

No. 11-162

In the Supreme Court of the United States

JAMES DAVID CNOCKAERT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether possessing images of child pornography is a lesser-included offense of receiving images of child pornography.
2. Whether a court of appeals may vacate a conviction on a lesser-included offense with the instruction that it be reinstated if the more serious offense is subsequently overturned on appeal or on collateral review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is available at 2011 WL 1749357.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2011. The petition for a writ of certiorari was filed on August 5, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Montana, petitioner was convicted of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). He was sentenced to three years of imprisonment, to be followed by ten years of super-

vised release. The court of appeals affirmed. Pet. App. A1-A3, A5, A7, A9.

1. Petitioner viewed child pornography on computers at his work as well as at home. Forensic analyses of petitioner's home computers and the computer that he had accessed at work revealed images of child pornography and evidence that petitioner had visited child pornography websites. Pet. App. A2-A3.

2. A grand jury in the District of Montana returned a two-count indictment charging petitioner with receiving child pornography, in violation of 2252A(a)(2) (Count 1), and possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Count 2). Before trial, the government moved to dismiss Count II of the indictment. Petitioner took no position on the motion, and the district court took the motion under advisement. Gov't C.A. Br. 2-3.

Following a one-day bench trial, the district court found petitioner guilty on both counts and then granted the government's motion to dismiss the possession count. The court subsequently vacated that order because it had granted the government's motion without providing petitioner an opportunity to be heard and the order improperly dismissed, rather than vacated, the possession conviction. Pet. App. A39-A40, A58, A62.

The court reconsidered the question of vacating one of the convictions at sentencing. The court concluded that the possession conviction was "the best fit from the facts," and it vacated petitioner's conviction for receiving child pornography. Pet. App. A36. The court then sentenced petitioner to three years of imprisonment, to be followed by ten years of supervised release. Gov't C.A. Br. 9.

3. The court of appeals affirmed in a brief unpublished memorandum. Pet. App. A1-A3. The court found irrelevant petitioner's arguments as to the ambiguity in the law when a defendant is charged with both receipt and possession of child pornography because the district court vacated the receipt conviction and found petitioner guilty only of the lesser-included possession charge. *Id.* at A2. The court also rejected petitioner's challenge to the sufficiency of the evidence. *Id.* at A2-A3.

ARGUMENT

1. Petitioner contends (Pet. 6-11) that the courts of appeals are divided on whether possession of child pornography is a lesser-included offense of receipt of child pornography. Petitioner errs in describing the conflict and, in any event, his case does not implicate the issue.

Petitioner correctly states that the Third, Sixth, Eighth, Ninth, and Eleventh Circuits agree that a defendant may not be punished for both receiving and possessing child pornography based on the same act. See *United States v. Ehle*, 640 F.3d 689, 694-699 (6th Cir. 2011); *United States v. Muhlenbruch*, 634 F.3d 987, 1003-1004 (8th Cir. 2011), petition for cert. pending, No. 10-11208 (filed June 22, 2011); *United States v. Bobb*, 577 F.3d 1366, 1373-1374 (11th Cir. 2009), cert. denied, 130 S. Ct. 3322 (2010); *United States v. Miller*, 527 F.3d 54, 58, 72 (3d Cir. 2008); *United States v. Davenport*, 519 F.3d 940, 947 (9th Cir. 2008). Contrary to petitioner's contention (Pet. 9-10), however, the Second Circuit has not yet decided the issue. See *United States v. Polouizzi*, 564 F.3d 142, 159 (2009) (noting that it finds the reasoning in *Davenport*, *supra*, and *Miller*, *supra*, "persuasive," but stating that "[o]ur Circuit has not decided" whether a defendant could be convicted of receipt

and possession of the same item) (citing *United States v. Irving*, 554 F.3d 64, 79 (2009)).

Nor is there a conflict with the Seventh Circuit. Petitioner cites *United States v. Myers*, 355 F.3d 1040, cert. denied 541 U.S. 1069 (2004), in which the court of appeals held that the Sentencing Guidelines' specification of a higher base offense level for receipt of child pornography than for possession of child pornography was not irrational. *Id.* at 1042-1043. No Double Jeopardy Clause challenge was raised in that case, and although some of the court's reasoning is arguably in tension with the cases cited above, its holding is perfectly compatible with the holdings of other courts of appeals that possession is a lesser-included offense of receipt.

In any event, even if there were a conflict among the circuits, it is not implicated by the facts of this case. The district court vacated the receipt conviction and sentenced petitioner solely on his conviction for possessing child pornography. Thus, there is no call here for this Court to consider the circumstances under which a defendant may be sentenced for receiving and possessing child pornography.

2. Petitioner also contends (Pet. 11-15) that a defendant's Fifth Amendment rights are violated when a court of appeals vacates a judgment of conviction on a lesser-included offense following a defendant's successful challenge to multiple convictions and sentences on multiplicity grounds, but allows the vacated conviction to be reinstated if the more serious conviction is later overturned. See *Davenport*, 519 F.3d at 948. Because it was the district court that vacated the receipt conviction and the court of appeals did not allow for its reinstatement, the specific issue of appellate procedure that petitioner raises is not raised by this case. In any event,

any question concerning the possibility of the reinstatement of the vacated receipt conviction is not ripe because it has not been reinstated and may never be.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER 2011