Laws protecting children against sexual exploitation are based on the government's interest in safeguarding the mental, emotional, and physiological development of minors.[1] Specifically, 18 U.S.C. § 2251(a) recognizes this interest by prohibiting sexual exploitation of a minor for the purpose of producing a "visual depiction."[2] The statute does not include a knowledge requirement regarding a minor's age.[3] Thus, the question becomes, should the court incorporate a reasonable mistake of age defense into the statute to avoid unconstitutional overbreadth and chilling constitutionally protected speech? In March 2009, the United States Court of Appeals for the Fourth Circuit addressed this issue.[4]

In *United States v. Malloy*,[5] the Fourth Circuit upheld a Maryland district court's decision to disallow Michael Malloy, a thirty-three-year-old police officer who videotaped himself having sex with a minor,[6] from offering a reasonable mistake of age defense.[7] By analyzing the statutory text, the legislative history, and related Supreme Court precedent, the court held that the district court was not constitutionally required to integrate the defense into the statute.[8]

In addition to arguing that this defense was constitutionally mandated, the defendant presented three other issues on appeal.[9] Malloy argued that the federal government and the trial court constructively amended his indictment, impermissibly lowering the government's burden of proof;[10] that 18 U.S.C. § 2251(a) as applied to his case exceeded Congress's Commerce Clause power;[11] and that his prison sentence violated the Eighth Amendment.[12] The Fourth Circuit rejected each of Malloy's arguments.[13]

Malloy's friend, a high school football coach, brought the football team's fourteen-year-old female manager to Malloy's home so that he and Malloy could have sex with her.[14] Malloy testified "that he was told that the victim was a 19-year-old college student who had just entered her sophomore year at Bowie

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1. *See* New York v. Ferber, 458 U.S. 747, 758 (1982); United States v. Malloy, 568 F.3d 166, 175 (4th Cir. 2009); United States v. U.S. Dist. Court, 858 F.2d 534, 544 (9th Cir. 1988) (Beezer, J., dissenting) (quoting Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204).
2. 18 U.S.C. § 2251(a) (2006 & Supp. 2009).
3. *Id.*
4. *Malloy*, 568 F.3d at 172.
5. 568 F.3d 166 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1736 (2010).
6. *Id.* at 169.
7. *Id.* at 176.
8. *See id.* at 171–76.
9. *Id.* at 171.
10. *Id.* at 177.
11. *Id.* at 179.
12. *Id.* at 180.
13. *Id.* at 169.
14. *Id.*

State."[15] "Other than asking her how old she was, however, he did not further investigate [her] age."[16] Malloy had sex with the girl and videotaped the encounter with a Sony camcorder.[17] The government charged Malloy "with sexual exploitation of a minor for the purpose of producing a visual depiction in violation of 18 U.S.C. § 2251(a)."[18]

> This charge contains three essential elements: (1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) the visual depiction was produced using materials . . . transported in interstate or foreign commerce.[19]

Before trial, Malloy moved to dismiss the indictment, arguing that it exceeded Congress's power under the Commerce Clause.[20] The district court denied the motion, however, concluding that the possession and use of items manufactured in foreign nations constituted an "economic class of activities that ha[d] a substantial effect on interstate commerce."[21] Also before trial, the government moved to preclude Malloy from offering a mistake of age defense.[22] The district court granted the motion, comparing § 2251(a) to statutory rape law, which does not recognize the defense.[23] At the close of the government's case in chief, Malloy moved for a directed verdict, arguing that the government and the court constructively amended his indictment by incorrectly requiring that he committed the prohibited act "knowingly."[24] The district court denied the motion, concluding that the added term was "superfluous" and that a constructive amendment had not occurred.[25] The jury ultimately found Malloy guilty, and the court sentenced him to the mandatory minimum of fifteen years in prison.[26]

The Fourth Circuit first examined Malloy's argument that "the district court erred by refusing to allow a reasonable mistake of age defense."[27] After reviewing the statute's language, legislative history, and Supreme Court

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15. *Id.* at 170 n.1.
16. *Id.* at 169.
17. The Sony camcorder was manufactured in Japan and the videotape was manufactured in Mexico. *Id.* at 170.
18. *Id.* at 169.
19. *Id.*
20. *Id.*
21. *Id.* at 169–70 (internal quotation marks omitted).
22. *Id.* at 169.
23. *Id.* at 170.
24. *Id.*
25. *Id.* (internal quotation marks omitted).
26. *Id.* at 171.
27. *Id.* at 171–76.

precedent regarding its interpretation, the Fourth Circuit concluded that "knowledge of the victim's age [was] neither an element of the offense nor textually available as an affirmative defense."[28] Next, the court concluded that absence of the defense in the statute's text neither invalidated the law as overbroad nor chilled a substantial amount of protected speech.[29]

According to the First Amendment overbreadth doctrine, a statute is "facially invalid if it prohibits a substantial amount of protected speech."[30] "The government interest in prohibiting criminal conduct must be weighed against the danger of chilling constitutionally protected speech."[31] Determining that a statute is invalid requires that its "overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[32]

In determining whether § 2251(a) was overbroad, the Fourth Circuit reviewed the United States Supreme Court's decision in *New York v. Ferber*,[33] noting that the decision "comprehensively considered child pornography in the context of an overbreadth challenge under the First Amendment."[34] In *Ferber*, the Court recognized that "sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults."[35] Moreover, the Court concluded that "[t]he prevention of sexual exploitation and abuse of children constitute[d] a government objective of surpassing importance."[36] The Fourth Circuit reasoned that the government not only had a compelling interest in preventing sexual exploitation of children generally, but also had "a compelling interest in protecting . . . children who lie[d] about their age."[37] Ultimately, the Fourth Circuit concluded that the "government's interest in safeguarding the physical and psychological wellbeing of children" granted it "greater leeway to regulate child pornography than . . . other areas" and that the statute was not overbroad.[38]

Next, the court examined whether § 2251(a) threatened to chill a substantial amount of protected speech.[39] The court noted that "little legitimate pornography would be chilled because producers of pornography [were] *already* required to authenticate actors' ages."[40] Additionally, the court observed that the

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28. *Id.* at 171–72.
29. *Id.* at 174–76.
30. *Id.* at 174 (quoting United States v. Williams, 128 S. Ct. 1830, 1838 (2008)) (internal quotation marks omitted).
31. *Id.* (citing *Williams*, 128 S. Ct. at 1838).
32. *Id.* (quoting *Williams*, 128 S. Ct. at 1838) (internal quotation marks omitted).
33. New York v. Ferber, 458 U.S. 747 (1982).
34. *Malloy*, 568 F.3d at 174.
35. *Ferber*, 458 U.S. at 758 n.9.
36. *Id.* at 757.
37. *Malloy*, 568 U.S. at 175.
38. *Id.* (citation omitted).
39. *Id.* at 175.
40. *Id.*; *see also* 18 U.S.C. § 2257(b)(1) (2006) (requiring pornography producers to obtain each performer's name and birth date from an "identification document").

type of protected pornography that the statute threatened to chill was a mere subset of adult pornography that used actors who appeared young.[41] The court further explained that the statute would not deter this small group of producers because "most prosecutions for child pornography involve a subject that is not simply 'youthful-looking' but unmistakably a child,"[42] and a producer's opportunity to earn high profits with "youthful-looking subjects who are not unmistakably children" outweighs the "slim chance of prosecution."[43] In light of this analysis, the court concluded that the possibility that "producers of such pornography [would] be chilled, much less substantially chilled, by the unavailability of a mistake of age defense" was unlikely.[44]

Malloy was also unsuccessful in arguing that the district court and the government constructively amended his indictment.[45] The court explained that a constructive amendment, also known as a fatal variance, occurs when "the indictment is altered to change the elements of the offense charged . . . ."[46] A constructive amendment violates a defendant's constitutional rights when "it prejudices the defendant either by surprising him at trial and hindering the preparation of his defense, or by exposing him to the danger of a second prosecution for the same offense."[47]

Here, two months before trial, the government filed a motion indicating the language of the statute and "the voluminous case law supporting the proposition that 'knowingly' [was] not an element of the charge."[48] Moreover, Malloy's response indicated that "he agreed with the government that it did not have to put on any proof with respect to Malloy's knowledge of [the girl's] age."[49] The court thus concluded that Malloy suffered "no surprise, no hindrance in trial preparation, and no prejudice"; he knew that neither § 2251(a) nor the standard jury instructions contained the word "knowingly."[50] Additionally, because Malloy's conviction was not for a "distinct, unindicted offense," he cannot be prosecuted again for the same crime.[51]

The court also determined that § 2251(a) as applied to Malloy's case did not exceed Congress's Commerce Clause power.[52] The Supreme Court has consistently "reaffirmed the long-standing principle that the Commerce Clause empowers Congress to regulate purely local intrastate activities, so long as they

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41. *Malloy*, 568 F.3d at 175–76.
42. *Id.* at 176 (quoting H.R. REP. NO. 98-536, at 3, 7–8 (1984)).
43. *Id.*
44. *Id.*
45. *Id.* at 179.
46. *Id.* at 177–78 (quoting United States v. Randall, 171 F.3d 195, 203 (4th Cir. 1999)) (internal quotation marks omitted).
47. *Id.* at 178 (quoting *Randall*, 171 F.3d at 203) (internal quotation marks omitted).
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 180.

are part of an economic class of activities that have a substantial effect on interstate commerce."[53] Malloy claimed that because he did not know that he was creating pornography, "he was neither a consumer nor supplier of child pornography" and his creation "had a null effect on the national market."[54] The Fourth Circuit clarified, however, that an individual's knowledge regarding whether or not he is participating in an activity that has a "substantial effect on interstate commerce" is irrelevant.[55] The relevant point is simply that he participated at all.[56]

Last, the court upheld Malloy's fifteen-year prison sentence, disagreeing that it constituted cruel and unusual punishment under the Eighth Amendment.[57] Proportionality review under the Eighth Amendment "is not available for any sentence less than life imprisonment without the possibility of parole."[58] Because proportionality review was unavailable to Malloy, the Fourth Circuit affirmed the district court's sentencing.[59]

This case presented a novel issue to the Fourth Circuit. The court's decision not to incorporate a reasonable mistake of age defense into 18 U.S.C. § 2251(a) is unsurprising given the statute's text, its legislative history, and public policy concerns. Nevertheless, the case provides a clear analytical framework and persuasive reasoning to other courts facing the same issue.

Carmel Matin

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53. *Id.* at 179 (quoting United States v. Forrest, 429 F.3d 73, 78 (4th Cir. 2005)) (internal quotation marks omitted).

54. *Id.* at 180 (internal quotation marks omitted).

55. *Id.* (quoting *Forrest*, 429 F.3d at 78) (internal quotation marks omitted).

56. *Id.* (citing *Forrest*, 429 F.3d at 78).

57. *Id.* at 181.

58. *Id.* (quoting United States v. Ming Hong, 242 F.3d 528, 532 (4th Cir. 2001)) (internal quotation marks omitted).

59. *Id.*

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