No. 18-8224

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO DICKERSON, AKA GIRBAUD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a conviction for the production of child pornography, in violation of 18 U.S.C. 2251(a), requires the government to establish the defendant's mental state with respect to the victim's age.

2. Whether the 15-year minimum sentence required for an offense of sexual exploitation of children, see 18 U.S.C. 2251(e), violates the Due Process Clause of the Fifth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 735 Fed. Appx. 349.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2018. A petition for rehearing was denied on November 28, 2019 (Pet. App. 5). The petition for a writ of certiorari was filed on February 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of production of child pornography, in violation of 18 U.S.C. 2251(a). Judgment 1; Pet. App. 1-2. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 1. The court of appeals affirmed. Pet. App. 1-4.

1. In April 2011, petitioner organized a trip from Sacramento to Costa Mesa, California, for purposes of prostitution. Presentence Investigation Report (PSR) ¶ 11. C.M., who was 16 years old at the time, was one of the prostitutes. Ibid. The group stopped in Oakland and stayed with petitioner's mother, and C.M. engaged in prostitution that night. PSR ¶ 11(b). "After concluding that 'business' was slow in Oakland," petitioner took the group to Costa Mesa. PSR ¶ 11(d). While staying at a hotel there, petitioner directed C.M. and an adult prostitute "to engage in sexual acts while he took photographs of their conduct," and he later posted at least five of those photographs online to advertise C.M.'s services as a prostitute. PSR ¶¶ 11(e), 12(a) & n.3.

A federal grand jury in the Central District of California charged petitioner with one count of sex trafficking of a minor, in violation of 18 U.S.C. 1591(a)(1) and (b)(2), and one count of

production of child pornography, in violation of 18 U.S.C. 2251(a). Superseding Indictment 1-3. Petitioner proceeded to trial, where the jury found him guilty on the production of child pornography count and not guilty on the sex trafficking count. Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, the minimum sentence required under 18 U.S.C. 2251(e), to be followed by five years of supervised release. Judgment 1.

2. The court of appeals affirmed. Pet. App. 1-4. The court first rejected petitioner's argument that the district court should have instructed the jury as to "a reasonable mistake of age defense to the production of child pornography charge." Id. at 2. Noting that petitioner had not requested such an instruction, and thus reviewing his claim for plain error, the court of appeals examined the evidence that petitioner knew or should have known of C.M.'s age and determined that, "[o]n this record, it was not 'clear' or 'obvious' that a reasonable mistake of age instruction was required." Id. at 3 (citations and internal quotation marks omitted); see id. at 2-3.

Next, the court of appeals rejected petitioner's argument "that the government should have been required to affirmatively prove" his mental state as to C.M.'s age "in order to convict him of violating 18 U.S.C. § 2251(a)." Pet. App. 3. The court observed that petitioner had also failed to raise that argument in

the district court. Ibid. Assuming the argument had only been forfeited and not waived, the court of appeals observed that it had "squarely rejected" petitioner's argument in a prior decision, ibid. (citing United States v. United States Dist. Court, 858 F.2d 534, 536-538 (9th Cir. 1988)), and determined that no subsequent decision of this Court had "plainly" undermined that authority. Ibid.; see id. at 3-4.

Finally, the court of appeals rejected petitioner's argument that the 15-year minimum term of imprisonment required by 18 U.S.C. 2251(e) "violates the Eighth Amendment's guarantee against cruel and unusual punishment." Pet. App. 4. Noting that this Court "'has upheld far tougher sentences for less serious crimes,'" the court of appeals determined that petitioner's sentence "is not so grossly disproportionate as to violate the Eighth Amendment." Ibid. (quoting United States v. Williams, 636 F.3d 1229, 1232-1233 (9th Cir.), cert. denied, 565 U.S. 856 (2011)).

ARGUMENT

Petitioner contends (Pet. 9-20) that the government should have been required to prove recklessness (or knowledge) with respect to C.M.'s minority status in order to support his conviction under 18 U.S.C. 2251(a). Petitioner did not preserve that claim in the district court, and the court of appeals' determination that petitioner could not demonstrate plain error does not conflict with any decision of this Court or another court

of appeals. Petitioner further argues (Pet. 20-30) that the 15-year minimum sentence required under 18 U.S.C. 2251(e) violates the Due Process Clause of the Fifth Amendment. That claim, which was neither pressed nor passed upon below, also implicates no conflict among the courts of appeals. Further review is not warranted.

1. Petitioner and the government jointly proposed jury instructions in the district court that did not require the government to prove, as an element of the offense, petitioner's mental state regarding the victim's age. See Gov't C.A. Br. 53-54. Petitioner's claim that the government should have proved that he was at least reckless as to C.M.'s age is therefore waived; and even if the claim were merely forfeited, it would be reviewable only for plain error. See ibid.; Pet. App. 2-3; see also Fed. R. Crim. P. 32(d), 52(b).

a. On plain-error review, petitioner has the burden to establish (i) an error (ii) that was "clear or obvious, rather than subject to reasonable dispute," (iii) that "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings," and (iv) that "seriously affected the fairness, integrity or public reputation of judicial proceedings." Puckett v. United States, 556 U.S. 129, 135 (2009) (brackets, citations, and internal quotation marks omitted); see Rosales-Mireles v.

United States, 138 S. Ct. 1897, 1904-1905 (2018); United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting Dominguez Benitez, 542 U.S. at 83 n.9).

The court of appeals correctly determined that the district court did not plainly err in failing to instruct the jury sua sponte that the government was required to prove, under 18 U.S.C. 2251(a), that petitioner either knew that C.M. was a minor or was reckless as to that fact. Pet. App. 3-4. Section 2251(a) makes it a crime for "[a]ny person [to] employ[], use[], persuade[], induce[], entice[], or coerce[] any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * * if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce."

Every court of appeals to consider the question has recognized that the government is not required to prove that the defendant knew the victim's age. See United States v. Henry, 827 F.3d 16, 22-25 (1st Cir.), cert. denied, 137 S. Ct. 374 (2016); United States v. Griffith, 284 F.3d 338, 348-349 (2d Cir.), cert. denied, 537 U.S. 986 (2002); United States v. Malloy, 568 F.3d 166, 171-172 (4th Cir. 2009), cert. denied, 559 U.S. 991 (2010); United States v. Crow, 164 F.3d 229, 236 (5th Cir.), cert. denied, 526 U.S. 1160 (1999); United States v. Humphrey, 608 F.3d 955, 962

(6th Cir. 2010); United States v. Fletcher, 634 F.3d 395, 400-401 (7th Cir.), cert. denied, 565 U.S. 942 (2011); United States v. Pliego, 578 F.3d 938, 942-943 (8th Cir. 2009), cert. denied, 558 U.S. 1133 (2010); United States v. United States Dist. Court, 858 F.2d 534, 537-538 (9th Cir. 1988) (Kantor); United States v. Deverso, 518 F.3d 1250, 1257 (11th Cir. 2008); see also United States v. Smith, 662 Fed. Appx. 132, 136 (3d Cir. 2016).

Those uniform decisions are consistent with this Court's discussion of the history and purpose of Section 2251(a) in United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), which observes that Congress omitted the word "knowingly" from Section 2251(a), while retaining it in a neighboring provision, "reflecting an 'intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.'" Id. at 76 (quoting S. Conf. Rep. No. 601, 95th Cong., 1st Sess. 5 (1977)); see Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted). The Court accordingly recognized that producers of child pornography "may be convicted under § 2251(a) without proof they had knowledge of age." X-Citement Video, 513 U.S. at 76 n.5. In light of that authority, petitioner at a minimum cannot establish

that the district court committed the sort of "clear or obvious" error that could warrant correction under the plain-error standard, Puckett, 556 U.S. at 135; see Henderson v. United States, 568 U.S. 266, 278 (2013) ("[L]ower court decisions that are questionable but not plainly wrong (at time of trial or at time of appeal) fall outside the * * * scope" of the plain-error rule.); United States v. Frady, 456 U.S. 152, 163 (1982) (noting that reversible plain error must be "so 'plain'" under governing law that a court would be "derelict in countenancing it, even absent the defendant's timely assistance in detecting it").

b. Petitioner incorrectly contends (Pet. 11-20) that, notwithstanding X-Citement Video, this Court's cases suggest that Section 2251(a) requires proof that a defendant was at least reckless with respect to the minor victim's age. As this Court has recognized, "many sex crimes involving minors do not ordinarily require that a perpetrator know that his victim is a minor." Flores-Figueroa v. United States, 556 U.S. 646, 653 (2009). Petitioner's argument to the contrary primarily relies (Pet. 12-15) on this Court's decision in Elonis v. United States, 135 S. Ct. 2001 (2015), in which this Court applied "[t]he 'presumption in favor of a scienter requirement'" in the context of a statute criminalizing threats. Id. at 2011 (quoting X-Citement Video, 513 U.S. at 72). The common-law presumption relied upon in Elonis, however, does not include "sex offenses, such as rape, in

which the victim's actual age was determinative despite [the] defendant's reasonable belief that the girl had reached age of consent." Morissette v. United States, 342 U.S. 246, 251 n.8 (1952). This Court has explained that in such cases, "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age." X-Citement Video, 513 U.S. at 72 n.2. Indeed, this Court has specifically identified "the criminalization of pornography production at 18 U.S.C. § 2251" as an example of an offense for which proof of mens rea as to the victim's age is not required. Ibid. This Court's decisions in New York v. Ferber, 458 U.S. 747 (1982), and Osborne v. Ohio, 495 U.S. 103 (1990), on which petitioner also relies (Pet. 16-18), are therefore inapposite for the reasons this Court explained in X-Citement Video: Those cases address the "distributing," Ferber, 458 U.S. at 749, and "possession," Osborne, 495 U.S. at 108, of child pornography -- not its production -- and thus do not implicate criminal defendants like petitioner who confront their underage victims personally.

Petitioner also errs in relying upon Leocal v. Ashcroft, 543 U.S. 1 (2004), for the proposition that the word "use" in Section 2251(a) requires "at least a reckless mens rea." Pet. 14-15. That argument misreads the statute: Section 2251(a) applies to a defendant who "uses * * * any minor to engage in" the creation of pornography; the word "uses" thus may impose a mens rea requirement

with respect to the defendant's actions, but it does not indicate the existence of a mental-state requirement with respect to the minor's age. Petitioner's reading of the statute, moreover, is contradicted by this Court's explanation of the statute's legislative history in X-Citement Video, which explains that Congress's omission from Section 2251(a) of a mens rea requirement with respect to age was deliberate. See 513 U.S. at 76-77.

Finally, insofar as petitioner argues (Pet. 18) that the absence of a mental-state requirement with respect to a child's age under Section 2251(a) will chill protected speech, he is mistaken. Section 2251(a) reaches only depictions of real children engaging in sexually explicit conduct, and such depictions lack any First Amendment protection. See Ferber, 458 U.S. at 764. The statute does not apply to pornographic material with youthful-looking adult actors or to virtual child pornography. Cf. Ashcroft v. Free Speech Coal., 535 U.S. 234, 250-251 (2002) (invalidating statute criminalizing production of virtual child pornography). And because Section 2251(a) reaches only unprotected speech, it necessarily does not "punish[] a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" Virginia v. Hicks, 539 U.S. 113, 118-119 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)); see United States v. Johnson, 376 F.3d 689, 695-696 (7th Cir. 2004) (rejecting overbreadth challenge to Section 2251 because the

statute reaches only unprotected speech). Nor does petitioner offer any reason to think that Section 2251(a) will deter those who would engage in constitutionally protected speech but for the mistaken belief that the sexually explicit conduct they wish to depict involves a minor.

c. Petitioner errs in asserting (Pet. 9-11) that "confusion and conflict" exists among the circuits about whether the defendant's mental state as to the victim's age is an element of a Section 2251(a) offense. The only relevant point on which the courts of appeals differ is whether Section 2251(a) permits an affirmative defense where there are reasonable grounds to believe that the defendant neither knew nor reasonably could have learned that the victim was under 18 years of age. Compare Kantor, 858 F.2d at 543 (recognizing such a defense), with Henry, 827 F.3d at 24 (collecting cases from five other courts of appeals rejecting the Ninth Circuit's recognition of such a defense and "adopt[ing] the majority view" that no such defense exists). But petitioner -- whose case comes to this Court from the only circuit that does recognize such a defense -- does not and could not argue that this Court should grant review to address its existence. Petitioner did not request an instruction providing for such a defense at trial, and the court of appeals determined that the district court did not plainly err in failing to instruct the jury on that defense sua sponte. Pet App. 2-3.

2. Petitioner contends (Pet. 20-30) that the 15-year minimum term of imprisonment required under Section 2251(e) violates the Fifth Amendment. That argument, raised for the first time in his petition for a writ of certiorari, is lacks merit.

Petitioner did not raise any constitutional challenge to his sentence before the district court. See Gov't C.A. Br. 61. And his only challenge to his sentence before the court of appeals was his argument that it violated the Eighth Amendment (not the Fifth Amendment), see Pet. C.A. Br. 38-42, which the court of appeals rejected, see Pet. App. 4. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." United States v. Williams, 504 U.S. 36, 41 (1992) (citation and internal quotation marks omitted); see EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986) (per curiam) (this Court typically "refrain[s] from addressing issues not raised in the Court of Appeals"). Petitioner offers no sound reason to deviate from that traditional practice here.

In any event, petitioner's Fifth Amendment argument is unsound. Petitioner primarily relies (Pet. 20-21) on Lambert v. California, 355 U.S. 225 (1957), in which this Court invalidated a law imposing "heavy criminal penalties" on certain felons in Los Angeles who failed to register with the city, including those who were unaware of the requirement to do so, because "[n]otice is

required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." Id. at 228-229. But this case does not involve the sort of "wholly passive" offense at issue in Lambert, id. at 228, and instead involves affirmative acts of photographing sexually explicit activity by a minor. Nothing in Lambert -- which recognized "wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition," ibid. -- suggests that petitioner's conviction or sentence here violated due process.

Petitioner asserts that "[t]he lower courts are divided" on the due process question he presents. Pet. 24 (emphasis omitted). Yet in support of that contention, petitioner cites (Pet. 24-27) only two cases, each decided over 30 years ago, addressing criminal punishment under the Migratory Bird Treaty Act, 16 U.S.C. 703 et seq. See United States v. Engler, 806 F.2d 425, 433-434 (3d Cir. 1986) (reasoning that the Act's felony provision imposing strict liability does not violate the Due Process Clause), cert. denied, 481 U.S. 1019 (1987); United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985) (reasoning that the Act's felony provision violates the Due Process Clause). The Migratory Bird Treaty Act imposes a different penalty for significantly different behavior, and any disagreement regarding the constitutionality of punishment under that statute has little relevance here. To the extent that the

Sixth Circuit's decision in Wulff has any implications for mental-state requirements generally, moreover, the Sixth Circuit has since applied it narrowly, reasoning that Wulff "obviously falls into the class of cases like Lambert, in which the defendant has no warning that his acts might be illegal." Stanley v. Turner, 6 F.3d 399, 405 (1993) (emphasis added). Petitioner's case falls outside that class of cases for the reasons explained above. See pp. 8-9, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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