No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD LAVERNE MECHAM, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the First Amendment protects morphed child pornography created without any child's involvement in sexually explicit conduct, as the Eighth Circuit holds, or does not, as the Second, Fifth and Sixth Circuits hold.

## PARTIES TO THE PROCEEDINGS

All parties to the petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

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### CONSTITUTIONAL PROVISION



### STATUTES AND RULES



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## PRAYER

Petitioner Clifford Laverne Mecham, Jr. ("Mr. Mecham") prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

## OPINION BELOW

The Westlaw version of the opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Mecham*, -- F.3d --, 2020 WL 729502 (5th Cir. Feb. 13, 2020), is attached to this petition as Appendix A. The written order of the United States District Court for the Southern District of Texas denying the motion to dismiss the indictment is attached as Appendix B.

## JURISDICTION

The Fifth Circuit's judgment and opinion was entered on February 13, 2020. *See* Appendix A. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## DIRECTLY RELATED PROCEEDINGS

There are no other state or federal proceedings directly related to the case in this Court. *See* Sup. Ct. R. 14.1(b)(iii).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech[.]"

Petitioner was convicted of possessing morphed images of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(C). Sections 2252A and 2256 are reprinted in Appendices C and D.

## STATEMENT OF THE CASE[1]

### A. The indictment and the motion to dismiss.

On November 28, 2018, a federal grand jury in the Corpus Christi Division of the United States District Court for the Southern District of Texas returned a single-count indictment charging Mr. Mecham with possessing child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(C). The indictment alleged that on or about August 6, 2018, Mr. Mecham

> did knowingly possess material which contains an image of child pornography, as defined in Title 18, United States Code, Section 2256(8)(C), that involved a minor who had not attained 12 years of age, to wit: a video graphic file titled **scren-laney.wmv**, which was produced using materials which had been mailed, shipped and transported in interstate and foreign commerce, by any means, including by computer, to wit: a HP Pavilion p6823w desktop computer . . . which had been manufactured in China.

(Boldface type in original). This video file featured morphed images in which the face of his five-year-old granddaughter had been digitally superimposed (by him, using his computer) onto the face of an adult female actor engaged in various sex acts.

On December 21, 2018, Mr. Mecham moved to dismiss the indictment. He argued that the "cut-and-pasted image" of the child engaged in sexually explicit conduct was "made without the participation of any real children and [was] therefore protected under the First Amendment." He argued further that "the images created by photo-shopping a

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[1] The facts summarized in this section are described at length, supported by detailed citation to the record, in petitioner's opening brief in the court of appeals. *See* Brief for Appellant at 3-14, *United States v. Mecham*, -- F.3d --, 2020 WL 729502 (5th Cir. 2020) (No. 19-40319), 2019 WL 3606008, at *3-*16. No part of that description was ever contested by the government, and it is consistent with the court of appeals' recitation of the facts in the opinion below. *See* Pet. App. A, at 1a-2a.

child's head on the body of an adult engaged in a sex act [do] not implicate the compelling interests identified in *Ferber*[2] and *Free Speech Coalition*,[3] making any definition that reaches such an image unconstitutional as applied." The government, he contended, "has failed to demonstrate that the statute under which [he] is being prosecut[ed] is narrowly tailored to a compelling state interest, and therefore his prosecution cannot survive strict scrutiny."

On January 4, 2019, the district court entered a written order denying the motion to dismiss. Pet. App. B, at 9a-28a. The court wrote that "the creation and possession of pornographic images of living, breathing and identifiable children via computer morphing is not 'protected expressive activity' under the Constitution." Pet. App. B, at 26a. The court did not reach the question whether 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(C), as applied to Mr. Mecham, survive strict scrutiny under the First Amendment.

**B. The stipulated bench trial.**

On January 7, 2019, Mr. Mecham waived his right to a jury trial and proceeded to a bench trial on stipulated facts. The government presented, as exhibits, the parties' signed "Stipulation of Facts" and a disc containing the video file referenced in the indictment. The parties presented no other evidence or witness testimony.

The parties' signed "Stipulation of Facts" stated in pertinent part:

> On August 6, 2018, detectives with the Corpus Christi Police Department (CCPD) Internet Crimes Against Children (ICAC) Unit interviewed a computer repair/networking technician regarding suspicious

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[2] *New York v. Ferber*, 458 U.S. 747 (1982).

[3] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

pornographic files found during the troubleshooting and repair of a Hewlett Packard (HP) Pavilion desktop computer dropped off to him by Clifford Laverne MECHAM (hereinafter MECHAM). Based on the information provided by the technician; agents applied for and received a search warrant for MECHAM's residence.

On September 12, 2018, CCPD ICAC Detectives and HSI Corpus Christi Special Agents executed a search warrant at MECHAM's residence. It was determined that MECHAM was the sole occupant and tenant of the residence. A total of 5 electronic devices and several items of storage media were seized from MECHAM's residence for forensic analysis.

MECHAM was interviewed at the CCPD ICAC office and gave a statement after he had been advised of his rights. During the interview, MECHAM confessed that he produced pornographic images by using images and videos of adults engaged in sexually explicit conduct and superimposing or morphing photographic images of the faces of his grandchildren onto the bodies of nude adults. MECHAM stated that he saved the morphed images and videos that he created to folders labeled with each of his granddaughters' names on his HP Pavilion computer. MECHAM stated that he obtained the adult pornographic images and videos from adult pornographic websites.

On September 28, 2018, a CCPD ICAC Computer Forensic Specialist prepared a report on the findings of the forensic analysis of the devices and storage media items seized from MECHAM on September 12, 2018. A total of 33,303 pornography files were found among seven devices. The 33,303 files include 1,741 videos and 31,562 images consisting of a morphing of facial images of two 16-year-old female children, one 10-year-old female child, and one 5-year-old female child onto nude adult female bodies engaged in various forms of sexual activity with nude or partially clothed adult male bodies upon which is morphed a large penis image and/or superimposed image of MECHAM's face.

Among the pornographic morphed images found on MECHAM'S devices was the computer graphic file entitled **"scren-laney.wmv,"** named in Count One (1) of the Indictment, an[d] offered as Government's Exhibit Two (2). "**scren-laney.wmv**," is an 8 minute, 43 second video file titled scren-laney.wmv [that] was found on an 8GB SanDisk flash drive seized from MECHAM. This video file featured an adult female actor's body engaged in various oral, vaginal, and anal sexual acts with the face of the aforementioned female child identified as age five (5) in source photos morphed over the face of the adult female actor. In some segments of the

> video file, MECHAM's face is morphed over the face of a nude male actor participating in the sexual acts. The identity of this child victim has been confirmed, and it has been confirmed that the child was five (5) years of age at the time the facial image was taken and is currently nine (9) years of age.
>
> MECHAM admittedly produced all of the morphed files on his HP Pavilion desktop computer. The country of origin of this HP Pavilion p6823w desktop computer bearing S/N: 4CD1181NBD containing a 1TB Seagate ST31000528AS hard drive bearing S/N 5VP8XBDL is China.

(Boldface type in original). Based on this evidence, the district court found Mr. Mecham guilty of the offense and entered a verdict of guilty as to Count One of the Indictment.

**C. The sentencing hearing.**

At sentencing on April 8, 2019, the district court determined that the advisory Guidelines range of imprisonment, based on a total offense level of 30 and a criminal history category of I, was 97 to 121 months. Its offense-level calculation included a four-level "sadism" enhancement under USSG § 2G2.2(b)(4)(A), which the court imposed over Mr. Mecham's objection.

The district court sentenced Mr. Mecham to 97 months' imprisonment and a lifetime of supervised release. The court did not impose a fine, but did order Mr. Mecham to pay a $100 special assessment and restitution in the amount of $2,966.78. Mr. Mecham timely appealed.

**D. The appeal.**

On appeal Mr. Mecham argued, in pertinent part, that 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(C) are unconstitutional as applied to him and, therefore, the district court erred

in denying his motion to dismiss the indictment.[4] Particularly he contended that, because no child was sexually abused in the production of the morphed images that he possessed, and the images thus were not integral to criminal conduct (namely, the sexual abuse of minors inherent in the production of child pornography), the images do not fall into the child-pornography category of speech that is unprotected by the First Amendment. His argument relied on the Court's clarification, in *United States v. Stevens*, 559 U.S. 460, 471-72 (2010), that "*Ferber* . . . grounded its analysis in a previously recognized, long-established category of unprotected speech," *i.e.*, "speech or writing used as an integral part of conduct in violation of a valid statute," as well as the Eighth Circuit's subsequent determination, in *United States v. Anderson*, 759 F.3d 891, 894 (8th Cir. 2014), that the First Amendment protects morphed child pornography created without any child's involvement in sexually explicit conduct.

Mr. Mecham argued further that 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(C), as applied to him, cannot survive strict scrutiny under the First Amendment because the government cannot demonstrate that restricting his mere possession of morphed images like these is actually necessary to safeguard the physical or psychological well-being of a child. Mr. Mecham pointed out that the government had failed to present any evidence that the child whose five-year-old face was used to create the "scren-laney.wmv" video ever actually learned of that video and what it depicted. He argued that other existing prohibitions on distributing and producing with intent to distribute morphed images of

[4] Mr. Mecham also challenged the district court's decision, at sentencing, to impose the four-level "sadism" enhancement under USSG § 2G2.2(b)(4)(A).

child pornography provide less restrictive means for the government to protect that child (and any other) from psychological harm.

The Fifth Circuit affirmed Mr. Mecham's conviction, but vacated his sentence and remanded for resentencing in light of a Guidelines-calculation error (*i.e.*, its error in applying the "sadism" enhancement under USSG § 2G2.2(b)(4)(A)). Pet. App. A, at 1a-7a. In its published opinion, the Fifth Circuit recognized that "[c]ircuits disagree about whether morphed child pornography is protected speech," and that "there are reasoned arguments on both sides of the issue," but stated that it agreed with the "majority view"—that is, the view of the Second and Sixth Circuits—"that morphed child pornography does not enjoy First Amendment protection[.]" Pet. App. A, at 1a-6a. It did not reach the question whether the prohibition on possessing morphed child pornography, as applied to Mr. Mecham, can survive strict scrutiny under the First Amendment. *See* Pet. App. A, at 7a (n.5).

The Fifth Circuit reasoned that the Court's child-pornography decisions "have consistently cited the interest in preventing reputational and emotional harm to children as a justification for the categorical exclusion of child pornography from the First Amendment," and that "*Free Speech Coalition* and every circuit to consider the question have recognized that morphed child pornography raises this threat to a child's psychological well-being." Pet. 5a. The Fifth Circuit also found it significant that *Stevens* "makes no mention of the [government's] interest in preventing reputational or emotional harm to children" and did not "say that a connection to underlying sexual abuse is the only

one of *Ferber*'s many rationales that now matters[.]" Pet. App. A, at 5a. It did not read *Stevens* as "allow[ing] a First Amendment defense to any child pornography prosecution when the images do not depict an underlying sexual abuse crime," as this would be a "significant doctrinal development . . . not likely to be hidden in a case about [animal] crush videos," and may "limit the reach not just of the ban on morphed child pornography but of the decades-old bans on real child pornography" (specifically, bans on images depicting a lascivious exhibition of the genitals). Pet. App. A, at 5a.

## BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

## REASONS FOR GRANTING THE PETITION

### I. The federal courts of appeals are divided on the question expressly left open by *Free Speech Coalition*: Does the First Amendment protect morphed child pornography created without any child's involvement in sexually explicit conduct?

The First Amendment commands, "Congress shall make no law ... abridging the freedom of speech[.]" A law imposing criminal penalties on protected speech is a "stark example of speech suppression." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

In *New York v. Ferber*, 458 U.S. 747 (1982), the Court upheld a New York statute that prohibited persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicted such a performance. In so doing, the Court recognized child pornography as a "category of material . . . not entitled to First Amendment protection." *Id.* at 765.

*Ferber* noted that the State of New York had a compelling interest in "safeguarding the physical and psychological well-being of a minor" and that the value of using real children in these works (instead of using simulated conduct or adult actors) is "exceedingly modest, if not *de minimis*." *Id.* at 756-57, 762-63. But, significantly, *Ferber* "grounded its analysis in a previously recognized, long-established category of unprotected speech," *i.e.*, speech "used as an integral part of conduct in violation of a valid criminal statute." *United States v. Stevens*, 559 U.S. 460, 471-72 (2010) (discussing *Ferber* and refusing, based on the *Ferber* framework, to recognize depictions of animal cruelty as a new category of unprotected speech). As the Court in *Stevens* explained:

> When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple

> cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. But our decision did not rest on this "balance of competing interests" alone. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." As we noted [in *Ferber*], "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." ***Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.**
>
> Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.

*Stevens*, 559 U.S. at 471 (cleaned up; internal citations omitted; bolding added).

Notably, *Stevens* cited to *Osborne v. Ohio*, 495 U.S. 103 (1990), and *Free Speech Coalition*, *supra*, as decisions that have "shared this understanding" of *Ferber*. *See Stevens*, 559 U.S. at 471. In the latter decision, the Court struck down the portions of the federal Child Pornography Protection Act of 1996 ("CPPA") that banned the possession and distribution of "virtual" (entirely computer-generated) child pornography and pornography that "appears to" depict children, finding these prohibitions to be "overbroad and unconstitutional." *Free Speech Coal.*, 535 U.S. at 239, 258. In relevant part, the Court stated:

> In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*.

> While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

*Free Speech Coal.*, 535 U.S. at 250 (internal citations omitted); *see also United States v. Williams*, 553 U.S. 285, 289 (2008) (noting that in *Free Speech Coalition*, the Court reasoned that "the child-protection rationale for speech restriction does not apply to materials produced without children"). And, rejecting the government's argument that "indirect harms" are sufficient because child pornography "rarely can be valuable speech," the Court clarified: "*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Free Speech Coal.*, 535 U.S. at 250-51.

*Free Speech Coalition* expressly left open the question whether the section of the CPPA applicable to "morphed" images, 18 U.S.C. § 2256(8)(C), was constitutional, as that section had not been challenged by the respondents. *Free Speech Coal.*, 535 U.S. at 242. But the Court did note, in *dicta*, that such images "implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Id.*

Now, in the wake of *Free Speech Coalition* and *Stevens*, the federal courts of appeals are divided on the question whether morphed images of child pornography can qualify as expressive speech that is protected by the First Amendment. On one side of the split, relying on *Stevens*'s clarification of *Ferber* (*supra* text, at 11-12), the Eighth Circuit has held that an image in which an identifiable minor's face was superimposed onto "an image

of two adults" does not fall into the child-pornography category of unprotected speech because "[n]o minor was sexually abused in the production of [the] image." *Anderson*, 759 F.3d at 894-95. Although the Eighth Circuit had previously held, in *United States v. Bach*, 400 F.3d 622 (8th Cir. 2005), that a morphed image of a minor's head superimposed onto another minor's nude body "involve[d] the type of harm which can constitutionally be prosecuted under . . . *Ferber*," *id.* at 632, that image was meaningfully different, *Anderson* reasoned, because it "recorded the sexual abuse of the nude minor who was posed [in a sexually explicit manner] in the original image." *Anderson*, 759 F.3d at 894-95 (discussing *Bach*).

The Supreme Court of New Hampshire has held, similar to *Anderson*, that adult pornography edited by superimposing an actual child's face onto an adult body is protected expressive speech. *See State v. Zidel*, 940 A.2d 255, 263-64 (N.H. 2008).

On the other side of the split, the Second and Sixth Circuits have held—without any discussion of the then-recent opinion in *Stevens*—that morphed images of child pornography are categorically unprotected by the First Amendment because, whenever an identifiable minor's face is used, that minor's interests are implicated and the minor is at risk of emotional or reputational harm. *See Doe v. Boland*, 698 F.3d 877, 883-84 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011).[5]

[5] The Ninth Circuit has held, in the habeas context, that it is not clearly established that the First Amendment protects morphed child pornography, *see Shoemaker v. Taylor*, 730 F.3d 778, 787 (9th Cir. 2013), and the Second Circuit has reasoned that morphed child pornography causes psychological harm, justifying the application of a sadistic-conduct sentence enhancement, *see United States v. Hoey*, 508 F.3d 687, 693 (1st Cir. 2007). Neither case "directly hold[s] that

The Fifth Circuit has now joined the Second and Sixth Circuits in holding that "morphed child pornography does not enjoy First Amendment protection[.]" Pet. App. A, at 1a. The Fifth Circuit reasons that the Court's child-pornography decisions "have consistently cited the interest in preventing reputational and emotional harm to children as a justification for the categorical exclusion of child pornography from the First Amendment," and that "*Free Speech Coalition* and every circuit to consider the question have recognized that morphed child pornography raises this threat to a child's psychological well-being." Pet. App. A, at 5a.

The Fifth Circuit also finds it significant that *Stevens* "makes no mention of the [government's] interest in preventing reputational or emotional harm to children" and did not "say that a connection to underlying sexual abuse is the only one of *Ferber*'s many rationales that now matters[.]" Pet. App. A, at 5a. It does not read *Stevens* as "allow[ing] a First Amendment defense to any child pornography prosecution when the images do not depict an underlying sexual abuse crime," as this would be a "significant doctrinal development . . . not likely to be hidden in a case about [animal] crush videos," and may "limit the reach not just of the ban on morphed child pornography but of the decades-old bans on real child pornography" (specifically, bans on images depicting a lascivious exhibition of the genitals). Pet. App. A, at 5a.

The Court should grant Mr. Mecham's petition for certiorari to resolve these divergent, and inconsistent, opinions of the federal courts of appeals on the same important

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morphed child pornography is categorically excluded from the First Amendment." Pet. App. A, at 8a (n.6).

matter. *See* Sup. Ct. R. 10(a).

## II. The Fifth Circuit has decided an important federal question in way that conflicts with *Stevens*'s and *Free Speech Coalition*'s clarifications of *Ferber*.

The Court should grant certiorari for an additional reason: the Fifth Circuit has decided an important federal question—one that was expressly left open by *Free Speech Coalition*—in way that conflicts with *Stevens*'s and *Free Speech Coalition*'s clarifications of *Ferber*. *See* Sup. Ct. R. 10(c).

In this case the Fifth Circuit joined the Second and Sixth Circuits in holding that morphed images of child pornography are fully outside the protection of the First Amendment simply because the government has an interest in protecting children from potential emotional or reputational harm. Pet. App. A, at 4a-6a; *see also supra* text, at 14-15. The Fifth Circuit did not say that morphed child pornography falls within a "historic and traditional" category of unprotected speech, *e.g.*, "obscenity" or "speech integral to criminal conduct." *See generally Stevens*, 559 U.S. at 468-69 (listing the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem").

The Fifth Circuit's reasoning is inconsistent with *Stevens*, which explained that the First Amendment protection extends to all speech outside the "historic and traditional categories long familiar to the bar" and does not depend on a "simple cost-benefit analysis." 559 U.S. at 468, 471-72; *see Anderson*, 759 F.3d at 894 (discussing *Stevens*). *Stevens* clarified that "*Ferber* . . . grounded its analysis in a previously recognized, long-established category of unprotected speech," *i.e.*, speech integral to criminal conduct. *Stevens*, 559 U.S.

at 471 (citing *Ferber*, 458 U.S. at 761-62); *see also id.* at 493 (Alito, J., dissenting) ("In *Ferber*, an important factor—I would say the most important factor—was that child pornography involves the commission of a crime that inflicts severe personal injury to the 'children who are made to engage in sexual conduct for commercial purposes.'" (quoting *Ferber*, 458 U.S. at 753)). The "decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment," *Stevens*, 559 U.S. at 472, no matter whether the government's attempts to suppress those categories of speech are made in the name of protecting children from potential emotional or reputational harm.

The Fifth Circuit's reasoning is also in clear conflict with the Court's earlier statement, in *Free Speech Coalition*, that "*Ferber*'s judgment about child pornography was based upon how it was made" and "reaffirmed that where the speech is *neither obscene nor the product of sexual abuse,* it does not fall outside the protection of the First Amendment." 535 U.S. at 250-51 (emphasis added). In this case the Fifth Circuit did *not* hold that the morphed images, which were produced without any child's actual involvement in sexually explicit conduct, are the "product of sexual abuse." Nor did it hold that those images are obscene; although it posited that "[t]he video Mecham was convicted of possessing would present a strong obscenity case," it would "only consider the child pornography law as that is the one the grand jury charged." Pet. App. A, at 7a (n.2).[6]

[6] To the extent that the Fifth Circuit is concerned about reading *Stevens* in a way that may limit the reach of some bans on real child pornography (specifically, bans on images depicting a lascivious exhibition of the genitals), *see* Pet. App. A, at 5a, the Fifth Circuit must be reminded, "'[T]he possible harm to society in permitting some unprotected speech to go unpunished is

This Court should grant certiorari to resolve the conflict between *Stevens*'s and *Free Speech Coalition*'s clarifications of *Ferber* and the morphed-child-pornography opinions of the Second, Fifth and Sixth Circuits. This is necessary to ensure that this Court's decisions in *Ferber* and other cases are not taken "as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 472 (warning against this). "[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the judgment of the American people, embodied in the First Amendment, that the benefits of its restrictions on the Government outweigh the costs." *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792 (2011) (cleaned up) (citing *Stevens*, 559 U.S. at 470).

The question presented is one not only of fundamental legal significance, but also of general importance. As the Court recognized in *Free Speech Coalition*, computer morphing is an even "more common" means of creating virtual images than the entirely computer-generated images at issue in that case. 535 U.S. at 242. The Court should finally resolve whether these images, too, are protected by the First Amendment.

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outweighed by the possibility that protected speech of others may be muted.'" *Free Speech Coal.*, 535 U.S. at 255 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). And in any event, if an adult uses an actual child to produce an image that contains a lascivious exhibition of that child's genitals, that image would be fully outside the protection of the First Amendment even under the Eighth Circuit's reading of *Stevens*. *See United States v. Rouse*, 936 F.3d 849, 852 (8th Cir. 2019) (noting, "It may not be illegal for an adult to place an unclothed child on a bed, but when the adult produces and distributes images of the child that contain a lascivious exhibition of the child's genitals, the activity is illegal and outside of the protection of the First Amendment.").

## III. This case is an ideal vehicle for resolving the question presented.

This case is an ideal vehicle for resolving the question presented because the Fifth Circuit, in a published opinion, acknowledged the circuit split, recognized that there are "reasoned arguments on both sides of the issue," and then clearly explained why it agreed with the "majority view." Pet. App. A, at 1a-6a. There was no alternative basis for its decision affirming the conviction. The question is squarely presented and ripe for review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Date: March 2, 2020

Respectfully submitted,

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UNITED STATES of America, Plaintiff - Appellee
v.
Clifford Laverne MECHAM, Jr., Defendant - Appellant

No. 19-40319
|
FILED February 13, 2020

**Synopsis**

**Background:** Defendant was convicted in the United States District Court for the Southern District of Texas, Janis Graham Jack, Senior District Judge, of possession of child pornography after stipulated bench trial. Defendant appealed.

**Holdings:** The Court of Appeals, Costa, Circuit Judge, held that:

morphed child pornography, such as superimposing faces of actual children on pornographic photos of adults to make it appear that minors were engaged in sexual activity, did not enjoy First Amendment protection, and

post-creation emotional harm to defendant's granddaughters by defendant's production of videos that superimposed their faces on pornographic photos of adults to make it appear that granddaughters were engaged in sexual activity did not warrant four-level sadism-or-masochism sentencing enhancement; and

error in applying sadism-or-masochism sentencing enhancement was not harmless.

Defendant's conviction affirmed, and his sentence vacated and case remanded for resentencing.

**Procedural Posture(s):** Appellate Review; Preliminary Hearing or Grand Jury Proceeding Motion or Objection; Sentencing or Penalty Phase Motion or Objection.

Appeal from the United States District Court for the Southern District of Texas, Janis Graham Jack, U.S. District Judge

**Attorneys and Law Firms**

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Before JOLLY, SMITH, and COSTA, Circuit Judges.

**Opinion**

GREGG COSTA, Circuit Judge:

***1** Real child pornography is not protected speech under the First Amendment. *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990); *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). But virtual child pornography—sexually explicit images "created by using adults who look like minors or by using computer imaging"—is protected speech. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). This appeal asks whether the First Amendment protects pornography that falls between those two categories. The defendant superimposed the faces of actual children on pornographic photos of adults to make it appear that the minors were engaged in sexual activity. Unlike virtual pornography, this "morphed" child pornography uses an image of a real child. Like virtual pornography, however, no child actually engaged in sexually explicit conduct. Circuits disagree about whether morphed child pornography is protected speech. We agree with the majority view that morphed child pornography does not enjoy First Amendment protection, so we affirm the conviction. But the fact that the pornography was created without involving a child in a sex act does mean that a sentencing enhancement for images that display sadistic or masochistic conduct does not apply, so we remand for resentencing.

I.

Clifford Mecham took his computer to a technician for repairs. The technician discovered thousands of images showing nude bodies of adults with faces of children superimposed. The technician reported the pornography to the Corpus Christi Police Department.

After receiving this report, police executed a search warrant of Mecham's home and seized several electronic devices. Mecham waived his *Miranda* rights and admitted he had added the faces of his four granddaughters to photos and videos of adults engaged in sexual conduct.

Mecham later explained why he made the images. After Mecham spent many years interacting with his grandchildren, his daughter prevented him from having any contact with her children. By creating the images, he hoped to get back at his family for cutting him off.

A forensic analysis of the items seized from Mecham's home revealed over 30,000 pornographic files. All these photos and videos were morphed child pornography using the faces of Mecham's grandchildren. The children were four, five, ten, and sixteen in the photos Mecham used. Mecham emailed some videos to his oldest granddaughter. One of those videos shows that granddaughter's face on an adult female having sex. Mecham superimposed his face on the male in the video. The video uses computer animation to show the male ejaculating, with the semen shooting to the granddaughter's mouth.

Although Mecham distributed at least some videos to his granddaughter, the grand jury charged him only with possession of child pornography. The video listed in that count lasts 8 minutes and 43 seconds. It adds the face of Mecham's five-year-old granddaughter to a montage of photos of an adult female engaging in oral, vaginal, and anal sex. In parts of the video, Mecham's face is morphed onto the face of the men engaging in the acts.

***2** Mecham moved to dismiss the indictment, arguing that the First Amendment protects morphed child pornography from prosecution. The district court disagreed.

The case proceeded to a stipulated bench trial, after which the court found Mecham guilty. The court later sentenced Mecham to a prison term of 97 months.

II.

A.

Child pornography cases are frequently prosecuted in federal court. So it may be surprising that such laws are of relatively recent vintage. The history of obscenity law explains why child pornography laws are a modern development. Before the Founding, most colonies treated profanity or blasphemy as criminal offenses. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 104, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting). During the nineteenth century, state prosecutions for the publication of "lewd or obscene" material increased under the common law and statutes. *Id.* The federal government joined in with the Tariff Act of 1842, which barred importing obscene material, and especially with the Comstock Act of 1873, which criminalized mailing obscene material. *Id.*; *Smith v. United States*, 431 U.S. 291, 311–313, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977) (Stevens, J., dissenting). From 1842 to 1956, Congress enacted 20 such obscenity laws. *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). With this many general obscenity laws on the books, there was no need for laws targeting sexually explicit material involving children.

Then obscenity laws came under constitutional scrutiny in the mid-twentieth century. The Supreme Court held that obscenity "is not within the area of constitutionally protected speech." *Id.* But that did not resolve the constitutional status of obscenity prosecutions. The Court also recognized that "sex and obscenity are not synonymous," meaning that some depictions of sex are entitled to First Amendment protection. *Id.* at 487, 77 S.Ct. 1304. Over the next several years, the Court grappled with drawing the line between unprotected obscenity and protected sexual material. In 1973, the Supreme Court tried to put an end to its "intractable obscenity problem" with a test requiring the government to prove that an allegedly obscene work appeals to the prurient interest, is offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 16, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (quoting *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968) (Harlan, J., concurring and dissenting)). Although *Miller* stabilized the Supreme Court's obscenity jurisprudence, its "community standards" test did not "make obscenity readily identifiable," leaving its "prosecution difficult and fraught with constitutional challenges." Note, James H. Jeffries IV, *Seizing Obscenity:* New York v. P.J. Video, Inc. *and the Waning of Presumptive Protection*, 65 N.C. L. REV. 799, 804 (1987).

With post-*Miller* obscenity law an uncertain vehicle for regulating sexually explicit materials, child pornography laws emerged. In 1977, Congress passed the first federal law aimed at child pornography. *See* Protection of Children Against

Child Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978). At the time, only six states had such laws. S. REPORT NO. 95-438, at 48 (1977). By 1980, less than a decade after *Miller*, twenty states had laws "prohibit[ing] the distribution of material depicting children engaged in sexual conduct without requiring that the materially be legally obscene." *Ferber*, 458 U.S. at 749, 102 S.Ct. 3348.

***3** New York enacted one of the early child pornography laws. [1] *Id.* at 750, 102 S.Ct. 3348. Its law, which criminalized distribution but not possession of child pornography, soon reached the Supreme Court. *Id.* at 750–51, 102 S.Ct. 3348. The Court rejected a First Amendment defense. It gave five reasons why "the States are entitled to greater leeway in the regulation of pornographic depictions of children." *Id.* at 756, 102 S.Ct. 3348. First, the government has a compelling interest in "safeguarding the physical and psychological well-being of a minor." *Id.* at 756–57, 102 S.Ct. 3348 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982)). Second, distribution of child pornography compounds the sexual abuse of children by circulating a "permanent record" of the abuse. *Id.* at 759, 102 S.Ct. 3348. Third, outlawing the sale of child pornography reduces the economic incentive to create it. *Id.* at 761–62, 102 S.Ct. 3348. Fourth, any value of child pornography is "exceedingly modest, if not *de minimis*." *Id.* at 762, 102 S.Ct. 3348. Fifth, categorically excluding child pornography from the First Amendment is consistent with the longstanding recognition that bans on certain types of speech escape First Amendment scrutiny when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake." *Id.* at 763–64, 102 S.Ct. 3348. As examples of speech categorically excluded from the First Amendment, the Court cited fighting words or libel against nonpublic figures. *Id.* at 763, 102 S.Ct. 3348.

Not long after *Ferber* the Supreme Court concluded that states may also ban possession. *See Osborne*, 495 U.S. at 111, 110 S.Ct. 1691. *Osborne*, largely echoing *Ferber*, cited the following reasons for its holding: punishing possession reduces demand for the pornography; a ban on possession may limit the reputational damage to the child by encouraging destruction of the images; and "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." *Id.* at 109–11, 110 S.Ct. 1691.

The constitutionality of child pornography laws seemed settled. But in the 1990s Congress expanded the reach of the federal statute after child pornography proliferated with the rise of personal computers and the internet. The Child Pornography Prevention Act of 1996 added both virtual and morphed child pornography to the types of depictions federal law prohibits. *Free Speech Coal.*, 535 U.S. at 239, 122 S.Ct. 1389.

The ban on virtual child pornography did not last long. In 2002, the Supreme Court held that images not depicting real children but that "appear" to do so are protected speech. [2] *Id.* at 239–40, 256, 122 S.Ct. 1389. The Supreme Court first emphasized that "themes [of] teenage sexual activity and the sexual abuse of children [ ] have inspired countless literary works," including *Romeo and Juliet*. *Id.* at 247, 122 S.Ct. 1389. [3] The Supreme Court then distinguished its cases allowing child pornography prosecutions. Unlike real child pornography, virtual pornography is not " 'intrinsically related' to the sexual abuse of children." *Id.* at 250, 122 S.Ct. 1389 (quoting *Ferber*, 458 U.S. at 759, 102 S.Ct. 3348). And unlike real child pornography, which results in "injury to the child's reputation and emotional well-being," *id.* at 249, 122 S.Ct. 1389, no child is involved in the creation of virtual pornography, *id.* at 250, 122 S.Ct. 1389. [4]

***4** The concern about child pornography's reputational and emotional impact on children also came up in *Free Speech Coalition*'s mention of the 1996 law's separate ban on "morphed pornography." That provision defines child pornography as "any visual depiction ... whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where ... such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(C). Although the Supreme Court did not resolve whether the First Amendment protects morphed pornography, it noted that images using photos of identifiable minors to make it appear they are engaged in sexual acts "implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Free Speech Coal.*, 535 U.S. at 242, 122 S.Ct. 1389.

*Free Speech Coalition* thus tells us that morphed child pornography is "closer" to real child pornography because the image makes it appear that an "identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(C). But it does not say whether it is close enough to real child pornography to constitute unprotected speech. That is the question this case poses.

B.

Mecham's video is morphed child pornography. He imposed the face of his granddaughter on the body of an adult engaged in sexual acts to make it appear that an identifiable minor was engaged in sexual conduct. He contends that the video is entitled to First Amendment protection because, even though it uses an image of a real child, it does not depict the sexual abuse of that child. That underlying criminal conduct is necessary, in his view, for an image to be excluded from the First Amendment.

To support his argument that child pornography falls outside the First Amendment only when it depicts sexual abuse of a real minor, Mecham points to a Supreme Court case decided after the child pornography decisions we have discussed. *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010), held that images depicting cruelty to animals are not categorically excluded from the First Amendment. *Id.* at 472, 130 S.Ct. 1577. In rejecting the government's emphasis on the negligible value of animal "crush" videos, *Stevens* noted that its prior recognition of categorical exclusions from the First Amendment did not depend on "a simple cost-benefit analysis" of the speech's worth. *Id.* at 471, 130 S.Ct. 1577. The Court acknowledged that it had discussed the "*de minimis*" value of child pornography in excluding such images from the First Amendment but explained that *Ferber* "did not rest on this 'balance of competing interests' alone." *Id.* (quoting *Ferber*, 458 U.S. at 764, 102 S.Ct. 3348). *Ferber* presented a "special case" because "[t]he market for child pornography was 'intrinsically related' to the underlying abuse" of children. *Id.* (quoting *Ferber*, 458 U.S. at 759, 102 S.Ct. 3348). And, *Stevens* continued, it has long been recognized that speech "used as an integral part of conduct in violation of a valid criminal statute" does not enjoy First Amendment protection. *Id.* (quoting *Ferber*, 458 U.S. at 762, 102 S.Ct. 3348).

*Stevens* persuaded one circuit to conclude that morphed child pornography created without any child's being abused is protected First Amendment speech. *See United States v. Anderson*, 759 F.3d 891, 894–95 (8th Cir. 2014); *see also State v. Zidel*, 156 N.H. 684, 940 A.2d 255, 265 (2008) (holding the same before *Stevens*). The image in *Anderson*, like Mecham's video, "digitally superimposed" the face of a young girl over the face of an adult female having sex. 759 F.3d at 893. The Eighth Circuit distinguished its earlier decision allowing prosecution of morphed child pornography when the face of a minor was superimposed on the face of another minor engaging in sexually explicit conduct. *Id.* at 894 (citing *United States v. Bach*, 400 F.3d 622 (8th Cir. 2005)). The Eighth Circuit concluded that the key under *Stevens* is whether the morphed child pornography depicts the underlying crime of sexual abuse of any minor, even if not the minor whose face is displayed. *Id.* at 895. [5]

***5** Two circuits have reached the opposite conclusion, concluding that morphed child pornography raises similar concerns as real child pornography and thus shares its categorical exclusion from the First Amendment. *See Doe v. Boland*, 698 F.3d 877 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725 (2d Cir. 2011). [6] By using identifiable images of real children, these courts conclude, morphed child pornography implicates the reputational and emotional harm to children that has long been a justification for excluding real child pornography from the First Amendment. *Doe*, 698 F.3d at 883; *Hotaling*, 634 F.3d at 729–30. The Sixth Circuit also pointed out that a ban on morphed child pornography does not raise the "*Romeo and Juliet*" threat to literary and artistic expression that the unconstitutional ban on adult actors appearing like children engaged in sexually explicit conduct created. *Doe*, 698 F.3d at 883–84 (citing *Free Speech Coal.*, 535 U.S. at 247, 122 S.Ct. 1389). And, the Sixth Circuit added, morphed child pornography has "relatively weak expressive value." *Id.* at 883.

That final point about the negligible value of morphed pornography may not carry much weight in light of *Stevens*'s warning against relying solely on a balancing approach when determining if a category of speech is excluded from the First Amendment. Indeed, neither the Second nor Sixth Circuit considered *Stevens* when ruling that morphed child pornography is not protected speech. *See Doe*, 698 F.3d at 883–84 (not addressing *Stevens* though it had issued two years earlier); *Hotaling*, 634 F.3d at 725 (issued after *Stevens*). But those circuits' conclusion that morphed child pornography falls outside the First Amendment came less from a balancing test than from the interest in preventing reputational and emotional harm to children that bans on real and morphed pornography share. *See Free Speech Coal.*, 535 U.S. at 242, 122 S.Ct. 1389. Does *Stevens* undercut that interest in preventing reputational and emotional harm to children, which has long been one of the primary reasons child pornography may be prosecuted?

As is typically the case when a circuit split exists, there are reasoned arguments on both sides of this issue. In deciding

which side has the better argument, we begin with a larger jurisprudential point about the restraint lower courts should show when Supreme Court caselaw is arguably in flux. We are not supposed to get ahead of the Supreme Court and read tea leaves to predict where it might end up. The Supreme Court's child pornography decisions—from *Ferber* through *Free Speech Coalition*—invoke the concern about reputational and emotional harm to children; a one-paragraph discussion of child pornography in a case involving animal crush videos does not allow us to overrule those decisions. *United States v. Price*, 775 F.3d 828, 838 (7th Cir. 2014) (noting that *Stevens* discussed child pornography "only in passing" and "then only to reject an analogy between it and depictions of animal cruelty"); *cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). That is especially true when *Stevens* makes no mention of the interest in preventing reputational or emotional harm to children. *See Stevens*, 559 U.S. at 471, 130 S.Ct. 1577. It had no reason to, as that interest could not be a justification for banning videos depicting animal torture (the minimal value of the crush videos was urged as a reason they should not be considered protected speech, which is why the Court addressed that aspect of *Ferber*). Nor does *Stevens* say that a connection to underlying sexual abuse is the only one of *Ferber*'s many rationales that now matters; it instead said that feature made *Ferber* a "special case." *Id.* If *Stevens*'s emphasis on child pornography's connection to criminality meant that such images could be prosecuted only when they depict sexual abuse of a minor, "[t]hat would have been a significant doctrinal development, and not likely to be hidden in a case about crush videos." *Price*, 775 F.3d at 839.

***6** Why would limiting the categorical exclusion of child pornography to images depicting criminal abuse of children be so significant? Because the federal definition of *real* child pornography is not limited to images that depict sexual abuse of a minor. Among the images long treated as "sexually explicit" are those showing a "lascivious exhibition of the anus, genitals, or pubic area" of a minor. 18 U.S.C. § 2256(2)(A)(v). This definition was used to prosecute a father who took images of his young stepdaughters through a hidden bathroom camera and cropped the images to focus on their genitals. *United States v. Traweek*, 707 F. App'x 213, 215 (5th Cir. 2017). In affirming the conviction, we rejected the defendant's argument that *Ferber* requires "that the minor affirmatively commit a sexual act or be sexually abused." *Id.* at 215 n.2 (citing *United States v. Steen*, 634 F.3d 822, 826–28 (5th Cir. 2011)). The Seventh Circuit likewise rejected a *Stevens* challenge to images with a lascivious exhibition of the genitals that may "stop short of depicting illegal child abuse." *Price*, 775 F.3d at 839. It concluded that "nothing in [*Stevens*'s] brief discussion addresses the definition of child pornography or limits the category to visual depictions of criminal child abuse." *Id.*

Similar prosecutions involving images that zoom in on a minor's genitals, but that do not depict sexual abuse of a minor, have been brought in many federal circuits as well as in state courts. *State v. Bolles*, 541 S.W.3d 128, 136–37 (Tex. Crim. App. 2017) (citing cases from the Sixth, Eighth, Ninth, and Eleventh Circuits); *see also United States v. Lyckman*, 235 F.3d 234, 240 (5th Cir. 2000) (recognizing that "child pornography may involve merely 'pictures of a [naked] child' ... without physical sexual contact"). This application of child pornography laws to lewd or lascivious displays of a child's genitals is not new; the New York child pornography law upheld in *Ferber* included "lewd exhibition of the genitals" among the banned material. *Ferber*, 458 U.S. at 765, 102 S.Ct. 3348 (quoting N.Y. PENAL LAW § 263.00(3)) (approving that aspect of the definition as a "permissible regulation"); *see also United States v. Williams*, 553 U.S. 285, 296, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (recognizing that *Ferber* "constitutionally approved" of the New York law's definition of "sexual conduct," which largely mirrors the federal child pornography law's definition of "sexually explicit conduct"). Reading *Stevens* to allow a First Amendment defense to any child pornography prosecution when the images do not depict an underlying sexual abuse crime would thus limit the reach not just of the ban on morphed child pornography but of the decades-old bans on real child pornography.

We do not read *Stevens* to have made that significant a departure from the Court's child pornography decisions. Those decisions have consistently cited the interest in preventing reputational and emotional harm to children as a justification for the categorical exclusion of child pornography from the First Amendment. *Free Speech Coalition* and every circuit to consider the question have recognized that morphed child pornography raises this threat to a child's psychological well-being. We conclude that because morphed child pornography depicts an identifiable

child, it falls outside the First Amendment. Mecham's conviction is affirmed.

III.

Having affirmed Mecham's conviction, we now turn to his sentence. Mecham argues that the district court erred in applying the four-level enhancement for a child pornography offense that "involve[s] material that portrays sadistic or masochistic conduct or other depictions of violence." U.S.S.G. § 2G2.2(b)(4)(A). The Presentence Report concluded that "numerous morphed images and videos" among the thousands that made up Mecham's relevant conduct qualified for this enhancement. Mecham objected, and the government's response argued only that the video that served as the count of conviction portrayed sadistic conduct. Without making findings, the district court overruled Mecham's objection and applied the enhancement. The four points meant Mecham's advisory Guidelines range was 97–121 months instead of 63–78 months. After "look[ing] at the Guidelines ... and us[ing] the factors in [18 U.S.C. §] 3553(a) for sentencing," the district court sentenced Mecham to the low end of the range it adopted: 97 months.

*7 An image is sadistic if it "depicts conduct that an objective observer would perceive as causing the victim in the image physical or emotional pain contemporaneously with the image's creation." *United States v. Nesmith*, 866 F.3d 677, 681 (5th Cir. 2017). Requiring the pain to be "contemporaneous with the image's creation" ensures that not every child pornography conviction receives the enhancement as all victim children are likely to experience emotional pain once they learn that pornography depicting them exists. *See id. Nesmith* rejected the sadism enhancement for images depicting a defendant's penis placed on the lips of an unconscious child. *Id.* at 678, 681. It reasoned that if a child is not being harmed in the image and does not know the image is being made, creation of the image does not cause contemporaneous physical or emotional pain. *Id.* at 681.

The district court seemed resistant to applying *Nesmith*. When Mecham cited the case at sentencing, the district court did not distinguish it. Instead, it noted the seriousness of the conduct in *Nesmith* (it had presided over that case) and commented "We're going to give [the Fifth Circuit] more cases, then, to look at." But *Nesmith* needed to be considered. It means that the postcreation emotional harm to Mecham's granddaughters does not warrant the enhancement.

Without contemporaneous emotional harm, an image must portray physical pain to be deemed sadistic. Sexual penetration of an actual prepubescent child qualifies. *See Lyckman*, 235 F.3d at 238–40. But for morphed pornography involving the obvious use of an adult body, intercourse alone does not involve the requisite pain. That is not to say that morphed pornography can never qualify for the sadism-or-masochism enhancement. The body image may be of a prepubescent child, just not the one whose face is shown. *See Bach*, 400 F.3d at 632. Or the body image may show conduct that is painful or cruel even for an adult; when, for example, the adult engaged in the sex act is forcibly restrained. *See Hotaling*, 634 F.3d at 731–32. Or it may reasonably appear that the body image is of a prepubescent child (even though it is not) for whom the sex act would be painful. *See id.*; *see also Nesmith*, 866 F.3d at 680 (holding that the standard is objective). The key inquiry is whether a reasonable viewer would conclude that the image depicts the contemporaneous infliction of pain. *See Nesmith*, 866 F.3d at 681.

The district court did not make that finding here. Nor does the Presentence Report or our review of the record support the sadism enhancement. The district court thus erred in including those four points in its Guidelines calculation.

The government contends this discussion of the sadism enhancement was unnecessary because the district court would have applied the same 97-month sentence without it. To show a sentencing error is harmless, the government must "convincingly demonstrate[ ] both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing." *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010).

The government's harmlessness argument fails at the first step. The district court did not say it would have given the same 97-month sentence without the enhancement, and that is the most straightforward way to prove harmlessness. *See, e.g., United States v. Richardson*, 676 F.3d 491, 510–11 (5th Cir. 2012) (affirming a sentence despite a calculation error when the district court stated it would impose the same sentence under either potential sentencing range). Although there are other situations in which the government may be able prove harmlessness, the feature of Mecham's sentencing that it emphasizes—that the court considered the section 3553(a) statutory sentencing factors —is unexceptional. Under the advisory Guidelines regime, a

court is supposed to consider those sentencing factors when determining the sentence. *See Gall v. United States*, 552 U.S. 38, 49–50, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007) (explaining that after determining the advisory Guidelines range, "the district judge should then consider all of the § 3553(a) factors"). So without more, a court's commonplace consideration of the statutory sentencing factors does not render a sentencing error harmless. We have found that to be the case even when the court imposes an out-of-Guidelines sentence. *See Ibarra-Luna*, 628 F.3d at 718–19 (holding that a court's analyzing the 3553(a) factors and assigning an out-of-range sentence was not enough to demonstrate the court would have assigned the same sentence but-for its sentencing error). When the court imposes a sentence at the low end of the Guidelines, making it more likely the advisory range had an anchoring effect, a court's mere consideration of the section 3553(a) factors is an even weaker basis for finding harmlessness.

***8** Application of the sadism-or-masochism enhancement was not harmless. And it was error. The sentence is vacated and the case is remanded for Mecham to be sentenced with an advisory range of 63–78 months.

* * *

Mecham's conviction is AFFIRMED. The sentence is VACATED and the case REMANDED for resentencing consistent with this opinion. We express no view on what sentence the district court should announce on remand.

**All Citations**

--- F.3d ----, 2020 WL 729502

## Footnotes

1 A preenforcement challenge to the New York law resulted in the first use of the term "child pornography" in a federal reporter. *See St. Martin's Press, Inc. v. Carey*, 440 F. Supp. 1196, 1205–06 (S.D.N.Y. 1977), *rev'd*, 605 F.2d 41 (2d Cir. 1979).

2 The Court recognized at the outset of its opinion that some virtual child pornography may be prosecutable under obscenity laws (obscene material need not depict real people). *Free Speech Coal.*, 535 U.S. at 240, 122 S.Ct. 1389. But it was considering only the constitutionality of the child pornography law's prohibition on virtual pornography. *Id.* The video Mecham was convicted of possessing would present a strong obscenity case, but we only consider the child pornography law as that is the one the grand jury charged.

3 *Free Speech Coalition* read *Ferber* to recognize First Amendment protection for some virtual pornography because of this artistic value, quoting *Ferber*'s acknowledgment that some sexual depictions involving children might have "literary or artistic value," but in those cases "a person over the statutory age who perhaps looked younger could be utilized." *Id.* at 251, 122 S.Ct. 1389 (quoting *Ferber*, 458 U.S. at 763, 102 S.Ct. 3348).

4 *Free Speech Coalition* appears to recognize that one interest *Osborne* had cited for why child pornography is unprotected could also apply to virtual child pornography: that the images might be used to solicit minors to engage in sexual conduct. 535 U.S. at 250, 122 S.Ct. 1389. The Court held, however, that this rationale alone was not sufficient to categorically exclude images from the First Amendment. *Id.*

5 *Anderson* nonetheless affirmed the conviction for distributing the morphed image after applying strict scrutiny to the protected speech. 759 F.3d at 895–96. As an alternative ground for affirming, the government argues that the prosecution of Mecham's video likewise survives strict scrutiny even if it is subject to the First Amendment. Mecham counters that prosecution of possession, as opposed to the distribution charge in *Anderson*, is not narrowly tailored to further the government's compelling interest in eliminating the reputational harm of morphed child pornography. We need not address this question because we take the majority view that morphed child pornography is categorically excluded from the First Amendment. And on the categorical question, Mecham concedes it does not matter whether he was charged with possession or distribution, just as that distinction does not matter for real child pornography.

Mecham's concession likely stems from the framing the parties (and other courts) have used for the First Amendment issue: Should morphed child pornography be treated like the real thing or like virtual child pornography? If the answer is that the First Amendment treats morphed images like real child pornography, then *Osborne* would seem to reject any distinction between possession and distribution offenses. But that distinction matters in at least one other area. Although *Roth* held that obscenity is categorically excluded from the First Amendment, the Supreme Court later ruled that criminalizing the private possession of obscenity abridged the "personal liberties guaranteed by the First and Fourteenth Amendments." *Stanley v. Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). Because Mecham did not raise the issue, we do not decide whether a *Stanley*-like privacy claim may provide a defense to a defendant charged with only the private possession of morphed child pornography.

6 The United States argues that the circuit split is more lopsided. But the cases it cites did not directly hold that morphed child pornography is categorically excluded from the First Amendment. *Shoemaker v. Taylor*, 730 F.3d 778, 787 (9th Cir. 2013) (holding in the habeas context that it is not clearly established that the First Amendment protects morphed child pornography); *United States v. Hoey*, 508 F.3d 687, 693 (1st Cir. 2007) (reasoning that morphed child pornography causes psychological harm, justifying the application of a sadistic-conduct sentence enhancement, but not addressing a First Amendment challenge).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

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| UNITED STATES OF AMERICA | § | |
| | § | |
| VS. | § | CRIMINAL ACTION NO. 2:18-CR-1339 |
| | § | |
| CLIFFORD LAVERNE MECHAM JR. | § | |

**ORDER DENYING MOTION TO DISMISS**

Clifford Laverne Mecham ("Mecham" or "Defendant") is charged in a one-count indictment with a violation of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("PROTECT"), codified in various sections of 18, 28, and 42 of the United States Code. 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(C) criminalizes the possession of child pornography consisting of visual depictions that have been "created, adapted or modified to appear that an identifiable minor is engaging in sexually explicit conduct." Presently before the Court is Defendant's motion to dismiss the indictment on the ground that the definition of child pornography in 18 U.S.C. § 2256(8)(C) is unconstitutional as applied to him in light of the holding of the United States Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). For the reasons stated herein, the Defendant's Motion is DENIED.

**JURISDICTION**

The Court has jurisdiction pursuant to 18 U.S.C. § 3231.

**FACTUAL AND PROCEDURAL BACKGROUND**

According to the facts alleged by the government and the Defendant, On August 6, 2018, detectives with the Corpus Christi Police Department ("CCPD") Internet Crimes Against Children ("ICAC") Unit interviewed a computer repair technician about suspicious pornographic

files found during the troubleshooting and repair of Mecham's computer. The technician reported seeing nude bodies of adult women with morphed images of children's faces.

The identity and age of the child victim was confirmed.[1] On September 12, 2018, CCPD ICAC detectives executed a search warrant at Mecham's property where a total of five (5) electronic devices were seized. A total of 33,303 Images were found amongst the devices. All images consisted of morphing facial images of children under the age of sixteen (16) onto nude adult female bodies engaged in various forms of sexual activities and poses. When interviewed, Mecham admitted to "morphing" images of the children onto adult pornographic images and videos. Mecham was then arrested for violating Title 18 U.S.C. §2252A.

## LEGAL ANALYSIS

*A. Constitutional Prohibition of Child Pornography*

In *New York v. Ferber*, 458 U.S. 747 (1982), the United States Supreme Court first upheld a criminal ban on the distribution of child pornography that did not meet the traditional definition of "obscene" set forth in *Miller v. California*, 413 U.S. 15, 24 (1973) ("[crimes for pornography must . . . be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."] ) because of the legitimate state interest in protecting "the physiological, emotional, and mental health" of children. *Ferber*, 458 U.S. at 758. In *Ferber*, the Court emphasized that children are harmed not only through the actual production of pornography, "but also by the knowledge of its continued circulation." *Id.* at 756–59 & n. 10. Based in significant part on this psychological harm, the Supreme Court later upheld a statute criminalizing the mere possession of child pornography. *See Osborne v. Ohio*, 495 U.S. 103, 110–11 (1990) ("[T]he materials produced by child pornographers permanently

[1] The Government contends that the minors were the Defendant's grandchildren. (D.E. 16, at 1).

record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come.").

Moreover, in *Osborne*, *supra*, the Supreme Court recognized that it was "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who [merely] possess and view the product, thereby decreasing demand." 495 U.S. at 109–10 (emphasis added). In *Osborne*, the Court noted that its earlier and seemingly inapposite holding in *Stanley v. Georgia*, 394 U.S. 557, 567 (1969) (states cannot criminalize mere private possession of obscene material), was a "narrow" one. *Osborne*, 495 U.S. at 108, 110 S.Ct. 1691. *Osborne* also observed that after the Court's decision in *Stanley*, " 'the value of permitting child pornography has been characterized as exceedingly modest, if not de minimis.' " *Id.* (*quoting Ferber*, 458 U.S. at 762, 102 S.Ct. 3348).

*B. The CPPA and Ashcroft*

Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*, that is, images created using actual minors. 18 U.S.C. § 2252 (1994 ed.). The Child Pornography Prevention Action of 1996 ("CPPA") retained that prohibition at 18 U.S.C. § 2256(8)(A) and added three other prohibited categories of speech, of which the first, section 2256(8)(B), and the third, section 2256(8)(D), were at issue in *Ashcroft*. 535 U.S. at 241. Section 2256(8)(B) prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct." As the *Ashcroft* court explained:

> The prohibition [in section 2256(8)(B) ] on "any visual depiction" did not depend at all on how the image was produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in

> sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated ... sexual intercourse." § 2256(2). These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. "[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." Congressional Finding (3), notes following § 2251. Furthermore, pedophiles might "whet their own sexual appetites" with the pornographic images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." Id., Findings (4), (10)(B). Under these rationales, harm flows from the content of the images, not from the means of their production. In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. See id., Finding (6)(A). As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

*Id.* at 241–42.

Section 2256(8)(C) of the CPPA covered any visual depiction modified to appear that an actual minor was engaged in sexually explicit activity. In *Ashcroft*, the Supreme Court described this provision as prohibiting a more "common and lower tech means of creating virtual images," known as "computer morphing." 535 U.S. at 242. In lieu of creating original images, "morphing" allowed pornographers to "alter innocent pictures of real children so that the children appear to be engaged in sexual activity." *Id.*

Finally, § 2256(8)(D) defined child pornography to include any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that convey[ed] the impression" it depicted "a minor engaging in sexually explicit conduct." "This provision prevent[ed] child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic

material which is *intentionally pandered* as child pornography." *Id.* (*citing* S.Rep. No. 104–358, p. 22 (1996) (emphasis added)).

In *Ashcroft*, a California trade association for the adult-entertainment industry challenged § 2256(8)(B) and (D) as unconstitutionally overbroad. At the outset of its opinion, the Supreme Court restated the "general principle [that] while the First Amendment bars the government from dictating what we see or read or speak or hear," it did not embrace certain categories of speech "including defamation, incitement, obscenity and pornography produced with real children." 535 U.S. at 245 (citation omitted). Nevertheless, the Court held that the "speech" criminalized in the challenged provisions of the CPPA did not fall into any of the afore-referenced categories. Indeed, the Court found that § 2256(8)(B) of the CPPA abridged First Amendment freedoms since it extended federal prohibition against child pornography to sexually explicit images that "appeared to" depict minors but were "produced without using any real children." *Ashcroft*, 535 U.S. at 240. Section 2256(8)(B) criminalized possessing or distributing images which could be created by using adults who only looked like minors or by using advanced computer imaging techniques to "create realistic images of children who do not exist." *Id.* "By prohibiting child pornography that [did] not depict an actual child," *id.*, § 2256(8)(B) of the CPPA "abridg[ed] the freedom to engage in a substantial amount of lawful speech" and was therefore overbroad and unconstitutional. *Id.* at 256.[2]

Importantly, the Supreme Court rejected an argument raised by the government in *Ashcroft* which contended that the overbreadth challenge to the CPPA was saved by an

[2] Like the text of the "appears to be" provision of § 2256(8)(B), the Court in Ashcroft also found the sweep of § 2256(8)(D) "was quite broad." Id. at 242, 122 S.Ct. 1389. Though intended to punish pornographers and pedophiles who pandered knowingly material as child pornography, "[t]he statute [was] not so limited in its reach." Id. To wit, under the CPPA, "[o]nce a work ha[d] been described as child pornography, the taint remain[ed] on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable." *Id.*

affirmative defense under the statute. *See Ashcroft*, 535 U.S. at 255. The Court found the so-called affirmative defense "incomplete and insufficient," however, in that it allowed distributors, but not mere possessors of child pornography to be exonerated upon showing the objectionable materials were produced using only adults. *Id.* (*citing* 18 U.S.C. § 2252A(c)).

*C. 2003 Revised Legislation*

Almost immediately after the *Ashcroft* decision was handed down, Congress began an effort to craft responsive legislation. The result was the PROTECT Act which defined child pornography to include, in addition to images of "real" children engaged in sexually explicit conduct, see § 2256(8)(A), digital or computer-generated images that are "indistinguishable" from images of actual minors engaging in sexually explicit conduct, see § 2256(8)(B), and visual depictions that have been created or modified to appear as though an identifiable minor is engaged in sexually explicit conduct. *See* § 2256(8)(C). The definition of "morphed" child pornography as discussed in *Ashcroft* remained unchanged as between the CPPA and the PROTECT Act. *See id.* However, the PROTECT Act extended the affirmative defense that each person depicted in the alleged unlawful material "was an adult at the time the material was produced" to defendants charged under 18 U.S.C. § 2252A(a)(1), (2), (3)(A), (4) and mere possession offenses under (5). The PROTECT Act's new affirmative defense, however, that no "actual minor" was involved in the production of pornographic images, *see* 18 § 2252A(c)(2), while available "to most possessors and distributors of these defined materials," *see United States v. Williams*, 444 F.3d 1286, 1296, n. 45 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285 (2008), was notably unavailable to those defendants charged under § 2256(8)(C):

> Prosecutions brought under the definition of child pornography contained in section 2256(8)(C) generally charge the accused with having taken the innocent image of an actual child and "morphing" it into a sexually explicit depiction. Under current law (which was not challenged in *Ashcroft v. Free Speech*

> *Coalition*) only one affirmative defense is available in a morphing prosecution: proof that only pictures of adults were used. S. 151 keeps this affirmative defense intact. However, S. 151 explicitly excludes morphing prosecutions from the new affirmative defense that "the alleged child pornography was not produced using any actual minor or minors."

S.Rep. No. 108–002, 51 at n. 2 (2003)

*D. Overbreadth Challenge*

Based on the principles outlined in *Ashcroft* and *Ferber*, defendant asserts that 18 U.S.C. § 2256(8)(C) is unconstitutional as applied to him since it criminalizes mere possession of "morphed" images, that is, images which have been altered to appear to depict identifiable minors engaged in sexually explicit conduct. Defendant contends that no actual child engaged in the conduct or activities depicted in the altered images and they were produced without exploiting minors. Based thereupon, defendant argues that his First Amendment freedoms are infringed by application of 18 U.S.C. § 2256(8)(C) in the indictment.

Because the respondents in *Ashcroft* did not challenge § 2256(8)(C), the Court did not consider this provision of the CPPA directly. In pointed dicta, however, the Court noted that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft*, 535 U.S at 242. Since *Ashcroft*, two Circuits have addressed directly the CPPA's prohibition against the possession and/or distribution of "morphed" images of child pornography. In *United States v. Bach*, 400 F.3d 622 (8th Cir. 2005), the defendant was indicted under the CPPA on various child pornography charges prior to the Supreme Court's decision in *Ashcroft*. Though the indictment charged defendant Bach with criminal conduct that had occurred in or about August 2000, an interlocutory appeal delayed Bach's trial until after *Ashcroft* was decided in 2002. Bach was thereafter convicted of receipt of child pornography under 18 U.S.C. §

2252A(a)(2) after a jury found he had knowingly received a visual depiction that "involve[d] the use of a minor engaging in sexually explicit conduct" or "ha[d] been created, adapted, or modified to appear that an identifiable minor [was] engaging in sexually explicit conduct." *Bach*, 400 F.3d at 629. The trial court's instruction concerning the definition of child pornography incorporated § 2256(8)(A), the definition of child pornography before the passage of the CPPA, 18 U.S.C. § 2251 et seq., as well as the definition in § 2256(8)(C) added by the CPPA. *See Id.* at 630.

The pertinent facts underlying Bach's conviction were as follows:

> One email in Bach's account had been received from Fabio Marco in Italy; .... Marco's email to Bach had an attached photograph which showed a young nude boy sitting in a tree, grinning, with his pelvis tilted upward, his legs opened wide, and a full erection. Below the image was the name of AC, a well known child entertainer. Evidence at trial showed that a photograph of AC's head had been skillfully inserted onto the photograph of the nude boy so that the resulting image appeared to be a nude picture of AC posing in the tree.

Relying on *Ashcroft*, Bach contended that his conviction for receipt of child pornography under these circumstances violated the First Amendment. Specifically, Bach argued that the definition of child pornography in § 2256(8)(C) covered images that only "appeared to depict an identifiable minor" and that the definitions found unconstitutional in *Ashcroft* used similar language. 400 F.3d at 630. Bach argued morphed pornography, like virtual pornography, was protected by the Supreme Court in *Ashcroft* "because it did not involve the abuse of a real minor and there was no evidence that a real minor was used to produce the image with AC's head." *Id.*

The Eighth Circuit disagreed. "In contrast to the definitions of child pornography in subsections (B) and (D) [of the CPPA found unconstitutional in *Ashcroft*,] the definition in subsection (C) targets harm to an identifiable minor." *Bach*, 400 F.3d at 631.

> Unlike the virtual pornography protected by the Supreme Court in Free Speech Coalition, the picture with AC's face implicates the interests of a real child and

> does record a crime. The picture depicts a young nude boy who is grinning and sitting in a tree in a lascivious pose with a full erection, his legs spread, and his pelvis tilted upward. The jury could find from looking at the *313 picture that it is an image of an identifiable minor, and that the interests of a real child were implicated by being posed in such a way.

*Id.* at 632. Finally, the court noted: "The interests of real children are implicated in the image received by Bach showing a boy with the identifiable face of AC in a lascivious pose. This image involves the type of harm which can constitutionally be prosecuted under *Free Speech Coalition* and *Ferber*." *Id.*

After *Bach*, the Second Circuit also addressed morphed child pornography which uses the faces of known minors and the bodies of adults in the context of 18 U.S.C. § 2256(8)(C). *See United States v. Hotaling*, 634 F.3d 725, 729 (2d Cir. 2011). In that case, Hotaling asserted that the morphed child pornography he created using the faces of actual minors and the bodies of adult females is protected speech under the First Amendment and therefore his conviction under 18 U.S.C. § 2256(8)(C) is unconstitutional as applied to him. *Id.* He contended that the interests of actual children were not implicated because they were not engaged in sexual activity during the creation of the photographs. *Id.* Hotaling urged the Second Circuit to differentiate the child pornography he created from the pornography addressed in *Bach*, 400 F.3d 622 (8th Cir.2005).

The Second Circuit agreed with the Eighth Circuit that the interests of actual minors are implicated when their faces are used in creating morphed images that it appears that they are performing sexually explicit acts. *Hotaling*, 634 F.3d at 730 ("even though the bodies in the images belonged to adult females, they had been digitally altered such that the only recognizable persons were the minors. Furthermore, the actual names of the minors were added to many of the photographs, making it easier to identify them and bolstering the connection between the actual minor and the sexually explicit conduct."). The Second Circuit noted that:

> Unlike the computer generated images in Free Speech Coalition, where no actual person's image and reputation were implicated, here we have six identifiable minor females who were at risk of reputational harm and suffered the psychological harm of knowing that their images were exploited and prepared for distribution by a trusted adult.

*Id.* The Court further explained that the images clearly fit within the bounds of *Ferber*, and the Supreme Court has made it clear that the harm begins when the images are created. *Id.* (*citing Free Speech Coal.*, 535 U.S. at 254).

Defendant argues that he merely morphed innocent photos of minors' heads and necks with images of adults and no children actually engaged in sexual activities. In support of the argument, Defendant relies on a non-precedential state case, *State v. Zidel*, 940 A.2d 255 (2008), which applied both federal and state law, holding that: (1) "where the naked bodies do not depict body parts of actual children engaging in sexual activity;" (2) no part of an image is "the product of sexual abuse;" and (3) a person "merely possesses the image," that "no demonstrable harm results to the child whose face is depicted in the image." *Zidel*, 940 A.2d at 263 (*citing Ashcroft*, 535 U.S. at 249). Based on that holding, Defendant argues that 2256(8)(C) is unconstitutional as applied to his private possession of morphed images. For the reasons in turn, Defendant's argument fails.

1. Substantive Legal Standard

"According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, (2008). The overbreadth doctrine is "strong medicine," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), to be used "sparingly," *id.*, and only when the overbreadth is not only real, but "substantial . . . judged in relation to the statute's plainly legitimate sweep." *Osborne*, 495 U.S. at 112. The showing that a law punishes a "substantial" amount of protected free speech,

suffices to invalidate all enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick*, 413 U.S. at 613; *see also Ferber*, 458 U.S. at 769; *Dombrowski v. Pfister*, 380 U.S. 479, 491, and n. 7 (1965). However, as the Supreme Court noted in *Broadrick*, there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law-particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." 413 U.S. at 615.

2. Application of § 2256(8)(C)

Defendant does not argue that § 2256(8)(C) fails to reflect a legitimate state interest. Rather, defendant contends that while prohibiting distribution of materials under § 2256(8)(C) is acceptable, the statute also criminalizes mere possession of morphed pornographic images which do not depict children engaged in actual sexual or lascivious activity. The Court must examine the scope of the statute before turning to defendant's specific argument concerning its unlawful facial application. *See Williams*, 553 U.S. 285 ("The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.").

a. Express Purpose of Statute

First, under 18 U.S.C. § 2256(8)(C), "child pornography" means "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(C).

"[S]exually explicit conduct" under the statute means "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(B).

In the context of the PROTECT Act, the Supreme Court has recently held that "'Sexually explicit conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring [a]nd 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred." *Williams*, 553 U.S. 285. "The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Id.* The challenged statute also defines "producing" as "producing, directing, manufacturing, issuing, publishing, or advertising." 18 U.S.C. § 2256(3). The definitions contained in the PROTECT Act clearly mean that any visual depiction of "sexually explicit conduct," produced or created in any part by using an identifiable minor, is subject to the statute's prohibition.

This conclusion is supported by review of the defenses available to defendants charged with possession or distribution of child pornography under § 2256(8)(C). The PROTECT Act allows only one affirmative defense to a charge of unlawful possession of "morphed" images of child pornography—that is, proof that "each person was an adult at the time the material was produced," 18 U.S.C. § 2252A(c)(1)(B); *see also* S.Rep. No. 108–002, *supra*, 51 at n. 2. "Each person" clearly means each individual that appears in the visual depiction and the "material" referred to this provision is obviously the "visual depiction" which is "produced" by computer

morphing or other means. Importantly, the statute does not state what defendant herein claims—that one may exonerate oneself from criminal liability by proving that "each person involved in the 'sexually explicit conduct' was an adult at the time the material was produced." Indeed, the plain language of statute is directly at odds with defendant's premise since it eliminates the defense that no "actual minor" was used in the "produc[tion]," 18 U.S.C. § 2252A(c)(2), of the material in any prosecution under § 2256(8)(C). Thus, to the extent that defendant herein argues that the government is required to prove that he used an actual child in the "production" of morphed pornography, he is manifestly wrong.

b. Legislative Intent

The implication of § 2256(8)(C) is apparent from the plain meaning of the statute. Any doubt about whether the statute is constructed to apply to pornographic images—morphed or otherwise—which only appear to depict identifiable minors engaged in sexually explicit conduct is vanquished upon review of provision's legislative history. As previously noted, Congress explicitly removed the affirmative defense that "no actual minor[s]" were used in the production of morphed images of child pornography for defendants charged under § 2256(8)(C):

> The reason for this is simple. The affirmative defense [available to defendants charged under § 2252A(a)(1), (2), (3)(A), (4) or (5) ]will be unavailable if the evidence shows that the image was produced, directly or indirectly, from the sexual abuse of a child. Thus, the affirmative defense is unavailable both for a "first generation" image that directly records the sexual abuse of a child and for a later generation image that uses such an image. In either situation, it cannot be said that "the alleged child pornography was not produced using any actual minor or minors." By contrast, the morphing provision is explicitly aimed at the creation of a sexually explicit image using an innocent image of a child. Because many morphed images thus do not use, either directly or indirectly, a sexually explicit image of any child, it could be argued (incorrectly) by some that it does not involve any "use" of a child and fits within the affirmative defense. If such an argument were successful, it could defeat the entire point of the morphing provision. To eliminate any possible doubt on this issue, the morphing provision has been expressly excluded.

S.Rep. No. 108–002, 51 at n. 2 (2003). Moreover, the Eighth Circuit agreed in *Bach* that § 2256(8)(C) was intended expressly to apply to innocent images of actual children manipulated to depict sexual conduct, even where such conduct did not actually occur:

> Evidence in the record indicates that a photograph of the head of a well known juvenile, AC, was skillfully inserted onto the body of the nude boy so that the resulting depiction appears to be a picture of AC engaging in sexually explicit conduct with a knowing grin. Although there is no contention that the nude body actually is that of AC or that he was involved in the production of the image, a lasting record has been created of AC, an identifiable minor child, seemingly engaged in sexually explicit activity. He is thus victimized every time the picture is displayed. Unlike the virtual pornography or the pornography using youthful looking adults which could be prosecuted under subsections (B) and (D), as discussed in Free Speech Coalition, this image created an identifiable child victim of sexual exploitation.

*Bach*, 400 F.3d at 632.[3] Indeed, *Bach* concluded "[t]he definition in [§ 2256(8)(C)] was intended by Congress to prevent harm to minors resulting from the use of 'identifiable images . . . in pornographic depictions, even where the identifiable minor is not directly involved in sexually explicit activities.'" *Bach*, 400 F.3d at 631 (*quoting* S. Rep. 104–358, at 8 (1996)). Based on the foregoing, the Court finds that § 2256(8)(C) applies to any pornographic image in which an identifiable child "appears to be" engaged in sexually explicit conduct, even if no child actually participated in such activity at the time the material was produced.

3. Overreach

Having so construed the statute, the Court now turns to the question whether § 2256(8)(C) prohibits a "substantial" amount of protected speech. According to defendant, he did not actually record a minor engaging in sexual activity. Instead, he created the images by superimposing non-offensive digital images of minors upon the bodies of adult women engaged in sexual acts and poses. Further, the pictures were created using digital editing in the privacy of

[3] Although *Bach* examined the impact of *Ashcroft* on § 2256(8)(C) of the former CPPA, the identical provision appears in the PROTECT Act as noted above.

his home. (D.E. 2). Defendant urges the Court to adopt *Zidel*'s construction of *Ashcroft* as prohibiting the criminalization of possession of morphed images that depict identifiable minors on naked adult bodies when no child has actually engaged in sexual conduct. This Court will not do so. Mecham fails to reconcile *Zidel*, 940 A.2d 255, with critical legal distinctions in his own case. Moreover, the application of *Zidel* to 18 U.S.C. § 2256(8)(C) is dubious given the plain reading of the PROTECT Act and the explicit legislative history of the challenged provision.

Defendant here is charged with an updated version of said federal offense under the PROTECT Act. Defendant fails to recognize that passage of the PROTECT Act was a legislative attempt to cure some of the infirmities in the CPPA identified by *Ashcroft*. As referenced above, the PROTECT Act: (1) extended the affirmative defense that each person depicted in an alleged image of child pornography "was an adult" at the time the material was produced, 18 U.S.C. § 2252A(c)(1)(B), to possessors of child pornography; and (2) created a new defense that the material was produced without using "actual minor[s]." 18 U.S.C. § 2252A(c)(2). However, the PROTECT Act eliminated expressly the defense in § 2252A(c)(2) for anyone charged with possessing "morphed" images of child pornography under § 2256(8)(C). Assuming *arguendo*, that the CPPA created doubt about whether it applied to morphed pornographic images of identifiable minors when no minors actually engaged in the sexual acts depicted, the PROTECT Act erased it. It is evident from the plain meaning of the PROTECT Act and its explicit legislative history that the alleged "innocence" of the picture is not a defense to § 2256(8)(C) if an identifiable minor is depicted therein. Thus, the Defendant's argument is based on an inaccurate assessment of current federal law.

To the extent that defendant argues that "no demonstrable harm" results to a child whose face, but not his or her naked body, is depicted in a pornographic image, this Court strongly

disagrees. Notably, Defendant overlooked *Bach*' s recognition that AC, the minor child depicted in a lascivious pose, was harmed even though he had not actually engaged in the conduct depicted in the morphed photo. Indeed, *Bach* noted that "the nude body actually is [not] that of AC" nor was AC "involved in the production of the image." *Bach*, at 632. Nevertheless, "a lasting record ha[d] been created of AC, an identifiable minor child, seemingly engaged in sexually explicit activity." *Id.* Defendant failed to recognize that *Bach* focused at least partly on the harm to AC, the child who had not engaged in sexually explicit activity, in rejecting the defendant's argument.

The Court notes that Defendant's argument is at odds with every other federal and state court which has confronted, even indirectly, the constitutional question raised by the dicta in *Ashcroft* concerning statutes which impose criminal penalties for possession of morphed images of child pornography. In *United States v. Hoey*, 508 F.3d 687 (1st Cir. 2007), the defendant appealed from a four-level sentence enhancement for possession of material "that portray[ed] sadistic or masochistic conduct or other depictions of violence." 508 F.3d at 689 (*citing* U.S.S.G. § 2G2.2(b)(4)). The image relied on by the district court in applying the enhancement "portray[ed] a young boy with an expression of pain and disgust who [was] being anally penetrated by the penis of a much older man. The relative sizes of the man's penis and the small boy, in addition to the boy's expression, all suggest[ed] the likelihood of ongoing pain." *Hoey*, 508 F.3d at 691. In *Hoey*'s view, the "image depict[ed] a man about to penetrate, but not yet penetrating, the child, so the image necessarily [could] not be of sadism." *Id.* at 692. Hoey contended that the government was obligated to prove the portrayed conduct actually occurred to justify the sentencing enhancement. *See id.* Specifically, Hoey claimed that the prosecutor was

required to have proven "not only that the child [was] real, but that the sadism [was] as well." *Id.*

> The court "rejected" the premise of Hoey's argument as "wrong":
>
> > That an image "portrays sadistic or masochistic conduct" does not require that it depict actual sadistic conduct, *id.*, if that were the Sentencing Commission's intent, there would be express language to that effect. The language it did choose is to the contrary. Webster's Third New International Dictionary defines "portray" as "to represent by drawing, painting, engraving," "to describe in words," and to "enact." The Guidelines simply do not require the image to be an accurate documentation of real sadistic conduct.

*Id.* The First Circuit found "no conflict between [U.S.S.G. §] 2G2.2(b)(4) and the child pornography statute as interpreted by *Ashcroft* v. *Free Speech Coalition*." *Id.* The court noted that both *Ferber* and *Ashcroft* emphasized children are harmed "not only through the actual production of pornography, but also by the knowledge of its continued circulation." *Id.* at 693. Based "in significant part" on this psychological harm, the court in *Hoey* noted that the Supreme Court "upheld a statute criminalizing the mere possession of child pornography." *Id.* (*citing* *Osborne*, 495 U.S. at 110–11) ("[T]he materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come.").

The First Circuit found that "[it was] this continuing psychological harm that *Hoey* overlook[ed]." *Id.* "An image of an identifiable, real child involving sadistic conduct—even if manipulated to portray conduct that was not actually inflicted on that child—is still harmful, and the amount of emotional harm inflicted will likely correspond to the severity of the conduct depicted." *Id.* It was for this reason that the federal child pornography statute defined "child pornography" as including a "visual depiction [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." *Id.* (*quoting* 18

U.S.C. § 2256(8)(C). In support of its conclusion, the court cited: (1) the Supreme Court's "careful[ ] reserv[ation]" of consideration of § 2256(8)(C) in *Ashcroft*; (2) the above-cited dicta relating "manipulated images of identifiable children" to the images in *Ferber*, *see id.* (*citing Ashcroft*, 535 U.S. at 242, 122 S.Ct. 1389); and (3) the "similar reasoning" of the Eighth Circuit's holding in *Bach*. *Id.* (*citing Bach*, 400 F.3d at 629–32).

In the unreported decision of *Cobb v. Coplan*, 2003 WL 22888857, at *7–8 (D.N.H. Dec. 8, 2003), the district court rejected the defendant's arguments that his photo "collages" made by juxtaposing adult nude bodies with cut-outs of children's faces taken from children's catalogs were protected by the First Amendment. The court found defendant Cobb's collages were "not the sort of 'virtual pornography'" described by *Ashcroft* as falling within the scope of section 2256(8)(B), "since those collages did involve real children."[4] *Id.* (emphasis in original) (*citing Ashcroft*, 535 U.S. at 241). The court in *Cobb* determined that "[i]mages of [the sort contrived by the defendant] . . . are the prohibited "morphed" material addressed in § 2256(8)(C), since "computer morphing involves altering photographs of actual children to make it appear that those children are engaged in sexually explicit conduct." *Id.*

This Court holds that the creation and possession of pornographic images of living, breathing and identifiable children via computer morphing is not "protected expressive activity" under the Constitution. *Williams*, 553 U.S. 285. As discussed above, these images "implicate the interests of real children" and are "closer" to the types of images placed outside the protection of the First Amendment in *Ferber*. *Ashcroft*, 535 U.S. at 242, 254 ("in the case of material covered by *Ferber*, the creation of the speech is itself the crime of child abuse"); *see also Williams*, 553

[4] The District of New Hampshire noted that "[u]nlike a Renaissance painting of a fictitious subject or a Hollywood movie that employs adult actors who simply appear to be minors, Cobb's collages involved pornographic images of real children." 2003 WL 22888857, at *8. "In that regard, they implicate[d] concerns identified in both *Ferber* and *Ashcroft*, insofar as a lasting record ha[d] been created of those children seemingly engaged in sexual activity." *Id.*

U.S. at 285 ("categorical[ly] exclu[ding]" child pornography as protected expression is "based . . . on the principle that . . . what it is unlawful to possess ha[s] no social value and thus, like obscenity, enjoy[s] no First Amendment protection.") (*citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 387–89 (1973)).

Thus, 18 U.S.C. § 2256(8)(C), which criminalizes morphed images of child pornography created without the filming or photographing of actual sexual conduct on the part of an identifiable minor, does not violate the First Amendment. The statute's definition of child pornography "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller*: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *Williams*, 553 U.S. 285 (*citing Free Speech Coalition*, 535 U.S. at 245–246) (First Amendment does not protect obscenity or pornography produced with actual children). There is no doubt that this prohibition falls well "within constitutional bounds," *id.* at 1841–42, for "it is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Ferber*, 458 U.S. at 756–58 (citations omitted). "Th[is] legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," which judgment "easily passes muster under the First Amendment." *Id.*

**CONCLUSION**

For the foregoing reasons, Defendant's motion to dismiss the indictment based on constitutional infirmity is DENIED.

SIGNED and ORDERED this 4th day of January, 2019.

Janis Graham Jack
Senior United States District Judge

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Held Unconstitutional as Applied by U.S. v. Larson, D.Mont., June 05, 2008

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)

18 U.S.C.A. § 2252A

# § 2252A. Certain activities relating to material constituting or containing child pornography

Effective: December 7, 2018
Currentness

**(a)** Any person who--

**(1)** knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

**(2)** knowingly receives or distributes--

**(A)** any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

**(B)** any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

**(3)** knowingly--

**(A)** reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

**(B)** advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains--

**(i)** an obscene visual depiction of a minor engaging in sexually explicit conduct; or

**(ii)** a visual depiction of an actual minor engaging in sexually explicit conduct;

**(4)** either--

**(A)** in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

**(B)** knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

**(5)** either--

**(A)** in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

**(B)** knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

**(6)** knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct--

**(A)** that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

**(B)** that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

**(C)** which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce,

for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor. [1]

shall be punished as provided in subsection (b).

**(b)(1)** Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, 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, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

**(2)** Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has 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, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

**(3)** Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

**(c)** It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--

**(1)(A)** the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

**(B)** each such person was an adult at the time the material was produced; or

**(2)** the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to

a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

**(d) Affirmative defense.**--It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

**(1)** possessed less than three images of child pornography; and

**(2)** promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

**(A)** took reasonable steps to destroy each such image; or

**(B)** reported the matter to a law enforcement agency and afforded that agency access to each such image.

**(e) Admissibility of evidence.**--On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

**(f) Civil remedies.--**

**(1) In general.**--Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

**(2) Relief.**--In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including--

**(A)** temporary, preliminary, or permanent injunctive relief;

**(B)** compensatory and punitive damages; and

**(C)** the costs of the civil action and reasonable fees for attorneys and expert witnesses.

**(g) Child exploitation enterprises.--**

**(1)** Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

**(2)** A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

## CREDIT(S)

(Added Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121[3(a)]], Sept. 30, 1996, 110 Stat. 3009-28; amended Pub.L. 105-314, Title II, §§ 202(b), 203(b), Oct. 30, 1998, 112 Stat. 2978; Pub.L. 107-273, Div. B, Title IV, § 4003(a)(5), Nov. 2, 2002, 116 Stat. 1811; Pub.L. 108-21, Title I, § 103(a)(1)(D), (E), (b)(1)(E), (F), Title V, §§ 502(d), 503, 505, 507, 510, Apr. 30, 2003, 117 Stat. 652, 653, 679, 680, 682 to 684; Pub.L. 109-248, Title II, § 206(b)(3), Title VII, § 701, July 27, 2006, 120 Stat. 614, 647; Pub.L. 110-358, Title I, § 103(a)(4), (b), (d), Title II, § 203(b), Oct. 8, 2008, 122 Stat. 4002, 4003; Pub.L. 110-401, Title III, § 304, Oct. 13, 2008, 122 Stat. 4242; Pub.L. 111-16, § 3(5), May 7, 2009, 123 Stat. 1607; Pub.L. 112-206, § 2(b), Dec. 7, 2012, 126 Stat. 1490; Pub.L. 115-299, § 7(b), Dec. 7, 2018, 132 Stat. 4388.)

Notes of Decisions (417)

## Footnotes

1 So in original. The period probably should be a comma.

18 U.S.C.A. § 2252A, 18 USCA § 2252A

Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)

18 U.S.C.A. § 2256

# § 2256. Definitions for chapter

Effective: December 7, 2018
Currentness

For the purposes of this chapter, the term--

**(1)** "minor" means any person under the age of eighteen years;

**(2)(A)** Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated--

**(i)** sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

**(ii)** bestiality;

**(iii)** masturbation;

**(iv)** sadistic or masochistic abuse; or

**(v)** lascivious exhibition of the anus, genitals, or pubic area of any person;

**(B)** For purposes of subsection 8(B)[1] of this section, "sexually explicit conduct" means--

**(i)** graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

**(ii)** graphic or lascivious simulated;

**(I)** bestiality;

**(II)** masturbation; or

**(III)** sadistic or masochistic abuse; or

**(iii)** graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

**(3)** "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

**(4)** "organization" means a person other than an individual;

**(5)** "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

**(6)** "computer" has the meaning given that term in section 1030 of this title;

**(7)** "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

**(8)** "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--

**(A)** the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

**(B)** such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

**(C)** such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

**(9)** "identifiable minor"--

**(A)** means a person--

**(i)(I)** who was a minor at the time the visual depiction was created, adapted, or modified; or

**(II)** whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

**(ii)** who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

**(B)** shall not be construed to require proof of the actual identity of the identifiable minor.

**(10)** "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

**(11)** the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

**CREDIT(S)**

(Added Pub.L. 95-225, § 2(a), Feb. 6, 1978, 92 Stat. 8, § 2253; renumbered § 2255 and amended Pub.L. 98-292, § 5, May 21, 1984, 98 Stat. 205; renumbered § 2256, Pub.L. 99-500, Title I, § 101(b) [Title VII, § 703(a)], Oct. 18, 1986, 100 Stat. 1783-39, 1783-74; Pub.L. 99-591, Title I, § 101(b) [Title VII, § 703(a)], Oct. 30, 1986, 100 Stat. 3341-39, 3341-74; amended Pub.L. 99-628, § 4, Nov. 7, 1986, 100 Stat. 3510; Pub.L. 100-690, Title VII, §§ 7511(c), 7512(b), Nov. 18, 1988, 102 Stat. 4485, 4486; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121[2]], Sept. 30, 1996, 110 Stat. 3009, 3009-27; Pub.L. 108-21, Title V, § 502(a) to (c), Apr. 30, 2003, 117 Stat. 678, 679; Pub.L. 110-401, Title III, § 302, Oct. 13, 2008, 122 Stat. 4242; Pub.L. 115-299, § 7(c), Dec. 7, 2018, 132 Stat. 4389.)

Notes of Decisions (72)

**Footnotes**

1 So in original. Probably should be "(8)(B)".

18 U.S.C.A. § 2256, 18 USCA § 2256

Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

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