

No. 20-____

In the
Supreme Court of the United States

Fernando Clarke,

Petitioner,

v.

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Fernando Clarke was charged with, *inter alia*, two counts of transporting child pornography. At trial, the government witnesses testified that Mr. Clarke had used uTorrent, a peer-to-peer file sharing program, to download child pornography. The government then used its own program to transport the child pornography from Mr. Clarke's computer to a government computer. Mr. Clarke took no part in this movement of child pornography from his computer to the government computer. The question presented is whether the government's own action in uploading a file containing child pornography from the defendant's folder on a peer-to-peer network to the government's computer constituted "transport[ing]" of child pornography by the defendant within the meaning of 18 U.S.C. § 2252(a)(1)?

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Opinions and Orders Below

The Second Circuit's decision is published and available at 979 F.3d 82. It is also reproduced in the appendix at Pet. App. 1-13.

Jurisdiction

The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) and entered judgment on October 29, 2020. The district court had jurisdiction under 18 U.S.C. § 3231 and judgment was rendered on May 18, 2018, and entered on May 22, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Statutory Provisions

Transportation of child pornography, 18 U.S.C. § 2252(a)(1).

Section 18 U.S.C. § 2252(a)(1) states that “Any person who—

(1) knowingly transports or ships 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 mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct...

shall be punished as provided in subsection (b) of this section.

Subsection (b) states in relevant part that “Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years.” 18 U.S.C. § 2252(b)(1).

Receipt or distribution of child pornography, 18 U.S.C. § 2252(a)(2).

Section 18 U.S.C. § 2252(a)(2) states that “Any person who—

(2) knowingly receives, or distributes, any visual depiction 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, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

- (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
- (B) such visual depiction is of such conduct...

shall be punished as provided in subsection (b) of this section.

Subsection (b) states in relevant part that “Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years.” 18 U.S.C. § 2252(b)(1).

Statement of the Case

A. Introduction and Summary of Grounds for Certiorari

Fernando Clarke was convicted after a jury trial of two counts of transporting child pornography, four counts of receipt of child pornography, and one count of possessing child pornography. He was sentenced to 10 years in prison. For the transportation counts, he was sentenced to a mandatory term of five years of

incarceration, running consecutively to a five-year sentence for the counts of receipt and possession of child pornography.¹

With respect to the two counts of transportation, the sole evidence against Mr. Clarke was the assertion that a government computer program had transported two files containing child pornography from Mr. Clarke's folder on a peer-to-peer network to a government computer. There was no factual dispute that Mr. Clarke did not move the files, physically or electronically, from his computer to somewhere else. Instead, it was the government which caused the files to be moved from Mr. Clarke's computer to the government's computer.

Section 18 U.S.C. § 2252(a)(1) states that a person is guilty of transporting child pornography when that person "knowingly transports or ships 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 mails, any visual depiction [of child pornography]." A separate crime prohibits the distribution of child pornography. *See* 18 U.S.C. § 2252(a)(2). In the Second Circuit, Mr. Clarke argued that the statutory definition of transportation in 18 U.S.C. § 2252(a)(1) required movement by the defendant and could not include situations like Mr. Clarke's where the government – not the defendant – caused the child pornography to move. The Second Circuit, however, largely relying on cases analyzing the

¹ The sentencing breakdown was 60 months on each transportation count, to run concurrently to each other, but consecutively to 60 months on each receipt count. A 36-month sentence for the possession count was also to run concurrently. *See* Second Circuit Appellant Appendix at 500 (hereinafter "A."). Citations preceded by "T" refer to pages of the trial transcript.

separate statute of distribution of child pornography, held that the fact that the files were available in Mr. Clarke’s peer-to-peer program was sufficient evidence of transportation, even though the government, rather than Mr. Clarke, moved the files.

Subsequent to the Second Circuit’s decision in Mr. Clarke’s case, the conduct required for distribution of child pornography and transportation of child pornography using a peer-to-peer network is exactly the same. Both may be completed when a defendant leaves a file available for upload in a peer-to-peer network. This cannot be correct. Congress drafted and passed legislation with two separate child pornography crimes, one prohibiting transportation of child pornography and the other prohibiting distribution of child pornography. In drafting two separate statutory subsections, Congress clearly did not intend the two crimes to mean the same thing and prohibit the exact same conduct. This is supported by the ordinary meaning of “transportation,” which includes movement, while the ordinary meaning of “distribution” does not.

The consequences in allowing the Second Circuit’s decision conflating the two crimes into one are significant: A conviction for transporting child pornography carries a mandatory five-year sentence, which Mr. Clarke is serving right now. This case, therefore, presents a pressing statutory issue concerning the definition of “transportation” in 18 U.S.C. § 2252(a)(1). The Second Circuit’s precedential opinion here will surely be followed by the lower courts and influence other circuits. This Court’s review is necessary.

B. Facts

Trial and conviction

At trial, Debra Gerbasi, a special agent with Homeland Security Investigations, testified that she used government software called Torrential Downpour to look for people sharing child pornography through BitTorrent. A. 122. “BitTorrent” is a peer-to-peer file sharing program that downloads pieces of a file “from many different places” to facilitate faster downloads. A. 125. Once BitTorrent is installed and the computer is connected to the internet, files are downloaded and shared automatically, without the user doing anything. A. 158. Unlike the public version of BitTorrent, which would upload files only in small parts from individual users, the government program did “single-source downloads,” which meant that a full file could be taken from one person. A. 125. Using this government software, Gerbasi got a “lead” about child pornography associated with Mr. Clarke’s IP address and used Torrential Downpour to upload two videos from Mr. Clarke’s IP address to the government’s computer. A. 40, 136. The transportation counts related to these two videos.

At the close of the case, counsel objected that there was insufficient evidence to prove that Mr. Clarke knowingly or intentionally transported child pornography. A. 423. The government argued that the act of “placing child pornography files in a shared folder accessible to others via peer to peer file sharing program constitutes either distribution or transportation.” A. 437. The court overruled counsel’s objection and charged the jury that it was “not necessary for the Government to show that the defendant personally transported or shipped the depiction.” T. 614. It

added, “[i]t is sufficient if the Government proves that the defendant knowingly caused the interstate shipment to take place, or knowingly allowed others to access his computer equipment to obtain the visual depiction via the internet or file sharing.” T. 614.

The jury convicted Mr. Clarke of all counts.

The Second Circuit Briefing and Decision

After initial briefing and oral argument, the Second Circuit Court of Appeals directed the parties to submit supplemental briefing this question: “Whether the government agent’s action in downloading to a government computer a file, which the defendant had placed in a folder on his computer that was accessible to other users of a peer-to-peer file sharing network, constituted a “transport[ing]” by the defendant within the meaning of 18 U.S.C. § 2252(a)(1)?” *See* Dkt. No. 83. In response, Mr. Clarke argued that the files were transported from his computer to the government agent’s computer only by the agent’s conduct, without participation on his part, and that such transportation of files by government actors did not satisfy the statutory requirement of transportation by the defendant.

The Second Circuit rejected Mr. Clarke’s argument on this point, and others, affirming Mr. Clarke’s conviction and sentence in a published decision, *United States v. Clarke*, 979 F.3d 82 (2d Cir. 2020).

In relevant part, the Circuit stated that Mr. Clarke “is correct that there is neither evidence (nor allegation) that, at the time of the downloading by the government agents, [Mr.] Clarke took any action or was aware of the government’s

downloading,” but that “[Mr.] Clarke cannot escape liability for the transportation of his files merely because the movement of the files was effectuated in part by government actors requesting downloads from his computer to theirs.” *Id.* at 90. The court faulted Mr. Clarke for “fail[ing] to take into account the role of his own actions and intentions in the transportation of his files to the computers of other users of the file-sharing network,” writing that Mr. Clarke “made use of the BitTorrent peer-to-peer file-sharing network to obtain child pornography files from the computers of others, knowing that by doing so he was enabling other users to obtain the files from his computer.” *Id.* at 93.

The Court explained:

the jury found that the government agents’ downloads of the files [Mr.] Clarke had placed in his shared folder constituted knowing and intentional transportation of the files by [Mr.] Clarke. We agree that, in those circumstances, by knowingly and intentionally joining the file-sharing network, downloading files from the computers of other network users to his own, storing those files in a folder that was shared with other network users, and maintaining his folder’s connection to the network, [Mr.] Clarke himself performed actions that would constitute the crime of knowing transportation of the files when, as anticipated, another user of the file-sharing network caused the files to be downloaded and sent from his computer to the other user’s computer. *Id.* at 95.

The Court recognized that this was a novel conclusion, explaining that “[n]o precedents of our court have addressed the precise question before us.... Other courts of appeals have upheld transportation convictions under § 2252(a)(1) under similar factual circumstances, but none have explicitly considered the argument made by Clarke in his supplemental briefs.” *Id.*

The Court then discussed decisions of other circuits relating to *distributing* child pornography, rather than transporting child pornography, stating that a “number of our sister circuits have rejected similar challenges to prosecutions for *distributing* child pornography under § 2252(a)(2), and have uniformly held that that a defendant who knowingly makes child pornography available to be downloaded by others (including undercover law enforcement officers) on a peer-to-peer file sharing network has “distributed” within the meaning of the statute.” *Id.*, citing, *inter alia*, *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007).

The Court “recognize[d] that … “[d]istribution” and “transportation” are different, in a manner that can be significant for [Mr.] Clarke’s argument, as distribution can be accomplished by mere transfer of ownership without movement from one place to another” but said that the “logic of these [distribution] cases is nonetheless consistent with our conclusion that when [Mr.] Clarke downloaded child pornography files on a peer-to-peer file-sharing network, knowing that his own downloading of files and storing them in a shared folder enabled others to download those files to their computers, the downloading by other users of the network completed [Mr.] Clarke’s commission of the offense of transporting child pornography.” *Id.*

The Circuit rejected the defense argument, saying that the “fact that the movement of the files was effectuated in part by the Government’s downloads without Clarke’s awareness does not alter our conclusion.” *Id.* The court continued:

In storing those files on his computer in a folder that allowed other users of the network to download copies to their computers,

he went far towards transporting his files to the computers of unknown others, which offense was completed when the files moved from his computer to theirs...We are therefore satisfied that, because [Mr.] Clarke knew he was sharing child pornography files on a file-sharing network, he cannot escape liability for the transportation of those files when it occurred. *Id.*

The Court concluded that “when the illicit files moved from his computer to the agents’ upon their requests to download, that completed [Mr.] Clarke’s commission of the transportation offenses charged in Counts One and Two.” *Id.* at 97.

Reasons for Granting the Writ

This Court should grant certiorari to address the statutory construction issue of whether “transportation” of child pornography can be completed when a government agent is the sole person who moved the pornography.

Mr. Clarke did not move any child pornography files, physically or electronically, from his computer to somewhere else. Instead, it was the government who transported the files; the government caused the files to be moved from Mr. Clarke’s computer to the government’s computer. The Second Circuit’s decision that Mr. Clarke need not move any files at all to be convicted of transportation of child pornography is wrong. Congress made two different crimes: one for transportation of child pornography and another for distribution of child pornography. The government’s evidence that the files on Mr. Clarke’s computer were in a folder that could be accessed by others could prove possession of child pornography and distribution of child pornography, but was insufficient to prove transportation of child pornography because Mr. Clarke did not move the files. The Second Circuit’s

decision to the contrary erases any difference between the statute prohibiting transportation and the statute prohibiting distribution of child pornography. This Court should grant certiorari to address whether transportation of child pornography can be completed without the defendant moving any child pornography.

A. Legal Background: The separate crimes of transportation of child pornography and distribution of child pornography.

Section 18 U.S.C. § 2252 (a)(1) states that a person is guilty of transporting child pornography who

knowingly transports or ships 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 mails, any visual depiction [of child pornography].

Although the statute does not define “transports or ships,” a survey of cases shows that transportation of child pornography is appropriate when an individual moves a child pornography image from one location to another, either in the physical world, or electronically. *See, e.g., United States v. Jenkins*, 854 F.3d 181, 184 (2d Cir. 2017) (“Jenkins owned a collection of child pornography and brought it across the U.S.–Canada border on the way to a family vacation for his personal viewing”); *United States v. Hutcheson*, 608 F. App’x 300, 301 (5th Cir. 2015) (“electronically transmitting child pornography over the internet to appear on social-media websites”); *United States v. Dean*, 705 F.3d 745, 746 (7th Cir. 2013) (boarded international flight with laptop “housing” child pornography); *United States v. Aumais*, 656 F.3d 147, 149 (2d Cir. 2011) (child pornography found in the

car when defendant attempted to enter the United States from Canada); *United States v. Buczkowski*, 458 F. App'x 311, 313 (4th Cir. 2011) (travel with computer containing child pornography across state lines); *United States v. Kennedy*, 643 F.3d 1251, 1252 (9th Cir. 2011) (inspection at airport after international trip revealed child pornography on computer); *United States v. Tenuto*, 593 F.3d 695, 697 (7th Cir. 2010) ("sending an email with the illicit image attached"); *United States v. Polanco*, 451 F.3d 308, 309 (3d Cir. 2006) (during international travel, United States Immigration and Customs Enforcement found three compact discs and a computer hard drive containing child pornography); *United States v. Mohrbacher*, 182 F.3d 1041, 1048–49 (9th Cir. 1999) ("[t]ransport" is defined as "to carry, convey, or remove from one place or person to another; to convey across"; "Shipping is usually defined as one manner of transporting," "to cause to be transported," or "to move (something) from one place or position to another"); *United States v. Toler*, 901 F.2d 399, 400 (4th Cir. 1990) (physically transporting child pornography from Florida to West Virginia).

These cases all assume that transportation requires the defendant to cause the child pornography to move from one place to another, for example, by sending an email with an image or physically moving child pornography across state lines.

That movement is key to the definition of transportation of child pornography is consistent with how circuit courts have defined transportation in a variety of other contexts. *See, e.g., United States v. Maldonado-Ochoa*, 844 F.3d 534, 538 n. 4 (5th Cir. 2016) ("Move" and "transport" are synonyms, and there is no reason to

believe that “transport” should have a special, more restrictive meaning in this context; analyzing criminal immigration statute) (citing *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203, 5 S.Ct. 826, 29 L.Ed. 158 (1885) (“Transportation implies the taking up of persons or property at some point and putting them down at another.”); Black’s Law Dictionary 1729 (10th ed. 2014) (defining “transportation” as “movement of goods or persons from one place to another by a carrier.”); 18 Oxford English Dictionary 423 (2d ed. 1989) (defining “transport” as “[t]o carry, convey, or remove from one place or person to another; to convey across.”). *See also United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000) (explaining that “Webster’s Third defines the verb ‘ship’ as ‘to cause to be transported.’ Transport means to ‘transfer or convey from one person or place to another: to CARRY, MOVE.’ By bringing his package to the post office and beginning the mailing process, Hinton definitely caused the package to be transported by the United States postal system”)(internal citations omitted); *Exec. Jet Aviation, Inc. v. United States*, 125 F.3d 1463, 1468 (Fed. Cir. 1997) (“The first definition which appears in the dictionary for “transport” is “to transfer or convey from one person or place to another” ...We believe that this is the most “plain, obvious and rational” definition of “transport.”); *United States v. Wright*, 791 F.2d 133, 137 (10th Cir. 1986) (“The ordinary meaning of the word is defined as: “to transfer or convey from one person or place to another”; analyzing mail fraud statute).

Congress also prohibited a distinct crime of distributing child pornography. 18 U.S.C. § 2252 (a)(2) (penalizing a person who “knowingly receives, or distributes, any visual depiction 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”). *See, e.g., United States v. Tenuto*, 593 F.3d 695, 697 (7th Cir. 2010) (“transporting child pornography [is] a distinct offense from distributing child pornography”; “[t]hey are, in fact, separate crimes”); *Mohrbacher*, 182 F.3d at 1048–49 (downloading images of child pornography from an electronic bulletin board could not be charged as transportation but could have been charged as receipt).

Unlike the definition of transportation, the definition of distribution does not require movement. The “plain meaning of distribution is “[t]he act or process of apportioning or giving out.” Black’s Law Dictionary 543 (9th ed. 2009).” *United States v. Chiaradio*, 684 F.3d 265, 281–82 (1st Cir. 2012). As then-Judge Gorsuch explained:

Black’s offers this definition [of distribute]: “1. To apportion; to divide among several. 2. To arrange by class or order. 3. To deliver. 4. To spread out; to disperse.” Black’s Law Dictionary 508 (8th ed. 2005). Webster’s adds this understanding: “to divide among several or many ... deal out ... apportion esp. to members of a group or over a period of time ... [allot] ... [dispense] ... to give out or deliver.” Webster’s Third New Int’l Dictionary Unabridged 660 (2002). The instruction offered by the District Court to the jury captured much the same sentiment: “To distribute something simply means to deliver or transfer possession of it to someone else.”

United States v. Shaffer, 472 F.3d 1219, 1223 (10th Cir. 2007) (upholding conviction for distributing child pornography based on the defendant making the pornography available to others in a peer-to-peer network).

Thus, circuits have held that making child pornography available to others in a shared folder can meet the elements of distribution of child pornography. See *United States v. Stitz*, 877 F.3d 533 (4th Cir. 2017); *United States v. Richardson*, 713 F.3d 232 (5th Cir. 2013); *United States v. Chiaradio*, 684 F.3d 265 (1st Cir. 2012) (“When an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred.”); *United States v. Chiaradio*, 684 F.3d 265, 281–82 (1st Cir. 2012).; *United States v. Darway*, 255 F. App’x 68 (6th Cir. 2007); *United States v. Griffin*, 482 F.3d 1008 (8th Cir. 2007) (conviction for receiving child pornography; addressing distribution sentencing enhancement in peer-to-peer context). Indeed, this case law is well developed. As then-Judge Gorsuch explained, using an oft-cited analogy to a self-service gas station, the defendant does not need to move the child pornography to be guilty of distributing it:

Just because the operation is self-serve, or in Mr. Shaffer’s parlance, passive, we do not doubt for a moment that the gas station owner is in the business of “distributing,” “delivering,” “transferring” or “dispersing” gasoline; the raison d’être of owning a gas station is to do just that. So, too, a reasonable jury could find that Mr. Shaffer welcomed people to his computer and was quite happy to let them take child pornography from it.
Shaffer, 472 F.3d at 1224.

In *Shaffer*, and in other distribution cases, proof that the defendant has made child pornography available in a peer-to-peer network is sufficient to meet the element of “distribution.” No such case law supports the Second Circuit’s conclusion that the same conduct is also sufficient to meet the element of “transportation” of child pornography. As the Circuit recognized, no circuits have “explicitly considered” the definition of “transportation” in the child pornography statute and whether it can be completed without any movement of child pornography by the defendant. *Clarke*, 979 F.3d at 94.

B. This Court should consider whether “transportation” has a different statutory definition than distribution.

Congress created two separate crimes, one prohibiting the “transportation” of child pornography and another prohibiting the “distribution” of child pornography. The Second Circuit’s decision that transportation does not require the defendant to move any files, however, conflates these two separate crimes, making the definitions of transportation and distribution exactly the same. This cannot be correct.

Here, the files were only moved by the government’s action. Without action by the government to transport the files to the government computer, the specific crime of transporting child pornography would not have been completed because the files would not have been moved from one computer to another. The Second Circuit’s decision that it is irrelevant that the government moved the files because Mr. Clarke “went far towards transporting his files to the computers of unknown others” by simply having the files in a peer-to-peer network, means that in the

Second Circuit the crimes of transportation and distribution of child pornography are both completed any time a user has child pornography files available in a peer-to-peer network. No distinction between the two crimes remains.

Permitting the Second Circuit's decision to stand, thus, produces an absurd result, allowing the same conduct to result in separate child pornography offenses for distribution and transportation, each of which carries a five-year mandatory minimum prison term. Congress could not have intended this result when it made two different statutory subsections, using different language, and prohibiting different conduct.

The Second Circuit's decision also allows the government to take the sole action for an element of the offense in contravention of settled case law explaining that "if the government unilaterally supplies an essential element of a crime, the government has in effect failed to prove that element as to the defendant." *United States v. Al Kassar*, 660 F.3d 108, 120 (2d Cir. 2011) (citing *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973)); *United States v. Coates*, 949 F.2d 104, 105 (4th Cir. 1991) (reversing when the "agent drove to Virginia for the sole purpose of making a telephone call across state lines"); *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir. 1985) ("wholly unnecessary for the FBI to move gambling equipment from Virginia to South Carolina. . . [w]e do not think the commercial predicate for federal jurisdiction can be found in such pretense").

C. This case presents a suitable vehicle for resolving the question presented.

This case provides an appropriate certiorari vehicle. Petitioner raised the question presented below, and specifically urged the court of appeals to overturn the district court's decision because the statutory definition of transportation of child pornography was not met when a government actor moved the files. *See* Pet. App. 15-16; Appellant's Second Circuit Supplemental Letter Brief. The facts about the file transfer are undisputed. Indeed, the government has never contested that Mr. Clarke did not move the files to the government computer. The government has also never disputed that only the government's Torrential Downpour program was able to upload a full file from Mr. Clarke's computer through the peer-to-peer network. The Second Circuit cleanly decided the question on the merits in a lengthy, published decision that is likely to prove influential, and which lower courts will be bound to follow. *See United States v. Clarke*, 979 F.3d 82 (2d Cir. 2020).

The decision on this issue was also dispositive to the outcome of Mr. Clarke's appeal with respect to two counts, for which he received a sentence of five years, running consecutively to his sentences on the other counts. Mr. Clarke is currently incarcerated with a release date in 2026. Without the conviction for these two counts of transportation of child pornography, Mr. Clarke's sentence would be near completion.

Accordingly, for the reasons explained above, this Court should grant certiorari.

Conclusion

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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