No. 24-5752

ORIGINAL

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NORMAN THURBER
— PETITIONER
(Your Name)

UNITED STATES OF AMERICA
— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

EIGTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

NORMAN THURBER #04095-089
(Your Name)

FCI-MEMPHIS
P.O. BOX 34550
(Address)

MEMPHIS, TN 38184
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Is there a mens rea requirement for Scienter in 18 U.S.C. Section 2251, since

"... criminal responsibility may not be imposed without some element of Scienter on the part of the Defendant"?

- quoting: SMITH v CALIFORNIA, 361 US 147 (1959)
HAMLING v UNITED STATES, 418 US 87 (1974)
OSBORNE v. OHIO, 495 US 103 (1990)
BUILDING & CONST. TRADES COUNCIL, 485 US 568 (1988)

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

NONE

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

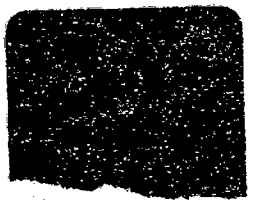
[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.



JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was July 8, 2024.

[X] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Aug 27, 2024, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 2251. Sexual exploitation of children

(a) 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 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.

STATEMENT OF THE CASE

Thurber met A.H. online. They subsequently engaged in sex. Thurber filmed six videos. A.H. had told Thurber she was 18 years old and was born in 2002. The night the videos were recorded, Thurber told A.H. he would be returning her back to her home the next day. A.H. became upset, and left the residence. She had contact with the local police. She told police that she was 18 years old. After more questioning, she stated that she was in fact 15 years old.

Thurber avers he never knew she was underage. Thurber was denied a "Mistake of Age" defense at trial. The Ninth Circuit is in conflict on this exact issue with the Eighth Circuit. Because Thurber was tried in the Eighth Circuit, he was found guilty. If tried in the Ninth Circuit, Thurber avers he would be innocent.

> Although 18 USCS § 2251 on its face does not permit reasonable mistake of age of minor depicted to be affirmative defense, statute must be construed to incorporate defense in order to save it from collision with First Amendment; defendant may avoid conviction only by showing by clear and convincing evidence that he did not know, and could not reasonably have learned, that actor was under 18. United States v. United States Dist. Court for Cent. Dist., 858 F.2d 534, 1988 U.S. App. LEXIS 13528 (9th Cir. 1988).
>
> Preclusion of reasonable-mistake-of-age defense did not violate defendant's right to due process at his trial for violation of 18 USCS § 2251(a). United States v. McCloud, 590 F.3d 560, 2009 U.S. App. LEXIS 28497 (8th Cir. 2009), cert. denied, 562 U.S. 828, 131 S. Ct. 72, 178 L. Ed. 2d 24, 2010 U.S. LEXIS 6192 (2010).
>
> Defendant was not entitled to present mistake-of-age defense to charge under 18 USCS § 2251(a) of producing child pornography; based on distinction between those who merely distribute child pornography and those who produce it, First Amendment did not require defense. United States v. Heath, 624 F.3d 884, 2010 U.S. App. LEXIS 23600 (8th Cir. 2010), cert. denied, 563 U.S. 961, 131 S. Ct. 2164, 179 L. Ed. 2d 937, 2011 U.S. LEXIS 3352 (2011).
>
> District court appropriately refused to instruct jury that Government was required to prove that defendant had knowledge of age of victims for production of child pornography count because there was no scienter requirement as to victim's age and mistake of age was not defense to charge of producing child pornography. United States v. Nosley, 62 F.4th 1120, 2023 U.S. App. LEXIS 6337 (8th Cir. 2023).

The Committee Reports and legislative debate speak more opaquely as to the desire of Congress for a scienter requirement with respect to the age of minority. An early form of the proposed legislation, S 2011, was rejected principally because it failed to distinguish between obscene and <*pg. 383> nonobscene materials. S Rep No. 95-438, p 12 (1977). In evaluating the proposal, the Justice Department offered its thoughts:

"[T]he word 'knowingly' in the second line of section 2251 is unnecessary and should be stricken. . . . Unless 'knowingly' is deleted here, the bill might be subject to an interpretation requiring the Government to prove

[513 US 75]

the defendant's knowledge of everything that follows 'knowingly', including the age of the child. We assume that it is not the intention of the drafters to require the Government to prove that the defendant knew the child was under age sixteen but merely to prove that the child was, in fact, less than age sixteen. . . .

"On the other hand, the use of the word 'knowingly' in subsection 2252(a)(1) is appropriate to make it clear that the bill does not apply to common carriers or other innocent transporters who have no knowledge of the nature or character of the material they are transporting. To clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved." Id., at 28-29.

Respondents point to this language as an unambiguous revelation that Congress omitted a scienter requirement. But the bill eventually reported by the Senate Judiciary Committee adopted some, but not all, of the Department's suggestions; most notably, it restricted the prohibition in § 2251 to obscene materials. Id., at 2. The Committee did not make any clarification with respect to scienter as to the age of minority.

("As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant"); Smith v California, 361 US 147, 4 L Ed 2d 205, 80 S Ct 215 (1959); Hamling v United States, 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887 (1974); and Osborne v Ohio, 495 US 103, 115, 109 L Ed 2d 98, 110 S Ct 1691 (1990), suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress. Edward J. DeBartolo Corp. v Florida Gulf Coast Building & Constr. Trades Council, 485 US 568, 575, 99 L Ed 2d 645, 108 S Ct 1392 (1988).

Subsequently, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994), the Supreme Court interpreted 18 U.S.C. § 2252, which prohibits "knowingly" transporting, shipping, receiving, distributing, or reproducing a visual depiction which "involves the use of a minor engaging in sexually explicit conduct[,]" to include a scienter requirement for age of minority. *Id.* at 68. In doing so, the Court distinguished § 2252 from § 2251(a), observing that when Congress amended these statutes in 1977,

> the new bill retained the adverb "knowingly" in § 2252 while simultaneously deleting the word "knowingly" from § 2251(a). The Conference Committee explained the deletion in § 2251(a) as reflecting an "intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child." [S. Conf. Rep. No. 95-601, p. 5 (1977)].*Id.* at 77 (footnote omitted). As the Court further explained,
>
> [t]he difference in congressional intent with respect to § 2251 versus § 2252 reflects the reality that producers are more conveniently able to ascertain the age of performers. It thus makes sense to impose the risk **{2010 U.S. App. LEXIS 10}**of error on producers. *Although producers may be convicted under § 2251(a) without proof they had knowledge of age*, Congress has independently required both primary and secondary producers to record the ages of performers with independent penalties for failure to comply. 18 U.S.C. §§ 2257(a) and (i) (1988 ed. and Supp. V) . . . .**{608 F.3d 960}** *Id.* at 77 n.5 (internal citation omitted, emphasis added).

The Court found § 2252 to be "akin to the common-law offenses against the state, the person, property, or public morals, that presume a scienter requirement in the absence of express contrary intent." *Id.* at 71-72 (citation and internal quotation marks omitted, footnote omitted). By contrast,

> the common-law presumption of *mens rea* . . . expressly excepted sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached the age of consent. But as in the criminalization of pornography production at 18 U.S.C. § 2251(a), the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age. The opportunity for reasonable mistake as to age increases significantly once the victim is **{2010 U.S. App. LEXIS 11}**reduced to a visual depiction, unavailable for questioning by the distributor or receiver. Thus, we do not think the common-law treatment of sex offenses militates against our construction of the present statute.*Id.* at 72 n.2 (internal citations and quotation marks omitted).

REASONS FOR GRANTING THE PETITION

The decision of the Eighth Circuit Appellate Court is in conflict with that of the Ninth Circuit Appellate Court. Specifically the Scienter Requirement of mens rea which has been addressed by the Supreme Court most recently in REHAIF, and in RUAN/KHAN.

It has been repeatedly held that 2251 neither contains a Scienter Requirement not permits an affirmative mistake-of-age defense. This is in direct conflict with the Supreme Court's Rulings in: SMITH v CALIFORNIA (1959); HAMLING v UNITED STATES (1974); and OSBORNE v OHIO (1990).

This decision effects thousands of people across our nation and currently in prison.
With the advent of cell phones, and there ability to "photograph" or "videotape", our technology has outstripped our criminal laws. The Supreme Court is the only venue, and the appropriate venue, to re-affirm the Constitutional Rights guaranteed in both the Fifth and First Amendments to the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Norman Thurber

Date: Sept 23, 2024