In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1139

MARK BENNER,

Petitioner-Appellant,

v.

JESSE CARLTON, Chief Probation Officer of St. Joseph County, Indiana,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division.
No. 3:20-CV-731-DRL-MGG — **Damon R. Leichty**, *Judge*.

ARGUED SEPTEMBER 20, 2022 — DECIDED JANUARY 26, 2023

Before EASTERBROOK, HAMILTON, and BRENNAN, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. A statute in Indiana makes it a crime for anyone who "has or had" a professional relation with a person under the age of 18 to "use[] or exert[] the person's professional relationship to engage in sexual intercourse" with that young person. Ind. Code §35-42-4-7(n). A jury convicted Mark Benner of violating this statute, and the

judge sentenced him to 66 months' imprisonment, suspended in favor of probation. The state's judiciary first rejected two constitutional challenges to this statute, 2017 Ind. App. Unpub. LEXIS 981 (July 27, 2017), and then affirmed the conviction, 131 N.E. 3d 634 (Ind. App. 2019). A district court denied Benner's petition for collateral relief, which rests on a contention that the statute is unconstitutionally vague. 2021 U.S. Dist. LEXIS 247052 (N.D. Ind. Dec. 23, 2021).

The evidence at trial permitted a jury to find that, when Benner was 43, he used his position as her mentor to seduce P.A., who was 17. P.A. hoped to use her athletic abilities not only to play basketball but also to obtain a college scholarship. Benner became an assistant varsity basketball coach at Mishawaka High School in 2010 and coached P.A. in that capacity. He and his wife had tutored P.A. in basketball for years before he joined the school's coaching staff. Benner's daughter was one of P.A.'s friends and teammates. Benner resigned his position in March 2013 and told P.A. personally; she cried, and they kissed. Benner promised to coach her one-on-one and help her get a basketball scholarship. He did both things—and the pair also began a sexual relationship that lasted through the spring of P.A.'s first year in college, when Benner's and P.A.'s families learned what was happening.

The phrase "use[] or exert[] the person's professional relationship" has a lengthy statutory definition, Ind. Code §35-42-4-7(p), with six non-exclusive factors, including the defendant's "ability to exert undue influence over the child." But the potentially ambulatory terms on this list are not the focus of Benner's constitutional challenge. Instead he asserts: "A person of ordinary intelligence would not understand how he might 'use' or 'exert' a professional relationship to engage in

sexual conduct with a child when that professional relationship no longer exists". This might puzzle Benner's lawyer, but it would not puzzle an ordinary person. Recall that the statute defines the crime as abusing a professional relation that a person "has *or had*" with the victim. It is easy to see how a coach can use that position to groom a youngster for sex, even if the coach plans that the sexual activity will follow the basketball season's end. A jury readily could find that Benner used his time as P.A.'s official coach to set up a situation in which she would depend on him afterward and be easier to seduce.

The statute defines "professional relationship" to include a situation in which "the person has a relationship with a child that is based on the person's employment or licensed status as described in subdivision (1)." Ind. Code §35-42-4-7(i)(2). Benner had a formal coaching relation with P.A. before April 2013; he does not doubt that this comes within §35-42-4-7(i)(1). After he resigned as the assistant coach, he and P.A. had the sort of relation described in §35-42-4-7(i)(2), because Benner told P.A. that he would take her under his wing and continue coaching her.

Benner's vagueness argument strikes us as an ex post facto argument in disguise. He observes that his position as assistant coach ended before amendments to the statute took effect on July 1, 2013, and he adds that the definition of "professional relationship" in subsection (i) is in the present tense. He never had a licensed or official coaching relation with P.A. after the statutory amendment. And, until its amendment, subsection (n) used the present tense ("has"); not until July 2013 did "has" become "has or had".

As an argument based on the Ex Post Facto Clause, this is a flop. Indiana did not charge Benner with any conduct that

preceded July 2013. It contended—and the jury found—that *after* July 2013 Benner seduced P.A. by using influence gained from his former ("has or had") position as assistant coach (paragraph (i)(1) plus paragraph (n)(1)) and his ongoing position as her personal coach (paragraph (i)(2)).

Benner's argument is no better when denominated as one about vagueness. Doubtless the present tense in subsection (i) has some potential to confuse, but present tense is the recommendation of legislative drafters because other tenses can be worse. See Senate Legislative Drafting Manual §103(a) (1997); House Legislative Counsel's Manual on Drafting Style §351(f) (1995); Drafting Manual for the Indiana General Assembly Ch. 2(C)(3) (2012). Past tense might imply that the important time is the date the bill became law or an indictment was returned; future tense would leave time utterly uncertain unless the legislation specified a future benchmark. Drafting in one tense, and leaving disambiguation to context, see 1 U.S.C. §1, is the normal choice. Treating this choice as unconstitutional would leave almost the entirety of state and federal statute books unenforceable.

When a federal court conducts collateral review of state convictions, a petition

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). Benner has not pointed to any decision of the Supreme Court that "clearly establish[es]" a constitutional problem with the present tense or words such as "use" or "exert". These are ordinary parts of both legal and lay vocabularies. Nor does Benner contend that §35-42-4-7 is invalid across the board; he acknowledges that his is an "as applied" challenge. Such challenges fail if the statute gives notice that illuminates the facts at hand, even if cases at the margin present difficult questions. E.g., *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 (1982). And a reasonable jury (or reasonable state judiciary) could find that a 43-year-old man has exerted undue influence when using a professional coaching relation, plus a girl's desire for a basketball scholarship, to get her into bed. This is something that every coach or mentor should understand with or without a statute.

Asked at oral argument what decision of the Supreme Court "clearly establishes" the invalidity of a statute such as §35-42-4-7, Benner did not have an answer. He pointed to some appellate decisions, but §2254(d)(1) forecloses reliance on them. See, e.g., *Lopez v. Smith*, 574 U.S. 1 (2014). After argument he filed a letter naming *Johnson v. United States*, 576 U.S. 591 (2015), as his best authority. Yet that decision is not remotely controlling. *Johnson* held the residual clause of 18 U.S.C. §924(e)(2)(B) invalid because it depended on the riskiness of a prior offense—but not on the riskiness of the offense as committed. Instead, the Court observed, risk had to be evaluated using an ideal manifestation of the offense, without any way to figure out what the ideal was, plus the absence of any metric for how much risk was too much. 576 U.S. at 597–98. The Justices added:

> As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as

> "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly … some matter of degree," *Nash v. United States*, 229 U.S. 373, 377 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime.

576 U.S. at 603–04. Indiana's statute does not require courts to hypothesize idealized cases; it calls for concrete application of ordinary words such as "use" and "exert". Compared with some statutes that the Supreme Court has held valid—e.g., *United States v. Powell*, 423 U.S. 87 (1975) (firearm "capable of being concealed on the person")—§35-42-4-7 is a model of precision. And *Nash*, which *Johnson* cited favorably, held the Sherman Antitrust Act, 15 U.S.C. §1, to be valid. Again Indiana's law is more concrete.

AFFIRMED