No._____

IN THE SUPREME COURT OF THE UNITED STATES

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CLINT R. SCHRAM

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

* * * * *

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Schram created and administered four websites which facilitated the distribution of child pornography. The government charged him with engaging in a child exploitation enterprise, and advertisement of child pornography. Those offenses include the element that an actual minor or minors be involved in the offense. But the government presented no evidence that the images represented actual minors. In addition, over objection, the government presented numerous child pornography images, both found on links from the websites and on Mr. Schram's separate computer which was not connected to the websites.

Mr. Schram was convicted and sentenced to life imprisonment. The Eighth Circuit affirmed. The case thus presents the following questions:

I. Given the increasing ease of creating of artificial images, is the government required to present evidence that the images it contends are of minors represent actual persons?

II. Where evidence was presented that Mr. Schram admitted administering websites for the presentation of child pornography, was he unduly prejudiced when the government presented evidence of multiple highly offensive pornographic images, including uncharged misconduct evidence not linked to the websites?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Clint R. Schram, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals, rendered in these proceedings on February 12, 2025.

OPINION BELOW

The Eighth Circuit Court of Appeals Mr. Schram's convictions and sentences on February 12, 2025. The opinion is published at 128 F.4th 922, and is reprinted in the appendix to this petition at page 1a. The order of the Eighth Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at page 12a.

JURISDICTION

The United States Court of Appeals, Eighth Circuit, entered judgment on February 12, 2025. That court denied a timely petition for rehearing or, in the alternative, for rehearing en banc, on March 20, 2025.

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

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 2251(d)

(d) (1)Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct; shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be 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 mailed; or

(B)such notice or advertisement is 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 mailed.

shall be punished as provided under subsection (e).

18 U.S.C. § 2252A(g)

(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.

Federal Rule of Evidence 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair

prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rule of Evidence 414

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved-

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

STATEMENT OF THE CASE

The government presented evidence at trial that Mr. Schram operated four websites over the Tor "dark web" network for at least eight months. The websites operated as chat rooms. The websites did not themselves contain child pornography. Users were required to register their nicknames through the site, but were not charged fees. The registration page indicated that registered users could share child pornography videos and images to other sites, and could post links on Mr. Schram's websites to those uploads and to other child pornography content. The website text encouraged the users to participate and share content.

Mr. Schram was arrested on July 22, 2020, when a search warrant was executed at his home. The computers running the websites, as well as external

drives, were seized. Interviewed by law enforcement, he admitted that he was the administrator for all of the websites, and that they were hosted in his residence. In addition to files related to the websites, Mr. Schram told the investigators he had child pornography on his devices. Portions of Mr. Schram's interview with law enforcement containing these admissions were presented to the jury.

Over objection under Fed. R. Ev. 403, and 414, both content that was available from links on the websites and content found only on Mr. Schram's devices was presented to the jury. At least 16 pornographic images were presented, 9 of which were found on Mr. Schram's computer but were not connected to the websites.[1] Via a pretrial order, the district court limited the number of images to be presented, directed that each pornographic image be displayed for no more than 3 seconds to the jury, and recognized that defense counsel would have a continuing objection to the images.

At sentencing, in support of its request for restitution, the government presented documentary evidence that some of the images represented actual children. But that evidence was never presented to the jury.

After Mr. Schram's conviction and life sentence, he appealed. On appeal, he argued that the government had not met its burden of proof with respect to the

[1] The images themselves are not included in the Appendix, because they are not available to the petitioner and cannot be electronically transmitted or mailed, although they are part of the district court record and were therefore available to the court of appeals. Mr. Schram invites this Court, should it deem it necessary, to direct the district court to provide the admitted images to this Court.

charges of advertising child pornography (18 U.S.C. § 2251(d)) and conducting a child exploitation enterprise (18 U.S.C. § 2252A(g)) because the government did not offer proof that any of the images shown to the jury represented actual children, and therefore that he was denied due process of law. He pointed out that it is not difficult to create fake images that appear real. The government responded that it could have presented evidence that the images were of the required number of real persons, but that it decided not to, instead relying on case law that such direct evidence was not required.

Mr. Schram also challenged the admission of multiple images of child pornography, both from links found on the websites and from his personal computer. He argued that the admission violated Fed. R. Evid. 403. (Mr. Schram was not charged with possession or distribution of child pornography, so the evidence from his personal computer was offered as propensity evidence only.)

The court of appeals affirmed the convictions and sentences, and denied rehearing.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD MAKE CLEAR THAT IN ORDER TO PROVE ADVERTISEMENT OF CHILD PORNOGRAPHY, THE GOVERNMENT MAY NOT RELY SOLELY ON THE JURY'S OBSERVATION OF IMAGES TO PROVE THAT THE REQUIRED NUMBER OF IMAGES ARE OF ACTUAL CHILDREN.

To convict Mr. Schram on Count 1 of the indictment alleging that he engaged in a child exploitation enterprise, the government was required to prove that the underlying advertisement[2] of child pornography offenses "involved more than one minor victim." 18 U.S.C. § 2252A(g). To convict Mr. Schram under Counts 3, 5, 7 and 9, alleging advertisement of child pornography, the government was required to prove that the child pornography "advertised" involved "a person under the age of 18 years. . . ." 18 U.S.C. § 2251(d).

The government certainly presented *images* that appeared to depict persons under 18 performing sexual acts. But it presented no evidence that any of the images depicted actual persons. Instead, the jury was asked to find, based on the images alone, that they depicted actual minors. And it was required to do so after viewing the images for no more than 3 seconds each.

The government included, on its witness list, two witnesses who could have testified that the images represented more than one actual child. According to the government's brief, the government did not call these witnesses because "There are

[2] The term "advertisement" in the statutes means giving "notice" of availability of child pornography content. There is no requirement of an advertisement in the usual sense of a paid promotion.

substantial demands on these witnesses' time in prosecutions across the country." Govt. Brief, p. 17. The government did present, at sentencing, documentary evidence that some of the images represented identified victims who were entitled to restitution.

Despite the government's protestations, however, in most reported cases involving these statutes, evidence that the images involved actual children is presented. For example, in *United States v. Daniels*, 653 F.3d 399, 408 (6th Cir. 2011), the government presented testimony from the minor victim that the defendant participated in the production of images. In *United States v. El-Battouty*, 38 F.4th 327, 329 (3rd Cir. 2022), the government presented evidence that the defendant produced pornographic images using live victims. In *United States v. Fuller*, 2019 WL 1822801 (6th Cir. 2019), the government presented evidence that the defendant admitted that he convinced at least ten minor girls to perform lascivious acts, and that he recorded this conduct. In *United States v. Sammons*, 55 F.4th 1062 (6th Cir. 2022), the government presented evidence that Mr. Sammons confessed to sending pictures of a child victim. In *United States v. Wilder*, 526 F.3d 1 (1st Cir. 2008), the government presented the testimony of a medical expert that based on her examination of the images, she believed they were of real children. Thus, such evidence is not only common, its presentation does not appear unduly burdensome.

The government, and the Eighth Circuit, relied on statements in these cases which are basically dictum. The courts in the cases cited above concluded that the

evidence was sufficient to show actual victims, and gratuitously added that no such evidence was necessary because juries can make this decision themselves. The Eight Circuit concluded that at this point, there is no need to revisit that conclusion.

But that conclusion is no longer tenable, especially in this case where the jurors were not able to study the images for more than three seconds each. In his brief, Mr. Schram presented internet articles making clear that in 2020, when the events at issue here occurred, it was possible to create fake photographs and post them on the internet. In its opinion, the Eighth Circuit cited an article which makes clear the scope of the problem. In David Thiel, Melissa Stroebel, Rebecca Portnoff, *Generative ML and CSAM: Implications and Mitigations*, Stanford Internet Observatory (2023) at 2, the authors found that as of 2023, relatively few computer generated child pornography images existed. The Eighth Circuit relied on this statement to hold that its current standard should not be disturbed.

However, the article makes clear that fake images are increasingly hard to distinguish from real images. The article suggests that such images can be distinguished by observing "lack of skin imperfections or texture, inaccurate hands or joint poses, shadows that do not reflect real-world lighting conditions, difficulty depicting wet surfaces. . . , [and] asymmetry of ears or eyes. . . . *Id* at 4. None of these "tells" would have been easily identified from an image that is seen for only three seconds on a screen.

The authors also point out that advances in computer generated imagery are occurring rapidly. The article was written in 2023, and states,

> In just the first few months of 2023, a number of advancements have greatly increased end-user control over image results and their resultant realism, to the point that some images are only distinguishable from reality if the viewer is very familiar with photography, lighting, and the characteristics of diffusion model outputs.

Id. at 3. This "familiarity" is not required for jury service, and even if the jurors had it, they could not have taken advantage of it in three seconds.

While the images at issue in Mr. Schram's case were created before 2023, the Eighth Circuit's cavalier conclusion that the time is not yet ripe to re-examine the prior statements about the need for evidence is clearly not warranted by current advancements in production of internet content.

The court and the government also adverted to the fact that Mr. Schram did not point out this particular failure in the government's burden of proof in district court. Of course, it is the government's job to prove the elements of the charged offense. In order to obtain a criminal conviction, U.S. Const. Amend. V requires the government to prove each element of the charged offense beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358 (1970). The defense is not required to coach the government about how to do so. Here, in final argument, the government essentially vouched for the genuineness of the images, saying "We've shown you many, many child victims." But in fact, the government had not done that.

The evidence in this case, and the circumstances under which it was presented to the jury, present for this Court a needed opportunity to ensure that the mandate of the Fifth Amendment is followed even in cases involving conduct that many find repulsive. Mr. Schram is serving a life sentence when the government failed to prove all of the elements of his offense. This Court should grant certiorari.

II. THIS COURT SHOULD MAKE CLEAR THAT THE UNNECESSARY INTRODUCTION OF MULTIPLE PORNOGRAPHIC IMAGES VIOLATES THE RULES OF EVIDENCE.

To support its case, the government presented to the jury at least 16 pornographic images. At least seven of the images were taken from links posted on the websites maintained by Mr. Schram. The remaining 9 images were found on Mr. Schram's computer, but were not associated with the websites.

The trial court recognized the impact of these images: "Before we publish any of these pictures, I don't want to ask you to look at these things, but I have to. . . . I know it's tough to ask humans to look at this." Tr. Vol. 1, pp. 86-87.

The government also presented evidence of Mr. Schram's confession. He admitted that he administered the websites, and showed the agents the computers on which they were hosted. He also showed them the computers where his personal collection of pornographic images was stored, and frankly admitted his interest in child pornography. There was thus no contention that Mr. Schram lacked intent to promote child pornography.

The government justified the introduction of the website-related images as part of its responsibility to show that the websites facilitated access to child pornography. It presented the personal computer images as uncharged misconduct under Fed. R. Evid. 414 as showing Mr. Schram's propensity to commit the charged offenses of advertisement and child exploitation. (Mr. Schram was not charged with possession or distribution of child pornography.)

The court of appeals affirmed the admissibility of all of the images. As to the website-related images, the court found that although the government could have presented fewer images, Fed. R. Evid. 403 did not require it to do so, and the number of images was not excessive. As to the propensity images, the court found that they showed Mr. Schram's intent, and that any error was not prejudicial.

The Eighth Circuit's decision here conflicts with the Seventh Circuit decision in *United States v. Loughry*, 660 F.3d 965, 973 (7th Cir. 2011). There, the court held that admission of uncharged misconduct evidence was reversible. The case is quite similar to Mr. Schram's. Like Mr. Schram, Mr. Loughry was not charged with possession of child pornography. Also like Mr. Loughry's case, the government here did not contend that Mr. Schram posted the uncharged videos on the websites. Another similarity to Loughry is that the government introduced these videos near the end of its case, when their impact on the jury would be greatest. Unlike Mr. Loughry, Mr. Schram was not charged with distribution either. This further weakens the probative value of the evidence to the government.

On the issue of prejudice, the *Loughry* court emphasized the facts that, as in Mr. Schram's case, no limiting instruction was given when the evidence was introduced, that the improper evidence was highly disturbing, and that the evidence against Mr. Loughry was not overwhelming. Here, of course, the evidence against Mr. Schram does not include evidence of an element of the offense as to which the jury was instructed. It is clearly not overwhelming either. And, as in Mr. Loughry's case, the improper images were clearly disturbing. The Eighth Circuit itself has held, in *United States v. Sumner*, 119 F.3d 658 (8th Cir. 1997), that admission of evidence of prior, uncharged assaults was improperly admitted because the defendant did not dispute intent but denied that the charged conduct occurred. The court held, "Sumner was prejudiced because of the inflammatory nature of the evidence and the overall weakness of the government's case." *Id.* at 661.

This Court should grant certiorari to resolve the conflict and clarify that the relevance of child pornography evidence should be carefully analyzed under Fed. R. Evid. 403, and that even though propensity evidence is allowed under Fed. R. 414, it should be used sparingly, and only when it is truly relevant to a contested issue..

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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