IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD GEASLAND,

Defendant.

OPINION & ORDER

15-cr-132-jdp

Defendant Richard Geasland has pleaded guilty to one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). Dkt. 10. Now he asks the court to determine before his sentencing hearing whether his Wisconsin conviction for first-degree sexual assault will qualify as a predicate offense under § 2252(b)(2). Dkt. 65. If his conviction does qualify, he will be subject to a 10-year mandatory minimum sentence, which his counsel says is tantamount to a life sentence given his age, 68, and poor health. I conclude that a Wisconsin conviction for first-degree sexual assault is a qualifying predicate offense; accordingly, I must impose a sentence that meets the mandatory minimum.

ANALYSIS

All agree that the court must take a categorical approach to the question at issue, under which the actual facts of Geasland's prior offense are immaterial. *See e.g., Mathis v. United States*, No. 15-6092, 2016 WL 3434400 (U.S. June 23, 2016). The categorical approach requires the court to compare the elements of the statute under which Geasland was convicted—the 1984 version of Wis. Stat. § 940.225(1)(d)—to the elements of the federal crimes listed in § 2252(b)(2). The parties also seem to agree that an appropriate

comparator offense is "abusive sexual contact," 18 U.S.C. § 2244. Geasland contends that the Wisconsin sexual assault statute sweeps more broadly than the federal statute, and thus under the categorical approach, a Wisconsin conviction for first-degree sexual assault cannot be a qualifying predicate offense.

Geasland argues that the Wisconsin statute has supported convictions for penis pinching, *State v. Olson*, 113 Wis. 2d 249, 335 N.W.2d 433 (Ct. App. 1983), and nipple twisting, *State v. Bonds*, 165 Wis. 2d 27, 477 N.W.2d 265 (1991), acts that would not constitute sexual abuse under federal law. The critical aspect of the Wisconsin statute is that it criminalizes the touching of the genitals (or other intimate parts, such as the nipples) if the touching would constitute a battery, which is to say, essentially, if the touching were intended to cause physical harm. Geasland argues that because under Wisconsin law physical harm is such a low threshold, including even minor discomfort, Wisconsin has criminalized non-sexual touching of the genitals if intended to cause any discomfort. Thus, penis pinching and nipple twisting support sexual assault convictions in Wisconsin but do not constitute sexual abuse under federal law. Geasland's argument is intriguing because federal law offers sparse guidance on the meaning of "sexual abuse," but, ultimately, the court is not persuaded.

Geasland is right about the Wisconsin side of the equation. The 1984 version of Wisconsin's first-degree sexual assault statute provides that anyone who "[h]as sexual contact or sexual intercourse with a person 12 years of age or younger[]" is guilty of a class B felony. Wis. Stat. § 940.225(1)(d). Sexual contact, in turn, was defined as:

> any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or

> if the touching contains the elements of actual or attempted battery under s. 940.19(1).

Id. § 940.225(5)(a). "Intimate parts" was defined under § 939.22(19) as "breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." The battery statute provided that:

> Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

Id. § 940.19(1). Bodily harm meant "physical pain or injury, illness, or any impairment of physical condition." *Id.* § 939.22(4). This is all to say that Geasland is correct that in 1984, Wisconsin's first-degree sexual assault statute criminalized the touching of the genitals of a child under 12 if intended to cause physical pain. And so the operative question before the court is whether this statute, with its somewhat unconventionally broad scope, is categorically equivalent to the predicate federal offenses identified in § 2252(b)(2), specifically, "abusive sexual contact," 18 U.S.C. § 2244.

I disagree with Geasland's parsing of the federal statute, which turns on the meaning of "abuse." The § 2252(b)(2) predicate offenses include:

> a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward[.]

At the first level, the question is whether Geasland's conviction is one under a Wisconsin law "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." Neither party takes up the question of what "relating to" might mean here. In defining the predicate offenses, the child pornography statute does not say "or state laws

that are the *equivalent* of the foregoing federal statues," but instead adopts the looser "relating to" formulation. Wisconsin's first-degree sexual assault statute certainly "relates to" sexual abuse and abusive sexual conduct. This rough-and-ready analysis would not require the excruciating element-by-element analysis that the categorical approach typically involves. And, at first blush, it seems to comply with *Mathis*, because it involves only statute-to-statute comparison, without looking to the underlying facts of the offense conduct. But trying to figure out what state statutes "relate to" sexual abuse and abusive sexual conduct might lead to the kind of vagueness issues that produced *Johnson v. United States*, 135 S. Ct. 2551 (2015) (residual clause defining predicate offenses under the Armed Career Criminal Act void for vagueness). So, avoiding the vagueness danger and following the lead of the parties, I will construe the § 2252(b)(2) predicate offenses to include only those convictions under state law that are equivalent to the federal offenses of aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, which are listed in Chapter 109A of Title 18.

The parties' apparent agreement on this point avoids a potentially complex issue: determining the "generic, contemporary meaning" of the offense categories at issue, as the first step in the categorical approach introduced in *Taylor v. United States*, 495 U.S. 575 (1990). This can be a complicated task. *See, e.g., United States v. Rodriguez*, 711 F.3d 541, 549 (5th Cir. 2013) (examining various approaches to the question). Here, sticking to the federal sex abuse statutes makes sense. The Supreme Court has said that the similarity between the description in § 2252(b)(2) of the state predicate offenses and the federal crimes in Chapter 109A "appears to be more than a coincidence." *Lockhart v. United States*, 136 S. Ct. 958, 964 (2016). *Lockhart* did not involve the categorical analysis that this case requires, and the Court

stopped short of holding that the state predicates are patterned on the federal offenses. But, like the Court in *Lockhart*, I will not ignore the obvious parallel. Based on the statutory language, it makes sense that Congress intended § 2252(b)(2) to include at least those state crimes that are the categorical equivalent of the cited federal sex abuse crimes as predicate offenses.[1]

In its brief, the government compares the Wisconsin statute to two Chapter 109A crimes: aggravated sexual abuse under 18 U.S.C. § 2241(a)(5), and abusive sexual contact under 18 U.S.C. § 2244. I will use the offense defined in 18 U.S.C. § 2244(a)(5) because it involves a set of elements closest to the Wisconsin statute. The starting point is the statute concerning aggravated sexual abuse of a child, which defines that crime, in pertinent part, as:

> knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years[.]

18 U.S.C. § 2241(c). The abusive sexual contact statute, 18 U.S.C. § 2244(a)(5), incorporates the conditions set out in § 2241(c) and makes it a crime to have sexual contact with a person under the same conditions under which a sexual act is prohibited by § 2241(c). Sexual contact is defined as:

> the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]

[1] The meaning of "sexual abuse" is, however, context specific. The Seventh Circuit has concluded that the crime "sexual abuse of a minor" as used in the statute defining "aggravated felonies" under immigration law, 8 U.S.C. § 1101(a)(43)(A), is not the same as "sexual abuse of a minor" in 18 U.S.C. § 2243. *Lara-Ruiz v. I.N.S.*, 241 F.3d 934, 941 (7th Cir. 2001).

18 U.S.C. § 2246(3). So the federal crime of abusive sexual contact includes the intentional touching of the genitals of a child under 12, "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]"

The prohibited touching under the federal statute is a very close match to the prohibited touching under the Wisconsin statute. But Geasland contends that the intent elements do not match. Geasland argues that intending physical pain does not fall within the scope of intending to "abuse." Geasland contends that the term "abuse" is undefined in federal law, so the court would have to guess whether intending physical harm would fall within that concept.

There is a surprising lack of appellate guidance on the meaning of "abuse" in the context of the federal sex abuse statutes. Recently, the Supreme Court considered the scope of predicate offenses under 18 U.S.C. § 2252(b), but it declined to consider the meaning of "abuse." *Lockhart*, 136 S. Ct. at 965 ("We take no position today on the meaning of the terms 'aggravated sexual abuse,' 'sexual abuse,' and 'abusive sexual conduct,' including their similarities and differences."). The Supreme Court can leave that issue for another day, but this court must make the call one way or the other.

Because I find no statutory definition and no decisive appellate guidance, I will start with the plain meaning of the term, as articulated in dictionaries. *See United States v. Martinez-Carillo*, 250 F.3d 1101, 1103-04 (7th Cir. 2001) (endorsing a plain language approach and the use of Black's Law Dictionary when determining the meaning of the phrase "sexual abuse of a minor" for purposes of a sentencing enhancement under the United State Sentencing Guidelines). Black's Law Dictionary offers two definitions of "abuse":

> 1. A departure from legal or reasonable use; misuse. 2. Cruel or violent treatment of someone; specif., physical or mental

> maltreatment, often resulting in mental, emotional, sexual, or physical injury. — Also termed cruel and abusive treatment.

Black's Law Dictionary (10th ed. 2014). Unabridged general purpose dictionaries include these definitions, and some others, although the additional definitions are not pertinent to this context. Black's Law Dictionary defines "sex abuse" as:

> 1. An illegal or wrongful sex act, esp. one performed against a minor by an adult. — Also termed carnal abuse. 2. rape (2). — Also termed (in both senses) sex abuse.

Id. Based on dictionary definitions, "abuse" in the context of sexual abuse crimes essentially means "wrongful" or "harmful." *See also Martinez-Carillo*, 250 F.3d at 1104 ("Congress intended to give a broad meaning to the term 'sexual abuse of a minor.'" (citations omitted)).

The broad definition of abuse and sex abuse make sense in the context of the federal sex crime statutes. The sexual abuse statute, 18 U.S.C. § 2242, covers, essentially, coerced or unconsented sex acts. The sexual abuse of a minor statute, 18 U.S.C. § 2243(a), covers any sex act with a minor ages 12 to 15 if the offender is at least four years older than the minor. As the term is used in these statutes, "abusive" is essentially a synonym for "wrongful."

One might object that reading "abuse" so broadly effectively reads out any intent element from these federal sex crimes. After all, sexual contact is defined as prohibited touching "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." So, the argument would go, if abuse simply means "wrongful," then sexual contact with a child under 12 is a strict liability offense under federal law and the term "abuse" becomes mere surplusage. Not quite. A physician or a parent might have occasion to touch the intimate parts of a child for purposes of providing medical care or even basic hygiene. Such contact would not constitute sexual abuse, because the contact would not be intended to be wrongful or harmful (and also not for purposes of humiliating, degrading, or

for sexual arousal or gratification). So the term "abuse" in the intent element of the federal statutes serves the important purpose of distinguishing innocent or helpful intimate touching of children from sex crimes.[2]

Given the necessarily broad notion of "abuse" as that term is used in federal sex crime statutes, I conclude that the touching of a minor's intimate parts for the purpose of inflicting physical pain—such as a battery to the genitals or breast—would constitute sexual contact within the meaning of the federal sex abuse statutes. I accept Geasland's contention that there has been no reported case of a federal prosecution for a non-sexual battery to the genitals. But that does not mean that the federal statutes would not support a conviction for that conduct. Wisconsin's 1984 first-degree sexual assault statute is categorically equivalent to abusive sexual contact of a minor under Chapter 109A, and, as a result, it is a conviction under state law "relating to . . . abusive sexual conduct involving a minor or ward[.]"

I conclude by stepping back to a broader perspective on the issue. If Geasland were correct, then first-degree sexual assault of a child under Wisconsin law would not be a predicate offense under 18 U.S.C. § 2252(b)(2). That would be a remarkable, counterintuitive result. Surely if any Wisconsin crime would count as a predicate offense under federal child pornography law, it would be first-degree sexual assault of a child.

[2] In an alternative argument, Geasland argues that, unlike federal law, Wisconsin law makes sexual intercourse with a child a strict liability offense with no intent element. Dkt. 72, at 6-7. But under Wisconsin law, the courts have supplied the intent element. *See State v. Lesik*, 2010 WI App 12, ¶ 13, 322 Wis. 2d 753, 780 N.W.2d 210 ("[W]e also conclude here that 'sexual intercourse' as used in the sexual assault of a child statute does not include 'bona fide medical, health care, and hygiene procedures.'"). Wisconsin courts have supplied saving constructions for criminal statutes where a strict reading of the text would produce the absurd result of criminalizing benign behavior. For this reason, Geasland's alternative argument is also unpersuasive.

Congress could not have intended the result Geasland suggests. But under the formalistic element-by-element analysis called for under *Mathis* (and presumably required by the Constitution), defendants will sometimes achieve results that would frustrate Congressional intent. But this is not one of those cases. I conclude that the statute under which Geasland was convicted criminalizes no more conduct than do the federal sexual abuse statutes in Chapter 109A. His conviction under Wis. Stat. § 940.225(1)(d) is thus a qualifying predicate offense. A sentence of at least 10 years may well be excessive in Geasland's case, but that is a problem that only Congress can correct.

ORDER

IT IS ORDERED that:

1. Defendant Richard Geasland's motion for determination before sentencing, Dkt. 65, is GRANTED.

2. Defendant's objection, Dkt. 63, to the Presentence Investigation Report is OVERRULED; his conviction under Wis. Stat. § 940.225(1)(d) is a qualifying predicate offense.

Entered July 6, 2016.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge