iii) makes aliens removable based on the nature of their convictions, not based on their actual conduct. Accordingly, to determine whether an alien's conviction qualifies as an aggravated felony under that section, a court employs a categorical approach by looking to the statute of conviction, rather than to the specific facts underlying the crime. Under that approach, the court asks whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony. In other words, the court presumes that the state conviction rested upon the least of the acts criminalized by the statute, and then the court determines whether that conduct would fall within the federal definition of the crime.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Statutory Rape > Elements

Because Cal. Penal Code § 261.5(c) criminalizes unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator and defines a minor as someone under age 18, the conduct criminalized under this provision would be, at a minimum, consensual sexual intercourse between a victim who is almost 18 and a perpetrator who just turned 21.

Governments > Legislation > Interpretation

A court's analysis begins with the language of the statute.

Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Statutory Rape > Elements

By providing that the abuse must be of a minor, the Immigration and Nationality Act, 66 Stat. 163, focuses on age, rather than mental or physical incapacity. Accordingly, to qualify as sexual abuse of a minor, the statute of conviction must prohibit certain sexual acts based at least in part on the age of the victim. Statutory rape laws are one example of this category of crimes. Those laws generally provide that an older person may not engage in sexual intercourse with a younger person under a specified age, known as the **age of consent**. Many laws also require an age differential between the two partners. Although the **age of consent** for statutory rape purposes varies by jurisdiction, reliable dictionaries provide evidence that the generic age is 16.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Statutory Rape >

Elements

In the context of statutory rape, the prepositional phrase ``of a minor" naturally refers not to the age of legal competence (when a person is legally capable of agreeing to a contract, for example), but to the **age of consent** (when a person is legally capable of agreeing to sexual intercourse).

Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies

The offense of sexual abuse of a minor is listed in the Immigration and Nationality Act (INA), 66 Stat. 163, as an aggravated felony. 8 U.S.C.S. § 1227(a)(2)(A)(iii). An aggravated offense is one made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime. Moreover, the INA lists sexual abuse of a minor in the same subparagraph as murder and rape, 8 U.S.C.S. § 1101(a)(43)(A)-among the most heinous crimes it defines as aggravated felonies. 8 U.S.C.S. § 1227(a)(2)(A)(iii). The structure of the INA therefore suggests that sexual abuse of a minor encompasses only especially egregious felonies.

Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Statutory Rape > Elements

When ``sexual abuse of a minor" was added to the Immigration and Nationality Act, 66 Stat. 163, in 1996, 31 States and the District of Columbia set the **age of consent** at 16 for statutory rape offenses that hinged solely on the age of the participants. As for the other States, one set the **age of consent** at 14; two set the **age of consent** at 15; six set the **age of consent** at 17; and the remaining ten, including California, set the **age of consent** at 18. A significant majority of jurisdictions thus set the **age of consent** at 16 for statutory rape offenses predicated exclusively on the age of the participants.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Statutory Rape > Elements
Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies

Absent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as sexual abuse of a minor under the Immigration and Nationality Act, 66 Stat. 163, regardless of the age differential between the two participants.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Statutory Rape > Elements
Immigration Law > Deportation & Removal > Grounds > Criminal Activity > Aggravated Felonies

In the context of statutory rape offenses focused solely on the age of the participants, the generic federal definition of ``sexual abuse of a minor under 8 U.S.C.S. § 1101(a)(43)(A) requires the age of the victim to be less than 16.

Syllabus

{137 S. Ct. 1565}{198 L. Ed. 2d 25} Petitioner, a citizen of Mexico and lawful permanent resident of the United States, pleaded no contest in a California court to a statutory rape offense criminalizing ``unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator." Cal. Penal Code Ann. §261.5(c). For purposes of that offense, California defines ``minor" as ``a person under the age of 18." §261.5(a). Based on this conviction, the Department of Homeland Security initiated removal

proceedings under the Immigration and Nationality Act (INA), which makes removable ``[a]ny alien who is convicted of an aggravated felony," 8 U.S.C. §1227(a)(2)(A)(iii), including ``sexual abuse of a minor," §1101(a)(43)(A). An Immigration Judge ordered petitioner removed to Mexico. The Board of Immigration Appeals agreed that petitioner's crime constituted sexual abuse of a minor and dismissed his appeal. A divided Court of Appeals denied his petition for review.

Held: In the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the generic federal definition of ``sexual abuse of a minor" requires the age of the victim to be less than 16. Pp. ___ - ___, 198 L. Ed. 2d, at 28-33.**{2017 U.S. LEXIS 2}**

(a) Under the categorical approach employed to determine whether an alien's conviction qualifies as an aggravated felony, the Court asks whether `` 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." *Moncrieffe* v. *Holder*, 569 U.S. 184, 190, 133 S. Ct. 1678, 185 L. Ed. 2d 727. Petitioner's state conviction is thus an ``aggravated felony" only if the least of the acts criminalized by the state statute falls within the generic federal definition of sexual abuse of a minor. *Johnson* v. *United States*, 559 U.S. 133, 137, 130 S. Ct. 1265, 176 L. Ed. 2d 1. Pp. ___ - ___, 198 L. Ed. 2d, at 28.

(b) The least of the acts criminalized by Cal. Penal Code §261.5(c) would be consensual sexual intercourse between a victim who is almost 18 and a perpetrator who just turned 21. Regardless of the actual facts of the case, this Court presumes that **{198 L. Ed. 2d 26}**petitioner's conviction was based on those acts. Pp. ___ - ___, 198 L. Ed. 2d, at 28-29.

(c) In the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the generic federal definition of ``sexual abuse of a minor" requires that the victim be younger than 16. The Court begins, as always, with the text. Pp. ___ - ___, 198 L. Ed. 2d, at 29-30.

(1) Congress added sexual abuse of a minor to the INA in 1996. At that time, the ordinary meaning of ``sexual abuse" included ``the**{2017 U.S. LEXIS 3}** engaging in sexual contact with a person who is below a specified age or who is incapable of giving consent because of age or mental or physical incapacity." Merriam-Webster's Dictionary of Law 454. By providing that the abuse must be ``of a minor," the INA focuses on age, rather than mental or physical incapacity. Accordingly, to qualify as sexual abuse of a minor, the statute of conviction must prohibit certain sexual acts based at least in part on the age of the victim. Statutory rape laws, which are one example of this category of crimes, generally provide that an older person may not engage in sexual intercourse with a younger person under the ``**age of consent**." Reliable dictionaries indicate that the ``generic"**{137 S. Ct. 1566}** **age of consent** in 1996 was 16, and it remains so today. Pp. ___ - ___, 198 L. Ed. 2d, at 29-30.

(2) The Government argues that sexual abuse of a minor includes any conduct that is illegal, involves sexual activity, and is directed at a person younger than 18. For support, it points to the 1990 Black's Law Dictionary, which defined sexual abuse of a minor as ``[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance" and defined ``[m]inor" as ``[a]n infant or person who is under the age of**{2017 U.S. LEXIS 4}** legal competence," which in ``most states" was ``18." But the generic federal offense does not correspond to the Government's definition, for three reasons. First, the Government's definition is inconsistent with its own dictionary's requirement that a special relationship of trust exist between the victim and offender. Second, in the statutory rape context, ``of a minor" refers to the **age of consent**, not the age of legal competence. Third, the Government's definition turns the categorical approach on its head by defining the generic federal offense as whatever is illegal under the law of the State of conviction. Pp. ___ - ___, 198 L. Ed. 2d, at 30.

(d) The structure of the INA, a related federal statute, and evidence from state criminal codes confirm that, for a statutory rape offense based solely on the age of the participants to qualify as sexual abuse of

a minor under the INA, the victim must be younger than 16. The INA lists sexual abuse of a minor as an ``aggravated" felony, §1227(a)(2)(A)(iii), and lists it in the same subparagraph as ``murder" and ``rape," §1101(a)(43)(A), suggesting that it encompasses only especially egregious felonies. A different statute, 18 U.S.C. §2243, criminalizes ``[s]exual abuse of a minor or ward." Section 2243 was amended to protect anyone under age**{2017 U.S. LEXIS 5}** 16 in the same omnibus law that added sexual abuse of a minor to the INA, suggesting that Congress understood that phrase to cover victims under (but not over) age 16. Finally, a significant majority of state criminal codes set **{198 L. Ed. 2d 27}**the **age of consent** at 16 for statutory rape offenses predicated exclusively on the age of the participants. Pp. ___ - ___, 198 L. Ed. 2d, at 30-33.

(e) This Court does not decide whether the generic crime of sexual abuse of a minor requires a particular age differential between the victim and the perpetrator or whether it encompasses sexual intercourse involving victims over 16 that is abusive because of the nature of the relationship between the participants. P. ___, 198 L. Ed. 2d, at 33.

(f) Because the statute, read in context, unambiguously forecloses the Board's interpretation of sexual abuse of a minor, neither the rule of lenity nor *Chevron* deference applies. Pp. ___ - ___, 198 L. Ed. 2d, at 33.

Reversed.

Counsel Jeffrey L. Fisher argued the cause for petitioner.
Allon Kedem argued the cause for respondent.

Judges: Thomas, J., delivered the opinion of the Court, in which all other Members joined, except Gorsuch, J., who took no part in the consideration or decision of the case.

Opinion

Opinion by: Thomas

Opinion

{581 U.S. 387}{137 S. Ct. 1567} Justice Thomas delivered the opinion of the Court.

{198 L. Ed. 2d LEdHR1} The Immigration and Nationality Act (INA), 66 Stat. 163, as amended, provides that ``[a]ny alien who is convicted of an aggravated**{2017 U.S. LEXIS 6}** felony after admission" to the United States may be removed from the country by the Attorney General. 8 U.S.C. §1227(a)(2)(A)(iii). One of the many crimes that **{581 U.S. 388}** constitutes an aggravated felony under the INA is ``sexual abuse of a minor." §1101(a)(43)(A). A conviction for sexual abuse of a minor is an aggravated felony regardless of whether it is for a ``violation of Federal or State law." §1101(a)(43). The INA does not expressly define sexual abuse of a minor.

We must decide whether a conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old qualifies as sexual abuse of a minor under the INA. We hold that it does not.

I

Petitioner Juan Esquivel-Quintana is a native and citizen of Mexico. He was admitted to the United States as a lawful permanent resident in 2000. In 2009, he pleaded no contest in the Superior Court of California to a statutory rape offense: ``unlawful sexual intercourse with a minor who is more than

three years younger than the perpetrator," Cal. Penal Code Ann. §261.5(c) (West 2014); see also §261.5(a) (``Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor"). For purposes of that offense, California defines**{2017 U.S. LEXIS 7}** ``minor" as ``a person under the age of 18 years." *Ibid.*

The Department of Homeland Security initiated removal proceedings against petitioner based on that conviction. An Immigration Judge concluded that the conviction qualified as ``sexual abuse of a minor," 8 U.S.C. §1101(a)(43)(A), and ordered petitioner removed to Mexico. The Board of Immigration Appeals (Board) dismissed his appeal. 26 I. & N. Dec. 469 (2015). ``[F]or a statutory rape offense **{198 L. Ed. 2d 28}** involving a 16- or 17-year-old victim" to qualify as ``'sexual abuse of a minor,'" it reasoned, ``the statute must require a meaningful age difference between the victim and the perpetrator." *Id.*, at 477. In its view, the 3-year age difference required by Cal. Penal Code §261.5(c) was meaningful. *Id.*, at 477. **{581 U.S. 389}** Accordingly, the Board concluded that petitioner's crime of conviction was an aggravated felony, making him removable under the INA. *Ibid.* A divided Court of Appeals denied Esquivel-Quintana's petition for review, deferring to the Board's interpretation of sexual abuse of a minor under *Chevron U.S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). 810 F. 3d 1019 (CA6 2016); see also *id.*, at 1027 (Sutton, J., concurring in part and dissenting in part). We granted certiorari, 580 U.S. 951, 137 S. Ct. 368, 196 L. Ed. 2d 283 (2016), and now reverse.

II

{198 L. Ed. 2d LEdHR2} Section 1227(a)(2)(A)(iii) makes aliens removable based on the nature of their convictions, not based on their actual conduct. See *Mellouli* v. *Lynch*, 575 U.S. 798, 805-806, 135 S. Ct. 1980, 192 L. Ed. 2d 60 (2015). Accordingly, to determine whether**{2017 U.S. LEXIS 8}** an alien's conviction qualifies as an aggravated felony under that **{137 S. Ct. 1568}** section, we ``employ a categorical approach by looking to the statute . . . of conviction, rather than to the specific facts underlying the crime." *Kawashima* v. *Holder*, 565 U.S. 478, 483, 132 S. Ct. 1166, 182 L. Ed. 2d 1 (2012); see, *e.g.*, *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007) (applying the categorical approach set forth in *Taylor* v. *United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), to the INA). Under that approach, we ask whether ``'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." *Moncrieffe* v. *Holder*, 569 U.S. 184, 190, 133 S. Ct. 1678, 185 L. Ed. 2d 727, 738 (2013) (quoting *Duenas-Alvarez*, *supra*, at 186, 127 S. Ct. 815, 166 L. Ed. 2d 683). In other words, we presume that the state conviction ``rested upon . . . the least of th[e] acts" criminalized by the statute, and then we determine whether that conduct would fall within the federal definition of the crime. *Johnson* v. *United States*, 559 U.S. 133, 137, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010); see also *Moncrieffe*, *supra*, at 191, 133 S. Ct. 1678, 185 L. Ed. 2d 727, 738 (focusing ``on the minimum conduct criminalized by the state statute"). 1 Petitioner's **{581 U.S. 390}** state conviction is thus an ``aggravated felony" under the INA only if the least of the acts criminalized by the state statute falls within the generic federal definition of sexual abuse of a minor.

A

{198 L. Ed. 2d LEdHR3} Because Cal. Penal Code §261.5(c) criminalizes ``unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator" and defines a minor as someone under**{2017 U.S. LEXIS 9}** age 18, the conduct criminalized under this provision **{198 L. Ed. 2d 29}** would be, at a minimum, consensual sexual intercourse between a victim who is almost 18 and a perpetrator who just turned 21. Regardless of the actual facts of petitioner's crime, we must presume that his conviction was based on acts that were no more criminal than that. If those acts do not constitute sexual abuse of a minor under the INA, then petitioner was not convicted

of an aggravated felony and is not, on that basis, removable.

Petitioner concedes that sexual abuse of a minor under the INA includes some statutory rape offenses. But he argues that a statutory rape offense based solely on the partners' ages (like the one here) is ``'abuse'" ``only when the younger partner is under 16." Reply Brief 2. Because the California statute criminalizes sexual intercourse when the victim is up to 17 years old, petitioner contends that it does not categorically qualify as sexual abuse of a minor.

B

We agree with petitioner that, in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be **{581 U.S. 391}** younger**{2017 U.S. LEXIS 10}** than 16. Because the California statute at issue in this case does not categorically fall within that definition, a conviction pursuant to it is not an aggravated felony under §1101(a)(43)(A). We begin, as always, with the text.

{137 S. Ct. 1569} 1

Section 1101(a)(43)(A) does not expressly define sexual abuse of a minor, so we interpret that phrase using the normal tools of statutory interpretation. **{198 L. Ed. 2d LEdHR4}** ``Our analysis begins with the language of the statute." *Leocal* v. *Ashcroft*, 543 U.S. 1, 8, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004); see also *Lopez* v. *Gonzales*, 549 U.S. 47, 53, 127 S. Ct. 625, 166 L. Ed. 2d 462 (2006) (``The everyday understanding of" the term used in §1101 ``should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant").

Congress added sexual abuse of a minor to the INA in 1996, as part of a comprehensive immigration reform Act. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §321(a)(i), 110 Stat. 3009-627. At that time, the ordinary meaning of ``sexual abuse" included ``the engaging in sexual contact with a person who is below a specified age or who is incapable of giving consent because of age or mental or physical incapacity." Merriam-Webster's Dictionary of Law 454 (1996). **{198 L. Ed. 2d LEdHR5}** By providing that the abuse must be ``of a minor," the INA focuses on age, rather than mental or physical incapacity. Accordingly,**{2017 U.S. LEXIS 11}** to qualify as sexual abuse of a minor, the statute of conviction must prohibit certain sexual acts based at least in part on the age of the victim.

Statutory rape laws are one example of this category of crimes. Those laws generally provide that an older person may not engage in sexual intercourse with a younger person under a specified age, known as the ``**age of consent**." See *id.*, at 20 (defining ``**age of consent**" as ``the age at which a person is deemed competent by law to give consent esp. to sexual intercourse" and cross-referencing ``statutory rape"). **{581 U.S. 392}** Many laws also require an age differential between the two partners.

{198 L. Ed. 2d 30} Although the **age of consent** for statutory rape purposes varies by jurisdiction, see *infra*, at ___, 198 L. Ed. 2d, at 32, reliable dictionaries provide evidence that the ``generic" age-in 1996 and today-is 16. See B. Garner, A Dictionary of Modern Legal Usage 38 (2d ed. 1995) (``***Age of consent***, usu[ally] 16, denotes the age when one is legally capable of agreeing . . . to sexual intercourse" and cross-referencing ``statutory rape"); Black's Law Dictionary 73 (10th ed. 2014) (noting that the **age of consent** is ``usu[ally] defined by statute as 16 years").

2

Relying on a different dictionary (and ``sparse" legislative history), the Government**{2017 U.S.**

LEXIS 12} suggests an alternative ``'everyday understanding'" of ``sexual abuse of a minor." Brief for Respondent 16-17 (citing Black's Law Dictionary 1375 (6th ed. 1990)). Around the time sexual abuse of a minor was added to the INA's list of aggravated felonies, that dictionary defined ``[s]exual abuse" as ``[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance," and defined ``[m]inor" as ``[a]n infant or person who is under the age of legal competence," which in ``most states" was ``18." *Id.*, at 997, 1375. ``'Sexual abuse of a minor,'" the Government accordingly contends, ``most naturally connotes conduct that (1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old." Brief for Respondent 17.

We are not persuaded that the generic federal offense corresponds to the Government's definition. First, the Government's proposed definition is flatly inconsistent with the definition of sexual abuse contained in the very dictionary on which it relies; the Government's proposed definition does not require that the act be performed ``*by a parent, guardian, relative, or acquaintance*." Black's Law Dictionary, at 1375 (emphasis added). In **{137 S. Ct. 1570}** any event, as we explain**{2017 U.S. LEXIS 13}** below, **{581 U.S. 393}** offenses predicated on a special relationship of trust between the victim and offender are not at issue here and frequently have a different age requirement than the general **age of consent**. Second, **{198 L. Ed. 2d LEdHR6}** in the context of statutory rape, the prepositional phrase ``of a minor" naturally refers not to the age of legal competence (when a person is legally capable of agreeing to a contract, for example), but to the **age of consent** (when a person is legally capable of agreeing to sexual intercourse). Third, the Government's definition turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted. Under the Government's preferred approach, there is no ``generic" definition at all. See *Taylor*, 495 U.S., at 591, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (requiring ``a clear indication that . . . Congress intended to abandon its general approach of using uniform categorical definitions to identify predicate offenses"); *id.*, at 592, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (``We think that 'burglary' in §924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes").

C

The structure of the INA, a related federal statute, and evidence**{2017 U.S. LEXIS 14}** from state criminal codes confirm that, for **{198 L. Ed. 2d 31}** a statutory rape offense to qualify as sexual abuse of a minor under the INA based solely on the age of the participants, the victim must be younger than 16.

1

Surrounding provisions of the INA guide our interpretation of sexual abuse of a minor. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012). **{198 L. Ed. 2d LEdHR7}** This offense is listed in the INA as an ``*aggravated* felony." 8 U.S.C. §1227(a)(2)(A)(iii) (emphasis added). ``An 'aggravated' offense is one 'made worse or more serious by circumstances such as violence, the presence of a deadly weapon, **{581 U.S. 394}** or the intent to commit another crime.'" *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 574, 130 S. Ct. 2577, 177 L. Ed. 2d 68 (2010) (quoting Black's Law Dictionary 75 (9th ed. 2009)). Moreover, the INA lists sexual abuse of a minor in the same subparagraph as ``murder" and ``rape," §1101(a)(43)(A)-among the most heinous crimes it defines as aggravated felonies. §1227(a)(2)(A)(iii). The structure of the INA therefore suggests that sexual abuse of a minor encompasses only especially egregious felonies.

A closely related federal statute, 18 U.S.C. §2243, provides further evidence that the generic federal definition of sexual abuse of a minor incorporates an **age of consent** of 16, at least in the context of statutory rape offenses predicated solely on the**{2017 U.S. LEXIS 15}** age of the participants. Cf. *Leocal*, 543 U.S., at 12-13, n. 9, 125 S. Ct. 377, 160 L. Ed. 2d 271 (concluding that Congress'

treatment of 18 U.S.C. §16 in an Act passed ``just nine months earlier'' provided ``stron[g] suppor[t]'' for our interpretation of §16 as incorporated into the INA); *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U.S. 224, 232, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007). Section 2243, which criminalizes ``[s]exual abuse of a minor or ward,'' contains the only definition of that phrase in the United States Code. As originally enacted in 1986, §2243 proscribed engaging in a ``sexual act'' with a person between the ages of 12 and 16 if the perpetrator was at least four years older than the victim. In 1996, Congress expanded §2243 to include victims who were younger than 12, thereby protecting anyone under the age of 16. §2243(a); see also §2241(c). Congress did this in the same omnibus law that added sexual abuse of a minor to the INA, which suggests that **{137 S. Ct. 1571}** Congress understood that phrase to cover victims under age 16. 2 See Omnibus Consolidated Appropriations Act, 1997, §§121(7), 321,110 Stat. 3009-31, 3009-627.

{581 U.S. 395} Petitioner does not contend that the definition in §2243(a) must be imported wholesale into the INA, Brief for Petitioner 17, and we do not do so. One reason is that the INA does not cross-reference §2243(a), whereas many other aggravated felonies in the INA are defined by cross-reference to other provisions of the United States Code, see, *e.g.*, §1101(a)(43)(H) (``an offense described**{2017 U.S. LEXIS 16}** in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)''). Another is that §2243(a) requires a **{198 L. Ed. 2d 32}** 4-year age difference between the perpetrator and the victim. Combining that element with a 16-year **age of consent** would categorically exclude the statutory rape laws of most States. See Brief for Respondent 34-35; cf. *Taylor*, 495 U.S., at 594, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (declining to ``construe[] 'burglary' to mean common-law burglary'' because that ``would come close to nullifying that term's effect in the statute,'' since ``few of the crimes now generally recognized as burglaries would fall within the common-law definition''). Accordingly, we rely on §2243(a) for evidence of the meaning of sexual abuse of a minor, but not as providing the complete or exclusive definition

2

As in other cases where we have applied the categorical approach, we look to state criminal codes for additional evidence about the generic meaning of sexual abuse of a minor. See *id.* (interpreting ``'burglary'' under the Armed Career Criminal Act of 1984 according to ``the generic sense in which the term is now used in the criminal codes of most States''); *Duenas-Alvarez*, 549 U.S., at 190, 127 S. Ct. 815, 166 L. Ed. 2d 683 (interpreting ``theft'' in the INA in the same manner). **{198 L. Ed. 2d LEdHR8}** When ``sexual abuse of a minor'' was added to the INA in 1996, thirty-one States**{2017 U.S. LEXIS 17}** and the District of Columbia set the **age of consent** at 16 for statutory rape offenses that hinged solely on the age of the participants. As for the other States, one set the **age of consent** at 14; two set the **age of consent** at 15; six set the **age of consent** at 17; and the remaining ten, including California, set the **age of consent** at 18. See Appendix, *infra*; cf. ALI, **{581 U.S. 396}** Model Penal Code §213.3(1)(a) (1980) (in the absence of a special relationship, setting the default **age of consent** at 16 for the crime of ``[c]orruption of [m]inors''). 3 A significant majority of jurisdictions thus set the **age of consent** at 16 for statutory rape offenses predicated exclusively on the age of the participants.

Many jurisdictions set a different **age of consent** for offenses that include an element apart from the age of the participants, such as offenses that focus on whether the perpetrator is in some special relationship of trust with the victim. That **{137 S. Ct. 1572}** was true in the two States that had offenses labeled ``sexual abuse of a minor'' in 1996. See Alaska Stat. §11.41.438 (1996) (**age of consent** for third-degree ``sexual abuse of a minor'' was 16 generally but 18 where ``the offender occupie[d] a position of authority in relation to the victim''); Me. Rev. Stat. Ann., Tit. 17-A, §254(1) (1983), as amended by 1995 Me. Laws p. 123 (**age of consent{2017 U.S. LEXIS 18}** for ``[s]exual

abuse of minors" was 16 generally but 18 where the victim was ``a student" and the offender was ``a teacher, employee or other official in the . . . school . . . in which the student [was] enrolled"). And that is true in four of the five jurisdictions that have offenses titled ``sexual abuse of a minor" today. Compare, *e.g.*, D. C. Code §§22-3001 **{198 L. Ed. 2d 33}**(2012), 22-3008 (2016 Cum. Supp.) (**age of consent** is 16 in the absence of a significant relationship) with §22-3009.01 (**age of consent** is 18 where the offender ``is in a significant relationship" with the victim); see also Brief for Respondent 31 (listing statutes with that title). Accordingly, the generic crime of sexual abuse of a minor may include a different **age of consent** where the perpetrator and victim are in a significant **{581 U.S. 397}** relationship of trust. As relevant to this case, however, the general consensus from state criminal codes points to the same generic definition as dictionaries and federal law: Where sexual intercourse is abusive solely because of the ages of the participants, the victim must be younger than 16.

D

The laws of many States and of the Federal Government include a minimum age differential (in addition to an **age of consent**) in defining statutory rape.**{2017 U.S. LEXIS 19}** We need not and do not decide whether the generic crime of sexual abuse of a minor under 8 U.S.C. §1101(a)(43)(A) includes an additional element of that kind. Petitioner has ``show[n] something *special* about California's version of the doctrine"-that the **age of consent** is 18, rather than 16-and needs no more to prevail. *Duenas-Alvarez*, *supra*, at 191, 127 S. Ct. 815, 166 L. Ed. 2d 683. **{198 L. Ed. 2d LEdHR9}** Absent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as sexual abuse of a minor under the INA, regardless of the age differential between the two participants. We leave for another day whether the generic offense requires a particular age differential between the victim and the perpetrator, and whether the generic offense encompasses sexual intercourse involving victims over the age of 16 that is abusive because of the nature of the relationship between the participants.

III

Finally, petitioner and the Government debate whether the Board's interpretation of sexual abuse of a minor is entitled to deference under *Chevron*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694. Petitioner argues that any ambiguity in the meaning of this phrase must be resolved in favor of the alien under the rule of lenity. See Brief for Petitioner 41-45. The Government**{2017 U.S. LEXIS 20}** responds that ambiguities should be resolved by deferring to the Board's interpretation. See Brief for Respondent 45-53. We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, **{581 U.S. 398}** read in context, unambiguously forecloses the Board's interpretation. Therefore, neither the rule of lenity nor *Chevron* applies.

***

We hold that **{198 L. Ed. 2d LEdHR10}** in the context of statutory rape offenses focused solely on the age of the participants, the generic federal definition of ``**{137 S. Ct. 1573}** sexual abuse of a minor" under §1101(a)(43)(A) requires the age of the victim to be less than 16. The judgment of the Court of Appeals, accordingly, is reversed.

It is so ordered.

Justice Gorsuch took no part in the consideration or decision of this case.

{198 L. Ed. 2d 34}APPENDIX

These tables list offenses criminalizing sexual intercourse solely because of the age of the participants. The tables are organized according to the statutory **age of consent** as of September

30, 1996-the date ``sexual abuse of a minor'' was added to the INA.