No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CLINTON MARK LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Randal McDonald
Counsel of Record
LAW OFFICE OF RANDAL B. MCDONALD
112 N. Central Ave., Suite 100
Phoenix, AZ 85004
Telephone: 602.325.3092
Randy@rbmcdonaldlaw.com

Attorney for Petitioner
Clinton Mark Lewis

QUESTION PRESENTED FOR REVIEW

1. Is the charge of possession or accessing child pornography under 18 U.S.C. § 2252(a)(4)(B) "image specific" in that it requires proof that the defendant knowingly possessed or accessed the images charged in the indictment, as the Tenth Circuit has held, or may the Government obtain a conviction based on circumstantial evidence that a defendant possessed or accessed other, uncharged images, which were not found on the defendant's computer, were not produced to the jury for them to determine if the images were child pornography, and cannot now be viewed or accessed, as the Ninth Circuit held in this case?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this petition.

STATEMENT OF RELATED PROCEEDINGS

United States v. Clinton Lewis, No. 2:20-cr-00044-SPL-1 (9th Cir.) (April 2, 2024 order denying rehearing; February 21, 2024 order upholding judgment of conviction).

United States v. Clinton Lewis, No. 22-10186 (D. Ariz.) (July 22, 2021 judgment of conviction).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Clinton Lewis respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's opinion is currently unpublished, but reprinted in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion on February 21, 2024. *United States v. Lewis*, 2024 WL 701006 (9th Cir. 2024). The court of appeals denied a timely filed petition for rehearing on April 2, 2024. (App. 003). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

18 U.S.C. § 2252(a)(4)(B):

> [Any person who either] knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—
>
> > (i)the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> >
> > (ii)such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

INTRODUCTION

In 2022, Clinton Lewis was convicted of possession of child pornography. He was convicted despite the fact that the Government's own expert witness admitted that Mr. Lewis could not have known about, accessed, viewed, or exercised any control whatsoever over the sixteen specific images alleged in the indictment. The Ninth Circuit upheld the conviction, reasoning that the Government need not prove that a defendant possessed the specific images charged in the indictment so long as there is circumstantial evidence of other, uncharged images. But the uncharged images in this case were uncharged because the government was unable to recover them from Mr. Lewis' computer. In short, Mr. Lewis was convicted of possessing some nebulous collection of uncharged images that the Government never found, never indicted him for, and never presented to a jury.

This case is simple. Does the possession of child pornography statute require that the Government prove that the defendant possessed or accessed the images charged in the indictment? The Tenth Circuit has definitively held that it does. The Ninth Circuit, in this case, held that it does not. This Court's review is thus necessary to determine this important issue of law.

STATEMENT OF THE CASE

On January 18, 2019, Probation officers raided the home of Clinton Lewis and seized two computers. 3-ER-282-84, 290-91.[1] During a forensic examination of the computers, the FBI identified several thumbnails in a thumbnail file called "thumbs.db" and in the thumbnail cache.[2] 4-ER-354-55. Some of the thumbnail files in thumbs.db and the thumbnail cache depicted images of child pornography. 4-ER-365-66. Other than these thumbnail images, *no other images containing child pornography were found on the computer*. The original images from which the thumbnails had been created could not be found anywhere. 4-ER-381.

The existence of the thumbnails does not mean that the images themselves were accessed or viewed – only that the files were populated into a folder and portrayed by a thumbnail icon. 4-ER-357-58. The thumbnail icons themselves, however, are not accessible by a user without special software that did not exist on Mr. Lewis' computer. 4-ER-435-36. They cannot be deleted from the computer. 4-ER-358. It is impossible to discern when the files that would have generated the thumbnails were viewed or by whom. 4-ER-445.

Mr. Lewis was indicted on one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). 2-ER- 057. Importantly, the indictment only listed sixteen thumbnail images found on the computer – and referenced no other

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[1] References to the trial transcripts in this case use the excerpts of record ("ER") filed in the Ninth Circuit.

[2] A thumbnail is an image that is created when a user opens a folder containing image files. 4-ER-356-57.

specific images. And at trial, the Government's expert testified that it would not have been possible for Mr. Lewis to access those images, view them, or delete them from his computer. 4-ER-363; 358; 435-36. Instead, the expert testified that there was other indicia that Mr. Lewis possessed child pornography, evidence that Lewis "had been using recording software such as ShareX and Replay Video Capture" to download and view files, "viewing these files in icon mode (requiring a change from the default list view and creating residual thumbnails on his desktop), encrypting such files using Veracrypt software, and transferring them to an encrypted container, which he later loaded and viewed on his laptop." (App. 007). But these files themselves could not be found anywhere on the computer.

Effectively, the Government presented evidence of two groups of files. First, it presented the charged images, which were recovered from the computer and listed in the indictment, but which could not have been "possessed" by Mr. Lewis because he did not know about them, could not have viewed them, and could not have disposed of them (by, for example, deleting them from his computer). These were the images specifically referenced in the indictment and were indisputably child pornography. Second, the Government presented evidence that Mr. Lewis had downloaded and viewed many other images using ShareX, RVC, and other file sharing, recording, and encryption software. But the Government was unable to recover these images and the Government's expert explicitly testified that he could not tie any of these images to the charged images.

Mr. Lewis was convicted and sentenced to ten years in prison. The Ninth Circuit upheld Mr. Lewis' conviction, holding that "[t]he government need not prove that Lewis knew of and exercised control of the thumbnails themselves—rather, the thumbnails are the leftover evidence of what pornographic materials Lewis had previously accessed on his desktop by viewing specific files in icon mode." (App. 006). It denied a petition for rehearing. (App. 003).

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DECISION THAT A CONVICTION FOR POSSESSING CHILD PORNOGRAPHY IS NOT "IMAGE-SPECIFIC" CONTRADICTS ITS OWN PRECEDENT AND THE LAW ESTABLISHED IN OTHER CIRCUITS.

The Government listed sixteen images in the indictment and presented only those images to the jury – because those were the only actual images that it was able to find. The purpose of listing the images in the indictment is to apprise the defendant of the charges against him. *Russell v. United States*, 369 U.S. 749, 763-64 (1962). An important corollary purpose of the specificity requirement is to only allow prosecution on the charges presented to the grand jury, not the prosecutor or court's interpretation of the charges. *Id*. at 770. Allowing Mr. Lewis to be convicted based on evidence that he manipulated *other*, uncharged, files – which could not be directly tied the thumbnails charged in the indictment – undermines those protections and is not permitted by the statute.

A. The Ninth Circuit's holding that possession of child pornography is not an image-specific crime directly contradicts the law in other circuits.

The Tenth Circuit has squarely held that possession of child pornography is "an image-specific crime." *United States v. Haymond*, 672 F.3d 948 (10th Cir. 2012); *United States v. Dobbs*, 629 F.3d 1199 (10th Cir. 2011). In *Dobbs*, the two charged images listed on the indictment were found in a cache on the computer and there were no indications that the defendant had seen the charged images, much less exercised control or manipulated them. 629 F.3d at 1204. In that case, despite evidence that the defendant had searched for child pornography, the Tenth Circuit overturned his conviction because there was no evidence that he knew about the charged images. *Id.* at 1209.

In *Haymond*, the Tenth Circuit applied *Dobbs* to charges of possession of child pornography under 18 U.S.C. § 2252(a)(4)(B), the exact same charge faced by Mr. Lewis in this case. There, the court held:

> As an initial matter, Mr. Haymond points out that possession of child pornography is an image-specific crime. The district court recognized this when it instructed the jury that the government was required to prove its case as to the specific "charged images," noting that Mr. Haymond was "not on trial for ... any image not contained in Government's Exhibits 8–14. To convict Mr. Haymond under 18 U.S.C. § 2252(a)(4)(B), **the government was required to prove he knowingly possessed at least one of the seven charged images listed on the verdict form**.

672 F.3d at 954-55 (emphasis added) (citations omitted).

Other circuits have not addressed this issue as squarely, but the image-specific nature has been assumed in other contexts. Double jeopardy arises

frequently when a defendant is charged with (usually) both receipt and possession of several images of child pornography. The Second and Eighth Circuits have looked to the indictments to discern whether there was a double jeopardy issue. *See United States v. Polouizzi*, 564 F.3d 142 (2nd Cir. 2009) (holding that there was not a double jeopardy issue because the charges had different specific images listed on the indictment); *United States v. Morrissey*, 895 F.3d 541 (8th Cir. 2018) (holding that double jeopardy was violated because the charged images were not specific to the separate counts).

The double jeopardy issue highlights the need for specificity in child pornography indictments. Indictments are meant not only to protect defendants from double jeopardy, but also ensure that the defendant is prosecuted only on the charges presented to the Grandy Jury, and that the defendant is apprised of the charge and can prepare a defense. *United States v. Haas*, 583 F.2d 216, 219 (5th Cir. 1978); *see also Russell v. United States*, 369 U.S. 749, 763-64, 770 (1962).

This court should also affirm the Tenth Circuit's decisions holding that possession or accessing child pornography is an image-specific offense because to do otherwise would significantly impair a defendant's right to present a defense in his case, contravening the Sixth and Fourteenth Amendments. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'

(*quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986)); *accord Faretta v. California*, 422 U.S. 806, 818 (1975) ("The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it."); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). In cases involving computers (which is virtually all modern-day child pornography cases), the sheer volume of data available on any given hard drive would make it impossible to prepare a defense without the indictment providing the specific images charged. *See, e.g., Riley v. California*, 573 U.S. 373, 394 (2014) (finding that a 16 GB cell phone could contain "millions of pages of text, thousands of pictures, or hundreds of videos.").

The Fifth Circuit has diverged from the Tenth, explicitly holding that indictments need not include the specific images. *United States v. Cameron*, 699 F.3d 621, 635 (5th Cir. 2012). However, the Fifth Circuit's decision does not explain how it addresses the concerns addressed above, and that reasoning appears to implicate not only the requirement that the images be charged in the indictment but present a serious issue implicating double jeopardy. *See United States v. Barton*, 879 F.3d 595, 600 (5th Cir. 2018) ([t]hough he may be right that **some of the**

materials he received and possessed were indeed the exact same files, a complete overlap is not facially apparent from either the indictment or record" (emphasis added)).

The split between the holding of the Ninth Circuit in this case and the Tenth Circuit in *Haymond* and *Dobbs* must be resolved by this Court.

B. The Ninth Circuit's holding that possession of child pornography is not an image-specific crime is contrary to its own precedent.

In addition to conflicting with the established law in other circuits, the Ninth Circuit's decision in this case that "[t]he government need not prove that Lewis knew of and exercised control of the *thumbnails* themselves[,]" is contrary to its own precedent. (App. 006) (emphasis in original).

While never directly addressing the issue, the Ninth Circuit has assumed that possession of child pornography is image-specific in related rulings. In *United States v. Wright*, the defendant claimed that the jury instruction did not sufficiently inform the jury that they must find that the defendant knew about the specific images charged on the indictment. 625 F.3d 583, 619 (9th Cir. 2010) (overruled by statute on other grounds). The Ninth Circuit disagreed, finding that "the jury was asked whether Wright knew that the files charged in the indictment—those stipulated to by the parties—were on his computer or contained child pornography." *Id*. The instruction in *Wright* was under 18 U.S.C. § 2252A(a)(5)(B), while Mr.

Lewis was convicted under 18 U.S.C. § 2252(a)(4)(B), but the statutes have nearly identical language.[3]

United States v. Flyer, which was discussed in the Ninth Circuit's opinion in this case, also made clear that 2252(a)(4)(B) is an image-specific crime. 633 F.3d 911, 919-20 (9th Cir. 2011). In overturning Flyer's conviction, the Ninth Circuit ruled "there is no evidence here that Flyer had accessed, enlarged, or manipulated **any of the charged images**, and he made no admission that he had viewed the charged images on or near the time alleged in the indictment." *Id.* (emphasis added).

In both cases, without addressing the question directly, the Ninth Circuit clearly adopts the image-specific reasoning of the Tenth Circuit. In fact, it seems to take for granted the fact that the crime must be proven in relation to the images actually listed on the indictment, and for good reason – these are the images that the defendant was on notice that he allegedly possessed and the images that were considered by the grand jury. In reversing course in Mr. Lewis' case, the Ninth Circuit departed from its own precedent.

[3] The relevant portion of 18 U.S.C. § 2252A(a)(5)(B) reads: "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" while 18 U.S.C. § 2252(a)(4)(B) reads: "knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction [of a minor engaging in sexually explicit conduct[.]"

II. IF THE CHARGE OF POSSESSION OF CHILD PORNOGRAPHY IS IMAGE-SPECIFIC, THE GOVERNMENT COULD NOT SUSTAIN ITS BURDEN OF PROVING MR. LEWIS' KNOWING POSSESSION OF THE IMAGES ALLEGED IN THE INDICTMENT.

The consequence of the Ninth Circuit's holding regarding the images on the indictment becomes clearer when examining the sufficiency of the evidence to uphold Mr. Lewis conviction. It is clear that based on the government's proof regarding Mr. Lewis' knowledge and control over the charged images that the Government did not have enough evidence to convict Mr. Lewis if possession of child pornography is an image-specific offense.

A. The existence of images in "unallocated space" on a computer, without more, is not enough to sustain a conviction for possession of child pornography.

In order to prove that a defendant has possessed child pornography, the Ninth Circuit (along with many other circuits) has required the Government to show that a user has knowledge of the images on a computer. *Flyer*, 633 F.3d at 919; *see also United States v. Moreland*, 665 F.3d 137 (5th Cir. 2011). "Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files." *United States v. Kuchinski*, 469 F.3d 853, 863 (9th Cir. 2006). It is not enough for the Government to demonstrate that a defendant used the computer, it must show that he had specific knowledge of the images charged.

In *United States v. Pothier*, 919 F.3d 143 (1st Cir. 2019), the First Circuit held, under similar circumstances, that the Government had not sufficiently proven that

the defendant had knowledge of the images. In *Pothier*, the court held that, although "[t]here is no dispute that…anyone viewing the videos would know they depicted child pornography....[t]he question at hand is whether a rational jury could find beyond a reasonable doubt that Pothier knew that his laptop contained the videos." *Id.* at 147. The Government's theory at trial – much like the Government's theory in this case – was that "Pothier must have known that the illicit material was on his laptop because he was the only person who otherwise used the laptop." *Id.* Finding that this leap was not sufficiently established by the evidence, the court reversed the conviction for lack of evidence. *Id.* at 149.

Pothier relies on two other cases, *United States v. Lowe*, 795 F.3d 519 (6th Cir. 2015), and *United States v. Moreland*, 665 F.3d 137 (5th Cir. 2011). In both cases, there was a laptop owned and used by the defendant which contained images saved in "unallocated space" that could not be sufficiently tied to any single user. The Sixth Circuit held that "without improperly stacking inferences, no juror could infer from such limited evidence of ownership and use that [the laptop owner] knowingly downloaded, possessed, and distributed the child pornography found on the laptop." *Lowe*, 795 F.3d at 523. Similarly, the Fifth Circuit held that the Government "did not provide any testimony or evidence from which it could reasonably be inferred that [the defendant] had ever seen the 112 images; knew that they were in the computers; or that [he] had the knowledge and ability to access those images." *Moreland*, 665 F.3d at 151 (5th Cir. 2011).

Like this case, *Pothier* involved a computer owned and used by the Defendant. 919 F.3d at 147. Like this case, in *Pothier*, "[t]here is no proof that anyone else either did or did not use the computer." *Id.* Like this case, *Pothier* involved child pornography that was not immediately accessible to a casual user of the computer. *Id.* In *Pothier*, "[t]he seven illegal videos contained on the computer at the time of the search were not filed in conspicuous locations, but rather in the recycle bin and in a temporary folder only visible to a user who overrode Microsoft's default setting." *Id.* While in *Pothier* "the evidence does not reveal whether an innocent user of the computer would have been aware that it contained child pornography," *id.*, here there was explicit testimony from the Government's expert that an innocent user would have absolutely no way of accessing the images on the computer without a specialized program available only to law enforcement. 4-ER-435.

In this case, the Government did prove that there were images of child pornography on the computer that was owned and used by Mr. Lewis. But the Government also presented evidence that no user of the computer would actually be able to view the files. 4-ER-435-37. Under the rule established by *Pothier*, *Lowe*, and *Moreland*, this is simply not enough to demonstrate that the Defendant had knowledge of the charged images. Thus, it was only by allowing the Government to prove possession of uncharged images that were never located by the FBI or presented to the jury that the District Court – and later, the Ninth Circuit – were able to find that sufficient evidence had been presented to convict Mr. Lewis.

B. The Government could not prove that Mr. Lewis exercised dominion and control over the charged images.

To establish possession, the Government must prove "a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised dominion and control over [it]." *United States v. Carrasco*, 257 F.3d 1045, 1049 (9th Cir. 2001) (quoting *United States v. Gutierrez*, 995 F.2d 169, 171 (9th Cir. 1993)). A person must have "power of disposal" over the contraband to exercise dominion and control over it. *Arellanes v. United States*, 302 F.2d 603, 606 (9th Cir. 1962).

The Government's own expert witness testified that he did not know whether Mr. Lewis knew about the charged images. He could not say whether he had ever viewed the charged images. He also testified that the Mr. Lewis could not delete the charged images if he had wanted to. "Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images." *Kuchinski*, 469 F.3d at 863. Without any knowledge of or power over the charged images, the Defendant cannot be convicted of possessing them.

1. The Government's expert could not say whether Mr. Lewis knew about the charged images.

In order to possess images on a computer, "the defendant must, at a minimum, know that the unlawful images are stored on a disk." *United States v. Romm*, 455 F.3d 990, 1000 (9th Cir. 2006). At trial, the Government's expert conceded that a

person using the computer would probably not know that the charged images located in the thumbnail cache and thumbs.db even existed:

> The file itself, the Thumbs.db file is actually a hidden file. So, for example, if I go into that folder and I see 20 videos and I delete those 20 videos, **I may or may not know that there's a hidden file sitting in there** because by default, Windows does not show hidden files.

4-ER-363 (emphasis added).

The Government's expert further testified that the only reason that he was able to see the charged images – which were hidden from the ordinary user of the computer – was with a specialized program:

> Q: So the originals, they don't exist?
>
> A. They are on the computer.
>
> Q. Well, they were deleted?
>
> A. They are not deleted.
>
> Q. They are in Thumbs.db?
>
> A. Correct, but that's not a deleted file.
>
> Q. Oh, all right. So if you went into the computer itself, other than going to Thumbs.db, you wouldn't be able to see it?
>
> A. That's correct.
>
> Q. And in order to see it through Thumbs.db, you would have to have a -- is it a program that you would be able to use to access the image?
>
> A. That's correct.
>
> Q. And that program is something that you have as an FBI agent; is that correct?
>
> A. Yes, as a forensic examiner.

> Q. Is that the FTK Program?
>
> A. Yes.
>
> Q. Now, that is something that is special for law enforcement, correct?
>
> A. No, FTK can be used by individuals as well, corporations.
>
> Q. When you were looking at the QPX3 and QPX1, those are the two computers that are the subject of this case, right?
>
> A. Yes.
>
> Q. You didn't see anything on them that indicated that those programs, that is, the FTK program, was available, correct?
>
> A. That's correct.
>
> Q. And in fact, you didn't see anything, when you were looking at the two computers, to indicate that there was any program that would have been able to open and view Thumbs.db?
>
> A. That's correct.

4-ER-435-36.

Thus, although charged images may have *existed* on the computer, there was no evidence that Mr. Lewis actually knew about them – they were, in the words of the Government's own expert, "hidden files." 4-ER-363. Furthermore, there was no evidence that Mr. Lewis employed any software program that would have allowed him to see these hidden files. 4-ER-436.

2. The Government's expert could not say whether Mr. Lewis ever viewed the charged images.

Because the Government was unable to provide evidence that the Defendant even knew about the hidden files on the computer, *a fortiori* it could not provide evidence that Mr. Lewis ever accessed those files. In *United States v. Navrestad*, the Court of Appeals for the Armed Forces held that a defendant who admitted to opening and viewing files on a public computer could not be charged with "possession" of those images because he lacked dominion and control over them. 66 M.J. 262, 267-68 (C.A.A.F. 2008). Although the viewed images had been automatically stored in the computer's temporary cache, the defendant could not access the hard drive where the cache files had been saved nor download the images to a portable storage device. *Id.* Additionally, no evidence indicated that the defendant had e-mailed or printed copies of the images or that he was aware that he could have done so. *Id.* In short, the Court held that without evidence that the defendant had accessed, downloaded, sent, or otherwise manipulated the files, the conviction could not be sustained.

And whereas the Government in *Navrestad* was able to prove that the defendant had actually viewed the images from which the cached files he was charged with possessing had been created, the Government here cannot even prove that. The Government's expert witness testified that the charged images were generated not by viewing the images from which the thumbnail images were derived, but merely by opening a folder that contained those images:

> Q. Okay. And so do you know the answer to the question of whether these thumbnails were in icon view because of the fact that your software even found them in the first place?

> A. Yes, I do.
>
> Q. And so explain that.
>
> A. I think I talked about it before, the Thumbs.db file does not get created unless the folder is put in icon view. So if the folder had always stayed in detail or list view, there never would have been a thumbnail created.
>
> Q. And so the existence of this thumbnail with its icons, what did that further tell you?
>
> A. That that folder that these came from, in this case it was ShareX screenshots 2018-11, that at some point that particular folder had been in icon mode.
>
> Q. Because your forensic software picks up the graphical representations?
>
> A. That were created from the icon mode, correct.

4-ER-363-64. Additionally, when asked whether it was possible for a thumbs.db file to exist when a user did not view the underlying file, the Government's expert testified, "I am uncertain." 4-ER-357.

In *United States v. Romm*, the Ninth Circuit upheld a conviction for possession of child pornography because the defendant "could copy the images, print them or email them to others, and did, in fact, enlarge several of the images." 455 F.3d 990, 1000 (9th Cir. 2006). But here, as in *Navrestad*, there is no evidence that the Defendant ever did any of those things – or even than he was able to do those things. Without the ability to access the charged images, he cannot be convicted of possessing those files. *See Flyer*, 633 F.3d at 919; *Kuchinski*, 469 F.3d at 863; *Navrestad*, 66 M.J. at 267-68.

3. The Government's expert testified that Mr. Lewis could not delete or otherwise control the charged images.

In addition to knowledge and access to the files, a defendant must exercise sufficient control over the contraband to give him "power of disposal" to exercise dominion and control over that contraband. *Arellanes*, 302 F.2d 603. Because the evidence presented at trial conclusively demonstrated that Mr. Lewis had no power to delete, control, or otherwise "dispose of" the charged, he cannot have exercised dominion and control over them.

In *Arellanes*, the defendant was the wife of a man convicted of importing and possessing heroin and marijuana. She was convicted on evidence that she occupied an apartment with her husband in which drugs were found and had accompanied her husband on a trip in a car in which other drugs were discovered. The issue in her case was whether her presence with her husband and the drugs was "a conclusively incriminating circumstance," sufficient to "show the possession or control which the government must establish to raise the presumption of guilty knowledge." *Id.* at 606-07. The Ninth Circuit held that it was not because "Mrs. Arellanes' presence with both [her husband and the narcotics] is as fully explained by her attachment to her husband as it might be by a control over the drugs." *Id.* at 606. The court defined dominion and control as the ability to "produce the [drug for sale]" as a means of determining whether the defendant had the power to dispose of (i.e., transfer or destroy) the drug. *Id.* at 603. Thus, *Arellanes* stands for the proposition that a defendant must have the power to "dispose of" – by manipulation, transfer, or

destruction – contraband to sufficiently exercise dominion and control over the contraband.

At several different points in his testimony, the Government's expert testified that it was not possible for a user to delete the charged images found in the cache or thumbs.db:

> Q. When Windows -- in Windows 7, if the original file is deleted, what happens to the corresponding thumbnail, assuming that the thumbnail got created simply because a user viewed it?
>
> A. So it doesn't go away. The thumbnail stays there. And like I said, in this particular instance we had some in – in the thing called Thumbs.db. That file is still on the computer, and the original image is still contained in it.

4-ER-358.

* * *

> Q. In fact, when a person -- or if a person deleted the original of each of these 77, why don't these thumbnails get deleted?
>
> A. You know, it's just Windows doesn't delete them. The file itself, the Thumbs.db file is actually a hidden file. So, for example, if I go into that folder and I see 20 videos and I delete those 20 videos, I may or may not know that there's a hidden file sitting in there because by default, Windows does not show hidden files. So that's why the Thumbs.db doesn't get deleted.

4-ER-363.

* * *

> Q. So the originals, they don't exist?
>
> A. They are on the computer.
>
> Q. Well, they were deleted?

A. They are not deleted.

Q. They are in Thumbs.db?

A. Correct, but that's not a deleted file.

4-ER-435.

The Government's own expert testified that Mr. Lewis did not have "power of disposal" over the images. Without the power to delete, transfer, or otherwise control the charged images, the Defendant cannot have possessed the charged images.

4. Without evidence that Mr. Lewis knew about, accessed, or was able to dispose of the charged images, the Government has failed to prove that he exercised dominion and control over the charged images.

In *Kuchinski*, the Ninth Circuit held that without knowledge, access, and control over hidden files contained on a computer, a defendant cannot be convicted of "possessing" those files. 469 F.3d at 863. Similarly, in *Flyer*, it held that it was not relevant whether some uncharged image had been previously deleted – the key question to determine if a defendant exercised sufficient dominion and control to have possession was whether the defendant had knowledge of and access to "the charged images." 633 F.3d at 920. There, the court found that "deletion of an image alone does not support a conviction for knowing possession of child pornography" when "[n]o evidence indicated that…[the defendant] could recover or view any of the charged images in unallocated space or that he even knew of their presence there." *Id.*

The Government's own expert testified that Mr. Lewis did not know about the charged images, did not have access to the charged images, and could not delete,

transfer, or otherwise control the charged images. Quite simply, he did not exercise sufficient dominion and control over the charged images to have legally possessed them. The Government has failed to produce evidence "adequate to allow any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." *Nevils,* 598 F.3d at 1163.

CONCLUSION

The Government was unable to provide any evidence that Mr. Lewis knew about, possessed, accessed, or otherwise exercised any control whatsoever over the images charged in the indictment. The Ninth Circuit thus affirmed his conviction based *only* upon the theory that crime of possession of child pornography is not image-specific, and that the Government need not prove the possession of the charged images. That holding is contrary to the law in other circuits and contrary to the intent of the law. This Court's review is required to remedy this split of circuit authority and establish whether the Government must prove possession of the images charged in the indictment in order to effect a conviction for possession of child pornography.

Respectfully submitted: June 28, 2024.

s/ Randal McDonald
Randal McDonald
Counsel of Record
Law Office of Randal B. McDonald
112 North Central Avenue, Suite 100
Phoenix, Arizona 85004
(602) 325-3092
randy@rbmcdonaldlaw.com
Attorney for Petitioner Lewis