APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: June 23, 2023]

No. 22-10412

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

SHERMAN MOORE,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CR-309-1

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

JERRY E. SMITH, Circuit Judge:

This case presents a pure question of statutory interpretation: What does the phrase "relating to the sexual exploitation of children" in 18 U.S.C. § 2251(e) mean? The statute in question, titled "Sexual exploitation of children," criminalizes offenses relating to child pornography. It then provides a mandatory sentencing enhancement for those who have two or more prior state convictions "relating to the sexual exploitation of children."

Sherman Moore has two state convictions for indecency with a child. The government contends that

those convictions "clearly" relate "to the sexual exploitation of children," so Moore should be subject to the enhancement. Moore counters that "sexual exploitation of children," in this context, applies only to offenses relating to child pornography, so his sentence is not subject to the enhancement.

We hold that 18 U.S.C. § 2251(e)'s use of the phrase "relating to the sexual exploitation of children" refers to any criminal sexual conduct involving children. Moore's convictions for indecency with a child neatly fall within that broad category, so we affirm the judgment of sentence.

I.

Sherman Moore pleaded guilty of indecency with a child under Texas Penal Code § 21.11(a)(2) in 1992 and was placed on deferred adjudication probation. He was convicted under the same statute in 1995 for a separate offense and sentenced to eight years in prison. After serving six years, he was placed on parole.

In 2021, Moore pleaded guilty of sexual exploitation of children under 18 U.S.C. § 2251(a). The presentence report ("PSR") did not include the sentencing enhancement, but the government requested it in an objection to the PSR. The government contended that Moore's two state convictions for indecency with a child made him subject to the enhancement. Over Moore's opposition, the district court agreed and sentenced Moore to 35 years' imprisonment.

Moore appeals, contending that his prior convictions are not convictions "relating to the sexual exploitation of children."

II.

Moore properly preserved the issue in the district court. Our review is thus *de novo*. *United States v.*

Hubbard, 480 F.3d 341, 344 (5th Cir. 2007) ("We review the district court's interpretation of a federal statute, as well as its determinations regarding a prior conviction, *de novo*." (footnotes omitted)).

III.

To determine whether a defendant's convictions under an indivisible state law qualify as "predicate offenses" under a federal statute, we "'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'"[1] *Descamps v. United States,* 570 U.S. 254, 261 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). We then "line[] up that crime's elements alongside those of the generic offense and see[] if they match." *United States v. Mendez-Henriquez*, 847 F.3d 214, 218 (5th Cir. 2017) (quoting *Mathis v. United States*, 579 U.S. 500, 505 (2016)).

So to determine whether Moore is subject to § 2251(e)'s sentencing enhancement provision, we must first determine the conduct enumerated in the generic offense (convictions "relating to the sexual exploitation of children") and then decide whether the elements of the Texas indecency-witha-child statute match.

A.

We begin by untangling the meaning of "relating to the sexual exploitation of children." We chart our course by laying out the proverbial directions of the statutory-interpretation rubric.

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[1] The parties do not dispute that § 21.11(a)(2) of the Texas Penal Code is indivisible—it contains "a single . . . set of elements to define a single crime." *Mathis v. United States*, 579 U.S. 500, 504–05 (2016).

Plain meaning is always the start. When interpreting statutory language, words are given their ordinary, plain meanings, and language must be enforced unless ambiguous. *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). This court is "authorized to deviate from the literal language of a statute only if the plain language would lead to absurd results, or if such an interpretation would defeat the intent of Congress." *Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 451 (5th Cir. 2008).

But "[t]ext should never be divorced from context." *United States v. Koutsostamatis*, 956 F.3d 301, 306 (5th Cir. 2020). Depending on the phrase, context can mean both the immediate clause and "the broader context of the statute as a whole." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Statutory history, "the record of enacted changes Congress made to the relevant statutory text over time," can also provide helpful context. *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (emphasis removed); *see also Thomas v. Reeves*, 961 F.3d 800, 817 n.45 (5th Cir. 2020) (en banc) (Willett, J., concurring).

If applicable, canons of construction can be used to resolve remaining ambiguity. *See generally Yates v. United States*, 574 U.S. 528 (2015). In very rare cases, we may look to legislative history, but "[o]nly after application of the principles of statutory construction, including the canons of construction." *Kornman*, 527 F.3d at 451 (quoting *Carrieri v. Jobs.com, Inc.*, 393

F.3d 508, 518–19 (5th Cir. 2004)). Regardless, its use is generally discouraged in this circuit.[2]

If these tools can't get us out of stalemate, ties go to the runner—the rule of lenity functions to resolve intractable ambiguity in a criminal defendant's favor. *United States v. Granderson*, 511 U.S. 39, 54 (1994).

That sorted, we turn to the text.

B.

The title of 18 U.S.C. § 2251 is "Sexual exploitation of children." Subsections (a)–(d) prohibit various activities relating to child pornography.

Subsection (e) then provides two potential sentencing enhancements. First, a person is given a minimum of 25 years "if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography."

Second, a person is given a minimum of 35 years "if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or

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[2] *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 428 (5th Cir. 2001) ("[L]egislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used cautiously." (quoting *Boureslan v. Aramco*, 857 F.2d 1014, 1018 (5th Cir. 1988))); *see also Thomas*, 961 F.3d at 817 n.45 (Willett, J., concurring).

under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children."

This case turns on the meaning of "relating to the sexual exploitation of children" as used in the last clause of the two-conviction enhancement provision.

Plain Meaning

The phrase "relating to the sexual exploitation of children" is not defined in § 2251. *See also id.* § 2256 (applicable-definitions section). We thus begin by looking to the term's "plain meaning at the time of enactment." *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020).

We fail to see a plain meaning of the term in isolation.

The government provides us with dictionary definitions from a smattering of time periods: In 2019, Black's Law Dictionary defined "sexual exploitation" as "[t]he use of a person, esp. a child, in prostitution, pornography, or other sexually manipulative activity,"[3] in 2007, one of MerriamWebster's definitions of "exploit" was "to make use of meanly or unfairly for one's own advantage,"[4] and in 2010, one of the New Oxford American Dictionary's definitions of "exploit" was to "use (a situation or person) in an unfair or selfish way."[5] These definitions are too vague to define the term clearly for our purposes. And although dictionaries can help decide plain meaning, they can't resolve ambiguity on their own. *Yates*, 574 U.S. at 537. We

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[3] *Sexual exploitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[4] *Exploit*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2007).

[5] *Exploit*, THE NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

need to look outside the phrase to decide what it means in context.

Statutory Structure & Context

Section 2251 has some unusual structural elements, but none that signifies a clear meaning of "relating to the sexual exploitation of children."

The government contends that because the other federal statutes referenced in the sentence-enhancement provisions ("chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)") include offenses other than child pornography, "[i]t is implausible that Congress intended to include so many prior federal offenses, but chose to restrict qualifying state offenses to child pornography production." *See United States v. Sanchez*, 440 F. App'x 436, 440 (6th Cir. 2011). Perhaps.

On the other hand, Moore points out that the one-conviction provision includes a federal predicate that the two-conviction provision does not: 18 U.S.C. § 1591, which criminalizes the "[s]ex trafficking of children or by force, fraud, or coercion." Moore claims that this discrepancy destroys any presumption of parallelism between the two provisions, and therefore, the government cannot be correct that the phrase "relating to the sexual exploitation of children" in the two-conviction provision means more than just child pornography.

But even if Moore is correct that this lack of parallelism was intentional, his conclusion does not follow. The claim that the state convictions included in the one-conviction provision (listing "aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution,

shipment, or transportation of child pornography") is not to be interpreted identically to the two-conviction provision ("relating to the sexual exploitation of children") might be true, but that does not necessarily mean that "relating to the sexual exploitation of children" includes only child pornography-related offenses. So the lack of parallelism also leads to a dead end.

The broader statutory context, however, proves more helpful.

Titles, when written by Congress,[6] can be a helpful tool for statutory interpretation. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc*., 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings are 'tools available for the resolution of a doubt about the meaning of a statute.'" (quoting *Porter v. Nussle,* 534 U.S. 516, 528 (2002))). And here, the section that criminalizes activities related to child pornography is titled "Sexual exploitation of children." That is a strong point in Moore's favor.

But the rest of the context goes the other way. The chapter in which the section appears is titled "Sexual exploitation and other abuse of children" and includes prohibitions against such things as failure to report child abuse. *See, e.g.*, 18 U.S.C. § 2258. Section 2251 is followed by § 2251A, titled "Selling or buying of children"; § 2252, titled "Certain activities relating to material involving the sexual exploitation of minors"; and § 2252A, titled "Certain activities relating to material constituting or containing child pornography." This hodgepodge of usage seems to evidence that

[6] This title was written by Congress. *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, sec. 2(a), 92 Stat. 7.

Congress did not have a clear definition in mind for the term "sexual exploitation."

Further, the Adam Walsh Child Protection and Safety Act of 2006 ("CPSA"),[7] which amended § 2251(e), uses the phrase "child exploitation" in a broader sense than just child pornography. Section 701 of the act defines "child exploitation enterprise" (for the purposes of § 2252A) to include sexual abuse of a minor victim, and section 704, which relates to "additional prosecutors for offenses relating to the sexual exploitation of children," describes "offenses relating to the sexual exploitation of children" as including types of sexual abuse against a minor victim.

That context strongly suggests that the term refers to a broader swath of conduct than just child pornography. The section's enactment history confirms that interpretation.

The first version of the current § 2251 was enacted in 1978, and although it was titled "Sexual exploitation of children," the phrase "relating to the sexual exploitation of children" was not used in the original enhancement provision. Instead, an offender would be subject to an enhancement if he had "a prior conviction under this section."[8] The phrase in question was first used in 1996, when an amendment split the enhancement into two parts—one amount of enhancement for one prior conviction and a greater amount of enhancement for two prior convictions.[9] The wording for both enhancements was identical—if the relevant convic-

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[7] Pub. L. No. 109-248, 120 Stat. 587.

[8] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, sec. 2(a), 92 Stat. 7.

[9] Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, sec. 121, 110 Stat. 3009.

tion was "under this chapter or chapter 109A, or under the laws of any State relating to the sexual exploitation of children," the offender was subject to the enhancement. *Id.*

After 1996, the sentencing-enhancement provisions were minorly amended several times to add more predicate enhancements, generally expanding the scope of what predicate convictions made an offender eligible for each enhancement. In 1998, chapter 117 was added,[10] and in 2003, chapter 71 and section 920 of title 10 (article 120 of the Uniform Code of Military Justice) were added.[11]

Then, as part of the CPSA, Congress amended the one-conviction enhancement by replacing the term "sexual exploitation of children" with "aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography."[12] The two-conviction enhancement was left the same—the offender's sentence would be enhanced if he had "2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children."

There isn't a clear reason why Congress would have amended the predicate convictions for the one-

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[10] Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, sec. 201, 112 Stat. 2974.

[11] PROTECT Act, Pub. L. No. 108-21, sec. 507, 117 Stat. 650 (2003).

[12] Pub. L. No. 109-248, sec. 206(b)(1), 120 Stat. 587.

conviction enhancement but not for the two-conviction enhancement; but the judicial understanding of the phrase at the time of the amendment confirms our understanding of the phrase as incorporating more than just convictions for offenses relating to child pornography.

Before the 2006 amendment, at least two circuits interpreted § 2251(e)'s use of the phrase "relating to the sexual exploitation of children" as including conduct beyond activities relating to child pornography. *See United States v. Randolph*, 364 F.3d 118, 122 (3d Cir. 2004); *United States v. Smith*, 367 F.3d 748, 751 (8th Cir. 2004) (per curiam). Yet when Congress amended § 2251(e) in 2006, it did not change its use of the phrase in the two-conviction provision. Though the 2006 amendment was not a full reenactment, Congress's choice to amend part of 2251(e) but not all of it may be a sign of Congressional acquiescence in the existing judicial interpretation of the phrase.[13]

Considering the broader statutory context, the government is correct: The phrase "relating to the sexual exploitation of children," in this context, easily encompasses a broader swath of conduct than just conduct relating to child pornography.[14]

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[13] *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (collecting cases)); *see also* CALEB NELSON, STATUTORY INTERPRETATION 478–85 (2011) (discussing the presumption of "ratificationby-reenactment" while noting its weaknesses).

[14] Because the phrase is unambiguous in context, we have no reason to reach legislative history or the rule of lenity.

IV.

Having determined that the phrase "relating to the sexual exploitation of children" stretches beyond child pornography, we must define what conduct does fit within its scope. Moore does not provide a recommendation. The government stresses that we should adopt the term's "common, ordinary meaning," which is undoubtably true but not sufficiently helpful. For example, the government asks us to define the term as "taking advantage of children for selfish and sexual purposes." Later, it states that the term should mean "taking advantage of or using children for sexual purposes." Neither of these definitions is precise enough to be workable.

The circuits that have interpreted the phrase broadly have adopted a variety of definitions.[15] The Fourth Circuit defines it as "to take advantage of children for selfish and sexual purposes." *United States v. Mills*, 850 F.3d 693, 697 (4th Cir. 2017). The Sixth Circuit broadly states that it "evinces a Congressional intent to define [the phrase] to extend to child-sexual-abuse offenses as well as child-pornography-related offenses," *United States v. Sykes*, 65 F.4th 867, 889 (6th Cir. 2023), and the Third Circuit does not appear to have a working definition, *United States v. Pavulak*, 700 F.3d 651, 675 (3d Cir. 2012); *Randolph*, 364 F.3d at 122. The Eighth Circuit says that it refers to "any criminal sexual conduct with a child" because, "[b]y its very nature, any criminal sexual conduct with a child takes

[15] The only court of appeals to have adopted Moore's proposed definition is the Ninth Circuit. *See United States v. Schopp*, 938 F.3d 1053, 1062 (9th Cir. 2019) (concluding that the phrase "sexual exploitation of children" as used in § 2251(e) "means the production of child pornography"). For the reasons given, we reject that narrow construction.

advantage of, or exploits, a child sexually." *Smith*, 367 F.3d at 751. The First Circuit agrees, stating that it "unambiguously refers to any criminal sexual conduct involving children." *United States v. Winczuk*, 67 F.4th 11, 17 (1st Cir. 2023).

For several reasons, that last reading is the best fit.

First, it is a broad definition of the term, which seems proper because of the use of "relating to." The ordinary meaning of "relating to" is "broad" and means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Hubbard*, 480 F.3d at 347–48 (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992)); *see also Relate*, BLACK'S LAW DICTIONARY (5th ed. 1979). It thus makes sense to interpret the phrase "relating to the sexual exploitation of children" in a broad sense, such as any criminal sexual conduct involving children.

Second, it tracks persuasive authority. In *United States v. Ary*, 892 F.3d 787, 788 (5th Cir. 2018), this court described a broad list of crimes as "qualifying prior convictions for the sexual exploitation of children." The section at issue in *Ary*, 18 U.S.C. § 2252, is titled "Certain activities relating to material involving the sexual exploitation of minors," and § 2252(b)(1), similarly to § 2251(e)(1), increases the mandatory minimum sentence when "such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking

of children." In *Ary*, we repeatedly summarized that list as "conviction[s] for sexual exploitation." 892 F.3d at 788, 789. *Ary*'s summary of § 2252(b)(1)'s predicate convictions does not bind our interpretation of § 2251(e), and its description of the relevant convictions as types of "sexual exploitation" is likely *dictum*, but the opinion does provide persuasive authority for adopting a definition of the phrase as broad as any criminal sexual conduct involving children.

Third, the definition we adopt is workable and contains limiting principles. Though broad enough to encompass a wide range of predicate convictions, "sexual" and "children" are bright-line terms that can provide easy guidance to lower courts and litigants alike.

V.

Armed with the proper definition of "relating to the sexual exploitation of children," we return to Moore. His convictions are both under Texas Penal Code § 21.11(a)(2), which prohibits indecency with a child. The parties agree that the elements of the offense (at the time of Moore's convictions) were

> (1) that the child was within the protected age group [younger than seventeen] and not married to the accused,
>
> (2) that a child was present,
>
> (3) that the accused had the intent to arouse or gratify someone's sexual desire,
>
> (4) that the accused knew that a child was present, and
>
> (5) that the accused exposed his anus or genitals.

Yanes v. State, 149 S.W.3d 708, 710 (Tex. App.—Austin 2004, pet. ref'd) (alteration in original) (citing TEX. PENAL CODE ANN. § 21.11(a)(2) (West 2003)); *see also Uribe v. State*, 7 S.W.3d 294, 296–97 (Tex. App. Austin 1999, pet. ref'd).

Such conduct is unequivocally criminal sexual conduct involving children. *Cf. United States v. Zavala-Sustaita*, 214 F.3d 601, 607 (5th Cir. 2000). Moore was convicted under the statute twice. The district court thus did not err in applying the 35-year sentencing enhancement.

AFFIRMED.

APPENDIX B

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CASE NO. 4:21-cr-309-O-1

UNITED STATES OF AMERICA,

Government,

vs.

SHERMAN MOORE,

Defendant.

FORT WORTH, TEXAS
APRIL 21, 2022
3:20 P.M.

VOLUME 1 of 1
TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE REED C. O'CONNOR
UNITED STATES DISTRICT COURT JUDGE

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[2] PROCEEDINGS

(Participants wearing masks.)

APRIL 21, 2022

* * *

To the extent the defendant also requests recusal under 455(a), I find that, under Fifth Circuit precedent, my partiality may not be reasonably questioned in this case. And so I deny the defendant's motion to recuse. I will [9] remain on the case. And now we will move forward with that taken care of to the underlying issues in this case.

And so before we get to the objections that have been filed, let me ask counsel, did you and your client receive a copy of the presentence investigation report and the addendum in this case?

MS. VANEGAS: Yes, your Honor.

THE COURT: And have you reviewed those documents with your client?

MS. VANEGAS: I have, your Honor.

THE COURT: Did the government receive these?

MS. SALEEM: Yes, your Honor.

THE COURT: Okay. So, correct me if I'm wrong, but it appears that we have one objection from the government that relates to the recidivist statute and then one

objection from the defense that goes to the restitution amount?

MS. VANEGAS: Correct.

THE COURT: Okay. So why don't we – well, let's take up your restitution argument first. The government has filed a response, and so why don't you address your argument overall and in response to the government's response to your objection.

MS. VANEGAS: Thank you, your Honor.

Your Honor, other than what I stated in my [10] response or my objections and Mr.– once Mr. Moore is sentenced, he's going to be indigent, your Honor. He is no longer going to be able to work. He is facing a substantial sentence.

Where, as I stated in my objection, the likelihood of Mr. Moore getting out is very small, unfortunately. He is 64 years old. His health is debilitating and getting worse.

So because of that, your Honor, even if you were to order restitution, just based on the Paroline factors, none of those victims are going to receive any money from Mr. Moore. And there's just going to be a judgment out there and, unfortunately, nobody is going to get anything from it.

THE COURT: Okay. I'm going to overrule that objection. I agree with the government's response that the defendant has agreed to pay restitution.

I also agree with the government's recitation of and weighing of the appropriate factors. And so I will enter a restitution order in the amounts that have been set out by the government.

Miss Saleem, do you want to – or I will hear from you on your objection as to the appropriate statutory punishment range in this case on the recidivism.

MS. SALEEM: Your Honor, we're going to ask that [11] you sentence the defendant to a range between 35 years to life because the defendant has two prior qualifying convictions.

In particular, I think that, while there is no precedent in the Fifth Circuit as to this particular issue, it is clear that 2251 was not intended – and I believe I might have referenced it as D, but it's Subsection E of 2251 that relates to the application of when a defendant has one or more prior convictions.

And more specifically, the language for an enhancement just from 25 to 50 years for the one prior conviction discusses that would include convictions from the state that involve aggravated sexual abuse, sexual abuse, and those type of related crimes.

In fact, the language is related to aggravated abuse, sexual abuse. That has not been specifically litigated in the Fifth Circuit in the context of 2251, but it has already been litigated in the context of 2252(a), Which it is the same language and which specifically included the fact that a contact offense is not required in order for this prior conviction to constitute an enhanceable conviction.

So with respect to just the 25 to 50 range, the defendant's conviction for indecency with a child by exposure qualifies. So that should be the starting point, [12] really, is 25 to 50.

And then the question becomes, does the second conviction also qualify and elevate him to the 35 to life? Well, just because the language of 2215(e)

references sexual exploitation crimes doesn't mean that Congress intended to limit itself to now only visual depiction crimes and 2251 violations. That just seems illogical.

And as the Fourth Circuit has noted in the Mills case, they found that to be an illogical explanation. And then you have also a Third Circuit case, I believe it's the Randolf case, where basically they understood that that's really a shorthand description of the type of violations that were intended to support an enhanced sentence.

And so for all those reasons, the fact that the defendant has stipulated to having two prior convictions for indecency with a child, the fact that the defendant has violations that are related to sexual abuse of a minor, those all qualify him for the statutory enhancement.

THE COURT: And what is your take on the Ninth Circuit's interpretation?

Right, we had the Third and Fourth Circuit on the one hand, and then they – your argument is consistent with their conclusion that the enhanced, increased statutory punishment would apply in this case, but the Ninth Circuit would not result in that kind of finding.

[13] So where do you think or what do you think – where do you think the Ninth Circuit got it wrong?

And then, specifically, the Ninth Circuit does talk about these other cases. What do you think they're missing?

MS. SALEEM: Your Honor, with all due respect to the Ninth Circuit, I believe they just too narrowly construed the congressional intent and the language within 2251.

I understand that the Ninth Circuit, essentially, said sexual exploitation of a child, that's the name of the violation, that's the type of violation that was being considered, but they didn't consider the entire context of 2251(e).

And the entire context of 2251(e) renders that conclusion, that it was limited to visual depictions only, really is kind of an absurd result, because I don't recall that the Schopp case, in addressing the fact that, for one prior conviction, you can have any type of violation that related to sexual abuse, yet, for a second conviction, we were going to limit it to less offensive crimes. I mean, I think that's where the Ninth Circuit missed it.

Taking a term of art would normally make sense, but not when they take it without consideration of the entire context of the language in that statute.

[14] THE COURT: Thank you, Miss Saleem.

What do you think, the Ninth Circuit right?

MS. VANEGAS: I think they are right. Obviously, I'm going to say that they should – his prior convictions should not apply.

The reason I'm going to say that is because, as I stated in my response to the government, I think the Texas statute is overbroad. If we're going to use a categorical approach, and specifically where in here it gives us a definition of abuse, and in that definition it requires a minor to be actually, or at least constructively present for the lewd act, and to experience harm.

Here in this case, for the offense of indecency with a child, as I pointed out under the United States vs. Martinez case, where there they analyze the New Jersey conviction to determine if it constituted abuse.

And under the plain language interpretation, that case was similar to the Texas statute.

Where, here, the minor actually doesn't even have to see the exposure in order for the defendant to still be charged with indecency with a child.

So that's what it is in Mr. Moore's case. He was charged with indecency with a child exposure. And under that specific portion of the statute, it says, that he, with the intent to arouse or gratify the sexual desire of any [15] person, exposed the person's anus or any part of the person's genital knowing the child was present.

But again, it does not, under the Wilson v. State case, there is no requiring that the victim actually see the exposed genitals and actually not even any comprehension of the conduct or the intent of the defendant.

So here in this case, that's why we're arguing that his two priors should not qualify, because they are not abusive necessarily to a minor.

Now, the government keeps referring back to contact, physical contact that is a component. I'm not arguing, saying there needs to be physical contact in order for priors to be considered enhanceable.

But in this case, it's just an overly broad statute where there's actually no contact and the minor doesn't even have to witness the actual act in order for him to be charged and convicted of the offense.

THE COURT: Okay. So you then, because I've read your response, so it appears to me that you, your response or your objection to following the government's recommendation is, number one, the Ninth Circuit had – the Ninth Circuit's interpretation is a correct interpretation?

MS. VANEGAS: Correct.

THE COURT: That is, the title of the Section 2251 mirrors the phrase used in the punishment section, the [16] penalty section.

And so, the Ninth Circuit's overall interpretation which includes that factor when they were making that interpretation is correct. And then, therefore, his prior convictions do not fit within what is prohibited by the statute early on, number one.

And number two, now what you've said, that these, under whatever interpretation, these prior convictions don't fit the recidivist act or crimes from the past. Do I have it right?

MS. VANEGAS: I believe so, your Honor. Yes.

THE COURT: Okay. Well, very good, and thank you for that.

Well, I'm going to grant the government's objection on this. I find the Third and Fourth Circuit cases to be persuasive. As you have both indicated, the Fifth Circuit has not weighed in on this at this point.

And so I've read these cases, and after doing so, reflecting on them, I think the Third and Fourth Circuit is correct.

I think the government is also correct that these prior convictions categorically would therefore fit within the – this portion of 2251(e), two or more prior conviction range, and so that will be my ruling.

* * *

APPENDIX C

18 U.S.C. § 2251 (2021)

§ 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, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal

guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), 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 outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes,

or causes to be made, printed, or published, any notice or advertisement seeking or offering--

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct; shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual

contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

APPENDIX D

Texas Penal Code § 21.11 (1992)
Title 5. Offenses Against the Person
Chapter 21. Sexual Offenses

§ 21.11. Indecency with a Child

(a) A person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he:

(1) engages in sexual contact with the child; or

(2) exposes his anus or any part of his genitals, knowing the child is present, with intent to arouse or gratify the sexual desire of any person.

(b) It is a defense to prosecution under this section that the child was at the time of the alleged offense 14 years or older and had, prior to the time of the alleged offense, engaged promiscuously in:

(1) sexual intercourse;

(2) deviate sexual intercourse;

(3) sexual contact; or

(4) indecent exposure as defined in Subsection (a)(2) of this section.

(c) It is an affirmative defense to prosecution under this section that the actor:

(1) was not more than two years older than the victim and of the opposite sex; and

(2) did not use duress, force, or a threat against the victim at the time of the offense.

(d) An offense under Subsection (a)(1) of this section is a felony of the second degree and an offense under Subsection (a)(2) of this section is a felony of the third degree.

APPENDIX E

Texas Penal Code § 21.11 (1995)
Title 5. Offenses Against the Person
Chapter 21. Sexual Offenses

§ 21.11. Indecency With a Child

(a) A person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he:

(1) engages in sexual contact with the child; or

(2) exposes his anus or any part of his genitals, knowing the child is present, with intent to arouse or gratify the sexual desire of any person.

(b) It is an affirmative defense to prosecution under this section that the actor:

(1) was not more than three years older than the victim and of the opposite sex; and

(2) did not use duress, force, or a threat against the victim at the time of the offense.

(c) An offense under Subsection (a)(1) is a felony of the second degree and an offense under Subsection (a)(2) is a felony of the third degree.