



UNITED STATES v. MICHAEL WILLIAMS
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EDITOR'S NOTE:

Periodically we are asked to review a local ordinance or statute in the context of a threatened or actual lawsuit in which there is a challenge that the statute or ordinance is invalid because it purportedly prohibits a substantial amount of protected speech. For that reason we review this new Decision authored by Justice Scalia.

FACTUAL BACKGROUND:

Section 2252A(a)(3)(B) of Title 18, United States Code, criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography. This case presents the question whether that statute is overbroad under the First Amendment or impermissibly vague under the due process clause of the Fifth Amendment.

DISCUSSION:

“We have long held that obscene speech - - sexually explicit material that violates fundamental notions of decency - - is not protected by the First Amendment. But to protect explicit material that has social value, we have limited the scope of the obscenity exception, and have overturned convictions for the distribution of sexually graphic but non-obscene material.

Over the past 25 years, the Court has confronted a related and overlapping category of proscribable speech: child pornography. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234

(2002). This category consists of sexually explicit visual portrayals that feature children. A statute that proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment. Moreover, the Court has previously held that the government may criminalize possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.

The broad authority to proscribe child pornography is not, however unlimited. Two examples are presented. *Free Speech Coalition* contained only youthful-looking adult actors or virtual images of children generated by a computer. This was invalid or overbroad because the child-protection rationale for speech restriction does not apply to materials produced without children. The second provision at issue in *Free Speech Coalition* criminalized the possession and distribution of material that had been pandered as child pornography, regardless of whether it actually was that. As a consequence, a person could face prosecution for possessing unobjectionable material that someone else had pandered. This was also facially overbroad.

Congress went back to the drawing board and produced this new legislation to add a new pandering and solicitation provision, relevant portions of which were quoted in the Decision. The Act's express findings indicate that Congress was concerned that limiting the child pornography prohibition to material that could be proved to feature actual children, presented a problem because the emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children. The present statute does not require the actual existence of child pornography. Rather than targeting the underlying material, this statute bans the collateral speech that introduces such material into the child-pornography distribution network. Thus, an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of this statute.

The statute's definition of the material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller*: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct.

The Court holds that offers to provide child pornography are categorically excluded from First Amendment protection.

There is a second and alternative ground for facial invalidation presented by the Eleventh Circuit, i.e., that the statute is void for vagueness. This doctrine is an outgrowth not of the First Amendment, but of the due process clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or so standardless that it authorizes or encourages seriously discriminatory enforcement. The Court reasoned that the Eleventh Circuit's basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt. Here the statute requires that defendant hold and make a statement that reflects the belief

that the material is child pornography or that he communicate in a manner intended to cause another so to believe. Those are clear questions of fact. The Eleventh Circuit's conclusion that the new statute gives law enforcement officials "virtually unfettered discretion" has no merit.

Child pornography harms and debases the most defenseless of our citizens. Both the state and federal governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet. This Court held unconstitutional Congress' previous attempt to meet this new threat, and Congress responded with a carefully crafted attempt to eliminate the First Amendment problems previously identified. As far as the provision at issue in this case is concerned, the Supreme Court's opinion is that this effort was successful.