No.

In The
Supreme Court of the United States

October Term, 2022

CLARK DOWNS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

---

PETITION FOR WRIT OF CERTIORARI

WILLIAM MALLORY KENT
Counsel for Petitioner
Florida Bar No. 0260738
24 North Market Street, Suite 300
Jacksonville, Florida 32202
(904) 398-8000 Telephone
(904) 662-4419 Cellphone
kent@williamkent.com Email
williamkent.com Webpage

QUESTION PRESENTED

WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT AS TO THE INTERSTATE COMMERCE ELEMENT ON COUNT ONE, WHICH CHARGED SEXUAL EXPLOITATION OF A FIFTEEN YEAR OLD FOR THE PURPOSE OF PRODUCING A VISUAL DEPICTION OF SUCH CONDUCT?

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATUTES

GUIDELINE PROVISIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 2022

CLARK DOWNS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, **CLARK DOWNS**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in *United States v. Clark Downs,* entered March 13, 2023.

OPINION BELOW

The decision of the Eleventh Circuit was published as *United States v. Clark Downs*, 61 F.4th 1306 (11th Cir. 2023), and a true and correct copy is included in Appendix A, *infra*.

JURISDICTION

This Petition seeks review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit in *United States v. Clark Downs*, 61 F.4th 1306 (11th Cir. 2023). The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is invoked under Title 28, United States Code § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S. Code § 2251 - Sexual exploitation of children

> (a)Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8, Clause 3

> The Congress shall have power . . .
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

STATEMENT OF THE CASE[1]

Petitioner Clark Downs ("Downs" or the "Defendant") was charged July 9, 2019 by grand jury in a two count indictment in the Northern District of Florida with sexual exploitation of a fifteen year old for the purpose of producing a visual depiction of such conduct in violation of 18 U.S.C. § 2251(a), (Count One), and with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), (Count Two). [Doc. 1]

A jury was initially selected September 14, 2020 but later discharged over the objection of Downs before being sworn. A new jury was selected October 5, 2020 and opening statements and presentation of witnesses began November 9, 2020. [Doc. 132, Doc. 136]

Down was convicted of both counts. [Doc. 141]

Downs was sentenced February 26, 2021 to 300 months imprisonment as to Count One and 120 months imprisonment as to Count Two, both to run concurrent. [Doc. 159]

An appeal followed in a timely manner thereafter. [Doc. 162] The initial three judge panel of the Eleventh Circuit heard oral argument and thereafter issued a

[1] Bracketed references are to the record on appeal at the Eleventh Circuit Court of Appeals.

published opinion denying relief.[2]

FACTS RELATING TO THE INTERSTATE COMMERCE ELEMENT AS TO COUNT ONE

In opening statement the Government accurately described the evidence which was going to be presented which it would ultimately argue supported the interstate commerce element on Count One:

> The defendant provides L.H. with alcohol. She gets drunk. And she'll tell you about a time when she was inside the defendant's truck in 2014, again going to one of these musical events, or what she intends to do, and he takes pictures of her -- she's taking -- in various stages of undress -- and then performing sexual acts on her.
> Part of the evidence in this case, ladies and gentlemen, are those photos and are videos. And they are explicit. That is part of the evidence in this case.
> From that point where they are in a parking lot, and it's in a parking lot at a hotel, L.H. will testify and explain to you what happened next, that the defendant got a hotel room, had her go inside the hotel room. She'll tell you what happened next.
> L.H. had asked the defendant what -- what did he do with those pictures. She didn't have them. He took them on his cell phone. He told her he saved them on his computer. He had a computer at his house that she'd seen obviously a number of times.

[Doc. 189, pp. 49-50]

---

[2] The Eleventh Circuit issued a first opinion January 6, 2023, 56 F.4th 1314, which it subsequently withdrew and issued a revised opinion March 13, 2023, 61 F.4th 1306.

> So Sergeant Dickey goes to find out. He gets a search warrant from the State of Florida, which gives him authorization to go to the defendant's house and look in his computers. It's on April 18 of 2018, that those search warrants are executed. There are special forensic analysts who are there on scene to assist the Gulf County Sheriff's Office. David Decker, who is with the Florida Department of Law Enforcement, he's there on scene; and he, as part of the search warrant, has the special expertise and knowledge to pull the things up on the computer. The defendant's computer at his house.
> Mr. Decker will be here today to tell you what he saw on the computer. He alerts Sergeant Dickey and says, Hey, these pictures, are these of L.H.? Sergeant Dickey will be here to testify and tell you what he saw, that, in fact, the pictures that were on the defendant's computer, that they found at the time of the search warrant in April 2018, were pictures of L.H. in the red truck, of her in seminude, nude, and having sexual acts done to her.

[Doc. 189, pp. 51-52]

The Government subsequently in closing argument summarized the evidence which it had presented at trial which it said had satisfied the interstate commerce element of Count One.

> But regardless, we know that those images and videos went from a Samsung cellular phone to the computers. The drives. The drive that was on the red computer --
> Ms. Carnley, if we could pull up Exhibit 2C.
> -- computer that was there in his kitchen.
> Could we go to 2E, please? Thank you.
> The defendant's computer right there in his kitchen.
> Those items, you heard from Agent Sikes, were moved and shipped and transported in interstate commerce. Right on the -- the external drives -- or the internal drives were produced in

> China, the external hard drives in Thailand.
> If we could go to Exhibit 2L, please.
> This is FDLE Item 13 that Ms. Roeder talked about, the forensic analyst from the Florida Department of Law Enforcement. This is another computer where the images and videos of L.H. had been, also tucked away in a storage area at Mr. Downs's house. And that item as well, the drive or the inside, had been transported in interstate commerce. So the law allows, the definition of "produced" in this regard, that perhaps we don't know for sure what device -- it was 2014 -- produced those images, but we know that where it got to, those items were transported in interstate commerce. So Element 2 has been met beyond a reasonable doubt.

[Doc. 191, pp. 514-515]

The defense had moved for a judgment of acquittal at the close of the Government's case, arguing that the evidence had not satisfied the interstate commerce element on Count One:

> MR. SCHAFFNIT: And to respect, again, not to Count Two but to Count One, it's the defendant's position that the Government has failed to present sufficient evidence to allow the jury to find beyond a reasonable doubt that the images created of L.H. -- which presumably were created by a phone but we don't know specifically where that phone was manufactured -- traveled in interstate commerce. They were created somewhere in the panhandle, and they were transferred to a computer; and that, I believe, is not interstate commerce.

[Doc. 190, p. 390]

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT AS TO THE INTERSTATE COMMERCE ELEMENT ON COUNT ONE, WHICH CHARGED SEXUAL EXPLOITATION OF A FIFTEEN YEAR OLD FOR THE PURPOSE OF PRODUCING A VISUAL DEPICTION OF SUCH CONDUCT.[3]

In a factually similar case the United States Sixth Circuit Court of Appeals has expressly held that for purposes of 18 U.S.C. § 2251(a), production of child pornography, that the interstate commerce element must be satisfied by an examination of the means or materials used at the point in time of the original production, that is, at the time when the child is being induced or coerced into the sexually explicit conduct for the purpose of then producing a visual image. The interstate commerce element in a production case can *not* be satisfied by examining evidence of materials used *after and separate* from the act of production during which the child was induced or coerced and after and separate from the purpose of producing the original image. *United States v. Lively*, 852 F.3d 549 (6th Cir. 2017).

> We hold that "producing" child pornography, within the meaning of § 2251(a), encompasses copying images onto a hard drive. Norwood-Charlier thus "produced" child pornography when he copied visual depictions of Lively abusing a minor onto his Seagate hard drive. That conclusion, however, does not end our analysis, because the government failed to prove that Lively abused a minor for the purpose of producing the Hard-Drive Images. The foreign origin of

[3] This offense is commonly referred to as "Production of Child Pornography."

> Norwood-Charlier's Seagate hard drive, standing alone, thus does not satisfy § 2251(a)'s interstate-commerce requirement in this case.

Lively, 852 F.3d 549, 559.

The relevant facts of *Lively* were that Norwood-Charlier (a codefendant who cooperated as a Government witness) had conspired with Lively to take pictures of Lively sexually abusing a child. These pictures were taken with a Kodak camera, which stored its images on a SanDisk memory card. That memory card was later used to transfer the stored image onto a Seagate computer hard drive. The parties stipulated that the Seagate hard drive was made in Thailand and moved in interstate commerce. The SanDisk memory card on which the Kodak camera stored its image had a trade inscription "Made in China" on it. The Kodak camera had no trade inscription and no evidence was presented at trial to show that the Kokak camera ever moved in interstate commerce. At trial the Government relied upon the stipulation that the Seagate hard drive was made in Thailand to satisfy the interstate commerce element of the offense of production of child pornography.

The Sixth Circuit held that that evidence legally insufficient. The Sixth Circuit, like our circuit in *United States v. Maxwell*, 446 F.3d 1210 (11th Cir. 2006), had no difficulty concluding that transferring an image to a hard drive to view it constituted "production," but explained that that was not the end of the interstate

commerce analysis. The Court held:

> Section 2251(a) reads, in relevant part:
>
> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.
>
> 18 U.S.C. § 2251(a). Section 2251(a) has two parts. The first part—everything from "Any person" through "shall be punished as provided under subsection (e)"—is written in the active voice and does not mention interstate commerce. To come within the statute's sweep, a defendant must sexually exploit a minor "for the purpose of producing any visual depiction of" that exploitation. Id.
>
> Section 2251(a)'s jurisdictional requirement is in its second part—everything from "if such person knows" through "foreign commerce or mailed"—much of which is written in the passive voice. This second part contains three jurisdictional hooks, each of which is prefaced by the word "if." See 1 Wayne R. LaFave et al., Criminal Procedure § 1.2(c) (4th ed. 2015) (explaining that criminal statutory provisions requiring nexus with interstate commerce "have come to be described as 'jurisdictional hooks'"). The government indicted Lively under the second of these jurisdictional hooks: Lively's indictment alleged that he sexually exploited a minor "for the purpose of producing visual depictions of such conduct" and that "[s]uch visual depictions were produced using materials that had been shipped and transported

in interstate and foreign commerce . . . including but not limited to a Seagate hard drive manufactured in Thailand." R.1 (Indictment at 1-2) (Page ID #1-2).

Lively's Rule 29 argument raises two claims. First, Lively argues that an individual does not "produce: child pornography when he copies digital images onto a hard drive, and thus the government was required to prove that Norwood-Charlier's Kodak camera or its SanDisk memory card had a nexus to interstate or foreign commerce. Second, Lively argues that there is no evidence in the record establishing the origin of the Kodak camera or SanDisk memory card.

We hold that "producing" child pornography, within the meaning of § 2251(a), encompasses copying images onto a hard drive. Norwood-Charlier thus "produced" child pornography when he copied visual depictions of Lively abusing a minor onto his Seagate hard drive. That conclusion, however, does not end our analysis, because the government failed to prove that Lively abused a minor for the purpose of producing the Hard-Drive Images. The foreign origin of Norwood-Charlier's Seagate hard drive, standing alone, thus does not satisfy § 2251(a)'s interstate-commerce requirement in this case.

In contrast, the government established that Lively abused a minor for the purpose of producing a different set of visual depictions: the SanDisk Images. At Lively's trial the government introduced into evidence a device that Norwood-Charlier used to produce the SanDisk Images: the SanDisk memory card from Norwood-Charlier's Kodak camera, which card bore a trade inscription stating that it was "[m]ade in China." Although the government did not introduce the SanDisk memory card for the explicit purpose of satisfying § 2251(a)'s interstate-commerce requirement, the card was still presented in evidence before Lively's jury. Viewed in the light most favorable to the government, the evidence at Lively's trial was thus sufficient to meet § 2251(a)'s interstate-commerce element.

. . .

> The district court also adopted an erroneous reading of § 2251(a) when it denied Lively's Rule 29 motion. In ruling that the government had satisfied § 2251(a)'s interstate-commerce requirement, the district court stated that there was no "requirement that the interstate commerce nexus be satisfied with respect to the original item that created the image. Every subsequent publication of the image counts." R. 87 (Trial Tr. at 336:3-7) (Page ID #887) (emphasis added). The government's reading of § 2251(a) rests on a similar premise: if "every subsequent publication of" a visual depiction of child pornography "counts," then the fact that Norwood-Charlier copied images of Lively abusing the boy onto his Thai-made Seagate hard drive would mean that Lively violated § 2251(a), even if Lively did not abuse the boy for the purpose of producing the Hard-Drive Images.
>
> This interpretation is incorrect. The district court's statement that "[e]very subsequent production" of child pornography may be used to satisfy § 2251(a)'s second jurisdictional hook finds no support in the statute. Under that reading of § 2251(a), the government meets the second hook's interstate-commerce element "if a visual depiction was subsequently produced using materials that have" a nexus to interstate or foreign commerce. Adopting that reading not only would require us to change words in § 2251(a), but also would require us to add words to the statute. Moreover, the district court's reading of § 2251(a) ignores the clear, limiting language in § 2251(a)'s text ("if that visual depiction"), and renders irrelevant a defendant's "purpose" under the statute.
>
> In sum, the fact that Norwood-Charlier produced child pornography when he produced the Hard-Drive Images does not mean that Lively is guilty under § 2251(a), because Lively did not abuse the boy for the purpose of producing the Hard-Drive Images.

United States v. Lively, 852 F.3d 549, 558-59, 563-564 (6th Cir. 2017).

In Downs' case there was only the computer hard drive in evidence and the images found on it, but the testimony from the child victim was that the pictures were

produced originally by inducing her to undress in Downs' truck where he used his cellular phone to make ("produce") the images - that is, Downs had the purpose of inducing the child to engage in sexually explicit conduct in 2014 when he induced her to undress and pose for his camera in his truck taking pictures with his phone.

Some undetermined time later, there is no evidence when or how or under what circumstances, the pictures were presumably transferred from this phone to Downs' computer.

Only the computer hard drives were introduced in evidence at trial together with evidence of *their* foreign sources to satisfy the interstate commerce nexus of the offense of production of child pornography, but there was no evidence at trial of any interstate commerce nexus with the camera or its media data storage card, assuming it had one.

Nevertheless, the Eleventh Circuit found the interstate commerce element satisfied.

Under the reasoning and holding of *Lively*, this fails to satisfy the interstate commerce element of the offense; the two opinions create a direct conflict in the circuits.

CONCLUSION

Wherefore, the Petitioner, Clark Downs, respectfully requests this Honorable Court grant this petition for certiorari to resolve this conflict in the Circuits and to decide this important question of interstate commerce, which despite the attempt of the Eleventh Circuit panel to distinguish this case from *Lively*, is in direct conflict with the Sixth Circuit's *Lively* decision.

Respectfully submitted,

KENT & McFARLAND
ATTORNEYS AT LAW

s/William Mallory Kent
WILLIAM MALLORY KENT
Fla. Bar No. 0260738
24 North Market Street, Suite 300
Jacksonville, Florida 32202
904-398-8000 Office
904-662-4419 Mobile
kent@williamkent.com