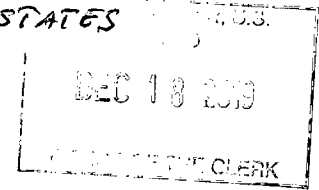


19-7141

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES



FERNANDO OLIVEROS,

PETITIONER,

v.

STATE OF ILLINOIS

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI

TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

PETITION FOR WRIT OF CERTIORARI

DECEMBER 17, 2019

FERNANDO OLIVEROS, Y12283

PRO SE

MENARD CORRECTIONS

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QUESTION PRESENTED

PETITIONER, FERNANDO OLIVEROS, WAS CONVICTED OF FOURTEEN COUNTS OF AGGRAVATED CHILD PORNOGRAPHY, SEVEN COUNTS RELATED TO THE UNDERLYING "FILMING OR VIDEOTAPING" AND SEVEN COUNTS RELATED TO POSSESSING ANY FILM OR VIDEO TAPES. THE "FILMING OR VIDEOTAPING" OFFENSES WERE CHARGED AS A CONTINUOUS ACT BETWEEN MAY 7, 2005 AND OCTOBER 4, 2012. THE POSSESSION OFFENSES WERE ALL CHARGED TO HAVE OCCURRED ON THE SINGLE DATE OF OCTOBER 4, 2012.

PETITIONER PRESENTED THIS ISSUE FOR REVIEW TO THE ILLINOIS COURT OF APPEALS FIRST JUDICIAL DISTRICT REQUESTING THAT SIX OF PETITIONER'S SEVEN CONVICTIONS FOR POSSESSION OF CHILD PORNOGRAPHY BE VACATED WHERE SIMULTANEOUS POSSESSION OF VIDEOS WERE ON ONE DEVICE, WHERE EACH VIDEO RELATED TO THE SAME VICTIM, AND WHERE, AT THE TIME THE OFFENSE OCCURRED, THE CHILD PORNOGRAPHY STATUTE HAD NOT YET BEEN AMENDED IN RESPONSE TO *PEOPLE V. MESWAIN*.

THE ILLINOIS COURT OF APPEALS FIRST JUDICIAL DISTRICT AFFIRMED PETITIONER'S SIX CONVICTIONS FOR A SINGLE OFFENSE BASED ON POSSESSION CONTRARY TO THE FOURTH JUDICIAL DISTRICT'S INTERPRETATION OF THE CHILD PORNOGRAPHY STATUTE AND RAISED A SQUARE CONFLICT FOR SETTLEMENT. THE FIRST JUDICIAL DISTRICT CLAIMED "THERE WAS NO WAY THE LEGISLATURE COULD HAVE ANTICIPATED THE MECHANISM OF HOW THE DEFENDANT'S PHONE WOULD LABEL THE 200+ VIDEOS AND IMAGES."

THE QUESTION PRESENTED IS THIS: WHEN THE LEGISLATURE HAS NOT SPOKEN IN LANGUAGE THAT IS CLEAR AND DEFINITE AND HAS NOT FIXED THE PUNISHMENT FOR A OFFENSE CLEARLY AND WITHOUT AMBIGUITY, CAN A STATE COURT RESOLVE THE AMBIGUITY IN A MANNER THAT IS PUNITIVE TO THE ACCUSED WHEN THIS COURT HAS HOLD THAT ABSENT CONGRESSIONAL INTENT, AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF LENITY? *BELL V. UNITED STATES*, 349 U.S. 81 (1955).

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PETITION FOR WRIT OF CERTIORARI

PETITIONER FERNANDO OLIVEROS RESPECTFULLY PETITIONS THIS COURT FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE ILLINOIS APPELLATE COURT FIRST JUDICIAL DISTRICT.

OPINIONS BELOW

THE DENIAL OF THE PETITION FOR LEAVE TO APPEAL OF THE ILLINOIS SUPREME COURT IS ATTACHED AS APPENDIX A. THE ORDER OF THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT DENYING REHEARING IS ATTACHED AS APPENDIX B. THE ORDER OF THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT AFFIRMING IN PART AND VACATING IN PART IS UNPUBLISHED, SEE *PEOPLE V. OLIVEROS*, 2019 IL APP (1ST) 161096-U, AND IS ATTACHED AS APPENDIX C.

JURISDICTION

THE ILLINOIS APPELLATE COURT FIRST JUDICIAL DISTRICT AFFIRMED IN PART AND VACATED IN PART ON MARCH 29, 2019. THE APPELLATE COURT DENIED PETITIONER'S TIMELY PETITION FOR REHEARING ON MAY 3, 2019, AND THE ILLINOIS SUPREME COURT DENIED THE PETITION FOR LEAVE TO APPEAL ON SEPTEMBER 25, 2019. THIS COURT HAS JURISDICTION PURSUANT TO 28 U.S.C. § 1257 (a).

RELEVANT CONSTITUTIONAL PROVISIONS

ARTICLE I, § 10 TO THE UNITED STATES CONSTITUTION PROVIDES IN RELEVANT PART :

NO STATE SHALL ... PASS ANY BILL OF ATTAINDER, EX POST FACTO LAW...

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES IN RELEVANT PART :

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ... BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES IN RELEVANT PART :

NO STATE SHALL ... DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTIONS OF THE LAWS.

STATEMENT OF THE CASE

THIS CASE INVOLVES A BENCH TRIAL IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS. THE PETITIONER WAS CONVICTED OF ALL 27 COUNTS OF SEX-RELATED OFFENSES AGAINST J.S. THE PETITIONER WAS SENTENCED TO AN AGGREGATE TERM OF 100 YEARS IMPRISONMENT.

PETITIONER WAS CHARGED WITH FOURTEEN COUNTS OF AGGRAVATED CHILD PORNOGRAPHY, SEVEN COUNTS RELATED TO THE UNDERLYING "FILMING OR VIDEOTAPING" AND SEVEN COUNTS RELATED TO POSSESSING ANY FILM OR VIDEOTAPES. THE "FILMING OR VIDEOTAPING" OFFENSES WERE ALLEGED AS A CONTINUOUS ACT BETWEEN MAY 7, 2005 THROUGH OCTOBER 4, 2012. THE POSSESSION OFFENSES WERE ALL ALLEGED TO HAVE OCCURRED ON THE SINGLE DATE OF OCTOBER 4, 2012. (C. 7-13, 21-27). THE SEVEN COUNTS OF POSSESSION WERE CHARGED AS VIDEOS DEPICTING A CHILD UNDER THE AGE OF THIRTEEN ENGAGING IN SEXUAL OR LEWD CONDUCT.

EACH OF THE VIDEOS, WHICH WERE RECOVERED FROM ONE CELL PHONE, PICTURES THE SAME VICTIM ENGAGING IN THE PROHIBITED SEXUAL OR LEWD CONDUCT. THE INDICTMENT ALLEGED THAT PETITIONER POSSESSED THESE VIDEOS ON OCTOBER 4, 2012.

AT TRIAL, THE STATE PRESENTED ERIN GABOR, A FORENSIC EXAMINER WITH THE F.B.I., WHO TESTIFIED REGARDING THE PROCESS USED TO OBTAIN THE MATERIAL OFF OF THE PASSWORD PROTECTED PHONE. (R. JJ 98-111). THE STATE ALSO ASKED THAT HE BE QUALIFIED AS AN EXPERT REGARDING CELL PHONE FORENSIC EXAMINATION. (R. JJ 103). MR. GABOR ALSO SELECTED AND BOOKMARKED THE SUSPECTED CHILD PORNOGRAPHY USED AT TRIAL. (R. JJ 114).

ON CROSS-EXAMINATION, MR. GABOR TESTIFIED THAT HE DID NOT KNOW IF EACH VIDEO WAS A UNIQUE VIDEO OR IF SOME WERE COPIES OF THE SAME VIDEO. (R. JJ 111). HE FURTHER TESTIFIED, THAT HE WAS NOT TRAINED TO DETERMINE WHETHER OR NOT A VIDEO HAS BEEN ALTERED AFTER ITS ORIGINAL PRODUCTION AND HE DID NOT INDEPENDENTLY VERIFY OUTSIDE OF THE PHONE, THE CREATED DATES AND MODIFIED DATES HE NOTED IN HIS REPORT. (R. JJ 112).

LESS THAN A YEAR BEFORE PETITIONER WAS CHARGED FOR POSSESSION OF THE VIDEOS, THE ILLINOIS COURT OF APPEALS FOURTH DISTRICT HELD IN *PEOPLES V. MCSWAIN* THAT THE TERM "ANY" USED IN THE CHILD PORNOGRAPHY STATUTE WAS AMBIGUOUS AS TO THE "ALLOWABLE UNIT OF PROSECUTION" FOR POSSESSION OFFENSES, AND THEREFORE CONCLUDED THAT, WITHOUT A STATUTORY PROVISION TO THE CONTRARY, "THE SIMULTANEOUS POSSESSION OF PORNOGRAPHIC IMAGES CANNOT SUPPORT MULTIPLE CONVICTIONS." *MCSWAIN*, 2012 IL APP (4TH) 100619. THE ILLINOIS LEGISLATURE SUBSEQUENTLY AMENDED THE STATUTE TO PERMIT MULTIPLE CONVICTIONS.

ON APPEAL TO THE ILLINOIS COURT OF APPEALS FIRST JUDICIAL DISTRICT, PETITIONER CLAIMED THAT SIX OF THE SEVEN CONVICTIONS FOR POSSESSION OF CHILD PORNOGRAPHY MUST BE VACATED WHERE THE SIMULTANEOUS POSSESSION OF THE VIDEOS ON ONE DEVICE, AND EACH VIDEO RELATED TO THE SAME VICTIM, AND WHERE, AT THE TIME OF THE OFFENSE OCCURRED, THE CHILD PORNOGRAPHY STATUTE HAD NOT YET BEEN AMENDED IN RESPONSE TO *PEOPLE V. McSWAIN*.

THE ILLINOIS COURT OF APPEALS FIRST JUDICIAL DISTRICT AFFIRMED, STATING AS FOLLOWS: "THERE WAS NO WAY THE LEGISLATURE COULD HAVE ANTICIPATED THE MECHANISM OF HOW THE DEFENDANT'S PHONE WOULD LABEL THE 200+ VIDEOS AND IMAGES. IT WOULD BE ILLOGICAL TO CONVICT THE DEFENDANT OF ONLY ONE COUNT OF CHILD PORNOGRAPHY UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE SIMPLY BECAUSE OF THE SINGLE "CREATED DATE," WHICH MAY HAVE BEEN UNIQUE TO THE DEFENDANT'S PHONE." PET. APP. C. THE ILLINOIS SUPREME COURT DENIED THE PETITION FOR LEAVE TO APPEAL. PET. APP. A.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE THE RULING OF THE ILLINOIS COURT OF APPEALS FIRST JUDICIAL DISTRICT IS IN SQUARE CONFLICT WITH THE ILLINOIS COURT OF APPEALS FOURTH JUDICIAL DISTRICT'S HOLDING ON STATUTORY CONSTRUCTION AS TO THE ALLOWABLE UNIT OF PROSECUTION AND CONTRARY TO THIS COURT'S HOLDING IN *BELL V. UNITED STATES*, 349 U.S. 81, 83 (1955), AND WARRANTS REVERSAL. THIS CASE IS WELL SUITED FOR CERTIORARI REVIEW, AS PETITIONER SQUARELY PRESENTED AND PRESERVED THE CONSTITUTIONAL ISSUE IN THE STATE COURTS.

I. THE RULING OF THE ILLINOIS COURT OF APPEALS CONSTRUCTION OF AN AMBIGUOUS STATUTE IN A MANNER PUNITIVE TO THE ACCUSED CONFLICTS DIRECTLY WITH THIS COURT'S PRECEDENT ON STATUTORY CONSTRUCTION OF AMBIGUOUS STATUTES.

"WHEN CONGRESS LEAVES TO THE JUDICIARY THE TASK OF IMPUTING TO CONGRESS AN UNDECLARED WILL, THE AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF LENITY." *BELL V. UNITED STATES*, 349 U.S. 81, 83 (1955).

AS IT EXISTED IN 2012, THE RELEVANT SECTION OF THE CHILD PORNOGRAPHY STATUTE PROVIDES THAT A PERSON COMMITS THE OFFENSE OF CHILD PORNOGRAPHY IF:

"WITH KNOWLEDGE OF THE NATURE OR CONTENT THEREOF, POSSESSES ANY FILM, VIDEOTAPE, PHOTOGRAPH, OR OTHER SIMILAR VISUAL REPRODUCTION OR DEPICTION BY COMPUTER OF ANY CHILD *** WHOM THE PERSON KNOWS OR REASONABLY SHOULD KNOW TO BE UNDER THE AGE OF 18 *** ENGAGED IN ANY ACTIVITY DESCRIBED IN SUBPARAGRAPHS (i) THROUGH (vii) OF PARAGRAPH (1) OF THIS SUBSECTION."
720 ILCS 5/11-20.1 (a)(6) (W08 2012).

IN *PEOPLE V. MCSWAIN*, 2012 IL APP (4TH) 100619 (2012), THE COURT HELD THAT THE USE OF THE TERM "ANY" IN THE CHILD PORNOGRAPHY STATUTE FOR POSSESSION OFFENSES, DOES NOT ADEQUATELY DEFINE THE "ALLOWABLE UNIT OF PROSECUTION." *MCSWAIN*, 2012 IL APP (4TH) AT 58. THE *MCSWAIN* COURT CITED WELL ESTABLISHED ILLINOIS PRECEDENT FROM THE ILLINOIS SUPREME COURT IN *PEOPLE V. CARTER*, 213 ILL. 2D 295 (2004),

WHICH FOUND THAT THE TERM "ANY" COULD MEAN EITHER THE SINGULAR OR THE PLURAL, AND WHEN A CRIMINAL STATUTE IS CAPABLE OF TWO OR MORE CONSTRUCTIONS, " COURTS MUST ADOPT THE CONSTRUCTION THAT OPERATES IN FAVOR OF THE ACCUSED. " CARTER, 213 ILL. 2D AT 302. THE COURT FURTHER NOTED THAT IT HAS " CONSISTENTLY HELD, WHERE A STATUTE IS AMBIGUOUS, IN THE ABSENCE OF A STATUTORY PROVISION TO THE CONTRARY, SIMULTANEOUS POSSESSION COULD NOT SUPPORT MULTIPLE CONVICTIONS. " ID. AT 302.

ON JANUARY 1, 2014, THE ILLINOIS GENERAL ASSEMBLY HEEDED THE McSWAIN COURT'S SUGGESTION AMENDING THE CHILD PORNOGRAPHY STATUTE SO THAT " THE POSSESSION OF EACH INDIVIDUAL FILM... IN VIOLATION OF THIS SECTION CONSTITUTES A SINGLE AND SEPARATE VIOLATION. " 720 ILCS 5/11-20.1 (a-5) (WEST 2014) PUBLIC ACT 98-437 (EFFECTIVE JANUARY 1, 2014).

THERE IS NO DISPUTE THAT THE USE OF THE TERM "ANY" IN THE 2012 CHILD PORNOGRAPHY STATUTE FOR POSSESSION OFFENSES DOES NOT ADEQUATELY DEFINE THE ALLOWABLE UNIT OF PROSECUTION. IN UNITED STATES V. VERRECCHIA, 196 F. 3D 294 (1ST CIR. 1999), THE FEDERAL COURT ALSO HELD THAT THE TERM "ANY" AS CONTAINED IN A SIMILAR FEDERAL FOLLOW-UP-POSSESSION-OF WEAPONS STATUTE, CREATED AN AMBIGUITY AS TO THE "ALLOWABLE UNIT OF PROSECUTION" AND THAT THE AMBIGUITY HAD TO BE RESOLVED IN FAVOR OF THE DEFENDANT BY PROHIBITING MULTIPLE CONVICTIONS FOR THE SIMULTANEOUS POSSESSION OF SEVERAL FIREARMS. VERRECCHIA, 196 F. 3D AT 297-98.

VERBECCHIA FURTHER RECOGNIZED THAT OTHER FEDERAL COURTS OF APPEAL HAVE RELIED ON THIS COURT'S HOLDING IN BELL TO CONCLUDE THAT THE SIMULTANEOUS POSSESSION OF MULTIPLE FIREARMS, OR A FIREARM AND AMMUNITION, CONSTITUTES ONLY ONE CRIME. *Id.* AT 297-98. CITING UNITED STATES V. POLUSIO, 725 F.2D 161, 168-69 (2ND CIR. 1983); UNITED STATES V. BULLOCK, 615 F.2D 1082, 1084 (5TH CIR. 1980); MCFARLAND V. PICKETT, 469 F.2D 1277, 1279 (7TH CIR. 1972).

IN THE CASE AT BAR, THE ILLINOIS COURT OF APPEALS' INTERPRETATION OF THE 2012 CHILD PORNOGRAPHY STATUTE AND RATIONALE FOR AFFIRMING THE POSSESSION CONVICTIONS WAS MAINLY ATTRIBUTED TO THE COURT'S VIEWPOINT THAT "THERE WAS NO WAY THE LEGISLATURE COULD HAVE ANTICIPATED THE MECHANISM OF HOW THE DEFENDANT'S PHONE WOULD LABEL THE 200+ VIDEOS AND IMAGES." *PER APP. C.* THIS VIEWPOINT HOWEVER, IS INCONSISTENT WITH THIS COURT'S HOLDING IN BELL ON HOW TO RESOLVE STATUTORY CONSTRUCTION ABSENT EXPRESS CONGRESSIONAL INTENT TO FIX THE PUNISHMENT CLEARLY AND WITHOUT AMBIGUITY. BELL, 349 U.S. AT 84.

BY AFFIRMING THE MULTIPLE JUDGMENTS FOR A SINGLE OFFENSE VIOLATES PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS CLAUSE TO THE UNITED STATES CONSTITUTION BY RELIEVING THE COURT OF ITS OBLIGATION TO COMPORT WITH PREVAILING NOTIONS OF FUNDAMENTAL FAIRNESS. CALIFORNIA V. TROMBETTA, 467 U.S. 479, 485 (1984).

FURTHERMORE, IN MCSWAIN, THE FIVE BILLS OF INDICTMENT ALLEGED THAT DEFENDANT POSSESSED ** FIVE DIFFERENT PHOTOS OF B.M. EACH BILL ** INDICATED THE ALLEGATION WAS "SEPARATE AND DISTINCT FROM THE ACT OF POSSESSION SET FORTH IN THE OTHER COUNTS

OF THE INDICTMENT. " MCSWAIN, 2012 IL APP AT 47.

ALTHOUGH THE STATE IN MCSWAIN PROPERLY APPORTIONED THE CHARGES IN THE CHARGING INSTRUMENT AND APPRISED THE DEFENDANT OF ITS INTENTION TO SEEK " SEPARATE AND DISTINCT ACTS," THE COURT NEVERTHELESS FOUND THE STATUTORY LANGUAGE TO BE AMBIGUOUS AND IN THE ABSENCE OF A STATUTORY PROVISION TO THE CONTRARY, RULED THAT THE SIMULTANEOUS POSSESSION OF THE IMAGES COULD NOT SUPPORT MULTIPLE CONVICTIONS. MCSWAIN, 2012 IL APP AT 59.

IN THE INSTANT CASE, THE STATE INDICTED PETITIONER WITH MULTIPLE COUNTS OF FILMING A CONTINUOUS TIME BETWEEN MAY 7, 2005 AND OCTOBER 4, 2012. (C. 107-113). HOWEVER, THE OFFENSES AT ISSUE CHARGED PETITIONER WITH POSSESSION ON ONE SPECIFIC DATE, OCTOBER 4, 2012. (C. 121-127). THE CHARGING INSTRUMENT DOES NOT REFLECT OR APPORTION SEPARATE AND DISTINCT ACTS OF POSSESSION. MOREOVER, THE STATE PROVIDED NO ARGUMENT OR PROOF AT TRIAL THAT THE ACT OF POSSESSION WAS ANYTHING OTHER THAN SINGULAR AS CHARGED ON OCTOBER 4, 2012. (C. 121-127). THE STATE DID NOT CHARGE THE ACT OF POSSESSION AT DIFFERENT AND DISTINCT TIMES. MORE IMPORTANTLY, THE STATE'S EXHIBIT 4, WHICH IS A PRINT-OUT INDEX OF THE VIDEOS FORENSICALLY RETRIEVED, BY THE STATE'S OWN FORENSIC EXPORT, ACTUALLY INDICATES THAT EVERY UNIQUE VIDEO ON THE PHONE HAS A SINGLE " CREATED DATE " OF MAY 27, 2012. (R. 55111); STATE'S EXHIBIT 4.

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION PROVIDES IN RELEVANT PART: IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ... BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION.

POTITIONER HAS A FUNDAMENTAL RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE CHARGES THE STATE HAS BROUGHT IN ORDER TO PREPARE A DEFENSE AND SO THAT THE CHARGES MAY SERVE AS A BAR TO SUBSEQUENT PROSECUTION ARISING OUT OF THE SAME CONDUCT. IN THE INSTANT CASE, THE INDICTMENT DOES NOT INDICATE THAT THE STATE INTENDED TO TREAT THE CONDUCT OF POSSESSION AS SEPARATE AND DISTINCT MULTIPLE ACTS. (C. 121-127).

IN THE ALTERNATIVE, IF THE ILLINOIS COURT OF APPEALS FIRST JUDICIAL DISTRICT'S CONSTRUCTION OF THE 2012 CHILD PORNOGRAPHY STATUTE ALLOWS FOR MULTIPLE CONVICTIONS FOR ONE ACT OF POSSESSION AS CHARGED, THEN ONE-ACT, ONE CRIME PRINCIPLES APPLY.

THE OFFENSES AS CHARGED IN THIS PARTICULAR CASE REFLECT POSSESSION AS THE ACTUS REUS OF THE ACT OF FILMING, WHICH IS THE FIRST JUDICIAL DISTRICT COURT'S INTERPRETATION OF THE STATE'S CASE. PET. APP. C, OLIVEROS, 2019 IL APP (1ST) AT 36. THE POSSESSION WAS THE RESULT OF FILMING. (THE CONDUCT WHICH LED TO THE POSSESSION). "THE STATE PRESENTED AMPLIFIED EVIDENCE THAT THE DEFENDANT RECORDED AND POSSESSED THE SEXUALLY EXPLICIT VIDEOS AND IMAGES OF J.S. ON DIFFERENT DATES OVER THE COURSE OF SEVEN YEARS." PET. APP. C, OLIVEROS, 2019 IL APP (1ST) AT 36.

POTITIONER ACKNOWLEDGES THAT ALTHOUGH THIS IN OF ITSELF IS A SEPARATE EVENT, IS IN FACT DISTINGUISHABLE FROM THE CONDUCT THAT PRODUCED THE RESULT, AND THEREFORE, CONSTITUTES A CRIME ITSELF. HOWEVER, THE CHARGING INSTRUMENT DOES NOT REFLECT THE STATE'S INTENTION TO SEEK MULTIPLE

CONVICTIONS FOR SEPARATE AND DISTINCT ACTS OF POSSESSION.

MORE IMPORTANTLY, THE STATE DID NOT ARGUE OR OFFER PROOF THAT THE VIDEOS CHARGED FOR POSSESSION WERE THE SAME OR DIFFERENT FROM THE VIDEOS CHARGED UNDER "FILMING."

THE APPELLATE COURT'S JUDGMENT AFFIRMING MULTIPLE JUDGMENTS FOR THE VIDEOS CHARGED FOR POSSESSION AS THE SAME VIDEOS CHARGED AS "FILMING" ALSO INFRINGES ON PRINCIPLES OF DOUBLE JEOPARDY. THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION PROVIDES IN RELEVANT PART: NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB. THIS CLAUSE PROTECTS A CRIMINAL DEFENDANT FROM REPEATED PROSECUTIONS FOR THE SAME OFFENSE. OREGON V. KENNEDY, 456 U.S. 667 (1982).

SINCE THE ILLINOIS COURT OF APPEALS INTERPRETS THE STATE'S CHARGES OF POSSESSION AS THE ACTUS REUS OF THE ACT OF FILMING, IT THEREFORE FOLLOWS THAT THEY ARE ONE AND THE SAME OFFENSE. UNDER DOUBLE JEOPARDY PRINCIPLES, AN OFFENSE AND ANY LESSER-INCLUDED OFFENSE ARE CONSIDERED TO BE THE "SAME OFFENSE." BROWN V. OHIO, 432 U.S. 161, 168 (1977); RUTLEDGE V. UNITED STATES, 517 U.S. 292, 297, (1996). NEVERTHELESS, THE COURT OF APPEALS STILL OVERLOOKED THE FACT THAT THE NOTICE IN THE INDICTMENT WAS INSUFFICIENT NOTICE TO SUPPORT MULTIPLE JUDGMENTS FOR A SINGLE ACT OF POSSESSION AS CHARGED.

BECAUSE THE ILLINOIS COURT OF APPEALS' STATUTORY CONSTRUCTION IS CONTRARY TO THE FOURTH JUDICIAL DISTRICT'S HOLDING, AND INCONSISTENT WITH THIS COURT'S HOLDING IN BULL,

IT RAISES A SQUARE CONFLICT FOR SETTLEMENT BY THIS COURT, AND REMAND THE CASE FOR FURTHER PROCEEDINGS.

II. THE ILLINOIS COURT OF APPEALS FIRST JUDICIAL DISTRICT'S RULING VIOLATES PETITIONER'S CONSTITUTIONAL GUARANTEE UNDER EX POST FACTO PRINCIPLES OF THE U.S. CONSTITUTION, ARTICLE I, § 10.

ARTICLE I, § 10, TO THE U.S. CONSTITUTION PROVIDES IN RELEVANT PART: "NO STATE SHALL ... PASS ANY ... EX POST FACTO LAW." EX POST FACTO LITERALLY MEANS "AFTER THE FACT" BLACK'S LAW DICTIONARY (9TH EDITION 2009).

THIS PROHIBITION MEANS THAT THE LEGISLATURE CANNOT CHANGE A CRIMINAL OR PENAL LAW, AFTER THE FACT, TO BE LESS FAVORABLE TO A DEFENDANT REGARDING EVENTS THAT OCCURRED BEFORE THE CHANGE. CARMELL V. TEXAS, 529 U.S. 513 (2000) (DISCUSSING MEANING OF PROHIBITION).

BECAUSE THE ILLINOIS GENERAL ASSEMBLY AMENDED THE CHILD PORNOGRAPHY STATUTE TO ALLOW PUNISHMENT FOR POSSESSION OF EACH INDIVIDUAL FILM AFTER PETITIONER'S ALLEGED ACT OF POSSESSION, THE AMENDMENT CANNOT APPLY UNDER EX POST FACTO PRINCIPLES. 720 ILCS 5/11-20.1 (9-5) (WOST 2014); PUBLIC ACT 98-437 (EFFECTIVE JANUARY 1, 2014).

PETITIONER'S INDICTMENT ALLEGES SEVEN COUNTS OF POSSESSION OF CHILD PORNOGRAPHY DEPICTING A CHILD UNDER THE AGE OF THIRTEEN ENGAGING IN SEXUAL OR LEWD CONDUCT. (C. 121-127).

EACH VIDEO WAS RECOVERED FROM ONE CELL PHONE AND
DEPICTS THE SAME VICTIM, ENGAGING IN THE PROHIBITED SEXUAL
OR LEWD CONDUCT. (R. JS 46-51, 53). THE INDICTMENT ALLEGES
THAT THESE VIDEOS WERE POSSESSED BY PETITIONER ON THE SINGLE
DATE OF OCTOBER 4, 2012. (C. 121-127). THE CHILD PORNOGRAPHY
STATUTE, AS IT EXISTED ON OCTOBER 4, 2012, REMAINED EXACTLY
THE SAME AS WHEN MCSWAIN WAS DECIDED EARLIER THAT SAME
YEAR, SEE 720 ILCS 11-20.1 (a)(6) (WEST 2012).

THE GENERAL ASSEMBLY EXPRESSLY PRESCRIBED THAT THIS
CHANGE (AMENDMENT) WAS TO TAKE EFFECT ON JANUARY 1, 2014.
BECAUSE THE AMENDMENT IS DEVOID OF ANY LANGUAGE AUTHORIZING
RETROACTIVE EFFECT, IT CANNOT BE APPLIED TO PETITIONER'S
ALLEGED CONDUCT OF 2012. *PLAUT V. SPENDTHRIFT FARM, INC.*,
514 U.S. 211, 237 (1995) (NEW STATUTES DO NOT APPLY RETROACTIVELY
UNLESS CONGRESS EXPRESSLY STATES THAT THEY DO.).

A LAW IS EX POST FACTO IF IT IS BOTH RETROACTIVE AND
DISADVANTAGEOUS TO THE DEFENDANT. A LAW DISADVANTAGES A
DEFENDANT IF IT CRIMINALIZES AN ACT THAT WAS INNOCENT
WHEN DONE, INCREASES THE PUNISHMENT FOR A PREVIOUSLY COMMITTED
OFFENSE, OR ALTERS THE RULES OF EVIDENCE BY MAKING A
CONVICTION EASIER. *KANSAS V. HENDRICKS*, 521 U.S. 346 (1997).

HERE, THE ILLINOIS COURT OF APPEALS FIRST JUDICIAL DISTRICT DID
NOT ADDRESS THE LEGISLATURE'S 2014 AMENDMENT AND ITS TEMPORAL
REACH IN RESPONSE TO THE MCSWAIN COURT FOR POSSESSION OFFENSES.
THE COURT'S INTERPRETATION OF THE 2012 STATUTE AND RATIONALE
FOR AFFIRMING THE CONVICTIONS FOR POSSESSION WAS MAINLY

ATTRIBUTED TO THE COURT'S VIEWPOINT THAT "THERE WAS NO WAY THE LEGISLATURE COULD HAVE ANTICIPATED THE MECHANISM OF HOW THE DEFENDANT'S PHONE WOULD LABEL THE 200+ VIDEOS AND IMAGES." POT. APP. C.

THE AMENDMENT TO THE CHILD PORNOGRAPHY STATUTE BY THE ILLINOIS GENERAL ASSEMBLY IN RESPONSE TO THE MCDONALD COURT DEMONSTRATES THAT THE LEGISLATURE KNOWS HOW TO AUTHORIZE, SPECIFICALLY, MULTIPLE VIOLATIONS FOR EACH INDIVIDUAL FILM, MAKING IT A SINGLE AND SEPARATE VIOLATION. 720 ILCS 5/11-20.1 (9-5) (WEST 2014); PUBLIC ACT 98-437. "EVEN WHEN JUDGES ENJOY DISCRETION TO ADJUST A SENTENCE BASED ON JUDGE-FOUND AGGRAVATING OR MITIGATING FACTS, THEY COULD NOT SWELL THE PENALTY ABOVE WHAT THE LAW HAD PROVIDED FOR THE ACTS CHARGED." APPENDIX V. NEW JERSEY, 530 U.S. 466, 477 (2000).

APPLYING THE 2014 AMENDMENT OF THE CHILD PORNOGRAPHY STATUTE FOR POSSESSION OFFENSES TO A SINGLE ACT OF POSSESSION THAT OCCURRED IN 2012 VIOLATES THE UNITED STATES CONSTITUTION ARTICLE I, § 10.

III. THIS CASE IS WELL SUITED FOR CERTIORARI REVIEW BECAUSE PETITIONER SQUARELY PRESENTED AND PRESERVED THE ISSUE IN THE ILLINOIS COURT OF APPEALS.

THIS CASE IS PARTICULARLY APPROPRIATE FOR CERTIORARI REVIEW BECAUSE THE SQUARE CONFLICT RAISED BY THE ILLINOIS COURT OF APPEALS FIRST JUDICIAL DISTRICT'S JUDGMENT WAS CONTRARY TO

THE FOURTH JUDICIAL DISTRICT'S HOLDING THAT THE 2012 CHILD PORNOGRAPHY STATUTE WAS AMBIGUOUS AS TO THE "ALLOWABLE UNIT OF PROSECUTION" FOR POSSESSION OFFENSES AND UNABLE TO SUSTAIN MULTIPLE CONVICTIONS FOR SIMULTANEOUS POSSESSION OF PORNOGRAPHIC IMAGES ON ONE DEVICE. *People v. McSwain*, 2012 IL APP (4TH) 100619. PETITIONER OBJECTED TO THE ILLINOIS COURT OF APPEALS JUDGMENT THROUGH A PETITION FOR REHEARING. SEE PETITION FOR REHEARING, PET. APP B. (APRIL 16, 2019), AND THEN SOUGHT DISCRETIONARY REVIEW ON THE ISSUE IN THE ILLINOIS SUPREME COURT. SEE PETITION FOR LEAVE TO APPEAL, *People v. Oliveros*, NO. 124906, P. 12-13 (MAY 31, 2019). BOTH COURTS DENIED PETITIONER'S REQUESTS. AS A RESULT, THE ISSUE IS BOTH CLEAR AND PROPERLY PRESERVED.

AS PETITIONER EXPLAINED, THE ILLINOIS COURT OF APPEALS HELD THAT BECAUSE "THERE WAS NO WAY THE LEGISLATURE COULD HAVE ANTICIPATED THE MECHANISM OF HOW THE DEFENDANT'S PHONE WOULD LABEL THE 200+ VIDEOS AND IMAGES, IT WOULD BE ILLOGICAL TO CONVICT THE DEFENDANT OF ONLY ONE COUNT OF CHILD PORNOGRAPHY UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE SIMPLY BECAUSE OF THE SINGLE "CREATED DATE" WHICH MAY HAVE BEEN UNIQUE TO THE DEFENDANT'S PHONE." *OLIVEROS*, 2019 IL APP AT 36. THAT LEGISLATIVE INTERPRETATION CONFLICTS DIRECTLY WITH THIS COURT'S HOLDING IN *BELL*, THAT WHEN THE TASK OF IMPUTING TO CONGRESS AN UNDECLARED WILL, THE AMBIGUITY WILL BE RESOLVED IN FAVOR OF LENITY. *BELL* V. U.S. 81 (1955), AND IS THEREFORE INSURABLE FROM THE FEDERAL ISSUE.

FOSTER V. CHATMAN, 136 S. CT. 1737, 1747 (2016)

(RECOGNIZING THAT WHERE A STATE LAW GROUND IS INTERTWINED WITH FEDERAL LAW, THIS COURT HAS JURISDICTION TO REVIEW IT.).

THE ILLINOIS COURT OF APPEALS STATED THAT THERE WAS NO WAY THE LEGISLATURE COULD HAVE ANTICIPATED THIS MECHANISM OF A COLL PHONE. ID AT 36. HOWEVER, THAT GROUND HAS NO "FAIR SUPPORT" UNDER ILLINOIS LAW. NAT'L ASS'N FOR ADVANCEMENT OF COLORED PEOPLE V. STATE OF ALA. EX REL. PATTERSON, 357 U.S. 449 (1958) (STATING THAT THIS COURT HAS JURISDICTION TO REVIEW A RULING INVOLVING A STATE LAW GROUND WHERE THE STATE LAW GROUND LACKS "ANY FAIR OR SUBSTANTIAL SUPPORT").

FINALLY, THE COURT'S RULING OVERLOOKED THE FACT THAT THE STATE PUBLISHED 18 VIDEOS AT TRIAL AND NO IMAGES, NOT THE 200+ VIDEOS AND IMAGES THE COURT STATED IN ITS ORDER, AND NO ARGUMENT OR EVIDENCE WAS PRESENTED THAT PETITIONER POSSESSED THE VIDEOS ON DIFFERENT DATES OVER THE COURSE OF SEVEN YEARS, CONTRARY TO THE ILLINOIS COURT OF APPEALS STATEMENT IN ITS ORDER, ID AT 36.

CONCLUSION

FOR THE FOREGOING REASONS, PETITIONER FERNANDO OLIVEROS, RESPECTFULLY REQUESTS THAT THIS COURT GRANT CERTIORARI, AND REMAND THIS CASE FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS COURT'S POSITION ON STATUTORY CONSTRUCTION.

RESPECTFULLY SUBMITTED,
Fernando Oliveros, Y12283
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