No.

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY ROLLINS, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the portion of the Illinois child pornography statute allowing for the termination of possession, 720 ILCS 5/11-20.1(b)(5) (2016), is unconstitutionally vague, where it offers no guidance on how to terminate possession of a digital file and this information is beyond the knowledge of a person of ordinary intelligence.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases: **Page**

Federal Cases:

State Cases:

Constitutional and Statutory Provisions:

Federal Constitutional Provisions:

State Statutory Provisions:

Secondary Sources:

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The petitioner, Gregory Rollins, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at 2023 IL App (2d) 200744, ___ N.E.3d ___, and is published. The order of the Illinois Supreme Court denying leave to appeal (Appendix B) is reported at 223 N.E.3d 644.

JURISDICTION

On August 9, 2023, the Appellate Court of Illinois issued its decision. No petition for rehearing was filed. The Illinois Supreme Court denied a timely filed petition for leave to appeal on November 29, 2023. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

720 ILCS 5/11-20.1 (2016)- Child Pornography

> (a) A person commits child pornography who:
>
> [***]
>
> (6) with knowledge of the nature or content thereof, possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child or person with a severe or profound intellectual disability whom the person knows or reasonably should know to be under the age of 18 or to be a person with a severe or profound intellectual disability, engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection;
>
> [***]
>
> (b)(5) The charge of child pornography does not apply to a person who does not voluntarily possess a film, videotape, or visual reproduction or depiction by computer in which child pornography is depicted. Possession is voluntary if the defendant knowingly procures or receives a film, videotape, or visual reproduction or depiction for a sufficient time to be able to terminate his or her possession.

STATEMENT OF THE CASE

Gregory Rollins was charged by indictment with two counts of possession of child pornography under 720 ILCS 5/11-20.1(a)(b). (C. 34-35) On January 2, 2020, he pled guilty to one count and the other count was *nolle prossed*. In exchange for his guilty plea, the State agreed to a sentence of ten years in prison. (R. 115; C. 94, 97) The State presented the factual basis for the plea as follows:

> Your Honor, if this matter were to proceed to trial, the State would call Detective Hansen of the Buffalo Grove Police Department, who would testify that in May of 2015 he was investigating the defendant, who he would identify in open court as the person standing three people to my right and the defendant in this case. He was investigating him for a violation of the sex offender registration. Through that investigation, the defendant consented to Detective Hansen searching his personal laptop.
>
> Dean Kharasch, K-h-a-r-a-s-c-h, of the Lake County State's Attorney's Office would testify that he performed a forensic analysis of the defendant's laptop and on that laptop he located a video entitled Aaron-P1010753.avi and that video depicted a male child, who the defendant reasonably should have known to be under the age of 18, engaged in an act of masturbation. All of those incidents occurring in DuPage County.

(R. 121)

The court accepted the plea agreement and sentenced Mr. Rollins according to its terms. (R. 121-22) No post-plea motion or notice of appeal was filed.

On September 1, 2020, Mr. Rollins filed a *pro se* post-conviction petition. (C. 120-25) Among other claims, Mr. Rollins argued:

> He was erroneously found guilty of the offense of Possession of Child Pornography. The video files in question had been deleted prior to any questioning, investigations, or suspicion of any wrong doing. Purposely deleting unwanted files is an act of abandonment and effectively terminates possession. Per the forensic examination report summary, the video files were inaccessible and recoverable only through the use of special software not present on the device searched. Additionally, section (b)(5) of the child pornography statute and the possession statute (720

> ILCS 5/4-2) are both impermissibly vague. Both state, in relevant part, "to be able to terminate his or her possession," implying that possession can be terminated, though neither explain any further.

(C. 121)

On November 10, 2020, the trial court announced that it was going to dismiss the petition as frivolous and patently without merit. The court also stated that it would subsequently draft an order to that effect. (R. 142-43) The court issued its written order on November 19, 2020. The order did not specifically mention the void-for-vagueness claim. (C. 140)

On appeal, Mr. Rollins argued that the Illinois child pornography statute was unconstitutional under the void-for-vagueness doctrine. The Illinois Appellate Court affirmed the dismissal of his post-conviction petition, first claiming that Mr. Rollins' argument "rests on an untenable assumption" that "all prior voluntary possession can simply be erased any time a file is later deleted, as if the act of termination could retroactively eliminate the fact of any prior procurement and subsequent knowing possession of any duration." *People v. Rollins*, 2023 IL App (2d) 200744, ¶ 18. Next, the Appellate Court claimed that "terminate" was a "commonly understood term[] that any ordinary person can comprehend, even in the context of a computer file." 2023 IL App (2d) 200744, ¶ 19. Finally, the Appellate Court outlined a procedure for this situation as follows:

> In its case-in-chief at trial, the State presumably would present evidence showing the automatically retained file in unallocated computer space. Defendant could then testify or present other evidence showing that his act of deleting the file (albeit an incomplete deletion of the material) and rendering it inaccessible to himself was an act intended to promptly terminate possession—indicating that his initial possession had been involuntary. The State would then have the burden of presenting additional evidence of, *inter alia*, defendant's intent to voluntarily possess

> the file, such as the duration of his possession in excess of a reasonable time to dispossess it, his seeking out or soliciting such material, his multiple openings of the file, or his opportunity or ability to copy, print, or send the images to others (even if not exercised).

2023 IL App (2d) 200744, ¶ 21.

Mr. Rollins filed a petition for leave to appeal with the Illinois Supreme Court, which was denied on November 29, 2023. *People v. Rollins*, 223 N.E.3d 644 (2023).

REASON FOR GRANTING CERTIORARI

This Court should grant review to determine if the Illinois child pornography statute is void for vagueness due to its failure to offer any guidelines on how one can terminate possession of a digital file.

In order to prevent convictions based on inadvertent possession, a defendant's possession must be voluntary, which, in Illinois, is defined as possession "for a sufficient time to be able to terminate his or her possession." 720 ILCS 5/11-20.1(b)(5) (2016). For offenses involving the possession of physical objects, such as drugs, it is easy to apply this definition because an ordinary person would know how to "terminate" possession of a physical object. However, when dealing with digital files, this definition becomes much more bewildering.

The Illinois child pornography statute gives no guidance on how one could "terminate" possession of a digital file. Moreover, this information is not within the knowledge of an ordinary person. If a person inadvertently downloads an image of child pornography, there are various ways in which possession could be considered "terminated." For instance, it could be when the file was sent to the recycle bin, when the recycle bin was emptied, when the user downloaded a sufficient number of other files to overwrite all the unallocated space on the computer, or when the file was removed from a cloud-based server. Yet, the statute gives no guidance on which of these actions, if any, would sufficiently terminate possession. Furthermore, the statute does not clarify whether the standard changes based on each individual's own degree of technical expertise.

Without any guidelines, the Illinois statute is void for vagueness. As technology continues to evolve, state legislatures cannot continue to rely on old definitions that

do not transfer over to new technology. In enacting a vague statute, such as the one at issue here, legislatures create a situation ripe for arbitrary and discriminatory enforcement. Here, for instance, different police officers and prosecutors will have to determine if a defendant sufficiently terminated possession of a digital file based solely on their own personal feelings, without any guidance from the legislature. Therefore, this Court should grant review.

The Fifth Amendment, applicable to the states through the Fourteenth Amendment, affirms that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. AMENDS. V, XIV. One aspect of due process is the requirement of fair notice, from which is derived the void-for-vagueness doctrine. *Wilson v. County of Cook*, 2012 IL 112026, ¶ 21. "Vagueness may invalidate a criminal law for either of two independent reasons." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). First, "the statute may fail to provide the kind of notice that would enable a person of ordinary intelligence to understand what conduct is [required]," and second, "a statute may [fail] to provide explicit standards for those who apply it, thus authorizing or even encouraging arbitrary and discriminatory enforcement." *People v. Law*, 202 Ill. 2d 578, 582-83 (2002).

For example, in *People v. Law*, the Illinois Supreme Court held that a statute prohibiting a social host from allowing an intoxicated minor to leave the gathering was unconstitutional under the void-for-vagueness doctrine. 202 Ill. 2d at 580. In analyzing the statute, the Court first noted that, unlike most criminal statutes, the focus in the provision at issue "is on conduct that is *required* of the individual, rather than on conduct which is prohibited." As such, in analyzing vagueness, "the proper inquiry is

whether the statute gives fair warning as to what conduct is *required* of the occupant to prevent an intoxicated minor from departing." 202 Ill. 2d at 583 (emphasis in original). Under this inquiry, the Illinois Supreme Court reasoned:

> The difficulty with section 6–16(c) is that it provides no guidance as to the steps that are to be taken to prevent an intoxicated minor from leaving the gathering. Section 6–16(c) attempts to impose an affirmative duty, but is silent as to the scope of this duty. The result is that the residential occupant is left to speculate as to what course he should take to avoid violating the statute. For example, would it be sufficient if the occupant merely called the police, or the minor's parents? If the parents were called, could the occupant release the intoxicated minor to the parents and still comply with section 6–16(c)? On the other hand, might it be sufficient for the occupant to simply warn the minor not to leave? If the minor left the premises despite the warning, would the occupant then be in violation of section 6–16(c)?

202 Ill. 2d at 583-84.

As a result, the *Law* Court held that this statute failed "to provide the kind of notice that would enable an ordinary person to understand what he must do to avoid prosecution under the statute." 202 Ill. 2d at 584-85. The Court further held that the statute was unconstitutionally vague on its face and not simply as applied to the individual case because "*any* person of common intelligence is forced to speculate as to the meaning of this statute" such that "there is no set of circumstances under which [the statute] would be valid." 202 Ill. 2d at 585 (emphasis in original).

Here, 720 ILCS 5/11-20.1(b)(5) is unconstitutionally vague under both prongs of the void-for-vagueness test. *Morales*, 527 U.S. at 56. First, it failed to provide notice that would enable a person of ordinary intelligence to understand what conduct is required. "Terminate" is not defined in the statute, but the Cambridge Dictionary defines it as "to (cause something to) end or stop." *available at*

http://dictionary.cambridge.org/us/dictionary/english/terminate (last visited on January 18, 2024). This definition is easy to apply when dealing with contraband such as drugs, in which possession can be terminated by something as simple as flushing the drugs down the toilet. It becomes much more difficult to apply when dealing with digital files. Unique from other types of contraband, digital files may continue to exist on a computer without the user's knowledge.

For instance, when a user visits an internet page that displays an image, the computer, without any action from the user, stores a copy of the image as a "Temporary Internet File" in a "web cache." *People v. Gumila*, 2012 IL App (2d) 110761, ¶ 20. Moreover, it is not a simple action to delete an item from one's computer. Simply clicking on "delete" will only send an item to the recycle bin. To actually delete an item, one has to take the extra step of emptying the recycling bin. *See* "How to Permanently Delete Files from Windows 10," *available at* http://www.avast.com/c-permanently-delete-files (last visited January 18, 2024). Yet, even then the item is not totally removed from the computer's hard drive. Instead, the files are transferred to "unallocated space," which is automatically overwritten if the computer needs more allocated space. Once a file is transferred to unallocated space, it cannot be located with a standard file-browsing utility, but can be recovered only with specialized software. *Gumila*, 2012 IL App (2d) 110761, at ¶ 18.

Adding even more confusion is the proliferation of storing items in "the cloud." Cloud storage is a model of computer data storage in which the digital data is physically stored on "multiple servers (sometimes in multiple locations)" owned and managed by a hosting company, which individuals or organizations can access to store

data. Wikipedia, "Cloud Storage," *available at* http://en.wikipedia.org/wiki/Cloud_storage (last viewed on January 18, 2024). As with items saved on a physical computer, deleting items from the cloud is not as straight-forward as it might appear at first glance. For example, items deleted from Apple's iCloud are recoverable for 30 days, but a user "can remove deleted files before the 30-day time period is up." iCloud User Guide, *available at* http://support.apple.com/guide/icloud/delete-files-mm3b7fcd0c10/icloud (last visited January 18, 2024). However, this does not necessarily mean that the data is deleted from the physical servers. For example, if something is deleted from the Google cloud, the process to delete it from the servers "generally takes around 2 months from the time of deletion," including "up to a month-long recovery period in case the data was removed unintentionally." Google's Statement on Deletion and Retention, *available at* http://policies.google.com/technologies/retention?hl=en&gl=us (last visited January 18, 2024).

Accordingly, "terminating" possession of a digital file is not a simple matter, which is why the statute's failure to offer any guidance is so problematic. Take, for example, a person who unintentionally views an image of child pornography on the internet. How does he terminate his possession? Does he simply close the website? Must he also delete his Temporary Internet Files?

And what happens if the person did not just open a website, but also downloaded an image? The downloading itself would not necessarily show voluntary possession because the names of files downloaded from the internet do not always match their actual content. Perhaps a person meant to download adult pornography (or something

else entirely) and accidentally downloaded child pornography. What would the person then have to do to terminate possession? Would the person have to send the file to the recycle bin? Empty the recycle bin? Download a sufficient number of other files until all the unallocated space is overwritten? Throw the entire computer into the trash? Furthermore, technical expertise will vary greatly from person to person. Does the "termination" standard change based on each individual's own degree of technical expertise?

And then what happens if the file was not simply downloaded to the individual computer but also automatically uploaded to the cloud? Does the person also have to repeat this process by permanently deleting the file from the cloud? Does its existence on a physical server owned by a company such as Google or Apple still show possession? The legislature, by failing to specify how one can terminate possession, offers no guidance on any of these questions. "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

In the instant case, subsection (b)(5) creates an affirmative duty but does not specify what steps must be taken to fulfill this duty. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) ("[T]he ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."). Thus, a person of ordinary intelligence is left to guess at what conduct is lawful and what conduct is unlawful. As such, the statute at issue is unconstitutionally vague because it fails the first prong of the void-for-vagueness test.

The statute is also unconstitutional because it does not provide a standard for authorities and consequently risks arbitrary and discriminatory enforcement. As in the first prong, the lack of standards for terminating possession means there are no guidelines for police officers and prosecutors. *See Morales*, 527 U.S. at 60 (ordinance was unconstitutional where it provided no guidelines for law enforcement). Ultimately, the Illinois legislature has left authorities in the dark in determining if someone has successfully terminated their possession of a digital file. Without any standards, the opinions of police officers and prosecutors will differ on what steps a person must take to terminate possession. Whether someone violated the statute will then be left to the whims, and perhaps even the technical expertise, of individual officers. Accordingly, by failing to describe with sufficient particularity the steps a person must take to comply with the law, the statute actually "encourages arbitrary enforcement." *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

If a statute fails either prong of the void-for-vagueness test, it is unconstitutional. *Morales*, 527 U.S. at 56. Here, the Illinois statute fails both prongs. Additionally, the statute is unconstitutionally vague on its face because "*any* person of common intelligence is forced to speculate as to the meaning of this statute" and, as a result, "there is no set of circumstances under which [the statute] would be valid." *Law*, 202 Ill. 2d at 585 (emphasis in original).

The Illinois Appellate Court rejected this argument, first claiming that Mr. Rollins' argument "rests on an untenable assumption" that "all prior voluntary possession can simply be erased any time a file is later deleted, as if the act of termination could retroactively eliminate the fact of any prior procurement and

subsequent knowing possession of any duration." *People v. Rollins*, 2023 IL App (2d) 200744, ¶ 18. On the contrary, Mr. Rollins never argued that *any* subsequent deletion would be a complete defense to possession. Nevertheless, there must be some way to terminate possession, or else the voluntary-possession provision of the statute would be superfluous, and citizens could be punished for involuntary possession. Hence, the question of what it means to terminate possession of a digital file remains.

The Appellate Court attempted to answer this question by stating, "If a defendant presents evidence that he dispossessed (or attempted to dispossess) the material, the State, in order to overcome the involuntary possession exception, must prove that he possessed it for a sufficient time for a jury to reasonably determine that the possession was voluntary." 2023 IL App (2d) 200744, ¶ 18. Yet, the Appellate Court never attempted to define how one could "dispossess" a digital file. Indeed, it is merely another way of saying "terminating possession" without any explanation of how this action could be accomplished. The Appellate Court claimed that "terminate" was a "commonly understood term[] that any ordinary person can comprehend, even in the context of a computer file." 2023 IL App (2d) 200744, ¶ 19. However, as explained above, how to terminate possession of a digital file is anything but straight-forward and commonly understood. Moreover, as technological expertise varies so widely from person to person, it is difficult to know what "ordinary person" the Appellate Court was referring to.

Notably, the Appellate Court did not even attempt to define this "commonly understood" term. Furthermore, the examples provided by the Appellate Court actually further emphasize the vagueness of the statute in question. Specifically, the Appellate

Court stated, "the presence of the file's copy in unallocated space is useful not only to the State in proving defendant's voluntary possession; that same fact is also useful to the defense in showing that he terminated his possession of the original file and thus did not possess it voluntarily." 2023 IL App (2d) 200744, ¶ 19. If the same fact can at once show both voluntary *and* involuntary possession, there are no guidelines for how to apply this statute in practice. Instead, it invites arbitrary and discriminatory enforcement that the void-for-vagueness doctrine is designed to prevent. Although a statute does not have to provide detailed step-by-step directions, it still must provide some guidelines to advise potential defendants and to prevent arbitrary and discriminatory enforcement.

Finally, the Appellate Court outlined a procedure for this situation as follows:

> In its case-in-chief at trial, the State presumably would present evidence showing the automatically retained file in unallocated computer space. Defendant could then testify or present other evidence showing that his act of deleting the file (albeit an incomplete deletion of the material) and rendering it inaccessible to himself was an act intended to promptly terminate possession—indicating that his initial possession had been involuntary. The State would then have the burden of presenting additional evidence of, *inter alia*, defendant's intent to voluntarily possess the file, such as the duration of his possession in excess of a reasonable time to dispossess it, his seeking out or soliciting such material, his multiple openings of the file, or his opportunity or ability to copy, print, or send the images to others (even if not exercised).

2023 IL App (2d) 200744, ¶ 21.

For two reasons, the above procedure does not cure the vagueness of the statute. First, none of it is in the statute. Instead, the Illinois Appellate Court created it whole cloth. For instance, the Appellate Court indicated that the defendant must present evidence that his attempted deletion "render[ed] it inaccessible to himself." Yet, this

language is not found anywhere in the statute. Moreover, it suggests a subjective standard in which those with more computer expertise would have to take additional steps to delete an item than someone who was relatively inexperienced with technology. As such, the Appellate Court took a vague statute and made it even more difficult to apply.

The second problem with the Appellate Court's procedure is that it is premised on the defendant's "act of deleting the file." However, the Appellate Court provided no guidance on what "delete" means or what actions would constitute deleting a file. As explained above, whether a file is "deleted" is not a simple either/or situation. Thus, the vagueness that plagues the statute also infects the Appellate Court's proposed procedure.

As neither the plain language of the statute nor the Appellate Court's decision have been able to describe what it would take to effectively terminate possession of a digital file, the statute is unconstitutionally vague. Therefore, this Court should grant review and, ultimately, vacate Mr. Rollins' conviction.

CONCLUSION

For the foregoing reasons, petitioner, Gregory Rollins, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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