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Recent Developments: Outmezguine v. State: Absence of Scienter Element under State's Child Pornography Statute Is Not Violative of the First Amendment

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***Outmezguine v. State*:**

ABSENCE OF SCIENTER ELEMENT UNDER STATE'S CHILD PORNOGRAPHY STATUTE IS NOT VIOLATIVE OF THE FIRST AMENDMENT.

In *Outmezguine v. State*, 335 Md. 20, 641 A.2d 870 (1994), the Court of Appeals of Maryland upheld the State's child pornography statute which strictly prohibits the photographing or filming of a minor engaged in an obscene act or sexual conduct. In a five-to-one decision, the court determined that the statute neither required the State to prove scienter nor required a defendant so prosecuted to assert a reasonable mistake of age defense. Accordingly, the court held that the State's child pornography law is not violative of the First Amendment.

Elan Outmezguine was convicted of violating Maryland Annotated Code Article 27 § 419A(c) ("§ 419A(c)"), which provides: "Every person who photographs or films a minor engaging in an obscene act or sexual conduct . . . is subject to [a fine of not more than $25,000 and/or ten years imprisonment.]" Md. Ann. Code art. 27, § 419A(c) (1957). Having denied Outmezguine's motion for judgment of acquittal, the trial judge similarly refused each of the four proposed jury instructions submitted by Outmezguine, which would have required scienter as an element of the offense. Thereafter, the trial judge accepted the jury's finding that Outmezguine unlawfully photographed a 15-year-old high school student. As a result, Outmezguine was sentenced to eight years imprisonment.

Finding no error, the Court of Special Appeals of Maryland affirmed the decision of the trial court. Subsequently, the Court of Appeals of Maryland granted certiorari to consider whether scienter is a required element of the offense of photographing or filming a minor under § 419A(c) and whether Outmezguine waived his right to appellate review on the issue of a mistake of age defense.

Before addressing these questions, however, the court confronted the threshold issue of whether § 419A(c), operating as a strict liability crime, is constitutional under the First Amendment of the United States Constitution. The court first considered § 419A(c) in light of the overbreadth doctrine, a mechanism designed to protect First Amendment expression from laws so broadly written that they would have a chilling effect on individuals taking advantage of such expression.

Acknowledging the potentially chilling effect such a strict liability child pornography statute might have, the court began by balancing the right of freedom of expression against the right of the state to protect children against sexual exploitation. *Id.* at 36, 641 A.2d at 878. In so doing, the court determined that the protected speech in this case would most likely not be chilled if § 419A(c) is indeed interpreted to be a strict liability offense. *Id.* at 36-37, 641 A.2d at 878. Remarking that the statute would only be invalidated if it were found

"substantially overbroad," the court held that it is not an unreasonable burden for a photographer or filmmaker to ascertain the true age of the individual being photographed or filmed. *Id.* at 37, 641 A.2d at 878.

The court likewise determined that the value of the constitutionally protected expression in this case is minimal. *Id.* at 37, 641 A.2d at 879. Such *de minimis* value becomes apparent upon weighing the value of such expression against "the State's unquestionably . . . significant interest in protecting children . . . and in prohibiting the use of children as subjects in pornographic material." *Id.* Essentially, the court held that the resulting minimal chilling effect on producers must necessarily be sacrificed as it is not "substantial". *Id.* at 38, 641 A.2d at 879.

Having considered the strict liability issue, the court further considered whether the First Amendment requires scienter as an element of a § 419A(c) offense and whether a reasonable mistake of age defense must be available to defendants prosecuted under Maryland's child pornography law. After examining each issue, the court found that: 1) the First Amendment does not require scienter as an element of the offense and 2) a reasonable mistake of age defense need not be afforded defendants prosecuted under § 419A(c). *Id.*

In addressing scienter and the imposition of criminal culpability for violations of child pornography laws, the court relied on *New York v. Ferber*, 458 U.S. 747 (1982). *Id.* at 35, 641 A.2d at 877. In *Ferber*, the court emphasized that states have a compelling interest in protecting minors and thus can regulate the production or dissemination of child pornography. *Id.* at 35, 641 A.2d 877-878 (paraphrasing *New York v. Ferber*, 458 U.S. 747 (1982)). Moreover, although the court of appeals held that "criminal responsibility may not be imposed for violations of child pornography laws without some element of scienter on the part of the defendant," it nevertheless provided that "[t]his scienter requirement . . . does not refer to knowledge of the minor's age." *Id.* at 40, 641 A.2d at 880. The court concluded that, rather than the age of the minor, scienter "refers to knowledge of the 'nature and character' of the materials produced . . . [hence], § 419A(c) satisfies this requirement because a defendant photographer must have knowledge that he or she is taking pictures of sexual conduct as defined in § 416." *Id.*

Additionally, upon its analysis of Maryland's child pornography statute under the facts of *Outmezguine*, the court of appeals exercised statutory interpretation to "ascertain and effectuate legislative intent." *Id.* at 41, 641 A.2d at 880. In so construing § 419A(c), the court considered the statute's plain language in its entirety to determine the intent of the legislature in enacting this law. Recognizing that both subsections (b) and (c) of § 419A include a scienter element, the court held that a plain reading of §419A(c) revealed its silence as to whether the State must prove the defendant had knowledge of the minor's age. *Id.* at 41, 641 A.2d at 881. Yet, such an omission "was not without purposeful design." *Id.* at 44, 641 A.2d at 882.

In addressing such purposeful design, the court reasoned that the legislature attempted to impose criminality based upon the perpetrator's active versus passive involvement in the world of child pornography. Impliedly, the court opined that subsection (c)'s attack on individuals who actively exploit children by photographing and/or filming them resulted in the legislature's deliberate and purposeful omission of knowledge of the child's age as an element of the crime.

The court concluded its analysis by considering the appropriateness of the mistake of age defense under § 419A(c). Specifically, the court determined the constitutionality of placing the burden of production on the defendant to raise the issue of mistake of age. The court ultimately held that Outmezguine failed to meet such burden of production and, likewise, failed to elucidate the record in this regard. Specifically, the court reasoned that "Outmezguine's argument that 'I did not know how old she

was' [was] insufficient to generate the issue of reasonable mistake of age in this case." *Id.* at 52, 641 A.2d at 886. Thus, the court held that the issue of reasonable mistake of age was not properly preserved for review.

In upholding § 419A(c), *Outmezguine v. State* takes the dangerous position of permitting criminal convictions under Maryland child pornography law without requiring the State to prove scienter as an element of the offense. Understandably, the court seeks to protect children from the cruelty of sexual exploitation by punishing those who engage in child pornography. Yet, to do so at the expense of impending upon a defendant's First Amendment rights is far more burdensome than the court should allow. Such overbearing interpretation of § 419A(c), as is articulated in *Outmezguine*, renders chilled a defendant's rights under the First Amendment and compels a reformed analysis of the statute. Hence, despite the State's significant interest in protecting children, the court's interpretation of § 419A(c) invites such unnecessary infringement of a defendant's First Amendment rights that *Outmezguine* remains ripe for appeal to the United States Supreme Court.

- *Lisa Y. Johnson*