

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

DOCKET NO. 18-5760

JORDAN COMBS,

PETITIONER

VS.

UNITED STATES OF AMERICA

RESPONDENT

* * * * *

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

C. WILLIAM SWINFORD, JR., ESQ.
271 WEST SHORT STREET, SUITE 505
LEXINGTON, KENTUCKY 40507
PHONE: 859.233.1786
FACSIMILE: 859.231.0691
EMAIL: cswinford@windstream.net

Counsel for Petitioner, Jordan Combs

*Combs is filing *In Forma Pauperis*, in light of the fact that counsel is CJA-
Appointed
December 17, 2018

QUESTIONS PRESENTED

WHETHER JORDAN COMBS' DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE DISTRICT COURT SENTENCED JORDAN COMBS TO ONE HUNDRED AND TWENTY (120) MONTHS ON POSSESSION OF CHILD PORNOGRAPHY (COUNT 20s) AND TWO HUNDRED AND FORTY (240) MONTHS FOR RECEIPT OF CHILD PORN (COUNTS 1s, 2s, 3s, 4s, 5s, 6s, 7s, 16s, 17s, 18s).

LIST OF ALL PARTIES TO THE DISTRICT
COURT CRIMINAL CASE

The sole Defendant in the District Court was Jordan Combs.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner in this Court, the Defendant/Appellant, is Jordan Combs. The Respondent in the Court, Plaintiff, Appellee below, is the United States of America.

Jordan Combs is not a corporation and he is not affiliated with any corporation.

TABLE OF CONTENTS

Questions Presented.....	i
List of All parties to the District Court Criminal Case.....	ii
Rule 29.6 Corporate Disclosure Statement.....	ii
Table of Contents.....	iii
Table of Authorities.....	iv
Basis for Jurisdiction in the Lower Courts and the U.S. Supreme Court.....	v
Constitutional Provisions Involved in this Case.....	vi
Statement of the Case.....	1-5
Argument.....	6-9
Conclusion.....	10
Certificate of Service.....	11

TABLE OF AUTHORITIES

Constitution of the United States.....	v
Amendment V to United States Constitution.....	vi
18 U.S.C. § 2252(a)(2).....	v
18. U.S.C. § 2251(a).....	v
18 U.S.C. § 2252(a)(4).....	v
28 U.S.C. § 1291.....	v
28 U.S.C. § 1254(1).....	v
Federal Rule 3 of Appellate Procedure:.....	v
Federal Rule 49(b) of Appellate Procedure:.....	v
<i>Jackson v Virginia</i> , 443 U.S. 207, 98 S. Ct. 2781 1979).....	5
<i>Bunkley v Florida</i> 538 U.S. 835, 123 S. Ct. 2020 (2003).....	5

BASIS FOR JURISDICTION IN THE LOWER COURTS

AND THE U.S. SUPREME COURT

Petitioner, Jordan Combs was indicted in a Superseding Indictment in the U.S. District Court for the Eastern District of Kentucky on September 7, 2017 (CR 35, SI, Page ID # 88-99), pursuant to the laws and Constitution of the United States of America, namely, Title 18 U.S.C. § 2252(a)(2)[15 counts], 18 U.S.C. §2251(a)[4 counts], 18 U.S.C. § 2252(a)(4) [1 count]. (R 776; June 11, 2015 Amended Judgment) (Copy attached as *Appendix “A”*). Combs’ conviction and sentence were affirmed on direct appeal to the U.S. Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1291, 18 U.S.C. § 3742(a), and Rules 3 and 49(b) of the Federal Rules of Appellate Procedure. The Court of Appeals for the Sixth Circuit rendered its opinion in *United States v. Jordan Combs* on June 20, 2019 (Document 32-2) (copy attached as *Appendix “B”*). Combs now files this Petition for *Writ of Certiorari* in the United States Supreme Court, pursuant to the statutes, rules, and Constitution (Article 2 Section 3) of the United States. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE:

AMENDMENT V TO THE U.S. CONSTITUTION: “No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”

STATEMENT OF THE CASE

Jordan Combs was indicted on twenty counts in a Superseding Indictment (R.35. Superseding Indictment, Page ID #88-99) on September 7, 2017.

7 counts of Receipt of Child Pornography
4 counts of Production of Child Pornography
5 counts of Distribution of Child Pornography
1 count of Possession of Child Pornography

Combs persisted in his not guilty plea and proceeded to trial.

On January 20, 2016, the Kentucky State Police received a cyber tip from *Omegle* through the National Center for Missing and Exploited Children. A state grand jury subpoena was subsequently issued to Time Warner Cable seeking the identity of the subscriber to the flagged IP address. The subscriber's information was as follows:

Name: Veronica Combs
Address: 237 Baybrook Circle, Nicholasville, Kentucky

Thereafter, a search warrant was obtained for said residence. Subpoenaed records from *Omegle* reflected that there were 4,707 chats from September 27, 2015, through January 20, 2016 associated with the IP address belonging to Veronica Combs¹. A search pursuant to a state search warrant was conducted of 237 Baybrook Circle, Nicholasville, Kentucky on March 10, 2016. The search revealed that the residence was occupied by Jordan Combs, and sometimes with his fiancé,

¹ Veronica Combs was the wife of Jordan Combs during the time period.

Becca Combs (not related). The search revealed the existence of several computers and external hard drives, including a desktop computer, laptop computer, tablet, and cell phones. However, an examination of all of the electronics physically located at 237 Baybrook Circle, Nicholasville, Kentucky revealed that child exploitation images were only located on a ASUS laptop computer, a Toshiba external hard drive, and a Seagate external hard drive.

The testimony adduced at trial from government witnesses was that the all of the child exploitation images (videos) were found on *Omegle*² chats with the exception of one video which KSP forensic expert Kim Bradley testified was a *Skype* video chat between a person using the IP address previously identified as being the IP address of Veronica Combs (a/k/a Veronica Henson). The one saved *Skype* video pertaining to Counts 14 and 15 were the production (14) and distribution (15) counts pertaining to the unidentified female³. The ages of the known victims are readily established. The age of the unidentified female on the Skype video obviously was not known. Furthermore, this female never stated her age, and, the person interacting with the unidentified female on *Skype* from the subject IP address is not visible and therefore not definitively known. The government argued that it was Combs.

² Omegle is an online chatroom that pairs random anonymous users.

³ Several of the females identified that are seen in videos that were streamed from the IP address belonging to Veronica Combs (and Jordan Combs) and were of known victims through the NCMEC.

Although the government had the *Omegle* chat session log associated with the subject IP address along with the other IP addresses that were in contact with the subject IP address, the government never cross referenced the other IP addresses which would have definitively provided the government with information that would have enabled it to identify the “strangers” on the other end of the *Omegle* chat and presumably establish the stranger’s ages.

Combs’ testified that he utilized a computer program named *Team Viewer*. *Team Viewer* is a program that allows a user to have remote access⁴ to other devices (desktop, laptop, tablet, mobile phone, etc.)

Combs testified that everyone (friends, family members, work acquaintances) knew his login for *Team Viewer*, and therefore was able to access his many devices which were all connected through the unattended access feature of *Team Viewer*. Succinctly stated during his cross examination of Combs by Assistant United States Attorney Dave Marye, Combs theory of the case was that a third party, utilizing the unattended access feature of *Team Viewer*, downloaded the child exploitation videos/images to his ASUS laptop and his two external hard drives (Toshiba and Seagate), framing him. Combs did acknowledge that the videos on his devices which depicted him masturbating his erect penis were taken by him at his residence or apartment or while at work at KET (Kentucky Educational Television), and

⁴ It is referred to in the TeamViewer literature as *Unattended Access*. There was extensive testimony about unattended access by Combs, Becca Combs, and Kim Bradley during the trial (see R. 126, Trial Transcript, Kim Bradley direct, Page ID# 906).

streamed to his then wife, Veronica Michelle Combs. However, Combs denied ever streaming these videos of him pleasuring himself to any other third person (including minors) (R.127. Trial Transcript, Jordan Combs direct, Page ID#1071-1072).

Bradley testified that the IP footprint associated with the Combs' residence was on the *Omege* logs. However, she did not know which IP footprint would appear on the *Omege* logs if a third party accessed Combs' devices from a remote point and used Combs' devices to get on *Omege*. She replied that "I would have to do more testing with that" (R. 126. Trial Transcript, Kim Bradley on Cross, Page ID#910). Combs did supplement his Motion for a New Trial with a new ground.

The trial was concluded on Thursday, March 8, 2018 when the jury returned a verdict of guilty as to all counts. Combs timely filed a Motion for a New Trial and he renewed his Motion for Judgement of Acquittal pursuant to FRCP 33 and FRCP 29 (R.97. Motion for New Trial and Renewed Motion for Judgement of Acquittal, Page ID# 517-522).

The U.S. District Court determined that the statutory maximums applied and sentenced Combs' as follows:

Two Hundred Forty (240 Months on Counts 1s-7s, 9s, 11ss, 13s, and 15s-19s; Three Hundred Sixty (360) Months on Counts 8s; 10s, 12s, and 14a; One Hundred Twenty (120) Months on Count 20, all counts to run concurrently to each other, FOR A TOTAL TERM OF Three Hundred Sixty (360) Months

(R.110. Sentencing Hearing Minutes, Page ID#735; R.113, Judgement in a Criminal Case, Page ID#: 619-627). Restitution was deferred at the Sentencing Hearing. A Notice of Appeal was timely filed by Combs on July 25, 2018 (R.114. Notice of Appeal, Page ID#608). Subsequently, after the government and Combs reached an Agreed Order on the issue of Restitution, an Amended Judgement in a Criminal Case was entered on September 5, 2018 (R.122. Amended Judgement in a Criminal Case, Page ID#687-695). The subsequent Notice of Appeal was timely filed on September 14, 2018 (R.123. Notice of Appeal, Page ID#696). The Amended Judgement in a Criminal Case was affirmed by the 6th Circuit Court of Appeals in an order dated June 20, 2019.

ARGUMENT

In its July 18, 2018 *Opinion and Order* (R. 107. *Opinion and Order*, Page ID#607-612), the Court opined that [it would] vacate the possession conviction if, at Combs' sentencing hearing, the government is unable to point to evidence presented at trial that makes clear the possession charge is based on separate conduct from each of the receiving counts. The District Court noted that Combs' supplement to his Motion was not filed within 14 days of the verdict pursuant to Fed. R. Crim P 29(C) (1), 33 (b)(2). Nevertheless, the Court considered the Motion and made the statement regarding vacating the possession conviction if the government is unable to point to evidence presented at the trial that makes clear the possession charge is based upon separate conduct from each of the receiving counts.

During the trial, Bradley, testified as to her examination of the ASUS laptop, the Toshiba external hard drive, and the Seagate external hard drive, all of which she stated contained images of child exploitation (R. 126. Trial Transcript- Kim Bradley testimony, Page ID#836-930; R. 127, Trial Transcript- Kim Bradley rebuttal, Page ID# 1140-1150). Bradley went through the first 19 counts during her testimony at the trial, playing snippets of videos regarding each of the 19 counts

AUSA Marye questioned Kim Bradley about the images that came from the cybertip dated January 20, 2016. This pertains to Count 19 (R. 126. Trial Transcript Kim Bradley on direct, Page ID#880). AUSA Marye then proceeded to question Kim

Bradley regarding Exhibit A1 and Exhibit ECB. AUSA Marye initially stated that this exhibit pertained to Count 20. There apparently was some confusion in the playing of the videos between Detective Craig Miller, Kim Bradley, and AUSA Marye. The following discussion occurred:

BY MR. MARYE:

Q. Again, Ms. Bradley, I ask if you can identify—or, excuse me. Verbally describe what was just shown in about an eight-second video, I would estimate.

A. It was approximately a five-to-seven year old unclothed female that was lying on her back in what looks to be a bed with an adult male on top of her. He ejaculates on her face and her mouth and then puts his penis in and out of her mouth.

MR. MARYE: I'm sorry, Your Honor. If we could play the next video, I think there is another portion. There's not going to be child porn—yeah, I'm sorry, it is. If you could play this next video, please.

THE COURT: Is this still Count 20?

MR. MARYE: This is referencing December 11th, which goes back to Counts 10 and 11. I would ask Detective Miller to play that.

BY MR. MARYE:

Q. If you could, please, Mr. Bradley, read the date and the file name and explain the various entries there.

A. Yes. The date is December 11th, 2013. The file name is black.mp4. The top left screen, it's a screen shot that shows the same type of video chat and text chat from Omegle. The top left is the stranger, the person that's being talked to.

(R. 126. Trial Transcript. Kim Bradley on direct, Page ID# 881-882)

Combs submits that this testimony of Bradley pertains solely to Counts 10 and 11 which are production and distribution counts. More specifically, it appears from the wording in the transcript that Kim Bradley

and AUSA Marye are talking about Counts 10 and 11, which pertains to events occurring on December 11, 2013 and not to the possession count- Count 20, which refers to the event on March 10, 2016 when the ASUS laptop and the two external hard drives were seized by the government. Obviously the Court was also confused because it interrupted and inquired of AUSA Marye:

THE COURT: Is this still Count 20?

MR. MARYE: This is referencing December 11th, which goes back to Counts 10 and 11. I would ask Detective Miller to play that.

Suffice to say, the testimony on this issue is confusing, to say the least.

Instead of obtaining a copy of the trial transcript prior to the Sentencing Hearing and pointing out where the government believed evidence presented at trial that makes it clear that the possession charge was based on separate conduct from the receiving counts, the government chose to put Bradley back on the stand at the Sentencing Hearing and have her delineate for the court the separate conduct. The government never did address at the Sentencing Hearing the trial court's charge to point to evidence presented at trial that makes it clear that the possession charge was based on separate conduct. Having the government's forensic expert testify that it was at a Sentencing Hearing is not the same thing. The standard of proof is different.

Combs respectfully disagrees with the conclusion of the appellate court that the government presented evidence of separate conduct underlying the possession count (count 20) at the trial (R. 32.2 Order, P 2) (Citing R. 126, Page ID 881) Upon questioning by the trial court at the trial, the government pointed out that the counts in question were 10 and 11 (R. 126, Page ID 882) and were of a video depicting images from December 11, 2013.

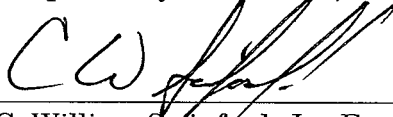
On direct appeal of federal convictions appellate courts must satisfy themselves that the evidence on the record could be reasonably support a finding of guilt beyond a reasonable doubt *Jackson v Virginia*, 443 U.S. 307, 98 S.Ct. 2781 (1979). The question the reviewing court is to ask itself is not whether it believes the evidence at the trial established guilt beyond a reasonable doubt, but whether after reviewing the evidence in the light most favorable to the prosecution, any rational trial of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id* at 316, 18-19. The due process clause requires the prosecution to prove, beyond a reasonable doubt every fact at trial necessary to convict the crime charged. *Bunkley v Florida*, 538 U.S. 835 123 S. Ct. 2020 (2003). Where the government failed to prove at the trial beyond a reasonable doubt that the possession count was different from the receipt count, it cannot remedy said defect by introducing proof at a sentencing hearing with a preponderance of evidence standard.

CONCLUSION

WHEREFORE, Combs respectfully prays this court grant his Petition for Writ of Certiorari and grant him appropriate relief from his conviction.

Dated this the 16th day of September, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'CW Swinford', is written over a horizontal line.

C. William Swinford, Jr., Esq.
271 West Short Street, Ste. 505
Lexington, Kentucky 40507
Tele: 859-233-1786
Fax: 859-231-0691

*Counsel for Defendant-Appellant,
Jordan Combs*