No. _____

In the
Supreme Court of the United States

DERECK PELLETIER,
Petitioner,

v.

WENDY KELLEY, Director of the Arkansas Department of Correction; and GREG HARMON, Warden of the East Arkansas Regional Unit,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arkansas

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A citizen of another state received a three-hundred-year sentence for sending, in one transaction, a single computer file containing thirty (30) images of child pornography to a law enforcement officer in Arkansas. The citizen plead guilty to thirty (30) counts of violating an Arkansas statute prohibiting the transfer of "any photograph . . . [or] computer program or file" that depicts child pornography. Ark. Code Ann. § 5-27-602(a)(1). The Arkansas Supreme Court held, breaking with nine state supreme courts and its own judicial precedent interpreting similarly worded statutes that a conviction and sentence for each item of contraband transferred did not violate the Fifth Amendment.

The questions presented are:

1. Whether a state supreme court can overcome a defendant's multiplicity challenge under the Double Jeopardy Clause of the Fifth Amendment by classifying a statute as unambiguous without utilizing the cannons of statutory construction; and

2. Whether an unforeseeable judicial enlargement of a criminal statute's unit of prosecution violates due process under the Fifth and Fourteenth Amendments when applied retroactively.

PARTIES TO THE PROCEEDING

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The opinion of the trial court appears at Appendix 16 to the petition and is unpublished.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on December 6, 2018. A copy of that decision appears at Appendix 1. A timely petition for rehearing was thereafter denied on January 31, 2019, and a copy of the order denying rehearing appears at Appendix 18. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Claus of the Fifth Amendment to the Constitution of the United States of America provides, in relevant part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides, in relevant part: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America provides, in relevant part: "[N]or shall any

state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

The relevant provision of Ark. Code Ann. § 5-27-602, titled "Distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child," under which the Petitioner, Dereck Pelletier, was charged provides:

> (a) A person commits distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child if the person knowingly:
>
> > (1) Receives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers, or agrees to offer through any means, including the Internet, any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct; or
> >
> > (2) Possesses or views through any means, including on the Internet, any photograph, film, videotape, computer program or file, computer-generated image, video game, or any other reproduction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.
>
> (b) Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child is a:

(1) Class C felony for the first offense; and

(2) Class B felony for any subsequent offense.

(c) It is an affirmative defense to a prosecution under this section that the defendant in good faith reasonably believed that the person depicted in the matter was seventeen (17) years of age or older.

STATEMENT OF THE CASE

In an online chatroom, the Petitioner, Dereck Pelletier ("Mr. Pelletier"), transferred, in one actus reus, a singular computer file from his home in Texas to an undercover police officer in Faulkner County, Arkansas. The computer file contained 30 images depicting child pornography. Mr. Pelletier was subsequently charged with, and plead guilty to, 30 counts of distributing child pornography. He was sentenced to a term of 10 years' imprisonment for each count, totaling 300 years, six to be served consecutively and 24- concurrently with those six.

Mr. Pelletier challenged his sentence as contrary to the prohibition against double jeopardy under to the Fifth Amendment to the United States Constitution, but the Supreme Court of Arkansas, in contrast with nine other states and its own decisional consistency involving similarly worded statutes, held that the statutory construction using "the word 'any' prior to listing the items covered under the statute and the items listed [as] singular, each photograph that the defendant *possessed* could support an individual charge." App. 7-8.

Mr. Pelletier also challenged his sentence on the ground that the ambiguity of the statute required that it be construed in favor of lenity so as not to run afoul of his due process rights, but the Supreme Court of Arkansas, relying on its holding in *Rea v. Arkansas*, a case decided three years after Mr. Pelletier sent the computer file, found that the statute was not ambiguous and the issue of due process, vis-à-vis the rule of lenity, was avoided. App. 7.

This case poses an opportunity for the Court to resolve two important constitutional questions:

1. Whether a state supreme court can overcome a defendant's multiplicity challenge under the Double Jeopardy Clause of the Fifth Amendment by classifying a statute as unambiguous without utilizing the cannons of statutory construction; and

2. Whether an unforeseeable judicial enlargement of a criminal statute's unit of prosecution violates due process under the Fifth and Fourteenth Amendments when applied retroactively.

A. Factual Background

On August 14, 2012, Mr. Pelletier sent from his home in the State of Texas, via one single electronic transmission, one computer file to an undercover police officer located in Faulkner County, Arkansas. The computer file contained thirty images depicting child pornography. Mr. Pelletier was subsequently charged with, and plead guilty to, thirty (30) counts of Distributing/Possessing or Viewing Matter Depicting

Sexually Explicit Conduct involving a Child in violation of Ark. Code Ann. § 5-27-602(a)(1). He was given separate ten-year sentences for each count, totaling 300 years, six of which to be served consecutively and 24 of which to be served concurrently with the first six. In total, Mr. Pelletier will serve 60 years for one click of the "send" button on his computer.

B. Procedural Background

On August 17, 2012, the State of Arkansas, by Felony Information, charged the Mr. Pelletier with 30 identical counts of Distributing/Possessing or Viewing Matter Depicting Sexually Explicit Conduct Involving a Child in violation of Ark. Code Ann. § 5-27-602. Specifically, that Mr. Pelletier did:

> knowingly sell, procure, manufacture, give, provide, lend, trade, mail, deliver, *transfer*, publish, distribute, circulate, disseminate, present, exhibit, advertise, offer or agree to offer through any means including the internet, *any photograph*, film, videotape, *computer program or file*, computer-generated image, video game, or any other reproduction or reconstruction which depict[ed] a child or incorporate[d] the image of a child engaging in sexually explicit conduct . . . .

Ark. Code Ann. § 5-27-602(a)(1) (emphasis added).

In response to the Prosecuting Attorney's threat of receiving thirty consecutive 10-year sentences, Mr. Pelletier plead guilty to all thirty counts in exchange for six consecutive 10-year sentences on counts one through six 24 separate 10-year sentences to be served

concurrently with the others. On June 17, 2013, Mr. Pelletier was sentenced to serve 60 years in the Arkansas Department of Corrections in accordance with his plea agreement.

Upon his conviction and sentencing, Mr. Pelletier was taken to the Arkansas Department of Corrections facility in Pine Bluff, Arkansas, where he became severely ill and was not permitted to contact his family or his attorney for more than four months. As a result of being held incommunicado, the 30-day window to appeal his conviction expired as did the 90-day window in which to file for post-conviction relief under Ark. R. Crim. P. 37.

On June 30, 2014, Mr. Pelletier filed a pro se Petition for Writ of Error Coram Nobis (and other relief) in the Faulkner County Circuit Court which stated, inter alia, that he had been illegally sentenced in violation of his rights to be free from double jeopardy because he only committed one illegal act, not thirty individual acts.

The Faulkner County Circuit Court, on December 17, 2014, issued an Order denying Mr. Pelletier's Petition for Writ of Error Coram Nobis. On January 8, 2015, Mr. Pelletier appealed the decision of the circuit court to the Supreme Court of Arkansas. The appeal was denied on the ground that *coram nobis* was not the proper method to raise the issues delineated in his Petition.

Mr. Pelletier subsequently filed a Petition for Habeas Corpus in the United States District Court for the Eastern District of Arkansas. The court, tolling the

time during which Mr. Pelletier was ill and unable to contact his family and attorney, rejected the Petition on the ground that it was untimely.

On October 23, 2017, Mr. Pelletier filed a Petition for a Writ of Habeas Corpus in the Circuit Court of Lee County, Arkansas. The Petition was amended on December 15, 2017. The circuit court, on January 11, 2018, issued an Order denying Mr. Pelletier's petition on the ground that the Petition lacked a sufficient showing or probable cause to move forward as required by Ark. Code Ann. § 16-112-103(a)(1). A Motion for Reconsideration was made by Mr. Pelletier on January 9, 2018, and was subsequently denied on February 2, 2018.

On January 31, 2018, Mr. Pelletier filed a timely Notice of Appeal from the circuit court's denial of his Petition for Writ of Habeas Corpus to the Supreme Court of Arkansas. On Appeal, Mr. Pelletier argued that:

(1) The imposition of an illegal sentence may be challenged at any time;

(2) The sentence was illegal because it violated Ark. Code Ann. § 5-1-110, Arkansas' statutory guideline for setting out what conduct constitutes more than one offense;

(3) The sentence was illegal because it violated the Double Jeopardy clauses of the United States and Arkansas constitutions; and

(4) The sentence was illegal because Ark. Code Ann. § 5-27-602 is ambiguous and therefore must be interpreted in favor of lenity for Mr. Pelletier.

The Supreme Court of Arkansas, on December 6, 2018, issued an Opinion in which it agreed that Mr. Pelletier had met his jurisdictional burden and decided the merits of his Petition. App. 5. The court found that the sentence did not violate Mr. Pelletier's protections against being twice put to jeopardy for the same conduct on the ground that its decision in *Rea v. Arkansas*, (Ark. 2015) established that the term "any" followed by individually listed forms of media, each in its singular form, allows for multiple units of prosecution for each individual item listed. 474 S.W.3d 493, 497 (Ark. 2015). This construction, however, was made in 2015, while Mr. Pelletier's conduct occurred in 2012. As a result, he was not aware of this new method of construction in which the court would interpret this statutes and statutes similarly worded.

The lower court failed to utilize any legislative history in its interpretation of the present statutory subsection or in its interpretation of the "possession" subsection of the statute found in *Rea*.

The lower court, when interpreting virtually every similarly worded criminal statute promulgated by the Arkansas Legislature, has consistently found that "any" followed by a list of contraband, could only

sustain a single count per transaction.[1] Additionally, the dissenting justice emphasized Arkansas' codification of the state's double jeopardy standards which reads

> When the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. However, the defendant may not be convicted of more than one (1) offense if . . . [t]he conduct constitutes an offense defined as a continuing course of conduct and the

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[1] *See Dunlap v. Arkansas*, 795 S.W.2d 920, 924-25 (Ark. 1990) (one count of promoting obscene materials where three films and one magazine were sold); *Morrow v. Arkansas*, 1992 WL 61687, No. CACR91-123 (Ark. App. Mar. 25, 1992) (three charges for promoting obscene materials where three separate transactions involving the purchase of 1, 5, and 50 videos, respectively); *Pitts v. Arkansas*, 509 S.W.2d 809, 811 (Ark. 1974) (finding that the simultaneous possession of multiple drugs classified as narcotics constitutes but one offense); *Goodrich v. Arkansas*, 1990 WL 188855, No. CACR 90-55, at 2-3 (Ark. Nov. 21, 1990) (holding that the transfer of drugs to two separate people constitutes two separate offenses but the transfer of the same quantity of drugs to one person constitutes a single offense); *Watson v. Arkansas*, 752 S.W.2d 240, 241 (1988) (holding that two of the three counts of theft by receiving must be dismissed because all the property was received in one single transaction and the crime punishes the transaction not each item stolen); *Yarbrough v. Arkansas*, 520 S.W.2d 227, 237-38 (1975) (holding that two of the three possession of counterfeit check charges must be dismissed because the same evidence was used for each charge and the defendants possessed each item of contraband simultaneously); *McNeely v. Arkansas*, 530 S.W.3d 876, 879 (Ark. App. 2017) (defendant convicted of one count of felon in possession of firearm when three guns were present).

> defendant's course of conduct was uninterrupted, unless the law provides that a specific period of the course of conduct constitutes a separate offense.

Ark. Code Ann. § 5-1-110(a)(5). The Supreme Court of Arkansas has interpreted a continuing course of conduct to mean "a continuous act or series of acts set on foot by a single impulse and operated by an unintermittent force." *Rowe v. Arkansas*, 607 S.W.2d 657, 660 (Ark. 1980).

The majority found no use for invoking Ark. Code Ann. § 5-1-110(a)(5) because, according to its decision in *Rea*, the Legislature intended to punish the conduct of transferring each individual image or computer file as a separate offense, notwithstanding the number of impulses. App. 7.

Mr. Pelletier challenged the usage of the *Rea* decision in his case because the court addressed the unit of prosecution for "possession" in that case while he was charged under the "transfer" subsection of the statute. The court rejected this distinction and found that "for double-jeopardy purposes, there is no distinction between possession under Ark. Code Ann. § 5-27-602(a)(2) and the prohibited activities listed in section 5-27-602(a)(1). App. 7.

Mr. Pelletier also challenged the constitutionality of his sentence on the ground that, because the statute was ambiguous, the statute should have been interpreted in favor of lenity so as not to run afoul of his due process rights. App. 23. The court, again relying on its holding in *Rea*, found that the statute

was not ambiguous, skirting the need to address whether the rule of lenity should apply. App. 7.

The dissenting justice, however, found that: (1) the sentence was illegal because it violated Mr. Pelletier's right to be free from double jeopardy; (2) the Supreme Court of Arkansas has always interpreted statutes with similar wording to sustain only one count per transaction; and (3) the rule of lenity should have been applied in favor of Mr. Pelletier. App. 14.

REASONS FOR GRANTING THE PETITION

This Petition should be granted in order to clarify or create a more precise doctrine of statutory construction that courts will use in determining whether unlawful conduct constitutes multiple criminal acts or one single crime for double jeopardy purposes; to provide a nationally binding rule of criminal statutory interpretation that is consistent with the due process; and to correct the error committed by the lower court when interpreting a statute in such a manner as to avoid federal constitutional jurisprudence.

I. The Arkansas Supreme Court's holding and reasoning conflict with circuit and state decisions, as well as the positions this Court has taken in the past.

The Arkansas Supreme Court, and other state appellate courts, have interpreted criminal statutes by assuming the intent of state legislatures with virtually no explanation or evidence for these assumptions. *See generally, Rea v. Arkansas*, 474 S.W.3d 493, 497 (Ark. 2015). More specifically, these courts are interpreting child pornography statutes in a way that permits

sweeping and severe penalties for, as in the present case, unsuspecting defendants who cannot have imagined that a single act could yield a sentence of several hundred years.

The statutory formula in question in these cases involves a forbidden act, e.g., selling, transferring, giving, possessing, etc., followed by the word "any," followed by a singularly-listed item or a string of singularly-listed items considered to be contraband. *See generally*, Ark. Code Ann. § 5-27-602. This statutory formula is commonly used to outlaw the possession or the transfer of contraband and can be seen in the context of prohibitions against the possession of firearms by felons,[2] statutes outlawing possession of forgery devices,[3] and crimes involving obscene materials.[4]

Until recently, the Supreme Court of Arkansas has found that these, and other similar statutes, can support only one offense per transaction. *See infra* Part II.A.i. Its decision in this case, however, is a drastic turn in the direction of sustaining multiple units of prosecution for single acts of criminal conduct. This shift by the Arkansas court not only conflicts with its own judicial precedent, but also conflicts with the statutory constructions made by this Court, nine other state appellate courts, and both of the federal circuit

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[2] Ark. Code Ann. § 5-73-103.

[3] Ark. Code Ann. § 5-37-209.

[4] Ark. Code Ann. § 5-68-303.

courts that have construed similarly-worded federal statutes. *See infra* Parts I.A-B.

A. This Court has interpreted similarly-worded statutes differently and in favor of the defendant.

This Court's jurisprudence pertaining to the construction of criminal provisions is an enlightening guide for the proper determination of a particular crime's unit of prosecution. In *Bell v. United States*, for example, this Court found that the Mann Act, which proscribed the knowing transport of any woman or girl for the purpose of prostitution, could only sustain one offense regardless of the number of women being transported. 349 U.S. 81, 83 (1955). A statute punishing a person for violating "any of the provisions of section 15 [of the Fair Labor Standards Act]" can only face one charge even though involving several employees. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). In *Ladner v. United States*, this Court held that the wounding of two federal officers by the single shot of a shotgun constituted only one offense under former 18 U.S.C. § 254 (now 18 U.S.C. § 111). 358 U.S. 169, 178 (1958).

Though this Court's interpretation of these and other statutes have been based on various rationales, the general take-away from these cases is that the Court does not simply profess that the statutes lack ambiguity and deny the defendant a fair assessment of the language and legislative intent. To do otherwise would give the judiciary the power to prune and mold laws promulgated by the legislature to best fit its ideals and desires. Furthermore, a failure to look into more

than just the plain language of the statute to determine whether or not a particular provision is ambiguous creates an unpredictable array of criminal statutes and punishments like those seen in Arkansas today.

B. The lower court's decision and reasoning conflict with appellate court decisions from other jurisdictions.

Virtually every jurisdiction in the nation has some statutory provision that criminalizes the use, creation, transfer, and/or possession of child pornography. No statute is exactly the same, but all except for a handful are substantially similar. The appellate courts interpreting these statutes, however, do so very inconsistently and based upon one or more of several different approaches for determining the unit of prosecution. *Compare Wisconsin v. Multaler*, 643 N.W.2d 437 (Wis. 2002) (unit of prosecution based on each decision to download more child pornography), *with Minnesota v. Rhoades*, 690 N.W.2d 135, 140 (Minn. Ct. App. 2004) (unit of prosecution based on the number of victims not the number of images).

i. Decisions of other state supreme courts on similarly-worded state statutes.

There are thirty-two states that have child pornography laws that use the same, or very similar, statutory formula like the one in Arkansas. Of those, nine states have construed their own state's statute either to permit only one unit of prosecution for the

possession of items and/or have applied the rule of lenity because they found the statute to be ambiguous.[5]

Seventeen states, including Arkansas, have interpreted their similarly-worded child pornography statutes to permit multiple punishments for possession of each individual item of contraband,[6] two states have upheld multiple punishments for each different victim depicted,[7] and two states have upheld multiple punishments for each storage unit in which the images

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[5] *See Girard v. Alabama*, 883 So.2d 717 (Ala. 2003); *Connecticut v. Ernesto P.*, 41 A.3d 1115 (Conn. 2012); *Massachusetts v. Rollins*, 18 N.E.3d 670 (Mass. 2014); *Missouri v. Liberty*, 370 S.W.3d 537, 548, 553 (Mo. 2012); *Castaneda v. Nevada*, 373 P.3d 108 (Nev. 2016); *New Mexico v. Olsson*, 324 P.3d 1230, 1231, 1235, 1239 (N.M. 2014); *North Carolina v. Smith*, 323 N.C. 439, 373 S.E.2d. 435 (1988); *Tennessee v. Pickett*, 211 S.W.3d 696, 706 (Tenn. 2007); *Washington v. Furseth*, 233 P. 3d 902 (Wash. 2010).

[6] *See Rea v. Arkansas*, 474 S.W.3d 493, 497 (Ark. 2015); *Arizona v. McPherson*, 269 P.3d 1181, 1184-85 (Ariz. App. 2012); *Colorado v. Renander*, 151 P.3d 657, 660 (Colo. App. 2006); *Fink v. Delaware*, 817 A.2d 781, 788 (Del. 2003); *Georgia v. Williams*, 818 S.E.2d 256 (Ga. 2018); *Idaho v. Gillespie*, 316 P.3d 126, 133 (Idaho Ct. App. 2013); *Illinois v. Sedelsky*, 997 N.E.2d 757 (Ill. Ct. App. 2013); *Kansas v. Donham*, 29 Kan. App. 86, P. 3d 750 (2001); *Williams v. Kentucky*, 178 S.W.3d 491, 495 (Ky. 2005); *Nebraska v. Mather*, 646 N.W.2d 605, 610-11 (Neb. 2002); *New Hampshire v. Cobb*, 732 A.2d 425 (N.H. 1999); *New York v. Kent*, 19 N.Y.3d 290, 304 (N.Y. 2012); *Ohio v. Starcher*, 5th Dist. Stark No. 2015CA00058, 2015-Ohio-5250, ¶35 (2015); *Pennsylvania v. Davidson*, 938 A.2d 198 (2007); *Vineyard v. Texas*, 958 S.W.2d 834, 840 (Tex. Crim. App. 1998); *Utah v. Morrison*, 31 P.3d 547, 555-56 (Utah 2001); *In Re Kirby*, 58 A.3d 230 (Vt. 2012);

[7] *See Louisiana v. Fussell*, 974 So.2d 1223 (La. 2008); *Minnesota v. Rhoades*, 690 N.W.2d 135, 140 (Minn. Ct. App. 2004).

were held.[8] Very few states have addressed the transfer sections of their statutes, but those that have generally charge one count per act of transmission or download.[9]

ii. Decisions of federal circuit courts on similarly-worded federal statutes.

Federal law prohibits "knowingly receiv[ing] . . . any visual depiction . . . of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a)(2). Thus far, only two federal circuits have addressed the unit of prosecution for this statute. The United States Circuit Court for the Second Circuit has found that the word "any" has been found ambiguous and therefore the rule of lenity must be applied in favor of the defendant charged under this statute and that he be charged with only one count per single transaction. *United States v. Polouizzi*, 564 F.3d 142, 155-58 (2d Cir. 2006). In *United States v. Buchanan*, the United States Circuit Court for the Fifth Circuit found that the burden was on the state to show that each of the four images had been separately received in order to sustain four separate convictions. 485 F.3d 274, 282 (5th Cir. 2007).

In both the state courts and the federal circuits, there is ample indication that the interpretation of criminal statutes is vexing. The inconsistencies in results can be attributed to many things, the most

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[8] *See California v. Hertzig*, 156 Cal. App. 4th 398, 67 Cal. Rptr. 3d 312, 316 (2007); *Brown v. Oklahoma*, 177 P.3d 577 (Okla. 2008).

[9] *See New York v. Keyes*, 75 N.Y.2d 343 (N.Y. 1990); *Wisconsin v. Multaler*, 643 N.W.2d 437 (2002); *South Dakota v. McKinney*, 699 N.W.2d 460, 468 (S.D. 2005).

relevant of which is likely the approach each judicial body takes for determining the unit of prosecution when the text of the statute is not unambiguous. Generally, "[c]ourts have employed four approaches for ascertaining a statute's unit of prosecution: (1) examining legislative intent, (2) looking to criminal impulse, (3) applying an 'act'-based approach, and (4) analyzing the crime based on time units."[10] Because there is no mandated test for determining multiplicity, some courts, like the court below, are able to race through important maxims of statutory construction in order to avoid the possibility of issuing opinions that might be inconsistent with this Court's jurisprudence.

II. The Arkansas Supreme Court's unforeseeable interpretation and retroactive application of the law at issue in this case raises important constitutional questions.

This case presents the Court with the opportunity to clarify the multiplicity doctrine and to bring a much needed, nationally binding rule of law to the double jeopardy analysis and statutory construction. The current procedures for interpreting criminal statutes and units of prosecution are in disarray and the emergence of issues of multiple punishment, like those presented here, are both "vexing and recurring." *Gore v. United States*, 357 U.S. 386, 393 (1958) (Warren J., dissenting).

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[10] Jeffrey M. Chemerinsky, Note, *Counting Offenses*, 58 Duke L.J. 709, 711 (2009).

A. The lower court's construction and application of the law in question is in contrast with this Court's double jeopardy jurisprudence.

The Double Jeopardy clause of the Fifth Amendment states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend V. In *Benton v. Maryland*, this Court applied the Double Jeopardy Clause to the states through the Fourteenth Amendment. 395 U.S. 784, 794 (1969).

This Court has held that multiple charges for the same conduct violates the prohibition against double jeopardy. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). When multiple counts are based on the same statutory provision, the legislature's intended unit of prosecution must be ascertained so as not to violate double jeopardy. *See Bell v. United States*, 349 U.S. 81, 83-84 (1955). The starting point for determining the unit of prosecution is by looking at the text of the statute. *See* id. at 82-83. If the language of the statute does not make the statute any less ambiguous, the next step is to look at the statutory scheme to determine whether, in connection with the other words of the act, the unit of prosecution can be ascertained. *See United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). Finally, if the unit of prosecution remains questionable, a look into the legislative history for guidance is warranted. *Id.* If there is nothing in the history to assist in the determination, this Court has said that the "ambiguity should be resolved in favor of lenity." *Bell* at 83.

In contrast with this method of interpretation, the lower court analyzed the issue of double jeopardy by stating that its decision in *Rea v. Arkansas*, "sets out that the legislature intended the number of offenses to be based on the number of photographs, not the activity undertaken with the photographs." App. 7. As previously mentioned, the *Rea* decision was decided three years after Mr. Pelletier's conduct.

Turning to the lower court's opinion in *Rea*, the court began its analysis into the unit of prosecution for the possession of child pornography by saying, "As pertinent here, the statute prohibits the possession of 'any' 'photograph' and 'any' 'videotape.' In our view, the plain language of the statute demonstrates that the General Assembly unambiguously intends that each act of possession is a discrete and independent offense." 474 S.W.3d 493, 497 (Ark. 2015). The court then supports its decision with the opinions of other state supreme courts. *Id.* at 497-98.

The lower court in both the current case and in *Rea* failed to consider the plain meaning of the word "any, which has multiple meanings and, in fact, "has typically been found ambiguous in connection with the allowable unit of prosecution, for it contemplates the plural, rather than specifying the singular." *United States v. Polouizzi*, 564 F.3d 142, 147 (2d Cir. 2009) (quoting *United States v. Coiro*, 922 F.2d 1008, 1014 (2d Cir. 1991)). It also failed to take into account the statutory scheme which clearly separates the possessory and transfer sections of the statute, suggesting that the unit of prosecution for possession of child pornography might be different than under the

transfer subsection. *Compare New York v. Kent*, 19 N.Y.3d 290, 304 (2012) (134 total charges for possession), *with New York v. Keyes*, 75 N.Y.2d 343 (1990) (one charge per transaction).

Because of the shortcomings in its analysis, the lower court determined that Mr. Pelletier's 60-year prison sentence for sending a single file on only one occasion did not violate double jeopardy. This conclusion is a miscarriage of justice that must be remedied and prevented in the future.

B. The lower court's decision goes so far beyond a fair reading of the statute that it constitutes a denial of due process.

This Court has held that the Due Process Clause prohibits the government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Under this doctrine, laws that fix permissible sentences must, with sufficient clarity, specify the range of available sentences. *United States v. Batchelder*, 442 U.S. 114, 123 (1979). This Court has struck down criminal statutes under the Due Process Clause where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. *Bouie v. City of*

Columbia, 378 U.S. 347, 353-54 (1964) (quoting Hall, General Principles of Criminal Law (2d ed. 1960), at 61).

In determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which he is entitled, the standards of state decisional consistency are applicable. *Bouie*, at 354. When applied retroactively to criminal liability for past conduct, the state court construction effectively deprives a defendant of due process. *Id*. at 354-55.

i. The lower court's construction of the statute directly contradicts its prior decisional consistency.

As previously noted, the Supreme Court of Arkansas has consistently interpreted similarly-worded criminal statutes to sustain but one offense per transaction. *See Pitts v. Arkansas*, 509 S.W.2d 809, 811 (Ark. 1974) (holding that simultaneous possession for delivery of drugs in the same classification constitutes only one offense, but simultaneous possession of two different classifications of drugs constitutes multiple offenses); *Yarbrough v. Arkansas*, 520 S.W.2d 227, 237-38 (1975) (holding that two of three possession of counterfeit check charges must be dismissed because the same evidence was used for each charge and each item was possessed simultaneously.); *Watson v. Arkansas*, 752 S.W.2d 240, 241 (1988) (holding that two of three counts of theft by receiving must be dismissed because all the property was received in one transaction); *Perkins v. Arkansas*, 767 S.W.2d 514, 516-17 (1989) (upholding two theft of property charges

though the property was stolen at the same time because the established intent was to steal from two different persons); *Dunlap v. Arkansas*, 795 S.W.2d 920, 924-25 (1990) (defendant charged with one count of promoting obscene material when transferring 3 films and one magazine); *Morrow v. Arkansas*, 1992 WL 61687, No. CACR91-123 (Ark. App. Mar. 25, 1992) (defendant charged with three counts of promoting obscene material after three sales of one, five, and fifty videos, respectively).

As these cases show, Arkansas has always followed the single impulse rule, i.e., "when the impulse is single, but one indictment lies, no matter how long the action may continue." *McLennan v. Arkansas*, 987 S.W.2d 668, 671 (1999). In fact, the Arkansas statute regarding multiple offense prosecutions reads:

> When the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. However, the defendant may not be convicted of more than one (1) offense if . . . [t]he conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that a specific period of the course of conduct constitutes a separate offense.

Ark. Code Ann. § 5-1-110(a)(5).

For double jeopardy purposes, the test Arkansas uses to determine whether a continuing offense is involved is "a continuous act or series of acts set on foot

by a single impulse and operated by an unintermittent force." *McLennan*, at 88. The test to determine if a situation involves a continuing offense is "whether the individual acts are prohibited, or the course of action which they constitute; if the former, then each act is punishable separately; if the latter, there can be but one penalty." *Britt v. Arkansas*, 549 S.W.2d 84, 86 (1977).

The statute at bar prohibits the transfer of "any photograph . . . [or] computer program or file" that depicts child pornography. Ark. Code Ann. § 5-27-602(a)(1). The statute outlaws the act of transferring any of the items listed. In this context, "any" can mean "one or another taken at random; every; one, some, or all indiscriminately of whatever quantity; one or more; all; a or some without reference to quantity or extent; etc." Merriam-Webster, http://www.merriam-webster.com/dictionary/any.

If the General Assembly meant for this statute to punish each image transferred, it could have used those words to give that affect. The Legislature failed to fix the punishment clearly and without ambiguity, and the Arkansas Supreme Court should have resolved the ambiguity in favor of Mr. Pelletier.

ii. The unforeseeable interpretation and retroactive application of the statute denied Mr. Pelletier due process.

In 2012, when Mr. Pelletier clicked the "send" button and transferred the computer file containing thirty images. He could not have foreseen that the language of the statute with which he would be

charged permitted a punishment in such excess. The lower court's construction of Ark. Code Ann. § 5-27-602(a)(1) makes his single act just as severe as another who might have sent one image every day for thirty days. Where Mr. Pelletier had but one impulse and this hypothetical offender thirty separate impulses, they could be sentenced the same.

Even though the average person is not likely to consider the text of the law before committing a crime, however, this Court has said that a fair warning should be given to the world. *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Mr. Pelletier, and other defendants who have suffered from similar interpretation of similar statutes in other jurisdictions, did not have fair notice of the severity of his actions before he committed them. State courts better, stricter guidance for interpreting laws and whether they are single offense crimes or multiple offense crimes.

III. The decision of the Supreme Court of Arkansas is wrong.

The decision by the Arkansas Supreme Court to sustain Mr. Pelletier's sixty-year jail sentence for a single transfer of thirty images of child pornography is wrong and should be reversed. Not only did the court broaden the intensity and severity of the crime charged, it applied that interpretation to Mr. Pelletier without proper notice pursuant to the due process clauses of the Fifth and Fourteenth Amendments.

There is a clear divide amongst the several states and circuits as to whether the statutory formula at issue here is ambiguous and whether their individual

statutes can sustain multiple units of prosecution or only a single unit. As previously mentioned, one of the reasons for the nationwide ambiguity of criminal statutory interpretation is the lack of a clear and precise methodology binding on all jurisdictions. The methodology could require that statutes be interpreted as to their legislative intend, but, there are issues with reliability and, according to the late Justice Scalia, "opinions using legislative history are often curiously casual, sometimes even careless, in their analysis . . . . [I]t is simply hard to maintain a rigorously analytical attitude, when the point of . . . inquiry is the fairyland in which legislative history reflects what is in 'the Congress's mind'" Chemerinsky, at 715 (quoting *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280-81 (1996)).

Another solution might be to focus on the criminal impulse as the unit of prosecution. This approach, however, can be unreliable in that it is difficult to define and even more difficult to distinguish between each impulse, especially when we have a sleuth of different impulses guiding our actions at any moment in time. *See* Chimerinsky, at 721. Instead of measuring impulses, another framework sometimes used is the measurement of the number of acts committed. This, like impulses, will be difficult to measure as well. In the case of battery, for example, would a criminal defendant be charged with each throw of a punch while on a rampage, or would he be charged only once with battery? Under an act-based approach, the unit of prosecution might increase dramatically and unnecessarily.

All of these possibilities, and the additional insights this great Court might have in mind could be put into a methodological approach that could solve the issue of unwitting citizens whose actions could land them in jail for six months or in prison for 300 years, depending on the whims of a particular state's appellate court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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