APPENDIX

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NOT FOR PUBLICATION

FILED

AUG 21 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANTONIO DICKERSON, AKA Girbaud, Defendant-Appellant.	No. 16-50174 D.C. No. 8:14-cr-00179-SVW-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted August 6, 2018
Pasadena, California

Before: HAWKINS, M. SMITH, and CHRISTEN, Circuit Judges.

Antonio Dickerson was charged with sex trafficking a minor in violation of 18 U.S.C. § 1591(a)(1) and production of child pornography in violation of 18 U.S.C. § 2251(a). At trial he claimed that he reasonably believed the victim was over 18, and he was acquitted of the trafficking charge, which included a mens rea element as to the victim's age. He was convicted of the production of child

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

pornography charge, which included no such mens rea element. He now appeals his conviction and sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Dickerson first claims that the district court erred in failing to instruct the jury on a reasonable mistake of age defense to the production of child pornography charge. Dickerson did not raise this claim at trial, and the government argues it is waived. Because there is no reason to believe that Dickerson "intentionally relinquished or abandoned a known right," the claim is instead forfeited and we review for plain error. *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc).

The district court did not plainly err in failing to *sua sponte* give a reasonable mistake of age instruction. That defense would require Dickerson to show that he "did not know, and could not reasonably have learned, that [the victim] was under 18 years of age." *United States v. U.S. Dist. Court (Kantor)*, 858 F.2d 534, 543 (9th Cir. 1988). Dickerson testified that he barely knew the minor victim, CM, and that he believed she was between 19 and 21. In his closing argument, Dickerson's counsel argued that Dickerson did not know that CM was a minor and that she seemed to be an adult based on the context and her appearance. However, Dickerson's defense did not focus on the "could not reasonably have learned" requirement, which is a higher bar than the "reasonable opportunity to

observe" standard that applied to the trafficking charge. Dickerson presented evidence that CM sometimes lied about her age, but she told his friend D'Antoine Thomas that she was 17; had Dickerson asked her age and received the same answer, he would still have known she was underage. On appeal he argues that CM's tattoos were evidence that she was over 18 because California law prohibits tattooing minors, Cal. Penal Code § 653, but this argument was never presented to the judge or jury at trial. On this record, it was not "'clear' or 'obvious,'" *Perez*, 116 F.3d at 846 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)), that a reasonable mistake of age instruction was required.

Dickerson argues that the government should have been required to affirmatively prove a scienter element in order to convict him of violating 18 U.S.C. § 2251(a). However, *Kantor* squarely rejected the argument that § 2251(a) "should be interpreted to require the government to prove scienter as to age in its prima facie case." 858 F.2d at 536–38. Dickerson argues that subsequent Supreme Court authority, particularly *Elonis v. United States*, 135 S. Ct. 2001 (2015), is "clearly irreconcilable" with *Kantor* and we may therefore reject the latter as "having been effectively overruled," *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Even assuming this claim is forfeited rather than waived, any conflict between *Elonis* and *Kantor* was not so obvious that the district court plainly erred by following a directly controlling precedent of this

court.

Finally, Dickerson argues that a fifteen-year mandatory minimum sentence for a pornography offense that lacks a mens rea element violates the Eighth Amendment's guarantee against cruel and unusual punishment. The parties dispute our standard of review, but even under de novo review we conclude that the district court did not err. "The Supreme Court has repeatedly emphasized that 'federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare.'" *United States v. Meiners*, 485 F.3d 1211, 1213 (9th Cir. 2007) (per curiam) (quoting *Ewing v. California*, 538 U.S. 11, 22 (2003)). Indeed, "the Supreme Court has upheld far tougher sentences for less serious crimes," *United States v. Williams*, 636 F.3d 1229, 1232-33 (9th Cir. 2011) (citing cases), including a 40-year sentence for possession and distribution of less than nine ounces of marijuana, *Hutto v. Davis*, 454 U.S. 370, 370, 374–75 (1982) (per curiam), and a life sentence without the possibility of parole for a first-time offender convicted of possessing 672 grams of cocaine, *Harmelin v. Michigan*, 501 U.S. 957, 961, 994–96 (1991). While Dickerson's fifteen-year sentence is harsh, under Supreme Court precedent it is not so grossly disproportionate as to violate the Eighth Amendment.

AFFIRMED.

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANTONIO DICKERSON, AKA Girbaud, Defendant-Appellant.	No. 16-50174 D.C. No. 8:14-cr-00179-SVW-1 Central District of California, Santa Ana ORDER

Before: HAWKINS, M. SMITH, and CHRISTEN, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judges M. Smith and Christen have voted to deny the petition for rehearing en banc, and Judge Hawkins so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.