No.

In the Supreme Court of the United States

RYAN COURTADE, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case implicates two longstanding circuit splits involving the interpretation and application of the federal child pornography statute's definition of "a minor engaging sexually explicit conduct," 18 U.S.C. 2252(a)(4)(B)—and, in particular, its use of the phrase "lascivious exhibition of the * * * genitals[] or pubic area." 18 U.S.C. 2256(2)(A).

The Fourth Circuit upheld the district court's determination that the video possessed by Petitioner showed a "lascivious exhibition" of a minor's pubic area while she showered, and thus that the video depicted "a minor engaging in sexually explicit conduct." The court of appeals reviewed the district court's conclusion for clear error and did not independently review the video at issue. And the court of appeals upheld the district court's conclusion even though the video depicted no sexual acts, sexual posing, or sexual statements by either Petitioner or the minor; in so doing, the court of appeals relied primarily on Petitioner's motive for and means of recording Doe.

The questions presented are:

1. When reviewing a district court's conclusion that an image depicts a "lascivious exhibition" under 18 U.S.C. 2256(2)(A), must the appellate court review that conclusion *de novo* or for clear error?

2. When determining whether an image depicts "a lascivious exhibition" under 18 U.S.C. 2256(2)(A), may a court consider the subjective intent or motive of either the defendant or the person who created the video, or must the court focus on the objective content of the exhibition itself?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellanous:

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Ryan Courtade respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–17a) is reported at 929 F.3d 186. The order and opinion of the district court (App., *infra*, 21a–59a) is reported at 243 F. Supp. 3d 699.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2252 and 18 U.S.C. 2256, part of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225, are reprinted in full in the appendix to this petition (App., *infra*, 60a–67a).

INTRODUCTION

Under 18 U.S.C. 2252(a)(4)(B), it is a federal crime to possess depictions "of a minor engaging in sexually explicit conduct." The phrase "engaging in sexually explicit conduct" does not comprise all instances of child nudity. Instead, the phrase refers to images depicting "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A). But the process by which courts determine whether an exhibition of child nudity is "a lascivious exhibition"—and thus depicts a minor "engaging in sexually explicit conduct"—has produced ample confusion and two different circuit splits.

In this case, Petitioner Ryan Courtade recorded a minor showering; her pubic area was visible for seconds at a time, for a total of a few out of the video's twenty-four minutes. Although Courtade's conduct was repugnant, the video depicted no sexual acts, sexual posing, or sexual statements. Nonetheless, the Fourth Circuit upheld the district court's determination that the video contained a "lascivious exhibition" of the teenager's pubic area. In so doing, the court of appeals implicated two aging circuit splits that the Court should resolve.

First, the Fourth Circuit deepened a circuit split over the proper standard of review—whether a district court's application of the facts to the statutory phrase "lascivious

exhibition" is reviewed *de novo* or for clear error. Although the parties briefed the issue and acknowledged the circuit split, the Fourth Circuit did not say explicitly which standard it applied. But it said enough. In obscenity or child-pornography cases, independent appellate review of the photo or video at issue is the hallmark of *de novo* review. By declining to review the video itself, and by relying instead on the district court's written description of that video, the Fourth Circuit necessarily reviewed for clear error and further intensified the circuit split.

Resolving that split is essential not only to ensure uniformity in federal criminal appeals, but to ensure that criminal cases with First Amendment implications are reviewed consistently and correctly by reviewing courts. At a minimum, the Court should summarily vacate and remand for the Fourth Circuit to (1) state explicitly what standard of review it applied, and (2) review the video.

Second, the Court of Appeals deepened another, even more vexing circuit split over whether the "lascivious exhibition" analysis considers whether the defendant (or other producer of the image) had a sexual motive. On this question, the circuits are split at least three ways: Some say sexual motive may always be considered, even if the motive evidence goes beyond the image itself; others say that sexual motive may not be considered and the objective depiction of the minor controls; a third group splits the difference and considers motive evidence in some circumstances but not in others.

In this case, the Fourth Circuit purported to avoid addressing that split, but failed to actually do so. Although it stated that it was not examining Courtade's subjective intent and was focusing only on the video itself, in practice, the Fourth Circuit did in fact consider Courtade's motive and subjective intent. In upholding the district court's conclusion, the Fourth Circuit opined that the

video reflected a "lascivious exhibition" because it captured Courtade manipulating Doe into showering in the presence of a video camera. In other words, the Fourth Circuit upheld a lasciviousness conclusion based not on the exhibition itself—what the minor did and how she did it—but on how that exhibition came to be in the first place.

That question—whether and to what extent motive matters—has confounded and divided the circuits for at least three decades; it has also divided the appellate courts of states whose child-pornography statutes are based on the Act and which thus rely on federal decisions to interpret their states' statutes.

"[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley* v. *United States*, 523 U.S. 614, 620 (1998). When Congress defines a crime narrowly and a court interprets and applies it more broadly—and when an appellate court fails to properly review a district court decision doing the same—serious harm results. There is harm to separation of powers: The executive prosecutes people for, and the judiciary convicts people of, crimes that the legislature did not actually create. There is harm to federalism: As it did here, the federal government effectively displaced the state from exercising its own police power to enforce its own state laws. And there is harm to individual liberty: Defendants are convicted of conduct that is not actually a crime under the statute at issue. These tripartite harms are at issue in both of these circuit splits, and the Court should review this case and resolve them.

STATEMENT

A. Statutory Background

This case concerns the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225 ("Act"). The Act sought to fight "trafficking * * * in pornographic

materials" by "highly organized, multimillion dollar industries that operate on a nationwide scale," S. Rep. 95-438, at 15.

The Act prohibits both the production and possession of visual materials in which a minor "engage[s] in" "sexually explicit conduct." Production is prohibited by 18 U.S.C. 2251(a), which covers conduct aimed at having a minor "engage in[] sexually explicit conduct for the purpose of producing any visual depiction of such conduct." Possession is covered by 18 U.S.C. 2252(b), which bars "knowingly possess[ing], or knowingly access[ing] with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction" if "(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct."

The production and possession provisions' operative phrase—"engag[e] in sexually explicit conduct"—does not comprise all nude depictions of a minor's genitals or pubic area. Rather, the phrase refers to depictions of "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A). This definition comes from the "lewd exhibition" language from this Court's objective test for obscenity. S. Rep. 95-438, at 11 (citing *Miller* v. *California*, 413 U.S. 15 (1973)).

In focusing on sexual acts, Congress rejected a proposal for a subjective standard—one that would have prohibited depicting child nudity "for the *purpose* of sexual stimulation or gratification of any individual who may view such depiction." S. Rep. 95-438, at 11 (emphasis added). Instead, "'sexually explicit conduct' was more

tightly drawn so as to include only those activities where the child was engaged in sexually-oriented acts." *Id.* at 13. The definition also excluded everyday activities like "skinny dipping." *Id.* at 11. Similarly, the House Report stated that "definition of 'sexually explicit conduct' [should] be interpreted so as to apply only to conduct that is sexual in nature. For example, the term 'bestiality' as used in this definition would only apply to sexual bestiality." H.R. Conf. Rep. 95-811, at 6.

Notwithstanding this statutory language, context, and history, most federal courts have interpreted "lascivious exhibition" using a six-part test first applied by a district court in *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd*, 813 F.2d 1231 (9th Cir. 1987). The *Dost* factors are: (1) "whether the focal point of the visual depiction is on the child's genitalia or pubic area"; (2) "whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity"; (3) "whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child"; (4) "whether the child is fully or partially clothed, or nude"; (5) "whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity"; and (6) "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* at 832. Although most federal courts have relied at least in part on *Dost* and its six factors, the motive-oriented sixth factor has been called the "most confusing and contentious" of those factors. *United States* v. *Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).

B. Trial Proceedings

1. In 2014, after being called to investigate Courtade for suspected child abuse, police discovered him attempting to destroy a video of Jane Doe, his teenage stepdaughter, showering. C.A. App. 92–93. The twenty-four-minute

video was created when Doe was a minor. See Gov't D. Ct. Ex. 1 ("Video Ex.") (maintained by the government, under 18 U.S.C. 3509(m), and submitted to the district court under seal). In the video, Doe showers while testing a waterproof camera at Courtade's request and appears nude during a few of the video's twenty-four minutes.

The video begins with Courtade turning on the camera and placing it on the bathroom counter while talking to Doe. C.A. App. A330; see also Video Ex. After Courtade leaves, Doe undresses, gets in the shower, closes an opaque blue shower curtain, and turns on the water. See Video Ex. Doe then calls for Courtade, who returns to the bathroom and hands her the camera over the shower curtain. *Ibid.*

Next, Doe runs the camera under the water, and then hands it back to Courtade, who states that it "[d]oesn't look like any water's getting in there [the camera]." C.A. App. A334. Courtade then hands the camera back to Doe and tells her to put it on the shower floor. *Id.* at A330. Doe does so, then takes a five-minute shower. See Doe Video.

During much of the shower, Doe is seated and appears on the bottom right of the screen, with neither her chest nor pubic area visible. *Ibid.* During part of the shower, Doe stands and shampoos; even then, her chest and pubic area are visible for only seconds at a time and the camera does not focus on them, much less zoom in on them. *Ibid.* In addition, the shower head is at the center of the screen and water drops appear on the camera lens. *Ibid.* After showering, Doe returns the camera to Courtade, who then returns it to the bathroom counter, facing the shower, and leaves the room. *Ibid.*

Doe continues to shower for several minutes; during which her body is obscured entirely by the opaque blue shower curtain. *Ibid.* During that time, Courtade asks her when she will finish showering and tells her that "he is

preparing her an ice cream treat." *Ibid.* Doe peeks out of the shower a few times, then exits at the far end of the shower; she appears briefly on the far edge of the screen, then drops to the floor and crawls out of the view of the camera below the countertop. *Ibid.* She reappears on the other side of the camera's view, dries off, gets dressed, and leaves the bathroom. *Ibid.*

At no time does Doe say anything sexual, pose sexually, or touch herself sexually. And at no time does Courtade say anything sexual to Doe, ask Doe to pose sexually, or ask her to touch herself sexually. And Doe's pubic area is visible for only seconds at a time, for a total of a few of the video's twenty-four minutes.

2. Courtade was charged in Circuit Court of the City of Chesapeake with (1) indecent liberties with a child by a custodian, (2) production of child pornography, and (3) possession of child pornography. The day before his state-court trial, however, a federal grand jury charged Courtade with (1) production of child pornography in violation of 18 U.S.C. 2251(a), and (2) possession of child pornography in violation of 18 U.S.C. 2252(a)(4)(B). C.A. App. A3, A323. The state charges were then dismissed.

Courtade's trial lawyers (a father-son duo of Greg and Jarrett McCormack) moved to dismiss the federal charges on the ground that the video did not depict conduct that was "sexually explicit" under the Act. *Id.* at A31, A40. Indeed, after reviewing the video, the McCormacks "did not believe that the video in question really qualified as sexually explicit," *id.* at A572, because "it wasn't really a sexually explicit setting * * * [there] was no posing or anything else at that point, and obviously the fact that there was no actual sexual consent or sexual acts that were being depicted in there," *id.* at A573–A574.

Despite initially concluding that the video was not "sexually explicit" under the Act, trial counsel later advised Courtade to plead guilty to violating the Act. They did so after the government's lawyer pointed them to cases—from outside the Fourth Circuit—evaluating the defendant's subjective intent in addition to the contents of the image itself. See *id.* at A576 ("Government counsel had basically pointed me to other circuits which essentially look more at the surreptitious recording and really the mindest of the defendant, I guess, or the * * * person who is making these recordings * * * ."). In particular, Jarrett McCormack focused on the sixth factor in the six-part *Dost* test; some courts applying that factor have looked beyond the image itself to the defendant's subjective intent in creating or viewing that image. See *id.* at A605.

McCormack knew that "many circuits" have stated that the sixth *Dost* factor "is problematic" and have evaluated the images without considering the defendant's subjective intent. *Ibid.* More generally, he understood that it "is not clearly settled law [in] every single jurisdiction." *Id.* at A606. Despite these multiple caveats, he decided that the dismissal motion was "a dead-end." *Id.* at A577; see also *id.* at A644. As a result, trial counsel told Courtade that the video was "sexually explicit" and that "he was guilty." *Id.* at A597, A602; see also *id.* at A628, A642. Based on this advice, Courtade pleaded guilty to one count of possessing child pornography. *Id.* at A82, A86, A91, A326.

C. Postconviction Proceedings

After retaining new counsel, Courtade moved under 28 U.S.C. 2255 to vacate his conviction. He argued, in relevant part, that: (1) the conduct to which he admitted did not violate the Act; (2) his plea was not voluntarily and intelligent, and otherwise violated Federal Rule of Criminal

Procedure Rule 11(b)(3), because the district court did not properly identify a factual basis for Courtade's plea, given that the conduct to which he admitted did not violate the Act. C.A. App. A276–A320. He also argued that trial counsel was ineffective in failing to pursue a direct appeal or consult Courtade about a direct appeal. *Id.* at A317–A320.

1. After an evidentiary hearing, the district court denied the petition in full. App., *infra*, 21a–59a. Among other things, the court concluded that his first three claims were procedurally defaulted, because Courtade had not filed a direct appeal of his conviction, and that he did not qualify for the "actual innocence" exception to this procedural default because his possessing the video violated the Act. *Id.* at 47a.

With respect to the latter question—whether the video depicted a "lascivious exhibition" and thus constituted child pornography under federal law, the district court discussed the content of the video (*id.* at 42a–45a) as well as Courtade's motive for making the video (*id.* at 35a–37a, 45a–47a). The district court added that the latter inquiry "is not limited to the 'four corners' of the depiction" and includes "evidence of other, related conduct." *Id.* at 37a–38a; see also *id.* at 46a (considering such related conduct). And in addressing Courtade's argument that statute defines "lascivious exhibition" with respect to the minor's acts, not the defendant's motive, the district court maintained that this standard would be "over-generous to the defendant." *Id.* at 35a (quoting *United States* v. *Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987)).

Later that month, the district court summarily denied a Certificate of Appealability "[f]or the reasons set forth in the court's Opinion." *Id.* at 20a.

2. The Fourth Circuit granted a Certificate of Appealability on two questions, including whether "Courtade is actually innocent of possession of child pornography and,

if so, whether Courtade's guilty plea is invalid." *Id.* at 18a. After briefing on the merits, the Fourth Circuit affirmed.

At the outset, the court of appeals rejected the government's various procedural objections to considering Courtade's actual-innocence arguments; if Courtade is actually innocent, the Fourth Circuit recognized, then his innocence would undermine his guilty plea, excuse his failure to file a direct appeal challenging his guilty plea, and override the appeal waiver that accompanied his guilty plea. *Id.* at 7a–9a (citing, *e.g.*, *Bousley*, 523 U.S. at 622).

On the merits, the court considered "whether the video of Jane Doe depicts a 'lascivious exhibition of the anus, genitals, or pubic area' under the statute." App., *infra*, 10a. The court cited dictionary definitions of "lascivious" (such as "tending to arouse sexual desire" or "tending to excite lust"). *Ibid.* The court did not, however, address Courtade's argument that the canon of *noscitur a sociis* required interpreting "lascivious exhibition" in light of the other statutory examples of "sexually explicit conduct" (such as "sexual intercourse," "bestiality," and "masturbation"). See *ibid.*

Noting Courtade's argument that his subjective intent or motive is irrelevant to the analysis, the court of appeals said that it need not "define the parameters of any subjective-intent inquiry, because [the court] can dispose of this case based on the objective characteristics of the video alone." *Id.* at 12a. But then examined Courtade's subjective intent, relying primarily on the parts of the video highlighting Courtade's motive: Doe's nudity "is entirely the product of an adult man's deceit, manipulation, and direction" (*ibid.*), and the video "reveal[s] a young girl deceived and manipulated by an adult man into filming herself nude the shower" (*id.* at 13a–14a)—such that "the video's purpose was to excite lust or arouse sexual desire in the viewer" (*id.* at 14a).

As for the standard of appellate review, the Fourth Circuit did not state explicitly whether it was reviewing the district court's "lascivious exhibition" conclusion *de novo* or for clear error. Yet although the court of appeals opinion relied heavily on the video's content, it did not actually watch the video.[1] Instead of watching the video, however, the court of appeals noted that "[t]he district court reviewed the video in camera and made these factual findings, which [the court of appeals] review[ed] for clear error." *Id.* at 12a.

REASONS FOR GRANTING THE PETITION

I. The Court should resolve a longstanding circuit split over the standard of appellate review for conclusions that an image depicted a "lascivious exhibition."

A. The circuits are split on whether to review *de novo* or for clear error."

The Fourth Circuit's decision deepens a longstanding, recognized conflict over the standard of review in federal child-pornography cases.

1. a. The First, Third, and Tenth Circuits have held that whether an image depicts a "lascivious exhibition" is reviewed *de novo*.

The First Circuit has held repeatedly that the mixed question of law and fact—whether the photos or videos depict a "lascivious exhibition"—is reviewed *de novo*. See, *e.g.*, *United States* v. *Brunette*, 256 F.3d 14, 17 (1st Cir. 2001) (appellate court required "to review de novo the legal determination that a given image depicts a 'lascivious exhibition of the genitals'"); *Amirault*, 173 F.3d at 32–33

[1] The video was part of the appellate record and available to the court of appeals. See C.A. Doc. 73 (requesting that district court clerk's office transmit "Sealed Video" to Fourth Circuit clerk's office); C.A. Doc. 74 (reflecting that disc containing video was transmitted to Fourth Circuit).

("[W]e must review the district court's determination *de novo* to ensure that the First Amendment has not been improperly infringed."). In the First Circuit, "[n]o deference is owed to the district court's resolution of this question." *United States* v. *Frabizio*, 459 F.3d 80, 83 (1st Cir. 2006).

The Third Circuit and Tenth Circuits have used the same approach. In *United States* v. *Knox*, 32 F.3d 733 (3d Cir. 1994), the Third Circuit held that interpretation of "lascivious exhibition" is "a pure question of law" and its review "is plenary." *Id.* at 1036. *De novo* review is essential, the Third Circuit stressed, "to ensure that the First Amendment has not been improperly infringed." *Id.* at 744. And the Tenth Circuit (albeit in an unpublished opinion) has held that "[o]n the mixed question of whether the facts satisfy the proper legal standard, we conduct a de novo review where, as here, the question primarily involves the consideration of legal principles." *United States* v. *Helton*, 802 F. App'x 842, 846 (10th Cir. 2008).

b. The Fifth, Seventh, and Ninth Circuits, now joined by the Fourth Circuit, review for clear error.

Acknowledging that three other circuits have held that *de novo* review is required, the Fifth Circuit disagreed and applied "the clear error standard" when reviewing the conviction, "so far as it indicates a factual finding that the image was a lascivious exhibition of the genitals." *United States* v. *Steen*, 634 F.3d 822, 825–26 (5th Cir. 2011). Likewise, in *United States* v. *Schuster*, 706 F.3d 800 (7th Cir. 2013), the Seventh Circuit held that whether an image depicts a "lascivious exhibition of the genitals" is "left to the factfinder to resolve, on the facts of each case, applying common sense"—"so we will review only for clear error, despite [the defendant's] argument for *de novo* review." *Id.* at 806 (citations and quotation marks omitted).

The Ninth Circuit has applied deferential review for decades. It first adopted clear-error review in *Wiegand*, holding that "whether the pictures fall within the statutory definition is a question of fact as to which we must uphold the district court's findings unless clearly erroneous." 812 F.2d at 1244. It has since reiterated that holding, rejecting a defendant's argument that "*de novo* review of the photographs applies" and applying the "significantly deferential, clearly erroneous standard" to the district court's conclusion that the photos depict "sexually explicit conduct." *United States* v. *Overton*, 573 F.3d 679, 687, 688 (9th Cir. 2009).

In this case, the Fourth Circuit joined the Fifth, Seventh, and Ninth Circuits in reviewing for clear error. To be sure, the Fourth Circuit did not state explicitly what standard of review it chose. But the content of its opinion reveals that its review was deferential. Most notably, the Fourth Circuit did not independently review the video. App., *infra*, 12a n.5 ("The district court reviewed the video in camera and made these factual findings, which we review for clear error."). That omission is telling: The case centered on the video, and independent review of the underlying image defines *de novo* review in cases involving obscenity, child pornography, or other cases alleging that the defendant's expression was unprotected. See *Brunette*, 256 F.3d at 17 & n.2 (court is "obligated, where possible, to review de novo the legal determination that a given image depicts a 'lascivious exhibition of the genitals'" but "[i]n this case, we cannot undertake our own review of the images because none were included in the record on appeal"); cf. *United States* v. *Hodge*, 805 F.3d 675, 680 (6th Cir. 2015) (reviewing sentencing: "Because we have not seen the videos, we cannot determine [that] they were lascivious.").

In addition, an earlier Fourth Circuit child-pornography case (although not resolving the question) equated *de novo* review with independent review of the underlying images. See *United States* v. *Nemuras*, 740 F.2d 286 (4th Cir. 1984) (per curiam).[2] By declining to independently review the video, then, the Fourth Circuit necessarily aligned itself with three other circuits in reviewing the "lascivious exhibition" conclusion for clear error only.

B. The question is important and this case presents an excellent vehicle in which to decide it.

1. This Court has recognized the importance of determining "which kind of court"—trial or appellate—"is better suited to resolve" a mixed question of law and fact. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). The standard-of-review question presented here is especially important because of its First Amendment implications and the increasing frequency with which these questions will arise in the coming years. A Westlaw search reveals that in 2018, 108 circuit-court cases and 181 district-court cases cited 18 U.S.C. 2256 (which defines "sexually explicit conduct"). From 2010 to 2018, 178 circuit courts

[2] In *Nemuras*, the defendant challenged his conviction for producing child pornography, arguing that the photos at issue did not contain a "lewd exhibition of the genitals or pubic area" and thus did not depict "sexually explicit conduct." *Id.* at 286 (citing 18 U.S.C. 2251, 2253(2)(E)). He maintained that the district court's "lewd exhibition" conclusion should be reviewed *de novo*; the government argued that it should be reviewed for clear error. *Ibid.* The Fourth Circuit did not resolve the question, instead concluding that the photos met the statutory definition "under either standard." *Ibid.* When characterizing its *de novo* review, the Fourth Circuit emphasized that reviewing the images was key: "After independently reviewing the photographs that serve as a basis for [appellant's] conviction, we conclude and find beyond a reasonable doubt that they represent the 'lewd exhibition of the genitals or pubic area.'" *Id.* at 286–287.

and 223 district courts applied the phrase "lascivious exhibition" in child-pornography cases. Those numbers will only increase as federal prosecutors bring more and more child-pornography cases. See, *e.g.*, Press Release, *Number of Persons Prosecuted for Commercial Sexual Exploitation of Children Nearly Doubled from 2004 and 2013*, Bureau of Justice Statistics (Oct. 12, 2017), https://tinyurl.com/yxd7f66m. In the future, they will likely rise dramatically. See Michael H. Keller & Gabriel J.X. Dance, *The Internet Is Overrun With Images of Child Sexual Abuse. What Went Wrong?* N.Y. Times (Sept. 29, 2019), https://tinyurl.com/y4lmbm9c ("[L]ast year, tech companies reported over 45 million online photos and videos of children being sexually abused—more than double what they found the previous year."). Trends like these make it especially important for the Court to ensure uniformity—with federal child-pornography defendants having the same appellate rights no matter where they live.

2. The standard of review also has significant practical consequences. In general, "the 'standard of review' * * * more often than not determines the outcome." Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1391 (1995). It is even more important in cases like these—focusing on a discrete set of visual materials. The proverbial picture worth a thousand words is even more valuable when it is a twenty-four-minute video.

Indeed, in this case neither a written transcript nor a written summary of the video painted the full picture, and thus the court of appeals did not fully appreciate the following context and circumstances:

- Doe's pubic area appears for seconds at a time, not continuously; and in total is visible for only a few of the video's twenty-four minutes. See Video Ex.

- During much of the shower, Doe is seated and appears on the bottom right of the screen, with neither her chest nor pubic area visible. *Ibid.* Even when she stands and shampoos, her pubic area is visible for only seconds at a time and the camera does not focus on them, much less zoom in on them. *Ibid.*
- The shower head is at the center of the screen and water drops appear on the camera lens, further obscuring any view. *Ibid.*
- For several minutes, the camera is outside the shower, and only an opaque blue shower curtain is visible. *Ibid.*

These facts and circumstances inform the video's overall effect and the extent to which it truly depicted a minor "engaging in sexually explicit conduct." Few of them were apparent from the video's transcript or a written summary, much less analyzed or discussed by the court of appeals when reviewing for clear error.

3. The Court should grant review even though the Fourth Circuit did not explicitly identify the standard of review or acknowledge the circuit split.

For one, the standard of review—and the fact of a circuit split—was squarely before the Fourth Circuit. In both his opening and reply briefs, Courtade identified the circuit split and argued that the court of appeals should review the district court's conclusion *de novo*. C.A. Opening Br. 18 (noting that "the federal appeals courts are not unanimous on the standard of review" but that *de novo* review was especially important given the First Amendment considerations); C.A. Reply Br. 5–7 (same). The government disagreed and argued that the court of appeals should review that conclusion for clear error. Gov't C.A. Br. 44.

What is more, the Court has readily granted certiorari to resolve circuit splits even when those splits were not expressly acknowledged by the court of appeals decisions

under review. See, *e.g.*, *Smith* v. *Bayer Corp.*, 564 U.S. 299, 305 (2010) ("We granted certiorari because the order issued here implicates two circuit splits arising from application of the Anti-Injunction Act's relitigation exception."); *In re Baycol Prods. Litig.*, 593 F.3d 716 (8th Cir. 2010) (lower-court decision that does not acknowledge the existence of either of those circuit splits); see also *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 291–292 (2009) ("We granted certiorari to resolve a split among the Courts of Appeals and State Supreme Courts over a divorced spouse's ability to waive pension plan benefits through a divorce decree not amounting to a [qualified domestic relations order]."); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 497 F.3d 426 (5th Cir. 2007) (lower-court decision that does not acknowledge the existence of that circuit split).

Both the question and the circuit split were before the Fourth Circuit; the Fourth Circuit did not answer it explicitly but did so in practice; and the Court has granted certiorari to resolve circuit splits even when the lower-court decision at issue did not acknowledge the split. Given the practical importance of the issue and the growing number of federal child-pornography cases, the Court can and should do the same here.

C. In reviewing the district court's conclusion for clear error, the decision below was incorrect.

The ultimate inquiry in this case is a quintessentially mixed question: Applying the facts (the image at issue) to the law (the definition of "engaging in sexually explicit conduct" generally and "lascivious exhibition" specifically). Recently, the Court addressed the standard of appellate review for mixed questions, concluding that the answer "all depends—on whether answering it entails primarily legal or factual work." *Lakeridge*, 138 S. Ct. at 967. If the mixed question "involves developing auxiliary legal

principles of use in other cases—appellate courts should typically review a decision *de novo*." *Ibid.* (citation omitted). Conversely, if the "mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgements, and otherwise address what we have * * * called multifarious, fleeting, special, narrow facts that utterly resist generalization," then an appellate court "should usually review [such] a decision with deference." *Ibid.* (quotation marks omitted).

Under this standard, *de novo* review would be required even if the case did not implicate First Amendment concerns. Whether an image depicted a "lascivious exhibition" implicates more than who did what, where, and when; the question requires a court to interpret statutory language to determine what kinds of acts Congress meant to include and exclude, given the statutory text, structure, and context. And the raw materials—the underlying photos or videos—will usually be self-contained; the ultimate question is whether that discrete image or set of images depicts the type of conduct that Congress described in the Act.

In any event, this case implicates the First Amendment—child pornography is unprotected expression, but too broad a definition can punish speech that the First Amendment protects. As the First Circuit put it: In determining that an image depicts a "lascivious exhibition," "the district court helped define the limits of the largely unprotected category of child pornography." *Amirault*, 173 F.3d at 33. "This was a quintessential First Amendment ruling." *Id.*

As a matter of First Amendment law, this point is not new. For decades, this Court has stressed the need for an independent review of the record in cases implicating First Amendment rights. In *Bose Corp.* v. *Consumers*

Union of United States, Inc., 466 U.S. 485 (1984), the Court held that in defamation cases, appellate courts, "as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.* at 511. "[W]hether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection," the Court explained, "is not merely a question for the trier of fact." *Ibid.*

In deciding *Bose Corp.*, moreover, the Court relied on earlier cases addressing whether particular material was protected speech or unprotected obscenity or child pornography. See *id.* at 506–508. In the obscenity case of *Miller* v. *California*, the Court explained that the "prurient interest" and "patently offensive" inquiries were essentially factual, but still pointed to the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S. at 25. And in the landmark child-pornography case of *New York* v. *Ferber*, 458 U.S. 747 (1982), the defendant did not argue that the films at issue did "not fall squarely into the category of activity [that the Court has] defined as unprotected"; had he so argued, however, an "independent examination of the material [would be] necessary to assure [the Court] that the judgment here does not constitute a forbidden intrusion on the field of free expression." *Id.* at 774 n.28 (quoting *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 285 (1964)).

Then, there is Justice Stewart's classic description of obscenity: "I know it when I see it." *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Stewart did not say: "I know it when I read the district court's written summary of it and review the district court's conclusion for clear error." In fact, the Court in

Jacobellis "viewed the film," and then applied its precedent to "conclude that it is not obscene within the standards enunciated in *Roth* v. *United States* and *Alberts* v. *California*." 378 U.S. at 196. The Fourth Circuit erred by failing to do the same analysis here.

D. If there is any uncertainty about what standard of review the Fourth Circuit applied, the Court should grant, vacate, and remand for the court of appeals to identify the standard of review it applied and independently review the video.

If the Court remains uncertain whether the Fourth Circuit reviewed *de novo* or for clear error, "it would be inappropriate to assume away that ambiguity in respondent's favor." *Wellons* v. *Hall*, 558 U.S. 220, 225 (2010) (per curiam) (GVR). At a minimum, then, the Court should grant certiorari, vacate the judgment below, and remand the case. See, *e.g.*, *Jefferson* v. *Upton*, 560 U.S. 284, 293 (2010) (per curiam) (summarily vacating and remanding because "the Court of Appeals did not properly consider the legal status of the state court's factual findings); *Lawrence on behalf of Lawrence* v. *Chater*, 516 U.S. 163, 171 (1996) (per curiam) ("[W]e have GVR'd on the basis of a reasonable probability of a change in result in nonconfession of error cases."). The Court should instruct the Fourth Circuit, on remand, to (1) state explicitly whether it reviewed the district court's "lascivious exhibition" conclusion *de novo* or for clear error, and (2) independently review the video at issue as required by the First Amendment, see *Bose Corp.*, 466 U.S. at 511; *Ferber*, 458 U.S. at 774 n.28.

II. The Court should resolve the circuit split over whether and to what extent the "lascivious" inquiry turns on the defendant's subjective intent.

In upholding Courtade's conviction, the Fourth Circuit intensified a second circuit split, this one over the substantive standards governing whether an image depicts a "lascivious exhibition." The courts of appeals are split three ways over whether and to what extent a defendant's sexual motive informs whether a given exhibition was lascivious. And the Fourth Circuit, although purporting to not consider Courtade's subjective intent, focused primarily on what he did and why he did it, rather than on whether the minor engaged in a statutorily enumerated act.

A. The circuits are split three ways over the role (if any) of subjective intent.

The circuit courts are split three ways on whether and to what extent subjective intent may be considered. They are joined by many state appellate courts, including two state courts of last resort, who rely on federal precedent to interpret their parallel state child-pornography statutes.

1. The Seventh and Ninth Circuits, as well as the Tenth Circuit in an unpublished opinion, have held that courts may and should consider the subjective intent of the defendant or the creator of the depiction.

In *Wiegand*, the Ninth Circuit flatly rejected the defendant's argument that subjective intent was not relevant to the statutory definition. See 812 F.2d at 1244. Describing the district court's analysis, the Ninth Circuit opined that "[t]he standard employed by the district court was over-generous to the defendant in implying as to the 17-year-old girl that the pictures would not be lascivious unless they showed sexual activity or willingness to engage in it." *Ibid.*

The Seventh and Tenth Circuits have also considered subjective intent, upholding wide-ranging inquiries into the defendant's conduct and motives. In *Schuster*, the Seventh Circuit pointed to the defendant's "intent and motive in photographing the boy in that specific way" and, more generally, his "addiction to child pornography" and "sexual interest in young boys." 706 F.3d at 808. And in *Helton*, the Tenth Circuit cited *Wiegand* approvingly and noted, as evidence of the defendant's sexual motive, the district court's finding (based on material found in the defendant's home and car) that the defendant "had an extreme interest in visual depictions of female underpants." 302 F. App'x at 849 (quotation marks omitted).

2. Other courts, such as the First and Eighth Circuits, look only for objective indicia of intent. For instance, in *United States* v. *Kemmerling*, 285 F.3d 644 (8th Cir. 2002), the Eighth Circuit "emphasize[d] that the relevant factual inquiry in this case is not whether the pictures in issue appealed, or were intended to appeal, to [the defendant's] sexual interests but whether, on their face, they appear to be of a sexual character." *Id.* at 646. Similarly, in *Amirault*, the First Circuit held that "the focus should be on the objective criteria of the photograph's design." 173 F.3d at 34–35.

3. A third group of circuits, joined in this case by the Fourth Circuit, has tried to split the difference.

Although the Fourth Circuit purported to ground its analysis in "the video itself" and disavowed any "probing of Courtade's subjective intent or any sustained examination of his motives," App., *infra*, 14a, the court's analysis did in fact probe Courtade's motives and examine his subjective intent. The video's "images and audio," said the court, "reveal[] deceit, manipulation, and the careful directing and filming of a young girl resulting in footage of her breasts and genitals" and "make clear that the video's

purpose was to excite lust or arouse sexual desire in the viewer." *Ibid.* The court's motive inquiry focused on the video rather than outside evidence, but it was a motive inquiry all the same.

The Sixth Circuit applies a similar approach. Under its "limited context" test, the court allows some evidence of subjective intent—"the context in which the images were taken"—but forbids motive evidence that is not "directly related to the taking of the images." *United States* v. *Brown*, 579 F.3d 672, 683 (6th Cir. 2009).

Although drawing a somewhat different line, the Second Circuit also considers some but not all evidence of the defendant's subjective intent. In the Second Circuit, the photographer's subjective intent "can be relevant to whether a video or photograph is child pornography"—but "should be considered * * * only to the extent that it is relevant to the jury's analysis of the five other [*Dost*] factors and the objective elements in the image." *United States* v. *Spoor*, 904 F.3d 141, 150, 151 (2d Cir. 2018).

4. Relying on federal cases and language, state high courts have likewise disagreed about whether to consider motive or intent when applying state statutes using similar or identical language.

In *State* v. *Whited*, 506 S.W.3d 416 (Tenn. 2016), the Tennessee Supreme Court interpreted "lascivious exhibition," and "look[ed] particularly to federal caselaw for guidance in 'lascivious exhibition' cases." *Id.* at 426. In that case, the defendant hid a phone camera under the bathroom mirror, "apparently to capture onscreen as much of [his daughter's] body as possible as she entered and exited the shower"; the girl was "at times seen fully nude, from the back, from the front, and in profile"; "[h]er bare breasts, buttocks, and pubic area [were] intermittently visible as she turns on the shower, enters and exits the shower." *Id.* at 442. Despite the defendant's obvious

sexual motive, however, the video did not depict a "lascivious exhibition" because "the victims are engaged in normal, everyday activities for the setting, such as showering and changing clothes" and "[t]he recorded interactions with the victims are ordinary and do not enhance the sexuality of the video depictions." *Id.* at 446.

Even more recently, the Tennessee Supreme Court rejected an argument similar to the one adopted by the Fourth Circuit in this case: The video at issue did not depict a "lascivious exhibition," held the court, despite the defendant's "careful placement of the camera," "extensive staging," and "presence and conduct in the video." *State* v. *Hall*, No. M201502402SCR11CD, 2019 WL 117580, at *14, *15–16 (Tenn. Jan. 7, 2019) (quotation marks omitted). The defendant's staging showed that he "intended to video the Victim in the nude while changing clothes," but it did not make the exhibition itself any more "lascivious." *Id.* at *14.

On the other side of the split is the Kentucky Supreme Court. In interpreting its state statute, the court sided with the federal appeals courts who consider motive or subjective intent: The court considered "more persuasive" the federal decisions evaluating "the photographer's intent[,] and the intended reaction of the expected viewer, in determining whether a particular performance was a 'lewd exhibition.'" *Purcell* v. *Commonwealth*, 149 S.W.3d 382, 391–92 (Ky. 2004).

Needless to say, this motive-based inquiry "has been the subject of significant controversy" and courts "are sharply split." *Whited*, 506 S.W.3d at 434. Now, the Fourth Circuit's decision has made that split even more pronounced.

B. The question is important and this case presents an excellent vehicle in which to answer it.

Given the confusion over whether and to what extent subjective intent matters, it is essential for the Court to resolve this question.

1. For decades, the same conduct may be a federal sex crime in one state and not a federal sex crime in another state. These divergent standards not only affect ultimate questions of guilt or innocence, but they also impede plea bargaining and make it harder for lawyers to advise their clients pretrial. This case reflects these problems: Courtade's trial counsel initially believed that the video did not violate the statute and confidently moved to dismiss; then changed his mind and deemed the dismissal motion a "dead-end" (C.A. App. A577) after the prosecutor sent him cases from other circuits.

2. Many states also rely on federal decisions interpreting the federal child pornography statute to inform their own laws, which are often phrased identically.[3] This reliance has, in turn, created a division over the issue of motive that parallels the federal circuit split.

For example, the Fourth Circuit's analysis and outcome here diverges from Virginia state courts' interpretation of nearly identical language in the Virginia state

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[3] See, *e.g.*, *State* v. *Bolles*, 541 S.W.3d 128, 139 (Tex. Crim. App. 2017) ("We may also turn to case law—both state and federal—for assistance in interpreting the meaning of ['lewd exhibition']."); *State* v. *Cerna*, 522 S.W.3d 373, 379 (Mo. Ct. App. 2017) ("[N]o Missouri case has construed the term in conjunction with this statute; however, numerous federal cases have applied the term to a similar federal statute, and we find those cases instructive."); *Whited*, 506 S.W.3d at 426 ("[W]e look particularly to federal caselaw for guidance in "lascivious exhibition" cases."); *Hood* v. *State*, 17 So. 3d 548, 555 (Miss. 2009) (adopting six-part *Dost* test used by many federal courts); *State* v. *Dubois*, 746 N.W.2d 197, 208 (S.D. 2008) (same); *State* v. *Saulsbury*, 498 N.W.2d 338, 344 (Neb. 1993) (same).

statute. Under Va. Code 18.2-374.1, depictions of child nudity are "sexually explicit" only if they are "lewd," *Asa* v. *Commonwealth*, 441 S.E. 2d 26, 29 (Va. Ct. App. 1994); "lewd" is treated as a synonym for "lascivious," *Dickerson* v. *City of Richmond*, 346 S.E. 2d 333, 336 (Va. Ct. App. 1986). Given these similarities, Virginia courts have relied on federal cases when interpreting the state statute. See, *e.g.*, *Foster* v. *Commonwealth*, No. 0369-87-2, 1989 WL 641956, at *2 (Va. Ct. App. Nov. 21, 1989) ("the six factors identified in [the federal *Dost* case] are germane to the proscriptions of our statute and provide an appropriate basis for gauging photographs under our statutory standard").

Yet Virginia's courts have reversed convictions based on depictions of child nudity even when the defendant's sexual motive was clear. See, *e.g.*, *Frantz* v. *Commonwealth*, 388 S.E. 2d 273, 274–76 (Va. Ct. App. 1990) (despite defendant's sexual motive in possessing them, child-pornography statute did not cover photos of naked underage boys because there was "no evidence that the boys assumed erotic or provocative poses"); *Asa*, 441 S.E. 2d at 29. Charged for the same conduct under a statute with the same language, a Virginia defendant like Courtade would likely be convicted in federal court but acquitted in state court.

That anomaly would result not from different choices made by the Virginia General Assembly and the United States Congress, but from courts' different understanding and application of federal precedents interpreting the same language. And it would encourage prosecutors to forum shop—transferring cases from state court to federal court to rely on more favorable decisions interpreting the same language. Indeed, Courtade originally was charged under Virginia's state law; he was indicted on federal

charges the day before his state-court trial; and the state charges were then dismissed. C.A. App. A3, A323.

4. Nor should the Court decline to review this case and resolve the split merely because the Fourth Circuit purported to be relying on objective factors rather than Courtade's motive or subjective intent. A disciplined and uniform interpretation of the Act turns on how the courts of appeals analyze the cases, not how they label their analysis. Cf. *eBay* v. *MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006) (although it "recited the traditional four-factor test," the district court did not "fairly appl[y] these traditional equitable principles in deciding respondent's motion for a permanent injunction"). And here, the court of appeals focused heavily if not exclusively on Courtade's motive and intent.

C. In relying on Courtade's motive and subjective intent, the decision below was incorrect.

The Fourth Circuit's reliance on Courtade's motive and intent was also incorrect. As discussed above, the court of appeals gleaned "lascivious exhibition" not from the shower itself but from the way that Courtade manipulated Doe into taking the shower. But a manipulation standard is not found in the statutory text.

Perhaps most significantly, in choosing a broader definition of "lascivious exhibition"—in which the same exhibition becomes legal or illegal depending on how that exhibition came about—the Fourth Circuit also did not address the canon of *noscitur a sociis*: "[A] word is known by the company it keeps." *Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015). Under this canon, the phrase "lascivious exhibition of the genitals" must be harmonized with the other forms of "sexually explicit conduct" preceding it: "sexual intercourse," "bestiality," "masturbation," and "sadistic or masochistic abuse." These are graphic

sexual terms, and a "lascivious exhibition" must be equally graphic.

The Court has recently and repeatedly applied *noscitur a sociis* to prevent the federal government from applying statutes, including criminal statutes, too broadly:

- In *Gustafson* v. *Alloyd Co.*, 513 U.S. 561 (1995), the Court interpreted the word "communication" in the Securities Act to mean a "public communication." Because the word was preceded by other examples of public communications, such as "notice, circular, [and] advertisement," it was "apparent that the list refer[red] to documents of wide dissemination." *Id.* at 575–76.
- In *Yates*, the Court held that the term "tangible object" referred "not to any tangible object"—such as a fish, as the government argued—but rather to "the subset of tangible objects involving records and documents, i.e., objects used to record or preserve information." 135 S. Ct. at 1085.
- In *Lagos* v. *United States*, 138 S. Ct. 1684 (2018), the Court interpreted "other expenses" in the criminal-restitution statute in light of the list of the preceding words—"lost income, child care, and transportation"—finding "both the presence of company that suggests limitation and the absence of company that suggests breadth." *Id.* at 1689.

These decisions foreclose the more freewheeling definition of "lascivious exhibition" used by the Fourth Circuit in this case. When it comes to "sexual intercourse" (or "bestiality" or "masturbation"), the act either takes place or it does not—a defendant's deceit or arousal (even if captured on video) does not create sexual intercourse where it did not already exist. And under *noscitur a sociis*, the same goes for determining whether the video showed "a minor engaging in" a "lascivious exhibition of the * * *

genitals[] or pubic area." 18 U.S.C. 2252(a)(4)(B)(i); *id.* § 2256 (2)(A)(v).

The Act's legislative history reinforces these textual and structural limits. The Senate Report, for example, explains that "'sexually explicit conduct' was more tightly drawn so as to include only those activities where the child was engaged in sexually-oriented acts." S. Rep. 95-438, at 13. Likewise, the House Report stated that "[i]t is also the intent of the conferees that the definition of 'sexually explicit conduct' be interpreted so as to apply only to conduct that is sexual in nature." H.R. Conf. Rep. 95-811, at 6.

Congress, to be clear, knew how to enact a broader ban: The voyeurism statute applies to anyone with "the intent to capture an image of a private area of an individual without their consent." 18 U.S.C. 1801. And Congress rejected a more flexible definition in the child-pornography law: When writing the Act, Congress rejected a proposal that would have broadly banned depicting child nudity "*for the purpose* of sexual stimulation or gratification of any individual who may view such depiction." S. Rep. 95-438, at 11 (emphasis added).

Finally, the district court noted that the video was "not innocent" and quoted a Ninth Circuit decision stating that a narrower, purely objective definition of "lascivious exhibition" would be "over-generous to the defendant." App., *infra*, 35a (quoting *Wiegand*, 812 F.2d at 1244). And the Fourth Circuit, in upholding the district court's conclusion, noted Courtade's "deceit" and "manipulation." *Id.* at 14a.

Courtade's conduct was disturbing and immoral, and he likely could have been prosecuted for violating one or more provisions of Virginia law. But Congress chose its words carefully. And as with enforcing vague laws, applying criminal statutes more broadly than written "hand[s]

off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and [leaves] people with no sure way to know what consequences will attach to their conduct." *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019). Congress may have defined "lascivious exhibition" narrowly to avoid First Amendment concerns, or to avoid routinely interfering with states' exercising their police power to enforce their own criminal laws. "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

With the circuit courts divided over how to apply the words that Congress wrote and how to review district-court decisions applying those words, the Court should review the case to restore uniformity and certainty to prosecutions under the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2019

APPENDIX

TABLE OF CONTENTS

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6150

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RYAN COURTADE,
Defendant-Appellant,

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW ADVANCED ADMINISTRATIVE LITIGATION CLINIC,
Amici Supporting Appellant.

Argued: April 2, 2019

Decided: July 3, 2019

Amended: July 10, 2019

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Rebecca Beach Smith, District Judge.
(2:15-cr-00029-RBS-LRL-1; 2:16-cv- 00736-RBS)

Before GREGORY, Chief Judge, and KING, Circuit Judge.[1]

Affirmed by published opinion. Chief Judge Gregory wrote the opinion, in which Judge King joined.

GREGORY, Chief Judge:

Appellant Ryan Courtade seeks post-conviction relief in connection with his guilty plea for possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The district court denied Courtade's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Finding no error, we affirm the judgment of the district court.

I.

In August 2014, investigators with the Chesapeake Police Department received a complaint from Courtade's wife alleging that she had discovered Courtade in the bedroom of Jane Doe, his 14-year-old stepdaughter, kneeling by the bed with his hands underneath the sheets while she was asleep. When the police arrived at the residence, an officer found Courtade inside his car breaking a CD. The officer asked Courtade what was on the CD, and he responded that there was "a video of Jane Doe, naked and in the shower." A member of the U.S. Navy who had served as a combat photographer, Courtade said that he had instructed Jane Doe to take the camera—a GoPro video camera belonging to the Navy—into the

[1] Judge Thacker was unable to participate in oral argument. The decision is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

shower with her "to see if the camera was waterproof." With Courtade's consent, the police then seized computers and other equipment from the residence. On a laptop was a 24-minute video of Jane Doe showering.

According to a Statement of Facts that Courtade signed, the video begins with Courtade turning on the camera and placing it on the bathroom counter facing the shower. Courtade speaks with Jane Doe and then leaves, at which point Jane Doe "undresses completely, gets in the shower, closes the shower curtain, and turns on the shower." Jane Doe then calls for Courtade, who reenters the bathroom and hands her the camera over the shower rod. Jane Doe holds the camera under the water before returning it to Courtade, who reviews the camera and hands it back to Jane Doe with instructions to put it on the shower floor. Jane Doe complies and then gives the camera back to Courtade. Courtade again places the camera on the bathroom counter facing the shower and leaves the bathroom. Jane Doe "peeks out at the camera a few times," and then exits "at the far end of the shower, drops to the floor, and crawls out of the view of the camera below the countertop." She reappears at the other side of the camera's frame, "dries off, gets dressed," and leaves the bathroom. During the video, Jane Doe's "breasts and genitals are visible at various points."

In March 2015, a grand jury returned a two-count indictment against Courtade, and a superseding indictment followed. Count One charged Courtade with production of child pornography in violation of 18 U.S.C. § 2251(a), and Count Two charged him with possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). In July 2015, the government offered Courtade a plea deal on Count Two, which carried no mandatory minimum and a

10-year statutory maximum. Count One had a 15-year mandatory minimum and a 30-year statutory maximum. As the government explained, it was offering this plea deal to prevent Jane Doe from having to testify.

In August 2015, Courtade's counsel filed a series of pretrial motions, including a motion to dismiss the indictment. Counsel argued principally that the video of Jane Doe showering did not depict a minor engaging in "sexually explicit conduct" within the meaning of the statute. As relevant here, that term is defined as the "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v). Counsel reasoned that the statutory definition is not met because "[t]he alleged victim in this video is simply showering"—she is "never involved in any provocative or sexually-themed poses or actions," and although her pubic area is visible at times, the video "is filmed in its entirety in a fixed-zoom manner that is never adjusted to aim for a specific portion or private region of [her] body." In sum, the video "merely depicts nudity, and not sexually explicit conduct."

Despite moving to dismiss the indictment, Courtade's counsel eventually took a different position on the case's merits after doing more research and talking with the government's lawyers. Specifically, counsel testified that the government pointed him to cases outside the Fourth Circuit that evaluated the "mindset of the defendant" in making the video in addition to assessing the content of the video itself—case law that "caused [him] some greater concern as to the validity of the motion that [he] had filed," especially because the Fourth Circuit had no precedent on the meaning of "lascivious exhibition." And if the motion to dismiss and the other pretrial motions

were denied, counsel testified, potentially "a lot of damaging evidence [] was going to come into trial in this case." For these reasons, counsel concluded that the motion to dismiss "was essentially a no go" and "felt that the plea was the best option" for Courtade. Counsel explained this reasoning to Courtade, advised him that the Jane Doe video met the definition of "sexually explicit conduct," and told him that he was guilty of the charged offense.

Courtade pleaded guilty to one count of possession of child pornography, and a magistrate judge accepted the plea agreement at a hearing held on August 25, 2015. As part of the agreement, Courtade "waive[d] the right to appeal the conviction and any sentence within the statutory maximum . . . (or the manner in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatsoever." Courtade also stipulated to the Statement of Facts describing the circumstances of his arrest and the contents of the video.

In December 2015, the district court held a sentencing hearing. The court noted that Courtade's Sentencing Guidelines range was 210–262 months, a range that exceeded the 10-year statutory maximum for the possession charge to which he pleaded guilty. The court then sentenced Courtade to the 10-year term, along with lifetime supervised release, and dismissed the production charge. No direct appeal was taken.

On December 22, 2016, Courtade, with new counsel, filed a motion under 28 U.S.C. § 2255 alleging the following grounds for relief. First, he claimed that he pleaded guilty to conduct that is not criminal under 18 U.S.C. § 2252(a)(4)(B) because the video does not show a minor engaging in "sexually explicit conduct" as defined in 18 U.S.C. § 2256(2)(A). Second, Courtade argued that his

guilty plea was not voluntary and intelligent because he did not understand that the conduct to which he pleaded guilty was not criminal. Third, he alleged that the district court violated Federal Rule of Criminal Procedure 11(b)(3) by failing to determine a proper factual basis for his guilty plea. And fourth, Courtade contended that counsel provided ineffective assistance, including by failing to consult with him about an appeal.

Attached to the § 2255 motion were several exhibits. As relevant here, Courtade attached as an exhibit a transcript of the audio from the Jane Doe video. That transcript reveals two more facts important to our analysis. First, at the beginning of the video, Courtade lies to Jane Doe and tells her that the camera "is off" and "can't record you." *See Courtade v. United States*, No. 16-cv-736, 2017 WL 6397105, at *2 (E.D. Va. Dec. 13, 2017). Second, Courtade induces Jane Doe to film herself by promising her ice cream as a reward after her shower.[2] *Id.* at *2–3.

On December 13, 2017, the district court issued an order denying the § 2255 motion. *See id.* at *15. The court rejected Courtade's first three grounds for relief as procedurally defaulted because he failed to file a direct appeal and could not satisfy the actual innocence exception to procedural default. *Id.* at *5–10. The court held in particular that Courtade was not actually innocent because the video of Jane Doe does in fact depict "sexually explicit conduct" in portraying a "lascivious exhibition of the

[2] As the government states, the Presentence Report ("PSR") contains additional facts concerning Courtade's conduct. The district court acknowledged the existence of these facts but declined to rely on them in denying the § 2255 motion. *See Courtade*, 2017 WL 6397105, at *7 n.5.

anus, genitals, or pubic area."[3] 18 U.S.C. § 2256(2)(A)(v). Turning to the ineffective assistance ground for relief, the court rejected this claim as well, holding that counsel was not ineffective for failing to consult with Courtade about filing an appeal. See Courtade, 2017 WL 6397105, at *11–14. The court thus denied the motion in full.

Courtade timely appealed. In November 2018, this Court granted a certificate of appealability on (1) whether Courtade was actually innocent of possession of child pornography and (2) whether counsel provided ineffective assistance by failing to consult with Courtade about nonfrivolous grounds for appeal.

II.

A.

On appeal, Courtade first contends that he is actually innocent of possession of child pornography because the video of Jane Doe showering does not depict a minor engaging in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(4)(B). And because he is actually innocent, Courtade argues, his procedural default should be excused and his guilty plea deemed invalid and vacated. *See Bousley v. United States*, 523 U.S. 614, 622 (1998) (holding that a defendant may raise a procedurally defaulted claim if he can demonstrate actual innocence).

Before taking up Courtade's actual innocence claim, we address briefly arguments from the government

[3] The court also denied the first three grounds for relief on the merits to the extent they asserted or relied on the claim that Courtade's conduct was not criminal under 18 U.S.C. § 2252(a)(4)(B). *See Courtade*, 2017 WL 6397105, at *10. And the court denied a "jurisdictional" challenge that Courtade brought for similar reasons. *Id.* at *11.

about why Courtade should not be permitted to make such a claim in the first place. None of these arguments has merit.

The government first argues that Courtade cannot bring an actual innocence claim under *Bousley* because his claim depends on the construction of a statute and he has failed to identify any "new, binding precedent [that] has changed the law applicable to the statute of conviction," a requirement for such a claim. As even the government recognizes, however, this Court has previously entertained actual innocence claims on the merits where the claims turned on issues of statutory construction and there was no intervening change in the law. *See United States v. Fugit*, 703 F.3d 248, 253–54 (4th Cir. 2012) (addressing merits of actual innocence claim where petitioner argued that the district court erred in construing the statute of conviction to encompass the conduct admitted in the guilty plea); *see also United States v. Burleson*, 815 F.3d 170, 176 (4th Cir. 2016) (finding petitioner actually innocent where he pleaded guilty to a felon-in- possession charge in 2013 but we determined—based on our reading of the relevant statute and a 1992 decision from this Court—that his prior convictions failed to qualify as predicates necessary to sustain the conviction). We thus reject the government's argument in this regard.

The government also contends that Courtade cannot pursue his actual innocence claim because his guilty plea itself bars such a claim and so does the appellate waiver in the plea agreement. Our case law again indicates otherwise. *See Fugit*, 703 F.3d at 253–54 (addressing actual innocence claim on the merits despite a guilty plea and no intervening change in the law); *see also United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (stating that

"[w]e will refuse to enforce an otherwise valid [appeal] waiver if to do so would result in a miscarriage of justice" and explaining that a cognizable claim of actual innocence meets this standard and compels the conclusion that the § 2255 motion falls outside the waiver's scope). The government thus cannot successfully argue that the guilty plea or appeal waiver bars Courtade's claim.

We turn now to the merits of the § 2255 motion. To establish that he is actually innocent of possession of child pornography, Courtade "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327–28 (1995)) (internal quotation marks omitted). Actual innocence "means factual innocence, not mere legal insufficiency." *Id.*

Courtade's actual innocence claim turns ultimately on our interpretation of 18 U.S.C. § 2252(a)(4)(B), the statute of conviction. That statute criminalizes in relevant part "knowingly possess[ing] . . . 1 or more [matters] . . . which contain any visual depiction . . . which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if (i) the producing of such visual depiction involves the use of a *minor engaging in sexually explicit conduct*; and (ii) such visual depiction is of such conduct." 18 U.S.C. § 2252(a)(4)(B) (emphasis added). "Sexually explicit conduct" is defined as "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) *lascivious exhibition of the anus, genitals,*

or pubic area of any person." 18 U.S.C. § 2256(2)(A) (emphasis added). The question in this case is whether the video of Jane Doe depicts a "lascivious exhibition of the anus, genitals, or pubic area" under the statute.

We begin with the statutory text. *See Chris v. Tenet*, 221 F.3d 648, 651 (4th Cir. 2000) ("Statutory interpretation necessarily begins with an analysis of the language of the statute."). As an initial matter, we agree with Courtade that the statute by its terms "requires more than mere nudity, because the phrase 'exhibition of the genitals or pubic area' . . . is qualified by the word 'lascivious.'" *United States v. Villard*, 885 F.2d 117, 124 (3d Cir. 1989) (citation omitted); *see also United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999) (explaining that "the statute requires more than mere nudity"). Based on the statutory language, then, that Jane Doe appears nude in the video cannot suffice to prove that the video meets the statutory definition. If that were so, the word lascivious would become superfluous. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (courts must give effect to every provision of a statute).

This Court has no precedent interpreting the term "lascivious exhibition" as used in § 2256(2)(A)(v). "When analyzing the meaning of an undefined statutory term, 'we must first determine whether the language at issue has a plain and unambiguous meaning.'" *Fugit*, 703 F.3d at 254 (quoting *Chris*, 221 F.3d at 651). According to *Webster's*, "lascivious" means "inclined to lechery: lewd, lustful" or "tending to arouse sexual desire: libidinous, salacious." *Webster's Third New International Dictionary* 1274 (2002); *see also Black's Law Dictionary* 1013 (10th ed. 2014) (defining the term as "tending to excite lust;

lewd; indecent; obscene"). And "exhibit" means "to present to view: show, display" or "to show publicly: put on display in order to attract notice to what is interesting or instructive or for purposes of competition or demonstration." *Webster's Third* at 796. Taken together, these definitions indicate that "lascivious exhibition" means "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." *United States v. Knox*, 32 F.3d 733, 745 (3d Cir. 1994) (citing *Webster's* and *Black's Law*).

Many courts, recognizing that applying the term "lascivious exhibition" is not always easy, have looked to the six factors articulated in *United States v. Dost* as guideposts in determining whether conduct meets the statutory definition. 636 F. Supp. 828, 832 (S.D. Cal. 1986) (explaining that the factors are neither controlling nor exhaustive). As Courtade points out, however, the *Dost* factors have been subject to criticism over the years. *See, e.g., United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006) (observing that the factors "have fostered myriad disputes that have led courts far afield from the statutory language"). Particularly divisive has been the sixth factor, which potentially implicates subjective intent and asks whether the depiction is intended or designed to elicit a sexual response in the viewer.[4] *See United States*

[4] The other factors are: (1) whether the depiction focuses on the child's genitalia or pubic area; (2) whether it is sexually suggestive, i.e., in a place or pose associated with sexual activity; (3) whether the child is depicted in an unnatural pose or inappropriate attire; (4) whether the child is clothed or nude; and (5) whether the depiction suggests sexual coyness or a willingness to engage in sexual activity. *Dost*, 636 F. Supp. at 832.

v. Brown, 579 F.3d 672, 682–83 (6th Cir. 2009) (explaining that "[s]ome courts have accepted arguments that lasciviousness should be determined from the image alone" and "[o]ther courts have explicitly avoided the question"). Courtade indeed argues at length that his subjective intent or motive in creating the video is irrelevant to our analysis, and that considering his intent would be at odds with the statutory language and would raise concerns under the Due Process Clause and the First Amendment.

In this case, we need not venture into the thicket surrounding the *Dost* factors or define the parameters of any subjective-intent inquiry, because we can dispose of this case based on the objective characteristics of the video alone. The plain meaning of "lascivious exhibition" requires that we ask whether the video depicts Jane Doe's genitals or pubic area "in order to excite lustfulness or sexual stimulation in the viewer." *Knox*, 32 F.3d at 745. Here, the video's objective characteristics—the images and audio contained within its four corners, irrespective of Courtade's private subjective intentions—reveal the video's purpose of exciting lust or arousing sexual desire within the plain meaning of "lascivious exhibition."

Far from depicting merely a girl showering, drying off, and getting dressed, the video contains extensive nudity—including shots of her breasts and genitals—that is entirely the product of an adult man's deceit, manipulation, and direction as captured in the video.[5] As the dis-

[5] The district court reviewed the video in camera and made these factual findings, which we review for clear error. *See United States v.*

trict court found, Courtade tricks Jane Doe into undressing by lying to her about wanting to "test" whether the camera is waterproof—a test he could have conducted himself by (for example) holding the camera under a running tap. *Courtade*, 2017 WL 6397105, at *9 & n.10.[6] Courtade lies to Jane Doe again by reassuring her—before she begins showering—that the camera is off and cannot record her. *Id.* Once Jane Doe takes the camera in the shower, Courtade directs her on how to hold and position it, ensuring that the camera records her nude body. *See, e.g.*, *id.* at *8 (directing her to "hold [the camera] like arm's length in front of you . . . so the back is away from you"); *id.* (instructing her to "set it back down on the [shower] floor there," where it continues recording her shower). Courtade himself also takes an active role in filming Jane Doe's nude body, at one point holding the wide-angle camera above the shower rod—long after he has "tested" the waterproof quality of the camera—and deliberately angling the camera lens down in such a way as to capture even more footage of Jane Doe's breasts and genitals. *See id.* And while Jane Doe is showering, moreover, Courtade can be heard promising her ice cream as a reward for testing the camera. *See id.* at *9.

On its face, then, the video depicts not simply a young girl nude in the shower. Its images and audio reveal a young girl deceived and manipulated by an adult man into

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Roane, 378 F.3d 382, 395 (4th Cir. 2004). The court also based its findings on the Statement of Facts and the audio transcript of the video that was attached to the § 2255 motion.

[6] As the district court further observed, Courtade leaves the camera on to continue recording Jane Doe in the shower even after his test has ended. *See id.* at *8 & n.8.

filming herself nude in the shower, and methodically directed to do so in a way that ensures she records her breasts and genitals. *See United States v. Ward*, 686 F.3d 879, 883–84 (8th Cir. 2012) ("When a photographer selects and positions his subjects, it is quite a different matter from the peeking of a voyeur upon an unaware subject pursuing activities unrelated to sex." (citation omitted)). The video also reveals an adult man himself filming a teenage girl's breasts and genitals as she showers. Under these circumstances, we are satisfied that the video objectively depicts a "lascivious exhibition" because the images and audio—revealing deceit, manipulation, and the careful directing and filming of a young girl resulting in footage of her breasts and genitals—make clear that the video's purpose was to excite lust or arouse sexual desire in the viewer. *See Knox*, 32 F.3d at 745.[7] This conclusion requires no probing of Courtade's subjective intent or any sustained examination of his motives; it follows from the video itself, and would thus be apparent to any reasonable viewer.

On this record, therefore, Courtade has failed to show that "it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (quoting *Schlup*, 513 U.S. at 327–28). A reasonable jury

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[7] *Cf. Amirault*, 173 F.3d at 30, 33–34 (finding no lascivious exhibition where the depiction had been downloaded from the internet and was "a photograph of a young naked female, probably a teenager," standing "face forward, in a hole in the sand, with her feet below the ground" and with her pubic area visible at the bottom of the photo); *Villard*, 885 F.2d at 123–25 (finding no lascivious exhibition where "closein" photographs showed a young boy lying naked on a bed with his eyes closed, his knees "bent slightly upwards," and a "three quarters erection").

indeed could have found that the Jane Doe video depicts a "lascivious exhibition of the anus, genitals, or pubic area" and convicted Courtade of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). For this reason, Courtade's actual innocence claim fails, and his first three grounds for relief are procedurally barred.

B.

Courtade separately contends that plea counsel provided ineffective assistance by failing to consult with him about filing an appeal. This claim is not subject to procedural default. *See Massaro v. United States*, 538 U.S. 500, 503–04 (2003).

In *Roe v. Flores-Ortega*, the Supreme Court held that counsel has a constitutional duty to consult with a defendant about an appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. 470, 480 (2000). Before this Court, Courtade argues only that counsel was constitutionally deficient in failing to consult with him because a rational defendant would have wanted to appeal given the nonfrivolous argument that his conduct did not constitute a crime.[8] *See Bostick v. Stevenson*, 589 F.3d 160, 167 n.9

[8] Courtade unsuccessfully argued the second prong before the district court—that he tried to speak with counsel about appealing—but he does not press that argument before this Court. It is thus forfeited. *See United States v. Robinson*, 744 F.3d 293, 298 (4th Cir. 2014) (distinguishing waiver from forfeiture and defining forfeiture as "the failure to make the timely assertion of a right" (citation omitted)). Even if we were to address the argument, however, the district court committed no error in finding that the record does not support Courtade's

(4th Cir. 2009) (ground for appeal need not prove meritorious to be nonfrivolous).

Under the circumstances of this case, Courtade cannot show that a rational defendant in his position would have wanted to appeal.[9] *See Flores-Ortega*, 528 U.S. at 480 (stating that "[o]nly by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal"); *see also United States v. Cooper*, 617 F.3d 307, 313–14 (4th Cir. 2010). Courtade pleaded guilty and executed a broad appellate waiver, and he otherwise indicated a desire for the proceedings to end, including through providing a written statement (as reflected in the PSR) that "I truly hope that my acceptance of responsibility and my plea of guilty to this offense will assist in the healing process for all who have been impacted by my conduct." *See Flores-Ortega*, 528 U.S. at 480 (explaining that "a highly relevant factor" in the inquiry is whether the defendant pleaded guilty "both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings"); *see also id.* (stating that "the court must consider . . . whether the plea expressly reserved or waived some or all appeal rights").

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assertion that he reasonably demonstrated to his attorneys that he was interested in appealing. *See Courtade*, 2017 WL 6397105, at *14.

[9] We note that Courtade's appellate waiver does not bar him from making this showing. *See United States v. Poindexter*, 492 F.3d 263, 271 (4th Cir. 2007) (explaining that "an attorney in an appeal waiver case still owes important duties to the defendant," including the duty to consult with him about an appeal under *Flores-Ortega*); *see also Adams*, 814 F.3d at 182 (declining to enforce appeal waiver where petitioner alleged actual innocence).

In return for his plea, moreover, Courtade received dismissal of the more serious production charge, which carried a 15-year mandatory minimum and a 30-year maximum. *See id.* (court must consider "whether the defendant received the sentence bargained for as part of the plea"). Courtade's guilty plea also spared Jane Doe from having to testify, another significant consideration in determining whether a defendant in his position would have wanted to appeal.

For these reasons, and where counsel properly advised Courtade of the risks of going to trial given the unfavorable case law and Courtade understood these risks (foremost among them losing his plea deal), we conclude that Courtade has failed to show that a defendant in his position would have wanted to appeal. Counsel was therefore not constitutionally deficient in failing to consult with Courtade about taking an appeal, and his ineffective assistance claim fails.

III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

FILED: November 6, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6150
(2:15-cr-00029-RBS-LRL-1; 2:16-cv-00736-RBS)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RYAN COURTADE,
Defendant-Appellant.

CORRECTED ORDER

Ryan Courtade seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion. We grant a certificate of appealability on the following issues:

(1) Whether Courtade is actually innocent of possession of child pornography and, if so, whether Courtade's guilty plea is invalid; and

(2) Whether plea counsel rendered ineffective assistance by failing to consult Courtade about nonfrivolous grounds for appeal.

The Clerk's Office will issue a final briefing order by separate order. See 4th Cir. R. 22(a).

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

RYAN COURTADE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CIVIL NO. 2:16cv736
[ORIGINAL CRIMINAL NO. 2:15cr29]

ORDER

For the reasons set forth in the court's Opinion, filed on December 13, 2017, the court declines to issue a certificate of appealability. The Clerk is **DIRECTED** to send a copy of this Order to the counsel for the Petitioner and to the United States Attorney at Norfolk.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith, Chief Judge
REBECCA BEACH SMITH
CHIEF JUDGE

December 29, 2017
Nunc pro tunc December 13, 2017

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

RYAN COURTADE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CIVIL NO. 2:16cv736
[ORIGINAL CRIMINAL NO. 2:15cr29]

OPINION

This matter is before the court on the Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion"), and incorporated Memorandum, filed by counsel on December 22, 2016. ECF No. 51. The court issued an order requiring the government to respond on January 18, 2017. ECF No. 53. Subsequently, the United States sought discovery from the Petitioner's former counsel. ECF No. 54. That motion was granted in accordance with the protective order issued in the court's Memorandum Order of March 20, 2017. ECF No. 66. The affidavits of the Petitioner's former counsel, with attached exhibits, were filed under seal on April 19, 2017. ECF Nos. 71, 72.

The United States filed a Response in Opposition to the Motion on May 19, 2017. ECF No. 76. The Petitioner filed his Reply on June 5, 2017. ECF No. 79. On July 20,

2017, the court ordered the United States to file, under seal, the original video at issue in this case, so that the court could conduct an in camera review of the video. ECF No. 82. On July 28, 2017, the court granted the Petitioner's request for an evidentiary hearing. ECF No. 84. On October 16, 2017, prior to the evidentiary hearing, the Petitioner filed a letter that included supplemental authority for the court's consideration. ECF No. 88. At the evidentiary hearing on October 17, 2017, the court set a deadline at October 20, 2017, at 5:00 P.M., for the parties to file any additional materials for the court to consider. ECF No. 89. On the evening of October 20, 2017, the Petitioner filed Proposed Findings of Fact and Conclusions of Law. ECF No. 90. The Motion is now ripe for review.

I. FACTUAL AND PROCEDURAL HISTORY

On May 20, 2015, a grand jury returned a two-count Superseding Indictment against the Petitioner. Count One charged the Petitioner with Production of Child Pornography, in violation of 18 U.S.C. §§ 2251(a), (e), and 2256(2). ECF No. 13 at 1. Count Two charged the Petitioner with Possession of Child Pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). Id. at 2. On August 25, 2015, the Petitioner, appearing with counsel, pleaded guilty to Count Two. ECF Nos. 26, 27. The Petitioner, under oath, and the government agreed to a "Statement of Facts," which described the following foundations for the Petitioner's guilty plea:

On August 5, 2014, the Petitioner was found in the bedroom of Jane Doe, a young teenager, kneeling by her bed with his hands underneath the sheets. Statement of Facts ¶ 3, ECF No. 28. Jane Doe was asleep at the time. Id. When local police arrived on the scene, they found the

Petitioner in his car, breaking a CD. Id. ¶ 4. When questioned about the contents of the CD, the Petitioner informed the police that it was a video of Jane Doe naked and in the shower, made with a GoPro video camera belonging to the United States Navy. Id. The Petitioner "stated he had Jane Doe take the camera in the shower to see if the camera was waterproof." Id. A forensic review of the Petitioner's computer revealed a twenty-four minute video of Jane Doe. Id. ¶ 6.

> In the video, COURTADE is seen turning on the video camera and then placing the camera on the bathroom counter facing the shower with Jane Doe in view. COURTADE talks to Jane Doe and then leaves. Jane Doe undresses completely, gets in the shower, closes the shower curtain, and turns on the shower. Jane Doe then calls for COURTADE, who comes back into the bathroom, hands her the camera over the shower rod, and Jane Doe runs the camera under the water for a little while. Jane Doe hands the camera back to COURTADE, COURTADE reviews the camera, and hands the camera back to Jane Doe and tells her to put it on the floor of the shower. Jane Doe follows the instruction, and then gives it back to COURTADE. COURTADE then places the camera, still on, back on the counter of the bathroom facing the shower and exits the bathroom. Jane Doe peeks out at the camera a few times, then gets out at the far end of the shower, drops to the floor, and crawls out of

> the view of the camera below the countertop. Jane Doe reappears on the other side of the camera's view, dries off, gets dressed and exits the bathroom. During the video, Jane Doe's breasts and genitals are visible at various points.

Id. In the Plea Agreement, which the Petitioner signed and confirmed under oath at the plea agreement hearing, ECF No. 26, he stated that he (1) "will plead guilty because [he] is in fact guilty of the charged offense," (2) "admits the facts set forth in the statement of facts filed with this plea agreement[,] and [(3)] agrees that those facts establish guilt of the offense charged beyond a reasonable doubt." Plea Agreement ¶ 3, ECF No. 27.

The Petitioner also attached a transcript of the audio from the video to his Motion as Exhibit 3:

> Beginning
>
> {COURTADE starts video, showing his face. He places it on the bathroom counter facing the shower, the wide angle lens shows the entire bathroom. He says something here that is covered by noise from movement.}
>
> :11 to :39
>
> COURTADE: Unclear until "... this is off, [unclear], can't record you. You want to take this out and do this myself I will. It's all up to you. You cool?
>
> VIC: Yeah.
>
> COURTADE: So just holler at me in a minute, when you get in the shower, gonna hand it to you, can you do that?

VIC: 'Kay.

COURTADE: [unclear due to VIC tapping on counter] You cool?

VIC: Um-hm.

COURTADE: You gonna need a minute, or you need to use the bathroom?

VIC: I just need a minute.

COURTADE: Okay.

{COURTADE exits bathroom, shutting door. From :40 to 1:44, VIC undresses, starts water, turns on shower, and gets in}

1:46 to 2:47

VIC: [sealed][1]

COURTADE: (through door) You ready?

VIC: Yeah!

COURTADE: Ready?

VIC: Yeah!

{COURTADE reenters bathroom}

COURTADE: You good?

VIC: Yeah.

{COURTADE picks up camera, hands it over shower curtain to VIC}

COURTADE: So if you hold it like right in front of you, and hold it under the water for a few minutes, then hand it back to me, so I can make sure no water's getting into it . . .

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[1] For privacy purposes, the victim's remark is placed under seal and attached hereto as Exhibit A.

VIC: Okay.

COURTADE: then just (garbled by noise) ... off ... hold it like arm's length in front of you ... (garbled by noise) ... so the back is away from you ... (garbled)

{VIC takes camera and puts it under the shower spray, gives it back.}

3:39 to 4:20

COURTADE: Yeah. I'm going to be over here for a second . . . { } Alright, it looks good. Doesn't look like any water's getting in there, {hands it back to VIC over curtain} Got it?

VIC: Yeah.

COURTADE: You need to set it back down on the floor there. {VIC puts camera on floor of shower, pointing up at her as she washes}

VIC: Like that? (barely audible over shower hitting camera)

(Shower runs over camera from 4:20 until 9:37)

9:37 to

VIC: (garbled by noise)

COURTADE: What's that?

VIC: (garbled by noise)

COURTADE: (garbled by noise) Will you, rinse it off?

VIC: Okay.

9:55 to 11:03

COURTADE: Hold it .... Out in front of you ... just a little bit ... (garbled) .... There.

10:10 begins tapping on the video recorder repeatedly, COURTADE speaks but is garbled until he says "There. Alright."

10:25

COURTADE: you ahhhh.... (garbled from brushing/tapping noises)

VIC: Yeah?

COURTADE: (garbled)

VIC: yeah.

COURTADE: (garbled) .... I have a surprise waiting for you downstairs.

VIC: (garbled)

COURTADE: It starts with i.c.e ....

VIC: i. c. e. ?

COURTADE: i.c.e.? What has i.c.e.c.r.e.a.m. in it?

VIC: Ice cream?

COURTADE: no.

VIC: (giggles) heehee, yeah.

(pause)

COURTADE: (unable hear name)

VIC: Ummhummm?

COURTADE: Hurry up, please.

VIC: Okay.

{COURTADE leaves at 11:04. No further dialog[ue].)

Mot. Ex. 3, ECF No. 51–1.

On December 18, 2015, the Petitioner was sentenced to one hundred twenty (120) months imprisonment. ECF No. 47. The Judgment was entered on December 21, 2015. ECF No. 48. The Petitioner did not appeal.

II. LEGAL STANDARDS

A prisoner may challenge a sentence imposed by a federal court, if (1) the sentence violates the Constitution or laws of the United States; (2) the sentencing court lacked jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum; or (4) the sentence "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). A sentence is "otherwise subject to collateral attack," if a petitioner shows that the proceedings suffered from "a fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962) (internal quotation marks omitted)). If the Petitioner is successful in making such a showing, the court may vacate, set aside, or correct the sentence. See 28 U.S.C. § 2255(b). However, if the motion, when viewed against the record, shows that the petitioner is entitled to no relief, the court may summarily deny the motion. Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970).

Further, once a defendant has waived or exhausted his appeals, the court is "entitled to presume he stands fairly and finally convicted." United States v. Frady, 456 U.S. 152, 164 (1982). Under the doctrine of procedural default, claims asserting errors, of fact or law,

> that could have been, but were not raised on direct appeal are barred from review under § 2255, unless the defendant [(1)] shows

> cause for the default and actual prejudice resulting from such errors or [(2)] demonstrates that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack.

United States v. Shelton, No. 1:04cr45, 2009 WL 90119, at *1 (W.D. Va. Jan. 14, 2009) (citing United States v. Mikalajunas, 186 F.3d 490, 492–93 (4th Cir. 1999)); see also Frady, 456 U.S. at 167–68. If alleging cause and prejudice, both must be present, and the absence of either is sufficient to deny the petitioner relief. See id. at 168 ("[W]e find it unnecessary to determine whether [the petitioner] has shown cause, because we are confident he suffered no actual prejudice."). Cause "must turn on something external to the defense, such as the novelty of the claim or a denial of effective assistance of counsel." Mikalajunas, 186 F.3d at 493 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). Prejudice cannot be "merely that the errors at [the] trial created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 456 U.S. at 170 (emphasis in original).

Alternatively, if alleging that "a miscarriage of justice would result from the refusal of the court to entertain the collateral attack, a movant must show actual innocence by clear and convincing evidence." Mikalajunas, 186 F.3d at 493 (citing Murray, 477 U.S. at 496). "To establish actual innocence, [the] petitioner must demonstrate that 'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" Bousley v. United States, 523 U.S. 614, 623 (1998) (quoting Schlup v.

Delo, 513 U.S. 298, 327–28 (1995)). Because "'actual innocence' means factual innocence, not mere legal insufficiency," Bousley, 523 U.S. at 623, and "resolving [actual innocence] claims on an artificially restricted record would eviscerate the critical systemic interest in finality," United States v. Fugit, 703 F.3d 248, 257 (4th Cir. 2012), the court is not limited to the stipulated facts that typically accompany a plea agreement or colloquy. Rather, the court can look to the entire universe of admissible evidence. See Bousley, 523 U.S. at 624 (stating the government can "present any admissible evidence of [the] petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy"); Schlup, 513 U.S. at 328 (stating that "[t]he habeas court must make its determination concerning the petitioner's innocence in light of all of the evidence . . ." (internal quotation marks and citation omitted)); Fugit, 703 F.3d at 256–58 (reasoning that facts contained in a presentence report, conceded to by the defendant in open court and used by the trial judge as the basis for sentencing, are firmly within the realm of admissible evidence).

III. ANALYSIS

The Petitioner alleges five grounds for relief in his Motion:[2]

Ground One: the charged conduct is not criminal under 18 U.S.C. § 2252(a)(4) (B), because the video at issue in the indictment does not show a minor engaging in sexually explicit conduct, as defined in 18 U.S.C. § 2256(2);

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[2] For clarity, the Petitioner's Ground Four claiming ineffective assistance of counsel has been split into two separate grounds, for purposes of this Opinion.

Ground Two: the Petitioner's guilty plea was not voluntary and intelligent, because the Petitioner did not understand that the conduct to which he pleaded guilty was not criminal;

Ground Three: the District Court did not properly determine the factual basis for the Petitioner's guilty plea, as required by Rule 11 of the Federal Rules of Criminal Procedure;

Ground Four: the Petitioner's counsel provided ineffective assistance by advising him to plead guilty without informing him that his conduct was not criminal under the applicable statute;

Ground Five: the Petitioner's counsel provided ineffective assistance by failing to consult with him regarding whether to file an appeal.

Mot. at 4–10, 23–45. At the evidentiary hearing on October 17, 2017, ECF No. 89, the Petitioner withdrew Ground Four. See Proposed Findings of Fact and Conclusions of Law at 1 n.1, ECF No. 90. However, to the extent that Ground Four relates to, or relies on, the Petitioner's other claims, the court will consider it.

The United States argues that Grounds One, Two, and Three are procedurally defaulted, as the Petitioner could have raised them on direct appeal but did not. See Resp. at 9–12, ECF No. 76; see also Mikalajunas, 186 F.3d at 492–93; Frady, 456 U.S. at 167–68. The Petitioner argues that he can demonstrate "actual innocence" to overcome this default. Mot. at 4, 24. Therefore, the court must first determine whether Grounds One, Two, and Three are procedurally defaulted, or whether the Petitioner can successfully claim actual innocence.

A. Actual Innocence of Charged Conduct

The crime to which the Petitioner pleaded guilty provides for the punishment of any person who

> knowingly possesses . . . 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (ii) such visual depiction is of such conduct[.]

18 U.S.C. § 2252(a) (4) (B). The Petitioner argues that he is "actually innocent" of this crime because the video of Jane Doe does not show her engaging in "sexually explicit conduct," as that term is defined in 18 U.S.C. § 2256(2) (A). Mot. at 4, 25, 31–34. Pursuant to 18 U.S.C. § 2256(2) (A), "sexually explicit conduct" is defined as "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person[.]" 18 U.S.C. § 2256(2) (A). Neither party has argued that subsections (i)–(iv) apply in this case. Accordingly, the precise inquiry here is whether the video of Jane Doe naked and in the

shower depicts a "lascivious exhibition of the genitals or pubic area."[3]

1. Legal Parameters of the Inquiry

To the court's knowledge, there are no cases in which the United States Court of Appeals for the Fourth Circuit has interpreted "lascivious" for the purpose of determining whether a particular visual depiction meets the statutory definition set out in § 2256(2)(A)(v). The Petitioner argues that a "lascivious exhibition of the genitals or pubic area" requires sexual behavior or suggestiveness by the child depicted, either through dress or pose, and that mere nudity in the shower, "where one is expected to be naked on a daily basis as a matter of course," is insufficient to support a finding of lasciviousness. Mot. at 30–32. For the reasons below, the court disagrees with the Petitioner's interpretation.

"'[L]ascivious' is a 'commonsensical term.'" United States v. Whorley, 400 F. Supp. 2d 880, 884 (E.D. Va. 2005) (quoting United States v. Arvin, 900 F.2d 1385, 1390 (9th Cir. 1990)). Courts, including district courts within the Fourth Circuit, have primarily looked to the six "Dost factors" as guideposts for the "commonsensical" inquiry into whether a particular visual depiction is "lascivious." See, e.g., Whorley, 400 F. Supp. 2d at 883–84 (determining the Dost factors were relevant, but not controlling, to the lascivious question, and rejecting expert testimony on "whether an image is lascivious," as "'lascivious' is a 'commonsensical term'" (quoting Arvin, 900 F.2d at 1390)). The Dost factors are:

[3] The Petitioner does not contest that the video shows Jane Doe's pubic area. Mot. at 16, 31 & n.2; Reply at 10 nn. 4–5.

> 1) whether the focal point of the visual depiction is the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Whorley, 400 F. Supp. 2d at 883 (citing United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987)).

The Dost factors are neither exhaustive nor controlling on the question of whether a depiction is lascivious. Further, no one factor is outcome-determinative, nor do all the factors need to be present for a finding of lasciviousness. See Whorley, 400 F. Supp. 2d at 883 (quoting cautionary language from Dost, 636 F. Supp. at 832).[4] The

[4] In fact, the court in Dost stated from the outset that "the 'lascivious exhibition' determination must be made on a case-by-case basis using general principles as guides for analysis," and that "the trier of fact should look to the [ ] factors, among any others that may be relevant in the particular case." 636 F. Supp. at 832 (emphasis added).

courts that have adopted, or otherwise endorsed or allowed the use of, the Dost factors have all followed this comprehensive approach. See United States v. Wells, 843 F. 3d 1251, 1253–54 (10th Cir. 2016); United States v. McCall, 833 F.3d 560, 563 (5th Cir. 2016); United States v. Russell, 662 F.3d 831, 843 (7th Cir. 2011); United States v. Larkin, 629 F.3d 177, 182 (3d Cir. 2010); United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); United States v. Rivera, 546 F.3d 245, 249–50 (2d Cir. 2008); United States v. Hill, 459 F.3d 966, 972 (9th Cir. 2006); United States v. Frabizio, 459 F.3d 80, 87–88 (1st Cir. 2006); United States v. Horn, 187 F.3d 781, 789 (8th Cir. 1999).

The Petitioner argues that the application of the Dost factors to this case weighs against a finding of lasciviousness. In making this argument, he urges this court to disregard the sixth Dost factor—the intended effect of the visual depiction on the viewer—and to further adopt a requirement that the depiction contain an affirmative sexual act by the minor. Mot. at 33–34.

However, "children typically are not mature enough to project sexuality consciously." Russell, 662 F.3d at 844 (citing Arvin, 900 F.2d at 1391); see also Frabizio, 459 F.3d at 89. Requiring "the child subject [to] exhibit sexual coyness in order for an image to be lascivious ... r[uns] the risk of limiting the statute." Id.; see also Wiegand, 812 F.2d at 1244 (critiquing the district court's focus on whether the child appeared willing to engage in sexual activity, as "over-generous to the defendant," because it "impl[ied] . . . that the pictures would not be lascivious unless they showed sexual activity or willingness to engage in it"). Thus, many courts have held that a child is not required to demonstrate sexual invitation or coyness in pose, dress, or manner for a visual depiction of the child

to be lascivious. E.g., United States v. Wolf, 890 F.2d 241, 247 (10th Cir. 1989). Nor is the child depicted required to affirmatively commit a sexual act for a visual depiction to be lascivious. See McCall, 833 F.3d at 564 (rejecting the defendant's argument that, to be a "lascivious exhibition," a "surreptitious recording . . . requires an affirmative display or sexual act by a minor"); United States v. Holmes, 814 F.3d 1246, 1252 (11th Cir. 2016), cert. denied, 137 S. Ct. 294 (2016) ("Today, we join the Eighth, Ninth, and Tenth Circuits and hold that a lascivious exhibition may be created by an individual who surreptitiously videos or photographs a minor . . . even when the original depiction is one of an innocent child acting innocently.").

Instead, as the Ninth Circuit has held, "[w]here children are photographed, the sexuality of the depictions often is imposed upon them by the attitude of the viewer or photographer." Arvin, 900 F.2d at 1391. Put differently, "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles." Wiegand, 812 F.2d at 1244. "The motive of the photographer in taking the pictures therefore may be a factor which informs the meaning of 'lascivious.'" Arvin, 900 F.2d at 1391.

Other courts have followed the Ninth Circuit, and held that the intent of the visual depiction's creator can be considered in determining whether a visual depiction is a "lascivious exhibition." See, e.g., Russell, 662 F.3d at 844 ("[I]t is often the photographer who stages the picture in such a way as to make it sexually suggestive." (citing Arvin, 900 F.2d at 1391)). The producer's intent can be determined from his actions in arranging the composition, lighting, content, angle or focus of the camera lens,

et cetera, in pre- and/or post-production. See Wells, 843 F.3d at 1256 ("By the location and angle at which [the defendant] positioned the camera, [the child's] pubic area was exposed never more than a few feet from the camera's prying lens. The jury reasonably could have concluded that [the defendant] intended to film [the child's] pubic area or genitals."); Holmes, 814 F.3d at 1252 ("[A] reasonable jury could have found that [the defendant's] conduct—including placement of the cameras in the bathroom where his stepdaughter was most likely to be videoed while nude, his extensive focus on videoing and capturing images of her pubic area, the angle of the camera set up, and his editing of the videos at issue—was sufficient to create a lascivious exhibition of the genitals or pubic area."); United States v. Schuster, 706 F.3d 800, 807 (7th Cir. 2013) (affirming the lower court's finding that an image was lascivious based on "the photo's failure to show the boy's whole body, and the resulting focus on the genitals"); Larkin, 629 F.3d at 183–84 (discussing the ways in which the defendant composed and framed photographs of nude children to find that the intended effect of the photographs was to arouse the viewer, and thus that the images were lascivious); Horn, 187 F.3d at 790 ("By focusing the viewer's attention on the pubic area, freeze-framing can create an image intended to elicit a sexual response in the viewer."); Wiegand, 812 F.2d at 1244 ("It was a lascivious exhibition," when the photos at issue focused on the child's genitalia, "because the photographer arrayed it to suit his peculiar lust.").

Further, the inquiry into the producer's intent is not limited to the "four corners" of the depiction. Courts have also considered evidence of other, related conduct to

make determinations regarding the producer's intent, including the context surrounding the creation, acquisition, and/or use of a visual depiction. E.g., Larkin, 629 F.3d at 184 (relying on producer's having trafficked a photo at issue to a pedophile to determine that she "designed the image depicted . . . to arouse"); Russell, 662 F.3d at 842–48 (upholding the district court's allowance of the government to introduce evidence of molestation to support the argument that the defendant intended to create sexually provocative photographs of his daughters); see also Frabizio, 459 F.3d at 89–90 (rejecting a "four corners rule" for determining the lasciviousness of a depiction, and stating that "the text of the statute itself does not require" such a rule). The relevance of such external evidence to "a defendant's motive and intent will turn on the facts of the case." Russell, 662 F.3d at 844. However, external evidence of motive and intent may be most relevant when "there is evidence that the photographer posed the minor in such [a] way that her genitals are visible but has disclaimed any intent to create a sexually suggestive image." Id.

It is important to note that this inquiry regarding a defendant's intent does not bring private fantasies "within the statute's ambit." Wiegand, 812 F.2d at 1245. Rather, the inquiry focuses on the visual depiction's intended effect, as opposed to its actual effect, on the viewer. Larkin, 629 F.3d at 184 (discussing Wiegand and the necessary limitations of an inquiry into the defendant's intent) (citing United States v. Villard, 885 F.2d 117, 125 (1989)). Additionally, the intent inquiry can be more helpful, and raise fewer constitutional concerns, in cases involving production of child pornography, as opposed to solely possession of child pornography. See Rivera, 546

F.3d at 251–52 (discussing the sixth Dost factor and its greater relevance in production, as opposed to possession, cases). Therefore, an inquiry into the Petitioner's intent is relevant, but not dispositive, evidence in determining whether the video in this case is "lascivious," pursuant to 18 U.S.C. § 2256(2)(A)(v), and thus whether the Petitioner was properly convicted of Possession of Child Pornography.

2. The Video

Having thus defined the parameters of the inquiry, the court now turns to the question of the Petitioner's factual innocence.[5] In order to prevail, the Petitioner must prove that, based on the video in question, "it is more likely than not that no reasonable juror would have convicted him" of violating 18 U.S.C. § 2252(a)(4)(B). See

[5] In conducting this analysis, the court relies on the facts stipulated to in the Statement of Facts; the transcript of the video's audio provided by the Petitioner as an exhibit to his Motion; the Petitioner's descriptions of the contents of the video, contained in his Motion and Reply; and the court's independent evaluation of the video, after it was provided pursuant to the court's Order of July 20, 2017, ECF No. 82, and reviewed in camera. The United States discusses additional facts contained in the Petitioner's presentence report, see Resp. at 1–3, and such facts may appropriately be considered here in determining the Petitioner's factual innocence, See Bousley, 523 U.S. at 624 (stating the government can "present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy"); Fugit, 703 F.3d at 251–52, 256–58 (relying on Bousley to consider additional facts contained in the presentence report, which the petitioner affirmed to be error-free during sentencing). However, the court finds that the Statement of Facts, the audio transcript, the Petitioner's descriptions, and its own evaluation are sufficient to resolve the question at hand—whether the video of Jane Doe naked and in the shower contains a "lascivious exhibition of the genitals or pubic area."

Schlup, 513 U.S. at 327. The Petitioner fails to make this showing.

The video shows Jane Doe nude. Statement of Facts ¶¶ 4, 6. Her breasts and pubic area are visible at various times in the video. Id. ¶ 6; Mot. at 16, 31. The Petitioner first positions the camera on the bathroom vanity, near waist level, so that the lens faces the shower. Mot. Ex. 3 at 2. This position, in combination with the wide-angle lens of the camera, allows the camera to capture the entire length of the bathroom, ensuring that Jane Doe undressing and entering the shower will be recorded. The Petitioner then exits the bathroom.

After Jane Doe enters the shower and turns it on, the Petitioner comes back in the bathroom and hands her the camera over the shower rod. Id. at 3. During this exchange, the Petitioner points the camera lens down toward Jane Doe, thereby recording her entire nude body. When Jane Doe initially holds the camera, it appears to only capture the bathroom wall. The Petitioner then directs Jane Doe to "hold it like arm's length in front of you . . . so the back is away from you." Id. at 3 (emphasis added). Directing Jane Doe to position the camera so the "back is away from [her]" ensures that the camera lens faces and records Jane Doe's nude body. When Jane Doe moves the camera, per the Petitioner's instructions, she records images of her breasts and pubic area.

The Petitioner then directs Jane Doe to "set [the camera] back down on the floor there," and she complies. Id. The audio transcript and video indicate that Jane Doe asks, "Like that?" after setting the camera down on the

shower floor, with the lens pointing up. Id.[6] For much of the time the camera is in this position, Jane Doe sits next to it on the shower floor, seemingly to avoid being recorded. However, while the camera is angled upward in this manner, it records images of Jane Doe's breasts and pubic area while she is standing.

Finally, when the Petitioner takes the camera back from Jane Doe for the last time,[7] he sets it back on the vanity, facing the shower. Statement of Facts ¶ 6. The Petitioner then spends time adjusting the camera's position on the vanity. When the wide-angle lens is again able to capture the entire length of the bathroom, the Petitioner leaves the camera turned on and exits. Id. This positioning again ensures that the camera will record Jane Doe's entire body as she exits the shower, towels off, and dresses.[8] At several points during the remainder of the video, Jane Doe peers around the edge of the shower curtain at the camera and stares at it. Id. She then adjusts

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[6] This suggests that the Petitioner may have made a request to position the camera in that specific manner. However, based upon the in camera review, the court cannot confirm whether the Petitioner made a request regarding the camera's positioning on the floor. If any such request was made by the Petitioner, it is inaudible.

[7] As already explained in text, the camera is passed between the Petitioner and Jane Doe over the shower rod several times during the video. Each time the camera is passed over the shower rod, the Petitioner angles the lens down toward Jane Doe, recording images of her entire nude body.

[8] The court notes that the camera remains on after being meticulously positioned by the Petitioner, even though the Petitioner's excuse for having the camera in the shower with Jane Doe, that he's testing whether it is waterproof, has ended. See Mot. at 4, 14–16, 31, 34 (stating that, in making the video, the Petitioner was merely testing whether the camera was waterproof).

the shower curtain, pressing it flush against the shower wall, as if making sure it cannot record her inside the shower.[9] When Jane Doe exits the shower, she drops to the ground and crawls across the bathroom floor to the other side of the room, before standing to dry off and dress. Id. This maneuver suggests that she is not aware that the edges of the bathroom are within the camera's view. However, while standing to dry off and dress, her entire nude body is recorded.

3. Conclusion Re Video

Jane Doe appears fully nude for large portions of the video, and she can be seen undressing, showering, and dressing. That the camera was not zoomed so as to capture close-ups of Jane Doe's genitals or pubic area does not help the Petitioner, as he argues. See Mot. at 31–32, 32 n.3. In Wells, the Tenth Circuit determined that it was not necessary for the defendant to have "edit[ed] the videos, freeze-frame[d] particular images from them, or zoom[ed] in on [the victim]." 843 F.3d at 1256. Instead, "[b]y the location and angle at which [he] positioned the camera, [the victim's] pubic area was exposed never more than a few feet from the camera's prying lens." Id. In this case, the Petitioner carefully positioned the camera on the bathroom vanity at the start and in the middle of the video. His selection of a camera with a "wide angle lens," capable of showing the entire bathroom when positioned on the vanity, see e.g., Mot. Ex. 3 at 2, maximized the likelihood that any images of Jane Doe would include her pubic area and breasts. He gave directions to Jane Doe regarding how to position and hold the camera, ensuring

[9] The shower curtain is opaque, so when the camera is on the vanity, it cannot record any images from inside the shower.

that the camera recorded her nude body. He also angled the camera lens down while it was above Jane Doe's head, so as to record her entire body. Such intentional positioning of the camera and composition of the video weigh against the Petitioner in deciding whether the video constitutes a "lascivious exhibition." See Wells, 843 F.3d at 1256 (finding that "the location and angle at which [the defendant] positioned the camera," supported a conclusion that the defendant "intended to film [the minor's] pubic area or genitals"); Holmes, 814 F.3d at 1252 (finding that the placement of the cameras and the angle of the camera set up helped support a finding of lasciviousness).

The Petitioner further argues that Jane Doe's nudity in the bathroom is innocent, as people are normally naked when they are in the shower. Mot. at 32. However, this shower involves a young teenager, not in the bathroom alone while taking a shower, and she is being told that she is to test a camera to see if it is waterproof. The Petitioner also argues that the shower is not a place commonly associated with sexual activity. Id. However, as other courts have recognized, "'showers and bathtubs are frequent hosts to fantasy sexual encounters as portrayed on television and in film,' such that a bathroom 'is potentially as much of a setting for fantasy sexual activity as is an adult's bedroom.'" Wells, 843 F.3d at 1256 (quoting Larkin, 629 F.3d at 177). Thus, that the video is set in a bathroom, and specifically in a shower, can be highly sexually suggestive. The Petitioner's attempt to make his choice of location for the video appear innocent is ineffective.

Further, Jane Doe's nudity and her decision to take a shower were not entirely of her own volition. The Petitioner's manipulation of Jane Doe in creating this video also counters his argument that Jane Doe's nudity and

the video's setting are innocent. The Petitioner asked Jane Doe to take a shower so he could "test" whether his camera was waterproof. Mot. at 4, 14–16, 31, 34. This manipulation to get her into the shower indicates that this is not normal or innocent behavior. See Mot. Ex. 3 (repeatedly asking Jane Doe if she was "cool with it" and saying that if she wasn't, he could do it). His promise of ice cream to her near the middle of the video underscores that manipulation and undermines his claim that this conduct is innocent. Id. at 4. Finally, he lies to her, stating that the camera is off and "can't record you." Id. at 2. This lie about whether he is recording at all further diminishes the possibility that the conduct captured in the video is innocent.

Additionally, Jane Doe's attempts to hide her nudity demonstrate her reluctance to be naked in front of the camera. Her discomfort underscores that this video does not depict innocent conduct. First, Jane Doe stares out from around the edge of the shower curtain at several points in the video. Statement of Facts ¶ 6. Seeing the camera's continued presence appears to unnerve her, evidenced by her repeatedly readjusting the shower curtain to ensure that it blocks the camera's view. Upon exiting the shower, Jane Doe drops to the ground and crawls across the floor to reach the other side of the bathroom before drying off and dressing. Id. This maneuver suggests that Jane Doe is unaware that even the edges of the bathroom are still within view of the camera's wide-angle lens. Such behavior further demonstrates her reluctance and discomfort with being nude in front of the camera. This is antithetical to a family photo or home video capturing children at play in the bath, where a child might easily and willingly smile up at the camera. Jane Doe's

behavior suggests very different, and disturbing, circumstances. Therefore, given the Petitioner's manipulation of Jane Doe and her corresponding reluctance to be recorded, a jury could have reasonably found that the shower was a sexually suggestive setting and that the behavior depicted in the video was not innocent. See Wells, 843 F.3d at 1256.

Next, the Petitioner insists that he had no sexual motive for producing and possessing the video. See Mot. at 31–34. However, the Petitioner also seems to argue that his actions were closer to those of a video voyeur. See id. at 28–29 (comparing voyeurism cases to child pornography cases). This court disagrees with both of those assertions. As the Fifth Circuit recognized in United States v. Steen, "[w]hen a photographer selects and positions his subjects, it is quite a different matter from the peeking of a voyeur upon an unaware subject pursuing activities unrelated to sex." 634 F.3d 822, 828 (5th Cir. 2011); see also Rivera, 546 F.3d at 250. Here, the Petitioner acted as more than a video voyeur. He was responsible for the mise-en-scéne: he selected the setting (the bathroom), the activity (taking a shower), and the child (Jane Doe). His own positioning of the camera, coupled with his directions to Jane Doe regarding the camera's position, evidence an intent to capture the images he desired of her nudity. His manipulation to get her into the shower, as well as the promise of ice cream as a reward, emphasize the exploitative nature of their relationship. See Mot. Ex. 3. Thus, counter to the Petitioner's arguments, this case presents more than mere nudity in the bathroom. This video does

not reflect the behavior of a man merely testing the waterproof nature of a camera.[10] Rather, this is exactly the kind of child abuse and exploitation that Congress aimed to punish when it passed the statute under which the Petitioner was convicted. See, e.g., S. Rep. No. 95–438, at 9–11 (1977) (explaining that federal law "aimed at eradicating this form of child abuse," that "is inherent in the production" of child pornography is necessary).

Finally, the Petitioner's possession of this video came to light after he was found in Jane Doe's bedroom, with his hands under her bedsheets, while she was asleep. Statement of Facts ¶ 3. The factual context surrounding the discovery of the video significantly undermines the Petitioner's claim that he was merely testing the waterproof nature of the camera. Therefore, a reasonable jury could find that the Petitioner intended the video to elicit a sexual response in the viewer—himself and others like-minded. See Rivera, 546 F.3d at 250; Wiegand, 812 F.2d at 1244.

It is important to note that the relevance of whether the video was intended or designed to elicit a sexual response in the viewer (the sixth Dost factor) is contested. The Petitioner argues that intent should not be considered at all as a relevant factor in this inquiry. See supra Part III.A.1; Mot. at 27–28. He argues that, "[t]o be prohibited under the statute, a visual depiction must involve . . . either actual or simulated sexual acts by or with a mi-

[10] Further, had he really wanted to test whether the camera was waterproof, the Petitioner could have, for example, tested the device under a running tap or tested it himself in the shower. Jane Doe's involvement in this activity was completely unnecessary.

nor, or the displaying of a minor's pubic area in a graphically sexual way." Mot. at 30 (emphasis added). However, the meaning of "sexually explicit conduct" under the statute is not so narrow. Several courts have incorporated the intended effect or design of a depiction when determining whether such depiction constitutes child pornography. See supra Part III.A.1. While intent is not dispositive, and many other considerations impact the court's ruling, it would be misguided to turn a blind eye to the video's intended effect, as well as to the factual circumstances surrounding this particular video. See Statement of Facts ¶¶ 3–4. The Petitioner's intent and the context in which he chose to create this video are relevant factors in the court's analysis of whether the video in question is a "lascivious exhibition." However, the other factors, discussed herein and considered by the court, play a large role in the court's conclusions, and ultimately they weigh against the Petitioner as well.

For the reasons above, and after considering all evidence presented to the court, and after taking all possible factors into account, the Petitioner has not shown that "it is more likely than not that no reasonable juror would have convicted him." Bousley, 523 U.S. at 623 (quoting Schlup, 513 U.S. at 327–28). Instead, a reasonable jury could have found the video to be a "lascivious exhibition of the genitals or pubic area," and convicted the Petitioner of possessing child pornography under 18 U.S.C. § 2252(a) (4)(B). Consequently, the Petitioner's claim that he qualifies for the actual innocence exception to procedural default fails. His procedural default on Grounds One, Two, and Three is not excused. The court, accordingly, **DISMISSES** Grounds One, Two, and Three as procedurally defaulted.

4. Additional Conclusion re Video

Further, in the course of determining whether the actual innocence exception applies, this court also determines that the conduct for which the Petitioner was charged and convicted, possession of the video of Jane Doe naked and in the shower, was criminal under 18 U.S.C. § 2252. The court, therefore, also **DENIES** Grounds One, Two, and Three to the extent they all assert or rely on the Petitioner's claim that his possession of the video was not criminal under 18 U.S.C. § 2252. See Mot. at 25 (Ground One: "[t]he video charged in the indictment does not show a minor 'engaging in' the 'lascivious exhibition of genitals' or other 'sexually explicit conduct[.]'"); id. at 35 (Ground Two: the Petitioner's "guilty plea cannot be considered voluntary and intelligent given his failure to understand that the conduct to which he pled guilty was not a federal crime");[11] id. at 38–39 (Ground Three: "[s]ince the video does not depict sexually explicit conduct constituting child pornography, and the Court did not view the video to determine that it was in fact child pornography, the District Court violated Rule 11(b)(3) by not determining a sufficient factual basis for [the Petitioner's] plea."); see also supra Part III (listing the Petitioner's asserted grounds for § 2255 relief). The court has viewed the video, and the Petitioner's conduct does constitute a federal crime under 18 U.S.C. § 2252.

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[11] As further support for the court's denial of Ground Two, the court notes that the Petitioner testified at the evidentiary hearing on October 17, 2017. The court assessed that, while on the stand, the Petitioner appeared to be intelligent and to fully understand the intricacies of his case. Further, the Petitioner has some college education and significant military training, and he stated in his testimony that he fully understood the proceedings.

B. Jurisdictional Challenge

The Petitioner also contends that the court lacked subject matter jurisdiction over his conviction because "[t]he Indictment and Statement of the Offense charge possession of a specific video that does not fall within the definition established by the relevant statute." Reply at 3. The Petitioner argues that "when the facts are undisputed the [c]ourt has jurisdiction to enter a conviction only when those facts fall within the scope of the statutory prohibition." Id. at 4. He likens the situation at hand to those when courts "vacate[ ] guilty pleas for conduct that—while nominally charged under a law of the United States—was later determined not to be criminal." Id. (internal quotation marks and citation omitted). To the extent the Petitioner presents a "jurisdictional" challenge to his guilty plea based on his claim that § 2252 does not reach his undisputed conduct, the court **DENIES** such challenge because § 2252 does reach the undisputed charged conduct. See supra Part III.A.3. (determining a reasonable jury could have convicted the Petitioner for possession of child pornography under 18 U.S.C. § 2252(a)(4)(B) based on his possession of the video at issue).

C. Ineffective Assistance of Counsel

The Petitioner alleges ineffective assistance of counsel as Grounds Four and Five. Such claims are not subject to the procedural default bar. See Massaro v. United States, 536 U.S. 500, 504 (2003). To succeed on his ineffective assistance of counsel claims, the Petitioner "must show (1) that his attorney's performance 'fell below an objective standard of reasonableness' and (2) that he experienced prejudice as a result, meaning that there exists 'a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Fugit, 703 F.3d at 259 (quoting Strickland v. Washington, 466 U.S. 668, 687–88, 694 (1984)). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700. Although the Petitioner withdrew Ground Four, because it relates to the court's analysis regarding the criminality of the charged conduct, the court will address it along with Ground Five.[12]

1. Ground Four

As Ground Four, the Petitioner argues that his attorneys' advice to plead guilty to possession of child pornography "without informing him that his conduct was not criminal under the statute" was deficient performance. Mot. at 41. Specifically, the Petitioner faults his attorneys' failure to inform him of, and discuss with him in full, his "complete defense to the charges"—the argument that the video of Jane Doe naked and in the shower did not meet the "lascivious exhibition" requirement. Id. at 41–42. However, as explained herein, this argument was not a "complete defense" to the charges, and a reasonable juror could have found the video of Jane Doe to be a lascivious exhibition. See supra Part III.A.3.

Thus, even assuming that the Petitioner's attorneys acted as he alleges, their conduct did not fall below an objective standard of reasonableness. "Just as '[i]t is certainly reasonable for counsel not to raise unmeritorious

[12] At the evidentiary hearing on October 17, 2017, ECF No. 89, the Petitioner withdrew Ground Four. See Proposed Findings of Fact and Conclusions of Law at 1 n.1, ECF No. 90.

claims,' it is equally reasonable for counsel not to advise clients of unmeritorious defenses." Fugit, 703 F.3d at 260 (alteration in original) (citation omitted) (quoting Truesdale v. Moore, 142 F.3d 749, 756 (4th Cir. 1998)). As the Petitioner fails to satisfy the first prong of the Strickland test, Ground Four is meritless.

2. Ground Five

As Ground Five, the Petitioner alleges that his counsel provided ineffective assistance by failing to consult with him regarding whether to file an appeal. Mot. at 42–45. To succeed on this claim, the Petitioner must show that "(1) his attorney had a duty to consult under Flores–Ortega; (2) his attorney failed to fulfill his consultation obligations; and (3) he was prejudiced by his attorney's failure to fulfill these obligations." United States v. Poindexter, 492 F.3d 263, 273 (4th Cir. 2007); see Roe v. Flores–Ortega, 528 U.S. 470 (2000).

With respect to the duty prong, attorneys have a constitutional duty to consult with their clients about an appeal when "there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Flores–Ortega, 528 U.S. at 480. "In making this determination, courts must take into account all the information counsel knew or should have known," as well as "whether the conviction follows a trial or guilty plea." Id. The latter consideration is a "highly relevant factor . . . because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id. Additionally, the court must consider "whether the defendant received

the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id.

As to the prejudice prong, a defendant demonstrates prejudice when he can show "that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id. at 484. This is a fact-sensitive inquiry, but "evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination." Id. at 485. Both the duty and prejudice prongs "may be satisfied if the defendant shows nonfrivolous grounds for appeal." Id. at 486 (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Showing prejudice does not, however, require a petitioner "to demonstrate that his hypothetical appeal might have had merit." Poindexter, 492 F.3d at 269 (quoting Flores–Ortega, 528 U.S. at 486).

As a preliminary matter, the Petitioner's former attorneys filed affidavits, ECF Nos. 71, 72, and testified before the court at the October 17, 2017 evidentiary hearing. Their statements establish that they did not consult with the Petitioner about an appeal following his sentencing. See G.M. Aff. at 17–18, ECF No. 71; J.M. Aff. at 21, ECF No. 72. The Petitioner must, therefore, show that his attorneys had a duty to consult and that their failure to do so prejudiced him. See Flores–Ortega, 528 U.S. at 480, 484. The Petitioner alleges that his attorneys had a constitutional duty to consult with him about an appeal because a rational defendant would have wanted to appeal. Mot. at 42–43. Specifically, the Petitioner alleges that there was a nonfrivolous ground for appeal, id., and that

he asked his attorneys "to come speak with [him] about an appeal" immediately after his sentencing. Courtade Aff. ¶ 22, Mot. Ex. 1, ECF No. 51–1.

The duty prong may be satisfied if the Petitioner can show that a rational defendant in his position would have wanted to appeal. Flores–Ortega, 528 U.S. at 480. In considering this inquiry, the court begins by discussing the Petitioner's guilty plea. His presentence report ("PSR") includes a written statement by the Petitioner, which sheds some light on his purpose in so pleading: "I truly hope that my acceptance of responsibility and my plea of guilty to this offense will assist in the healing process for all who have been impacted by my conduct." PSR ¶ 20, ECF No. 40. Furthermore, the Petitioner's expectations in pleading guilty were met. He received the statutory maximum for Possession of Child Pornography (Count Two), as the Guidelines range was well above the maximum, and the Production of Child Pornography charge (Count One) was dismissed. See id. ¶ 75; Judgment at 1, ECF No. 48. The Petitioner's plea agreement also included a waiver of his right to appeal his "conviction and any sentence within the statutory maximum . . . (or the manner in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatsoever." Plea Agreement ¶ 6, ECF No. 27.

Nonetheless, the Petitioner argues that a rational defendant in his position would have wanted to appeal, because his central claim—that his conduct was not criminal—is "unquestionably" a nonfrivolous argument, "as illustrated by appellate decisions rejecting [the] application of § 2252 in similar circumstances." Mot. at 43. In support, the Petitioner refers to cases "holding . . . § 2252

inapplicable to 'voyeurism' or 'mere nudity.'" Id.; compare Larkin, 629 F.3d at 183–84 (determining photos of a child in the shower were "lascivious" because the shower is a sexually suggestive setting and the child was posed unnaturally), with Doe v. Chamberlin, 299 F.3d 192, 196–97 (3d Cir. 2002) (determining that photos of nude girls taking showers at the beach were not "lascivious" because the focal point was not the genitals and the setting was not sexually suggestive). However, any direct appeal the Petitioner may have filed after sentencing would have been subject to the appeal waiver in the Petitioner's Plea Agreement.

Jurisdictional claims are one narrow exception to such an appeal waiver, giving a petitioner the ability to contest whether the court had subject matter jurisdiction over his case. See United States v. Cotton, 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction ... involves a court's power to hear a case, [and thus] can never be forfeited or waived."). A federal district court's jurisdiction over a criminal case is established by the Constitution or by federal statute. 18 U.S.C. § 3231; Lamar v. United States, 240 U.S. 60, 64–65 (1916) (Holmes, J.). "Jurisdiction" refers to "a court's power to hear a case," Cotton, 535 U.S. at 630, and to "prescriptions delineating the classes of cases ... and the persons ... falling within the court's adjudicatory authority." United States v. Hartwell, 448 F.3d 707, 717 (4th Cir. 2006) (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004)). Jurisdictional claims are, by definition, not based upon the merits of a case. "[N]othing can be clearer than that the district court, which has jurisdiction of all crimes cognizable under the authority of the United States ..., acts equally within its jurisdiction whether it decides a man to be guilty or innocent under

the criminal law, and whether its decision is right or wrong." Lamar, 240 U.S. at 65. Thus, a district court's jurisdiction over a criminal prosecution does not depend upon the guilt or innocence of a defendant under the offense charged.

The Petitioner argues that his central claim is "jurisdictional," and thus that the waiver of his right to appeal in the Plea Agreement does not apply. Mot. at 43; Reply at 3–4, 20–21. The Petitioner states that he does not challenge any of the facts underlying his guilty plea. Id. at 4. Rather, he argues that "when the facts are undisputed the Court has jurisdiction to enter a conviction only when those facts fall within the scope of the statutory prohibition." Id. Further, the Petitioner argues that the undisputed facts in this case do not fall within the scope of the statute, and so the district court was without jurisdiction to convict him. Id. at 2–4.

Non-jurisdictional claims on appeal, such as those based on the underlying question of a defendant's guilt or innocence, are subject to the appeal waiver in the Petitioner's Plea Agreement. See Plea Agreement ¶ 6. The government contends that the Petitioner's "jurisdictional" claim simply goes to the merits of the case, and boils down to an argument "that the elements of the crime could not have been satisfied." Resp. at 9–10. The court agrees with the government's characterization of the Petitioner's "jurisdictional" claim. The Petitioner's framing of his claim as "jurisdictional" is an attempt to circumvent his Plea Agreement and appeal waiver. The Petitioner's claim, essentially, is that he is not guilty of violating the statute under which he was charged. Such a claim is an attack on the sufficiency of the facts to support his conviction, and an attempt to relitigate his guilt. This claim

on appeal is of precisely the type that the Petitioner waived in his Plea Agreement.[13]

In conclusion, the Petitioner's "jurisdictional" claim does not undermine this court's subject matter jurisdiction over his prosecution, because it pertains to the merits of his conviction. Thus, this potential claim was waived when the Petitioner waived his "right to appeal the conviction and sentence within the statutory maximum . . . (or the matter in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatsoever." Plea Agreement ¶ 6. Accordingly, there is no evidence of a nonfrivolous claim that the Petitioner could have brought on direct appeal, nor is there any other evidence to support a finding that a rational defendant would have wanted to appeal. The Petitioner's claim that his attorneys failed to consult with him regarding an appeal, in violation of their duties, is meritless.

Alternatively, the Petitioner may satisfy the duty prong by showing that he "reasonably demonstrated to counsel that he was interested in appealing." Flores–Ortega, 528 U.S. at 480. In determining whether the Petitioner successfully makes this showing, the court relies

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[13] Further, this court did have subject matter jurisdiction over the Petitioner's prosecution. The Superseding Indictment lawfully alleges that the Petitioner's conduct violated federal law. ECF No. 13. Both crimes alleged in the Superseding Indictment (production and possession of child pornography) have been found constitutional and are lawful provisions of the United States Code. See, e.g. United States v. Whorley, 550 F.3d 326, 335–37 (4th Cir. 2008); United States v. Peterson, 145 F. App'x 820, 821–22 (4th Cir. 2005); United States v. Wyatt, 64 F. App'x 350, 351–52 (4th Cir. 2003). Therefore, the court's subject matter jurisdiction is clear.

on the affidavits of the Petitioner and his former attorneys, as well as evidence introduced at the October 17, 2017 evidentiary hearing. See Courtade Aff., Mot. Ex. 1; ECF Nos. 71, 72, 89. For the foregoing reasons, the court **FINDS** that the Petitioner does not show he reasonably demonstrated to his attorneys that he was interested in appealing.

The Petitioner states that he "asked both [of his attorneys] to come speak with [him] about an appeal while the marshals were placing [him] into cuffs." Courtade Aff. ¶ 22, Mot. Ex. 1. However, his attorneys strongly deny that claim. G.M. Aff. at 13 ("That assertion is flagrantly false! Mr. Courtade did not expressly, or otherwise, request counsel to consult with him regarding a direct appeal."); J.M. Aff. at 21 ("This is a false assertion. I did not at any point before, during, or after the sentencing hearing hear Mr. Courtade ask me or [his other attorney] to come see him about an appeal after the hearing."). While testifying at the evidentiary hearing, the Petitioner reiterated that he asked his attorneys to meet with him regarding a direct appeal immediately after sentencing. However, the Petitioner admitted that he did not attempt to contact his attorneys again after that day. The Petitioner did not call anyone after sentencing to discuss filing an appeal. The Petitioner's customary way of contacting his attorneys was through his mother, who frequently engaged in email correspondence with the attorneys. The Petitioner admitted that he never asked his parents to relay a message to his attorneys regarding an appeal, because he did not think an appeal was possible.[14]

[14] The Petitioner further testified that he only wanted to appeal after sentencing in order to contest his life term of supervised release. See

Additionally, both of the Petitioner's parents testified at the evidentiary hearing, and provided evidence that the Petitioner did not attempt to pursue an appeal after sentencing. The Petitioner's father stated that the Petitioner told his parents he wanted to meet the attorneys after sentencing, and that they did not show up. However, the Petitioner did not mention that his request was regarding an appeal. The Petitioner's mother stated that the Petitioner never asked her to tell his attorneys to contact him for any reason. The court, therefore, **FINDS** that the only way it is possible that the Petitioner told his attorneys he wanted to appeal after sentencing, is that any such request was made quietly, such that his attorneys were unable to hear. Further, after sentencing, the Petitioner made no effort to follow-up with any request for an appeal by attempting to contact his attorneys for any reason whatsoever. Accordingly, the court **FINDS** that the Petitioner did not reasonably demonstrate to counsel that he was interested in an appeal. Therefore, the Petitioner did not trigger his attorneys' duty to consult with him regarding whether to file an appeal. As such, the court **DENIES** Ground Five.

IV. CONCLUSION

For the reasons stated herein, the court **DISMISSES** as procedurally defaulted the Petitioner's Grounds One, Two, and Three, and, in the alternative, **DENIES** them on the merits to the extent they all assert or rely on the Petitioner's claim that his possession of the video of Jane Doe was not criminal under 18 U.S.C. § 2252(a)(4)(B).

Judgment at 3. The Petitioner stated that he did not want to appeal his sentence, or argue that his conduct was not criminal under the statute.

The court also **DENIES** Ground Four, to the extent it relates to the court's ruling on Grounds One, Two and Three, and **DENIES** Ground Five.

The Clerk is **DIRECTED** to send a copy of this Opinion to the counsel for the Petitioner and to the United States Attorney at Norfolk.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith
REBECCA BEACH SMITH
CHIEF JUDGE

December 13, 2017

APPENDIX E

18 U.S.C. 2252 provides:

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as de-

fined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involv-

ing a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) Affirmative Defense.—It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

> **(1)** possessed less than three matters containing any visual depiction proscribed by that paragraph; and
>
> **(2)** promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

> **(A)** took reasonable steps to destroy each such visual depiction; or
>
> **(B)** reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

18 U.S.C. 2256 provides:

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (ii) bestiality;
>
> (iii) masturbation;
>
> (iv) sadistic or masochistic abuse; or
>
> (v) lascivious exhibition of the anus, genitals, or pubic area of any person;

(B) For purposes of subsection 8(B) [1] of this section, "sexually explicit conduct" means—

> (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse

where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"—

(A) means a person—

(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the

depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.