

No. _____

In the Supreme Court of the United States

BAILEY WARREN LOWE, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Under U.S. Sentencing Guidelines § 2G2.1, a two-level enhancement applies when a defendant knowingly engages in the “distribution” of child pornography, and not its “mere solicitation.” The distribution enhancement also applies if the defendant aided, abetted, commanded, or induced the distribution.

The question presented is: Is a defendant’s request for child pornography from a minor “mere solicitation” and *not* “distribution” if the defendant does not disseminate the child pornography to another person after he receives it?

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Petitioner Bailey Warren Lowe asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on January 12, 2026.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

- Petitioner Bailey Warren Lowe, the defendant in the district court and appellant below.
- Respondent United States of America, the plaintiff in the district court and appellee below.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Lowe*, No. 6:23-CR-154-1 (W.D. Tex. Dec. 11, 2024) (judgment)
- *United States v. Lowe*, No. 24-51000 (5th Cir. Jan. 12, 2026) (published opinion)

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DECISION BELOW

A copy of the opinion of the court of appeals, *United States v. Lowe*, No. 24-51000 (5th Cir. Jan. 12, 2026), published at 163 F.4th 947, is attached to this petition as the Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 12, 2026. This petition is filed within 90 days after entry of judgment or order sought to be reviewed. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

U.S. SENTENCING GUIDELINE PROVISION INVOLVED

United States Sentencing Guideline § 2G2.1 is reproduced at Appendix B. Guideline § 2G2.1(b)(3) provides for a two-level increase to the offense level if the defendant “knowingly engaged in distribution....”

Application Note 1 of § 2G2.1 defines “distribution” as “any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing *but does not*

include the mere solicitation of such material by a defendant.” (emphasis added).

Application Note 3 states: “For purposes of subsection (b)(3), the defendant ‘knowingly engaged in distribution’ if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.”

STATEMENT

Petitioner, Bailey Warren Lowe, was convicted of one count of coercion and enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). C.A. ROA.9. He was sentenced to life in prison. *Id.* at 98–100, 103, 176–203.

In November 2022, the FBI received a complaint from a minor indicating that numerous men were soliciting nude images on the social media application Snapchat. The minor complied with the requests on more than one occasion. The minor was interviewed and reported that between approximately October 2021 and January 2022, the minor complied with a request to add herself via the quick add feature on Snapchat to an account displaying “blowe1146,” which used a display name “Warren,” later identified as Lowe. At first, Lowe indicated he was 17 years old, but later indicated he was 22 to 23 years old. The minor told Lowe she was 13 years old.

Lowe requested images of the minor displaying her nude breasts and vagina, and images of her inserting her fingers into her vagina. The minor complied with these requests. Between January and February 2022, Lowe drove from a location in the Western District of Texas to the minor's location in Troup, Texas, to meet the minor in person. During this meeting, the minor and Lowe engaged in sexual relations. The minor again told Lowe she was 13 years old.

Pursuant to a search warrant, agents seized devices from Lowe's home, which contained chats between the minor and Lowe, as well as other minors.

Lowe was charged in a one count indictment with the offense of coercion and enticement of a minor, in violation of 18 U.S.C. § 2422(b). Lowe pleaded guilty without a plea agreement.

A probation officer prepared the presentence report, which recommended a two-level enhancement pursuant to U.S. Sentencing Guideline § 2G2.1(b)(3) for distribution of child pornography. Lowe objected to this enhancement, arguing that Lowe's solicitation of the child pornography did not constitute distribution. The probation office cited *United States v. McGavitt*, 28 F.4th 571 (5th Cir. 2022), contending that this opinion foreclosed Lowe's objection to

the two-level enhancement. Trial counsel pointed out that the error was not preserved in *McGavitt* and was reviewed under the plain error standard, and that the Fifth Circuit clearly indicated that this issue had not been considered by the Court. C.A. ROA.204–05, 180–89. The district court overruled this objection. *Id.* at 191.

In its opinion, the Fifth Circuit acknowledged that it had “not previously considered whether a defendant’s coercing a minor to take and send images of child pornography qualifies as ‘distribution’ under § 2G2.1(b)(3)” of the Sentencing Guidelines. App. A 4 (citing *McGavitt*, 28 F.4th at 577). “That is the crux of the appeal.” *Id.* The court held that Lowe’s actions of coercing the minor to send him images made him an active participant in the minor’s distribution of images to him. *Id.* at 6. Thus, the court held that his conduct went beyond mere solicitation and subjected him to the distribution enhancement. *Id.*

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to decide an important question of federal law: that solicitation and receipt, without subsequent dissemination by the defendant, does not constitute distribution for U.S. Sentencing Guideline § 2G2.1.

A defendant whose sentencing guidelines are determined by § 2G2.1(b)(3)¹ can receive a two-level increase if he “knowingly engaged in distribution.” The two-level distribution enhancement has been in § 2G2.1 since 2004. U.S.S.G. App. C amend. 664. Yet the Fifth Circuit could find no cases from any court of appeals to have considered a defendant’s solicitation and receipt of material, without some sort of distribution thereafter by the defendant as qualifying for this distribution enhancement.

The Fifth Circuit has now twice upheld a distribution enhancement under § 2G2.1(b)(3) even though the defendant had not transferred, made available for transfer, or otherwise distributed

¹ Application Note 1 of § 2G2.1 defines “distribution” as:

any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

images once they had been received. *See* App. A; *United States v. McGavitt*, 28 F.4th 571 (5th Cir. 2022). In *McGavitt*, the distribution enhancement was applied because the district court found that the images were produced and distributed to him at his request. *McGavitt*, 28 F.4th at 576. *McGavitt* was upheld in large part because it was reviewed under the plain error standard.

No other circuit has applied § 2G2.1(b)(3) to a situation where a defendant received—but did not subsequently transfer—the materials. The Fifth Circuit stands alone in its elimination of the distinction between soliciting or receiving and distribution.

In *United States v. Cubero*, 754 F.3d 888, 894 (11th Cir. 2014), the court noted that guideline § 2G2.2² sweeps broadly to address a wide range of criminal conduct that occurs after child pornography has been produced. As the guideline’s title indicates, it covers (1) trafficking; (2) receiving; (3) transporting; (4) shipping; (5) soliciting; (6) advertising; and (7) possessing child pornography, both with and without intent to distribute. *Id.* at 894. The court recognized that the Sentencing Commission “concluded that the sentencing guideline should differentiate between the potential harm

² U.S. Sentencing Guidelines § 2G2.2 and § 2G2.1, as far as it relates to distribution, are identical. *United States v. Kruse*, 618 F. Supp. 2d 981, 992 (N.D. Iowa 2009).

caused by receipt and distribution—*two very different types of conduct*—by providing a two-level increase when a defendant distributes, rather than simply receives, child pornography.” *Id.* (emphasis added). The First Circuit similarly understands the guideline as “broadly cover[ing] all child pornography offenses and us[ing] the offense level spread and subsequent adjustments to reach appropriate benchmarks for different permutations of possession, solicitation, and distribution.” *United States v. Chiaradio*, 684 F.3d 265, 283 (1st Cir. 2012).

The “distribution” definition first appeared in § 2G2.1(b)(3) in 2004 as part of Application Note 1. U.S.S.G. App. C amend. 664. Application Note 1 defines “distribution” to exclude “mere solicitation of such material by a defendant.” Application Note 3, which explains that a defendant could knowingly engage in distribution if he “aided, abetted, counseled, commanded, induced, procured or willfully caused the distribution,” was included in 2016. U.S.S.G. App. C amend. 801. The significance is that the distribution enhancement has been in the guideline over 20 years and no court, prior to the Fifth Circuit, has used it to enhance a defendant’s offense level for mere solicitation.

The Fifth Circuit misapplied the guideline enhancement. The Fifth Circuit acknowledged as much when it said: “To be clear,

there is arguably some tension within the application notes of the guidelines.” App. A 4. But Application Note 3 did not create a whole new definition of distribution. Rather, Application Note 3 should be read in conjunction with the definition of distribution in Application Note 1, that solicitation by the defendant is *not* distribution. So a defendant who asks for material from a minor for himself does not aid, abet, command, or willfully cause the “distribution” because “distribution” is not “mere solicitation of such material by a defendant.”

The Fifth Circuit attempts to justify its novel interpretation of “distribution” by recounting at length Lowe’s “reprehensible” conduct. App. A 5–6. But the Guidelines must be applied objectively. The relevant inquiry was whether Lowe distributed the images, not whether his reprehensible conduct converted his solicitation of the images into distribution.

For over 20 years, courts focused on determining distribution based on what a defendant did after he got the pictures, not on how he got the pictures. That term was meant to address what happened to the material once the defendant obtained them—i.e., did he then distribute them, post them on a sharing service, mail them, give them away, sell them. To say otherwise eliminates any distinction between solicitation and distribution. If one distributes

by asking for the pictures, what then does the word “mere” mean? How does it provide any guidance to a defendant as to what conduct will be prohibited? How does one merely solicit images? If they ask more than once, does that go beyond mere solicitation? By applying the term “mere solicitation” to conduct that occurs once the material is received, the term becomes very clear and concrete. Any conduct that goes beyond soliciting and receiving the material, i.e., some sort of transfer of the material or making the material available to others by the defendant, satisfies the distribution element.

Rather than read Application Note 1 to § 2G2.1 as a whole, the Fifth Circuit focused exclusively on “distribution” meaning “*any act ... related to the transfer of material involving the sexual exploitation of a minor.*” App. A 5. But Application Note 1 specifically provides an example of what distribution means: Distribution includes posting material on a website for public viewing but does not include the mere solicitation of such material by defendant. § 2G2.1 cmt. n.1. This second sentence of Note 1 describes the “distribution” definition of the first sentence. They are not mutually exclusive. The Fifth Circuit ignored half of Application Note 1 to arrive at its conclusion.

The Fifth Circuit simply disposed of cases cited by Lowe as not controlling. But there are no controlling cases. Rather, those cases were cited on Lowe's behalf for the notion that they could provide some guidance on how "distribution" for the § 2G2.1(b)(3) enhancement has been and should be interpreted.

For example, in *United States v. King*, 979 F.3d 1075 (5th Cir. 2020), the defendant sexually molested young boys and produced child pornography which he then transferred from his cell phone to a computer disk. The government argued that the defendant had engaged in distribution. The Fifth Circuit disagreed, noting that, "[u]nder the Guidelines, *making the images available to others constitutes distribution*["] *King*, 979 F.3d at 1083 n.3 (emphasis added; quoting *United States v. Richardson*, 713 F.3d 232, 235 (5th Cir. 2013)).

In *United States v. Merrill*, 578 F. Supp. 2d 1144 (N.D. Iowa 2008), the district court addressed the issue of distribution. Noting that § 2G2.1(b)(3) and § 2G2.2(b)(3) were identical, the court determined that distribution required the act of disseminating or sharing the images with other individuals. *Id.* at 1152. The court cited *United States v. Horn*, 187 F.3d 781, 791 (8th Cir. 1999), and *United States v. Carter*, 292 F. App'x 16, 19 (11th Cir. Aug. 27,

2008) (unpublished). The court addressed cases that involved distribution and determined that it involved the defendant's transfer or attempted transfer to another person. *See United States v. Carrani*, 492 F.3d 867, 875–76 (7th Cir. 2007) (defendant knowingly placed child pornography in a shared drive on his computer so that another person could view it through a peer-to-peer file sharing program); *United States v. Darway*, 255 F. App'x 68, 70–72 (6th Cir. 2007) (unpublished) (same); *United States v. Hecht*, 470 F.3d 177, 182–83 (4th Cir. 2006) (defendant displayed child pornography on his computer monitor and pointed a webcam at the child pornography, so that another person could view the child pornography through the webcam); *United States v. Clawson*, 408 F.3d 556, 558 (8th Cir. 2005) (defendant made child pornography available to a minor by putting it in a closet in the minor's house); *United States v. Probel*, 214 F.3d 1285, 1288–91 (11th Cir. 2000) (defendant sent child pornography to another person over the Internet); *United States v. Stanton*, 973 F.2d 608, 610 (8th Cir. 1992) (defendant sold magazines containing child pornography to another person for profit); *United States v. Postel*, 524 F. Supp. 2d 1120, 1124–25 (N.D. Iowa 2006) (defendant used file-sharing software on his computer so that others could access it).

In *United States v. Hernandez*, 894 F.3d 1104 (9th Cir. 2018), the defendant produced child pornography while having sex with the minor victim. He transferred those images to the minor victim. The minor victim also took sexually explicit photographs of herself, often at Hernandez’s direction, and sent them to Hernandez. In upholding the distribution enhancement, the court only addressed the transfer of images from Hernandez to the minor victim as distribution. The court never indicated that the images solicited by Hernandez constituted distribution. “What all the cases (cited to the court) have in common is that a *defendant engaged in an “act ... related to” the “transfer”* of illicit, sexually explicit material involving minors. *Id.* at 1109 (emphasis added).

The Fifth Circuit asserted that *Hernandez* ran counter to Lowe’s position. App. A 6–7. Not so. *Hernandez* argued that distribution required that he distribute the pictures to someone other than the minor depicted in the picture. The Ninth Circuit disagreed, holding that Hernandez’s transfer of the images to someone else, in that case the minor depicted in the images, constituted distribution. Lowe cited *Hernandez* for the Ninth Circuit’s implicit holding: that the minor’s transfer of the images to Hernandez would not support the enhancement absent Hernandez also distributing images to the minor.

Other cases reflect the reasoning behind the distribution enhancement. For example, many courts have held that “the knowing use of a file-sharing program to download child pornography involves not merely the receipt of illicit material, but also the reciprocal distribution of it. *United States v. Vallejos*, 742 F.3d 902, 907–08 (9th Cir. 2014) (collecting cases). Because the effect of using a file-sharing program “is to receive and to send out,” there was a “distribution aspect” to the defendant’s actions. *Id.* at 907, 909.

In *United States v. Hussman*, 765 F.3d 169 (3d Cir. 2014), the court stated that the mere placing of the images in a shared folder available to others, without any evidence that the images were accessed by others, did not constitute distribution under 18 U.S.C. § 2252(a)(2). To give effect to the entire statutory scheme, “distribute” must require the transfer of possession of child pornography to another person. *Id.* at 174 (citing 21 U.S.C. § 802(11) (providing that “‘distribute’ means to deliver” for purposes of drug offenses).

In *United States v. Kruse*, 618 F. Supp. 2d 981, 992 (N.D. Iowa 2009), the court found that when a defendant “turned on his computer, loaded up [...] child pornography and directly displayed it to [a minor],” the defendant “thereby ‘distributed’ it to [the minor], as contemplated in § 2G2.2(b)(3)(E).” *United States v. Postel*, 524 F. Supp. 2d 1120, 1123, n.3 (N.D. Iowa 2006); see also *United States*

v. Hecht, 470 F.3d 177, 182–83 (4th Cir. 2006) (holding that defendant’s act of pointing his web camera at images of child pornography on his computer screen and transmitting them to an undercover agent through the Internet constituted “distribution” of child pornography within meaning of § 2G2.2).

As stated previously, the Fifth Circuit, in distinguishing the cases cited by Lowe, glossed over the implicit holdings of those cases: that the distribution enhancement requires a transfer by the defendant after his receipt of the material. The Court cited no cases to support its holding. That is because in the 20 plus years of the distribution enhancement, it has not been used in situations such as the instant case, where the defendant received the images from the victim but did not thereafter distribute them.

CONCLUSION

Courts have held that production is different than receipt which is different than distribution; each causing a different level of harm to a minor and each being punished differently. The Fifth Circuit’s holding in this case removes any such distinction and subjects virtually every defendant to the distribution enhancement. The enhancement was meant to increase punishment for a defendant who subjected a minor to the increased level of harm associated

with distributing the images to others after receiving them. The Fifth Circuit's decision removes any such distinction.

For these reasons, Lowe asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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