No. 18-9411

IN THE SUPREME COURT
OF THE UNITED STATES

STEVEN DOUGLAS ROCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

Reply For Petitioner To Brief In Opposition To A Writ Of Certiorari

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Stephen R. Sady
Chief Deputy Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner

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Introduction

The government's opposition obscures the reasons that the issue raised is appropriate for this Court's review and that this case is an excellent vehicle to resolve the legal issue. Contrary to the government's arguments, the Supreme Court of Tennessee resolved an important federal issue in direct conflict with federal Courts of Appeals, and the federal courts are split and in disarray on the utility and application of the judicial gloss on "lascivious exhibition" provided in *United States v. Dost*, 636 F. Supp. 828, 830 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239, 1243 (9th Cir. 1987). The Court should grant review of the question presented by the petitioner, which – unlike the alternative proposed by the government – recognizes the constitutional issues underlying the intractable dispute over the definition of a serious federal crime. The factual and procedural issues presented by the government are irrelevant to the core definitional question presented, which, once decided by this Court, can be resolved by remand to the lower courts to address the relevant claims in the first instance based on the correct legal standard.

A. The Tennessee Supreme Court Decided The Federal Question Regarding The Scope Of "Lascivious Display" Based On The Same Statutory Language And Cases As Addressed By The Federal Courts Of Appeal.

The government's claim that the Ninth Circuit's embrace of the *Dost* factors does not conflict with *State v. Whited*, 506 S.W.3d 416 (Tenn. 2016), lacks textual support. Opposition at 30. The words of the opinions establish the irreconcilable conflict:

- "We have repeatedly adopted and applied the *Dost* factors as written." *United States v. Rockett*, 752 F. App'x 448, 449 (9th Cir. 2018).

- "[W]e reject the use of the *Dost* factors as a 'test' or an analytical framework for determining whether certain materials constitute child pornography." *Whited*, 506 S.W.3d at 437.

The *Whited* court engaged in a complete and in-depth survey of federal law addressing the *Dost* factors before arriving at its conclusion rejecting their utility. 506 S.W.3d at 430-38. The *Whited* court surveyed the approaches to *Dost* by the federal courts because the same statutory term was being addressed in both the state and federal statutes – "lascivious exhibition" – as a definition for "sexually explicit conduct" in the federal statute and "sexual conduct" in the state statute. *Whited*, 506 S.W.3d at 426 ("The definition of 'sexual activity' in Tennessee Code Annotated section 39–17–1002(8)(G) and the definition of 'sexually explicit conduct' in 18 U.S.C. § 2256(2)(A)(v) both include the 'lascivious exhibition' of the genitals or pubic area."). So the rejection of *Dost* alone created a conflict on an important question of federal law that this Court should resolve.

The *Whited* court's resolution of the construction issue also conflicts with the Ninth Circuit and those other federal courts that embrace the subjective component of the *Dost* test. The government appears to be claiming that the *Whited* court's reliance on "other Tennessee provisions" means the result depended on state law. Opposition at 30. Not so. Both federal and state law recognize the basic rule of *inclusio unius est exclusio alterius*. Petition at 22-24. It is true that the *Whited* court referenced a Tennessee statute that demonstrated that, when the legislature intended to include a subjective component, it did so in express language (while also referencing a California state statute to the same effect).

506 S.W.3d at 439-41. But it is also true that the federal statutes include an exact parallel to the Tennessee provisions demonstrating the same legislative means of including a subjective component when intended. *Compare* Petition at 22 ("with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person") (quoting 18 U.S.C. § 2246(2)(D)) *with Whited*, 506 S.W.3d at 440 ("for the purpose of sexual arousal or gratification of the defendant.") (quoting Tenn. Code Ann. § 39–13–607).

The Ninth Circuit's decision is in direct conflict with both components of the highest Tennessee court's decision on important questions of federal law. The *Dost* factors should not be used because they pull fact finders "far afield" from the statutory task at hand, with the sixth factor in particular proving to be "analytical quicksand." *Whited*, 506 S.W.3d at 435-37. The split on subjective considerations depends on language in both state and federal statutory schemes that demonstrates that silence in both the state and federal statutes cannot be judicially construed to add a subjective element to the purely objective question of whether an image constitutes a "lascivious exhibition." *Id.* at 434. The *Whited* court correctly found that the "courts are sharply split on how the sixth *Dost* factor should be applied[,]" rejecting the holding of some, like the Ninth Circuit, that "the sixth factor should be applied 'subjectively,' that is, the court should determine whether the materials at issue were intended to elicit a sexual response in the defendant himself or a like-minded pedophile." *Id.*

B. The Federal Courts Are In Intractable Disarray Regarding The Definition Of "Lascivious Display" As Reflected In Courts' Own Words, The Academic Literature, And The Varying Model Instructions For The Same Offense.

The government claims that "The decision below does not implicate any circuit conflict." Opposition at 25. As the *Whited* court described, every circuit that has considered the question has expressed reservations or additions to the *Dost* factors, which in the present case the Ninth Circuit reiterated "as written." The government omits the sharp and subtle disagreements that stretch over the broad range of judicial tinkering with factors to expand on "lascivious exhibition." *Compare* Petition at 12-15 *with* Opposition at 23-29; *see* Kieran Dowling, Comment, *A Call to Rewrite America's Child Pornography Test: The Dost Factor Test*, 24 Seton Hall J. Sports & Ent. L. 151, 166 (2014) (noting scholarly criticism of the *Dost* factors "due to their vagueness and resulting differences in interpretation").

The government does not disagree that "variations" characterize the circuits' pattern instructions, then sees no problem because the pattern instructions "do not bind the courts." Opposition at 30 n.4. But the petitioner's reference to the varying pattern instructions illustrated the disarray among the circuits while also demonstrating the practical need for uniformity. Petition at 16-17. The reality is that, in federal courts around the country, federal defendants charged with the same offense are being convicted based on different pattern jury instructions, implicating this Court's core role as providing uniform standards on federal criminal law.

The government embraces the sixth *Dost* factor as providing an appropriate subjective standard for determining violation of the federal criminal statute. Opposition at 17. Touching only briefly on overbreadth and vagueness, the government claims that the petitioner "proposes no alternative framework of his own." Opposition at 21. On the contrary, the petitioner repeatedly, and with full support of the Court's rules on statutory construction, proposes construction of the statute to require a purely objective test for "lascivious exhibition," quite similar to the one proposed by the Solicitor General 25 years ago:

> In our view, the plain meaning of the statute requires a prohibited depiction to contain two elements that the court of appeals did not consider: (a) the material must include a visible depiction of the genitals or pubic area of the body (as distinguished from a depiction of the clothing covering those areas); and (b) *the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer).*

Brief for the United States, *Knox v. United States*, 510 U.S. 939 (1993) (No. 92-1183), 1993 WL 723366, *9 (emphasis added).

The government misses the significance of the contrast between *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and *United States v. Williams*, 553 U.S. 285, 297 (2008). Opposition at 21-23. This Court's rejection of a loosely constructed pornography statute and the tightening of statutory language that saved its successor from overbreadth and vagueness are directly analogous to the vague *Dost* factors and the objective standard urged by the defense. Petition at 19-21. The government agrees with the petitioner that *Williams* observed that "sexually explicit conduct" "connotes actual depiction of the sex

act rather than merely the suggestion that it is occurring." Opposition at 22 (citing 553 U.S. at 297). But the actus reus of the offense – "lascivious exhibition" – cannot be expanded based on what the government considers the proper definition of an image "intended or designed to arouse a sexual response in the viewer." Opposition at 23.

By doing so, the judicial gloss injects unconstitutional vagueness and overbreadth into the description of the offense. The mens rea is described separately in the statute as "with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct[.]" 18 U.S.C. § 2251(a). The image of a "lascivious display" is a separate objective actus reus from the accompanying mens rea necessary to establish the offense.

C. The Government's Alternative Question Presented Omits The Constitutional Implications Of The Definition Of The Offense And Clouds The Clean Definitional Question Before The Court.

The question presented in the Petition asks this Court to define the statutory term "lascivious exhibition" and, in doing so, to reject the judicial gloss expanding the definition beyond the constitutional limits for such statutory language:

> Whether the judicial construction of "lascivious exhibition" of the genitals or pubic area of a minor in 18 U.S.C. § 2256(2)(A)(v) to include consideration of subjective factors, beyond the objective meaning of those words, misconstrued the plain language of the statute and injected definitional vagueness and overbreadth into the trial proceedings that unconstitutionally permitted convictions for behavior beyond the scope of the federal statute.

The government's alternative statement of the issues should be rejected.[1] The question for the Court asks for a definition of a statutory term that exposes citizens to up to 30 years in prison for each violation. Until the definition is established, the question whether plain error occurred is premature.

The government's formulation includes no reference to the constitutional overbreadth and vagueness that follows from the Ninth Circuit's reaffirmation of the *Dost* factors "as written." The petitioner's formulation of the question correctly focuses on the statutory definition that constitutes the essential predicate for determinations of the validity of jury instructions and the sufficiency of the evidence.

D. The Procedural And Factual Background Need Not Detain The Court Because, With The Proper Definition Of The Crime, The District Court Should Determine Rights And Remedies In The First Instance.

The government engages in a detailed recitation of the facts, which both parties agree included video voyeurism and photography that the defense asserts did not fall within the constitutional description of "lascivious exhibition." The correct statutory definition provides the bases both for the jury to make the requisite findings and for the trial judge to determine the sufficiency of the evidence. The government claims the petition lacks clarity whether the question implicates the adequacy of the instruction or the finding of

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[1] The government proposes: "Whether the district court plainly erred in treating petitioner's intent in producing, and attempting to produce, images of nude minors as a permissible consideration in determining whether those images constituted "lascivious exhibition[s] of the anus, genitals, or pubic area," 18 U.S.C. § 2256(2)(A)(v), of a minor, and hence child pornography produced in violation of 18 U.S.C. § 2251(a), (c), and (e)."

sufficiency. Opposition at 14. Because the trial court was operating under an overly expansive definition of the crime, both are implicated, as the defense clearly argued on appeal, in the petition for rehearing en banc, and before this Court. When this Court addresses the definition of a crime, the consequences should be determined upon remand "for further proceedings consistent with this opinion." *See, e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019); *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015); *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009).

The core question is: what is the correct definition of "lascivious display"? If different from the *Dost* factors "as written," this Court need not engage in the parsing of remedies other than to remand to the lower courts for the issues to be addressed under the correct legal standard in the first instance. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) (holding that when a district court "fail[s] to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings").

The defendant fully briefed the issues in the Ninth Circuit, challenging both jury instructions and sufficiency determinations, and the Ninth Circuit affirmed on the merits, rejecting the challenge to the *Dost* factors on both precedential as well as the constitutional grounds. *Rockett*, 752 F. App'x at 449. He sought rehearing en banc on the same grounds raised in his petition for a writ of certiorari to no avail. The case is procedurally ripe for a decision on the merits of the proper definition of "lascivious exhibition" under 18 U.S.C. § 2256(2)(A)(v).

The government notes that the defendant's instructions included the *Dost* factors. Opposition at 10-11. Although the defense argued in the district court that the images and attempts to obtain images did not constitute "lascivious exhibition," the Ninth Circuit rule foreclosed the trial judge from doing anything but follow the *Dost* factors. *See Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue[.]"); *see Osborne v. Ohio*, 495 U.S. 103, 123-25 (1990) (forcing resort to "an arid ritual of meaningless form" "would further no perceivable state interest." (internal citation omitted)). To the same extent, even though the defense fully briefed the panel on the legal issues, the Ninth Circuit was bound by *Dost* through *Wiegand*. *Hart*, 266 F.3d at 1171 ("[A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court."). The *Dost* factors' unconstitutional expansion of the statute's plain language was fully raised on direct appeal and presented to the Ninth Circuit for en banc review, which it declined.

The government raises invited error in defense counsel's recognition of the *Dost* precedent in his jury instructions. Opposition at 14-15. The government raised the same argument on appeal, which the Ninth Circuit implicitly rejected by reaching the merits. The defense relied on Ninth Circuit authority citing to this Court's limitation on the invited error doctrine in *United States v. Olano*, 507 U.S. 725, 733 (1993). Reply Brief at 8-9.

None of the factors identified by the Court in *Olano* support invited error: "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." None of the predicates for invited error apply here, especially whether the right is waivable. Even after a guilty plea, the defendant can challenge the constitutionality of the conviction, asserting that the factual basis does not establish the elements of the offense. *Class v. United States*, 138 S. Ct. 798, 803 (2018).

The government and the Ninth Circuit suggest that the *Dost* factors narrow the scope of the offense. Opposition at 23. On the contrary, by eliminating the subjective components of the offense, and limiting conviction to cases involving objective "lascivious exhibition," the scope of the offense is narrower. Most specifically, video voyeurism that becomes child pornography by dint of the photographer's subjective design or intent expands the statutory proscription. Where the overbreadth and vagueness of the subjective standard provide bases for conviction beyond the scope of the statute's actual proscription, the convictions must be reversed. *See, e.g.*, *Griffin v. United States*, 502 U.S. 46, 53 (1991); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 440-42 (1972); *Stomberg v. California*, 283 U.S. 359, 369 (1931). The unconstitutional vagueness of the *Dost* factors turns the objective standard for unlawful images into a Rorschach test, permitting expansion of the statute beyond its objective text.

E. The Government's Conflation Of Evidence Adduced To Demonstrate The Defendant's Subjective Intent And Facts Alleged In The Federal Case, As Opposed To A Separate State Case, Demonstrates An Additional Benefit Of An Objective Standard.

The government's factual description creates the incorrect impression that the federal case involved images of actual sexual acts. Opposition at 2-4. The claim that the defendant took "a photograph of himself as he raped a 12-year-old girl in Oregon" was not part of the indictment: the earlier child rape allegations resulted in a separate state prosecution that resulted in a 630-month sentence, which the government stated was "factually and temporally distinct from the conduct at issue in this federal case." Reply Brief at 3 (quoting the government's letter to the Probation Office). It is true that the jury heard the full account of the uncharged bad acts in support of the subjective part of the *Dost* test, but the offense charged in Count 6 was limited to an unsuccessful request for naked pictures that occurred much later. Similarly, the government suggests that the surreptitious video in the shower involving J.D.L. included sex acts. Although the Count 2 involved sexual contact, the video counts did not include an actual sex act.

The government's treatment of the facts illustrates a benefit of the purely objective test for "lascivious exhibition." The calculus for admissibility of uncharged evidence changes when the subjective intent and design of the photographer is put into play by the *Dost* factors. The danger of unfair prejudice may or may not result in admissibility, but, where necessary for determining the actus reus, such extraordinarily prejudicial evidence becomes more easily admissible. This case provides an excellent vehicle for deciding the

important questions of federal law because the case went to trial, the issues were framed on appeal, and the video voyeurism extension of the statute is squarely presented.

Conclusion

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the Court should grant the writ.

Respectfully submitted this 4th day of October, 2019.

Stephen R. Sady
Attorney for Petitioner

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CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within Reply For Petitioner To Brief In Opposition To A Writ Of Certiorari on the counsel for the respondent by hand-delivery on October 4, 2019, an exact and full copy thereof addressed to:

Paul T. Maloney, Assistant U.S. Attorney
1000 S.W. Third Avenue
Suite 600
Portland, OR 97204

Gary Y. Sussman, Assistant U.S. Attorney
1000 S.W. Third Avenue
Suite 600
Portland, OR 97204

Kelly A. Zusman, Assistant U.S. Attorney
1000 S.W. Third Avenue
Suite 600
Portland, OR 97204

and by depositing in the United States Post Office, in Portland, Oregon on October 4, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

Noel Francisco
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

Further, the original and ten copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 4th day of October, with first-class postage prepaid.

Dated this 4th day of October, 2019.

Stephen R. Sady
Attorney for Petitioner

Subscribed and sworn to before me this 4th day of October, 2019.

OFFICIAL STAMP
TRAVIS SOUTHWORTH-NEUMEYER
NOTARY PUBLIC-OREGON
COMMISSION NO. 973115
MY COMMISSION EXPIRES APRIL 22, 2022

Notary Public of Oregon