

No. _____

In the Supreme Court of the United States

ELTON VALLARE, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

18 U.S.C. § 2252A(a)(5)(B) provides:

Any person who ... knowingly *possesses*, or knowingly accesses with intent to view, *any* book, magazine, periodical, film, videotape, computer disk, or *any other material* that contains an image of child pornography that has been mailed, or shipped or transported 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 that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer[.]

(emphasis added). The question presented is: What is the unit of prosecution under § 2252A(a)(5)(B)?

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Petitioner Elton Vallare asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 8, 2021.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Vallare*, No. 20-50433 (5th Cir. Apr. 8, 2021) (per curiam), is reproduced at Pet. App. 1a–2a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

On March 19, 2020, the Court extended the deadline for filing a petition for writ of certiorari due after that date to 150 days from the date of the lower court’s judgment. *See also* Sup. Ct. R. 13.1, 13.5. On July 19, 2021, the Court rescinded the March 19, 2020 Order, but kept the extension in place for judgments entered in between the dates of two orders: “[I]n any case in which the relevant lower court judgment... was issued prior to July 19, 2021, the deadline to file a petition for a writ of certiorari remains extended to 150 days from the date of that judgment or order.” This petition is filed within that time, as the opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on April 8, 2021. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 18 U.S.C. § 2252(a)(5)(B) provides:

Any person who ... knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical,

film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported 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 that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer[.]

STATEMENT

Elton Vallare was charged in a five-count indictment with child pornography offenses under 18 U.S.C. § 2252A:

- Counts One and Two: distributing child pornography on February 14, 2015, and March 11, 2017, respectively, in violation of § 2252A(a)(2);
- Count Three: receiving child pornography between September 2014 and March 11, 2017, in violation of § 2252A(a)(2); and
- Counts Four and Five: possessing material containing child pornography on June 14, 2017, in violation of § 2252A(a)(5)(B) .

Count Four alleged that the material was a laptop computer; Count Five alleged that the material was an external hard drive.

Vallare went to trial. A jury found him guilty of all five counts.

The district court sentenced Vallare to concurrent terms of 20 years' imprisonment and 10 years' supervised release on all five counts, to run concurrently with each other. The court also imposed a special assessment of \$500 (\$100 per count).

The written judgment differed slightly from the district court's oral pronouncement of the sentence. In the judgment, the court adjudged Vallare guilty of all five counts, but amended the oral pronouncement of the sentence on Count Three—the receipt count—due to multiplicity concerns:

The Court is concerned that entering sentences under both receipt and possession counts raises multiplicity and double jeopardy concerns. Accordingly, the Court now amends the sentence announced at the hearing.

As amended, the sentence on Count Three was zero years' imprisonment and zero years' supervised release. The sentences on the other four counts remained the same: concurrent terms of 20 years' imprisonment and 10 years' supervised release. The \$500 special assessment remained in place.

Vallare appealed. He argued that his convictions on two counts of possessing material containing child pornography were multiplicitous, because the allowable unit of prosecution under § 2252A(a)(5)(B) is the act of possession—not each separate material possessed. Pet. App. 2a Thus, Vallare argued, simultaneous

possession of multiple materials containing child pornography is only one offense under § 2252A(a)(5)(B). Vallare acknowledged that his argument was foreclosed under Fifth Circuit precedent, *see United States v. Planck*, 493 F.3d 501, 505 (5th Cir. 2007), but raised the issue to preserve it for further review. Pet. App. 2a. The court of appeals granted the Government's motion for summary affirmance. Pet. App. 2a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the circuit split over the unit of prosecution under 18 U.S.C. § 2252A(a)(5)(B), which makes it a crime to “knowingly possess[] ... any ... material that contains an image of child pornography[.]”

1. This case presents a circuit split conflict over the unit of prosecution under 18 U.S.C. § 2252A(a)(5)(B), which makes it a crime to “knowingly possess ... any ... material” containing child pornography.¹ Vallare was convicted and sentenced on two counts of possession under § 2252A(a)(5)(B) for simultaneously possessing two separate materials: a laptop computer and an external

¹ The provision reads in full:

Any person who ... knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported 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 that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer[.]

hard drive. Vallare argues that was error because the unit of prosecution under the statute is possession, not each separate material containing pornography. Thus, Vallare argues, his sentences for both counts are multiplicitous.

Vallare's argument was foreclosed by Fifth Circuit precedent, which has interpreted § 2252A(a)(5)(B) to define the unit of prosecution as each separate material that contains child pornography, even if a person simultaneously possesses more than one such material. *United States v. Planck*, 493 F.3d 501, 505 (2007). The Eighth Circuit has found the Fifth Circuit's interpretation of the statute persuasive. *See United States v. Hinkeldey*, 626 F.3d 1010, 1014–15 (8th Cir. 2010); *see also United States v. Anson*, 304 F. App'x 1, 4 (2d Cir. 2008) (summary order) (concluding that “the prohibition of the possession of ‘any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography,’ set forth in § 2252A(a)(5)(B), lends itself to treating each book, magazine, or other material—in this case a computer hard drive and thirty-nine CD–ROMs—as separate ‘units’ of prosecution”). The Tenth Circuit has rejected the Fifth Circuit's interpretation and agreed with Vallare's reading of the statute. *See United States v. Elliott*, 937 F.3d 1310, 1313–16

(2019). Vallare asks the Court to grant a writ of certiorari to resolve this circuit conflict.

2. “Multiplicity” is the charging of one offense in more than one count. *United States v. Woerner*, 709 F.3d 527, 538 (5th Cir. 2013); *United States v. Reedy*, 304 F.3d 358, 363 (5th Cir. 2002). “The rule against multiplicitous prosecutions stems from the Fifth Amendment’s proscription against double jeopardy.” *Planck*, 493 F.3d at 503. “The rule prevents the Government from charging a single offense in more than one count of an indictment.” *Id.* “The chief danger raised by a multiplicitous indictment is the possibility that the defendant will receive more than one sentence for a single offense.” *Id.* (cleaned up).

The test for multiplicity is “whether separate and distinct prohibited acts, made punishable by law, have been committed.” *Id.* (cleaned up). It is a two-step test. *Woerner*, 709 F.3d at 539. First, the Court “look[s] to the statute charged to ascertain the ‘allowable unit of prosecution,’ or the *actus reus* of the crime.” *Id.* (quoting *Reedy*, 304 F.3d at 365). This is a question of Congressional intent: “the legislature may castigate a particular act by exposing the actor to several prosecutions and punishments, or it may specify that the act should only be subject to a single unit of prosecution.” *Id.*

(cleaned up). Second, the Court “reviews the evidence to see how many distinct criminal acts the defendant committed.” *Id.*

Here, Counts Four and Five of the indictment both charged Vallare with possessing “material” containing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). That statute proscribes “knowingly possesses[ing] ... *any* book, magazine, periodical, film, videotape, computer disk, or *any other material* that contains an image of child pornography” (emphasis added). Court Four alleged that the “material” was an “HP Compaq Presario laptop computer[.]” Count Five alleged that the “material” was a “Toshiba external hard drive[.]” The counts alleged simultaneous possession of the two devices “[o]n or about June 14, 2017[.]”

Under similarly worded and structured statutes with an *actus reus* involving “any” specified item, the unit of prosecution is the act of possession, regardless of how many separate prohibited items are possessed simultaneously. For example, 18 U.S.C. § 922(g) makes it a crime for certain persons to “possess ... *any* firearm or ammunition[.]” Thus, under § 922(g), the unit of prosecution is possession, not the firearm or the ammunition. *United States v. Berry*, 977 F.2d 915, 919 (5th Cir. 1992). That is, possession of more than one firearm on a single occasion, or simultaneous possession of firearms and ammunition, is one offense under

§ 922(g), regardless of how many firearms or rounds of ammunition the person possesses at that one time. *Id.*

To take another example, 18 U.S.C. § 494, like § 922(g) and § 2252A(a)(5)(B), uses the “possess any” construction: “Whoever ... [knowingly] possesses with intent to utter or publish as true, any such false, forged, altered, or counterfeit writing” In *United States v. Prestenbach*, 230 F.3d 780 (5th Cir. 2000), the defendant was convicted of four counts of violating § 494. Each of the four counts was based on a separate altered money order, all of which were in a single lotion bottle. *Id.* at 781. Looking to *Berry* and cases interpreting similarly worded and structured statutes, the Fifth Circuit held that “[k]eeping four altered money orders in a lotion bottle is one action, and therefore one crime.” *Id.* at 784.

Section § 2252A(a)(5)(B) has the same structure—the “possess any” construction—and therefore should be interpreted the same way as these other statutes: the act of “possess[ing] ... any ... material” containing child pornography is a single offense, regardless of how many separate materials the person possesses at the same time. And those were the facts here. The indictment charged Val-lare with possessing two materials—a laptop computer and an external hard drive, both containing child pornography—on the same

date: June 14, 2017. Those were the facts the Government proved at trial.

The Fifth Circuit has held otherwise. In *United States v. Planck*, that court held that the unit of prosecution under § 2252A(a)(5)(B) is each separate material that contains child pornography, even if a person simultaneously possesses more than one such material. 493 F.3d at 505. At the same time, the Fifth Circuit has recognized that the word “any” has bedeviled courts when it comes to identifying the unit of prosecution under various statutes. *See Reedy*, 304 F.3d at 365 & n.7.

This bedevilment caused by § 2252A(a)(5)(B)’s use of “any” has led the Tenth Circuit to the opposite conclusion from the Fifth Circuit:

We must determine whether Congress unambiguously defined the unit of prosecution in § 2252A(a)(5)(B) as each individual device on which the defendant stores child pornography. We conclude that it did not. The statute of conviction contains the ambiguous modifier “any” preceding the enumerated list of storage materials. § 2252A(a)(5)(B). Both the Supreme Court and this court have determined that modifier creates sufficient ambiguity as to require lenity when interpreting numerous other statutes in the face of multiplicity challenges.

Elliott, 937 F.3d at 1313.

The Court should resolve this conflict to bring uniformity to the enforcement of § 2252A(a)(5)(B) across the country.

CONCLUSION

FOR THESE REASONS, Vallare asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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DATED: September 7, 2021