No. _____

In the Supreme Court of the United States

JASON LEE SARABIA, *PETITIONER*,

v.

UNITED STATES OF AMERICA

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

MAUREEN SCOTT FRANCO
Federal Public Defender

KRISTIN M. KIMMELMAN
Assistant Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206-1205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Petitioner Jason Lee Sarabia possessed two cell phones containing child pornography images that the Government believed he had received over a period of weeks before the phones were seized. For each phone, Sarabia was charged with receipt of child pornography and possession of the phone that contained child pornography. *See* 18 U.S.C. § 2252A(a)(2), (5)(B). The Government used receipt and possession of the same images to prove both counts per phone. The jury convicted Sarabia of all four counts.

On appeal, the Government did not dispute that possession is the lesser-included-offense of receipt for the same image. Instead, the Government argued, and the Fifth Circuit agreed, that the convictions were not multiplicitous because the jury could have convicted Sarabia based on receipt of different images for each count—even though the Government did not argue at trial, nor was the jury instructed, that distinct evidence supported each count.

The question presented is:

> Do convictions of greater and lesser-included offenses violate the Double Jeopardy Clause when the prosecution uses the same evidence to obtain both convictions, as most circuits have held, or must the defendant show that the jury could not have based each conviction on different evidence, as the Fifth Circuit has held?

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Petitioner, Jason Lee Sarabia 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 August 25, 2021.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

All proceedings directly related to the case are:

- *United States v. Sarabia*, No. 5:18-CR-441-1 (W.D. Tex. June 29, 2020) (amended judgment)

- *United States v. Sarabia*, No. 20-50438 (5th Cir. Aug. 25 & Oct. 5, 2021) (unpublished opinion and order denying petition for panel rehearing)

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A copy of the unpublished opinion of the court of appeals, *United States v. Sarabia*, No. 20-50438 (5th Cir. Aug. 25, 2021) (per curiam), is attached to this petition as Appendix A.

A copy of the order denying the petition for panel rehearing, *United States v. Sarabia*, No. 20-50438 (5th Cir. Oct. 5, 2021), is attached to this petition as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on August 25, 2021. Sarabia timely filed a petition for panel rehearing, which the Fifth Circuit denied on October 5, 2021. Pet. App. B. This petition is filed within 90 days after the denial of rehearing. *See* Sup. Ct. R. 13.3; The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall … be subject for the same offence to be twice put in jeopardy of life or limb …."

STATUTORY PROVISION INVOLVED

The text of 18 U.S.C. § 2252A is reproduced in Appendix D.

STATEMENT

The Government charged Sarabia with four counts related to child pornography found on two phones: receipt of child pornography on a ZTE phone during one month and later possession of that ZTE phone with child pornography on it, and receipt of child pornography on a Samsung phone over two months and later possession of that Samsung phone with child pornography on it.[1] Pet. App. C; *see* 18 U.S.C. § 2252A(a)(2), (5)(B). The case agent told the grand jury that the possession and receipt counts for each phone were based on the images found on those phones. C.A. ROA 3269–70. The district court exercised jurisdiction under 18 U.S.C. § 3231.

Sarabia, representing himself, moved to dismiss multiplicitous counts. C.A. ROA.292–300. He argued the two counts of receipt and possession per phone were multiplicitous, because once an item of child pornography is received, a device containing that item is necessarily possessed. Thus, possession is the lesser-included offense of receipt. The district court agreed there was potentially a multiplicity problem, but the court denied Sarabia's pretrial

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[1] The Government also charged Sarabia with distribution but dismissed that count after the jury hung.

motion to dismiss and allowed the Government the opportunity to prove each count was based on different acts or transactions. C.A. ROA 610.

The Government did not try to prove each count based on different acts or transactions. Instead, it relied on the images found on each phone as proof of the possession of a device containing child pornography on or about the date law enforcement seized the phones, and as proof of receipt of items of child pornography over a period of weeks before the phones were seized.[2] Sarabia asked for special jury instructions to ensure that each count was based on different evidence, but the district court denied that request. C.A. ROA 2073, 2078. In closing, the Government relied on the same images found on the phones for the possession and receipt offenses. C.A. ROA 2090–91, 2094–97. The Government highlighted the forensic expert's testimony that the images on the phones were received during the dates alleged for the receipt counts. C.A. ROA 2099. And the Government emphasized that the jury needed only to find that Sarabia "knowingly received an item

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[2] Specifically, the Government argued the same 77 images of child pornography found on the ZTE were possessed on or about November 30, 2017, and received on or about August 31, 2017, to September 2017. The Government argued the same 1,008 images of child pornography found on the Samsung were possessed on or about November 30, 2017, and received on or about February 23, 2017, to April 22, 2017.

of child pornography. One. An item. On or about those dates." ROA.2091.

At sentencing, Sarabia again objected to multiplicitous convictions and sentences. C.A. ROA 2259. The district court recognized "there's a multiplicity problem," but believed the problem could be avoided by imposing no imprisonment or supervised release on the possession convictions. C.A. ROA 2199, 2256. The court imposed a $100 special assessment on each conviction, for a total of $400, in addition to the aggregate sentence of 285 months' imprisonment on the receipt counts. C.A. ROA 1042, 1046.

On appeal, Sarabia argued the receipt and possession convictions per phone violated his right against double jeopardy because the possession offenses were lesser-included of the receipt offenses. Sarabia showed that the Government used the same evidence to prosecute both counts per phone and that the evidence would sustain convictions of both counts per phone. The Government did not dispute it used the images found on the phone to convict Sarabia of both counts per phone. Instead, it argued that Sarabia had the burden to prove that the jury convicted him based on the same receipts. C.A. Gov't Br. 34, 37. The Government claimed no multiplicity problem existed because the jury could have convicted Sarabia of each count based on images received through different

transactions—even though the Government did not ask the jury to base each conviction on separate evidence. *Id.* at 36.

Despite Sarabia's insistence that the Government cannot avoid double jeopardy concerns by drafting a broad indictment and failing to ask for each conviction to be based on distinct acts, the court of appeals agreed with the Government. The court of appeals reframed the question as "whether the jury could reasonably conclude that Sarabia received and possessed different depictions of child pornography at different times." Pet. App. A10 (citing *United States v. Winstead*, 717 F. App'x 369, 371 (5th Cir. 2017) (per curiam)). The court reasoned that the Government presented evidence that a large enough number of images were received and possessed over the relevant periods of time that the convictions are not multiplicitous. Pet. App. A11.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with this Court's double jeopardy jurisprudence.

1. The Double Jeopardy Clause "protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (cleaned up). In *Blockburger v. United States*, the Court established that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether

each provision requires proof of an additional fact which the other does not[.]" 284 U.S. 299, 304 (1932). This rule of statutory construction helps discern whether Congress intended multiple punishments. *Whalen v. United States*, 445 U.S. 684, 692 (1980).

This case involves a simultaneous prosecution of two statutory offenses for the same act—receipt of child pornography that necessarily meant possession of a material containing child pornography. *See* 18 U.S.C. §§ 2252A(a)(2), (a)(5)(B). All courts of appeals to have considered the issue have held that, when the offenses involve the same child pornography, receiving child pornography is the "same offense" as possessing a material containing it.[3] This conclusion accords with *Ball v. United States*, where this Court decided "proof of illegal receipt of a firearm necessarily includes proof of illegal possession of that weapon" because, when "received, a

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[3] *See, e.g.*, *United States v. Miller*, 527 F.3d 54, 72 (3d Cir. 2008) (addressing § 2252A(a)(2)(A) and (a)(5)(B)); *United States v. Ehle*, 640 F.3d 689, 695–96 (6th Cir. 2011) (same); *United States v. Davenport*, 519 F.3d 940, 947–48 (9th Cir. 2009) (same); *United States v. Bobb*, 577 F.3d 1366, 1374–75 (11th Cir. 2009) (same). *Cf. United States v. Muhlenbruch*, 634 F.3d 987, 1003 (8th Cir. 2011) (addressing materially similar 18 U.S.C. § 2252(a)(2) and (a)(4)(B) and finding possession is lesser-included of receipt); *United States v. Schales*, 546 F.3d 965 (9th Cir. 2008) (same); *United States v. Benoit*, 713 F.3d 1, 16 (10th Cir. 2013) (same).

Neither the Fifth Circuit nor the Government challenged the premise that receipt and possession convictions would be multiplictous if based on the same child pornography. *See* Pet. App. A10–A13; C.A. Gov't Br. 38.

firearm is necessarily possessed." 470 U.S. 856, 865 (1985) (cleaned up).

2. The Fifth Circuit parted ways with the Court and most circuits by holding that, given the many images, double jeopardy was not implicated because the jury could have convicted Sarabia of receipt based on a different subset of images than those supporting the possession conviction.

This after-the-fact parsing of evidence conflicts with century-old precedent that, when "a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Ex parte Nielson*, 131 U.S. 176, 188 (1889).

In *Nielson*, the Court explained that, when a person is convicted of a greater offense occurring over a period of time, that offense "'must, in a certain sense, be considered a merger of all the distinct acts'" culminating in that greater offense, and the greater conviction prohibits being punished for a single act during that same time period. 131 U.S. at 190 (quoting and analyzing *State v.*

Nutt, 28 Vt. 598 (1856)).[4] Applying this principle, the Court held convictions for unlawful cohabitation over a course of years and the lesser-included offense of adultery with the same woman during that period violated double jeopardy. 131 U.S. at 178, 188. Similarly, the Court held convictions for the lesser-included offense joyriding and greater offense auto theft violated double jeopardy even though prosecutors specified different dates for each charge, focusing on different parts of the nine-day joyride. *Brown*, 432 U.S. at 168. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Id.* at 169.

Sarabia's receipt and possession convictions conflict with *Nielson*'s principle, that a greater conviction cannot be parsed into subsequent convictions, in two ways. First, the Government prosecuted Sarabia broadly by alleging he received child pornography over the course of weeks on each phone. Pet. App. A11. Those broad time periods included multiple receipt transactions and, consequently, the possession of a phone containing those images.

[4] "[W]here a person was convicted of being a common seller of liquor, it was held that he could not afterwards be prosecuted for a single act of selling within the same period." *Nielsen*, 131 U.S. at 190 (discussing *Nutt*).

Having drafted the counts broadly, the Government could not then obtain a conviction for individual receipts (or possessions) included within those broad counts without placing Sarabia twice in jeopardy. *See Nielson*, 131 U.S. at 190.

Second, the Government broadly prosecuted Sarabia by alleging, in the possession counts, that he possessed a material—each phone—that contained an image of child pornography. *See* § 2252A(a)(5)(B). The unit of prosecution for § 2252A(a)(5)(B) is the material (phone), not each image. *United States v. Elliott*, 937 F.3d 1310, 1316 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 1549 (2020); *United States v. Woerner*, 709 F.3d 527, 540 (5th Cir. 2013); *United States v. Hinkeldey*, 626 F.3d 1010, 1013–14 (8th Cir. 2010). The possession offense cannot be parsed per image, but it does have "various incidents included in it," *Nielsen*, 131 U.S. at 188—individual receipts of images. Sarabia cannot be convicted of those individual receipts "without being twice put in jeopardy for the same offense," *id.*—because once he received child pornography on his phone, he necessarily possessed that phone with child pornography. *Cf. Ball*, 470 U.S. at 865.

3. The Fifth Circuit found no double jeopardy violation because it asked the wrong question. It framed the inquiry as whether the jury *could have* relied on receipt of some images for

the receipt convictions and possession of other *images*—and not possession of the phones, as indicted—for the possession convictions. But the Court looks to the indictment and jury instructions to assess double jeopardy claims, not to what evidence the jury could have used to render verdicts on hypothetical narrower charges. *Abney v. United States*, 431 U.S. 651, 664–65 (1977) (relying on jury instructions to find no double jeopardy violation); *United States v. Debrow*, 346 U.S. 374 (1953) (requiring indictment to sufficiently define the offense to protect against double jeopardy).

The Fifth Circuit also ignored that the Government never asked the jury to convict on separate evidence, nor was the jury instructed to do so. Sarabia's jury instructions tracked the indictment, which charged receipt of child pornography on each phone over several weeks, and the later possession of the phones with child pornography on them. Pet. App. C; C.A. ROA 566–68. The instructions also defined "receive" as meaning "to knowingly accept or take possession of something." C.A. ROA 567. The jury was not instructed, contrary to Sarabia's request, that any conviction be based on separate evidence. In its closing, the Government did not parse evidence between the receipt and possession counts. Instead, it specifically directed the jury to the exhibits of images that

were on the phones as evidence of both the receipt and possession counts per phone. C.A. ROA 2090–91, 2094–97, 2099. Nothing that occurred at trial supported the court of appeals carving out convictions based on distinct evidence to avoid double jeopardy concerns. Such a carve-out ignores the reality of how the indictment was drafted, how the case was prosecuted, and how the jury was instructed.

II. The Fifth Circuit's framework conflicts with other circuits' decisions finding receipt and possession convictions multiplicitous when based on numerous images.

The Fifth Circuit's rejection of Sarabia's double jeopardy right, based on the number of images involved, conflicts with the Third, Sixth, Eighth, Ninth, and Tenth Circuits, which have found convictions multiplicitous even when more than one image was involved per count. *See, e.g.*, *United States v. Miller*, 527 F.3d 54, 58–59, 72 (3d Cir. 2008) (convictions based on same 11 images found on a zip disk); *United States v. Ehle*, 640 F.3d 689, 695–96 (6th Cir. 2011) (convictions based on same, numerous images, and receipt occurred over yearlong period); *United States v. Muhlenbruch*, 634 F.3d 987, 1003–04 (8th Cir. 2011) (convictions based on "same facts and images"); *United States v. Davenport*, 519 F.3d 940, 942, 947–48 (9th Cir. 2008) (convictions based on hundreds of images and

videos); *United States v. Benoit*, 713 F.3d 1, 16–17 (10th Cir. 2013) (convictions based on the same "hundreds of images" and "over 70-some videos of child pornography" received and possessed during 19 months).

These decisions reflect a burden-shifting framework for addressing post-trial double jeopardy claims that did not occur in Sarabia's case. When the indictment and jury instructions show that the same evidence was used to obtain convictions for the greater and lesser-included offenses, the multiplicitous conviction is vacated unless the Government shows it relied exclusively on distinct evidence for each count. *See, e.g.*, *Benoit*, 713 F.3d at 17–18 (examining indictment, closing argument, and jury instructions to find counts multiplicitous, noting "the jury was never alerted to the fine distinction now made with respect to … the distinct charges"); *United States v. Schales*, 546 F.3d 965, 980 (9th Cir. 2008) (examining indictment, jury instructions, and jury verdict to find it cannot conclude Schales was convicted for separate conduct).

When it is clear the Government used different evidence to support each count despite a broad indictment, some courts have found receipt and possession convictions were not multiplicitous. *See, e.g.*, *United States v. Halliday,* 672 F.3d 462, 471 (7th Cir.

2012) (prosecutor clearly and consistently delineated different child pornography to form the bases for the receipt and possession counts); *United States v. Sturm*, 673 F.3d 1274, 1288 (10th Cir. 2012) ("jury was specifically instructed as to which images were associated with which count"); *Bobb*, 577 F.3d at 1375 (evidence showed that he received zip files on a particular date and possessed other images months later).

This accords with the framework used by every circuit, including the Fifth Circuit, to address interlocutory appeals of *pretrial* motions to dismiss arguing the current prosecution violates double jeopardy due to a prior one. *United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988) (collecting cases). Under that burden-shifting framework, circuits require the defendant to carry "the initial burden of establishing a prima facie nonfrivolous double jeopardy claim[.]" *United States v. Rabhan*, 628 F.3d 200, 204 (5th Cir. 2010). Once that burden is met, typically by focusing on the indictment language, the burden of persuasion shifts to the Government. *Id.* "This shift is appropriate because the government controls the particularity of an indictment" and chooses the evidence it presents to prove the charged offenses. *Id.* To place the burden solely on the defendant, given these practical difficulties, would render the Double Jeopardy Clause's "right of immunity from prosecution

… relatively meaningless[.]" *Ragins*, 840 F.2d at 1192 (citing *Abney*, 431 U.S. at 661).

In addressing Sarabia's *post-trial* double jeopardy claim for a multiplicitous indictment, the Fifth Circuit employed a different test that places the entire burden of proving multiplicity on the defendant.[5] *See* Pet. App. A11. The Fifth Circuit's test requires the defendant to show that the jury could *not* have based each verdict on distinct evidence. Pet. App. A10; *Winstead*, 717 F. App'x at 371.

The Fifth Circuit is not completely alone in setting up a double jeopardy test impossible for a defendant to meet when the Government prosecutes broadly. The Second Circuit endorsed this after-the-fact parsing of evidence in dicta. *United States v. Irving*, 554 F.3d 64, 79 (2d Cir. 2009) (noting no double jeopardy if jury could have based possession and receipt convictions on different images, but also finding other plain error factors not met); *see also United States v. Almonte*, 638 F. App'x 71, 74 (2d Cir. 2016) (per curiam) (same). And the Fourth Circuit found the overlap of evidence between receipt convictions for three images found on a laptop and

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[5] The Government argued, and the Fifth Circuit appears to have agreed, that precedent required placing the burden entirely on Sarabia. C.A. Gov't Br. 34, 37 (citing *United States v. Hope*, 545 F.3d 293, 296 (5th Cir. 2008), and *United States v. Register*, 931 F.2d 308, 312 (5th Cir. 1991)). Sarabia disagreed with the Government's interpretation of *Hope* and *Register*. C.A. Sarabia Reply Br. 13–17.

the possession of a laptop with four videos and 726 child pornography images was too small, on plain error review, to warrant finding the possession conviction multiplicitous. *United States v. Fall*, 955 F.3d 363, 374 (4th Cir. 2020); *see also United States v. Schnittker*, 807 F.3d 77, 83 (4th Cir. 2015) (finding sufficient proof that convictions were based on separate evidence "because the defendant admitted to possessing over one thousand images or videos of child pornography, at least some of which did not ground the receipt conviction").

The Seventh Circuit posited a slightly different post-trial double jeopardy test that also places the burden solely on the defendant but focuses on the indictment and evidence "to determine exactly what the *government sought to prove*" during the first trial. *United States v. Dortch*, 5 F.3d 1056, 1061–62 (7th Cir. 1993) (emphasis added); *but see United States v. Ellis*, 622 F.3d 784, 796 n.4 (7th Cir. 2010) (describing other Seventh Circuit cases endorsing a burden-shifting framework). The Seventh Circuit did not ask whether the first jury *could have* found the defendant guilty based on evidence distinct from evidence that could have sustained the second conviction.

The Fifth Circuit's after-the-fact test of what the jury "could have determined," Pet. App. A12, is out of step with a majority of

circuits and offends the Double Jeopardy Clause. Given circuits' confusion and conflict, the Court should clarify how double jeopardy claims are assessed post-trial for multiplicitous indictments.

III. Sarabia's case is an ideal vehicle to address this important recurring issue.

Sarabia raised his multiplicity concerns early and often. He moved to dismiss multiplicitous counts pretrial, he asked for special jury instructions, and he raised multiplicity at sentencing. The record is clear that the Government relied on the same evidence to secure the possession and receipt convictions for each phone. This case squarely presents an opportunity to resolve the question presented.

This question recurs frequently in child pornography prosecutions. *See, e.g.*, *Miller*, 527 F.3d at 72; *Ehle*, 640 F.3d at 695; *Muhlenbruch*, 634 F.3d at 1003; *Davenport*, 519 F.3d at 947–48; *Benoit*, 713 F.3d at 16; *Bobb*, 577 F.3d at 1374–75. At least three appeals decided by the Fifth Circuit in the past four years have raised multiplicity concerns for possession and receipt convictions for broadly charged counts. *See Winstead*, 717 F. App'x at 371 (addressing multiplicity of receipt and possession); *United States v. Luera*, 770 F. App'x 708, 709 (5th Cir. 2019) (per curiam) (finding no plain error because of lack of controlling precedent). But the issue also arises whenever the Government prosecutes greater and

lesser-included offenses together in broad indictments that cover the same evidence in multiple counts.

By framing the inquiry as whether the jury *could have* concluded the defendant received and possessed different child pornography depictions at different times, even when the charged offenses encompass those discrete incidents, the Fifth Circuit endorsed the prosecutorial tactic of charging broadly to easily obtain convictions and evade multiplicity concerns by arguing after trial that the jury could have relied on distinct evidence for each count. This invites double jeopardy violations.

The Government relied on the same 77 images on the ZTE phone and the same 1,008 images on Samsung phone to obtain the greater and lesser-included convictions per phone. The jury was instructed it could convict Sarabia for any receipt and any possession. Under the majority approach, Sarabia's receipt and possession convictions were multiplicitious. *See, e.g.*, *Schales*, 546 F.3d at 980. Even under the Seventh Circuit's approach in *Dortch*, the convictions would be multiplicitous because the indictment and evidence show the Government sought to prove the receipt convictions with the receipt, over time, of multiple images that were possessed on two phones. *See* 5 F.3d at 1061–62. And the overlapping evidence between Sarabia's receipt and possession convictions was

not de minumus as in the Fourth Circuit's cases. *Cf. Fall*, 955 F.3d at 374; *Schnittker*, 807 F.3d 77, 83. The same child pornography on the phones was the basis for the receipt convictions.

Sarabia is subjected to four convictions under Fifth Circuit's outlier standard asking whether the jury could have parsed the evidence to sustain separate convictions, even though the Government and district court did not ask the jury to do so. When the Government prosecutes broadly, this standard is impossible to meet. If the Government wanted four convictions, then it should have drafted the indictment differently or asked the jury to base each conviction on separate receipts.

The Court should grant certiorari and clarify the protections of the Double Jeopardy Clause for broad prosecutions of greater and lesser-included offenses.

CONCLUSION

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

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
Tel.: (210) 472-6700
Fax: (210) 472-4454

KRISTIN M. KIMMELMAN
Assistant Federal Public Defender

Attorney for Defendant-Appellant

DATED: January 3, 2022