No. _____

In The
Supreme Court of the United States

JAMES McCULLARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether the proof at trial which established that petitioner was only engaged in private, closed communications – either one-to-one, or among a small group of twelve or fewer peers – rendered his conduct within §2251(d)'s advertising ambit.

PARTIES AND RULE 29.6 STATEMENT

James McCullars, an individual, was prosecuted criminally in the United States District Court. His co-defendant, individually, was John D. Gries. Both, as defendants-appellants, directly appealed to the United States Seventh Circuit Court of Appeals. Mr. Gries is no longer a party. In this court, James McCullars, individually, is Petitioner. In the district court, court of appeals, and in this court, the opposing party is the United States of America.

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Following Petitioner's trial in the federal district court, he was convicted of Conspiracy to Distribute and Receive Child Pornography, Conspiracy to Sexually Exploit a Child, and Child Exploitation Enterprise, he received the maximum punishment of: 20 years on Count One, 30 years on Count Two, and life on Count Three (Appendix D). A direct appeal was taken. Two issues were raised in the U.S. Seventh Circuit Court of Appeals: (1) the insufficiency of evidence to support Mr. McCullars' conviction on Counts Two and Three; and (2) his convictions and sentences on all three counts violated Double Jeopardy. The Seventh Circuit issued an Opinion on September 20, 2017 (Appendix C). Thereafter, a Corrected Opinion was entered on December 7, 2017 (Appendix B). The court of appeals found the evidence sufficient to support the jury's Count Two and Three guilty verdicts, but reversed and remanded the case with instructions for the trial court to "vacate the sentences on either the greater or lesser counts and enter new judgments accordingly." (Appendix B-11). The case, in line with the court of appeals directive, returned to the trial court for a determination of which of the three counts would stand and what sentence would be imposed.

On remand, as he had on appeal, Mr. McCullars objected to any judgment of conviction on Count Three. Back in the trial court, following the entry of memoranda of the parties, and a hearing, the court entered an Amended Judgment on September 25, 2018, finding James McCullars guilty of Count Three. Vacating his

previous sentence of life imprisonment, Mr. McCullars was sentenced to 30-years on Count Three. (Appendix A).

STATEMENT OF JURISDICTION

The trial court's jurisdiction was based on 18 U.S.C. §3231, which confers upon federal district courts exclusive jurisdiction over federal criminal prosecutions. Jurisdiction of the United States Seventh Circuit Court of Appeals was based on 28 U.S.C. §1291. Final Judgment was entered on September 25, 2018. This Court's jurisdiction rests upon Rule 13 of the Rules of the Supreme Court of the United States and 28 U.S.C. §1254(1).

> **This petition for writ of *certiorari* to review the December 7, 2017, judgment of the court of appeals with respect to sufficiency of evidence to convict is timely filed (Rule 13) as it is filed with the Clerk of this Court within 90-days after entry of final judgment.**

Appeals are not allowed "from any decision which is tentative . . . or incomplete." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Here, despite the decision of the court of appeals finding the evidence sufficient to convict on Counts Two and Three, that same decision Reversing and Remanding with Instructions for the trial court to enter judgment on either Count One, Two or Three, effectively *tolled* the running

of the 90-day period in which to file a petition for a writ of *certiorari*. A subsequent trial court decision – entering judgment on Count One, and therefore vacating Counts Two and Three – would have rendered an appeal on the question of the sufficiency of evidence on Count Three *moot*. Here, due to the compelling and unique procedural history of this case, the 90-day tolling period was therefore suspended from the date of the court of appeals decision – December 7, 2017 – to the date of the final Amended Judgment of the trial court – September 25, 2018. James McCullars has timely and consistently pursued all relief to which he is entitled on review in the courts. This petition is therefore timely filed – within 90 days – under Rule 13 of the Rules of the Supreme Court of the United States.

STATUTE INVOLVED

18 U.S.C. §2251(d) states:

> (1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering –
>
> > (A) to receive, exchange, buy, produce, display, distribute or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

> (B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;
>
> shall be punished as provided under subsection (e).
>
> (2) The circumstance referred to in paragraph (1) is that –
>
> (A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or
>
> (B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

INTRODUCTION

PUBLIC PERSUASION, as Mark Twain is quoted as saying, has made "[m]any a small thing . . . large by the right kind of advertising." The goal of advertising – public persuasion – is a viral effect: to increase the usage and acceptance of an idea.

But public persuasion is much different than private communication. Private communication among peers does not have the same type of viral effect that public advertising does. Private communication does not have reach.

18 U.S.C. §2251(d) is aimed at combating the proliferation of child pornography through public reach. It plainly prohibits publishing an ad seeking to sell child pornography on an internet message board. As does it prohibit publishing a classified in a publicly-distributed newsletter or message board seeking a child with whom to create child pornography.

The statute's language focused on criminalizing communication that increases the use or incidence of child pornography among the public: persuading people to buy, sell, trade, or create child pornography. Because this public persuasion can have viral effect and increase the occurrence of the creation or use of child pornography, the 30-year mandatory minimum imposed by the Child Exploitation Enterprise statute is arguably justified.

However, privately displaying or requesting pornography in private messages is not proscribed by the plain meaning of §2251(d) – nor would such conduct justify the steep sentencing scheme the statute imposes. Because the proof at trial was that James McCullars only engaged in private, closed communication – either one-to-one or among a small group of peers – his conduct was not within §2251(d)'s

advertising ambit. His conviction and 30-year sentence for Child Exploitation Enterprise, therefore, cannot stand.

PETITION FOR WRIT OF *CERTIORARI*

As Petitioner, individually, James McCullars seeks review of a judgment of the United States Seventh Circuit Court of Appeals affirming his conviction of child exploitation enterprise and his 30-year sentence. Petitioner is in federal prison. He seeks relief in this Court.

STATEMENT OF THE CASE

On July 8, 2014, James McCullars was charged in a fourth superceding indictment.

Count 1 alleged a Conspiracy to Distribute and Receive Child Pornography (18 U.S.C. §§2252A(a)(2) & 2252A(b)(1)). Summarized, the charge alleged that McCullars, with a dozen others, as an isolated, private group of online friends, agreed to possess and make available child pornography with one another, solely within the group, and with no one else. They did this through their personal computers, with usernames and passwords known only to each other.

Count 2 alleged the identical Conspiracy – adding beyond receipt and sharing, that the same group conspired to Sexually Exploit a Child (18 U.S.C. §2251(d)(1)(A) and (e)) through their online communications –

amongst each other – by making available child pornography for exchange within their group. This charge mirrored Count One, but substituted possessing and sharing child pornography with the terms "notice" and "advertising" as essential elements of Child Exploitation.

Count 3 alleged Child Exploitation Enterprise (18 U.S.C. §2252A(g)(2)). It repeated the identical Count One conspiracy, adding the Count Two "notice" and "advertisement" allegations, calling them "Predicate Offenses," listed as: Predicate Offense 1, McCullars conspired to distribute and receive child pornography (18 U.S.C. §§2252A(a)(2) and 2252A(b)(1) as charged in Count One); Predicate Offense 2, McCullars conspired to sexually exploit children (18 U.S.C. §2251(d)(1)(A) and (e) as charged in Count Two, through "notice" and "advertising."); Predicate Offenses 3 through 17, McCullars shared child pornography (18 U.S.C. §2252A(a)(2) as alleged in Count One, with each of those 15 "offenses" being separate violations of §2252A(a)(2)); Predicate Offenses 18-20, he distributed child pornography by making his collection available in folders, with each a separate violation of §2251(d). Following jury trial Mr. McCullars was found guilty of all charges on November 4, 2014, but following remand from the court of appeals, an amended judgment was entered on Count Three only. He was sentenced to 30 years.

ARGUMENT

Mr. McCullars challenges the sufficiency of the evidence to justify his conviction. A court of review will reverse a defendant's conviction, if, viewing the evidence produced at trial in the light most favorable to the government, no rational finder of fact could have convicted the defendant (*United States v. Curtis*, 324 F.3d 501, 505 (7th Cir. 2003); *United States v. Given*, 164 F.3d 689 (7th Cir. 1999); *United States v. Maloney*, 71 F.3d 645, 655 (7th Cir. 1995)). Reversal is warranted when the record is devoid of evidence regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt. (*United States v. Gutierrez*, 978 F.2d 1463 (7th Cir. 1992)). The remedy in a case as this is entry of a judgment of acquittal (*United States v. Locklear*, 97 F.3d 196, 199-200 (7th Cir. 1996)).

The trial record is devoid of proof of "notice" and "advertisement."

The crime of conspiracy requires an agreement between two or more persons to do something unlawful. The essence of this crime is to violate the law. *See Iannelli v. United States*, 420 U.S. 770 at 777 (1975); *United States v. Shabani*, 513 U.S. 10, 16 (1994). "The partners in the criminal plan must agree to pursue the same criminal objective," *Salinas v. United States*, 522 U.S. 52 at 64 (1997). "The scope of a conspiracy is determined by the scope of the agreement . . . ," *United States v. Sababu*, 891 F.2d 1308 (7th Cir. 1989) and "if there is no meeting of the minds, there is no conspiracy." *See United States v. Rosario-Diaz*, 202 F.3d 54, 64

(1st Cir. 2000). Conspiracy is an "ongoing" offense. So, the statute of limitations begins when the conspiracy is complete or terminated by arrest. *See United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999). Some conspiracies are called "wheel," or "hub-and-spoke" conspiracies (*see Kotteakos v. United States*, 328 U.S. 750, 755 (1946)); some are called "chain" conspiracies, in much the same organizational structure as legitimate business operations between manufacturer-wholesaler-retailer-customer-consumer (*see United States v. Evans*, 970 F.2d 663, 668 (10th Cir. 1992)).

Membership in a conspiracy "requires proof of purposeful behavior aimed at furthering the goals of the conspiracy" (*United States v. Torres*, 901 F.2d 205, 220 (2d Cir. 1990)), and membership is proven by the defendant's own words and actions (*United States v. Richardson*, 225 F.3d 46, 53 (1st Cir. 2000)). While such conspiratorial membership is a binary concept, there being no "degree of membership" based on role (*United States v. Lopez*, 443 F.3d 1026, 1030 (8th Cir. 2006)), the present conspiracy lacked hierarchy – as there were neither leaders nor followers, no major nor minor participants. Rather, this conspiracy, that went on for ten years, had the same numbers – an isolated, private group of individuals who discussed, possessed and shared child pornography with one another, within the group, and no one else.

The proof at trial did not support defendant's conviction of child exploitation enterprise. That law was never intended by Congress to criminalize a closed, non-public group of a dozen or less exchanging child

pornography with each other. Different from the agreement to "receive" or "distribute" child pornography provision (Count One, Section 2252A(a)(2) and (b)(1), which carries a maximum of 20 years imprisonment), the child exploitation enterprise provision Count Three, Section 2252A(g)(2), is much harsher, carrying a minimum prison sentence of 30 years and a maximum sentence of life in prison. The provision focuses on a person, who engages in a series of conduct that induces, entices, or coerces a minor to engage in sexually explicit activity *and* prints, publishes or gives notice or advertisement of such criminalized conduct. The offense further requires three or more separate instances, involving more than one victim, where the conduct is in concert with three or more persons. Essential to conviction is the indispensable conduct – "notice" and "advertising" – which is at the core of the federal child exploitation law. (18 U.S.C. §2251(d)).

While courts have applied this statute to the sharing of files between large groups publicly (*see United States v. Wayerski*, 624 F.3d 1342 (11th Cir. 2010) [Forty-five members using complex encryption methods]; no case has applied the federal child exploitation provision to a completely private, invitation-only, exclusive membership of companions in an ongoing friendship sharing such material between themselves. (*See*, *e.g.*, *United States v. Autry* (2018 U.S. Dist. LEXIS 56501)). Congress intended the statute to reach pedophiles who advertise through traditional modes of internet communication, interested in obtaining or distributing child pornography, not like Mr. McCullars,

who chatted and shared such material to a small-set group. *See* Child Sexual Abuse and Pornography Act of 1986, H.R. Rep. No. 99-910, at 6 (1986) [stating that in "computer 'bulletin boards,'" that contain offers of child pornography); S. Rep. No. 99-537, at 13-14 (1986) [discussing the increasing danger from computer bulletin boards, serving as "an electronic form" of classified ads for the exchange of communications among pedophiles].

The legislative history (Appendix E) of §2251(d) supports the above definition prohibiting public alerts – rather than private communications with peers. The Summary of the Bill states that "[§2251(d)] prohibits advertising – to buy or sell child pornography, to offer or seek acts for the purpose of producing child pornography, or to participate with children in sex acts for the purpose of producing child pornography." Further, the Committee on the Judiciary, describes the purpose of the bill to "ban the production and use of advertisements for child pornography or solicitations for child pornography." (Appendix E, page *3).

> The advertising of child pornography has been a very serious problem. There are a number of magazines and newsletters which serve to advertise the availability of child pornography or to offer children to participate in sexually explicit conduct. Control of advertising of this type was the first recommendation of the Senate Permanent Subcommittee on Investigations. (Appendix E, page *3).

The harm the legislature was counteracting in enacting §2251(d) was ending the publishing of advertisements in magazines and newsletters – widespread publications sent by a party to multiple subscribers. Thus, the legislature's plain intent – as evidenced by the language used in the statute and the stated purpose of the bill – was for §2251(d) to criminalize public acts, not private communications.

The simple definition of "advertise" from Merriam-Webster's dictionary is:

1. to make the public aware of something (such as a product) that is being sold;
2. to make a public announcement (in a newspaper, on the internet, etc.) about something that is wanted or available;
3. to cause people to notice (something).[1]

"Notice" is defined as:

1. *a (1)*: warning or intimation of something; the condition of being warned or notified – usually used in the phrase *on notice* : information, intelligence;
2. *a*: attention, heed; *b*: polite or favorable attention : civility
3. a written or printed announcement;
4. a short critical account or review.[2]

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[1] http://www.merriam-webster.com/dictionary/advertise.

[2] http://www.merriam-webster.com/dictionary/notice.

At its base, the terms "advertisement" and "notice" are indispensable elements of Count Three. A conviction requires proof of communication with the public or "some public component." (*United States v. Grovo*, 826 F.3d 1207, 1218 (9th Cir. 2016)). To understand the present conspiracy requires imagining a fall day in Boston. The Patriots offense is on the field. Tom Brady, joining his eleven teammates in the huddle, as they join in a circle on the field, calls a play. No one in the stadium can hear or know what is said by Tom Brady or his teammates. What is said there in the Patriots' huddle is strictly a private communication between teammates. Such is the case here.

Plainly, what McCullars did here is nowhere near an advertisement in a magazine or newsletter. His simply posting pornography to his group, making it available for sharing to participants of the group, was neither public nor an ad or notice to the public. It was the equivalent of a "group text." (*See United States v. Autry*, 2018 U.S. Dist. LEXIS 56501 * (N.D. GA. 2018)). While conduct, involving a wholesale club or public group of chat members, or a broad group of friends within a network, may fit the intended scope of this criminal provision, this small, limited group, that could fit around a 6-foot table sharing child pornography, does not.[3] The evidence at trial affirmatively

[3] The mere labelling of file-folders within a server *cannot* be regarded as "notice" or "advertisement" as the existence of the library and its general contents is known, and thus not in need of any advertisement. The organization and labelling of files in a particular server, defendants submit, amounts to nothing more than a "table of contents."

demonstrates that this was strictly private activity between a fixed group of twelve or fewer companions. Three co-defendant cooperators testifying for the government, described the nature of this closed group's activity: Thomas Vaughn explained that they were limited in membership, and non-public. The group, over ten years, chatted and possessed and made available electronic files containing child pornography with each other (R. 396, 400). All used encryption to ensure that only they and they alone accessed other member's child pornography libraries (R. 396). This was achieved by user names and passwords that only members of the group had access to.[4] Similarly, David Bebetu, in describing the activity, explained that he had first used "public channels," but after 1998 he and another member of the group created their own private channel (R. 562, 567). The group exclusively employed what Bebetu described as this "private-type channel" so that they could communicate only with one another. The public was excluded. Privacy was assured by the members' use of secret passwords in order for its members

[4] Significantly, the government was unable to decrypt and thus access the members' computer hard drives, thumb drives, discs and DVDs without their separate, individual cooperation in decrypting. This was done at the point of the government's execution of search warrants at the group members' separate homes. At trial, the government still, without James McCullars handing over his password, could not access his media, thus, if government forensic investigators could not access defendants' library, no member of the public could have ever seen, possessed, or received the illegal contraband. This fact contradicts the government's theory that the defendants "noticed" or "advertised" child pornography, which Congress intended to criminalize.

to have access to another's child pornography (R. 564-565). Rick Leon traded child pornography for ten years (R. 595). He described it this way:

> "*The main purpose of that room was* to have people who had a like interest in child pornography files, mainly featuring boys. And, you know, we would use that forum to talk about those things and also *to arrange a transfer of files between us*" (R. 596 *emphasis added*).

Rick Leon further explained to the jury, that the group used several layers of encryption to initiate and have private chats and to access others' libraries (R. 599, 623-625). The child pornography files, he testified, were for their "personal use – not for dissemination" (R. 602-603). Government forensic examiner Jennifer Barnes explained how each member of the group accessed another's library (R. 425-438). Private channels, known only to the group, were utilized to chat and to enter other's servers. Advertisement and notice were unnecessary, as each group member created "library cards" for the others to use in accessing the members' servers at will. Each had a password known only to group members (R. 442, 454-457, 505-530). Barnes described how members of the group uploaded and downloaded each others' computer files. This was confined, she explained at trial, to members with a library card (R. 539, 542-544). In actuality, with this ongoing activity as it was, advertisement was unnecessary.

The actions and conduct of the present conspiracy were entirely circumspect. The manner in which the group discussed, exchanged or shared child

pornography was antithetical to any notion that they engaged in conduct of a public nature. Any conclusion that they "advertised" child pornography is belied by the record. They simply made their libraries available to each other. There was no "advertisement." There was no "notice." All used encryptions to ensure that they and they alone could access others' child pornography folders (R. 396), accomplished by usernames and passwords that only other members knew. The public was not allowed. To convict, the government needed to prove (first) an agreement between two or more persons to commit the crime of advertising child pornography; and (second) that James McCullars and another intended to advertise child pornography (*United States v. Moe*, 781 F.3d 1120 at 1124 (9th Cir. 2015)). In the present case, the private communications between Mr. McCullars and his peers did not increase child pornography usage or creation; nor did it alert the public to something new or unknown. At worst, Mr. McCullars was simply continuing communication among a small group who were already involved in the subject matter.

CONCLUSION

To conclude this communication is "advertisement" is a strained and untenable meaning of the word. Because, here, the proof at trial failed to establish that petitioner agreed to advertise or advertised child pornography (under 18 U.S.C. §2251(d)), James McCullars is not guilty. For these reasons, Petitioner respectfully requests that this Court grant the petition and issue a writ of *certiorari* to the United States Seventh Circuit Court of Appeals.

Respectfully submitted,

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