

AUG 12 2019

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No. 18-9285IN THE
SUPREME COURT OF THE UNITED STATES

DEAN A. SCHWARTZMILLER - PETITIONER

VS.

STATE OF CALIFORNIA -- RESPONDENT

SUPPLEMENTAL BRIEF TO PETITION FOR CERTIORARI

Pursuant to Rule 15.8, Rules of the Supreme Court of the United States, Petitioner supplements his Petition for Writ of Certiorari placed on the Court's docket on May 16, 2019.

PETITIONER'S SUPPLEMENTAL BRIEF

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1 CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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3 AMENDMENT XIV: .. All persons born or naturalized in the United
4 States, and subject to the jurisdiction thereof, are citizens of
the United States and of the State wherein they reside. No State
shall make or enforce any law which shall abridge the privileges
5 or immunities of citizens of the United States; nor shall any State
deprive any person of life, liberty, or property, without due pro-
6 cess of law; nor deny to any person within its jurisdiction the
equal protections of the laws.

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9 STATUTORY PROVISION

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11 CALIFORNIA PENAL CODE § 288: (a) Any person who willfully and
12 lewdly commits any lewd or lascivious act...upon or with the body
13 or any part or member thereof of a child who is under the age of
14 years, with the intent of arousing, appealing to, or gratifying
the lust, passions, or sexual desires of the person, or the child,
is guilty of a felony....

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13	United States v. Davis, 588 U.S. ____ (June 24, 2019) <i>passim</i> ,	
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19	Rule 15.8, Rules of the Supreme Court	(i)
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21	<u>STATE STATUTES</u>	
22	Penal Code § 288	Passim,
23	Penal Code § 290 et.seq.	2,

1 SUPPLEMENTATION

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3 On June 24, 2019, this Honorable Court issued its Opinion in the

4 case of United States v. Davis, 588 U.S. ____ (2019), that requires

5 calling this Court's attention to it as a new caselaw not available

6 at the time of filing this Petition for Writ of Certiorari on April

7 29, 2019. The current petition assaults the constitutionality, vel

8 non, of California Penal Code Section 288 as suffering from both

9 vagueness and overbreadth as currently construed by the Courts of

10 California.

11 The Davis opinion essentially tracks the arguments made in

12 Petitioner's Certiorari application beginning with the opening para-

13 graph:

14 In our constitutional order, a vague law is no law at all. Only the

15 people's elected representatives in Congress have the power to write

16 new...criminal laws. And when Congress [state legislature] exercises

17 that power, it has to write statutes that give ordinary people fair

18 warning about what the law demands of them. Vague laws transgress

19 both of those constitutional requirements. They hand off the legis-

20 lature's responsibility for defining criminal behavior to unelected

prosecutors and judges, and they leave people with no sure way to know

what consequences will attach to their conduct. When Congress [the

State legislature] passes a vague law, the role of courts under our

Constitution is not to fashion a new, clearer law to take its place,

but to treat the law as a nullity and invite Congress [State Legis-

lature] to try again. Davis, slip op. at 1.

21 At page 4, of the Davis Opinion, the Court continues:

22 Our doctrine prohibiting the enforcement of vague laws rests on the

23 twin constitutional pillars of due process and separation of powers.

24 See Dimaya, 584 U.S. at ____ (plurality opinion) slip op. at 4-5;

GORSCUCH, J., concurring in part and concurring in judgment)(slip op.

25 at 2-9)...Vague laws also undermine the Constitution's separation of

26 powers and the democratic self-governance it aims to protect. Only

the people's elected representatives in the legislature are authorized

27 to make an act a crime." United States v. Hudson, 7 Cranch 32, 34

(1812). Vague statutes threaten to hand responsibility for defining

1 crimes to relatively unaccountable police, prosecutors, and judges,
2 eroding the people's ability to oversee the creation of the laws they
3 are expected to abide. See Kolender v. Lawson, 461 U.S. 352, 357-358
4 and, n.7 (1983); United States v. L. Cohen Grocery Co., 255 U.S. 81,
89-91 (1921); United States v. Reese, 92 U.S. 214, 221 (1876). Davis
588 U.S. ____ (2019)(slip op. at 4-5). See also, Petition for Certiorari
at 9 & 27.

6 Like Davis, [slip op at 3, n.1], when his case was tried, a
7 defendant convicted of two § 288(a) violations in a single prosecution
8 faced a 30 year to life minimum for the second violation. Section
9 924(c), Title 18 U.S.C., carried only a minimum of 25 years, no life.

10 The vague overbroad Penal Code § 288 uses more than 35 pages of
11 the California Penal Code to list punishments imposed from 25 years to
12 consecutive life imprisonments and if ever released from prison, civil
13 complaints and trials for confinement for life for being an "any touch-
14 ing" Sexually [non]-violent predator (SVP), WIC 6600 et.seq.; regis-
15 tration as a sex offender on the internet for life, or GPS tracking
16 devices for life, or what used to be called "shaming" for life in your
17 own community while living on the streets for life. See, Penal Code
18 § 290 et.seq. No other crime currently carries the stigma as does a
19 sexual crime in today's society, the result of political exploitation
20 of these non-violent crimes. Simply make an allegation of sexual con-
21 tact and the defendant is presumed guilty before any trial is had.

22 As also directly concluded by the Davis majority, when reading
23 a statute most naturally, a court would expect the words of the stat-
24 ute to retain the same meaning. "After all, '[i]n all but the most
25 unusual situations, a single use of a statutory phrase must have a
fixed meaning.' Cochise Consultancy, Inc. v. United States ex rel.,
26 Hunt, 587 U.S. ___, ___ (2019)(slip op. at 5)." Davis at 10.

1 As relates to this Petition For Writ of Certiorari, the word
2 lewd was changed to "any touching" in People v. Martinez, 11 Cal.4th
3 434 (1995), by the California Court by activism. "Any touching"
4 however has no fixed meaning thus allowing for the courts and pros-
5 ecutors to select defendants by an ad hoc process in every case to
6 come before the courts.

7 Moving forward, the Davis Court also opines that "we normally
8 presume that the same language in related statutes carries a consis-
9 tent meaning. See, e.g., Sullivan v. Stroop, 496 U.S. 478, 484
10 (1990), Id. at slip op 12. See also, Petition for Certiorari at 8
11 (emphasis supplied), citing to United States v. Evans, 504 U.S. 255,
12 260 and n.3 (1990) ("...as Justice Frankfurter advised, 'if a word is
13 obviously transplanted from another legal source, whether the common
14 law or other legislation, it brings the old soil with it.'"). In
15 Section 288 of the California Penal Code however, Martinez, Lopez
16 [19 Cal.4th 281 (1998)], and Murphy [25 Cal.4th 136 (2001)], the
17 California Court completely changed the sexual nature of the offense
18 of lewd and lascivious conduct from sexual offenses to "any touching"
19 of a child, and no lewd or lascivious acts are necessary to convict
20 a defendant. Just any touching however slight. See, JA G.

21 Concerning the alteration of any criminal statute's nature,
22 this Court states in Davis, "so in plain English, when we speak of
23 the nature of an offense, we're talking about 'what an offense nor-
24 mally -- or, as we have repeatedly said, ordinarily' -- entails,
25 not what happened to occur on one occasion." Dimaya, 584 U.S. ____
26 (slip op at 14). The term lewd or lascivious has never been defined
27

1 in any legal context as being simply "any touching" of a child, not
2 even when first written and construed by a court in People v. Stouter, 142 Cal. 146 (1904). Davis (slip op at 11).

4 "Usually when statutory language "is obviously transplanted
5 from... other legislation," we have reason to think 'it brings
6 the old soil with it'". Sekhar v. United States, 570 U.S. 729, 733
7 (2013).

8 Respect for due process and the separation of powers suggest a court
9 may not, in order to save Congress the trouble of having to write a
10 new law, construe a criminal statute to penalize conduct it does not
11 clearly proscribe. Davis (slip op at 18-19).

11 But here, with Section 288 of the California Penal Code, the
12 Court, not the Legislature, has taken it upon itself to rewrite a
13 statute with already vague and overbroad language to make it more
14 so, molding it into a catchall criminal code that is:

15 ...willing to consign "thousand" of defendants to prison for years--
16 potentially decades [or life], not because it is certain or even
17 likely that Congress ordained those penalties, but because it is
18 merely "possible" Congress might have done so. Post at 30, 33-34.
19 In our republic a speculative possibility that a man's conduct vio-
20 lated the law should never be enough to justify taking his liberty.
21 Davis (slip op at 23). (Emphasis supplied).

22 Here, it is unknown just exactly what Penal Code § 288 as con-
23 strued by the California Court's always "subjectively", not the
24 Legislature, addresses. And its now adopted "any touching" defin-
25 ition of lewd and lascivious acts without requiring or describing
26 any lewd or lascivious act or acts, the Court must purposely mean
27 any conduct, sexual or not as any Court reviewing the charges may
28 perceive fit to violate the statute, including non-sexual acts.

29 The Court in Davis determined that "after all, in all but the

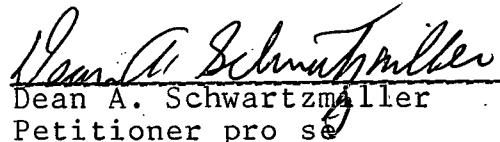
1 most unusual situations, a single use of a statutory phrase must
2 have a fixed meaning." Davis (slip op at 10). Pet. Certiorari at
3 8 & 20. Lewd and lascivious acts did at one time at least, sort of,
4 had one:

5 The Court's first inquiry is whether the term "lewd" or "lascivious"
6 have well defined, generally accepted meanings. If these terms have
7 meanings of general import, this Court is unaware of what they are.
Schwartzmiller v. Gardner, 567 F.Supp. 1371, 1376 (D.Id. 1983).

8 On May 28, 2019, Petitioner advised Respondent with the Clerk
9 supplied waiver form to Mr. Xavier Becerra, Attorney General for
10 California at his San Diego, California office, to which no reply
11 was received. This supplemental Brief by Petitioner is also being
12 sent to him via the prison mail system postage prepaid as required
13 by Rule 29, Rules of this Supreme Court.

14 DATED this 12th day of August, 2019.

15 Respectfully submitted,

16 
17 Dean A. Schwartzmiller
18 Petitioner pro se

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Dean A. Schwartzmiller

Dean A. Schwartzmiller
Petitioner pro se

Date: August 12, 2019

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4 No. 18-9285
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IN THE
SUPREME COURT OF THE UNITED STATES

10 DEAN A. SCHWARTZMILLER--PETITIONER

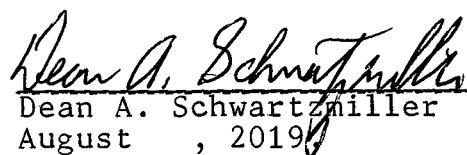
11 VS.
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13 STATE OF CALIFORNIA--RESPONDENT

14 PROOF OF SERVICE

15 I Dean A. Schwartzmiller, do swear or declare that on this date
16 August 12, 2019, as required by Supreme Court Rule 29, I have served
17 the enclosed SUPPLEMENTAL BRIEF TO PETITION FOR CERTIORARI on the
18 Attorney General for the State of California or his representative
19 Respondent's counsel, by depositing an envelope containing the above
20 documents in the United States mail, prison system by depositing the
21 above document to him with first-class postage prepaid to:

22 Xavier Becerra
23 Attorney General for California
24 Cal. Department of Justice
25 455 Golden Gate Avenue, Suite 11000
26 San Francisco, CA. 94102

27
28 
Dean A. Schwartzmiller
August , 2019