

No. 26-_____

SUPREME COURT OF THE UNITED STATES

Emory Allen Day,

Petitioner,

vs.

United States of America,

Respondent

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

CORRECTED PETITION FOR A WRIT OF CERTIORARI

James W. Amberg (P68564)
Attorney for the Petitioner
Amberg & Amberg, PLLC
32121 Woodward Ave., Suite PH
Royal Oak, MI 48073
(248) 681-6255

Question Presented

1. In *Old Chief v United States*, 519 US 172 (1997), this Court held that a district court abuses its discretion under Federal Rule of Evidence 403 by admitting the full record of a prior conviction when a defendant offers to stipulate to his status. The circuits have divided over whether, and to what extent, that principle requires the exclusion of child-pornography images themselves when a defendant offers to stipulate to their child-pornographic nature. The question presented is:

Whether a criminal defendant's offer to stipulate to the child-pornographic nature of charged images requires the exclusion of the images themselves under Rule 403 and *Old Chief*.

2. In *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), this Court held that the First Amendment requires the Government to prove that a proscribed image depicts a real, rather than a virtual, child. The question presented is:

Whether, in light of the proliferation of computer-generated and artificial-intelligence imagery, the Government must affirmatively prove—and a sentencing court must expressly find—that an image relied upon to impose the four-level enhancement under USSG §2G2.2(b)(4)(A) depicts a real, prepubescent minor.

Related Proceedings

United States District Court (EDMI)

United States v Emory Allen Day, No 1:21-cr-20402

United States Court of Appeals (6th Cir)

United States v Emory Allen Day, No 25-1050

Parties to the Proceeding

Per Rule 14.1(b), the parties to the proceeding are:

The United States of America, represented by the US Attorneys' Office for the Eastern District of Michigan.

Emory Day, represented by CJA counsel James Amberg.

Table of Contents

Question Presented.....	ii
Related Cases	iii
Parties to the Proceeding.....	iv
Table of Authorities	vi
Petition for Writ of Certiorari	1
Opinions Below.....	1
Jurisdiction	1
Statutory Provisions Involved.....	1
Statement of the Case.....	2
Reasons for Granting the Writ.....	5
Conclusion and Prayer for Relief.....	8

INDEX OF APPENDICES:

APPENDIX A	United States Court of Appeals Order Affirming the District Court 1a
------------	--

Table of Authorities

United States Supreme Court Cases	Page Number
<i>Ashcroft v Free Speech Coalition</i> , 535 US 234 (2002)	7
<i>Old Chief v United States</i> , 519 US 172 (1997).....	2,5
United States Court of Appeals Cases	
<i>United States v Kimler</i> , 335 F3d 1132 (10th Cir 2003).....	7
<i>United States v Luck</i> , 852 F3d 615 (6th Cir 2017)	4,6
<i>United States v Merino-Balderrama</i> , 146 F3d 758 (9th Cir 1998)	6
<i>United States v Vowels</i> , 159 F.4 th 1095 (6th Cir 2025)	8
Statutes, Guidelines, and Rules	
18 USC §2252A	3
USSG §2G2.2(b)(4)(A).....	4,5,8
Fed R Evid 403	2,5,6

I. Petition for Writ of Certiorari

Emory Allen Day petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

II. Opinions Below

The Sixth Circuit's unpublished opinion affirming the district court's judgment is attached as Appendix A.

III. Jurisdiction

The Sixth Circuit entered judgment on March 5, 2026. *See* Appendix A. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 USC §1254(1).

VI. Statutory Provision Involved

Federal Rule of Evidence 403 provides: "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."

USSG §2G2.2(b)(4) of the United States Sentencing Guidelines provides, in pertinent part: "[i]f the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler, increase by 4 levels."

V. Statement of the Case

A. Introduction

This petition arises from the Sixth Circuit's decision affirming the Mr. Day's conviction and sentence on one count of distributing and one count of possessing child pornography. Two questions warrant this Court's review. First, the courts of appeals are divided over whether a defendant's offer to stipulate to the child-pornographic nature of charged images requires the exclusion of the images themselves under Rule 403 and this Court's decision in *Old Chief*. Mr. Day offered to stipulate that the images were child pornography, and proposed admitting them with the most graphic portions redacted; the district court nevertheless permitted the jury to view the unredacted images, and the Sixth Circuit held that a child-pornography defendant has no right to insist otherwise. Second, the case implicates an important and recurring question, unresolved since *Free Speech Coalition*, concerning how the Government must prove that a charged image depicts a real child rather than a computer-generated or artificially generated one—a question of growing urgency in the age of generative artificial intelligence.

B. Factual Background

In June 2021, somebody named “Vivy91” sent alleged child pornography to another individual through the dating application MeetMe and solicited that individual to engage in sexual activity with a child. The recipient reported the

conduct to law enforcement. Investigators traced the internet-protocol address used by the Vivy91 account to a wireless router belonging to the next-door neighbors of Mr. Day, who had previously shared their wireless password with him. The profile images associated with the Vivy91 account depicted Mr. Day's former girlfriend. Officers obtained and executed a search warrant at Mr. Day's home on June 2, 2021. They recovered an LG cellular telephone, which Mr. Day admitted was his, and a Samsung Galaxy telephone, which was found with a cracked screen in his detached garage. The Samsung telephone contained the MeetMe and Skout applications, the charged images, and other material associated with the Vivy91 account. The Government charged Mr. Day with distributing child pornography, in violation of 18 USC §§2252A(a)(2) and (b)(1), and with possessing child pornography, in violation of 18 USC §§2252A(a)(5) and (b)(2).

C. Procedural History

Mr. Day proceeded to trial. His defense was that the Samsung telephone was not his and that his former girlfriend, who had access to his passwords and a motive to incriminate him, was responsible for the Vivy91 account. The jury convicted Mr. Day on both counts.

Before and during trial, Mr. Day sought to keep the unredacted child-pornography images from the jury. He offered to stipulate that the images constituted child pornography and proposed that they be admitted with their most

graphic portions redacted, arguing that displaying the unredacted images to the jury carried great prejudice and little additional probative value once their nature was conceded. The district court declined and permitted the jury to view the unredacted images. In his post-trial motion under Federal Rules of Criminal Procedure 29 and 33, Mr. Day renewed this objection; the district court denied the motion.

At sentencing, the district court applied a four-level enhancement under USSG §2G2.2(b)(4)(A) for material portraying sadistic or masochistic conduct, based on an image the Government described as depicting an adult male vaginally penetrating a prepubescent child. Mr. Day objected that the Government had not proved—and the court had not found—that the image depicted an actual, prepubescent minor, and observed that, given the ease of creating artificial images, the depiction might not portray a real human being at all. The district court overruled the objection and sentenced Mr. Day to 132 months' imprisonment, followed by five years of supervised release.

D. The Circuit Court Decision

The Sixth Circuit affirmed. As relevant here, the Court held that the District Court did not abuse its discretion in declining to permit Mr. Day to stipulate to the nature of the images so as to keep them from the jury, citing *United States v Luck*, 852 F3d 615 (6th Cir 2017). The court further held that the District Court did not

clearly err in applying the §2G2.2(b)(4)(A) enhancement, relying on an agent's testimony that the image depicted "a prepubescent minor." The Circuit also treated Mr. Day's contention that the image could be artificially generated as waived because he had conceded below that the images were child pornography, and stated that the contention would fail on the merits in any event.

VI. Reasons for Granting the Writ

A. The Courts of Appeals Are Divided Over Whether a Defendant's Offer To Stipulate to the Nature of Child-Pornography Evidence Requires Its Exclusion Under Rule 403 and *Old Chief*.

This Court has held that the prosecution's ordinary right to prove its case with evidence of its own choosing "has virtually no application when the point at issue is a defendant's legal status." *Old Chief v United States*, 519 US 172 (1997). In that circumstance, this Court held, a district court abuses its discretion under Rule 403 by admitting the full record of a prior conviction when the defendant offers to stipulate to the status element, because the prejudicial effect of the evidence substantially outweighs its discounted probative value. *Id.* At the same time, the Court cautioned that its holding was addressed to proof of status and did not disturb the general rule permitting the Government to present a coherent narrative of the charged conduct.

The courts of appeals have not agreed on how *Old Chief* applies when a defendant offers to stipulate to the child-pornographic nature of the very images

underlying a child-pornography charge. The Ninth Circuit has held that, “a defendant’s offer to stipulate to an element of a crime is relevant evidence that must be factored into a district court’s analysis under Rule 403.” *United States v Merino-Balderrama*, 146 F3d 758 (9th Cir 1998). Importantly, in *Merino*, the court found that where that defendant offered to stipulate to the contents of child pornographic films, and the Government could not show that the defendant viewed the films, the probative value of displaying the material itself is substantially outweighed by the danger of unfair prejudice under Rule 403.

The Sixth Circuit, by contrast, has held that a child-pornography defendant has no right to stipulate his way around the Government’s presentation of the images, *United States v Luck*, 852 F3d 615 (6th Cir 2017), and applied that rule to reject Mr. Day’s objection here. In Mr. Day’s case, even though he attempted to frame the issue as a 403 challenge, the District Court denied this argument solely on the *Luck* decision. The result of this is that the admissibility of the most inflammatory evidence in a criminal case—evidence whose display to the jury carries an unusually high risk of unfair prejudice—turns on the circuit in which the defendant is tried. Because the question recurs in virtually every contested child-pornography prosecution, and because it concerns the reach of this Court’s decision in *Old Chief*, it warrants this Court’s review.

Mr. Day's case is a suitable vehicle. He preserved the issue before trial, at trial, and in his post-trial motion; he offered not just to stipulate but to admit the images in redacted form; and the Sixth Circuit squarely resolved the question against him. The conflict is outcome-determinative: under the Ninth Circuit's approach, the unredacted images may well have been excluded.

B. The Circuit's Decision Implicates an Important and Recurring Question, Unresolved Since *Free Speech Coalition*, Concerning How the Government Must Prove That a Charged Image Depicts a Real Child.

In *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), the Court held that the First Amendment does not permit the Government to proscribe “virtual” child pornography that “records no crime and creates no victims by its production.” *Id* at 250. The line drawn by *Free Speech Coalition*—between images of real children and images that merely appear to depict them—requires that the Government prove the depiction of an actual child.

The courts of appeals have generally held that the Government may satisfy that burden through the images themselves, without expert testimony, on the theory that a jury can distinguish real from virtual depictions. See, e.g., *United States v Kimler*, 335 F3d 1132, 1142 (10th Cir 2003). Whatever the soundness of that approach when it was adopted, it rested on a factual premise—that ordinary observation can reliably separate real from fabricated images—that the advent of

photorealistic, artificial-intelligence-generated imagery has called into serious question. The premise underlying the prevailing rule is eroding precisely as artificial images become indistinguishable from real ones, and this Court's guidance is needed on what proof the Constitution requires. For example, counsel recently watched the 2023 movie *Indiana Jones and the Dial of Destiny*, which starred an 80-year-old Harrison Ford, but also depicted a much younger and indistinguishable 45-year-old version of Mr. Ford, created by artificial intelligence.

Mr. Day's sentencing illustrates the problem. The four-level enhancement under §2G2.2(b)(4)(A) turned on a finding that the image depicted the penetration of a real, prepubescent child. See *United States v Vowels*, 159 F.4th 1095, 1100 (6th Cir 2025) Mr. Day disputed both that the image depicted a prepubescent minor and that it depicted a real human being at all, yet the district court applied the enhancement without expressly resolving either dispute. As artificially generated images become ubiquitous, the question whether the Government must affirmatively prove—and a court must find—that a charged image depicts a real child is one of national importance that this Court should resolve.

VII. Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ James Amberg

AMBERG & AMBERG, PLLC

James W. Amberg P68564

CJA Attorney for the Petitioner

32121 Woodward Ave. St PH

Royal Oak, MI 48073

248.681.6255 office

248.681.0115 fax

Dated July 1, 2026

No. 26-_____

SUPREME COURT OF THE UNITED STATES

Emory Allen Day,

Petitioner,

vs.

United States of America,

Respondent

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

APPENDIX

James W. Amberg (P68564)
CJA Attorney for the Petitioner
Amberg & Amberg, PLLC
32121 Woodward Ave., Suite PH
Royal Oak, MI 48073
(248) 681-6255

APPENDIX 1 United States Sixth Circuit Court of Appeals Opinion and Order
in *United States v Emory Day*, 25-1050

No. 26-_____

SUPREME COURT OF THE UNITED STATES

Emory Allen Day,

Petitioner,

vs.

United States of America,

Respondent

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

WORD COUNT

The Petitioner's Writ of Certiorari contains 1,799 words and is formatted in Times New Roman with 14pt font.

James W. Amberg (P68564)
CJA Attorney for the Petitioner
Amberg & Amberg, PLLC
32121 Woodward Ave., Suite PH
Royal Oak, MI 48073
(248) 681-6255

No. 26-_____

SUPREME COURT OF THE UNITED STATES

Emory Allen Day,

Petitioner,

vs.

United States of America,

Respondent

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

CERTIFICATE OF SERVICE

I, James Amberg, CJA attorney for the Petitioner, certify that on July 1, 2026, I served a copy of the Writ of Certiorari and its accompanying documents via US mail to the Government and the Court via US mail and efile.

James W. Amberg (P68564)
CJA Attorney for the Petitioner
Amberg & Amberg, PLLC
32121 Woodward Ave., Suite PH
Royal Oak, MI 48073
(248) 681-6255