11-265

No. _____

In the
Supreme Court of the United States

WILLIAM HART, II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether 18 U.S.C. § 2422(b) – which makes it a crime "to knowingly persuade, induce, entice, or coerce any individual who has not attained the age of 18 years to engage in . . . any sexual activity for which any person can be charged with a criminal offense" – requires a jury to come to a unanimous verdict on a single, specific underlying criminal offense for which the defendant could be charged.

Whether concurrent conviction under 18 U.S.C. § 2422 and 18 U.S.C. § 2251 violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Several United States Courts of Appeals have addressed the first question, and have come to conflicting decisions. Nearly all United States Courts of Appeals have issued published opinions regarding the type of convictions addressed in the second question, and, while no explicit split exists among the circuits, the question raises important issues reaching every federal court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in this case on March 29, 2011.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which will be published in the Federal Reporter, 3d edition, as *United States v. Hart*, 635 F.3d 850 (6th Cir. 2011), is attached as Appendix A. The opinion of the district court denying the Defendant's request for specific jury instruction is attached as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment and opinion of the Court of Appeals was entered on March 29, 2011. On June 16, 2011, Justice Kagan extended the time to file this petition to and including August 26, 2011. This petition is timely filed on August 26, 2011. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2422 provides as follows:

> **(b)** Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly

> persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2251 provides as follows:

> **(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.

. . . .

(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 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.

U.S. Const. amend. V states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

U.S. Const. amend. VI states:

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

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner was indicted on October 6, 2008, in the Western District of Kentucky.

Count 1 of the indictment charged that Petitioner, using a facility and means of interstate commerce, specifically, the Internet, knowingly attempted to persuade, induce, entice, and coerce a minor to engage in any sexual activity for which a person can be charged with a criminal offense, in violation of Title 18, United States Code, Section 2422(b).

The United States argued that the underlying offense for which the defendant could have been charged, had the "sexual activity" taken place, was criminal attempt, as defined in Ky. Rev. Stat. Ann. ("KRS") § 506.010, to commit ***either*** rape in the third degree, as defined in Ky. Rev. Stat. Ann. § 510.060(1)(b) (West 2006); ***or*** sodomy in the third degree, as defined in Ky. Rev. Stat. Ann. § 510.090(1)(b). Both rape in the third degree and sodomy in the third degree are Class "D" felonies, carrying a potential sentence of 1-5 years. Ky. Rev. Stat. Ann. § 532.020(1)(a). Kentucky's criminal attempt statute reduces the criminal level of attempt to commit sodomy in the third degree to a Class "A" misdemeanor, carrying a maximum penalty of 12 months imprisonment. Ky. Rev. Stat. Ann. § 506.010(4).

Count 2 of the indictment was added prior to trial by superceding indictment on May 20, 2009, which charged that Petitioner attempted to knowingly use, persuade, induce, entice, and coerce a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct in violation of Title 18, United States Code, Sections 2251(a) and 2251(e).

On December 14, 2009, the Defendant was found guilty on both counts on a jury in the Western District of Kentucky. Defendant was sentenced to 120 months imprisonment on Count 1, and 180 months imprisonment on Count 2, to run concurrently for 180 months.

On December 28, 2009, the Petitioner filed a notice of appeal in the District Court, and the Court of Appeals for the Sixth Circuit upheld Petitioner's conviction on March 23, 2011, rejecting the holding of the Seventh Circuit in *United States v. Mannava*, 565 F.3d 412, 415 (7th Cir. 2009), in favor of its own ruling to the contrary.

B. Statement of the Facts

This case originated from an investigation by the Louisville (Kentucky) Metropolitan Police Department ("LMPD"), Crimes Against Children Unit, where a Detective posed as a 14-year old female in an internet "chat room" and used the service "Yahoo Messenger" to exchange "chats" with the Defendant (Petitioner herein).

At the trial, an LMPD detective testified that he posed as a 14-year-old female named Ashley, using the online moniker "ashley_ky2106" in order to take part in conversations using online chat rooms. In November 2006, by using this fictitious persona, he was chatting in a Yahoo! "Kentucky romance" chat room when he was first contacted by an online persona titled "jtown9inch." The detective testified that his chats as "ashley_ky2106" with "jtown9inch" occurred over approximately 17 days, between November 21, and December 8, 2006.

The detective testified that "ashley_ky2106" arranged to meet "jtown9inch" at a local bowling alley on December 8, 2006, and that when a vehicle described by "jtown9inch" arrived there, Petitioner was arrested. Upon search of his vehicle, a camera was found in the vehicle. Evidence from an internet service provider linked the chats from "jtown9inch" to a computer owned by the Petitioner's employer.

Petitioner was charged with attempted violations of 18 U.S.C. § 2422 and 18 U.S.C. § 2251 as a result of the arrest. With regard to the charge under § 2422, and relying on authority from the Seventh Circuit directly on point with regard to unanimity instructions, *United States v. Mannava*, 565 F.3d 412 (7th Cir. 2009), Trial Counsel for Petitioner sought a jury instruction requiring that the jurors be unanimous as to the underlying offense that constituted "sexual activity for which any person may be charged with a crime." The trial judge denied this request, declaring that Judge Posner's analysis in *Mannava* was incorrect.

In its closing, the United States, with regard to the element of "sexual activity" in Count One, argued to the jury that they could find that the Defendant intended to commit either sodomy or rape as defined under Kentucky law, that they did not have to agree as to which underlying crime the Petitioner intended to commit.

After deliberation, the jury returned a general verdict of guilty as to both counts.

On December 14, 2009, the District Judge found that based upon several factors that this event for the

Defendant appeared to be an aberration from an otherwise honorable life, and that a guideline range-sentence for these offenses (between 135-168 months) was well below the statutory mandatory minimum. Stating she had no choice but to impose the mandatory minimum, the District Judge subsequently imposed concurrent mandatory minimum sentences of 120 months under Count One and 180 months under Count Two for a total of 180 months.

Upon appeal to the Sixth Circuit, the Court upheld the conviction.

C. Opinion of the Sixth Circuit

United States v. Hart, 635 F.3d 850 (6th Cir. 2011).

On Appeal to the Court of Appeals for the Sixth Circuit, the Petitioner raised the following arguments: "(1) that the district court erred in failing to deliver an augmented unanimity jury instruction regarding the specific state offense that underlies the federal charges against him, (2) that 18 U.S.C. §§ 2422(b) and 2251 are unconstitutionally overbroad and vague, and (3) that his sentence violates the Double Jeopardy Clause, the Due Process Clause, and the Eighth Amendment." *Hart*, 635 F.3d at 852. Under the requested augmented unanimity jury instruction, "before the jurors could find Hart guilty under § 2422(b), they must unanimously decide which of the underlying Kentucky crimes he had attempted to violate." *Id.* at 853. The United States had provided two "options" to the jury: Rape in the third degree or sodomy in the third degree. *Id.*

Petitioner had argued, based on the lack of augmented unanimity, that the jury instructions were incorrect, and that, therefore, he was entitled to review *de novo* at the Court of Appeals. *See Fisher v. Ford Motor Co.*, 224 F.3d 570, 576 (6th Cir. 2005) ("'[T]he correctness of jury instructions is a question of law,' which the court reviews *de novo*."). The Court of Appeals ignored this argument, instead reviewing the jury instructions under the more deferential abuse of discretion standard. *Hart*, 635 F.3d at 854; *see United States v. Adams*, 583 F.3d 457, 468-69 (6th Cir. 2009).

Despite the more deferential standard, the Court of Appeals nonetheless recognized that augmented unanimity is necessary if "there is a genuine risk that the jury is confused or that a conviction may occur as the result of *different jurors concluding that a defendant committed different acts*." *Hart*, 635 F.3d at 855, *quoting United States v. Algee*, 599 F.3d 506, 514 (6th Cir. 2010) (emphasis added). Despite this apparent indicator to the Petitioner's favor, the Sixth Circuit held that augmented unanimity was not required. *Hart*, 635, F.3d at 855-56.

In so holding, the Court of Appeals explicitly rejected the holding in *United States v. Mannava*, 565 F.3d 412, 417 (7th Cir. 2009), that augmented unanimity is necessary in order to bring about a conviction under § 2422(b). In addition, the Court of Appeals attempted to distinguish this Court's holding in *Richardson v. United States*, 526 U.S. 813, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999), that the underlying offense was a necessary element of 21 U.S.C. § 848, the continuing criminal enterprise statute, and that a jury must be unanimous as to which underlying offenses constituted "violations" for the purposes of § 848. It

held that, while such "violations" constituted "elements" for purposes of § 848, in this case, conduct "for which any person can be charged with a criminal offense" only constituted "means by which an element may be accomplished." *Hart*, 635 F.3d at 856.

The Court of Appeals rejected all other arguments presented by the Petitioner, including his argument that conviction under both 2422(b) and 2251(a) constituted a violation of Double Jeopardy under the test established in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). To satisfy the separate elements requirement of *Blockburger*, the Court of Appeals stated:

> 18 U.S.C. § 2422(b) requires the government to prove that Hart attempted to persuade a minor to engage in "sexual activity for which any person can be charged with a criminal offense." This element is not found in 18 U.S.C. § 2251. And § 2251 requires the government to prove that Hart attempted to persuade a minor to engage in sexually explicit conduct "for the purpose of producing any visual depiction of such conduct." This element is not contained in 18 U.S.C. § 2422(b).

Hart, 635 F.3d at 858. The Sixth Circuit did not respond to Petitioner's contention that all "sexually explicit conduct for the purpose of producing any visual depiction of such conduct" by a minor would, in fact, constitute "sexual activity for which any person can be charged with a criminal offense."

D. Conflicting Opinion of the Seventh Circuit

United States v. Mannava, 565 F.3d 412 (7th Cir. 2009)

The Seventh Circuit's opinion in *Mannava* requires that, in order to secure a conviction under 18 U.S.C. § 2422(b), the jury must be unanimous as to the criminal offense that could be charged. In this case, the defendant had, under very similar circumstances to Mr. Hart, engaged in online conversations with a detective posing as a child. He was convicted under § 2422(b) with having attempted to persuade the apparent minor into sexual conduct chargeable under either Ind. Code § 35-42-4-5(a) or Ind. Code § 35-42-4-6(b). The jury returned a general verdict without specifying which underlying offense applied. *Mannava*, 565 F.3d at 414.

The Seventh Circuit reversed on several grounds, among them that "it was an error to allow the jury to convict without a unanimous determination that the defendant had violated one or both of the Indiana statutes." *Id.* at 415. On this issue the Court of Appeals relied primarily on this Court's rule set forth in *Richardson* that "the jury must, to convict, be unanimous with respect to all the elements of the charged offense." *Mannava*, 565 F.3d at 415 (citing *Richardson*, 526 U.S. at 817).

Specifically, the *Mannava* court held that "[t]he liability created by 18 U.S.C. § 2422(b) depends on the defendant's having violated another statute, and the elements of the offense under that other statute must therefore be elements of the federal offense in order to

preserve the requirement of jury unanimity." 565 F.3d at 415.

To permit a conviction without unanimity as to the underlying offense would lead to the "absurd" result "that the government could charge a defendant with violating the federal statute by violating 12 state statutes and that he could be properly convicted even though with respect to each of the 12 state offenses 11 jurors thought him innocent and only one thought him guilty." *Id.* In addition, the Seventh Circuit specifically distinguished between unanimity as to a specific offense, which it considered a separate element, and what it called "details of the defendant's conduct." *Id.* at 416.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to resolve the split in the circuits over whether a jury must agree unanimously on the underlying predicate crime giving rise to a federal charge under 18 U.S.C. § 2422(b).

Mr. Hart's case presents a clear opportunity for this Court to resolve a conspicuous split between the circuits regarding an important question of statutory construction in Federal criminal practice: the requirement of jury unanimity with regard to the underlying offense giving rise to a federal charge under 18 U.S.C. § 2422, which makes it a crime to "knowingly persuade[], induce[], entice[], or coerce[] 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" while using any facility or means of interstate or foreign commerce.

At this time, only two Circuits have ruled on this issue. The Seventh Circuit ruled that jury unanimity as to the underlying offense is an absolute requirement to a conviction under § 2422, and that permitting a conviction in which the jury was not unanimous as to the predicate offense was "absurd." *United States v. Mannava*, 565 F.3d 412, 415 (7th Cir. 2009).

In stark contrast, the Sixth Circuit held in this case that "the government need only prove, and the jury unanimously agree, that the defendant attempted to persuade a minor to engage in sexual activity that would have been chargeable as a crime if it had been completed." *United States v. Hart*, 635 F.3d 850, 855 (6th Cir. 2011).

In particular, the United States argued that the Defendant, Petitioner herein, could have been charged with one of two Kentucky criminal offenses,[1] and proposed jury instructions along these lines. The Petitioner objected to the United States' jury instruction, and requested a separate instruction requiring the jury to be unanimous as to the specific underlying predicate offense with which the Petitioner could be charged. The trial court overruled the objection and adopted the United States' jury instructions without the unanimity requirement.

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[1] Rape in the Third Degree, Ky. Rev. Stat. Ann. § 510.060(1)(b) (West 2006); Sodomy in the Third Degree, Ky. Rev. Stat. Ann § 510.090(1)(b) (West 2006); see *Hart*, 635 F.3d at 853.

On appeal, Petitioner argued that, under *Mannava*, jury unanimity as to the predicate offense is necessitated under the Sixth Amendment. *Cf. Johnson v. Louisiana*, 406 U.S. 356, 369-70 (1972) (Powell, J., concurring). Petitioner's argument followed that, because the jury instruction violated his right to a unanimous jury under the Sixth Amendment, the Sixth Circuit should review the jury instructions *de novo*. *See Fisher v. Ford Motor Co.*, 224 F.3d 570, 576 (6th Cir. 2005).

Instead, the Court of Appeals ignored the constitutional error and instead accepted the United States' argument that the denial of a request for new jury instructions is reviewed under an Abuse of Discretion standard, subject to the rules set out in *United States v. Heath*, 525 F.3d 451, 456 (6th Cir. 2008)[2] and *United States v. Krimski*, 230 F.3d 855, 860 (6th Cir. 2000).[3] Despite the court's own identification of the *Heath* rule as the controlling standard for such a situation, it failed to even consider whether the jury instruction was correct. Under *Mannava*, without question, it was not. 565 F.3d at 415.

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[2] "A trial court's refusal to give a requested jury instruction is reversible error only if the instruction is (1) correct, (2) not substantially covered by the actual jury charge, and (3) so important that failure to give it substantially impairs [the] defendant's defense." (internal quotation marks omitted).

[3] "[A] jury instruction addressing specific or augmented unanimity is necessary if 1) a count is extremely complex, 2) there is a variance between the indictment and the proof at trial, or 3) there is a tangible risk of jury confusion."

Nevertheless, the Court of Appeals for the Sixth Circuit "respectfully disagree[d] with the Seventh Circuit's analysis on this issue," effectively coming to the opposite conclusion that

> the government is not required to prove that the defendant completed or attempted to complete any specific chargeable offense. The government need only prove, and the jury unanimously agree, that the defendant attempted to persuade a minor to engage in sexual activity that would have been chargeable as a crime if it had been completed [and that such sexual activity,] if completed, would have violated Kentucky law. There is no requirement under 18 U.S.C. § 2422(b) that they had to unanimously agree on the specific type of unlawful sexual activity that he would have engaged in. App. A. at 7.

Thus the Sixth Circuit knowingly and willfully created this nascent split among federal Circuits.

This Court now has the opportunity, especially as internet-based "sting operations" become more common, to cure this split, as the number of prosecutions of this particular statute are likely to increase. This issue directly implicates the interpretation of a federal statute, the intersection of federal and state law, the corresponding and necessary separation between the two, and an important question of fundamental Constitutional interpretation. The notion that all elements of a crime must be proven by a unanimous jury of one's peers is an ancient right, *See Apodaca v. Oregon*, 406 U.S. 404, 407-08 & nn. 2-3

(1972), which our Founding Fathers made permanent in the Sixth Amendment to the Constitution.

In *Richardson v. United States*, 526 U.S. 813, 815-16 (1999), this Court required a federal jury to be unanimous as to an underlying statutory offense with regard to 21 U.S.C. § 848(a), which punishes "continuing criminal enterprise[s]" while not punishing the underlying drug offenses themselves. The discourse between trial court and defense counsel as to the request for unanimous jury instructions is nearly identical. *Id.* at 816; *cf. Hart*, 635 F.3d at 853.

While they address very different conduct, 21 U.S.C. § 848(a) and 18 U.S.C. § 2422 are of a similar spirit, in that they both make criminal some additional conduct dependent upon a wholly separate criminal act.[4] In *Richardson*, the term "violations" could not be parsed down to a "means" of committing the act punishable under the statute. 526 U.S. at 821. By the same right, "charged with a criminal offense" cannot be reduced to the malleable, non-descript level of "means." *Contra Hart*, 635 F.3d at 856.

Especially in this case, where the underlying criminal offense is almost inevitably a state – rather than federal – law, the need for specificity, and

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[4] *Richardson* also shares in common with this case an "early" circuit split, that is, the applicable federal issue had, at the time certiorari was granted in that case, affected only three federal Circuit Courts of Appeal. *Id.*; *see United States v. Edmonds*, 80 F.3d 810, 822 (3d Cir. 1996) (en banc) (unanimity required); *contra United States v Hall*, 93 F.3d 126, 129 (4th Cir. 1996) *and United States v. Anderson*, 39 F.3d 331, 350-51 (D.C. Cir. 1994) (no unanimity required).

therefore for jury unanimity, is most necessary in the federal court. Simply put, *Richardson*'s treatment of the "crime-within-a-crime" phenomenon must unify the circuits in order to maintain the effective administration of justice.

II. The Court should grant the writ to address and rectify the growing trend toward multiple convictions for a single act under § 2422 and § 2251, which has become commonplace throughout the Federal Circuit Courts, and to rectify a Constitutional violation in the instant case.

Since 2000, nearly every Circuit Court of Appeals has issued a published opinion on a conviction for both 18 U.S.C. § 2422 and § 2251.[5] Even in cases in which both crimes were not charged, the two statutes have become interchangeable in judicial decisionmaking. Where a case revolves around violation of one statute, Courts of Appeals are routinely making reference to the other in their opinions.[6]

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[5] *See generally United States v. McKelvey*, 203 F.3d 66 (1st Cir. 2000); *United States v. Griffith*, 284 F.3d 338 (2d Cir. 2002); *United States v. Rivera*, 546 F.3d 245 (2d Cir. 2008); *United States v. Wise*, 447 F.3d 440 (5th Cir. 2006); *United States v. Champion*, 248 F.3d 502 (6th Cir. 2001); *United States v. Pierson*, 544 F.3d 933 (8th Cir. 2008); *United States v. Gleich*, 397 F.3d 608 (8th Cir. 2005); *United States v. Rayl*, 270 F.3d 709 (8th Cir 2009); *United States v. Seljan*, 497 F.3d 1035 (9th Cir. 2007); *United States v. Lee*, 603 F.3d 904 (11th Cir. 2010).

[6] *See United States v. Searcy*, 418 F.3d 1193, 1196-97 (11th Cir. 2005) *affirming* 299 F. Supp. 2d 1285 (S.D.Fla. 2003); *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007); *United States v. Barlow*, 568 F.3d 215, 220 n. 18 (5th Cir. 2009) (citing

In *Searcy*, the 11th Circuit even went so far as to call the statutes "sufficiently similar" to apply legal conclusions about one statute to considerations of the other, ultimately stating that "the Sixth Circuit's reasoning with respect to its interpretation of § 2251(a) is also relevant to our interpretation of § 2422(b)." 418 F.3d at 1196-97; *cf. Barlow*, 568 F.3d at 220 n. 18. In *Rayl*, conduct clearly violative of § 2251 (i.e. creating a sexually explicit visual depiction of a minor) was actually used as the underlying offense necessary for conviction under § 2422. 270 F.3d at 713.[7] It appears, simply by the numbers, that these

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United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002)); *United States v. Bauer*, 626 F.3d 1004, 1007-08 (8th Cir. 2010); *United States v. Davey*, 550 F.3d 653, 658 (7th Cir. 2008); *United States v. Polanco*, 451 F.3d 308, 310 (3d Cir. 2006); *United States v. Riccardi*, 405 F.3d 852, 866-67 (10th Cir. 2005) *affirming* 258 F. Supp. 2d. 1212 (D. Kan. 2003); *United States v. Rearden*, 349 F.3d 608, 612, 613 (9th Cir. 2003); *United States v. Pearl*, 324 F.3d 1210, 1216-17 (10th Cir. 2003) (Briscoe, J., concurring in part and dissenting in part); *United States v. Somerville*, No. 07-13474 (11th Cir. April 25, 2008); *see also United States v. Abregana*, 574 F. Supp. 2d 1123, 1143-44 (D. Hawai'i 2008); *United States v. Marcus*, 487 F. Supp. 2d 289, 312 (E.D.N.Y 2007); *United States v. Burns*, No. 07-CR-00556 (N.D. Ill. Oct. 27, 2009).

[7] "In Count 2, Rayl was charged with use of interstate facilities to entice a minor to engage in "any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2422(b). Under Missouri law, forced sexual contact and photographing nude minors for sexual stimulation are criminal offenses. *See* Mo. Ann. Stat. §§ 566.100, 568.060.1(2), 2. D.R. testified that Rayl used e-mail messages to entice her to meet him on January 21, and he then forced her to have sexual contact and to pose for suggestive nude photographs. Rayl again argues the evidence was insufficient because D.R.'s testimony was not credible. We decline to second-guess the jury's decision to credit

two criminal offenses have evolved into a symbiotic pair.

This trend in federal prosecutions to continually pair these two statutes is increasingly troubling where, as in *Rayl* as well as in the Petitioner's case, the conduct punishable under § 2251 overlaps so heavily with that punishable under § 2422, that the two statutes become indistinguishable. Where it rises to the point, as it does in this case, in which there is no separate element to prove in order to obtain convictions under both statutes, this constitutes Double Jeopardy.

The Double Jeopardy conundrum arises in large part due to the lack of specific proof of an underlying offense for purposes of a § 2422 conviction. The "separate element" necessary to satisfy *Blockburger v. United States*, 284 U.S. 299, 304 (1932) is § 2422's requirement that the conduct persuaded could be charged as a crime. Notwithstanding that any creation of a visual depiction of sexually explicit behavior under § 2251 is, in fact, chargeable as a crime, the requirement of specificity and jury unanimity as to the underlying offense could avoid the possibility of a Double Jeopardy conviction.

In essence, if the United States wishes to prosecute a defendant under these two statutes, it must be able to specifically point to and prove a) persuasion to some sexual conduct that could be charged as a crime, and b) persuasion to some *other* conduct for purposes of

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D.R.'s testimony. That testimony was sufficient to establish a violation of 18 U.S.C. § 2422(b)." *Id.*

creating a visual depiction. By requiring jury unanimity, as the Seventh Circuit has done, the Double Jeopardy problems evaporate.

As this trend toward indictment and conviction continues under these statutes in tandem, it becomes a matter of great importance to the effective administration of federal justice that such convictions are free from Constitutional issue. Because these federal criminal statutes are so closely related, and "sufficiently similar," *Searcy*, 418 F.3d at 1196-97, and because § 2422 almost inevitably involves some crossover between state and federal laws, this issue is of utmost federal importance.

Such federal importance is of course focused here on the Petitioner, whose Fifth Amendment rights have been violated by this prosecution. *See United States v. DeCarlo*, 434 F.3d 447, 456-57 (6th Cir. 2006); citing *Rutledge v. United States*, 517 U.S. 292, 301-03, 307; 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). Where such prosecutions are growing more and more common, this Court has the opportunity to intervene and avoid prosecutions involving multiplicity without clearly evidenced legislative intent. *DeCarlo*, 434 F.3d at 455.

CONCLUSION

Petitioner therefore requests that the Court grant certiorari on this question in order to establish sufficient boundaries in an increasingly common trend in federal prosecution.

Respectfully Submitted,

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