No. _____

# In The
# Supreme Court of the United States

JAMES DOYLE COLLINS JR.,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The Court Of Appeals**
**For The First District Of Texas**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the act of an accused to delete or destroy contraband constitutes a "knowing or intentional possession" of the contraband.

## LIST OF PARTIES

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

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## PETITION FOR WRIT OF CERTIORARI

James Doyle Collins, Jr., an inmate currently incarcerated in the Texas Department of Corrections —Institutional Division, by and through Charles G. Kingsbury, trial and appellate attorney of record, respectfully petitions this court for a writ of certiorari to review the judgment of the Court of Appeals for the First District of Texas.

## OPINIONS BELOW

The decision by the Court of Appeals for the First District of Texas denying Mr. Collins' direct appeal and Judge Massengale's concurring opinion is reported as *Collins v. State*, No. 01-17-00920-CR, No. 01-17-00921-CR, No. 01-17-00922-CR (Tex. App. Dec. 6, 2018) and is attached at Appendix ("App.") at 1-58. The Texas Court of Criminal Appeals denied Mr. Collins' discretionary Petition for Review on March 27, 2019. That order is attached at App. 59-61.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). On March 27, 2019, the Texas Court of Criminal Appeals denied Collins' discretionary Petition for Review. Mr. Collins invokes this Court's jurisdiction, having timely filed this petition for a writ of certiorari

within ninety days of the Texas Court of Criminal Appeal's judgment.

## RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the Appendix. App. at 62-65.

## STATEMENT OF THE CASE

### A. Introduction

This case presents the question of whether the act of an accused to delete or destroy contraband constitutes a "knowing or intentional possession" of the contraband. Collins contends that his deletion of contraband indicates that he did not intend to possess the contraband, and thus, undermines a finding of knowing possession.

The State of Texas holds in *Assousa v. State*, No. 05-08-00007-CR, 2009 WL 1416759, at *4 (Tex. App.—Dallas May 21, 2009, pet. ref'd) (not designated for publication) that "Logically, one cannot destroy what one does not possess and control. Indeed, the ability to destroy is definitive evidence of control." (internal quotations omitted). The State of Texas has extended the deletion doctrine of *Assousa* in *Fridell v. State*, Nos. 09-04-200-CR, 09-04-201-CR, 2004 WL 2955227, at *3 (Tex. App.—Beaumont Dec. 22, 2004, pet. ref'd) (mem. op., not designated for publication) holding that

"[A]ttempts to erase [child-pornography] material from the computer . . . show[s] that [defendant's] possession of child pornography was knowing or intentional."

The State of Texas' "deletion rule" to establish knowing possession is at war with this Court's holding and opinion in *Morissette v. United States*, 342 U.S. 246 (1952) and the United States Court of Appeals for the Fifth Circuit's holding in *United States v. Moreland*, 665 F.3d 137, 141 (5th Cir. 2011); the Ninth Circuit's holding in *United States v. Kuchinski*, 469 F.3d 853 (9th Cir. 2006); and the Tenth Circuit's holding in *United States v. Dobbs*, 629 F.3d 1199 (10th Cir. 2011).

No recent case has presented this issue so squarely or with such straightforward facts.

### B. The State Criminal Proceedings

As relevant here, Collins was charged in a three-count indictment alleging that Collins possessed child pornography in violation of Texas Penal Code § 43.26 "on or about the 12th day of May, 2015, and before the presentment of this Indictment."

On June 25, 2015, the Pearland, Texas Police Department executed a search of Petitioner's residence pursuant to a search warrant. Detectives Arnold and Lewis interrogated the Petitioner while other police officers conducted a search of the private residence in which Petitioner's computers and other electronics were seized by law enforcement. Law

enforcement discovered no child pornography in Collins' residence or on his electronic devices during the search. A Forensic examination conducted in a lab after the search revealed that software was installed on Collins' computers that would allow him to connect to the peer-to-peer network called ARES. Images of child pornography were also discovered in the unallocated slack space on Collins' computers.

A jury trial commenced on November 14, 2017. During the trial, Detective Arnold testified that he has a computer in his office with specialized software that monitors files being uploaded or downloaded on peer-to-peer networks. The specialized software on the computer compares a file's unique SHA-1, or Secure Hash Algorithm, attributes and queries the SHA-1 value against the SHA-1 attributes of all known files containing child pornography. Detective Arnold received an alert from the specialized software that Collins' computer had downloaded a file with a SHA-1 attribute known to be child pornography. Detective Arnold electronically grabbed the file and downloaded it, and confirmed the file was child pornography. Detective Arnold also testified that he does not know who actually downloaded the file containing child pornography.

On cross-examination, Detective Arnold testified that he didn't know how the child pornography found in Collins' residence was downloaded or if it was accidentally downloaded or not. Detective Arnold confirmed that Collins told him that when he saw an image that was child pornography, he deleted it immediately.

Detective Arnold also testified that a deleted file will remain on the hard drive even if the user did not have the intent to possess the file. Detective Arnold also confirmed that Collins admitted during the interrogation that he did not know how the Internet or computers worked, that he just wanted to download movies and sometimes he would receive porn instead of a movie.

Detective Arnold testified that an average lay person would believe if they deleted a file on a computer then it would no longer be on the hard drive. Detective Arnold admitted that he can't tell the Jury beyond a reasonable doubt that Collins was the person who was using the computer when the child pornography was downloaded and he also explained that by using a peer-to-peer network client such as ARES, Collins was distributing any child pornography that was accidentally downloaded, without his actual knowledge or intent.

Detective Jonathan Cox is a cyber-forensic examiner for the Pearland, Texas Police Department. Detective Cox used a forensic software tool called EnCase to scan every computer, cell phone and thumb drive found at the residence and did not find any evidence of a crime, nor did he find any files containing child pornography during the search warrant execution. Detective Cox did find "link files," or shortcuts to files that are titled suggestive of being child pornography. Link files indicate that at some point in time a file was opened on the computer. Despite finding no evidence of a crime—let alone any child pornography, the police still seized sixteen items found in Collins' residence.

Detective Vlasek testified that the link files suggestive of child pornography found on Collins' computer were associated with the ARES peer-to-peer file-sharing network. Detective Vlasek also testified that possessing peer-to-peer network software is not illegal or an indicator of possessing child pornography, but opined that possessing peer-to-peer network software and link files with suggestive titles does indicate child pornography has been on the computer.

Detective Vlasek conducted a forensic analysis of Collins' computers at the police station at which time he "recovered" child pornography from two computers and one flash drive seized during the search warrant execution. Detective Vlasek testified that he believes all of the files containing child pornography were downloaded from the ARES peer-to-peer network. Detective Vlasek testified that all of the "recovered" files containing child pornography were files that had been previously deleted.

Detective Vlasek also testified that on the Dell computer, the files containing child pornography were deleted in July 2014 and that he did not know who was using the Dell computer in July 2014. Detective Vlasek admitted that he cannot "say beyond a reasonable doubt that [Collins] was the one that actually downloaded that child pornography." Detective Vlasek further testified that the images could all date from 2010 or earlier and could have been on the devices when Collins purchased them used and explained that when a file is deleted, "the majority of the time, it's there for a good period of time."

Detective Vlasek also stated that there is free software available on the Internet that would enable someone to "recover" deleted files but there is no evidence that Collins had any software on his computer that would enable him to "recover" or otherwise access a deleted file. Detective Vlasek also testified that Appellant cannot be tied to any I.P. address of the computers containing child pornography.

The jury found Collins guilty on each of the three counts of the indictment and sentenced Collins to a term of imprisonment of five years in the Texas Department of Corrections—Institutional Division for counts one and two to run consecutively and also to a term of imprisonment of ten years deferred in the Texas Department of Corrections—Institutional Division for count three, to run consecutively to counts one and two.

### C. The Direct Appeal

Collins timely filed a direct appeal to the Court of Appeals for the First District of Texas. Collins raised two issues in the direct appeal: (1) The trial court erred in denying Collins' Motion to Suppress; and (2) The evidence is insufficient to sustain all the convictions.

The Court of Appeals for the First District of Texas affirmed Collins' conviction and sentence in an unpublished 55-page opinion. *Collins v. State*, No. 01-17-00920-CR, No. 01-17-00921-CR, No. 01-17-00922-CR

(Tex. App.—Houston [1st Dist.] December 6, 2018, no pet. h.).

### D. The Discretionary Petition for Review

Collins timely filed a discretionary Petition for Review on February 6, 2019. Collins sought relief on whether the Court of Appeals erred in its sufficiency analysis when the evidence shows that the defendant did not possess the contraband. On March 27, 2019, the Texas Court of Criminal Appeals refused discretionary review. The mandate issued on May 3, 2019.

## REASONS FOR GRANTING THE PETITION

"[T]here is no word more ambiguous in its meaning than Possession." *Nat. Safe Dep. Co. v. Illinois*, 232 U.S. 58, 67 (1914). This Petition for Writ of Certiorari presents an issue of exceptional importance that affects most, if not all, criminal cases involving possession of contraband and is much more far-reaching than just child pornography cases. As the Supreme Court explained nearly two generations ago in *Morissette*:

> "As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an

> implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "scienter," to denote guilty knowledge, or "mens rea," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes."

342 U.S. 246, 252 (1952).

If allowed to stand as written, the Texas Court of Criminal Appeals' affirmance of the Court of Appeals for the First District of Texas' sweeping "deletion rule" will mark a radical shift away from the judicial system's historical and bedrock doctrine that to convict one of a felony without requiring intent to commit a crime is repugnant to society. See Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55, 66.

**Certiorari should be granted because the act of deleting or destroying contraband evidences an accused's conscious objective to rid themselves of the contraband.**

It is axiomatic that if a person wants or intends to possess an item, then that person will care for and preserve the said item. If a person does not want or intend to possess an item, then that person will discard or dispose of the item.

The State of Texas Penal Code § 1.07 defines "possession" as "actual care, custody, control, or management." App. at 62. Thus, if a person is holding onto a widget, then the widget is in the actual care, custody, control and management of the person holding onto it. In order for the possession of the widget to be a crime, the person must "knowingly or intentionally" possess the widget. At first glance, it seems straightforward whether a person knows or intends to hold onto a widget, and in many criminal cases this logic is forthright. But in many instances, it is not.

If a person goes through a drive-through window at a fast food establishment and orders a coffee and is then handed a coffee cup at the window, the person is then in possession of the coffee cup. But what if there is a package of cocaine inside the coffee cup? The person did not order (i.e., "intend") to get (i.e., "possess") the cocaine. But when the person goes to drink from the coffee cup, the person will learn (i.e., "know") that in fact, they are in possession of cocaine rather than coffee. Under State of Texas law, the person is guilty of

possessing a controlled substance—even if they drive directly to a police station and report what happened. Similarly, if a person downloads a video named 'Bonanza S1E12' from a website, the person expects to receive a video of episode twelve from season one of the television series Bonanza. When the person launches the video and the images depict a western-themed pornographic movie including children, the person then learns (i.e., "knows") that they are in possession of child pornography even though they did not want (i.e., "intend") to.

Here lies the problem with the State of Texas' "deletion rule." In *Assoussa*, the Court ruled that "the ability to destroy is definitive evidence of control." *Assousa v. State*, No. 05-08-00007-CR, at *1 (Tex. App. May. 21, 2009). This holding was reinforced in *Gasper v. State*, No. 01-16-00930-CR (Tex. App. Sep. 26, 2017) and relied upon in this case to deny Collins' sufficiency challenge. In the aforementioned examples, if the person were to throw the coffee cup into the trash or delete the offensive video, they still knowingly possessed contraband in violation of Texas law and face being labeled a felon and/or sex offender in addition to prison time.

In a case originating out of Mississippi that is nearly identical to Collins' case, the United States Court of Appeals for the Fifth Circuit held that "the evidence presented at trial was insufficient to provide a basis for a rational jury to find beyond a reasonable doubt that the defendant knowingly possessed child pornography." *United States v. Moreland*, supra at 154. Therein, the Court of Appeals stated in dicta "the

digital images were not in plain view, but were in the computers' unallocated slack spaces, which are accessible only to a knowledgeable person using special computer software, and there was no circumstantial indicium that established that Keith knew of the images or had the ability to access them." *Id.* at 152.

The United States Court of Appeals for the Fifth Circuit relied upon a United States Court of Appeals for the Tenth Circuit opinion to justify its reasoning. See *United States v. Dobbs*, supra. In *Dobbs*, the United States Court of Appeals for the Tenth Circuit was faced with the question of whether images stored only in a computer's automatic cache constituted knowing possession of child pornography and "determined that while a jury could conclude from that evidence that Dobbs—or at least his computer—received the images, no reasonable jury could find that he knowingly received the images." *Id*. at 1205, 1207.

The reasoning of the *Moreland* holding has been cited by multiple courts, but not affirmatively by any in Texas. See *United States v. Pothier*, 2019 U.S. App. LEXIS 9003 (1st Cir. Mar. 26, 2019); *Free Speech Coalition, Inc. v. AG of the United States*, 677 F.3d 519, 534 (3d Cir. 2012); *United States v. Lowe*, 795 F.3d 519, 523 (6th Cir. 2015); *United States v. Niggemann*, 881 F.3d 976, 980 (7th Cir. 2018); *United States v. Seiver*, 692 F.3d 774, 778 (7th Cir. 2012); and *United States v. Sumner*, 2013 U.S. Dist. LEXIS 69566 (N.D. Iowa, 2013).

The reasoning behind *Moreland* has also been utilized by other courts without citing the *Moreland* case. The State of Michigan held that "unless one knowingly has actual physical control or knowingly has the power and the intention at a given time to exercise dominion or control over a depiction of child sexually abusive material, including an 'electronic visual image' or 'computer image,' either directly or through another person or persons, one cannot be classified as a 'possessor' of such material." *People v. Flick*, 487 Mich. 1, 11-14 (Mich. 2010).

By affirming the "deletion rule," the lower courts' rulings turn the crime of possession of child pornography—and indeed any possession case—into a strict liability offense without any scienter requirement for intent. There is no affirmative defense for a lay person who inadvertently or accidently received contraband. See Texas Penal Code §§ 43.25(f) and 43.26(h). Indeed, prosecution has, and will remain, arbitrary and left to a prosecutor's discretion.

Imagine if an individual on a legal blog or list serve posted child pornography on it. Nobody subscribing to the blog or list serve wanted or intended to possess the child pornography, but now, in the State of Texas under the lower courts' rulings, every single subscriber would be guilty of possession of child pornography even if they deleted the files as Collins unquestionably did.

The act of deleting the files evidences an individual's specific intent to get rid of contraband—not possess it. Thus, if this court is to allow the State of Texas

to hold that deleting a file is indeed knowing possession ("actual care, custody, control, or management"), then the statute is at war with this Court's precedent and that of several federal circuits. This case presents this Court with an opportunity to align the mens rea requirement for possession cases and prevent convictions for mistake, inadvertence and accidental possession of contraband.

Certiorari should be granted because the State of Texas' "deletion rule" is drawn in question on the ground of its being repugnant to the laws of the United States. Certiorari should also be granted because applying the "deletion rule" to all cases of possession will make crimes of all unwitting, inadvertent and unintended possessions of contraband.



## CONCLUSION

For the foregoing reasons, Mr. Collins respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the First District of Texas.

DATED this 25th day of June 2019.

Respectfully submitted,

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