

A05-460

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

HELMUT HORST MAUER,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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PROCEDURAL HISTORY

On May 23, 2003, the appellant was arrested for possession of child pornography.

On August 28, 2003, a criminal complaint was issued, charging the appellant with four counts of possession of child pornography.

On August 10, 2004, trial was commenced before the District Court of Hennepin County, the Honorable Charles Porter presiding.

On September 3, 2004, the District Court issued Findings of Fact and Conclusions of Law, finding appellant guilty of three counts of possession of child pornography.

On December 8, 2004, judgment of conviction was entered by the District Court.

On March 8, 2005, the appellant filed his Notice of Appeal.

On July 8, 2005, the appellant filed a motion to stay his appeal and remand to the District Court for post-conviction relief proceedings.

On July 22, 2005, the Court of Appeals ordered that the appeal be stayed pending the completion of post-conviction relief proceedings in District Court.

On December 12, 2005, the District Court issued an order denying appellant's motion for post conviction relief.

On January 23, 2007, the Court of Appeals affirmed the judgment of the District Court.

On April 17, 2007, the Supreme Court granted the appellant's Petition for Review.

LEGAL ISSUE

Whether Minn. Stat.617.247, Subd. 4(a) violates the First Amendment to the United States Constitution by failing to require scienter as to the minority of the performers as an element of the offense?

The trial court held that the statute does not violate the First Amendment.

The Court of Appeals affirmed.

Apposite cases:

United States v. X-Citement Video, Inc.,
513 U.S. 64, 115 S. Ct. 464. 130 L. Ed. 2d 372 (1994).

United States v. X-Citement Video, Inc.,
982 F. 2d 1285 (9th Cir. 1992).

State v. Peterson,
535 N.W. 2d 689 (Minn. App. 1995).

State v. Grover,
437 N.W. 2d 60 (Minn. 1989).

Apposite Constitutional Provisions:

U.S. Const. Amend I.

STATEMENT OF THE CASE

In April of 2002 postal inspectors in Florida received information that an individual identified as Angel Mariscal was distributing child pornography from a location in Miami. An investigation revealed that Mariscal was traveling to Ecuador and Cuba and producing child pornography in those countries. The material was then brought into the United States and distributed to customers through a business known as "Cultural Research Team" or CRT. Mariscal was arrested in Florida and child pornography was seized from his hotel room and a storage facility. Among the items seized was a customer list. The agents assumed control of the business and sent out catalogues to the persons identified as past customers.

Appellant was one of the persons who received a catalogue in the mail. In response to the solicitation the appellant ordered four CD's. These CD's were described in the catalogue as featuring children between the ages of 9 to 14 engaged in acts of sexual conduct.

On May 23, 2003, postal agents delivered the package containing the four CD's to the appellant and the appellant signed for it. Shortly thereafter, the agents executed a search warrant at the appellant's place of business and recovered the four CD's under the appellant's desk. The package was opened but there was no evidence that the appellant had actually viewed any of the CD's.

The appellant was charged with four counts of possession of child pornography under Minn. Stat. 617.247, subd. 4(a), which prohibits the possession of a pornographic

work, or computer disk containing a pornographic work, knowing or with reason to know its contents and character.

The case was tried before the court without a jury. At trial the appellant stipulated that the CD's which were confiscated from him contained child pornography. Appellant contended, however, that when he received the CD's he did not know that the actors appearing on the CD's were actually minors; he testified that when he ordered the CD's he believed that they would feature actors who were actually over 18 years old, but who appeared to be younger. Appellant's defense was bolstered by the fact that he had not actually viewed the CD's at the time of their delivery.

The trial court found that three of the four CD's contained child pornography. (The court determined that the fourth CD was not child pornography, because it did not involve sexual acts). The court found that the appellant possessed three works of child pornography and that the appellant had reason to know that the actors in the video scenes would be actual children. Accordingly, the court found appellant guilty of three counts of possession of child pornography.

Following his conviction the appellant filed a Notice of Appeal to the Court of Appeals from the judgment of conviction. Subsequently the appellant filed a motion to stay his direct appeal and remand to the district court for post-conviction proceedings. The Court of Appeals granted appellant's motion and ordered that the appeal be stayed pending the completion of post-conviction proceedings in the district court.

Appellant then filed a post-conviction petition, challenging the constitutionality of Minn. Stat. 617.247, subd. 4(a) on the ground that the statute does not require knowledge

of the age of minority of the performers as an element of the crime. On December 12, 2005, the district court issued its order denying appellant's petition and upholding the constitutionality of Minn. Stat. 617.247, subd. 4(a). Appellant then renewed his appeal to the Court of Appeals.

The Court of Appeals affirmed the conviction, holding that a statute which proscribes the possession of child pornography when the possessor has "reason to know" that the pornographic works uses a minor to depict sexual conduct requires that the possessor be in some manner aware that the performers are minors, and therefore prescribes a level of scienter sufficient to satisfy the requirement of the First Amendment.

Appellant then filed a Petition for Review of the decision of the Court of Appeals. On April 17, 2007, this Court granted appellant's Petition for Review.

ARGUMENT

I. MINN. STAT. 617.247, SUBD. 4(a) VIOLATES THE FIRST AMENDMENT IN THAT IT DOES NOT REQUIRE SCIENTER AS TO THE MINORITY OF THE PERFORMERS AS AN ELEMENT OF THE OFFENSE.

The appellant was convicted of three counts of possession of child pornography contrary to Minn. Stat. 617.247 subd. 4(a) for his possession of CD's containing video representations of children engaging in sexually explicit conduct. Section 617.247, subd. 4(a) states:

Subd. 4. Possession prohibited. (a) A person who possesses a pornographic work or computer disk or computer or other electronic, magnetic or optical storage system or a storage system of any other type, containing a pornographic work *knowing or with reason to know* its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than five years and a fine of not more than \$5,000 for the first offense and for not more than ten years and a fine of not more than \$10,000 for a second or subsequent offense. (emphasis added).

The appellant submits that Minn. Stat. 617.247, subd. 4(a) violates the First Amendment because it does not require that the defendant have knowledge of the minority of the persons depicted in the sexually explicit materials, but instead permits a conviction if the defendant had reason to know that the persons depicted in the material were minors.

The constitutionality of a statute is a question of law to be determined by the Court. Hamilton v. Commissioner of Public Safety, 600 N.W. 2d 720 (Minn. 1999). Ordinarily, legislative enactments enjoy a presumption of constitutionality which remains in force until the contrary is established beyond a reasonable doubt. State v. Cannady, 727 N.W. 2d 403 (Minn. 2007). However, a provision of law restricting First

Amendment rights does not bear the usual presumption of constitutionality normally accorded to legislative enactments, and the state bears the burden of establishing the constitutionality of the statute. State by Humphrey v. Casino Marketing Group, Inc., 491 N.W. 2d 882 (Minn. 1992); Johnson v. State Civil Service Dept., 280 Minn. 61, 157 N.W. 2d 747 (1968); Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W. 2d 370 (1975); see also State v. Zarnke, 589 N.W. 2d 370 (Wis. 1999). Because Minn. Stat. 617.247, subd. 4(a) implicates First Amendment rights,¹ the State has the burden of proving that the statute is constitutional.

A. The First Amendment Requires Scierter as to the Minority of the Performers.

It is established that a statute prohibiting the possession or distribution of printed or taped materials that does not require some knowledge of the contents of the material violates the First Amendment of the United States Constitution. The Supreme Court so ruled in Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205 (1959). In Smith, the Court held that the First Amendment prohibits prosecution of a book distributor for possession of an obscene book unless the distributor has “knowledge of the

¹ “The Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.” Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 91 L.Ed.2d 584 (1963). This case does not involve an obscenity statute, but an analogous demarcation between protected and unprotected speech is involved. The First Amendment is implicated in this question because “the age of the performers is the crucial element separating legal innocence from wrongful conduct.” United States v. X-Citement Video, Inc., 513 U.S. 64, 73, 115 S.Ct. 464, 136 L.Ed.2d 372. “Nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment,” while nonobscene, sexually explicit materials involving persons under the age of 18 are not. Id. at 73, 115 S.Ct. at 469.

contents of the book.” 361 U.S. at 153, 80 S.Ct. at 218. See also Mishkin v. New York, 383 U.S. 502, 510, 86 S.Ct. 958, 16 L.Ed. 2d 56 (1966) (“The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.”).

Like obscenity statutes, laws criminalizing child pornography present the risk of self-censorship of constitutionally protected material, and therefore “criminal responsibility may not be imposed without some element of scienter on the part of the defendant.” New York v. Ferber, 458 U.S. 747, 765, 102 S.Ct. 3348, 73 L.Ed. 2d 1113 (1982).

In United States v. X-Citement Video, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed. 2d 372 (1994), the Supreme Court considered a challenge to the constitutionality of the federal child pornography statute based on the appellant’s claim that the statute lacked the necessary element of scienter. The Court held that the word “knowingly” in the statute extended to the sexually explicit nature of the material and to the age of the performers, even though this interpretation was contrary to the most natural grammatical reading of the statute. The Court applied the rule that “the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.” Id. at 72, 115 S.Ct. 469. The Court reasoned that the age of minority “indisputably possesses the same status as an elemental fact because nonobscene, sexually explicit materials involving person over the age of 17 are protected by the First Amendment.” Id. at 72. Consequently, “the age of the performers is the crucial element separating legal innocence from wrongful conduct,” Id. at 73, 115 S.Ct.

469, and therefore, “a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts.” *Id.* at 78, 115 S.Ct. 472.

The holding in United States v. X-Citement Video has been regarded as applicable in state cases. In State v. Peterson, 535 N.W. 2d 689 (Minn. App. 1995), the Court of Appeals considered the application of Minn. Stat. 617.246, subd. 2, which prohibits the use of a minor in a sexual performance. The appellant argued that the statute was unconstitutional because it did not require scienter as to the child’s age. Relying on the reasoning of United States v. X-Citement Video, the Court of Appeals distinguished between producers of child pornography and distributors, holding that a producer of child pornography can be subject to strict liability with respect to the age of a pornographic performer, while a distributor cannot. *Id.* at 692.

Based on the foregoing decisions, it is clear that a statute which prohibits the possession of child pornography is constitutionally required to include the element of scienter as to the minority of the performers.

B. What Level of Scienter Does the Constitution Require?

The opinion in Smith v. California did not delineate the level of scienter required by the First Amendment. In subsequent cases, however, the constitutional requirements have been more fully explained. In Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590 (1974), a defendant convicted of distributing obscene material argued that the government was required to prove that he knew the material was obscene. The Supreme Court, in rejecting that argument, stated: “It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials

he distributed, and that he knew the character and nature of the materials.” *Id.* at 123, 94 S.Ct. at 2910.

In *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d. 98 (1990), the Supreme Court upheld a statute prohibiting possession of child pornography that applied a recklessness standard. The Supreme Court rejected the defendant’s contention that the statute was unconstitutionally overbroad because it did not require scienter. The statute defining the offense did not specify a mental state. The Court noted, however, that an Ohio law provided that recklessness was the appropriate *mens rea* when a statute “neither specifies culpability nor plainly indicates a purpose to impose strict liability.” The Supreme Court held that the Ohio statute “plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter.” *Id.* at 115, 110 S.Ct. at 1699.

In *United States v. X-Citement Video*, 982 F.2d 1285 (9th Cir. 1992), the Ninth Circuit Court of Appeals considered the issue of what level of scienter is required in prosecutions for child pornography. In that case the appellant was convicted under 18 U.S.C. §2252, which prohibits “knowingly” transporting, shipping, receiving, distributing or reproducing a visual depiction, if such depiction involves the use of a minor engaging in sexually explicit conduct. The Court reversed the conviction, declaring the statute unconstitutional on its face because it did not require a showing that the defendant knew that at least one of the performers was a minor. The Court held that, “The First Amendment mandates that a statute prohibiting the distribution, shipping or receipt of

child pornography requires knowledge of the minority of the performers as an element of the crime it defines.” Id. at 1291.

In United States v. X-Citement Video, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d. 372 (1994), the Supreme Court reversed the judgment of the Court of Appeals, holding that the term “knowingly” in §2252 extends both to the sexually explicit nature of the material and to the age of the performers, and therefore the Act is properly read to include a scienter requirement for the age of minority. It is important to note, however, that, although the Supreme Court reversed the judgment of the Court of Appeals, the Court’s opinion did not repudiate the holding of the Court of Appeals that the First Amendment requires that a defendant must have knowledge of the minority of at least one of the performers depicted in the work. Indeed, by interpreting the statute to require knowledge of the age of the performers, the Supreme Court’s opinion lends implicit support to the holding of the Court of Appeals that knowledge of the minority of the performers is constitutionally required.

In upholding the constitutionality of Minn. Stat. 617.247, the Minnesota Court of Appeals relied upon the case of Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). There the Supreme Court was faced with the sufficiency of a New York statute which proscribed the “knowing” distribution of obscene materials to minors. “Knowing” was defined in the statute as “knowledge” of, or “reason to know” of, the character and content of the material. In examining the statute, the Supreme Court noted that the New York Court of Appeals had authoritatively interpreted the statutory

provision to require the “vital element of scienter,” and that it had defined the required mental element as follows:

“A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the character of the material they *attempt to distribute* should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised.”

Id. at 644, S.Ct. at 1283. (emphasis supplied). Relying upon this interpretation of the statutory language, the Supreme Court upheld the statute.

Contrary to the respondent’s claim, however, Ginsberg is not controlling in the present case. In the first place, Ginsberg was concerned with an obscenity prosecution and not child pornography. The issues relative to the question of scienter in the context of obscenity cases and in child pornography cases are not the same. In Ginsberg the defendant’s guilt depended on his knowledge of the “character and content” of the material. The issue in the present case does not concern the appellant’s knowledge of the general character and content of the material; it concerns his knowledge of one particular fact – the underage status of the performer. As Chief Justice Rehnquist remarked in X-Citement Video, “The age of the performers is the crucial element separating legal innocence from wrongful conduct.” 513 U.S. at 73, 115 S.Ct. at 469. Thus it would be inappropriate to transfer a standard fashioned for obscenity statutes to a case involving child pornography.

Secondly, a careful reading of Ginsberg, makes it clear that the standard of scienter accepted in that case was meant to apply to distributors and purveyors of obscene

materials and not to mere possessors.² The Court indicated that, under the statute, “only those who are in some manner aware of the character of the material they *attempt to distribute* should be punished.” *Id.* at 644. Likewise the Court stated that it is “the *calculated purveyance* of filth which is exorcised.” *Id.* at 644. Thus the holding of the Court applies to those who “attempt to distribute” unlawful material, and to the purveyors of obscenity. There is nothing in the language of the opinion which suggests that the standard approved there would also extend to mere possessors of obscene material. For these reasons, appellant submits that the holding of Ginsberg v. New York cannot be considered dispositive of the present case.

In summary, the relevant decisions of the United States Supreme Court establish that the minimum constitutional standard of scienter for a statute prohibiting the possession of child pornography is knowledge that the performers are minors or the reckless disregard of a known risk of that fact.

C. The “Reason to Know” Standard Fails to Satisfy the Requirement of Scienter.

The requirement of scienter in statutes restricting freedom of expression exists in order to prevent the chilling effect which would otherwise threaten the dissemination of constitutionally protected material. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205. “For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells

². The distinction between distributors and mere possessors has been recognized by the Supreme Court. Under Stanley v. Georgia, 394 U.S. 557, 89 S.Ct 1243, 22 L.Ed.2d 542 (1969), the state has more latitude to proscribe the distribution of materials not protected by the First Amendment than it does when prohibiting their private possession.

to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.” Id. at 153, 80 S.Ct. at 218.

“Scienter” is a Latin word which means “knowingly.” It is defined as “a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act’s having been done knowingly, esp. as a ground for civil damages or criminal punishment.” Black’s Law Dictionary, 1347 (7th ed. 1999).

Requiring only that a defendant have reason to know that a performer depicted in the material is under 18 is not sufficient to satisfy the scienter requirement established by Smith and X-Citement Video. That a person had reason to know the age of a person depicted is not equivalent to a person having actual knowledge of the person’s age. Cf. State v. Melina, 297 Minn. 342 (1973) (The element of knowledge is not satisfied by a finding that defendant had reason to know; test is actual knowledge).

A standard requiring “reason to know” an elemental fact cannot be equated with a standard requiring knowledge. Indeed, the phrase “with reason to know” is an expression of the ordinary standard for negligence at criminal law. Criminal negligence requires a showing that the actor’s conduct involved a “gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.” State v. Grover, 437 N.W. 2d 60 (Minn. 1989). Unlike knowledge or belief, which are subjective, the criminal negligence standard is objective; it requires only that the defendant ought to have been aware of the fact, even if he was not because of inadvertence, accident or mistake. See LaFave and Scott, Substantive Criminal Law, Vol 1, §3.7 (a)(2) (1986).

The distinction was clearly explained in State v. Grover, supra. In Grover, this Court considered the application of Minn. Stat. 626.556, subd. 6, which requires that a mandated person “who knows or has reason to believe that a child is neglected or physically or sexually abused” report the information to the proper authorities. The Court described the application of the statute in these words:

“Thus, it is apparent that violation of the child abuse reporting statute entails either one of two levels of culpability. A mandated reporter who knows or believes that a child is being or has been abused but fails to report it exhibits the callousness associated with the knowing commission of a criminal act. On the other hand, neither knowing violation nor conscious disregard of substantial risk are requisite to a violation of the reporting act. A mandated reporter who has reason to know or believe that a child is being or has been abused but fails to recognize it also violates that statute though the actor’s culpability is merely negligent rather than purposeful, knowing or reckless.”

State v. Grover, supra, at 62-63.

The language “with reason to know” thus allows the conviction of a defendant under Minn. Stat. 617.247, subd. 4(a) without either a knowing violation or the conscious disregard of a known risk concerning the age of the performers, and permits the state to convict the defendant without any showing of the defendant’s subjective knowledge or belief. Instead, the effect of the statute is to place the burden upon the possessor of pornography to make certain that none of the performers are underage. Thus the language of the statute relieves the state of the burden to establish any level of scienter.

A person who had no role in the creation of the material is not in a reasonable position to ascertain the true age of the persons depicted. He may be one step or many

steps from the production of the material and will most likely have little or no opportunity realistically to determine whether a person depicted is a child. As the Supreme Court stated in X-Citement Video, “The opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction, unavailable for questioning by the distributor or receiver.” Id. 513 U.S. at 72. Of course, the opportunity for mistake increases even more significantly where, as in this case, the defendant had no opportunity to actually view the visual depictions.

A statutory standard allowing conviction of those merely having reason to know of the minority of the persons depicted in the materials is not adequate to serve the end of protecting the fundamental value of free expression for which the requirement of scienter is imposed. Minn. Stat. 617.247 potentially applies to all kinds of recipients and distributors of videotapes, magazines and computer disks. To render them all *prima facie* criminals if one of the performers in a portrayal of sexually explicit conduct is underage, without the recipient’s knowledge, would be to create precisely the kind of chilling effect condemned by the Supreme Court in Smith and X-Citement Video. Thus the “reason to know standard” of Minn. Stat. 617.247 is inconsistent with the protection of the First Amendment.

D. The Court of Appeals Erred in its Interpretation of Minn. Stat. 617.247.

In its opinion in this case, the Court of Appeals adopted a narrowing construction of Minn. Stat. 617.247, holding that the statute should be interpreted to require that the possessor of pornographic material be “in some manner aware” that the performer is a

minor. “We therefore interpret ‘reason to know’ as used in this particular statute to require the possessor to be ‘in some manner aware’ that the performer is a child.” (A. 28). Appellant submits that this interpretation of the statute is incorrect because it is inconsistent with previous caselaw and contrary to the plain language of the text.

In the first place, the Court of Appeals’ interpretation of the phrase “reason to know” is contrary to established Minnesota caselaw. In State v. Grover, supra, this Court held that the term “know or has reason to believe” has acquired a meaning in Minnesota involving a reasonably definite standard, and that standard is an objective standard of criminal negligence. Id. at 63. The Court also stated:

“*** we will interpret any criminal negligence statute as requiring a showing that the actor’s conduct involved a ‘gross deviation from the standard of care that a reasonable person would observe in the actor’s situation’ ”

Id. at 63.

It is evident that the interpretation of the phrase “reason to know” adopted by the Court of Appeals in this case cannot be reconciled with the construction set forth by this Court in State v. Grover. Obviously the words “reason to know” in Minn. Stat. 617.247, subd. 4(a) and “reason to believe” in Minn. Stat. 626.556, subd. 6, were intended by the legislature to convey the same meaning. “After the courts have once said that the legislature meant a certain thing by certain language, the legislature will be deemed to have intended the same meaning by again using the same language.” Jones v. Fiesel, 204 Minn. 333 (1939).

Moreover, the Court of Appeals' interpretation of the statute cannot be fairly derived from the language of the text. In its opinion the Court states: "In this context a person has 'reason to know' only if he has knowledge of facts that subjectively lead him to believe that the performer is a child." (A. 28). But Minnesota's criminal code provides that "'know' requires only that the actor believes that the specified fact exist." Minn. Stat. 609.02, subd. 9(2). Therefore, if the Court of Appeals' interpretation of the statute were correct, the phrase "with reason to know" would be superfluous. Such an interpretation is contrary to reason and the principle of statutory construction that "a statute is to be construed, if possible, so that no word, phrase or sentence is superfluous, void, or insignificant." See Boutin v. LaFleur, 591 N.W. 2d 711 (Minn. 1999).

Thus appellant submits that the Court of Appeals clearly erred in construing the phrase "with reason to know" to mean that the defendant must have knowledge of facts that subjectively lead him to believe that the performer is a child. Instead of being read out of existence by equating it with knowledge and belief, the phrase should be understood in accordance with its accepted meaning under prior caselaw, viz: as an expression of the ordinary standard of criminal negligence.

In short, when Minn. Stat. 617.247, subd. 4(a) is properly understood, it is clear that the statute lacks the element of scienter as required by the First Amendment.

CONCLUSION

Minnesota statute 6019.247, subd. 4(a) violates the First Amendment to the United States Constitution because it does not require scienter with respect to the minority of the performers as an element of the offense. Accordingly, the statute is unconstitutional on its face, and as applied in this case. Therefore the judgment of the Court of Appeals should be reversed.

Dated: May 11, 2007



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