UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
XXXXX YYYY,	)	
	)	
Defendant.	)	
	)	

Defendant, XXXXX YYYY, moves this Court *in limine* to preclude the government from asking questions of any witness at trial, or presenting evidence or argument at trial, with regard to the subjects set forth below.

DEFENDANT'S CONVICTION FOR CHILD PORNOGRAPHY IN THE STATE OF ILLINOIS

The government alleges in the Indictment in this case that Mr. YYYY had a duty to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA). While the underlying conviction that the government alleges created this duty is not alleged in the Indictment, upon information and belief, it appears the government will attempt to prove that Mr. YYYY's 2000 convictions for five counts of "child pornography" under Illinois law (720 ILCS 5/11–20.1(a)(1)) created the alleged duty. Nevertheless, because the Illinois statute under which Mr. YYYY was convicted is broader than both the federal child pornography laws and the Texas child pornography statute, the 2000 Illinois "child pornography" convictions *do not* create a duty to register under SORNA or Texas law. Consequently, these convictions are irrelevant to the charges set forth in this case.

Illinois law 720 ILCS 5/11–20.1(a)(1) provides:

(a) A person commits child pornography who:

> (1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction or depicts by computer any child whom he or she knows *or reasonably should know* to be under the age of 18 or any person with a severe or profound intellectual disability where such child or person with a severe or profound intellectual disability is:
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> > (i) actually or by simulation engaged in any act of sexual penetration or sexual conduct with any person or animal; or
> >
> > (ii) actually or by simulation engaged in any act of sexual penetration or sexual conduct involving the sex organs of the child or person with a severe or profound intellectual disability and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child or person with a severe or profound intellectual disability and the sex organs of another person or animal; or
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> > (iii) actually or by simulation engaged in any act of masturbation; or
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> > (iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal; or
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> > (v) actually or by simulation engaged in any act of excretion or urination within a sexual context; or
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> > (vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
> >
> > (vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person;

(emphasis added) Moreover, the Illinois statute at issue provides:

> For the purposes of this Section, "child pornography" includes a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is, *or appears to be*, that of a person, either in part, or in total, under the age of 18 or a person with a severe or profound intellectual disability, regardless of the method by which the film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer is created, adopted, or modified to appear as such. "Child pornography" also includes a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer is of a person under the age of 18 or a person with a severe or profound intellectual disability.

720 ILCS 5/11–20.1(f)(7) (emphasis added)

A. SORNA Registration Requirements

As part of the Adam Walsh Child Protection Act, Congress enacted SORNA to create a national sex offender registry. 34 U.S.C. § 29011(1) (formerly 42 U.S.C. § 16911(1)). SORNA also made it a crime if a "sex offender," who is required to register under the Act and who travels in interstate commerce, knowingly fails to register or update a registration. 18 U.S.C. § 2250. Thus, a prerequisite to a conviction under 18 U.S.C. § 2250 is a determination that a defendant is required to register under SORNA.

A "sex offender" subject to SORNA's registration requirement is an individual convicted of a "sex offense." 34 U.S.C. § 20911(1). A "sex offense" is defined under SORNA as:

> (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
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> (ii) a criminal offense that is a specified offense against a minor;
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> (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;
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> (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(I) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

34 U.S.C. 20911(5)(A) The statute then further defines the second category for "specified offense against a minor" to mean "an offense against a minor" that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

34 U.S.C. § 20911(7).

The question of whether Mr. YYYY's Illinois conviction triggered a duty to register under SORNA is a question of law. *See, e.g., United States v. Church*, 461 F.Supp. 3d 875, 881 (S.D. Iowa 2020); *United States v. George*, 223 F.Supp. 3d 159, 163 (S.D.N.Y. 2016); *United States v. Shepherd*, 880 F.3d 734 (5th Cir. 2018).[1] In order to answer this question, the Fifth Circuit directs

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[1]Indeed, an analogy can be drawn between the failure to register statute and the felon in possession statute, where the question of whether a conviction constitutes a predicate offense for prosecution under § 922(g)(1) is "purely a legal one" to be decided by the district court and not the jury. *United States v. Broadnax*, 601 F.3d 336, 345 (5th Cir.), *cert. denied,* 562 U.S. 883 (2010).

this Court to use a "categorical approach" to determine "whether [the state offense] is "comparable to or more severe than" one of the enumerated offenses listed in § 20911. *See, e.g., United States v. Brown*, 774 Fed. Appx. 837, 840 (5th Cir. 2019), *citing*, *United States v. Young*, 872 F.3d 742, 746 (5th Cir. 2017). In applying the categorical approach, "a court does not look to the particular facts of the underlying conviction and focuses only on comparing the elements or statutory definition of the prior offense to those of the enumerated offense." *Brown*, 774 Appx. at 840, *citing*, *Taylor v. United States*, 495 U.S. 575, 600 (1990). Under the categorical approach, this Court "must presume that the conviction at issue 'rested upon [nothing] more than the least of th[e] acts' criminalized [by the state statute], and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013), *citing*, *Johnson v. United States*, 559 U.S. 133, 137 (2010).

Simply put, this Court must look at the elements or statutory definition of the Illinois child pornography offense set forth in 720 ILCS 5/11–20.1(a)(1) in order to determine if the Illinois statute "sweeps more broadly" than the referenced federal offense. *See Descamps v. United States*, 570 U.S. 254, 261 (2013). If the Illinois statute "sweeps more broadly" than the referenced federal offense, the Illinois offense cannot serve as a proper predicate to a violation of 18 U.S.C. § 2250. *United States v. Montgomery*, 966 F.3d 335, 338 (5th Cir. 2020). It then follows that, if the Illinois child pornography offense "sweeps more broadly" than the comparable federal offense, Mr. YYYY's conviction for five counts of child pornography under 720 ILCS 5/11–20.1(a)(1) are irrelevant to the instant prosecution and should not be admissible at trial in any form.

Here, it is clear that when one compares the elements of 720 ILCS 5/11–20.1(a)(1) with the elements of a federal child pornography offense, 720 ILCS 5/11–20.1(a)(1) "sweeps more broadly"

in at least two aspects. First, at the time Mr. YYYY was convicted in Illinois, 720 ILCS 5/11–20.1(a)(1) included virtual child pornography in its definition of "child pornography." *See* 720 ILCS 5/11–20.1(f)(7). On the other hand, federal law does not prohibit virtual child pornography since the holding by the United States Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Second, the Illinois statute allows a defendant to be convicted if he or she "should [have] know[n]" the child or virtual child was under 18 years old or appeared to be under 18 years old. *See* 720 ILCS 5/11–20.1(a). In other words, the Illinois child pornography only requires a negligence standard of *mens rea*. *See Brown*, 774 Fed. Appx. at 840.[2] In contrast, the federal child pornography law does not swipe nearly as broadly and requires a defendant to actually know the child is under 18. *See generally* 18 U.S.C. § 2256(8).[3]

Because the Illinois child pornography offense "sweeps more broadly" than the comparable federal law, Mr. YYYY's conviction for five counts of child pornography under 720 ILCS 5/11–20.1(a)(1) should be excluded from being admitted in this case under Fed. R. Evid. 402, 403 and 404(b).[4]

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[2]*Brown*, 774 Fed. Appx at 840 ("If, however, the federal sexual abuse statute requires a defendant to have knowledge of both the sexual act and the victim's inability to consent, then the statute is narrower than the UCMJ sexual assault statute, which only requires a negligence (should have known) standard of awareness. The district court would have erred here when it found the defendant's UCMJ conviction comparable to a conviction under the federal sexual abuse statute.").

[3]*See also United States v. Smith,* 739 F.3d 843, 848 (5th Cir. 2014) (Knowledge requirement in child pornography statute extends to age of persons depicted.).

[4]Given the legislature's specific reference to "child pornography" in 34 U.S.C. § 20911(7)(g), it would *not* be proper to compare Mr. YYYY's Illinois conviction with any of the other enumerated "offense(s) against a minor" set forth in 34 U.S.C. § 20911(7). Indeed, this would violate the well-settled rule against superfluities *See Corley v. United States*, 556 U.S. 303 (2009). That rule provides that "[a] statute should be construed so that effect is given to all

B. State of Texas Registration Requirements

Even if it could be argued that 720 ILCS 5/11–20.1(a)(1) does not sweep more broadly than its federal equivalent, under Fifth Circuit precedent, the government would still have to prove that the Illinois statute at issue is "substantially similar" to the Texas child pornography statute in order to sustain a violation of 18 U.S.C. § 2250. *Shepherd*, 880 F.3d at 740. Moreover, the Fifth Circuit will apply state law when making this determination and again the categorical approach will apply. *Shepherd*, 880 F.3d at 739, *citing*, *Texas Department of Public Safety v. Anonymous Adult Texas Resident*, 382 S.W.3d 531, 535 (Tex. App.–Austin 2012).[5]

Unlike the Illinois statute, the Texas statute does *not* include virtual child pornography. *Porath v. State*, 148 S.W.3d 402, 414 (Tex. App.–Houston [14th] 2004). Also, unlike the Illinois statute, the Texas statute uses a knowing standard of *mens rea* instead of a negligence standard of *mens rea* with regard to whether a defendant knew a child was under 18. *See* Tex. Penal Code § 43.26. Thus, here again, the Illinois statute is "broader" than the Texas statute and, as such, is not

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its provisions, so that no part will be inoperative or superfluous, void or insignificant ... ." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004), *quoting*, 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181–186 (rev. 6th ed. 2000).

Nevertheless, comparing Mr. YYYY's Illinois conviction with any of the other enumerated "offense(s) against a minor" set forth in 34 U.S.C. § 20911(7) would lead to a similar result given that a person could be convicted of violating the Illinois statute even though the depiction in question did not involve an actual minor and with only a negligence standard of culpability as to age.

[5]It is anticipated that the government will attempt to adduce evidence that the Department of Public Safety had determined that 720 ILCS 5/11–20.1(a)(1) is "substantially similar" to Tex. Penal Code § 43.26. Nevertheless, the "substantially similar" determination is ultimately a "question of law" for *the Court* to determine. *Anonymous Adult*, 382 S.W.3d at 536 ("Whether or not the statutes are substantially similar is a question of law.").

"substantially similar." *Shepherd*, 880 F.3d at 745.

C. *Old Chief* Stipulation

In the event that the Court determines that 720 ILCS 5/11–20.1(a)(1) does not sweep more broadly than federal child pornography law and Texas law, thereby making Mr. YYYY's Illinois conviction for five counts of pornography admissible, Mr. YYYY intends to stipulate that he was convicted of five counts of violating 720 ILCS 5/11–20.1(a)(1).[6]

This proposed stipulation will render any reference to Mr. YYYY's conviction of five counts of child pornography in Illinois irrelevant and prejudicial, and the Court should preclude any reference to the nature of Mr. YYYY's Illinois conviction. *See* Fed. R. Evid 402, 403, 404(b). The Court would then also be free to instruct this jury that it concluded as a matter of law that Mr. YYYY was required to register as a sex offender under SORNA Texas law.

Respectfully submitted,

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[6]*See Old Chief v. United States*, 519 U.S. 172 (1997); *United States v. Clark*, 2013 WL 4008196 (E.D. Wash. 2013) ("Defendant requests that the Court provide the jury with an *Old Chief* stipulation for the predicate felony conviction.... The Government's response indicates it is in agreement with Defendant and believes the parties can agree upon a stipulation to avoid the necessity of disclosing to the jury the nature of Defendant's prior sex offense."); *People v. McManamy*, 2015 WL 202691 (Mich. Ct. App. Jan. 22, 2015) (Reversing failure to register as sex offender conviction because defendant was not allowed to stipulate to underlying conviction); *McLain v. State*, 898 N.E.2d 409 (Ind. Ct. App. 2008) (same).