APPENDIX

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. PATRICK JONES, Defendant - Appellant.	No. 23-3045 D.C. No. 3:09-cr-01250-W-2 Southern District of California, San Diego ORDER

Before: RAWLINSON, CHRISTEN, and JOHNSTONE, Circuit Judges.

The panel voted to deny the Petition for Rehearing.

Judges Rawlinson, Christen and Johnstone voted to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

The Petition for Rehearing and Rehearing En Banc, filed December 6, 2024, is DENIED.

NOT FOR PUBLICATION

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. PATRICK JONES, Defendant - Appellant.	No. 23-3045 D.C. No. 3:09-cr-01250-W-2 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Submitted November 19, 2024**
Pasadena, California

Before: RAWLINSON, CHRISTEN, and JOHNSTONE, Circuit Judges.

Patrick Jones (Jones), who was convicted of sexual exploitation of a child in violation of 18 U.S.C. § 2251(a), (e), appeals the district court's denial of his petition for a writ of error *coram nobis*. "We have jurisdiction under 28 U.S.C. §

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1291," and, reviewing *de novo*, we affirm the district court's denial of Jones' petition. *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020) (citation omitted).

"Coram nobis is an extraordinary remedy available only under circumstances compelling such action to achieve justice." *Id.* (citation and internal quotation marks omitted). "To qualify for this extraordinary remedy, the petitioner must establish four requirements: (1) the unavailability of a more usual remedy; (2) valid reasons for the delay in challenging the conviction; (3) adverse consequences from the conviction sufficient to satisfy Article III's case-and-controversy requirement; and (4) an error of the most fundamental character." *Id.* (citation, alteration, and internal quotation marks omitted).

Jones asserts that he is entitled to *coram nobis* relief because *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988) (*Kantor II*),[1] addressing the *mens rea* requirements for a conviction under 18 U.S.C. § 2251(a), is clearly irreconcilable with the Supreme Court's recent decision in *Counterman v. Colorado*, 600 U.S. 66 (2023). "Generally, a panel opinion is binding on subsequent panels unless and until overruled by an en banc decision of this circuit." *United States v. Eckford*, 77 F.4th 1228, 1233 (9th Cir. 2023) (citation

[1] We previously relied on *Kantor II* in affirming Jones' conviction under 18 U.S.C. § 2251(a). *See United States v. Jones*, 459 F. App'x 616, 617 (9th Cir. 2011), *cert. denied*, 566 U.S. 950 (2012).

omitted). However, "en banc review is not required to overturn a case where intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority." *Id.* (citation and internal quotation marks omitted). "The clearly irreconcilable requirement is a high standard that demands more than mere tension between the intervening higher authority and prior circuit precedent." *Id.* (citation, alteration, and internal quotation marks omitted). "If we can apply our precedent consistently with that of the higher authority, we must do so." *Id.* (citation and alteration omitted).

Jones is not entitled to *coram nobis* relief because *Kantor II* is not clearly irreconcilable with *Counterman*. In *Kantor II*, we held that that there was "little doubt that knowledge of the minor's age is not necessary for conviction under [18 U.S.C. §] 2251(a)," although a defendant could pursue "a reasonable mistake of age defense." 858 F.2d at 538, 542 (citation omitted). In *Counterman*, the defendant was charged with making threats in violation of a state statute. *See* 600 U.S. at 70-71. The Supreme Court considered "whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements." *Id.* at 69. The Supreme Court held that "the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character," and that "a recklessness standard" was a sufficient *mens rea* for threat offenses. *Id.* at 73. The Supreme Court did not hold

that the *mens rea* requirement for true-threat convictions must be applied to other criminal offenses, such as sexual exploitation of a child. *See id.* at 76-77, 82 n.6.

"Typically we apply a presumption in favor of a scienter requirement to each of the statutory elements that criminalize otherwise innocent conduct, even where the statute by its terms does not contain a scienter requirement." *United States v. Jayavarman*, 871 F.3d 1050, 1058 (9th Cir. 2017) (citation, alteration, and internal quotation marks omitted). "That presumption has not historically applied, however, to the element of a victim's age in a sex crime when the defendant personally confronts the victim. . . ." *Id.* (citations omitted). The Supreme Court has applied this principle in distinguishing the *mens rea* requirement for convictions under 18 U.S.C. § 2251(a). *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) (citing to *Kantor II* and observing that "producers [of explicit materials] may be convicted under [18 U.S.C.] § 2251(a) without proof they had knowledge of age").

In light of the Supreme Court's acknowledgment that 18 U.S.C. § 2251(a) lacks a *mens* rea requirement with respect to the victim's age, *Counterman's* holding concerning the *mens rea* requirement for true-threat offenses is not clearly irreconcilable with our precedent. *See Eckford*, 77 F.4th at 1233. The district court, therefore, committed no error when denying Jones' petition for writ of error *coram nobis* because Jones failed to demonstrate any error, let alone "an error of

the most fundamental character." *Kroytor*, 977 F.3d at 961 (citation and alteration omitted).[2]

AFFIRMED.

[2] Because Jones does not demonstrate "an error of the most fundamental character," *Kroytor*, 977 F.3d at 961 (citation and alteration omitted), we do not address the government's contentions that Jones could have filed a motion under 28 U.S.C. § 2255 in lieu of a petition for writ of error *coram nobis*, or that any instructional error during Jones' trial was harmless.