NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

Beau Brandon Croghan - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Eighth Circuit erred by holding that a defendant knowingly *receives* child pornography by *viewing* it on a website, even without any evidence that the defendant retained the illegal images.

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## PETITION FOR WRIT OF CERTIORARI

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The petitioner, Beau Brandon Croghan, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 18-3709, entered on August 28, 2020.

## OPINION BELOW

The Eighth Circuit affirmed Mr. Croghan's conviction for receipt or attempted receipt of child pornography, 18 U.S.C. § 2252A(a)(2). The Eighth Circuit's opinion is published at 973 F.3d 809 (8th Cir. 2020). Mr. Croghan incurred his conviction in the United States District Court for the Southern District of Iowa. The district court did not file an opinion related to the single issue presented in this petition.

## JURISDICTION

As noted, the Eighth Circuit entered its judgment on August 28, 2020. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition for a writ of certiorari is timely pursuant to this Court's March 23, 2020, order extending the deadline for filing in light of the ongoing COVID-19 pandemic.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2252A(a)(2), which provides as follows:

> (a) Any person who—
>
> . . . .
>
> (2) *knowingly receives* or distributes—
>
> (A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or
>
> (B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;
>
> . . . .
>
> shall be punished as provided in subsection (b).

18 U.S.C. § 2252A(a)(2) (emphasis added). A companion provision, 18 U.S.C. § 2252(a)(2), also criminalizes the receipt of child pornography. Secondarily, any ruling by this Court would provide guidance concerning the statutory provisions that

criminalize possession of child pornography. *See* 18 U.S.C. §§ 2252(a)(4)(B), 2252A(a)(4)(B).

## STATEMENT OF THE CASE

Mr. Croghan accessed Playpen, a now-defunct child pornography website on the Tor network. Tor is an alternative to the regular Internet, offering users relative anonymity. It allows users to access to what some call the "dark web," a portion of the Internet inaccessible via typical web browsers such as Internet Explorer. Playpen was structured like a message board with categories for different genres of child pornography. When Playpen users clicked on a particular topic (for instance, "boys"), images of child pornography within a particular genre would appear on their computer screen. (App., pp. 3-5.)

The FBI eventually seized control of Playpen and identified many of its users during a 13-day period in which it operated the website. Mr. Croghan was caught in the dragnet. During the 13-day period, Mr. Croghan accessed Playpen on four days, and he accessed 51 topics on which more than 600 images of child pornography were posted. (*Id.*, pp. 5-7.)

Based on the evidence that Mr. Croghan accessed Playpen, law enforcement searched his home and seized his laptop computer. (*Id.*, p. 8.) Significantly, a forensic examination "did not find any child pornography" on the computer. (*Id.*, p. 10.) Instead, the forensic examiner found what he called "artifacts" of child-pornography-related activities. (*Id.*) In particular, the examiner found that the laptop's user had

utilized VideoLAN Controller ("VLC"), a video-playing software, to open file with a name indicative of child pornography. The video itself was not saved on the laptop. Additionally, the examiner found evidence that the computer had opened a Windows media file with a filename indicative of child pornography (again, the file itself was not on the computer). Finally, the examiner also found that the laptop's user had bookmarked a Russian website containing child exploitation material and adult pornography. (*Id.*, pp. 9-10.)

For his activities, Mr. Croghan initially faced a one-count indictment charging him with knowing access and attempted access to child pornography, 18 U.S.C. § 2252A(a)(5)(B). (App., p. 10.) The district court granted Mr. Croghan's motion to suppress the evidence seized pursuant to the search warrant for his home, but the Eighth Circuit reversed. *See United States v. Horton*, 863 F.3d 1041 (8th Cir. 2017). Thereafter, the grand jury returned a superseding indictment charging Mr. Croghan with knowing receipt or attempted receipt of child pornography, 18 U.S.C. § 2252A(a)(2), in addition to the original access charge. (App., p. 10.)

At trial, the jury found Mr. Croghan guilty of the receipt offense. The jury did not return a verdict on the access offense, which the district court concluded was a lesser-included offense of the receipt charge. The court sentenced Mr. Croghan to 110 months' imprisonment. (*Id.*)

On appeal to the Eighth Circuit, Mr. Croghan raised several trial and sentencing issues, but only one is relevant to this petition. Mr. Croghan argued that

the district court erred by denying his motion for judgment of acquittal because insufficient evidence supported his conviction for the receipt offense. He argued that because the government presented no evidence that he saved or otherwise retained any of the child pornography that he accessed, there was no evidence that he "received" it. Instead, the jury's verdict supported a conviction on the lesser-included access offense. (*See id.*, p. 21.)

The Eighth Circuit affirmed Mr. Croghan's conviction and sentence. Regarding the issue presented, the court held that "the government's evidence that Croghan viewed the images [of child pornography] is sufficient in the present case to prove receipt." (*Id.*, p. 30.) According to the Eighth Circuit, evidence that images of child pornography were "saved" is unnecessary to prove receipt of the images. (*See id.*)

## REASONS FOR GRANTING THE WRIT

An individual who *views* images on a computer, *without more*, has not knowingly received (or possessed) those images. The Eighth Circuit's ruling runs contrary to plain meaning and contributes to confusion among the circuits regarding the appropriate interpretation of the child pornography statutes.

As the Eighth Circuit acknowledged, there is no definition of "receives" in the child pornography statutes, and the plain meaning of the term means "takes possession." (*See* App., pp. 22-23.) Thus, the concepts of receipt and possession are

intertwined: "all receivers are possessors," but "not all possessors are receivers." (*Id.*, p. 23 n.8 (quoting *United States v. Watzman*, 486 F.3d 1004, 1010 (7th Cir. 2007)).).

For two reasons, the Eighth Circuit incorrectly applied the definition of "receives" in Mr. Croghan's case. First, although Mr. Croghan viewed (accessed) images of child pornography, there was no evidence that he or his computer retained (received and possessed) any of those images. As noted, law enforcement found no images of child pornography on the computer – not even in a temporary Internet file folder (also called a "cache"). Instead, the examiner found only "artifacts" of potential child pornography files that had been opened on the computer, but not saved.

No matter, according to the Eighth Circuit, because an individual exercises "some control over the images [on a website] even without saving them." (*Id.*, p. 30 (quoting *United States v. Ramos*, 685 F.3d 120, 131 (2d Cir. 2012)).). But the mere ability to receive is not receipt. An individual does not take possession of something by viewing it, whether on a computer screen or otherwise. Receipt requires retention.

The error in the Eighth Circuit's reasoning is apparent when one applies it to other online contexts. For instance, a Twitter user who merely reads a tweet has not received (or possessed) the tweet; that person has viewed it, no matter whether he sought out tweets regarding a particular topic. If the same user was the recipient of a direct message, then he did receive the message because it is retained in his account (just as an email user receives an email message). For another example, an Instagram user who views another user's pictures has not received the photos. And

a Facebook user reviewing another person's profile has not received the profile. Finally, for another example closer to Mr. Croghan's situation, a person who navigates to a website does not take possession of the website. By the Eighth Circuit's logic, Mr. Croghan received and possessed the entire Playpen website by accessing it.

The second flaw in the Eighth Circuit's reasoning is its misunderstanding of what it means to "knowingly" receive. The Eighth Circuit seized on the evidence that Mr. Croghan took "several steps to view child pornography on Playpen." (*See id.*, pp. 29-30.) But that did not establish Mr. Croghan's knowledge that his computer would retain child pornography, as required for a conviction for the receipt offense. Instead, Mr. Croghan knowingly accessed Playpen and its contents, just the same as someone who navigates to *http://www.supremecourt.gov* knowingly accesses this Court's website and its contents. Knowing access is not necessarily knowing receipt.

The Eighth Circuit relied on decisions from other circuits that contain confusing guidance, but are factually distinguishable from this case in any event. The court placed its greatest reliance on the Second Circuit's decision in *Ramos*. (*See* App., pp. 26-27.) *Ramos* suggests that any individual who has "intentionally searched for images of child pornography, found them, and knowingly accepted them onto his computer, albeit temporarily" has knowingly received child pornography. *See* 685 F.3d at 132. For the reasons already addressed, *Ramos* is incorrect, and the fact that the Eighth Circuit relied on it demonstrates the need for this Court's intervention to provide guidance to the circuits. That assertion aside, *Ramos* is distinguishable

because there *was* actual evidence of receipt: "some 140 images of child pornography . . . were stored on the computer in temporary internet files," where Ramos could "still exercise dominion and control over them." 685 F.3d at 132. Here, as noted, there was no evidence that Mr. Croghan's computer temporarily "stored" illegal images in a cache. Moreover, unlike this case, there *was* actual evidence of knowledge: Ramos "knew that these images would be found on his computer, as he told the ICE agents that they would probably find child pornography there." *Id.*

*United States v. Pruitt*, 638 F.3d 763 (11th Cir. 2011) (*per curiam*), also garnered attention in the Eighth Circuit's decision for an overly broad assertion. (*See* App., pp. 25-26.) According to *Pruitt*, any "person 'knowingly receives' child pornography under 18 U.S.C. § 2252A(a)(2) when he intentionally views, acquires, or accepts child pornography on a computer from an outside source." 638 F.3d at 766. As explained, a person who views child pornography has not necessarily received it, just as a Facebook user who looks at another person's profile has not received the profile. Again, however, *Pruitt* is distinguishable: Pruitt actually *did* receive child pornography because, unlike here, "investigators discovered child-pornography images in the computer's cache and in the unallocated spaces on the computer's hard drive." *Id.* at 766.

The Eighth Circuit's decision contributes to a circuit split on the issue whether viewing child pornography is synonymous with receiving and possessing it, as evidenced by *United States v. Flyer*, 633 F.3d 911 (9th Cir. 2011). *Flyer* reversed a

conviction for possession of child pornography images found in unallocated space on the defendant's computer. *Id.* at 920. Unlike files in a cache, files in unallocated space "cannot be seen or accessed by the user without the use of forensic software." *Id.* at 918. *Flyer* correctly reasoned that an individual who views child pornography does not necessarily possess (or receive) it, even if that child pornography lands in unallocated space on the computer. *See id.* at 919 (citing *United States v. Kuchinski*, 469 F.3d 853, 863 (9th Cir. 2006) ("Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images."); *United States v. Navrestad*, 66 M.J. 262, 267-68 (C.A.A.F. 2008) (holding that viewed images are not necessarily possessed)).

The Eighth Circuit's decision also creates a split with the Tenth Circuit and its decision in *United States v. Dobbs*, 629 F.3d 1199 (10th Cir. 2011). *Dobbs* reversed a conviction for knowing receipt of two images of child pornography found in a cache. *Id.* at 1200-01. The court held that proof of knowledge was lacking: there was no evidence that Dobbs accessed the two images in the cache, saw the two particular images, or even knew that the computer sent images to the cache. *Id.* at 1204. The Eighth Circuit attempted to distinguish *Dobbs* because of Mr. Croghan's concession that he viewed child pornography (App., p. 29 n.12), but that is beside the point. Dobbs engaged in a "pattern of child-pornography-related searches," 629 F.3d at

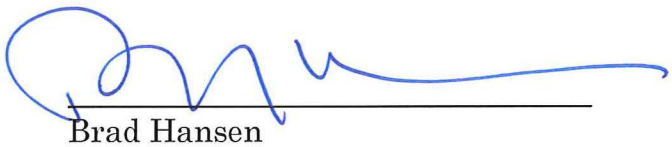
1204, but the Tenth Circuit found that insufficient to establish knowing receipt of the images in the cache. *See id.* at 1209. The images retained in the cache were necessary to prove receipt, and the defendant's knowledge of those images was necessary to prove knowing receipt. Here, again, there was no retention, and thus no receipt.

As technology continues to evolve, and child pornography cases continue to be prosecuted, the question presented in this petition will grow more significant. Now is a good time for this Court to resolve the confusion among the circuits and provide guidance regarding what it means to receive or possess child pornography.

## CONCLUSION

For the reasons explained, Mr. Croghan respectfully asks the Court to grant his petition for a writ of certiorari.

RESPECTFULLY SUBMITTED,



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