No._____

IN THE SUPREME COURT OF THE UNITED STATES

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DENIS SALGUERO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's convictions for receipt and possession of child pornography violated the Double Jeopardy Clause of the Fifth Amendment.

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Petitioner Denis Salguero respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit affirmed petitioner's convictions for distribution, receipt, and possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(2), (b)(1), (a)(5)(B), (b)(2), rejecting petitioner's argument that his convictions for both receipt and possession of child pornography violated the Double Jeopardy Clause of the Fifth Amendment. *See United States v. Salguero*, No. 16-50329 (9th Cir. 2018). The Ninth Circuit's memorandum is attached to this petition as Appendix A.

JURISDICTION

On September 4, 2018, the Ninth Circuit filed its memorandum affirming Petitioner's convictions. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb…"

STATEMENT OF THE CASE

After receiving a tip about child pornography being uploaded to an online website, law enforcement executed a search warrant at petitioner Salguero's home. They found Salguero there and seized his laptop, which contained child pornography. According to agents, Salguero confessed to possessing and receiving child pornography on his computer. The government ultimately charged Salguero in a 19-count indictment with multiple offenses related to the possession, receipt, and distribution of child pornography. Count 18 charged Salguero with receipt of child pornography, "between on or about May 20, 2009 and July 2, 2010" into his "email account demonios13_6@hotmail.com," in violation of 18 U.S.C. §§ 2252A(a)(2), (b)(1). Appellant's Excerpts of Record ("ER") at 672. Count 19 charged Salguero with possession of child pornography "on or about July 20, 2010 in a folder on his laptop computer entitled 'My Received Files,'" in violation of 18 U.S.C. §§ 2252(a)(5)(b), (b)(2). ER 673. The matter proceeded to trial.

At trial, the government argued extensively that the images that supported the possession count—those saved in the "My Received Files" folder—arrived there through Salguero's earlier email exchanges with third parties, which accounted for the evidence that supported the receipt count. In its opening statement, the government told the jury that "you will also hear the testimony of this computer

expert discuss how he found on that laptop computer a file folder associated with a chat program called 'Windows Live Messenger' that was linked to the demonios13_6@hotmail.com email address." ER 562.

The government returned to this argument in its closing statement, noting that "next there's the receipt of child pornography, this just means receiving the emails containing child pornography. And that's Count 17. And finally there's the possession count, which is the last count in the indictment, and that's keeping the emails—I apologize, that's a typo, keeping the files on his laptop in his my received files folder." ER 562. The government further argued: "where did the my received files come from? Well, the my received files are linked to defendant's demonios13_6@hotmail.com Windows Live messenger." ER 217. The government ended its plea to the jury for a conviction on Count 19 by arguing: "And what actually makes the files from the my received files to demonios13_6@hotmail.com in addition to the fact that the chat is linked to this folder? Well, defendant actually emails some of the files that are stored in the my received files." ER 218.

Finally, during its rebuttal argument, the government argued to the jury that "some of the attachments to emails were also found in the my received files." ER 88 (emphasis provided). It further argued vigorously that "the emails, with the Yahoo! groups, with the my received folders, everything hangs together…" Id. Further, the

evidence at trial had shown that the files in the "My Received Files" had been downloaded between March 30 and July 7, 2010 (Government's Excerpts of Record at 13), which is the same timeframe in which the government alleged Salguero received images and video via email. *See* ER 691.

But the district court did not instruct the jury that it had to find separate conduct before it could convict Salguero for both receipt and possession of child pornography. *See* ER 14-66. And the jury did not receive a special verdict form requiring it to make a finding to that effect on those counts. Predictably, after the government's repeated arguments about the connection between Salguero's email accounts and the images on his hard drive, the jury returned a note shortly after deliberations began. It stated: "the jury wants to know if the pornography was found on the actual physical hard drive." ER 67-71. After consulting with the parties, the Court answered by telling the jury that "you have heard all the evidence in this case, and I am going to refer you to the evidence and the jury instructions as a whole." ER 112. Shortly after, the jury returned guilty verdicts on all 19 counts. ER 8-13. The district court ultimately sentenced Salguero to 145 months in custody.

On appeal, Salguero argued that the district court erred by entering convictions against him for both receipt and possession of child pornography that

were based on the same conduct. He reasoned that the Double Jeopardy Clause of the Fifth Amendment protects a defendant from being convicted for both receipt and possession of child pornography unless each conviction is supported by conduct separately alleged in the indictment and proven to the jury beyond a reasonable doubt. Moreover, Salguero argued that the jury must be either properly instructed in that regard and/or reach a special verdict for each offense. He noted that throughout his trial the government had repeatedly argued that the images found in Salguero's email and the images found in his hard drive all resulted from the same course of conduct, and the district court did not properly instruct the jury, nor did it require a special verdict finding in response. He reasoned that his convictions on both the receipt and possession counts amounted to plain error.

The Ninth Circuit rejected Salguero's arguments and affirmed his convictions. The Court held, *inter alia*, that "the indictment in this case specified that Count 18—the receipt charge—was based on material received into Salguero's email inbox, while Count 19—the possession charge—was based on material possessed in a particular file folder on Salguero's hard drive that he had downloaded from an online chat platform. Accordingly, the government presented separate evidence, corresponding to the appropriate medium, to support each charge. Even if some of the same images were found in Salguero's email and on his hard drive, the evidence

makes clear that the images Salguero affirmatively downloaded to his hard drive were separate from the images he received as email attachments." Appendix A at 4-5.

This petition follows.

REASON FOR GRANTING THE PETITION

Review is warranted because convictions for possession and receipt of child pornography when based on the same evidence violate the Double Jeopardy Clause of the Fifth Amendment.

The Fifth Amendment's prohibition on double jeopardy protects against being punished twice for a single criminal offense. U.S. Const. amend. V.; *Brown v. Ohio*, 432 U.S. 161, 165 (1977). When multiple sentences are imposed in the same trial, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown*, 432 U.S. at 165. When a defendant has violated two different criminal statutes, the double jeopardy prohibition is implicated when both statutes prohibit the same offense or when one offense is a lesser included offense of the other. *Rutledge v. United States*, 517 U.S. 292, 297 (1996).

Circuit authority is in accord that possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) is a lesser included offense to receipt of child pornography

under 18 U.S.C. § 2252A(a)(2). *See e.g. United States v. Davenport*, 519 F.3d 940, 947 (9th Cir. 2008); *United States v. Benoit*, 713 F.3d 1, 16 (10th Cir. 2013); *United States v. Ehle*, 640 F.3d 689, 694-695 (6th Cir. 2011). As such, "while the government can indict a defendant for both receipt and possession of sexually explicit material, entering judgment against him is multiplicitous and a double jeopardy violation when it is based on the same conduct." *See United States v. Schales*, 546 F.3d 965, 978 (9th Cir. 2008) Indeed, "if the government wishes to charge a defendant with both receipt and possession of material involving the sexual exploitation of minors based on separate conduct, it must distinctly set forth each medium forming the basis of the separate counts." *Schales*, 546 F.3d at 980.

That did not happen here. Count 18 of the indictment charged Salguero with receiving child pornography into his email account during a 14-month period beginning in May of 2009 and ending in July of 2010. ER 691. Count 19 charged Salguero with possessing, on or about July 20, 2010, "in a folder on his laptop computer entitled 'My Received Files,' at least one image of child pornography." ER 692. The government merged these offenses at trial by arguing repeatedly that the images exchanged via email and those saved in the computer's hard drive should be considered as equal conduct. Indeed, in its rebuttal argument, the government argued vigorously that, "remember how I told you at the beginning of this trial that

everything tied together through demonios13_6. I think during the course of trial you've heard that that's true, that with the emails, with the Yahoo! groups, with the my received folders, everything hangs together. But it doesn't hang together just through the single email address… everything also hangs together through the laptop computer. That's defendant's laptop computer that they seized from his house. All of the evidence that you heard about the conduct—the emails, the Yahoo groups, the my received folders—all of that was found on that laptop." ER 88. The government continued: "You also heard about how everything hung together through the crossover in the attachments. My co-counsel walked you through that yesterday, that the same attachments, not—some of the same attachments in the my received folder were found uploaded to Yahoo! groups, and some of the attachments to emails were also found in the my received files." *Id.*

Because the jury was not asked to return a special verdict on these counts, it is impossible to determine which images it found had been received and which had been possessed for the purpose of a Double Jeopardy analysis. Compounding this error, the district court did not instruct the jury that a conviction on these counts could not be based on the same conduct, giving only a general "separate consideration of multiple counts" instruction that did not adequately protect Salguero's Fifth Amendment rights. ER 40. Indeed, the record supports a finding

that the jury was not properly instructed or prepared to distinguish between the receipt and possession offenses, with the jurors sending a note during deliberations asking whether any images had been found on Salguero's hard drive. With the jury focused only on the contents of Salguero's hard drive, they could not properly evaluate the separate conduct required to support convictions for both the receipt and possession offenses.

And the error was plain. Circuit authority is in accord that "concurrent sentences for both receipt and possession of material involving the sexual exploitation of minors constitute plain error" and that this affects "substantial rights by imposing on [a defendant] the potential collateral consequences of an additional conviction." *United States v. Schales*, 546 F.3d 965,980 (9th Cir. 2008). *See also Ehle*, 640 F.3d at 699 ("[T]he Supreme Court's holding in *Ball v. United States*—that dual convictions for possessing and receiving the same firearm violate the Double Jeopardy clause—is sufficiently analogous to the instant matter such that the constitutional error in Ehle's two child-pornography convictions is quite 'plain.'"); *United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008), and *United States v. Giberson*, 27 F.3d 882 (9th Cir. 2008) (finding plain error in similar circumstances).

Here, the record shows that Salguero's substantial rights, along with the fairness and integrity of the proceedings, were affected due to the failure to require

the jury find separate conduct before returning convictions on these counts. Shortly after deliberations began, the jury returned a note stating: "the jury wants to know if the pornography was found on the actual physical hard drive." This note suggests that the jury gave substantial weight to the government's arguments that convictions on all counts could be supported by the same evidence, despite the law requiring separate conduct for convictions on the receipt and possession offenses. Salguero suffered substantial prejudice accordingly. The Ninth Circuit erred in finding to the contrary. Certiorari should be granted to preserve Salguero's Fifth Amendment rights.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: November 29, 2018

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APPENDIX

A

NOT FOR PUBLICATION

FILED

SEP 4 2018

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DENIS AVILES SALGUERO, AKA Alfredo Aviles-Salguero, AKA Denis Alfredo Aviles-Salguero, AKA Demonios13_6, AKA Aviles Salguero Dennis, AKA Davis A. Aviles Salguero, AKA Denis A. Salguero, AKA Denis Alfredo Aviles Salguero, Defendant-Appellant.	No. 16-50329 D.C. No. 2:11-cr-01156-FMO-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Argued and Submitted August 28, 2018
Pasadena, California

Before: BYBEE and WATFORD, Circuit Judges, and HERNANDEZ,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Marco A. Hernandez, United States District Judge for the District of Oregon, sitting by designation.

Denis Aviles Salguero appeals from his convictions for distribution, receipt, and possession of child pornography in violation of 18 U.S.C. § 2252A(a)(2), (b)(1), (a)(5)(B), (b)(2). We affirm, but remand to correct the judgment.

1. Salguero argues that the district court erred in seating four jurors—Jurors 7, 12, 16, and 21—who indicated that they had trouble speaking, reading, writing, or understanding English. Juror 7 was not in fact seated on the jury; for reasons not disclosed in the record, she was absent on the second day of *voir dire* when the jury was empaneled, and another juror took her place. Jurors 12 and 16 were seated without objection. The district court's decision not to excuse those jurors for cause was not plain error, as each engaged in colloquies with the court and indicated their ability to sufficiently understand English. Salguero requested that Juror 21 be excused for cause, but the district court did not abuse its discretion in declining that request. The transcript reflects that Juror 21 was able to understand and answer questions in English, and does not provide a basis to conclude that the court erred in determining that he was qualified to serve. *See People of Territory of Guam v. Palomo*, 511 F.2d 255, 258–59 (9th Cir. 1975).

2. Next, Salguero argues that the district court's conducting a portion of *voir dire* at sidebar violated his right to be present under Federal Rule of Criminal Procedure 43 and the Fifth Amendment, as well as his right to a public trial under the Sixth Amendment. Because Salguero failed to object to his absence from the

sidebar, we review only for plain error. *See United States v. Rivera*, 682 F.3d 1223, 1232 (9th Cir. 2012) (public trial right is forfeited if not asserted in a timely fashion); *United States v. Sherwood*, 98 F.3d 402, 407 (9th Cir. 1996) (right to be present is forfeited where defendant failed to indicate that he wished to be present during sidebar *voir dire*); *see also United States v. Olano*, 507 U.S. 725, 731–32 (1993) (plain error review applies where defendant forfeits a claim by failing to raise it in a timely manner). Even assuming the sidebar amounted to a violation, there was no plain error. The court placed no restrictions on Salguero's ability to confer with counsel, and Salguero does not allege that his presence would in any way have affected the composition of the jury. *See United States v. Reyes*, 764 F.3d 1184, 1192–93 (9th Cir. 2014); *United States v. Fontenot*, 14 F.3d 1364, 1369–70 (9th Cir. 1994).

3. The district court did not err in ending the peremptory strike process after the prosecution and the defense passed on their turns in succession. In *United States v. Turner*, 558 F.2d 535 (9th Cir. 1977), we explained that the district court's broad discretion in setting the procedure for peremptory challenges is subject to two limitations. First, "the defendant must be given adequate notice of the system to be used," and second, that system "must not unduly restrict the defendant's use of his challenges." *Id.* at 538. Neither limitation was violated here. The district court explained in advance that if both parties passed on their

turns in succession, no further strikes would be allowed. That procedure did not unduly restrict Salguero's use of his challenges, because no jurors were added to the panel whom Salguero did not have a chance to strike. *See id.* ("Our holding does not prevent a district judge from forbidding a challenge to any juror who was a member of the panel at the time the jury was accepted."); *see also United States v. Yepiz*, 685 F.3d 840, 846 (9th Cir. 2012).

4. Salguero's convictions for receipt and possession of child pornography do not violate the Double Jeopardy Clause of the Fifth Amendment. Possession of child pornography is a lesser included offense of receipt of child pornography, *United States v. Davenport*, 519 F.3d 940, 947 (9th Cir. 2008), but double jeopardy is not implicated where separate conduct underlies each offense, *United States v. Johnston*, 789 F.3d 934, 938 (9th Cir. 2015). "If the government wishes to charge a defendant with both receipt and possession of [child pornography] based on separate conduct, it must distinctly set forth each medium forming the basis of the separate counts." *United States v. Schales*, 546 F.3d 965, 980 (9th Cir. 2008). The indictment in this case specified that Count 18—the receipt charge—was based on material received into Salguero's email inbox, while Count 19—the possession charge—was based on material possessed in a particular file folder on Salguero's hard drive that he had downloaded from an online chat platform. Accordingly, the government presented separate evidence, corresponding to the appropriate

medium, to support each charge. Even if some of the same images were found in Salguero's email and on his hard drive, the evidence makes clear that the images Salguero affirmatively downloaded to his hard drive were separate from the images he received as email attachments.

5. Finally, we note that the judgment states that the conviction on Count 18 was for possession of child pornography, when in fact that count charged receipt. We remand to the district court with instructions to correct the judgment to reflect that the conviction on Count 18 was for receipt of child pornography, not possession. *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding *sua sponte* to correct the judgment).

AFFIRMED; REMANDED solely to correct the judgment.