No. 20-6948

IN THE SUPREME COURT OF THE UNITED STATES

BEAU BRANDON CROGHAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. McQUAID
Acting Assistant Attorney General

ROSS B. GOLDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether sufficient evidence supported the jury's finding that petitioner received or attempted to receive child pornography, in violation of 18 U.S.C. 2252A(a)(2)(2012).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Iowa):

United States v. Croghan, No. 15-cr-48 (Dec. 6, 2018)

United States Court of Appeals (8th Cir.):

United States v. Croghan, No. 18-3709 (Aug. 28, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-36) is reported at 973 F.3d 809. A prior opinion of the court of appeals is reported at 863 F.3d 1041. An additional opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 784 Fed Appx. 475. The order of the district court is reported at 209 F. Supp. 3d 1080.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1) was entered on August 28, 2020. The petition for a writ of certiorari was

filed on January 18, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of receiving or attempting to receive child pornography, in violation of 18 U.S.C. 2252A(a)(2)(2012) and 18 U.S.C. 2252A(b)(1). Pet. App. 37. He was sentenced to 110 months of imprisonment, to be followed by ten years of supervised release. Id. at 38-39. The court of appeals affirmed. Id. at 2-36.

1. Petitioner came to the attention of the FBI after agents determined that his laptop had been used repeatedly to access a website called "Playpen," "a message board-type website where people would distribute and share images and videos of child pornography." Pet. App. 4 (citation omitted). Playpen was located on the hidden Tor network, which operates on top of the normal Internet and is frequently used by those who wish to protect the anonymity of their network activities. Id. at 3-4.

Law enforcement officers executed a search warrant at petitioner's residence, where they found a computer that displayed a folder and shortcut for the Tor browser. Pet. App. 8-9. A forensic examination of the computer revealed several "child pornography artifacts." Id. at 10 (citation omitted).

2. A federal grand jury returned an indictment charging petitioner with accessing or attempting to access child

pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Pet. App. 10. The district court initially suppressed the evidence obtained through the search of petitioner's laptop, but the court of appeals reversed, 863 F.3d 1041, and this Court denied certiorari, 138 S. Ct. 1440. On remand, the grand jury returned a superseding indictment again charging petitioner with accessing and attempting to access child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B), and newly charging petitioner with receiving and attempting to receive child pornography, in violation of 18 U.S.C. 2252A(a)(2) (2012). Pet. App. 10.

At petitioner's trial, an FBI special agent testified that a user seeking to access Playpen would need to install the Tor browser, navigate to the website using a 16-digit random code, and then register a user account. Pet. App. 4. Once logged into Playpen, a user would be taken to an index page containing links to the various parts of Playpen, including "boys, girls, toddlers," and "incest." Ibid. (citation omitted). When a user clicked on a category, he would be taken to a sub-forum listing different posts that had been uploaded by other users with "titles indicative of the types of images or videos" that had been uploaded. Id. at 4-5 (citation omitted). After clicking on one of these posts, the user "would enter that actual posting, and at that point typically . . . would see images of child pornography on [the user's] computer screen and links to download full videos." Id. at 5 (citation omitted). The special agent explained that the images

themselves are "embedded within [the] post[s] so when the user click[s] on that particular post, these full-sized images [a]re within that post" and are "downloaded to [the user's] computer and displayed on the computer screen without additional action being taken." Ibid. (citation omitted).

The government also presented evidence that petitioner was a registered user of Playpen, and that -- during a 13-day period when the FBI took over Playpen in order to identify its users -- petitioner had accessed 51 topics and over 600 images of child pornography. Pet. App. 5-6. The FBI special agent testified that petitioner had "accessed" or "looked at" sections including "Preteen HardCore, Infants and Toddlers" and "Incest," and downloaded images from those sections. Id. at 7 (citation omitted). The agent explained, for example, that petitioner had gone to the "Pre-teen hard core section" and "clicked on a topic," after which "all of the images in the posting [were] downloaded" to petitioner's computer. Ibid. (citations omitted).

The state patrol officer who conducted the forensic examination of petitioner's computer also testified. The officer explained that the recent history of a video-player program on petitioner's computer included the name "Baby…0yosuck penis.avi," and other locations on the hard drive likewise listed video files with suggestive names, although he did not locate the actual files associated with the names at the time he examined the computer. Pet. App. 9 (citation omitted). The officer testified that he was

not surprised to find "child pornography artifacts" without locating the pornography itself because, in his experience, "people who use Tor or networks like Tor want to be anonymous." Id. at 10 (citations omitted).

The district court instructed the jury to deliberate first on the count of the indictment charging petitioner with receiving and attempting to receive child pornography on the premise that accessing or attempting to access child pornography "was a lesser included offense of the receipt count." Ibid. The court further instructed the jury "to only consider the access count" if it could not reach a conclusion or if it reached a not guilty verdict with respect to the receipt count. Ibid. The jury found petitioner guilty of receiving or attempting to receive child pornography. Pet. App. 10. The district court denied a judgment of acquittal and sentenced petitioner to a below-Guidelines sentence of 110 months of imprisonment, to be followed by ten years of supervised release. Id. at 10, 38-39.

3. The court of appeals affirmed. Pet. App. 2-36. As relevant here, the court rejected petitioner's argument that the evidence was insufficient to permit a reasonable jury to find that he received or attempted to receive child pornography. Id. at 21-30.

The court first explained that the statute of conviction, 18 U.S.C. 2252A (2012), punishes possessing, receiving, and accessing child pornography, and that all three of the offenses "require the

defendant to have acted 'knowingly.'" Pet. App. 21 (citation omitted). The court observed that this scienter requirement "carries critical importance" because it "eliminates the possibility that an unwitting downloader" will face liability. Ibid. (citations omitted). And the court recognized that the scienter requirement can make it particularly hard to prove the "knowing-receipt" of child pornography because the tracing analysis necessary to prove receipt is extremely "intricate" "unless . . . the Government happen[s] to be operating undercover on the same peer-to-peer, internet-file-sharing network as defendant," as was the case here. Ibid. (quoting United States v. Ross, 948 F.3d 243, 247 (5th Cir.), cert. denied, 141 S. Ct. 305 (2020)).

The court of appeals then considered the elements of the receipt offense. Pet. App. 22-25. It afforded the term "receipt" "its ordinary meaning": "'to knowingly accept'; 'to take possession or delivery of'; or 'to take in through the mind or senses.'" Id. at 22-23 (quoting, inter alia, Webster's Third New International Dictionary of the English Language (1993)) (emphasis omitted). The court accordingly reasoned that "[r]eceiving child pornography 'generally require[s] a knowing acceptance or taking possession of the prohibited item.'" Id. at 23 (quoting United States v. Schales, 546 F.3d 965, 978 (9th Cir. 2008), cert. denied, 555 U.S. 1202 (2009)). The court noted that it had not yet "decided whether viewing images stored in temporary internet files is

sufficient" to meet the definition. Id. at 24. But it observed that its "sister circuits have upheld child pornography receipt and possession convictions where a defendant viewed child pornography stored in temporary internet files on a computer," even where the defendant did not "act[] to save the images to a hard drive, to edit them, or otherwise to exert more control over them." Id. at 25 (citations and internal quotation marks omitted).

The court of appeals then rejected petitioner's argument that the evidence in his case "proved, at most, that he knowingly accessed child pornography," and not that he knowingly received it. Pet. App. 27. The court explained that knowingly accessing child pornography (referred to as "access-with-intent") "requires only an intent to view," and might therefore be committed solely by navigating to a child-pornography website, while knowingly receiving child pornography "requires 'intentionally viewing, acquiring, or accepting child pornography on a computer from an outside source.'" Id. at 29 (citation omitted). The court then pointed to numerous pieces of evidence establishing that petitioner had taken the necessary additional steps to knowingly receive child pornography. Id. at 29-30. Among other things, the court observed that petitioner had logged into his Playpen user account and "searched 51 topics during the two-week period that the FBI controlled" the site, and that petitioner's computer contained "child pornography artifacts," including recent history

showing "video file names of child pornography." Id. at 29-31 (citations omitted).

The court of appeals explained that "in the present case" "evidence that" petitioner "viewed the images [wa]s sufficient * * * to prove receipt," and that "[t]he government was not required to prove that [he] saved the images to his hard drive." Pet. App. 30. It observed, for example, that officers had testified that once petitioner clicked on a Playpen post "[a]ll of the images in the posting [were] downloaded to [his] computer" and that he "had some control over the images, even without saving them." Ibid. (citations omitted). The court therefore found "ample evidence that [petitioner] intentionally searched for images of child pornography, found them, and knowingly accepted them onto his computer, albeit temporarily." Id. at 30-31 (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 9-14) that insufficient evidence supports his conviction for receiving child pornography. The court of appeals' decision was correct, and it does not conflict with any decision from any other court of appeals. No further review is warranted.

1. Federal law prohibits "knowingly receiv[ing] * * * any child pornography using any means or facility of interstate or foreign commerce or that * * * has been shipped or transported in or affecting interstate or foreign commerce, by any means,

including by computer." 18 U.S.C. 2252(a)(2)(A). The court of appeals correctly found ample evidence in the record of this case to support petitioner's conviction for receiving child pornography.

Testimony of government witnesses established that petitioner repeatedly logged into a website designed for sharing child pornography, and that he clicked on numerous posts on that website, prompting images of child pornography to be downloaded to his computer where he could exercise control over them. See, e.g., Pet. App. 7 (recounting testimony that petitioner went to the "Pre-teen hard core section" and "clicked on a topic," after which "[a]ll of the images in the posting [were] downloaded" to his computer) (citations omitted). The testimony further established that petitioner's computer contained "child pornography artifacts," including an entry in the recent history of a video-player program with a graphic title, indicating that the program had recently been used to play an explicit video involving a very young child. Id. at 10 (citation omitted). That evidence was more than sufficient to demonstrate that petitioner had received child pornography -- that is, that he had "knowing[ly] accept[ed] or tak[en] possession of" pornographic material involving children. Id. at 23 (quoting United States v. Schales, 546 F.3d 965, 978 (9th Cir. 2008), cert. denied, 555 U.S. 1202 (2009)).

Petitioner does not dispute any of that evidence, but asserts (Pet. 10) that it establishes only that he "viewed" child

pornography and not that he "received" it. In his view (ibid.), "[r]eceipt requires retention." Petitioner offers no authority to support that view, which cannot be squared with the plain meaning of "receives," 18 U.S.C. 2252(a)(2). A person "receives" a newspaper, for example, if he picks it up, cursorily glances at the headlines, and then immediately recycles it. Petitioner also fails to provide a suggestion as to how long a defendant must "retain" something before he has "received" it, and he does not offer any evidence that a coherent line exists.

In any event, the evidence here established that petitioner did, in fact, retain pornography, "albeit temporarily." Pet. App. 30-31 (citation omitted). As the court of appeals observed, law enforcement officers testified that petitioner had "downloaded" images onto his computer and that he "had some control over the images even without saving them." Id. at 30 (citations omitted). Nor did the decision below even adopt a general rule that evidence that a defendant viewed pornography is necessarily sufficient to sustain a conviction for receiving child pornography. It found only that "in the present case" -- where the evidence established that viewing images on Playpen involved downloading and gaining control over them -- "evidence that [petitioner] viewed the images [wa]s sufficient." Ibid.

Petitioner is mistaken in his assertion that "evidence that [he] took 'several steps to view child pornography on Playpen'" is insufficient to establish that he "knowingly" received child

pornography because petitioner did not know "that his computer would retain child pornography." Pet. 11 (citation omitted). The evidence showed that petitioner repeatedly used the Playpen site, such that the jury could reasonably conclude that he was aware that clicking on a posting meant accepting the images onto his computer, where he could exercise some control over them, such as viewing them as much as he liked before moving on. Petitioner offers no sound reason why that is not enough to establish that he "knowingly" received child pornography. See, e.g., Schales, 546 F.3d at 978 ("knowing acceptance" of prohibited materials is sufficient to establish knowing receipt of child pornography).

2. Petitioner identifies no conflict between the decision below and a decision of any other circuit. Petitioner himself acknowledges (Pet. 11-12) that the decision below is consistent with the decisions of the Second and Eleventh Circuits regarding the evidence necessary to sustain a conviction for knowingly receiving child pornography. See United States v. Ramos, 685 F.3d 120, 131 (2d Cir.) (explaining conviction for receiving child pornography does not require evidence that defendant "save[d] [the images] onto his hard drive"), cert. denied, 568 U.S. 995 (2012); United States v. Pruitt, 638 F.3d 763, 766 (11th Cir.) (per curiam) (same), cert. denied, 565 U.S. 824 (2011). Petitioner asserts (Pet. 12-14), however, that the court's decision conflicts with the Tenth Circuit's decision in United States v. Dobbs, 629 F.3d 1199 (2011), and the Ninth Circuit's decision in United States v.

Flyer, 633 F.3d 911 (2011), "on the issue whether viewing child pornography is synonymous with receiving and possessing it." That assertion lacks merit and does not warrant this Court's review.

In Dobbs, the Tenth Circuit defined the knowing receipt of child pornography as "voluntarily and intentionally" acting to "accept an object and to have the ability to control it." 629 F.3d at 1203-1204 (citation omitted). That is fully consistent with petitioner's reading of the decision below as determining that receiving child pornography requires "knowing acceptance or taking possession" of images, Pet. App. 23 (citation omitted). Petitioner suggests (Pet. 13) that Dobbs nonetheless conflicts with this case because Dobbs rejected the proposition that a "pattern of child-pornography-related searches" was sufficient to establish the knowing receipt of child pornography. 629 F.3d at 1204. But Dobbs in fact acknowledged that evidence of searches for child pornography can provide circumstantial support for the proposition that a defendant knowingly received child pornography; it merely concluded that the evidence of searches in that case was insufficient to prove that defendant had knowingly received the particular images for which he was convicted because the timing of the searches did not correspond with the time when the images appeared on the computer. Ibid. Here, in contrast, petitioner's conviction rests on extensive evidence that he repeatedly logged onto a child pornography site where he downloaded a variety of pornographic images. Pet. App. 7-10.

Petitioner's suggestion (Pet. 12) of a conflict with the Ninth Circuit's decision in Flyer is likewise misplaced. In Flyer, the Ninth Circuit reversed a conviction for possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B), largely because it saw "no evidence" either "that Flyer knew of the presence of the files on the unallocated space of his Gateway computer's hard drive" or "that Flyer had the forensic software required to see or access the files." 633 F.3d at 918-920. The record here, in contrast, included ample evidence that petitioner had downloaded the Tor network necessary to access Playpen and that he had in fact intentionally logged onto the site to download images on numerous occasions. See also United States v. Navrestad, 66 M.J. 262, 268 (C.A.A.F. 2008) (cited at Pet. 13) (distinguishing fact-specific conclusion there from federal circuit decisions).

Moreover, the Ninth Circuit has more recently found that "[i]n the electronic context, a person can receive and possess child pornography" even "without downloading it, if he or she seeks it out and exercises dominion and control over it." United States v. Ruiz-Castelo, 835 Fed. Appx. 187, 190 (2020) (unpublished) (quoting United States v. Romm, 455 F.3d 990, 998 (9th Cir. 2006), cert. denied, 549 U.S. 1150 (2007)). Accordingly, no sound reason exists to believe the Ninth Circuit would reach a different conclusion than the court below on the facts of this case, in which petitioner repeatedly downloaded images of child pornography.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. McQUAID
Acting Assistant Attorney General

ROSS B. GOLDMAN
Attorney

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