

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TRAVIS JASON WINSTEAD — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS - FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Travis Jason Winstead
(Your Name)

Post Office Box 1010
(Address)

Bastrop Texas 78602
(City, State, Zip Code)

N/A
(Phone Number)

Question(s) Presented

1. Was it a denial of due process and fundamentally unfair for the prosecutor to argue to the jury that the defendant was a "leech" who was not willing to share files during trial, and then argue at sentencing that he had the intent to share in order to maximize his sentence?

2. When the government states that it targeted the defendant for several months with its specialized software but was not able to obtain any part of a file from the defendant and has no knowledge of any other person obtaining any part of a file from the defendant and that the defendant set his file sharing settings in such a way that it prevented file sharing, does his knowledge of how file sharing works constitute intent to share files warranting a distribution enhancement?

LIST OF PARTIES

All parties do not appear in the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Travis Jason Winstead, Defendant-Appellant, Petitioner;
2. Robert Pitman, United States Attorney;
3. Tracy Thompson, Assistant United States Attorney, who represented Plaintiff-Appellee in the district court;
4. Kenneth P. Kaplan, Assistant United States Attorney, who represented Plaintiff-Appellee in the court of appeals;
5. Joseph H. Gay, Jr., Assistant United States Attorney, who represented Plaintiff-Appellee in the court of appeals;
6. Steven E. Seward, Assistant United States Attorney, who represented Plaintiff-Appellee in the court of appeals;
7. Kristy Karen Callahan, Assistant United States Attorney, who represented Plaintiff-Appellee in the court of appeals;
8. John Finbar Carroll, Attorney at Law, who represented Defendant-Appellant in Guilt/Innocent and Sentencing phases of the proceedings in the district court;
9. Angela J. Moore, Attorney at Law, who represented Defendant-Appellant on appeal to the court of appeals.

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TABLE OF AUTHORITIES CITED

CASES

METRO-GOLDWYN-MAYER V. GROKSTER 545 U.S. at 921-922

UNITED STATES V. GROCE, 784 F. 3d 291 (5th Cir. 2015)

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 7, 2017.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF RELEVANT FACTS

During trial, FBI Agent Rex Miller informed the jury that Winstead set his maximum download setting to 999 while he set his maximum upload setting to 1. Trial Transcript, vol.II, p.15. Miller testified "Well, my first objective is to try to download from somebody. So after I immediately saw that IP address, one of the things that we can do with our program is we set up alerts so that when he's online, I can then set that program up to try to connect to his computer. I attempted that for a few months." Id., p. 18. Miller was asked if he knew of any other person ever downloaded all or part of a file from Winstead. Miller replied "No, sir." Id., p.15. AUSA Tracy Thompson argued to the jury "And he changed the upload setting to 1. "I don't really care if anybody gets anything from me." He's what Special Agent Miller described as a leech in the peer-to-peer world. "I'm going to collect it all because I want it. It's important to me, but I'm not going to share it with anybody." That says he knew exactly what he was doing." Id., pgs.207-08.

The PSR, par.9, indicates there were 100 movies and 329 images found on the three computers and one external hard drive, while Special Agent Charles Cox testified that several subdirectories were created within the "shared" folder and there were 1,047 total files located in the sub-directories. Trial transcript, vol.II, p.91. Of those 1,047 files, only 81 movies and 256 images were contraband. Id., p.83. 710 innocent files were located in the sub-directories of the computer running the Morpheus file sharing program. There were 966 small non-video files that could have been quickly and easily downloaded by investigators in a matter of seconds if downloading were possible from Winstead's computer, simply by putting one of the files in the queue and waiting for Winstead to turn on his computer, which investigators testified their software was set to monitor. Investigators testified that even after several months of attempts with their specialized software they still could not download any part of any file from Winstead.

Importantly, the government unequivocally established during the trial that downloading from Winstead's computer was not possible because Winstead took affirmative steps to prevent downloading by changing the default file share settings and the government possessed no evidence, forensic or otherwise, that anyone ever downloaded from Winstead.

ARGUMENT

AUSA Thompson argued before the jury that Winstead was a leech who was unwilling to share files and had no intention of sharing child pornography with others to explain why the FBI could not download from him as part of obtaining the conviction. Then AUSA Thompson argued before the sentencing court that (1) Winstead knew how peer-to-peer file sharing worked, (2) there was forensic evidence that Winstead had shared files, (3) Winstead had 1,047 files set to share, and (4) Winstead therefore had the "intent" to share child pornography, warranting the five-level enhancement for distribution for non-pecuniary gain. The enhancement was applied based on Fifth Circuit precedent in which knowledge of file sharing and having files in the shared folder were the bases for applying the enhancement. Winstead is distinguished from Groce and the other case because there was evidence and testimony that Winstead took affirmative steps to prevent file sharing and was unwilling to share, and because the government conceded there was no evidence of file sharing and the investigator had no knowledge or evidence that anyone ever downloaded anything from Winstead.

Rex Miller speculated that he could not download from Winstead because Winstead was already distributing to another Morpheus user. But that rationale is contradicted by the capabilities of Miller's Agency's software, which notified investigators immediately when Winstead logged onto Morpheus, and the fact that Winstead had hundreds of small files which the FBI could have queued and downloaded with priority in a matter of seconds immediately after Winstead logged on if only the file sharing settings would permit sharing. The version of Morpheus on Winstead's computer utilized a search protocol had a "time to live" and a "hop count" that caused the search to expire in a relatively short period of time or after a few "hops" so as to preserve network bandwidth, because Morpheus was a true peer-to-peer and did not upload information to an ultrapeer. See *Grokster III*, 545 U.S. at 921-22. Because of this relatively brief search query and limited locality due to the "time to live" and the "hop count", Winstead's computer could only be accessed by other users who were relatively close, and only for a few "hops", and therefore limited to other users in the San Antonio area, as opposed to users from across the entire nation. The FBI could have got in the queue and downloaded a file or at least part of a file from Winstead during the several months the FBI targeted Winstead, except that his computer would not share files.

her purposes during sentencing.

There are a number of reasons not to apply the enhancement; (1) the government testified and informed the jury that Winstead was a leech who would not share files when obtaining the conviction, (2) Miller's speculation that he could not download from Winstead because other users were ahead of him is implausible because he could always have gotten in the queue first using his software's monitoring capabilities, it was actually the 999:1 settings that effectively disabled the file sharing, (3) Miller testified he did not know of a file or part of a file that was downloaded by anyone, so there is no "forensic evidence" of distribution. Thompson argued that the setpoint of 999:1, coupled with 1,047 files in the "shared" folder constituted "intent" to distribute, but, as the FBI explained, the FBI monitored Winstead for months and could not obtain a single data packet from him. Sentencing transcript, pgs.7-9.

This court should take this opportunity to hold that it was a denial of due process for the government to argue the theory that Winstead was a leech who was unwilling to share before the jury in order to obtain the conviction and then contradict that argument by arguing Winstead had the intent to share at sentencing. This Court should also take the opportunity to hold that in the absence of any evidence of file sharing and with the affirmative evidence that steps were taken to prevent file sharing, and that the steps taken were evidently successful, there is no evidence of intent to share files and the five-level enhancement for distribution can not be applied.

February 01, 2018

Without Prejudice/Without Recourse
By: Travis Jason Winstead