

No. ____

IN THE
Supreme Court of the United States

TROY GEORGE SKINNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Frances H. Pratt
Counsel of Record
Laura J. Koenig
Assistant Federal Public Defenders
Office of the Federal Public Defender
for the Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Fran_Pratt@fd.org

October 6, 2023

QUESTIONS PRESENTED

One of the statutes addressing the sexual exploitation of children, 18 U.S.C. § 2251, prohibits (a) the employment, enticement, or coercion of a minor (2) with intent that the minor engage in sexually explicit conduct for the purpose of producing or transmitting a visual depiction of that conduct and (3) with knowledge that the depiction will be transported or transmitted using a means or facility of interstate or foreign commerce.

This case presents two questions:

1. Does § 2251(a) apply extraterritorially to permit the prosecution of a non-U.S. citizen located in a foreign country whose conduct giving rise to the § 2251(a) charges occurred entirely in that foreign country, or is the provision limited to domestic applications?
2. If § 2251(a) is limited to domestic applications, can it be applied to foreign conduct by foreign actors so long as the conduct involves domestic wire transmissions?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

- (1) U.S. District Court for the Eastern District of Virginia: *United States v. Skinner*, No. 3:19-cr-00019-MHL-1 (judgment entered Feb. 18, 2022)
- (2) U.S. Court of Appeals for the Fourth Circuit: *United States v. Skinner*, No. 22-4131 (judgment entered June 8, 2023)

TABLE OF CONTENTS

Questions Presented	i
Parties to the Proceeding	ii
Related Proceedings.....	ii
Table of Authorities	iv
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Statutory Provision Involved	1
Statement.....	2
A. Factual Background	2
B. Legal Proceedings.....	4
Reasons for Granting the Petition	7
Conclusion.....	9
Appendix A: Decision of the court of appeals <i>United States v. Skinner</i> , 70 F.4th 219 (4th Cir. 2023)	1a
Appendix B: Decision of the district court <i>United States v. Skinner</i> , 536 F. Supp. 3d 23 (E.D. Va. 2021)	14a

TABLE OF AUTHORITIES

Cases

<i>United States v. Elbaz</i> , 52 F.4th 593 (4th Cir. 2022), <i>petition for cert. filed</i> , No. 22-1055 (U.S. Apr. 27, 2023).....	7, 8, 9
<i>United States v. Skinner</i> , 70 F.4th 219 (4th Cir. 2023).....	1
<i>United States v. Skinner</i> , 536 F. Supp. 3d 23 (E.D. Va. 2021)	1, 6

Statutes

18 U.S.C. § 1201	4
18 U.S.C. § 1343	7
18 U.S.C. § 2251(a).....	i, 1, 2, 4, 5, 6, 7, 8
18 U.S.C. § 2251(e).....	2
18 U.S.C. § 3231	1
18 U.S.C. § 3742	1
28 U.S.C. § 1254	1
28 U.S.C. § 1291	1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Troy George Skinner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 70 F.4th 219 (4th Cir. 2023) and appears in Appendix A to this petition. *See Pet. App. 1a-13a.*¹ The district court's opinion is reported at 536 F. Supp. 3d 23 (E.D. Va. 2021) and appears in Appendix B to this petition. *See Pet. App. 14-47a.*

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on June 8, 2023. Petitioner did not seek rehearing.

On August 31, 2023, the Chief Justice extended the time for filing a petition for a writ of certiorari from September 6 to October 6, 2023. *See Docket for Application No. 23A203.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2251(a) of Title 18, United States Code, provides:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or

¹ "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

The penalty for violating § 2251(a) is a mandatory minimum of 15 years in prison, with a statutory maximum of 30 years. 18 U.S.C. § 2251(e).

STATEMENT

A. Factual Background

Petitioner is and has always been a citizen and resident of New Zealand. Pet. App. 3a. In New Zealand, where Petitioner was born, raised, and spent his entire life, the age at which a person can legally consent to sexual activities is 16. *See* C.A.J.A. 59-60 (text of Crimes Act 1961, 1961 No. 43, §134 (N.Z.)).

In approximately December 2017, Petitioner “met” a young American woman online through a gaming platform called Steam. Pet. App. 3a. They soon transitioned to another online platform, Discord, which allows users of the platform to communicate with one another on both desktop computers and cell phones. Pet. App. 3a. The users can message each other in the platform to have a typed “conversation.” The users can also talk with each other face to face in live-stream video sessions. *Id.*

Based on Petitioner's observations and what the young woman told him during their early online interactions, Petitioner believed the young woman to be at least 16 years. Pet. App. 3a. In fact, however, she was 13 years old at the time and falsely told Petitioner she was 16. *Id.* Petitioner truthfully told the young woman that he was 24. *Id.*

At some point after beginning this online romantic relationship, the young woman and Petitioner began having online consensual sex "with" each other. Pet. App. 4a. This sexually explicit conduct consisted of Petitioner and the young woman masturbating in front of each other, showing their genitalia to each other, and/or touching themselves in suggestive ways. *Id.* During these online video chats, one or both of them took screenshots and videos of some of the sexual activity that they would share with each other. Unbeknownst to the young woman, however, Petitioner video-recorded some of their encounters without sharing those videos with her. *See id.* But there is no evidence that Petitioner shared these images or videos with anyone else either.

All of Petitioner's conduct as it relates to the creation of the videos giving rise to Counts 1 through 9 took place in New Zealand. *See Pet. App. 4a.*

In June of 2018, the young woman ended her online relationship with Petitioner and cut off her communications with him. Pet. App. 4a. The end of the relationship devastated Petitioner. Several weeks later, he travelled from New Zealand to the young woman's home in the Eastern District of Virginia. *Id.* When the young woman's mother would not let Petitioner into the home, he tried to break in. *Id.* The mother fired a gun at Petitioner, hitting him in the neck. *Id.* Local law

enforcement officers found Petitioner lying on the ground on a neighbor's property; they also found two cell phones, duct tape, pepper spray, and a folding knife. *Id.*

B. Legal Proceedings

1. Based on the events described above, the government indicted Petitioner initially in February of 2019, on four counts of production of child pornography, in violation of 18 U.S.C. § 2251(a), which carries a mandatory minimum sentence of 15 years, and one count of kidnapping a minor, in violation of 18 U.S.C. § 1201(a)(1), (d) and (g), which carries a mandatory minimum sentence of 25 years. C.A.J.A. 16-19. That September, after receiving additional information from New Zealand authorities, the government filed a superseding indictment that added six more counts of production of child pornography and a second kidnapping charge, for a total of 11 counts. C.A.J.A. 21-29.

In the superseding indictment, each count that alleged a violation of § 2251(a) charged the offense using nearly identical statutory language. Count 1 is representative:

On or about January 13-14, 2018, in New Zealand, defendant, Troy George Skinner, did knowingly employ, use, persuade, induce, entice, and coerce a minor child in Goochland, Virginia, within the Eastern District of Virginia, to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, and for the purpose of transmitting a live visual depiction of such conduct, and the defendant knew and had reason to know that such visual depiction would be transported and transmitted using a means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce, and such visual depictions were produced using materials that had been mailed, shipped, and transported in and affecting interstate and foreign commerce by any means, including by computer, and such visual depictions had actually been transported and transmitted using a means and facility of

interstate and foreign commerce and in and affecting interstate and foreign commerce, to wit, a video file with file name “Desktop 01.14.2018 - 16.07.07.127.DVR.mp4” depicting masturbation and the lascivious exhibition of the genitals.

C.A.J.A. 21-22. No count contained any allegation that Petitioner knew that the person engaging in the sexually explicit conduct was less than 18 years old.

2. During pretrial litigation, Petitioner moved to dismiss the indictment and, later, the superseding indictment, raising three sets of issues, each constitutional in nature. In his initial motion, Petitioner challenged the court’s jurisdiction on two bases: first, that because § 2251(a) did not apply extraterritorially, the court did not have subject matter jurisdiction over the case; and second, even if there was subject matter jurisdiction, then his prosecution violated the Fifth Amendment’s Due Process Clause because there was not a sufficient nexus between his conduct and the United States. *See* C.A.J.A. 30-38, C.A.J.A. 480-488;² *see also* C.A.J.A. 84-98, C.A.J.A. 514-528 (government’s response); C.A.J.A. 137-142 (defendant’s reply). In his second motion, Petitioner raised a different argument under the Due Process Clause, that he could not be charged with violations of § 2251(a) because that statute does not require the government to establish any mens rea with respect to the element of the victim’s age. *See* C.A.J.A. 73-82, C.A.J.A.

² The sealed version of this motion, referencing Counts 1 through 4, is from the round of pretrial litigation that occurred after the original indictment. It was erroneously filed as the unredacted version of the motion challenging Counts 1 through 9 of the superseding indictment in March of 2022, following the district court’s grant of the motion to seal the latter motion. *See* C.A.J.A. 15 (docket entries 185, 187). The substantive argument is the same in both the original and the updated versions of the motion.

503-512; *see also* C.A.J.A. 117-135, C.A.J.A. C.A.547-565 (government's response); C.A.J.A. 149-153, C.A.J.A. 568-572 (defendant's reply). In his third motion, Petitioner raised an argument that also related to mens rea: that unless he was allowed to raise a mistake-of-age defense, his prosecution would violate the First Amendment. *See* C.A.J.A. 61-71, C.A.J.A. 490-500; *see also* C.A.J.A. 100-116, C.A.J.A. 530-545 (government's response); C.A.J.A. 144-148 (defendant's reply).

The district court conducted a hearing on the three motions in August of 2020. *See* C.A.J.A. 155-242. In March of 2021, the court issued a sealed 59-page decision addressing the three motions. *See* C.A.J.A. 630-688. The following month, the court released a redacted version of the decision. *See* C.A.J.A. 243-301; *United States v. Skinner*, 536 F. Supp. 3d 23 (E.D. Va. 2021).

3. Following the denial of his pretrial motions, Petitioner entered a conditional plea to Count 1 of the indictment pursuant to a plea agreement. Pet. App. 5a. The plea agreement allowed him to appeal both the denial of his three motions to dismiss the indictment and his sentence. *Id.*

At sentencing, the defense asked the court to sentence Petitioner to the mandatory minimum sentence of 180 months (15 years), whereas the government asked the court to sentence Petitioner at or near the statutory maximum of 360 months (30 years). The district court sentenced Petitioner to serve 252 months (21 years) in prison. Pet. App. 5a. Petitioner timely appealed. *Id.*

4. On appeal, Petitioner challenged his conviction in part on the ground that it constitutes an impermissible extraterritorial application of § 2251(a). Following briefing and oral argument, the Fourth Circuit issued its decision on

June 8, 2023. *See* Pet. App. 1a-13a. While the Court of Appeals agreed that § 2251(a) cannot be applied extraterritorially, the court concluded that Petitioner's prosecution and conviction resulted from a proper domestic application of the statute. Pet. App. 6a-10a.

REASONS FOR GRANTING THE PETITION

In rejecting Petitioner's extraterritoriality challenge to his prosecution under 18 U.S.C. § 2251(a), the Court of Appeals relied heavily on its recent decision in *United States v. Elbaz*, 52 F.4th 593 (4th Cir. 2022). *See* Pet. App. 6a-10a. *Elbaz* involved an Israeli citizen who lived and worked in Israel and was prosecuted under the federal wire fraud statute, 18 U.S.C. § 1343, for her involvement in an international investment fraud scheme that caused losses to victims in the United States. The defendant challenged her conviction on the ground that because the wire fraud statute does not apply extraterritorially, she did not commit a crime under U.S. law. 52 F.3d at 599-600. The Court of Appeals followed a two-step framework in analyzing the challenge. 52 F.3d at 601-605. At the first step, because there is a presumption against extraterritorial application of federal statutes, the court considered whether the statute itself clearly indicated that it was to be applied extraterritorially. *Id.* at 601-602. At the second step, if the presumption is not overcome, the court considered whether the prosecution under review involved a permissible application of the statute. *Id.* at 602. While the Court of Appeals agreed with the *Elbaz* defendant that § 1343 does not apply extraterritorially, the court concluded that she was properly prosecuted for a domestic offense because her conduct involved the misuse of American wires. *Id.* at 602.

In Petitioner’s case, the Court of Appeals followed the same two-part analysis that it did in *Elbaz*. Pet. App. 6. The court began its first-step analysis by stating that “[i]n all relevant respects, § 2251(a) is no different than the wire-fraud statute we considered in *Elbaz*. Just as the wire-fraud statute ‘lacks any affirmative statutory instruction that it criminalizes purely extraterritorial conduct,’ so too does § 2251(a).” Pet. App. 6a (quoting *Elbaz*, 52 F.4th at 602). Concluding that § 2251(a) does not apply extraterritorially, *id.* at 6a-7a, the court turned to its second-step analysis. In conducting that analysis, the court similarly relied on *Elbaz*, for example, in outlining what to look for in the statute. *Id.* at 7a (“As a textual matter, the statute’s focus is found within its ‘substantive elements,’ which ‘primarily define the behavior that the statute calls a violation of federal law’ and ‘describe “the harm or evil the law seeks to prevent.”’ (quoting *Elbaz*, 52 F.4th at 603)). And in concluding that “the harm or evil the law seeks to prevent” is the depiction of sexually explicit conduct that is produced or transmitted,” the court stated that its conclusion “accords with this Court’s recent decision in *United States v. Elbaz*” in that “[t]he same logic [employed in *Elbaz*] applies to § 2251(a)’s substantive elements and supports treating the production or transmission—the ‘essential conduct’—as the statute’s focus.” *Id.* at 8a (quoting and citing *Elbaz*, 52 F.4th at 603 & 604). Finally, the court again relied on *Elbaz* in determining that the live transmission of the depiction of sexually explicit conduct began in the United States, Petitioner’s conviction was “a permissible domestic application” of § 2251(a). Pet. App. 9a (citing *Elbaz*, 52 F.4th at 604); *see also* Pet. App. 10a (citing *Elbaz*, 52 F.4th at 604, to support observation that “[t]he transmission [in Petitioner’s case] involved both R.D.’s use of the webcam to transmit

the sexually explicit conduct and Skinner’s receipt of that depiction over the live video feed”).

The *Elbaz* defendant has petitioned this Court for a writ of certiorari, seeking review of the Fourth Circuit’s ruling on her extraterritoriality challenge to her prosecution under the wire fraud statute. *See* U.S. No. 22-1055 (petition filed Apr. 27, 2023; following filing of respondent’s brief and petitioner’s reply brief, case distributed for conference of Oct. 6, 2023). The petition explains why the Fourth Circuit’s decision was wrong, *see* Petition for Cert. 23-31, and Petitioner hereby incorporates by reference that portion of the petition.

Given the similarities of the questions presented and the Fourth Circuit’s heavy reliance on *Elbaz* in ruling against Petitioner in this case, Petitioner asks the Court to hold his case until the Court decides whether to grant a writ of certiorari in *Elbaz*. If the Court grants review in *Elbaz*, Petitioner further requests that the Court continue to hold his case until such time as the Court issues a decision on the merits in *Elbaz*. Finally, if the Court reverses the Fourth Circuit in *Elbaz*, then Petitioner requests that the Court grant certiorari in his case, vacate the Fourth Circuit’s judgment, and remand his case for further review in light of *Elbaz*.

CONCLUSION

For the reasons given above, the Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration in light of *Elbaz*.

Respectfully submitted,

Frances H. Pratt

Frances H. Pratt

Counsel of Record

Laura J. Koenig

Assistant Federal Public Defenders

Office of the Federal Public Defender

for the Eastern District of Virginia

1650 King Street, Suite 500

Alexandria, VA 22314

(703) 600-0800

Fran_Pratt@fd.org

October 6, 2023