No. 21-5631

IN THE SUPREME COURT OF THE UNITED STATES

ELTON VALLARE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed petitioner's two concurrent sentences for possessing "any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography," in violation of 18 U.S.C. 2252A(a)(5)(B), where petitioner possessed both a laptop and an external hard drive containing child pornography.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Vallare, No. 17-cr-547 (June 11, 2020)

United States Court of Appeals (5th Cir.):

United States v. Vallare, No. 20-50433 (Apr. 8, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 842 Fed. Appx. 953.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2021. The petition for a writ of certiorari was filed on September 7, 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 Western District of Texas, petitioner was convicted on two counts of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2) (2012) and 18 U.S.C. 2252A(b)(1); one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) (2012) and 18 U.S.C. 2252A(b)(1); and two counts of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Am. Judgment 1. He was sentenced to 240 months of imprisonment, to be followed by ten years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1a-2a.

1. On February 15, 2015, undercover FBI agents located a computer sharing child pornography on a file-sharing network. Presentence Investigation Report (PSR) ¶ 5. Agents were able to download "approximately 144 files depicting prepubescent females in sexually explicit positions or engaged in sexual acts." Ibid. The IP address of the computer hosting the images was linked to petitioner's residence. Ibid.

On June 14, 2017, agents executed a search warrant at the residence, where they recovered firearms, laptops, and an external hard drive. PSR ¶¶ 6-9. A forensic examination revealed that one of the laptops contained over 150 images of child pornography, the other computer contained 4000 images and 19 videos of child pornography, and the external hard drive contained more than 550 images and 33 videos of child pornography. PSR ¶ 11. "Most of

the images received, possessed, and distributed by the defendant were of infants and prepubescent female children exposing their genitalia and being sexually assaulted by adult men." Ibid.

2. Petitioner was indicted on two counts of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2); one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2); one count of possessing "material, specifically, an HP Compaq Presario laptop computer" containing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B); and one count of possessing "material, specifically a 1TB Toshiba external hard drive" containing child pornography, also in violation of 18 U.S.C. 2252A(a)(5)(B). Indictment 1-3. A jury found petitioner guilty on all counts. Am. Judgment 1.

The district court initially sentenced petitioner to five concurrent terms of 240 months of imprisonment, to be followed by five concurrent terms of ten years of supervised release. Sent. Tr. 15-17. The court subsequently amended the judgment to eliminate any punishment for the single count of receiving child pornography, explaining that it made the change because it was "concerned that entering sentences under both receipt and possession counts raises multiplicity and double jeopardy concerns." Am. Judgment 2 (emphasis omitted).

3. Petitioner appealed, arguing that his two sentences for possessing material containing child pornography were impermissibly "multiplicitous" because "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." Pet. C.A. Br. 10. Petitioner acknowledged, however, that "[b]ecause [he] did not raise his multiplicity challenge below, review [wa]s for plain error." Id. at 6. And he further acknowledged that his argument was foreclosed by United States v. Planck, 493 F.3d 501 (5th Cir. 2007), which "held that the unit of prosecution under [Section] 2252A(a)(5)(B) is each separate material that contains child pornography, even if a person simultaneously possesses more than one such material." Pet. C.A. Br. 10.

The government filed an unopposed motion for summary affirmance, which the court of appeals granted in an unpublished, per curiam opinion. Pet. App. 2a. The court agreed with petitioner that Planck "foreclosed" his argument and found that "summary affirmance [wa]s appropriate." Ibid.

ARGUMENT

Petitioner contends (Pet. 5-10) that his simultaneous possession of both a laptop containing child pornography and an external hard drive containing child pornography would support only a single sentence for possessing any material containing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B), rather than the two concurrent sentences he was given. The court of appeals' unpublished, summary decision is correct, and while petitioner has pointed (Pet. 10) to a recent, contrary decision from the Tenth

Circuit, that shallow conflict does not warrant review at this time -- particularly because petitioner has acknowledged that his challenge is subject only to plain error review, and because relief would not alter the length of his sentence.

1. The court of appeals correctly affirmed petitioner's two concurrent 240-month sentences for two counts of violating 18 U.S.C. 2252A(a)(5)(B) based on petitioner's possession of both a laptop containing a large quantity of child pornography and an external hard drive containing even more child pornography. Section 2252A(a)(5)(B) makes it a crime to "knowingly possess[] * * * any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography." 18 U.S.C. 2252A(a)(5)(B). Thus, where -- as here -- a defendant possesses more than one distinct "book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography," he may be charged, convicted, and sentenced for more than one violation of the statute. Ibid.

Petitioner acknowledges (Pet. 5-6) that he possessed two "separate materials" that contained child pornography: "a laptop computer and an external hard drive." He argues (Pet. 5), however, that possessing multiple, distinct materials containing child pornography constitutes only a single violation of Section 2252A(a)(5)(B) so long as all of the materials are possessed "simultaneously." That is incorrect. The statute defines the

offense as the possession of "any book * * * or any other material," 18 U.S.C. 2252A(a)(5)(B), employing the singular form of each enumerated noun; the statute does not refer to the possession of "any books or other materials," a plural formulation that might be susceptible to petitioner's reading. Moreover, as the Fifth Circuit has explained, adopting petitioner's favored interpretation "would allow amassing a warehouse of child pornographic material -- books, movies, computer images -- with only a single count of possession as a potential punishment." United States v. Planck, 493 F.3d 501, 504 (2007).

2. Petitioner notes (Pet. 10) the Tenth Circuit's decision in United States v. Elliott, 937 F.3d 1310 (2019), cert. denied, 140 S. Ct. 1549 (2020), in which a divided panel held that Section 2252A(a)(5)(B) "is ambiguous" as to the whether it permits multiple charges based on the simultaneous possession of multiple, distinct materials containing child pornography and applied the rule of lenity to "construe § 2252A(a)(5)(B) to preclude distinct charges for each electronic device or medium simultaneously possessed." Id. at 1312. Judge Tymkovich dissented, explaining that the court should have "follow[ed] the blueprint drawn up by the Fifth Circuit" in Planck. Id. at 1318.

No other court of appeals has adopted the Tenth Circuit's position, and -- as petitioner acknowledges -- at least two other circuits have indicated some support for the Fifth Circuit's interpretation of Section 2252A(a)(5)(B). See Pet. 6 (citing

United States v. Hinkeldey, 626 F.3d 1010, 1013-1014 (8th Cir. 2010) (finding no "'clear'" or "'obvious'" error where district court "declin[ed] to treat the defendants two convictions under § 2252A(a)(5)(B) as one crime for purposes of sentencing") (citation omitted); United States v. Anson, 304 Fed. Appx. 1, 4 (2d Cir. 2008) (summary order) (observing that the text of Section 2252A(a)(5)(B) "lends itself to treating each book, magazine, or other material * * * as separate 'units' of prosecution"), cert. denied, 556 U.S. 1160 (2009)) . The alleged conflict based on the Tenth Circuit's outlier decision is therefore shallow and underdeveloped, and does not warrant the Court's review at this time.

3. Review is particularly unwarranted in this case because petitioner's claim would fail irrespective of how the Court might answer the question presented, and would lack substantial practical import even if it succeeded.

As petitioner has acknowledged, his challenge is subject only to plain error review. Pet. C.A. Br. 6. To establish reversible plain error, a defendant must show (1) error, (2) that was "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings,'" and (4) that "'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009)

(brackets and citations omitted); see United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004) ("[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it."). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting Dominguez Benitez, 542 U.S. at 83 n.9). Petitioner cannot do so here.

Even if petitioner could establish error, the current state of the law in the circuits would undermine any effort to demonstrate that it was "clear or obvious, rather than subject to reasonable dispute." Puckett, 556 U.S. at 135. As petitioner himself acknowledges, Fifth Circuit precedent forecloses his argument and at least two other circuits have signaled support for the Fifth Circuit's position. See pp. 6-7, supra. That is more than enough to dispel a claim of plain error. See Hinkeldey, 626 F.3d at 1013 (rejecting similar Section 2252A(5)(B) challenge on plain error review); see also, e.g., United States v. Bennett, 469 F.3d 46, 50 (1st Cir. 2006) ("In light of conflicting case law, any error that might have been committed by the district court was not 'obvious,' and therefore not plain error."), cert. denied, 549 U.S. 1312 (2007).

In any event, certiorari review is unwarranted in this case because petitioner was sentenced to concurrent -- rather than consecutive -- sentences for each of his possession offenses. See p. 3, supra. That would not only undercut any attempt to establish the third and fourth plain error elements, but also means that, as

a practical matter, the time he spends in prison and on supervised release will be the same even if he were to obtain relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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