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The Hard Line Between Stopping Child Pornography and Protecting Free Speech: United States v. Williams, 444 F.3d 1286 (11th Cir. 2006),cert granted, (U.S. March 26,2007)(No.06-694).

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Introduction

The child pornography industry has become increasingly hard to combat as a result of advanced technology that can replicate the images of children with such quality that on their face it is almost impossible to determine if it is a picture of an actual child or if it is a computer generated image. While law makers attempt to adapt to these developments, others have challenged its Constitutionality under the First Amendment.[2] Congress' most recent attempt to combat the evolution of child pornography was the Protect Act of 2003 [hereinafter "Act").[3] In the most recent case evaluating the Act's constitutionality, the United States

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[2] U.S. CONST. amend. I.

[3] Protect Act 18 U.S.C. § 2252A(a)(5)(B)(2003).

Court of Appeals for the Eleventh Circuit [hereinafter "court") held in *United States v. Williams*[4] that the Act was unconstitutional. The government appealed to the United States Supreme Court which granted the case certiorari on March 26, 2007. This article will examine the Eleventh Circuit's decision, as well as the questions now before the Supreme Court.

Statement of the Case & Procedural History

The general issue before the court was whether or not the Act was overbroad and vague, and thus unconstitutional under the First Amendment. The defendant, Michael Williams, appealed his conviction by the United States District Court for the Southern District of Florida for promotion of child pornography under the Act.[5] He was convicted as a result of sending hyperlinks in a child pornography chat room that contained "among other things, seven images of actual minors engaging in sexually explicit conduct." These pictures where sent while Williams was having a conversation with an undercover officer. On appeal, Williams argued that the Act is unconstitutional because it

[4] 444 F.3d 1286 (11th Cir. 2006).

[5] *United States v. Williams*, 2004 WL 5388528 (S.D. Fla. 2004).

criminalizes speech and images related to child pornography that are not related to real children. This is because, as he argues in his case, at the onset it criminalizes his and others' computer generated images of children. These computer generated images are so sophisticated that they are sometimes initially indistinguishable from actual pictures of real children. Virtual child pornography is protected under the First Amendment. The relevant statement of the case and the part of the Act in question criminalizes "promoting, or 'pandering' material 'in a manner that reflects the belief, or that is intended to cause another to believe,' that the material contains illegal child pornography in violation of 18 U.S.C § 2252A(a)(3)(B), which carries a sixty-month mandatory minimum sentence.[6]"

The government argued in response to Williams that the First Amendment does not protect truthful advertising of illegal products or false advertizing.[7] That the Act is not unconstitutionally vague or overbroad because it

[6] *Williams*, 444 F.3d at 1289. Williams was also convicted of one count of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B).

[7] *Id.* at 1298.

criminalized intentional pandering[8], and that as written the Act is critical to eradicating the child pornography market.[9]

The Court's Analysis

The court begins by stating that their review of the district court's decision is *de novo*, and then goes on to examine the development of the child pornography industry. There are four type of child pornography, with "actual" and "virtual" child pornography being the types in question in *Williams*. [10] The court analyzes the Supreme Court's decision

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[8] *Williams*, 444 F.3d at 1289.

[9] *Id.* at 1293.

[10] The court states that there are four kinds of pornography: actual, virtual, custom and real time. The court states:

> "'[A]ctual' or 'real' child pornography depicts true minors engaged in sexual conduct. In contrast 'virtual' child pornography depicts what appear to be actual minors engaged in sexual conduct, but in reality consists of computer generated or enhanced images . . . sophisticated imagining technology and the rise of the Internet has been the proliferation of pornography involving children. . . . 'custom' child pornography (images of child rape created to order for the customer) and 'real time' child pornography, where members may watch the online rape of children as it occurs."

Williams, 444 F.3d at 1290.

regarding free speech as well as their decision's regarding child pornography.

In *Stanley v. Georgia*, the Court held that citizens has a protected right to have obscene materials in the privacy of one's home.[11] However, in *United States v. Orito* the Court held that the government had a constitutional right to regulate these materials when involved in interstate commerce.[12] Under *Miller v. California*, the Court held that the First Amendment's free speech clause does not protect obscenity.[13] Directly confronting child pornography in *New York v. Feber* the Court held that the First Amendment does not protect child pornography.[14] The Court held that this material could be regulated even if it failed the obscenity test in *Miller*. Following the ground work laid by *Ferber* Congress enacted new child pornography regulation, the Child Protection Act of 1984,[15] and confronted the problems created by the advancement of

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[11] *Stanley v. Georgia*, 394 U.S. 557 (1969).

[12] *United States v. Orito*, 413 U.S. 139 (1973).

[13] *Miller v. California*, 413 U.S. 15, 36 (1973).

[14] *New York v. Ferber*, 458 U.S. 747 (1982).

[15] Child Protection Act 18 U.S.C. §§ 2251-2254, 2256, 2516 (1984).

computer technology via the Child Protection and Obscenity Enforcement Act.[16]

The continued advancement of technology has made "virtual" child pornography so troublesome that it had to be addressed by Congress in the Child Pornography Prevention Act of 1996 ("CPPA").[17] The CPPA's pandering provision was held unconstitutional in *Ashcroft v. Free Speech Collation*.[18] It was held unconstitutional because it "penalize[ed] individuals farther down the distribution chain for possessing images, that despite how they were marketed, are not illegal child pornography."[19] It was in response to this that Congress enacted the Act which was found unconstitutional in *Williams*. The Act changed its target from what was previously found unconstitutional - the targeting of underlying material-to the "speech related to the material."[20] After examining Supreme Court precedent, the court went on to apply existing law to William's case.

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[16] Child Protection and Obscenity Enforcement Act 18 U.S.C. §§ 2251, 2252 (1988).

[17] Child Pornography Prevention Act 18 U.S.C. §§ 2251 (1996).

[18] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

[19] *Id.*

[20] *Williams*, 444 F.3d 1286.

Regarding William's overbreadth challenges the court examined if the Act's pandering provision restricted a substantial amount of speech protected under the First Amendment. Additionally, they examined if under existing law the Act's restrictions on non-commercial speech, which cannot be covered under the Commerce Clause, were overbroad under the Constitution. The court held that it was based on three reasons: 1) "pandered child pornography need only be 'purported' to fall under the prohibition . . .; 2) non-commercial, non-inciteful promotion of illegal pornography, even if repugnant is protected speech under the First Amendment; 3) the criminalization of speech that 'reflects' the belief that materials constitute obscene synthetic or real child pornography [gives no] regard [for] the actual nature or even the existence of the underlying material.[21]"

Regarding William's vagueness challenge, the court held a statute is vague if, "the language is so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed."[22] The court found that because the language in

[21] *Id.* at 1298.

[22] *Williams*, 444 F.3d at 1286.

the Act cannot be "uniformly interpreted" by those who are responsible for its enforcement it is "impermissibly vague."[23]

The court ends by expressing the importance of fighting the child pornography problem in America. It acknowledges the difficult situation facing Congress regarding the balance between "striking a balance between Congress's interest in protecting children from harm with constitutional guarantees." [24] In spite of this, it essentially urges Congress to try again.[25]

Conclusion

The Eleventh's Circuit opinion was clearly aimed at persuading the Supreme Court to hear its case. The opinion, presents several possible scenario's of the Act's misuse which are clearly outside of the scope of *Williams*. These include the possibility of movies such as American Beauty or Renaissance paintings violating the Act.[26] In doing this the court gives little credit to the actual possibility of this happening, sending the message that it is attacking

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[23] *Id.* at 1307.

[24] *Id.* at 1308-1309

[25] Id. Williams also had a Booker challenge which the court determined to be harmless error.

[26] *Williams*, 444 F.3d at 1286.

the law in a technical sense and pleading to the Supreme Court to give it the correct interpretation.

As previously stated, the Supreme Court has taken notice and will review the Act. The Supreme Court is faced with a tough choice of upholding free speech in the strictest sense, or giving the government a powerful tool to fight the child pornography problem facing our nation. The Supreme Court will undoubtedly look to the legislative intent of the Act, and on the possible enforcement problems. Hopefully, it will give a clearer definition of child pornography than Justice Stewart's concurring opinion in *Jacobellis v. Ohio* opinion regarding pornography where he stated, "I [will] know it when I see it."[27]

[27] 378 U.S. 184 (1964), the rest of his quote states ""and the motion picture involved in this case is not that." *Id.* Justice Stewart recanted this definition in *Miller v. California*, 413 U.S. 15 (1973).