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STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

HELMUT HORST MAUER,

Appellant.

RESPONDENT'S BRIEF

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LEGAL ISSUE

I. Does the scienter requirement contained in Minn. Stat. § 617.247, subd. 4 (a) violate the First Amendment?

Both the district court and court of appeals rejected Appellant's constitutional challenges.

Authorities: Minn. Stat. § 617.247, subd. 4 (a)
Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274 (1968)

STATEMENT OF FACTS

In April 2002, the United States Postal Service discovered a child pornography operation run by Angel Mariscal in Miami Beach, Florida. T. 19.[1] Mariscal sold child pornography under the business name "CRT" or "Cultural Research Team." T. 20. In September 2002, federal agents executed a search warrant at Mariscal's Florida residence and found more 90 videotapes, 109 compact discs, 58 "master" videotapes, and two computers containing child pornography. T. 24. Some of the videotapes showed Mariscal having sexual contact with underage girls. T. 26. Federal agents were able to identify at least 140 different children being abused in the pornographic materials. T. 26. They also learned that the pornographic works were being produced in Ecuador and Cuba. In November 2002, federal agents arrested four people in Cuba and one person in Ecuador connected with Mariscal's child pornography operation. They were able to positively identify 10 of the minor children depicted in Mariscal's videotapes. T. 46. In January 2003, federal agents executed a search warrant at Mariscal's Florida storage locker. T. 28. Agents recovered hundreds of additional videotapes and solicitations Mariscal sent to customers. They also recovered approximately 300 customer names and order forms. T. 28-29.

The federal government shut CRT down and set up a "sting" operation. Agents "took over" CRT and sent "fake" solicitations to the people on Mariscal's

[1] "T." refers to the successively paginated, multiple volume transcript of the bench trial.

customer list. T. 29-30. Appellant Helmut Horst Mauer was one of Mariscal's customers. In December 1998, he purchased videotapes titled "Med-Life, volume 4" and "Portraits 1 and 2." These videotapes contained images of young, prepubescent girls in the nude. A federal postal inspector characterized Appellant's purchases as "child erotica." T. 34-37.

On April 11, 2003, the fake solicitation was mailed to Appellant at his business on Excelsior Boulevard in Minneapolis. The solicitation contained a flyer describing various pornographic works and a blank order form. T. 39-40; Exhibit 2. On May 8, 2003, Appellant returned the order form mailed to him. He ordered "Projects 6, 7 and 8," "Projects 10, 11, 12, 14 and 15," "Real Action 1 through 5," and "Flowers 1-10." T. 42. The solicitation described the pornographic works as follows:

- "Projects 6, 7 and 8": A 12 year old cutie and her younger boyfriend take sexy pictures of each other and she gives him his first blow job. He likes and wants more! Then she shows him how she can fuck his dad too. All three projects on the CD for $125 – about 60 minutes long.

- "Projects 10, 11, 12, 14 and 15": For those who enjoyed action by this cutie in Projects 6 through 8 are in for a real treat. There are a good variety of scenes too extensive to describe, in these projects are featured also a couple of her friends and cousins as cute or even cuter than her. Some are even younger than her—preteens and, yeah, we said it, real pretty, doing sex for real. Hard to believe it!!! See for yourself!

- "Real Action 1-5": Pretentious young girls 11-13 years old interact with each other and with lots of older subjects, perform touching, kissing, and oral sex. Good camera angles and activities. Vol. 1 approximately 33 minutes, the rest

> approximately 45 minutes. No filler, real action from start to finish.

- "Flowers 1-10": A series from long ago! Our lolitas in many of their first appearances on film. Dancing, playing, modeling nude with great close in shots between the legs, and some having first sexual experience. They are from 9 to 14 years old.

T. 179-81.[2] Appellant paid over $500 for the compact discs and $15 extra to have them delivered by Federal Express. T. 43.

The fake solicitation Appellant received also provided an option for custom-order child pornography. The solicitation said:

> We are all sorry to say good-bye to our young friend, but this is the last time we can offer your fantasy with her. Feature the cutest little blonde from 'Flowers 1.' Now she is 13 years old. Write your own script (30 minutes). Put enough detail so I know what you want, but keep it to 30 minutes. Yes, you can send props to her.

T. 191-92. At the bottom of his order form, Appellant wrote, "P.S. Please send me more information about 'write your own script.'" T. 44.

On May 23, 2003, federal agents made a controlled delivery of the compact discs Appellant ordered. T. 92. A federal agent dressed as a Federal Express employee and delivered the child pornography to Appellant's business. Appellant signed for the delivery personally. After approximately five minutes, agents executed a federal search warrant. T. 94. Appellant was sitting at a desk just inside

---

[2] The girl and boy depicted in "Projects 6, 7 and 8" were identified in Cuba. The girl was 13 years old. The boy was 11 years old. T. 47-48.

the business. Appellant had already opened the package and the disks were sitting near Appellant's feet. T. 96-98.

The same day, federal agents searched Appellant's residence. They found numerous works indicating Appellant's sexual interest in "young" girls. Examples of titles included "Pigtails," "Schools," "The Hottest, Youngest, Wettest-looking Nymphs," and "Young Lust, volume 2." T. 72-73. Agents were unable to prove the ages of the people depicting in these films and, therefore, were unable to testify if they were legal or illegal to possess. T. 73.

Appellant was interviewed after receiving a *Miranda* warning. He told agents that he was interested in "younger-looking" girls but claimed that he believed the people in the films would be adults who simply looked young. T. 77, 79. Appellant used the videotapes of "younger-looking" girls to masturbate. T. 78. Appellant also told agents that his May 8th order was the first time he ordered anything from CRT. Appellant later admitted this was untrue. Appellant admitted to receiving and viewing the child erotica he ordered in 1998. Appellant told the agents that he ultimately threw the videotapes away because the girls depicted were obviously young children. T. 78.

On May 28, 2003, Appellant called Postal Inspector Barry Bouchie. T. 110. During the brief conversation, Appellant told Inspector Bouchie that "he knew the people [in the videos] were underage and that he was dumb." T. 111. Appellant stated that he was an "old pervert" and promised that he would never "do it" again.

T. 111-12. Appellant asked Inspector Bouchie to interview him a second time. T. 112.

On June 6, 2003, Inspector Bouchie went to Appellant's business to re-interview him. Appellant was again advised on his rights under *Miranda* and signed a waiver form. T. 113. The agents discussed both the 1998 and 2003 orders Appellant placed. Appellant again admitted that the 1998 videotapes contained obviously underage girls. He added that he kept the videotapes for "approximately two weeks" before throwing them away. T. 113-14. With respect to his 2003 order, Appellant again admitted that he knew the girls depicted in the pornographic works would be underage, but claimed that he believed they would be "between the ages of 13 and 16." T. 116. Appellant also admitted that he knew it was illegal to possess the compact discs he ordered. T. 118.

Appellant was charged for possessing child pornography in violation of Minn. Stat. § 617.247, subd. 4(a). A bench trial was held before the Honorable Charles Porter.

At trial, Appellant testified on his own behalf. T. 164. He admitted that he ordered and received the child pornography but claimed that he believed the children would be over age 18. T. 164. During cross-examination, however, Appellant admitted that he did nothing to ensure that the pornographic works he ordered would depict adults rather than children.

> Q: You were willing to deal with the possibility that you had underage kids in these films

> because it was sexually gratifying to you to watch, is that correct?
>
> A: Well, yes. Okay.

T. 177. Appellant also admitted that, given the descriptions in the 2003 solicitation, he knew that it was possible the videotapes would depict children as young as 9 years old. T. 182.

The district court found Appellant guilty of three counts of possessing child pornography, concluding that Appellant had reason to know that the compact discs he ordered May 8, 2003 would depict children under age 18. *See* Finding of Fact Essential to the Verdict, SIP #03038206, filed September 3, 2004.

After conviction, Appellant filed a Notice of Appeal and moved for a stay so he could pursue postconviction relief. Appellant filed a petition for postconviction relief contending that Minn. Stat. § 617.247, subd. 4(a) is unconstitutional because it contains an inadequate scienter requirement. *See* Petition for Post-conviction Relief, SIP #03038206, filed August 18, 2005. The district court denied Appellant's petition. The court held that Minn. Stat. § 617.247, subd. 4(a) was constitutional as applied to Appellant. *See* Order, SIP #03038206, filed December 12, 2005.

The Minnesota Court of Appeals affirmed the decision of the district court. The court interpreted the requirement of "knowing or with reason to know" that character and content of the pornographic work to mean that the prosecution must establish that the defendant is subjectively, "in some manner aware" that the

person(s) depicted in the pornographic work were minors. State v. Mauer, 726 N.W.2d 810, 813-14 (Minn. App. 2007). The court held that the "in some manner aware" standard was a constitutionally sufficient degree of scienter and did not, "on its face, violate the First Amendment." Id. at 815.

This court granted Appellant's petition for discretionary review to determine if Minn. Stat. § 617.247, subd. 4(a) violates the First Amendment.

ARGUMENT

I. MINN. STAT. § 617.247, SUBD. 4(a) DOES NOT VIOLATE THE FIRST AMENDMENT.

A. Applicable Statutes, Appellant's Claim and Standard of Review.

Minn. Stat. § 617.247, subd. 4(a) provides:

> *A person who possesses a pornographic work* or a 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 a first offense and for not more than ten years and a fine of not more than $10,000 for a second or subsequent offense.

Id. A minor is "any person under the age of 18." Minn. Stat. § 617.246, subd. 1(b). A pornographic work includes any "picture, film, photograph, negative, slide, videotape, videodisc, or drawing" that depicts a minor engaged in "actual or simulated sexual conduct." Minn. Stat. § 617.246, subd. 1(f).[3] "Sexual conduct" includes:

> (1) An act of sexual intercourse, normal or perverted, actual or simulated, including genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal;
>
> (2) Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in

[3] A pornographic work also includes certain, statutorily-defined sexual performances involving minors which are not relevant to this appeal. *See* Minn. Stat. § 617.246, subds. 1(d) and (f)(1).

> undergarments or in a revealing costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed;
>
> (3) Masturbation;
>
> (4) Lewd exhibition of the genitals; or
>
> (5) Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

Minn. Stat. § 617.246, subd. 1(e). To act "knowingly" means that the "actor believes that the specified fact exists." Minn. Stat. § 609.02, subd. 9(2).

Appellant claims that Minn. Stat. § 617.247, subd. 4(a) violates the First Amendment because "it does require that the defendant have knowledge of the minority of persons depicted" in the pornographic work "but instead permits a conviction if the defendant has reason to know that persons depicted in the material were minors." (Appellant's Brief at 6).

Statutes are presumed constitutional and this Court exercises its power to declare a statute unconstitutional with extreme caution and only when absolutely necessary. State v. Cannady, 727 N.W.2d 403, 406 (Minn. 2007). Constitutional challenges are questions of law which this Court reviews *de novo*. Id.

B. Relevant Constitutional Principles.

Child pornography is not protected by the First Amendment and the private possession of child pornography can be constitutionally prohibited. New York v.

Ferber, 458 U.S. 747, 763, 102 S. Ct. 3348, 3358 (1982); Osborne v. Ohio, 495 U.S. 103, 111, 110 S. Ct. 1691, 1697 (1990). Although child pornography can be banned, non-obscene adult pornography is protected by the First Amendment. Alexander v. United States, 509 U.S. 544, 549-50, 113 S. Ct. 2766, 2771 (1993).

The United States Supreme Court has recognized that laws proscribing speech and expressive conduct have a potential "chilling effect" and "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions." Gooding v. Wilson, 405 U.S. 518, 521 (1972). The overbreadth doctrine protects against improper self-censorship by invalidating laws that create an unacceptable deterrent to the exercise of protected activities.

Although it is not entirely clear, it appears Appellant is challenging Minn. Stat. § 617.247, subd. 4(a) on the grounds that it is overbroad. Overbreadth challenges represent an exception to the traditional rule of standing and allow a litigant to make a facial challenge to a statute on First Amendment grounds regardless of whether his or her own conduct can be constitutionally prohibited. Thus, litigants may challenge a statute not because their own rights of free expression are violated, but because "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 2916 (1973).

A statute may be "overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights." State v. Machholz, 574 N.W.2d 415, 419 (Minn. 1998). Because the overbreadth doctrine "has the potential to void an entire statute, it should be applied 'only as a last resort.'" Id. "[W]here conduct and not merely speech [are] involved, ... the overbreadth of statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615, 93 S. Ct. at 2918.

To avoid being overbroad, a statute penalizing the possession of child pornography must, "as written or authoritatively construed," be "adequately defined by the applicable state law." Ferber, 458 U.S. at 764, 102 S. Ct. at 3358. The offense must:

> (1) be "limited to works that visually depict sexual conduct by children below a specified age;"
>
> (2) the category of sexual conduct proscribed must be "suitably limited and described;" and
>
> (3) "criminal responsibility may not be imposed without some element of scienter on the part of the defendant."

Id., 458 U.S. at 764-65, 102 S. Ct. at 3358. Stated another way, statutes prohibiting the possession of child pornography must be sufficiently narrow to avoid "criminaliz[ing] an intolerable range of constitutionally protected conduct." Osborne, 495 U.S. at 112, 110 S. Ct. at 1697. Even if a statute infringes on protected expression "at its margins," facial invalidation is not appropriate if the

"remainder of the statute ... covers a wide range of easily identifiable and constitutionally proscribable ... conduct." Ferber, 458 U.S. at 770, n. 25, 102 S. Ct. at 3362, n. 25.

There is no dispute in that the images Appellant possessed were child pornography. Appellant does not claim that the statute is indefinite or vague. Nor does he claim that the definitions of "minor" or "pornographic work" are so broad that they prohibit a substantial amount of protected speech. Appellant's challenge is limited to the sufficiency of the scienter requirement in Minn. Stat. § 617.247, subd. 4(a).[4]

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[4] Claims involving the sufficiency of scienter have also been analyzed under due process principles. *See* Lambert v. California, 355 U.S. 225, 78 S. Ct. 240 (1957); Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274 (1968). There are two ways to challenge a statute on due process grounds: (1) as applied to a particular defendant, or (2) as facially unconstitutional. Appellant could not prevail under either due process theory. To mount a successful facial challenge, Appellant would have to "establish that no set of circumstances exists under which the [statute] would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987). By challenging only the phrase "reason to know," Appellant implicitly concedes that the statute validly penalizes a defendant who "knows" that the content and character of the material he possesses child pornography. Thus, there is at least one "circumstance" under which the statute is constitutionally valid. An "as applied" challenge involves the constitutionality of a statute based upon harm or "injury in fact" to the litigating party. To succeed, Appellant would have to show that he was "injured in fact" because he did not "know" or "have reason to know" that he possessed child pornography. *See* State v. Fingal, 666 N.W.2d 420, 425 (Minn. App. 2003). Appellant admitted to police and during trial that he was aware that the movies he purchased could contain images of children younger than 18 years old. As such, Appellant's conduct falls squarely within the statutory prohibition in Minn. Stat. § 617.247, subd. 4(a) and he suffered no cognizable injury.

C. The Scienter Requirement in Minn. Stat. § 617.247, Subd. 4(a) is Adequate to Satisfy the Constitution.

The United States Supreme Court has held that laws prohibiting the possession of child pornography must contain "some element of scienter on the part of the defendant." New York v. Ferber, 458 U.S. 747, 765, 102 S. Ct. 3348 (1982). The Supreme Court has not identified the minimum mental state needed to pass constitutional muster but has observed that only a statute "*completely bereft* of a scienter requirement as to the age of the performers would raise serious constitutional doubts." United States v. X-Citement Video, Inc., 513 U.S. 64, 78, 115 S. Ct. 464 (1994) (emphasis added).

1. Minn. Stat. § 617.247, subd. 4(a) is not "completely bereft" of a scienter requirement.

At various places in his brief, Appellant asserts that Minn. Stat. § 617.247, subd. 4(a) does not contain a scienter requirement as to the age of the minors depicted in the pornographic works prohibited. This is plainly false.

The statute prohibits possession of materials that a person "knows" or "has reason to know" is a pornographic work. As the court of appeals correctly observed:

> Unquestionably, the Minnesota statute at issue requires *some* degree of culpability as it relates to the age of the performers. The statute prohibits possessing depictions of minors involved in sexual conduct while "knowing or with reason to know its content and character." Minn. Stat. §§ 617.246, subd. 1(f), 617.247, subd. 4(a) (2002). The phrase "knowing or with reason to know its content and character" imposes accountability in some way for knowledge that the

> work is pornographic, which, in turn, relates to the age of the performers. *See* Minn. Stat. § 617.246, subd. 1(f) (requiring that prohibited material involve minors). The question is whether the degree of culpability the statute requires is sufficient to guard against the risk of self-censorship.

Mauer, 726 N.W.2d at 813.

2. The "reason to know" standard, as interpreted by the court of appeals, requires a showing of subjective scienter.

Appellant's complaint focuses on the sufficiency of the "reason to know" standard. He maintains that "reason to know" is "an expression of the ordinary standard for negligence at criminal law" and impermissibly allows conviction based on an objective, rather than a subjective, mental state. (Appellant's Brief at 14-15).

A criminal statute with a subjective scienter standard "requires scienter to be evaluated through the lens of [a] particular defendant" while an objective scienter standard is considered "from the perspective of a hypothetical reasonable man." United States v. Saffo, 227 F.3d 1260, 1268-69 (10th Cir. 2000). A person acts knowingly or recklessly if he is aware of the risk his conduct is prohibited and disregards that risk. A person acts negligently if he is not aware of the risk that his conduct is prohibited but should have been aware of it. *See* Charles Tortia, *Wharton's Criminal Law* §168 at 227 (15th ed. 1993).

The language of Minn. Stat. § 617.247, subd. 4(a) indicates a subjective scienter requirement. *The defendant*, not a hypothetical "reasonable man," must

know or have reason to know that he possesses child pornography. *See* CRIMJIG 12.107 (instructing jurors they must find the "defendant knew or had reason to know that the content and character of the work was pornographic work involving minors."). Under a plain reading of the statute, the state must prove that *the defendant* actually knows or has reason to believe that he possesses pornographic works depicting minors. A person who possesses visual images but has no reason to believe that they are pornographic in nature or depict children is not guilty of a crime.

The court of appeals interpreted the phrase "reason to know" to require a showing of subjective scienter. The court read the phrase to mean that a person must be "in some manner aware" of the general character and content of the pornographic work before criminal liability could attach. Mauer, 726 N.W.2d at 813-14. The "in some manner aware" definition was originally adopted by state courts in New York and has been approved by the United States Supreme Court. Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 629 (1968). In Ginsberg, the defendant was charged under a statute prohibiting the distribution of sexually explicit materials to minors. The statute sanctioned conviction of a defendant who had "reason to know" the content of the material or had "a belief or ground for belief" warranting further inspection or inquiry on the part of the distributor. Id., 390 U.S. at 644, 88 S. Ct. at 1283. The Supreme Court accepted the state court's interpretation of these scienter standards as requiring the prosecution to establish that the defendant was "in some manner aware" of the character and content of the

materials he distributed and found this standard satisfied the Constitution. Id., 390 U.S. at 644-45, 88 S. Ct. at 1283. *See also* State v. Oman, 261 Minn. 10, 17, 110 N.W.2d 514, 520 (1961) (reading statute prohibiting sale of indecent literature as requiring defendant be "in some manner aware" of character and content of material sold). Since Minn. Stat. § 617.247, subd. 4(a) was enacted in 1982, this court could infer that legislature intended that the statute "incorporate[] the gloss" the Supreme Court gave the term "reason to know" in Ginsberg. Ginsberg, 390 U.S. at 644, 88 S. Ct. at 1283.

As the court of appeals recognized, the "reason to know" standard was designed to prevent people from escaping prosecution through willful blindness or deliberate ignorance. Mauer, 726 N.W.2d at 815. A defendant should not be able ignore evidence alerting him to the risk that the visual images he possesses are child pornography. Under the "reason to know" standard, a defendant cannot evade criminal responsibility by "deliberately clos[ing] his eyes to what otherwise would have been obvious to him" regarding the content of the pornographic works. United States v. Stewart, 185 F.3d 112, 126 (3rd Cir. 1999). "[S]o far as the criminal law is concerned, the person acts at his peril in this regard, and is treated as having 'knowledge' of the facts as they are ultimately discovered to be." Martin v. Commonwealth, 96 S.W.2d 38 (Ken. 2003). Like the language of the statute, the concept of willful blindness is inconsistent with an objective scienter requirement. *See* United States v. Brodie, 403 F.3d 123, 148 (3rd Cir. 2005) (willful blindness "is not to be equated with negligence or lack of due care" and does not permit

conviction of a defendant who "should have known of facts of which he or she was not aware.").

Under the court of appeals' interpretation, a person has "reason to know" if he possesses facts or information that alert him to the risk the materials at issue are child pornography. On the other hand, if a person is in "no manner" aware of the risk that the materials are child pornography, he does not have a "reason to know" that the possession is prohibited. This reading of Minn. Stat. § 617.247, subd. 4(a) has been accepted by the United States Supreme Court and is consistent with the language of the statute and the rationale underlying the "reason to know" standard. Regardless of whether this reading is a considered a "narrowing" construction or merely an interpretation of the statutory language, it should be affirmed. *See* Oman, 261 Minn. at 18, 110 N.W.2d at 520.[5]

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[5] Although the court of appeals recognized some "support" in this court's cases for Appellant's negligence claim, it rejected the argument Mauer, 726 N.W.2d at 813 (*citing* State v. Grover, 437 N.W.2d 60 (Minn. 1989)). Grover upheld the use of a negligence standard to impose criminal liability for a mandatory reporter's failure to report suspected child abuse. Grover, 437 N.W.2d at 63-64. The statute in Grover did not implicate potentially protected speech or expression. If Grover's scienter requirement were applied to Minn. Stat. § 617.247,subd. 4(a), a person would be guilty if he "should have been aware" of the risk that the materials he possessed contained child pornography. The risk, however, would have to be of such a nature that his failure to perceive it involved a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Grover, 437 N.W.2d at 63 (quotation omitted). While it may be that a negligence standard is a constitutionally permissible, this court need not reach the issue given the court of appeals' decision to follow Ginsberg. *See* Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828, 870 (Feb. 1999) (noting the Supreme Court has "arguably indicated that a culpability level of negligence can suffice" under an obscenity or pornography prohibition.).

3. Minn. Stat. § 617.247, subd. 4(a)'s use of "reason to know" standard does not render the statute facially unconstitutional because it does not criminalize an intolerable range of constitutionally protected conduct.

Appellant asserts that a statute must require actual knowledge that the materials possessed are child pornography to satisfy the First Amendment. He is wrong.

In Smith v. California, 361 U.S. 147, 80 S. Ct. 215 (1959) the Supreme Court held that a statute proscribing the sale and possession of obscene materials could not withstand constitutional scrutiny if it contained no scienter requirement and imposed a criminal penalty based upon strict liability. Id., 361 U.S. at 154, 80 S. Ct. at 219. The Court left several questions unanswered.

> We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be.

Id.

At least some of these questions were answered in Ginsberg. As stated previously, the Court upheld that constitutionality of a criminal statute that prohibited the distribution of obscene material to minors if the defendant "was in some manner aware" of the character and content of the material and the age of the minor. Ginsberg, 390 U.S. at 644-45, 88 S. Ct. at 1283. Ginsberg stands for two

propositions. First, it is not constitutionally necessary that a defendant have actual knowledge that the materials he possesses are obscene. It is enough that he is in "some manner aware" of the general character and content of the materials. Second, if the defendant is "in some manner aware" of the general nature of the materials he possesses, he can be required to engage in "further inspection or inquiry" to make certain he is not distributing prohibited materials without offending the Constitution. Id. *See also* Mishkin v. New York, 383 U.S. 502, 511, 86 S. Ct. 958, 965 (1966) ("in some manner aware" standard "fully meets the demands of the Constitution by avoiding hazard of "self-censorship" and compensating for ambiguity in definition of obscenity); Hamling v. United States, 418 U.S. 87, 120, 94 S. Ct. 2887, 2909 (1974) (rejecting claim that defendant must actually know materials are obscene and holding it is sufficient if the "knew or had notice" of the content of the materials distributed).

Appellant's reliance on X-Citement Video in support of his argument is misplaced. The statute in that case prohibited a person from "knowingly" transporting materials in interstate commerce if the materials depicted children engaged in sexually explicit activity. The Supreme Court concluded that, as written, the statute required only "knowing" transportation but was "completely bereft" of a knowledge requirement regarding the materials being transported. X-Citement Video, 513 U.S. at 68-69, 115 S. Ct. at 467. The Court reviewed the legislative history of the statute and determined that Congress did not intend such a reading. Id, 513 U.S. at 74, 115 S. Ct. at 470. The Court applied its canons of

construction and ruled that the term "knowingly" should be read to apply to both the transportation and the nature of the material being transported. Id., 513 U.S. at 78, 115 S. Ct. at 472. The Court did not hold that "actual knowledge" of the age of person depicted in pornographic works is constitutionally required.

Appellant attempts to distinguish Ginsberg are equally unavailing. Appellant contends that Ginsberg should not apply because it involved a prohibition against the distribution of obscenity and not the "mere possession" of child pornography. The fact that Minn. Stat. § 617.247, subd. 4(a) regulates child pornography rather than obscenity weighs in favor of the state's position. The state's interest in restricting access to child pornography "far exceed[s]" its interest in curtailing access to obscenity, Osborne, 495 U.S. at 108, 110 S. Ct. at 1695, and states "are entitled to greater leeway in the regulation of pornographic depictions of children." Ferber, 458 U.S. at 756, 102 S. Ct. 3354. If anything, this suggests that a scienter requirement less exacting than "in some manner aware" would be constitutionally sufficient in cases involving child pornography.

Nor is there anything in Ginsberg which limits the application of the "in some manner aware" standard to those who distribute prohibited materials. While the Court has observed that "the opportunity for a mistake as to age increases significantly once the victim is reduced to a visual depiction [and is] unavailable for questioning by the distributor or receiver," this does not help Appellant's cause.

X-Citement Video, 513 U.S. at 72 n. 2, 115 S. Ct. at 469 n. 2.[6] As the quote makes clear, the Court considers distributors and possessors of materials the same with regard to their ability to ascertain the age of the person depicted in the work. If distributors and possessors are the same for this purpose, there is no reason they should not be treated the same with regard to the scienter requirement. In other words, there is no reason Ginsberg should apply to distributors of obscenity and not possessors of child pornography. Even if there were an appreciable distinction between distributors and possessors, it would not follow that the legislature is forbidden from requiring a person who is "in some manner aware" he may possess child pornography to "inspect" the images and "inquire" to make certain that the images are lawful.[7]

When courts evaluate claims of overbreadth, they balance the value of the protected activity potentially deterred and the likelihood that exercise of the

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[6] When X-Citement was before the Ninth Circuit, the defendant argued the statute was overbroad because it prohibited the use of pornography made with actors under age 18 and, because it is too difficult for people to ascertain an actor's age, the statute would create unwarranted self-censorship. United States v. X-Citement Video, Inc., 982 F.2d 1285, 1287 (9th Cir. 1992). The Ninth Circuit rejected the claim because actor-age uncertainty faced by viewers of pornography was not sufficiently substantial to invalidate the statute on its face. Id. Although the Supreme Court reversed the Ninth Circuit on other grounds, it rejected the defendant's overbreadth claim "for the reasons stated by the Court of Appeals in this case." X-Citement Video, 513 U.S. at 78-79, 115 S. Ct. at 464.

[7] As one justice put it: "The First Amendment will lose none of its value to a free society if those who knowingly place themselves in the stream of pornographic commerce are obliged to make sure that they are not subsidizing child abuse." X-Citement Video, 513 U.S. at 85, 115 S. Ct. at 475 (J. Scalia, dissenting).

expression will be chilled against the "legitimate sweep" of the government interest served by the regulation." *See* Broadrick, 413 U.S. at 615, 93 S. Ct. at 2918.; Ferber, 458 U.S. at 766, 102 S. Ct. at 3359 (considering the value of the protected material against the "harms sought to be combated by the State."); United States v. O'Brien, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678-79 (1968) ("sufficiently important governmental interest in regulating [expressive conduct] can justify incidental limitations on First Amendment freedoms."). The balance in this case establishes that Minn. Stat. § 617.247, subd. 4(a) is not facially overbroad.

Appellant claims that Minn. Stat. § 617.247, subd. 4(a) chills the right to possess non-obscene pornography depicting adults. Even though the "First Amendment will not tolerate the total suppression of erotic materials that have some arguable artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude that the interest" in other forms of speech. Young v. American Mini Theatres, Inc., 427 U.S. 50, 70-71, 96 S. Ct. 2440, 2452-53 (1976). As the Court further observed, there is "surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." Id., 427 U.S. at 61, 96 S. Ct. at 2448.

Given the modest value of the expression potentially threatened, to prevail, Appellant would have to make a strong case that use of the "reason to know" or "in some manner aware" standard creates a substantial or great risk that people will refuse to engage in protected activity. He has not made such a showing. Indeed, he

has failed to identify any instance where the statute would apply to constitutionally protected conduct. *Compare* Ferber, 458 U.S. at 773, 102 S. Ct. at 3363 (rejecting an overbreadth claim where "it has not been suggested" that "these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.").

Any arguable danger presented by Minn. Stat. § 617.247, subd. 4(a) pales in comparison to the legitimate sweep and purpose of the statute. There is no dispute that child pornography is a recordation of child abuse. It is also "evident" that the State has a "compelling" interest in protecting the safety and well-being of children. Ferber, 458 U.S. at 756, 102 S. Ct. 3354. The Minnesota legislature enacted Minn. Stat. § 617.247, subd. 4(a) in an effort "to destroy a market for the exploitative use of children" by prohibiting possession of child pornography. Osborne, 495 U.S. at 109, 110 S. Ct. at 1696. The statute's goal of preventing sexual exploitation and victimization of children "constitutes a government objective of surpassing importance." Ferber, 458 U.S. at 757, 102 S. Ct. at 3355.

Like the statute in Ferber, Minn. Stat. § 617.247, subd. 4(a) presents a "paradigmatic case of a state statute whose legitimate sweep dwarfs its arguably impermissible applications." Ferber, 458 U.S. at 773, 102 S. Ct. at 3363. Its scienter requirement does not result in overbreadth that is substantial and is entirely sufficient to satisfy First Amendment concerns. Appellant's claim to the contrary must be rejected.

CONCLUSION

Under Minn. Stat. § 617.247, subd. 4(a), a defendant has "reason to know" the "character and content" of the child pornography he possesses if he (1) is "in some manner aware" or "on notice" of the risk the materials at issue might depict children engaged in prohibited sexual conduct and (2) elects to possess the material despite his awareness or notice of the potential risk. This scienter requirement is more than sufficient to satisfy the demands of the First Amendment. As such, the state respectfully requests that Appellant First Amendment challenge be rejected and his conviction for possessing child pornography be affirmed.

DATED: June 13, 2007

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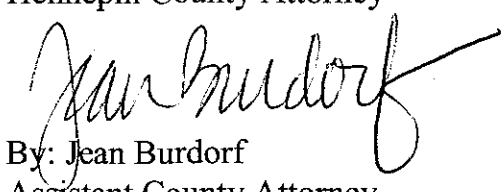

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A05-460
STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

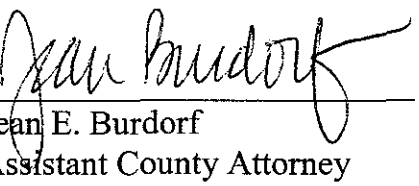
Helmut Horst Mauer,

Appellant.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,490 words. This brief was prepared using Microsoft Word 2003, Times New Roman font face size 13.

Dated: June 13, 2007



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