DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

KEVIN JAMES PETROSKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

Whether mere video voyeurism – surreptitious videoing of unaware subjects without any posing or manipulation of the video images – of the innocent conduct of minor females not engaged in or anticipated to engage in sexual or sexually suggestive conduct can constitute intending a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct as required for conviction of the production or attempted production of child pornography under U.S.C. Section 2251(a), an important question on which the Eighth Circuit decision in this case is in conflict with the decision of another United States court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Kevin James Petroske, seeks a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The decision of the United States Court of Appeals in this case is *United States v. Petroske*, No. 18-1572, reported as 928 F.3d 767 (8th Cir. 2019) and is attached as Appendix A. A timely request hearing for rehearing en banc or by the panel was denied by an order on September 10, 2019, attached as Appendix B. The district court's judgment and sentence is attached as Appendix C.

STATEMENT OF JURSDICTION

The Eighth Circuit Court of Appeals order denying rehearing en banc or by the panel was entered on September 10, 2019. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1). Supreme Court Rule 10(a) is applicable because the Eighth Circuit Court of Appeals decision in this case conflicts with the decision of another United States court of appeals on the same important question. This petition is timely served and filed under Supreme Court Rules 13.3, 29.2 and 29.3.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. Section 2251(a) provides:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

18 U.S.C. Section 2256(2)(A) provides:

> 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;

18 U.S.C. Section 2256(8)(A) provides:

> (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….

STATEMENT OF THE CASE

The petitioner was indicted on 8 counts of production or attempted production of child pornography. He was convicted by a jury on all counts and was sentenced to concurrent sentences of 240 months. He appealed, and his convictions were upheld by the Eighth Circuit Court of Appeals. He petitioned for rehearing en banc or by the panel, which was denied. He now petitions for certiorari review by this Court.

The petitioner was discovered engaged in video voyeurism, surreptitious videoing, from outside the home of a minor female. Trial Transcript (Tr.) at 45. Searches determined that he had engaged in surreptitious videoing a number of minor females. The videos were taken from outside the minor females' bedroom windows. Tr. at 55. Some of the charged videos show some nudity of the genitals or pubic area. Tr. at 320-321. Some of the videos had sound in which Mr. Petroske made sexual comments about the minor female. The videos show no zooming in or freeze-framing of images. The minors were not engaged in or anticipated to engage in any sexual or sexually suggestive conduct. They were in the government's words, "innocent girls doing everyday things," Tr. at 325-326, and were unaware of being videotaped. Tr. at 55.

Mr. Petroske was charged with and convicted at trial of eight counts of production and attempted production of child pornography based on the video

voyeurism, along with an unrelated charge and conviction of possession of child pornography. The applicable statute, 18 U.S.C. 2251(a), provides that anyone who uses a minor with the intent that such minor engage in "sexually explicit conduct" for the purpose of producing a "visual depiction of such conduct" is guilty of the production or attempted production of child pornography. One of the categories of "sexually explicit conduct," as defined in 18 U.S.C. 2256(2)(A)(v), is "lascivious exhibition of the genitals … or pubic area of any person." The term lascivious has the common meaning of sexually suggestive.

The petitioner moved for dismissal of the charges against him on the basis that his surreptitious videoing of the innocent conduct of minor females did not constitute the production or attempted production of child pornography as a matter of law, on the grounds that the statutes involved require for conviction the production or attempted production of an image involving sexually explicit conduct, here the lascivious display of the genitals or pubic area, and that mere nudity of minors not engaged in or anticipated to engage in sexual or sexually suggestive conduct did constitute the lascivious display of the genitals or pubic area as a matter of law.

The district court denied the petitioner's motion for judgment of acquittal but stated at sentencing it might have decided the case differently were it not bound by Eighth Circuit precedent: "In fact, I have some doubts about whether Mr.

Petroske's videos even constitute child pornography for purposes of federal law. I have held they do, because I am bound by *United States v. Johnson* [*United States v. Johnson,* 639 F.3d 433 (8th Cir. 2011)], and similar Eighth Circuit cases. If I had been writing on a clean slate, I might have decided differently." Sentencing Transcript at 41.

REASONS FOR GRANTING THE WRIT

> Certiorari should be granted to address the important question, on which the Eighth Circuit has entered a decision in conflict with the decision of another United States court of appeals, of whether mere video voyeurism – surreptitious videoing of unaware subjects without any posing or manipulation of the video images – of the innocent conduct of minor females not engaged in or anticipated to engage in sexual or sexually suggestive conduct can constitute intending a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct as required for conviction of the production or attempted production of child pornography under U.S.C. Section 2251(a).

The Eight Circuit decision upholding the petitioner's convictions conflicts with a decision of the Fifth Circuit, *United States v. Steen,* 634 F.3d 822, (5th Cir. 2011), in which the Fifth Circuit Court of Appeals reversed a conviction for production of child pornography on facts similar to those in the petitioner's case. In *Steen,* the defendant surreptitiously videotaped minor patrons at a tanning booth by holding a camera on top of a wall partition. The *Steen* court, 634 F.3d at 826-827, discussed the so-called *Dost* factors, from *United States v. Dost,* 636 F.Supp. 828, 832 (S.D.Cal. 1986), that have been applied to a determination of whether

there was a "lascivious exhibition" of a minor's genitals or pubic area:

> Section 2251(a) makes it unlawful to "use" a minor "to engage in ... sexually explicit conduct" for the purpose of producing a visual depiction of that conduct. In assessing conduct under § 2251(a), we ask "two questions: Did the production involve the use of a minor engaging in sexually explicit conduct, and was the visual depiction a depiction of such conduct?" **Steen clearly used C.B. for the purposes of producing a nude video, but the statute requires more—the film must depict sexually explicit conduct. Accordingly, this court has found, "a child could be used in the production of a photograph, but the image in the ultimate photograph could be one that did not capture the child engaging in sexually explicit conduct. If this were so, a defendant might be charged under a different statute—perhaps child molestation—but not child pornography."** [Emphasis added.]

> Here, the parties focused on whether the video was a "lascivious exhibition" of C.B.'s genitals or pubic area. The jury instructions included a description of the six factors first proposed in United States v. Dost that have been applied in this circuit to assess lasciviousness. These 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;
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.
>
> This list, however, "is not exhaustive, and no single factor is dispositive." **Any determination of lasciviousness "will have to be made based on the overall content of the visual depiction." Moreover, we note that these factors have never been deployed where a defendant's conduct said to be criminal under the statute**

at issue proved to be no more than voyeurism. [Emphasis added].

The court in *Steen*, 634 F.3d at 827-828, considered the *Dost* factors and the applicable statute and concluded:

> In consideration of the *Dost* factors and the statutory text, we find the evidence was insufficient to find a lascivious exhibition of the genitals. **First, the focal point of the visual depiction is not on [the minor's] genitalia or pubic area…. She neither acts coy nor willing to engage in sexual activity.** [Emphasis added.]
>
> The fourth *Dost* factor is nudity, which Steen's video satisfies since [the minor] was fully nude for her tan. However, the Supreme Court [in *New York v. Ferber*, 458 U.S. 747, 765, n. 18] has held that "nudity, without more, is protected expression." **Surreptitiously filming a nude tanner, on its own, does not meet the standard for producing child pornography.** [Emphasis added.]
>
> The sixth factor is the most difficult to apply—whether the visual depiction is intended or designed to elicit a sexual response in the viewer. Here, the primary evidence of intention to elicit a sexual response is that Steen surreptitiously filmed a nude 16–year–old. However, as a Missouri district court held in a similar case:
>
> > These videos could not be considered to have been intended to elicit a sexual response in the viewer any more than mere nudity would, which several courts have concluded is not of a sexual character. **We do have some limited context ... that [the defendant] set up a camera ... but that context indicates nothing more than an attempt to capture mere nudity and is very different than a person ... telling a minor to undress, lay on a bed, and open his legs for a nude photo.** [Emphasis added.]
>
> …. **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 activity unrelated to sex.**
>
> **We have previously adopted the ordinary meaning of the phrase "lascivious exhibition," which we defined as "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." Here, the government's evidence cannot meet this standard.** [Emphasis added.]

In the present case, the Eighth Circuit decision, *United States v. Petroske*, 928 F.3d 767, 772 (8th Cir. 2019) relied on *Johnson*, 639 F.3d 433, 440 (8th Cir. 2011) and *United States v. Ward*, 686 F.3d 879, 833 (8th Cir. 2012) in determining that video voyeurism of innocent conduct unrelated to sex can be determined to have been intended to depict the lascivious display of the genitals or pubic area.

United States v. Johnson, above, 634 F.3d at 440-44, in which the Eight Circuit reversed a judgment of acquittal of the attempted production of child pornography based on video voyeurism, and which was authority the district court in the petitioner's case felt compelled to follow in uphold the petitioner's convictions even though it noted it might have decided differently otherwise, created a standard under which a conviction for production or attempted production of child pornography could result from video voyeurism even though the minor depicted was unaware of being videoed, was not posed or acting sexually coy, and was not engaged in or anticipated to engage in sexually explicit conduct. Under *Johnson*, 639 F.3d at 441, and *United States v. Ward*, above, 686 F.3d at 833 (8th Cir. 2012), visual depictions of children acting innocently can be lascivious.

In *Johnson*, 639 F.3d at 440-41, the defendant, a wrestling coach, was found

guilty of attempted production of child pornography based on video voyeurism of minors who removed their clothing to weigh in for wrestling. The trial court in that case had entered a judgment of acquittal, finding that the video voyeurism did not show any sexually explicit conduct of the minors as required by the statute. The Eighth Circuit reversed, finding that producing images of innocent conduct on the part of the minors could constitute the attempted production of child pornography:

> The fact that the young women in the videos were not acting in an obviously sexual manner, suggesting coyness or a willingness to engage in sexual activity, does not necessarily indicate that the videos themselves were not or were not intended to be lascivious. In *Horn,* we explained that " 'lascivious exhibition' " need not necessarily be "the work of the child, whose innocence is not in question, but of the producer or editor of the video." *Horn,* 187 F.3d at 790. Thus, even images of children acting innocently can be considered lascivious if they are intended to be sexual. We further made clear that the fact that three of the *Dost* factors—a sexually suggestive setting, inappropriate attire or unnatural poses, and a suggestion of sexual coyness—were not relevant to that case did not prevent the images from being lascivious. *Id.* In this instance, a reasonable jury could find the video clips were intended to be lascivious. The camera was specifically pointed at the scale, where the young women were certain to be standing nude (at the direction of Johnson), and the camera angle was such that in many of the video clips, when the minors were on the scale, the frame encompassed their nude bodies from their shoulders to below their knees. Furthermore, statements made by the producer about the images are relevant in determining whether the images were intended to elicit a sexual response in the viewer.

In the petitioner's case there was no setting of the scene as in *Johnson*: the petitioner simply pointed the camera at a window and recorded what was seen. In this respect, the petitioner's case is much like the approving reference to *Steen* in

United States v. Ward, above, 686 F.3d at 884, otherwise relied on by the Eighth Circuit in the petitioner's case:

> We conclude a reasonable jury could find the exploitation of W.D. included using her to engage in sexually explicit conduct. Although the video may look to many viewers like a series of unfocused pictures of a nude youngster, Ward positioned W.D., using verbal commands and touching her body, so that the secret camera repeatedly filmed her pubic area. **"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. *United States v. Steen,* 634 F.3d 822, 828 (5th Cir. 2011).** [Emphasis added.]

Johnson, above, 634 F.3d at 339 n. 2, noted the conflict between its holding and that in *Steen*:

> Most recently, the Fifth Circuit concluded that a surreptitious filming of a nude tanner, taken when the defendant held a video camera over the adjoining wall of a tanning booth room, did "not meet the standard for producing child pornography" where the tanner's pubic region was visible in the video for a brief second on the far side of the video's frame. *See United States v. Steen*, 634 F.3d 822, 827 (5th Cir.2011). Notably, the defendant was charged with the completed crime, not attempt.

Steen was a case involving a charge of production of child pornography but applies equally to the charges against the petitioner of production and attempted production of child pornography because what the petitioner produced and attempted to produce was the same: visual depictions of minors not engaged in or anticipated to be involved in any sexually explicit or sexually suggestive conduct and so not the production or attempted production of child pornography.

The Eighth Circuit in the decision the petitioner's case considered "any

captions on the image" as an additional factor to consider. *Petroske,* 928 F.3d at 773. The petitioner had made comments of a sexual nature on some of the videos he recorded. The district court allowed the admission of these as in the nature of an audio caption. These comments were not the visual depictions themselves, which were of "innocent girls doing everyday things." An audio caption cannot create pornography where it does not exist in the visual depiction. *United States v. Steen,* above, 634 F.3d at 82. n. 25, quotes *New York v. Ferber,* 458 U.S. 747, 765 n. 18, as noting that to find nudity alone sufficient for child pornography would "outlaw many works of art or family photos of, say, naked children in bathtubs," perhaps, as in *Steen,* showing nudity of the genitals or pubic area. The addition of an audio comment by the photographer or videographer, or other person, to a family photo or video of a naked child in a bathtub would not create pornography out of images of mere nudity, and the same is true in the petitioner's case.

While the visual depictions in the petitioner's case are not of babies in the bath but of teenage minors, they are images of nudity alone, in some instances of the genitals or pubic area, of innocent minors doing everyday things and not engaged or anticipated to be engaged in any sexual or sexual or sexually suggestive conduct. They do not meet the ordinary meaning of the phrase "lascivious exhibition" of the genitals or pubic area, for which *Steen,* 634 F.3d at 828, used the definition "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. As was said in *Steen,* 634 F.3d at 828, the visual depictions in the petitioner's case "cannot meet that standard."

The distinction between *Steen* and the petitioner's case is that under *Steen* mere video voyeurism – surreptitious videoing – of unaware subjects without any posing or manipulation of the video images – of the innocent conduct of minor females not engaged in or anticipated to engage in sexual or sexually suggestive conduct, and involving nudity alone, including of the genitals or pubic area, is an insufficient basis for a determination, based on the totality of circumstances, that that a defendant intended to use a minor to engage in the lascivious display of the genitals or pubic area for the purpose of producing a visual depiction of such conduct as required for conviction of the production or attempted production of child pornography under U.S.C. Section 2251(a). In the petitioner's case, the Eighth Circuit reached the opposite conclusion.

CONCLUSION

Certiorari should be granted to address the important question, on which the Eighth Circuit has entered a decision in conflict with the decision of another United States court of appeals, of whether mere video voyeurism – surreptitious videoing of unaware subjects without any posing or manipulation of the video images – of the innocent conduct of minor females not engaged in or anticipated to

engage in sexual or sexually suggestive conduct can constitute intending a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct as required for conviction of the production or attempted production of child pornography under U.S.C. Section 2251(a).

Respectfully submitted,

Dated: December 9, 2019 NORTHLAND LAW

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