Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER G. LEE,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the United States Court of Appeals
For the Third Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Can innocent, concededly non-sexual conduct of a minor, depicted in an image, be retroactively converted into the "use or employment" of a minor to engage in "sexually explicit conduct" by said minor within the meaning of Chapter 110 of Title 18 of the United States Code via cropping of the image years after it was taken to focus on the minor's bathing suit area, and can such cropping be said to show "sexually explicit conduct" when such conduct was not engaged in by the minor at any time ever? Put another way, can a defendant be convicted of "using or employing" a minor to "engage in sexually explicit conduct," including but not limited to lascivious exhibition of the genitals by said minor, when at the time the photo was taken, the minor was engaging only in age-appropriate activity at a swimming pool, wearing age-appropriate attire, unaware even that he was being photographed?

2. Can a defendant be prosecuted under Chapter 110 of Title 18 of the United States Code, consistently with the First Amendment, where his alleged offense consists of cropping an image that was concededly non-pornographic when taken, and where (i) the cropping is done in such a way that the minor cannot be identified; (ii) the sexual connotations of the cropped image come in large part from its association with a constitutionally protected text story; and (iii) the images produced were not shared with anyone?

3. Can a jury be instructed that it may deem an image of a minor "lascivious" within the meaning of Chapter 110 of Title 18 of the United States Code based in whole or in part on the subjective sexual proclivities of the image's creator?

4. Was petitioner Lee's trial counsel ineffective for not seeking dismissal of the charges against him, and/or seeking appropriate jury instructions, on grounds including but not limited to the above?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States of America and petitioner Christopher G. Lee.

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2020 WL 127996 (M.D. Pa. Jan. 10, 2020)

The decision of the Court of Appeals declined to grant a certificate of appealability from an order of the United States District Court for the Middle District of Pennsylvania (Hon. Matthew W. Brann, J.), entered January 10, 2020, denying Petitioner's motion to vacate, pursuant to 28 U.S.C. § 2255, his conviction of using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

The Third Circuit's decision of September 30, 2020, denying rehearing and/or rehearing *en banc*, is unreported.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Third Circuit in a criminal case. The instant petition is timely because the Third Circuit's decision denying rehearing and/or rehearing *en banc* was issued on September 30, 2020, less than 150 days prior to the filing of this Petition. There have been no orders extending the time to petition for *certiorari* in the instant matter except to the extent that the time to petition for *certiorari* has been extended generally by this Court's COVID-19 guidance..

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. § 2251 (in pertinent part)

(a) 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. § 2256 (in pertinent part)

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;

[...]

(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.

STATEMENT OF FACTS

Until he was charged in this case, Petitioner Christopher G. Lee was a well-respected member of an old and honored Central Pennsylvania family. Through his time at Georgetown Prep where, after serving three years as class president, he graduated near the top of his class, and through his years at Princeton University where in 1970 he served as the President of "Whig-Clio" (the American Whig-Cliosophic Society, the nation's oldest collegiate literary and debate society, whose past presidents include James Madison and Woodrow Wilson), Petitioner developed a faith in American justice and a respect for rational thinking and for taking words first and foremost to mean what logic and experience show them to mean. Later, he became director of the Boal Mansion Museum in Boalsburg, PA – a mansion owned by his family since 1809 – and as an active member of the community, continued to put these principles and ideals into practice.

Imagine his surprise when, as a man in his sixties with an accomplished career behind him, he was sentenced to a 15-year mandatory minimum prison term for "using a minor to engage in... sexually explicit conduct for the purpose of producing [a] visual depiction of such conduct," see 18 U.S.C. § 2251(a), based on photographs that the government conceded were not pornographic when they were made, that depicted teenagers dressed in age-appropriate attire and engaged in age-appropriate non-sexual activities around a swimming pool, and that were cropped only months or years later to focus on the clothed bathing-suit area. Indeed, the trial record showed that all the parties to this case, including not only the government and the defense but the

supposed victim in the case, agreed that the minor in question did not engage in any such conduct and where the supposed victim and his father denied that any harm had occurred and continued to characterize Petitioner as an "inspiration."

At issue in this Petition, as discussed below, is whether the American system of justice has succumbed so far to moral panic that it can construe the cropping of a concededly innocent photograph, years after it was taken, to somehow constitute the "use" or "employment" of a minor to engage in "sexually explicit conduct" in some retroactive, time-warped manner, and whether Petitioner's counsel was ineffective for not seeking dismissal of the charges and/or requesting appropriate jury instructions on this and other grounds.

A. The Charges, Trial, and Direct Appeal.

On October 1, 2014, petitioner Lee was indicted on charges of interstate child enticement (later dismissed upon motion of the government), transporting a minor across state lines for purposes of unlawful sexual conduct, receiving child pornography, and possessing child pornography. (Doc. 1).[1] A superseding indictment lodged March 18, 2015 alleged an additional count of using, persuading, enticing and/or coercing a minor to take part in sexually explicit conduct for the purpose of producing a visual depiction thereof ("the Production Count"). (Doc. 41). On September 9, 2015, a second superseding indictment was filed adding an additional count of child enticement, a second transportation count, and one count of attempting to alter, destroy or conceal

[1] Citations to "Doc." refer to the electronic docket of case number 14-CR-254 in the Middle District of Pennsylvania.

evidence. (Doc. 86).

The gravamen of the charges arose out of Lee's role as director of the Boal Mansion Museum in Boalsburg, Pennsylvania, located in a house which belonged to his family and which was used as both an educational museum and a family home. Lee's duties included supervising teenagers who volunteered as docents. After one docent accused Lee of sexual misconduct, the police obtained search warrants, resulting in the discovery of child pornography on computers and devices to which both Lee and others had access. U.S. v. Lee, 701 Fed. App'x 175, 177-79 (3d Cir. 2017).

The child pornography counts involved two distinct sets of images. The receipt and possession counts involved images allegedly downloaded from the Internet which were pornographic in nature. The Production Count, however, didn't involve pornography. Indeed, the government conceded that the images relevant to this count originated from photographs of the docents wearing age-appropriate clothing and performing non-sexual, age-appropriate activities. Concededly, these photographs, as originally taken, were not pornographic, and the genitals were not exposed. Instead, the government alleged that Lee converted them into images of "minors engaged in sexually explicit conduct" per the specifications of Section 2251(a) – by cropping them to focus on the crotch or buttocks, with the cropped portions showing the bathing trunks from in front or behind as well as parts of the torso and leg, and using the cropped images to illustrate sexually explicit stories. (Doc. 217-1, Kyle Rude Dec., ¶¶ 5-7). It was undisputed that the cropping took place months or years after the images were taken; that the minors were not aware of it; that the minors' genital areas

remained clothed even in the cropped images; and that the cropping was done in such a way that the minors depicted in the original images could not be identified.

Lee retained Kyle Rude, Esq. to represent him on these charges, and Rude represented him through pretrial, trial and sentencing. (Doc. 217-1, ¶¶ 1-3).

Prior to trial, the child enticement and transportation counts were severed and as noted, subsequently dismissed on motion of the government. Lee, 701 Fed. App'x at 179 n.2. Trial on the remaining counts began on March 7, 2016 and concluded on March 11, 2016. (Doc. 205-09). During trial, the government introduced the original images underlying the Section 2251 count as well as the cropped images and 26 text stories that the cropped images were allegedly used to illustrate.

Defense counsel made no motion to dismiss the Production Count. (Doc. 208 at 533-34, 563). The reason for this wasn't strategic, but because Rude felt that such a motion wouldn't succeed because he mistakenly believed that there were precedents holding that non-pornographic images could be made into pornography via cropping. (Doc. 217-1, ¶ 8). In other words, Rude mistakenly believed that case law supported the conclusion that innocent pictures, such as those in this case, could be cropped into pornography, and did not bring to the district court's attention that 18 U.S.C. § 2251 requires sexually explicit conduct *on the part of the minor*, which all agreed did not occur here.

The district court then instructed the jurors concerning the meaning of "sexually explicit conduct" for purposes of the Production Count, including, as relevant to this case, a "lascivious execution of the genitals." (Doc. 208 at 664-65). The court's charge

included the six so-called "Dost factors," see U.S. v. Dost, 636 F. Supp. 828, 831 (S.D. Cal. 1986), the last of which is "whether the visual depiction is intended or designed to elicit a sexual response in the viewer."

Notably, the Third Circuit in U.S. v. Villard, 885 F.2d 117, 125 (3d Cir. 1987), held that this sixth factor must be determined objectively, "look[ing] at the photograph rather than the viewer," and that a jury may not find a photograph lascivious "merely because [the defendant] found [it] sexually arousing." Rude did not request an instruction on this principle and conceded that such failure was due to oversight. (Doc. 217-1, ¶ 9). Nor did Rude request an instruction that the jury could consider the lapse of months or years between the taking and cropping of the images in determining whether the minors were "used" to engage in "sexually explicit conduct," or indeed, whether no sexually explicit conduct was engaged in *by the minor* as the statute requires. (Id., ¶ 10).

The jury convicted Lee of all counts submitted to it. (Doc. 209 at 686-91).

Lee's sentencing submission included letters of support from Hugues de Thé and Pierre-Henri de Menthon, parents of interns at the museum, and Paul de Menthon, who was one of the interns and who wrote that he didn't feel victimized by the images shown at trial. (Doc. 187-1 at 4, 8-9). Indeed, Paul affirmed that "nothing bad happened," and his father Pierre-Henri – a highly respected journalist and national economic magazine editor – stated, "Mr. Lee remains an inspiration to my children" and opined that the American trial seemed "a strange process." (Id.)

On October 11, 2016, Lee was sentenced to concurrent and consecutive prison

terms totaling 216 months, including 180 months on the Production Count, which was the mandatory minimum sentence for that count. (Doc. 191 at 3). Judgment was entered that day (Doc. 191) and petitioner timely appealed (Doc. 196). On July 2, 2017, the Third Circuit affirmed petitioner's conviction, U.S. v. Lee, 701 Fed. App'x 175 (3d Cir. 2017), and this Court denied certiorari on March 26, 208, Lee v. U.S., 138 S. Ct. 1325 (2018).

B. The Section 2255 Proceedings.

On March 19, 2019, Lee timely moved in the district court to vacate his conviction and sentence on the Production Count pursuant to 28 U.S.C. § 2255 (Doc. 213), and filed papers in support of this motion (Doc. 217 through 217-5). Lee argued, with Rude's support, that Rude was ineffective in failing to make appropriate motions and request jury instructions concerning the Production Count and failing to offer evidence contextualizing the cropped images and stories. (Id.) The government opposed the motion (Doc. 221) and petitioner replied (Doc. 222). .

By Memorandum Opinion filed January 10, 2020, the district court denied relief. (App. 3-33).[2] With respect to Rude's failure to request a Villard instruction, the court opined that where a defendant is both the taker and the intended audience of an image, its intended effect, and thereby the sixth Dost factor, was relevant notwithstanding Villard. (Id. at 11-16). The court acknowledged, however, that "[a]dmittedly, the Third Circuit has been somewhat inconsistent with its application

[2] Citations to "App." refer to the Appendix to this Petition.

of the sixth Dost factor" (id. at 13), and contrasted the cases upon which it relied with other Third Circuit decisions such as Doe v. Chamberlin, 299 F.3d 192, 196 (3d Cir. 2002) and U.S. v. Franz, 772 F.3d 134, 157 (3d Cir. 2014), which held that the sixth factor is never a separate substantive inquiry (App. 13-16). Ultimately, the court held that because it wouldn't have given a Villard instruction, counsel's failure to request one wasn't deficient. (Id. at 16).

The court then found that counsel wasn't ineffective in failing to request an instruction regarding the lapse of time between Lee's taking and cropping of the photographs in determining whether he made use of minors to create pornography, finding that the "use" was made at the time the images were cropped. (Id. at 16-17). The court supported this finding by reference to cases regarding "morphed" pornography images (id. at 17), ignoring that morphing is not cropping. The court also did not address the issue of the absence of any sexually explicit conduct *on the part of a minor*.

The court found Rude wasn't ineffective for conceding the lasciviousness of the images, finding that he pursued a reasonable alternative strategy of focusing on Lee's lack of exclusive access to the computers on which they were found. (Id. at 18-19). The court also opined that the evidence established "at least three" of the Dost factors - focus on the pubic area, suggestion of willingness to engage in sexual activity, and the intended effect on the viewer, Lee himself. (Id. at 20).

The court additionally opined that certain circuits had held that editing non-pornographic images can make them pornographic, and that the cases relied upon

by Lee were inapposite because cropping a photograph "results in a new image which must be viewed on its own." (Id. at 21-25). Thus, Rude wasn't ineffective for moving to dismiss the Production Count on this ground. (Id. at 25). The court further held that a motion to dismiss on vagueness grounds wouldn't have succeeded even though none of the cropped images involved an identifiable minor. (Id. at 25-28). It held that unlike the morphing statute, Section 2251(a) "only requires an actual minor," and that if an identifiable minor were required, offenders "would be virtually immune from prosecution." (Id.)

Finally, the court found that Rude's failure to present art history evidence was reasonable in light of his belief that characterizing child pornography as art "falls on deaf ears," and that Lee had not presented prima facie evidence showing that there was a market for erotic stories about children. (Id. at 28-32).

The court denied a COA. (Id. at 33).

Petitioner then timely sought a COA from the Third Circuit. By order dated August 28, 2020, a panel of that Court (Ambro, Greenaway and Bibas, JJ.) denied a COA. (App. 1-2). The panel found (i) that Villard and its progeny did not mandate the jury instructions that Lee contends Rude should have requested; (ii) that it was reasonable for Rude not to challenge the lasciviousness of the images and not to argue that the images and/or stories in the case were art; (iii) that Rude was not ineffective for failing to move to dismiss "as several Courts of Appeals have concluded that pornographic images can be created by altering non-pornographic images" and "the Court in [Cunningham, supra] had no reason to assess the legality of the photographs

at issue"; and (iv) that Section 2251(a) does not require that a minor be identifiable in an image because unlike the morphing statute, such image "always involves the 'use' of an actual minor." (Id. at 1-2).

Petitioner then timely sought rehearing and/or rehearing *en banc* from the Third Circuit, which was denied by order dated September 30, 2020. (Id. at 34-35). By this Petition, review by this Court is now sought.

REASONS FOR GRANTING THE WRIT

This Petition arises from a Section 2255 proceeding claiming ineffective assistance of counsel, which is governed by the familiar standard of Strickland v. Washington, 466 U.S. 668 (1984): petitioner must prove that trial counsel Rude's performance fell below accepted professional norms and that there is a reasonable probability that the defects in Rude's performance affected the outcome. Underlying both prongs of the Strickland standard in this case, however, is Rude's failure to recognize how unique the prosecution of Lee under Section 2251(a) truly was, and to request relief appropriate to the uniqueness of the case.

As discussed in the Statement of Facts, this case represents the far end of Section 2251(a) prosecutions in a number of ways. Where but in this case has a child pornography prosecution been based on cropping of images that were not only concededly non-pornographic but concededly *innocent*, with the minors depicted in the images engaged not in sexually explicit conduct but in in age-appropriate, non-sexual activities around a swimming pool while appropriately clothed in loose-fitting, age-appropriate pool attire? Where else has the cropping of an image of a minor months

or years after it was taken, with the minor not present (indeed, a continent away), been treated as "use" or "employment" of the minor to "engage in… conduct?" In what other case has a defendant been prosecuted for cropping innocent photos in private, in such a way that the minor is not identifiable and any sexual connotation to the still-loosely-clothed cropped images is derived mainly from the collaging of those images and their use to illustrate First Amendment-protected stories? Where else has a jury been told that it can find the cropping of an innocent image to be the creation of child pornography based on the subjective tastes of the creator – a standard that, as courts have aptly stated, might turn the Sears catalog into child pornography if images from it are cut out and placed in a scrapbook by the wrong person? And where else have such images been the subject of prosecution where not only was no sexual abuse involved in their creation but they were not shared with anyone, thus setting them completely apart from both the abuse-prevention and market-dampening purposes of the child pornography laws?

At any point, Rude could have recognized that this case was not a garden-variety child pornography prosecution and treated it as the unique example of overreach it was – but he did not. Rude failed to point out to the court – or to the jury, by means of requests for appropriate instructions – how incongruous it was that a minor who did nothing sexual and engaged in no lascivious display at the time an image was taken can be deemed to have been used, employed and/or enticed, and/or to have "engaged in sexually explicit conduct," due to the much later selection of a particular part of that

image, outside his presence, to illustrate a story.[3] This Court should thus grant *certiorari* not only to emphasize that this was ineffective assistance of counsel but to provide guidance concerning the outer limits of Section 2251(a), to make clear that sexually explicit conduct *by a minor* is a necessary basis for prosecution, and to underscore that moral panic does not justify the imposition of harsh penalties for conduct so far outside the statute's scope.

I. A Minor Is Not Retroactively "Used or Employed" To Engage In "Sexually Explicit Conduct" When Both The Original Image And Conduct Depicted Therein Are Innocent And The Image Is Cropped Months Or Years Later.

This is, first and foremost, a case in which trial counsel and the courts below failed to recognize that the words "use" and "conduct," for purposes of the child pornography statutes, have been stretched well past the breaking point. "This Court has explained many times over many years that, when the meaning of [a] statute's terms is plain, [its] job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1749 (2020) (collecting cases). The legislative purpose of a statute "is expressed by the *ordinary* meaning of the words used." Jam v. Int'l Finance Corp., 139 S. Ct. 759, 769 (2019) (emphasis added), quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). And what possible "ordinary meaning" of either the word "use" or the word "conduct" would support a conclusion that a minor is "used" and "engages in… conduct"

[3] In the event that this Court grants *certiorari*, Petitioner also reserves the right to argue any and all other grounds of ineffectiveness that were raised below.

when a photograph of him, concededly innocent when taken, is cropped years later outside his presence?

Note well that Section 2251(a) requires that *the minor depicted in the image*, not the creator or editor of the image, be engaging in sexually explicit conduct, and this is true even where the type of "conduct" at issue is that defined in Section 2256 as "lascivious exhibition of the genitals." See U.S. v. Howard, 968 F.3d 717, 721-22 (7th Cir. 2020). "The most natural and contextual reading of the statutory language requires the government to prove that the offender took one of the listed actions to *cause the minor* to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct." Id. at 721 (emphasis added). Moreover, "[t]he six verbs that appear in the statute—'employs, uses, persuades, induces, entices, or coerces'—all describe means by which an exploiter might accomplish the end of having a child engage in sexually explicit conduct in order to capture a visual image of it." Id. at 721-22. Thus, conduct by the creator of an image – even reprehensible conduct, such as, in Howard, creating a video where the defendant masturbates while next to a sleeping child – does not violate Section 2251(a) in the absence of sexual conduct *by the minor*. See id. In addition, the statutory verbs "require some action by the offender to cause the minor's *direct* engagement in sexually explicit conduct and should not be read to have a jarringly different meaning." Id. at 722 (emphasis added).

If "use" in fact means "to cause the minor's *direct* engagement in sexually explicit conduct," then where was the "use" here? If a person such as Lee photographs a minor performing age-appropriate, non-sexual activities around a pool while

appropriately clad for the occasion, and years later cuts out part of that image and pastes it onto a text story, what "direct engagement" by the minor is there? What "conduct" has the minor, as opposed to the person cropping the images, engaged in? Indeed, if the minor depicted in the photograph did nothing to exhibit his genitals (or any other part of his body), then what "lascivious exhibition" *by the minor*, as required by Howard, has ever taken place? "Lascivious exhibition" is a statutory category of *conduct*, after all, and thus, some underlying conduct on the minor's part must be proven in order to sustain a conviction. Hence, charges under Section 2251(a) were inappropriate, and Rude was ineffective to not recognize this and take appropriate measures to secure dismissal.

The courts below in this case would have it that the cropping of an image, however long after the fact and however innocent the image may be, constitutes the creation of an entirely new image in which the minor is "used" anew and is somehow now engaging in "sexually explicit conduct" where he was not doing so before. Such a holding is, at the very least, in tension with the Seventh Circuit's Howard holding, and moreover, is illogical on its face. To illustrate how illogical it is, consider a situation in which, instead of cropping part of an innocent image, the creator instead puts the image on a computer screen and zooms in on the pelvic area. In such a case, does the mere act of zooming in on a particular part of the image constitute the making of a new image? Is the minor "used," and does he or she "engage in... conduct," every time the creator zooms in and out? Such a holding – that child pornography is retroactively created from an innocent image, and that any focusing in on part of that image is a

new "use" of, and "sexually explicit conduct" by, the minor – is as absurd with cropping as with zooming.

And, contrary to the holdings below, it is not only the Seventh Circuit that frowns on conduct by the creator of an image being substituted for conduct by the minor; although the courts below opined that there is a consensus in favor of cropping of an image being "use" of a minor, this is not in fact the case. To the extent that the lower courts relied upon such cases as U.S. v. Stewart, 729 F.3d 517, 522 (6th Cir. 2013) and U.S. v. Horn, 187 F.3d 781, 789 (8th Cir. 1999) to conclude that alteration of non-pornographic photos could create child pornography, those cases involved images that showed nude genitals and were thus pornographic to begin with. The creation of an image that is *pornographic at its inception*, thus "using" the minor and portraying the minor's conduct *at the time the image was made*, and then cropping that image, is worlds different from creating a *concededly innocent* image and then focusing, months or years later, on a particular part of it.

Moreover, the Steward and Horn cases are in tension not only with Howard but with U.S. v. Steen, 634 F.3d 822, 827 (5th Cir. 2011) and U.S. v. Cunningham, 669 F.3d 723 (6th Cir. 2012). In Steen, the Fifth Circuit held that a 15-second video depicting a nude minor on a tanning bed was not lascivious even though her genital region was visible for about 1.5 seconds of the video before she closed the bed. In other words, even though the defendant could have taken still frames from the video which would have showed the minor's unclothed genitals, the original video as a whole was not lascivious and therefore it could not form the basis of a Section 2251 conviction. And

that principle is at least equally applicable here where, in the photos taken by Lee, there was no nudity and no minor engaging in sexually explicit conduct.

Likewise, in Cunningham, the Sixth Circuit considered whether it was permissible for the district court to assess the defendant's risk of recidivism based on photographs taken during a pool party which were then "cropped in such a manner that only the child's pubic region or buttocks [were] shown." The defendant argued that the district court should not have considered these photos "[b]ecause the pictures… were not illegal." Cunningham, 669 F.3d at 735. The circuit held that the district court was permitted to consider these photographs, and another video in which Cunningham used a photo of a minor to make a video in which he acted out a rape fantasy, on the issue of sentencing, but - critically to the instant case - did not dispute that the cropping of the photographs was legal activity. Id.

The courts below chose to disregard Cunningham on the ground that the Sixth Circuit in that case was not required to consider whether or not the cropping of non-pornographic images was illegal. But this is not so. In fact, the Cunningham court *was* required to consider the legality of the cropped images, because the issue before it was whether those images could permissibly be considered in imposing sentence after Cunningham was convicted of possessing other images. Had the cropped images themselves been child pornography, the resolution of this issue would have been very simple – they would have been relevant conduct under the Sentencing Guidelines and could plainly have been counted against Cunningham for sentencing purposes. The complication in deciding whether these images could be used to enhance Cunningham's

sentence came from the fact that, in the Sixth Circuit's opinion as well as the sentencing judge's, they were *not* child pornography.

This Court should thus grant *certiorari* to resolve the dispute between circuit courts over whether the cropping of an innocent image, which does not "cause [a] minor's direct engagement" in sexual activity, see Howard, supra, falls within the scope of Section 2251(a). And it is all the more necessary that this Court engage in such review given that this nation continues to be in the grip of an ongoing moral panic over sex offenses, such that both prosecutors and lower courts are and will continue to be severely tempted to overreach, resulting in mass incarceration. If the statutory terms can be interpreted as broadly as the courts in this case have suggested, then Section 2251(a), rather than being a bulwark against the genuine abuse of children, becomes a cudgel that may be used by a prosecutor looking for any reason, no matter how illogical and counter-textual, to impose a harsh mandatory minimum penalty on someone viewed unfavorably. It is in situations such as these when strict adherence to statutory text and unyielding insistence on the letter of the law is most critical. This Court should therefore find that the cropping of admittedly innocent photographs, as charged in the Production Count, did not constitute the use or employment of a minor to engage in sexually explicit conduct in violation of Section 2251, and that trial counsel Rude was ineffective in not seeking dismissal and/or appropriate jury instructions on this issue.

II. The First Amendment Prohibits Prosecution Based On Cropping Of A Concededly Innocent Image In Such A Way That The Minor Depicted Is Non-Identifiable And Much Of The Significance Of The Cropping Comes From A Story

The second key factor that Rude failed to recognize is that even if the cropping of an image constitutes a new and different "use" of a minor and "conduct" on the minor's part – which it does not – the images in this case, *even as cropped*, can only be deemed "lascivious" based on external factors. Courts throughout the nation have adopted the so-called "Dost factors" first enunciated in U.S. v. Dost, 636 F. Supp. 828, 831 (S.D. Cal. 1986), which 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.

Although the weight to be given each factor is largely a matter for the jury, at least two must be present for an image to be considered lascivious. See U.S. v. Villard, 885 F.2d 117, 122 (3d Cir. 1985).

The objective characteristics of the images underlying the Production Count,

even as cropped, are simply not lascivious under a Dost analysis. The cropped images are centered on the pelvis but *not* on the genitals, which are invisible under loose-fitting bathing attire. The setting of the images is a pool at which the minors were engaged in age-appropriate activity. The minors are not unnaturally posed; indeed they are not posed at all, much less posed in a way that would constitute sexually explicit conduct under Section 2251. The pelvic area is, as noted above, clothed – and moreover, clothed appropriately and not in any kind of clothing that is revealing, excessively tight, and/or suggestive of sexual activity. No sexual coyness whatever is apparent from or suggested by the images themselves.

Thus, the cropped images cannot even conceivably be called "lascivious" without reference to factors outside the images themselves – in this case, the government's allegation that they were arranged in suggestive collages, used to illustrate sexually explicit stories, and/or cropped to Lee's sexual taste. The last of these – Lee's subjective sexual attitudes and responses – is, as will be discussed in Point III below, a factor that can broaden *anything* – including, as said by the First Circuit, the Sears catalog – into child pornography so long as the creator has the right (or wrong, depending on one's standpoint) proclivities. And the other two factors, under the circumstances of this case, also cannot form the basis of criminal charges under Section 2251(a), which requires sexually explicit conduct *by a minor*.

As detailed in the report of Ph.D. art historian Cora Michael, submitted with the underlying Section 2255 petition, collages in which images of minors, although not sexual themselves, are included in an overall work with sexual themes and atmosphere

have a long history and indeed hang in many museums. The Court's particular attention is drawn to John Baldessari's work discussed at page 10 of the report and shown at figure 11, which consists of a collage composed of parts of once-illicit Victorian nudes, as well as the use of cropped photographs to make a collage in Richard Hamilton's Just what is it that makes today's homes so different and so appealing? (discussed at pages 21-22 and fig. 37), the use of cropped images in Jess' Mouse's Tale (described at page 23 and fig. 41) and the various works of Robert Mapplethorpe (described at pages 24-29 and fig. 42-50) and Jack Pierson (described at pages 34-35 and fig. 62). If images not lascivious in themselves may be considered child pornography due to their positioning in a collage, then many artists and museum directors must fear for their freedom.

Similarly, there is no doubt that the First Amendment protects the right to write sexually explicit stories, even on subjects such as sexual activity by minors that the public may view as vile. The government has indeed never seriously argued to the contrary. Thus, if the stories are not unlawful, and the images might only be considered lascivious with reference to the stories, then Petitioner could not be prosecuted without adding zero and zero together to make one. And where an image can only be deemed lascivious by reason of it being attached to and used to illustrate constitutionally protected text, then the prosecution cannot be maintained consistently with the First Amendment. See Faloona v. Hustler Magazine, Inc., 607 F. Supp. 1341 (N.D. Tex. 1985) (nude photos of children who were not engaged in sexual conduct did not constitute child pornography even though they were published in a "Sex Atlas"

and/or a "raunchy" magazine); see also Villard, supra, at 125 (citing Faloona with approval).

And this is especially true where, as here, the cropping was done in a manner that left the minors in the image impossible to identify – their faces are not shown in the cropped images, nor is there any distinctive feature (e.g., a scar, birthmark or tattoo) from which they can be identified. Perhaps, where the minor who is depicted in an image can be identified, there might be some cogent argument in favor of deeming it unlawful to include such an image in a collage or use it to illustrate a sexually explicit story – after all, one of the reasons commonly cited for banning child pornography is the "secondary victimization" suffered by children from knowing that images of their sexual abuse are out there on the internet and that they are forever in danger of others recognizing them as the subjects of such images. But here, that is not the case – no one can possibly tell who the cropped images depict, the images were never shared with anyone, and the subjects of those images have thus not been made sex objects for public consumption.

Guidance may be taken here from the "morphing" cases. Although morphing is different from cropping – morphing consists of putting a child's face on an image of adults having sex, whereas cropping, as prosecuted in this case, involves the selection of parts of concededly innocent images – morphed images are like cropped images in that no sexual abuse of a child is involved in their creation and they do not depict any conduct on the child's part. And in light of these factors, the courts have upheld the constitutionality of the morphing statute only to the extent that an identifiable minor

is depicted in morphed images.

In U.S. v. Anderson, 759 F.3d 891, 895 (8th Cir. 2014), the Eighth Circuit held that morphed images *are not* categorically outside the protection of the First Amendment because "[n]o minors were sexually abused in the *production* of [such] image[s]," and that the constitutionality of the statute must therefore be judged on an as-applied basis. The court then proceeded to uphold the statute, but only on the narrow ground that it impinged on the privacy rights of an "identifiable minor" who appears in an "image that is distributed via the Internet." Id. at 896.

Likewise, in U.S. v. Hotaling, 634 F.2d 725, 729-30 & n.3 (2d Cir. 2011), the Second Circuit held that the constitutionality of the morphing statute rested on "the interests of actual minors [that are] implicated when their faces are used in creating morphed images that make it appear that they are performing sexually explicit acts," and on this basis, distinguished State v. Zidel, 940 A.2d 255 (N.H. 2008), which had found that morphed images which were "not specifically identified by names" enjoyed First Amendment protection. The Hotaling case also relied upon U.S. v. Bach, 400 F.3d 622, 631 (8th Cir. 2005), which similarly cited a Senate report indicating that the child pornography statutes were intended to prevent harm to minors from "*identifiable images in pornographic depictions*, even where the identifiable minor is not directly involved in sexually explicit activities" (emphasis added). The Bach court thus agreed that it was the use of a minor's head, superimposed on a sexually explicit photograph, that rendered the prosecution of morphing permissible. See id. at 632.

Contrary to the holdings below, there is no principled reason to distinguish

between the morphed images in Anderson, Hotaling and Zidel and the cropped images in this case. The key factor cited by the Anderson court – that the "production" of the images in question did not involve the sexual abuse of minors, and that such images took on sexual connotations only with reference to other images to which they were attached – is equally applicable here. There is no reason to treat an innocent pool photo of an appropriately dressed teenager engaged in non-sexual activities, which is then collaged and/or used to illustrate a story, any differently vis-a-vis the First Amendment from a morphed image. And thus, the images in this case, like those in Anderson, are not categorically outside the First Amendment, and without the additional factor present in Anderson – the possibility of reputational harm and trauma to the child through the use of his identifiable likeness – these images cannot constitutionally be prosecuted, especially where, as here, they were shared with no one. Thus, contrary to the decisions below, it was ineffective assistance of counsel for Rude not to seek dismissal on this ground, and this Court should use the instant case to make clear that the outer limits of Section 2251's applicability with respect to cropped images is no broader than with respect to morphed images.

III. A Concededly Innocent Image Cannot Be Made Pornographic Via Cropping Simply Because Of The Sexual Tastes Of The Image's Creator

Finally, the courts below were wrong in concluding that a non-lascivious image may become lascivious simply because the creator finds it so. At issue is whether the sixth of the Dost factors – "whether the visual depiction is intended or designed to elicit a sexual response in the viewer" – may encompass the viewer's subjective sexual tastes

and proclivities, or whether this factor is instead an objective standard made up of the sum of the sum of the other five factors. A majority of circuit courts have wisely held that the sixth Dost factor is objective – and moreover, contrary to the holdings below, there is at minimum a dispute over whether this factor can *become* subjective simply because the only intended viewer of an image is also its creator. This was hence a case in which Petitioner's counsel was ineffective in not requesting appropriate instructions and making appropriate motions to ensure that Lee was not convicted based on a purely subjective interpretation of the charged images.

In U.S. v. Villard, 885 F.2d 117, 125 (3d Cir. 1989), the Third Circuit – from which this case sprang – held that the sixth Dost factor is objective, and that "[c]hild pornography is not created when [a] pedophile derives sexual enjoyment from an otherwise innocent photo… Private fantasies are not within the statute's ambit." Thus, the sixth factor must be weighed objectively, "look[ing] at the photograph rather than the viewer." Id. Indeed, "the sixth Dost factor, rather than being a separate substantive inquiry about the photographs, is useful as another way of inquiring into whether any of the other five Dost factors are met." Id.

Other circuit courts have echoed the Third Circuit's view that the last Dost factor must be weighed objectively. See U.S. v. Amirault, 173 F.3d 28, 34-35 (1st Cir. 1999) (lasciviousness must be viewed objectively because if the defendant's "subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography" and must instead focus on the "objective criteria of the [image's] design"); U.S. v. Miller, 829 F.3d 519, 526 & n.3 (7th Cir. 2016) (citing Villard and holding that

"the subjective intent of the viewer cannot be the only consideration in a finding of lascivious[ness]"); U.S. v. Spoor, 904 F.3d 141, 150 (2d Cir. 2018) ("the sixth Dost factor - whether the image was designed to elicit a sexual response in the viewer - should be considered by the jury in a child pornography production case only to the extent that it is relevant to the jury's analysis of the five other factors and the objective elements of the image").

In this case, while acknowledging Villard and its progeny, the courts below relied upon other Third Circuit cases which gave the appearance that the sixth Dost factor might nevertheless be considered subjectively. But the district court acknowledged that that "the Third Circuit has been somewhat inconsistent with its application of the sixth Dost factor" and identified at least two cases - Doe v. Chamberlin, 299 F.3d 192, 196 (3d Cir. 2002) and U.S. v. Franz, 772 F.3d 134, 157-58 (3d Cir. 2014) - which reaffirmed that the sixth Dost factor is simply a reiteration of the previous five rather than an independent factor for the jury to analyze. (Doc. 224 at 11, 13). The court also acknowledged that this was "somewhat unique" in that Lee was "both the creator and the intended viewer of the cropped photographs," and acknowledged that the only decision in which this Court had confronted this situation was unpublished and therefore non-precedential. (Id. at 10).

Clearly, then, the district court erred in concluding that it is possible to draw a "simple conclusion" from the admittedly "muddled case law" and that Lee had no entitlement to a Villard instruction. (Id. at 13-14). To the contrary, there is no settled precedent either within or without the Third Circuit holding that the sixth Dost factor

somehow springs back to life and permits subjective assessment in cases where the creator of the images intended them for his own consumption. Nor is there any logical reason for subjective assessment to spring back to life in that situation, given that objective analysis of the photographs would still provide a sound basis to determine if they are lascivious or not, and subjective analysis, even if the photographer is the intended audience, would risk turning otherwise innocuous images into pornography depending on the creator's sexual quirks. See Amirault, supra. Hence, trial counsel Rude was indeed ineffective for not moving to dismiss or at least seeking a jury instruction making clear that the sixth factor was subjective, especially given his admission that his failure to do so resulted from oversight rather than strategy.

Indeed, the fact that the case law on this subject is admittedly "muddled" is reason enough for this Court to step in. The outcome of Lee's Section 2255 petition shows not only that the lower courts are wrong but that the law is hopelessly muddled – that there is no agreement between circuits, or even within the Third Circuit, as to whether an otherwise innocent image may be transmogrified into child pornography due to the viewer's sexual tastes and/or whether, if the sixth Dost factor is objective, it becomes subjective again when the viewer and creator are the same person. This is an issue that will have impact not only in this case but in many borderline prosecutions involving images of questionable lasciviousness. Thus, in addition to the other reasons discussed above – that there was no minor engaged in sexually explicit conduct and no transmission of any of the images, and that cropping an existing image cannot possibly constitute a "use" of, or "conduct" by, *the minor* – this Court should

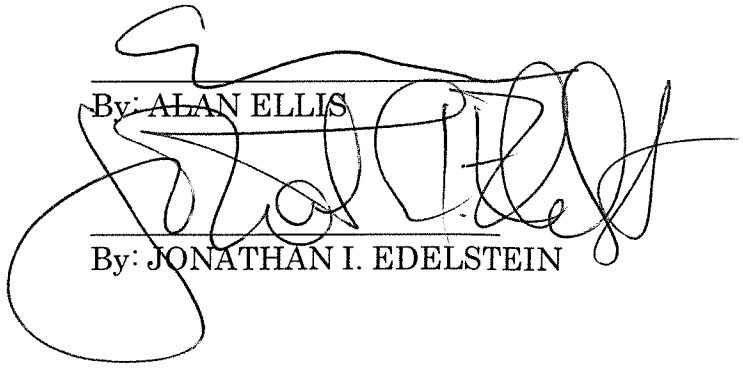
grant *certiorari* so that the question of whether lasciviousness under Section 2251(a) is subjective or objective may finally be settled, and so that Rude's ineffectiveness in failing to seek appropriate remedies in a case where there was clearly no sexually explicit conduct by any minor can be adjudicated.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and grant such other and further relief as may be appropriate.

Dated: Gualala, CA
February 24, 2021

Respectfully Submitted,
LAW OFFICE OF ALAN ELLIS
Attorney for Petitioner



By: ALAN ELLIS

By: JONATHAN I. EDELSTEIN

ORDER OF THE THIRD CIRCUIT COURT OF APPEALS DATED AUGUST 28, 2020 [App. 1-2]

BLD-277 August 13, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 20-1465

UNITED STATES OF AMERICA

v.

CHRISTOPHER G. LEE, Appellant

(M.D. Pa. No. 4:14-cr-00254-001)

Present: AMBRO, GREENAWAY, JR., and BIBAS, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

Lee's request for a certificate of appealability is denied because he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would agree, without debate, that all of Lee's claims were meritless, for the same reasons provided by the District Court. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Neither United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989), nor any of this Court's subsequent precedent mandates either jury instruction that Lee argues his counsel should have requested. Next, choosing not to challenge the lasciviousness of the cropped photographs at issue and instead to focus on the many other people who could have cropped the images was a reasonable strategic decision for Lee's trial counsel to make. See Strickland v. Washington, 466 U.S. 668, 689 (1984) ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.") (internal quotation marks and citation omitted). Similarly, Lee's trial counsel's explanation for why he decided not to argue that the images and stories in the case were art was based on a reasonable trial strategy. See id. at 687.

Lee's trial counsel also did not act deficiently in failing to move to dismiss Lee's 18 U.S.C. § 2251(a) count, as several Courts of Appeals have concluded that

pornographic images can be created by altering non-pornographic images. See United States v. Holmes, 814 F.3d 1246, 1251 (11th Cir. 2016); United States v. Stewart, 729 F.3d 517, 526 (6th Cir. 2013); United States v. Horn, 187 F.3d 781, 790 (8th Cir. 1999). Contrary to Lee's argument, the decision in United States v. Steen, 634 F.3d 822, 827 (5th Cir. 2011), is not relevant to the facts of his case, and the Court in United States v. Cunningham, 669 F.3d 723, 734-35 (6th Cir. 2012), had no reason to assess the legality of the photographs at issue or to determine whether they constituted a depiction of sexually explicit conduct for purposes of a § 2251(a) conviction. Additionally, § 2251(a) does not require that a minor be identifiable in an image, because unlike 18 U.S.C. § 2256(8)(c), a depiction in violation of § 2251(a) always involves the "use" of an actual child. See United States v. Theis, 853 F.3d 1178, 1181 (10th Cir. 2017); Ortiz-Graulau v. United States, 756 F.3d 12, 19 (1st Cir. 2014); United States v. Sirois, 87 F.3d 34, 41 (2d Cir. 1996). Finally, because all of Lee's underlying claims lack merit, his cumulative error claim is meritless. See Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008).

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: August 28, 2020
JK/cc: All Counsel of Record

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED 1/10/20 [App. 3-33]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	No. 4:14-CR-00254
v.	(Judge Brann)
CHRISTOPHER G. LEE,	
Defendant.	

MEMORANDUM OPINION

JANUARY 10, 2020

I. BACKGROUND

In 2015, Christopher G. Lee was charged in a second superseding indictment with two counts of knowingly enticing a minor to travel in interstate commerce to engage in criminal sexual activity, in violation of 18 U.S.C. § 2422(a) (Counts 1 and 8), two counts of transporting a minor in interstate commerce to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a) (Counts 2 and 7), receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2) (Count 3), possessing child pornography, in violation of 18 U.S.C. § 2252A(b)(2) (Count 4), using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of 18 U.S.C. § 2251(a) (Count 5), and attempting to alter, destroy or conceal evidence, in violation of 18 U.S.C. § 1512(c)(1) (Count 6).[1]

[1] Doc. 86.

The United States Court of Appeals for the Third Circuit summarized the basis for the charges thusly: "Lee supervised high school aged minors who volunteered as docents at the Boal Mansion Museum in Boalsburg, Pennsylvania. After one of the young docents accused him of sexual assault, the police obtained a search warrant for the Boal Mansion, where Lee resided."[2] A search of Lee's electronic devices revealed child pornography and—as relevant here—" photographs and videos that Lee had taken of the teenagers participating in the docent program" which had been edited "to focus on the children's genitals, buttocks, or pubic areas."[3] Some of these cropped images were included in graphic sexual stories that Lee wrote about children.[4] Those cropped images formed the basis of Count 5.

In early 2016, this Court granted Lee's motion to sever and severed four of the counts from the second superseding indictment.[5] Trial proceeded against Lee as to Counts 3 through 6 of the second superseding indictment;[6] after a four-day trial, a jury convicted Lee of all four counts.[7] The Court thereafter sentenced Lee to a

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2 *United States v. Lee*, 701 F. App'x 175, 177 (3d Cir. 2017).

3 *Id.* at 178.

4 *Id.*; Doc. 205 at 24-26.

5 Docs. 120, 121.

6 After trial concluded, the remaining counts were dismissed at the Government's request. (Docs. 202, 204).

7 Doc. 163.

total term of 216 months' imprisonment.[8] On appeal, the Third Circuit affirmed Lee's convictions.[9]

In March 2019, Lee filed a timely 28 U.S.C. § 2255 motion challenging his convictions based upon allegations of ineffective assistance of counsel.[10] First, Lee asserts that trial counsel was ineffective for failing to request appropriate jury instructions.[11] Specifically, Lee contends that trial counsel should have requested an instruction that the sixth *Dost*[12] factor must be viewed objectively and should not be viewed as an independent factor.[13] Moreover, Lee argues that trial counsel should have requested an instruction that the jury may consider the lapse in time between when Lee took the photographs and when he cropped them to determine whether Lee "used" or "employed" a minor to produce child pornography.[14]

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8 Doc. 191.

9 *Lee*, 701 F. App'x at 177.

10 Doc. 213. Although Lee challenges all of his convictions, his arguments relate solely to Count 5, and he argues that the remaining convictions "should be vacated due to prejudicial spillover." *Id.* at 35.

11 Doc. 217 at 16-23.

12 *United State v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). In *Dost*, the court set forth six non-exhaustive factors that courts may use to determine whether a depiction includes the lascivious exhibition of the genitals or pubic area. *Id.* at 832. The sixth factor is "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* The Third Circuit has adopted those factors for use by district courts within the circuit. *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989).

13 Doc. 217 at 16-21.

14 *Id.* at 21-23.

Second, Lee faults trial counsel for failing to move to dismiss Count 5.[15] Lee asserts that, had trial counsel not conceded that the cropped images were lascivious, this Court would have dismissed Count 5, as only one *Dost* factor is present in the cropped photographs.[16] Lee further argues that cropping non-pornographic images may not, as a matter of law, create new pornographic images.[17] Alternatively, Lee contends that, even if such cropping may violate 18 U.S.C. § 2251(a), that statute is unconstitutionally vague as applied to him because there were no identifiable minors in the cropped images.[18]

Third, Lee argues that trial counsel was ineffective for failing to place the cropped images and accompanying erotic stories in context for the jury.[19] In that respect, Lee asserts that he likely would not have been convicted had counsel presented testimony from an art historian explaining the use of homoerotic photography in art, or had counsel presented evidence that erotic stories involving children—such as the ones created by Lee—have a "legitimate market" and are "available in public venues."[20] Finally, Lee contends that, at the very least, the cumulative errors amount to ineffective assistance of counsel.[21]

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15 *Id.* at 23-31.

16 *Id.* at 23-24.

17 *Id.* at 24-28.

18 *Id.* at 28-31.

19 *Id.* at 31-34.

20 *Id.* at 33; *see id.* at 31-34.

21 *Id.* at 34-35.

The Government has responded to Lee's § 2255 motion, but only directly addresses three of Lee's claims.[22] The Government asserts that Lee's trial counsel was not ineffective because: (1) no case law supports the assertion that Lee was entitled to an instruction that the sixth *Dost* factor must be viewed objectively; (2) any motion to dismiss Count 5 would have been meritless, as cropping non-pornographic images may result in the creation of new pornographic images and "overwhelming evidence established that the images at issue here were pornographic"; and (3) counsel made a reasonable strategic decision to not call an art historian to testify.[23] This matter is now ripe for disposition and, for the reasons discussed below, the Court will deny Lee's motion.

II. DISCUSSION

"In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-part test to evaluate ineffective assistance of counsel claims."[24] "The first part of the *Strickland* test requires 'showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'"[25] In determining whether an attorney's performance is deficient, courts must "determine whether, in light of all the circumstances, the

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[22] Doc. 221.

[23] *Id.*

[24] *United States v. Bui*, 795 F.3d 363, 366 (3d Cir. 2015).

[25] *Id.* (quoting *Strickland*, 466 U.S. at 687).

[attorney's] acts or omissions were outside the wide range of professionally competent assistance."[26] As the United States Supreme Court has emphasized:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.[27]

"The second part [of the *Strickland* test] specifies that the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"[28] "This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable."[29] In other words, a movant must establish a "a substantial likelihood" that any errors "changed the outcome of . . . trial."[30]

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[26] *Strickland*, 466 U.S. at 690.

[27] *Id.*

[28] *Bui*, 795 F.3d at 366 (quoting *Strickland*, 466 U.S. at 694).

[29] *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (internal quotation marks omitted).

[30] *Branch v. Sweeney*, 758 F.3d 226, 238 (3d Cir. 2014).

A. Jury Instructions

Lee asserts that his trial counsel was ineffective for failing to request two separate jury instructions.[31] First, Lee argues that trial counsel should have requested an instruction that the jury must objectively weigh whether the cropped photos were intended to elicit a sexual response in the viewer, and may not consider the sixth *Dost* factor independently.[32] Second, Lee contends that trial counsel was deficient in failing to request an instruction that the jury may consider the lapse in time between when Lee took the photographs and when he cropped them in determining whether he used a minor to engaged in sexually explicit conduct.[33]

i. *Instructions Regarding the Sixth Dost Factor*

With regard to Lee's first claim, 18 U.S.C. § 2251(a) prohibits using or employing "any minor to 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." Sexually explicit conduct includes, as relevant here, the "lascivious exhibition of the anus, genitals, or pubic area of any person."[34]

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[31] Doc. 217 at 16-23.

[32] *Id.* at 16-21.

[33] *Id.* at 21-23.

[34] 18 U.S.C. § 2256(2)(A)(v).

In *United States v. Villard*, the Third Circuit adopted a list of six non-exhaustive factors that factfinders should consider in determining whether a depiction involves the lascivious exhibition of the genitals or pubic area of a person:

> 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.[35]

The factfinder may also consider "any other relevant factors given the particularities of the case."[36] No single factor is dispositive and, "[a]lthough more than one factor must be present in order to establish 'lasciviousness,' all six factors need not be present."[37]

With regard to the sixth factor, the Third Circuit in *Villard* noted that "[a]lthough it is tempting to judge the *actual* effect of the photographs on the viewer,

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[35] *Villard*, 885 F.2d at 122.

[36] *United States v. Knox*, 32 F.3d 733, 745 (3d Cir. 1994).

[37] *Villard*, 885 F.2d at 122.

we must focus instead on the *intended* effect on the viewer."[38] Thus, "[c]hild pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo . . . [a photograph] does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it."[39] The Third Circuit further stated that "the sixth *Dost* factor, rather than being a separate substantive inquiry about the photographs, is useful as another way of inquiring into whether any of the other five *Dost* factors are met."[40]

Lee asserts that the Third Circuit's decision in *Villard* mandates that any fact-finder weigh the sixth factor objectively—that is, it should not consider "Lee's subjective response to the images" and should consider the sixth factor simply as a means of determining whether the other five factors are met.[41] However, Third Circuit precedent does not support Lee's contention.

First, as to Lee's contention that his subjective response to the cropped images was not relevant, the Third Circuit in *United States v. Larkin*[42] reiterated that "*Villard* instructs that the focus must be on the *intended* effect, rather tha[n] the *actual* effect, on the viewer."[43] While the photograph's effect on a viewer is not relevant, the

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[38] *Id.* at 125.

[39] *Id.*

[40] *Id.*

[41] Doc. 217 at 19-20.

[42] 629 F.3d 177 (3d Cir. 2010).

[43] *Id.* at 184.

effect intended by the photographer is relevant. Thus, the Third Circuit in *Larkin* examined the intent of the photographer and found persuasive that the relevant photograph was trafficked "over the internet to an interested pedophile, whom [the defendant] acknowledged 'would find them sexually stimulating because of his predilection for young children.'"[44] The fact that the photographer knew that the particular image would be sexually arousing to its intended recipient tipped the balance in favor of concluding that the image was pornographic.[45]

Lee's situation is somewhat unique, as he was both the creator and the intended viewer of the cropped photographs. The Third Circuit addressed a similar circumstance in at least one unpublished opinion, noting that the relevant inquiry is "whether [the defendant] intended or designed the videos to elicit a sexual response in the viewer—that is, himself."[46] As the photographer, it was relevant and proper for the jury to consider whether Lee intended for the photographs to be sexually arousing to himself, i.e., "whether the visual depiction is intended or designed to elicit a sexual response in the viewer."[47] Because the jury could properly consider

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[44] *Id.*

[45] *Id.* at 184-85.

[46] *United States v. Clark*, 468 F. App'x 102, 104 (3d Cir. 2011).

[47] *Villard*, 885 F.2d at 122.

Lee's subjective view of the cropped photographs, his trial counsel was not ineffective for failing to argue in favor of an instruction to the contrary.[48]

Second, the Court finds that trial counsel was not ineffective in failing to request that the jury be instructed that the sixth *Dost* factor is not an independent factor but is instead "useful as another way of inquiring into whether any of the other five *Dost* factors are met."[49] Admittedly, the Third Circuit has been somewhat inconsistent with its application of the sixth *Dost* factor.

For example, in *United States v. Larkin* the Third Circuit spent considerable time analyzing the sixth *Dost* factor. When examining one photograph, the court determined that, while consideration of the first five *Dost* factors presented "a close call . . . [u]ltimately, it is *Dost* factor six that tips the balance on the side of qualifying the photograph as exhibiting lascivious conduct."[50] The Third Circuit took careful note of the evidence that demonstrated the defendant subjectively intended for the photographs to elicit sexual arousal in its recipient, including the defendant's statement that the recipient "would find [the photographs] sexually stimulating because of his predilection for young children."[51]

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48 *See Bui*, 795 F.3d at 366-67 (noting "[w]e have reasoned that there can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument" (internal quotation marks omitted)).

49 *Villard*, 885 F.2d at 125.

50 *Larkin*, 629 F.3d at 184.

51 *Id.*

In analyzing a different photograph, the court observed that "alone, none of the identified *Dost* factors sufficiently demonstrate lasciviousness. But given the particularities of the case, the presence of the sixth *Dost* factor, which when coupled with the other factors, tips the scale in favor of categorizing the image as lascivious."[52] The Third Circuit concluded that the sixth *Dost* factor was present because the defendant sent the image "to known pedophiles," confirmed the recipient's sexual preferences, and had the minor pose in such a way as to emphasize her breasts.[53] If the sixth *Dost* factor could not be treated as a separate factor and was merely a shorthand for asking whether the first five factors were satisfied, then the Third Circuit's conclusion that "the presence of the sixth factor, which *when coupled with the other factors*, tips the scale in favor of categorizing the image as lascivious"[54] would make little sense.

Similarly, in *United States v. Strausbaugh*, an unpublished opinion, the Third Circuit applied the *Dost* factors and concluded that "the sixth [*Dost* factor] is [present], as Strausbaugh's husband testified at trial that the pictures of the child were taken for his own personal use, that Strausbaugh knew that the pictures were for that purpose, and that Strausbaugh had reason to believe her husband looked at

[52] *Id.* at 185.

[53] *Id.*

[54] *Id.* (emphasis added).

child pornography."[55] This marks a clear application of the sixth *Dost* factor as a separate consideration, rather than a mere shorthand to again ask whether the image is lascivious.

In contrast, in *Doe v. Chamberlin*, the Third Circuit did not apply the sixth *Dost* factor to its analysis after remarking that "[t]he final *Dost* factor simply puts again the underlying question: Is the exhibition lascivious?"[56] And in *United States v. Franz*, the Third Circuit reiterated that "[t]he sixth factor is not a separate substantive inquiry about the photographs"[57] and, after analyzing the first five *Dost* factors, simply noted that "[s]ixth, all of the facts addressed above suggest that the image was intended to elicit a sexual response in the viewer."[58]

Although this case law is somewhat muddled, the Court draws from it a simple conclusion: direct or circumstantial evidence demonstrating a photographer's intent in creating photographs is relevant in any analysis under the *Dost* factors.[59] Whether that intent is considered under the sixth *Dost* factor or separately as a different "relevant factor[] given the particularities of the case"[60] is immaterial. The jury was

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55 534 F. App'x 175, 178 (3d Cir. 2013).

56 299 F.3d 192, 196 (3d Cir. 2002).

57 772 F.3d 134, 157 (3d Cir. 2014).

58 *Id.* at 158.

59 *See, e.g.*, *United States v. Russell*, 662 F.3d 831, 843 (7th Cir. 2011) ("Although the primary focus in evaluating the legality of the charged photographs must be on the images themselves, . . . the cases reveal that the intent and motive of the photographer can be a relevant consideration in evaluating those images" (citations omitted)).

60 *Knox*, 32 F.3d at 745.

permitted to consider whether Lee intended to be sexually aroused by the cropped images; an instruction that implied the contrary would have misled the jury, and the Court would not have given such an instruction. Thus, the Court cannot find that trial counsel was deficient in failing to request an instruction that the sixth *Dost* factor may not be considered independently. Moreover, given that the jury could properly consider Lee's subjective intent as a factor in determining whether the cropped images were lascivious, there is no substantial likelihood that such an instruction—if given—would have altered the outcome of the trial.

ii. *Instructions Regarding Lapse of Time*

Next, Lee contends that trial counsel was ineffective in failing to request an instruction that the jury could consider the lapse in time between when Lee took the photographs and when he cropped them in deciding whether the cropped images were lascivious in nature.[61] The Court finds no deficient performance in this respect.

The Court has found no case—and Lee points to none—where a court has issued Lee's proposed jury instruction or held that the time gap between taking a photograph and subsequently editing it is relevant to whether a defendant used a minor to create child pornography. Indeed, such a conclusion would be counterintuitive. Plainly, Lee did not create child pornography when he took innocuous photographs of teenagers engaged in ordinary activities. It was not until

[61] Doc. 217 at 21-23.

the images were cropped that their focal point became the children's pubic areas. It was Lee's intent in editing the photographs that was relevant to whether he used a minor, not his intent in taking the original, non-pornographic images. Thus, as discussed in more detail below, by cropping the photographs, Lee created new images that must be viewed in their own right.[62]

This is in accordance with plethora of case law in a similar context addressing the prohibition on "morphing" child pornography, where, "[r]ather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity."[63] Numerous circuit courts have concluded that the altered images may constitute new, prohibited child pornography.[64] Thus, the moment Lee cropped the images was the moment that he used or employed the children, and there was no relevant time gap for the jury to consider. The Court concludes that trial counsel was not ineffective for failing to request an instruction that had no legal basis, and which would not have been given by the Court.[65]

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62 *See* pp. 20-24.

63 *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242 (2002).

64 *See Shoemaker v. Taylor*, 730 F.3d 778, 786 (9th Cir. 2013); *Doe v. Boland*, 698 F.3d 877, 883-84 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725, 728-30 (2d Cir. 2011); *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005).

65 Lee also asserts he was entitled to a theory of defense instruction and counsel was ineffective for failing to request such an instruction. (Doc. 217 at 22-23). Lee does not explain or detail which theory of defense instruction counsel should have requested; to the contrary, his arguments focus on general criminal instructions, not instructions related to a theory of

B. Issues Related to Failure to Move to Dismiss Count 5

Next, Lee argues that trial counsel was ineffective for conceding that the cropped images were lascivious because, absent such a concession, Lee asserts that it is likely the jury would have concluded that the images were not lascivious as only one *Dost* factor was present.[66] Second, Lee contends that trial counsel was ineffective for failing to move to dismiss Count 5 on the grounds that (1) the cropping of non-pornographic images can never create new pornographic images and (2) 18 U.S.C. § 2251 is unconstitutionally vague as applied to Lee.[67]

i. *Concession That Images Were Lascivious*

The Court disagrees with Lee that trial counsel was ineffective for conceding that the cropped images were lascivious, as his concession was based on a reasonable trial strategy. Rather than argue that the cropped images were not lascivious which, as discussed below, is a dubious argument, counsel instead sought to convince the jury that a third party was responsible for cropping the photographs that were found on Lee's computer.[68] In that vein, trial counsel elicited testimony that Lee's computers were easily accessible by dozens of people over a course of years—

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defense. (*See* Doc. 217 at 21-23). Consequently, the Court cannot find that trial counsel was ineffective with respect to a missing theory of defense instruction.

66 Doc. 217 at 23-24.

67 *Id.* at 24-31.

68 *See* Doc. 217-1 at 3 (statement from trial counsel that "[m]y approach to the case was that we were not defending child pornography but that the case was instead about lack of security on the Boal Mansion Museum's computer system").

including volunteers at the museum, foreign students, and interns—and that anyone could have accessed Lee's personal account if given the password to that account.[69] Testimony also established that "everybody knew the password" to Lee's computers and account.[70]

Trial counsel's strategy—eschewing an argument with little likelihood of success in favor of the more promising argument that it was not Lee who created the cropped images—cannot be said to have been unreasonable.[71] Of course, counsel's strategy ultimately failed, and it is tempting to conclude that a sounder strategy would have been to challenge the lasciviousness of the cropped photographs. Nevertheless, this Court is mindful that great pains must be taken "to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time" of the trial.[72] Given the information available at trial and the relatively strong evidence of lasciviousness, counsel's decision to focus the jury only on the question of whether Lee cropped the images was reasonable.

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[69] Doc. 206 at 107-13, 138-39, 233-39; Doc. 207 at 286-89, 291-95, 435-36, 442-46; Doc. 208 at 507-24.

[70] Doc. 207 at 445; *see id.* at 446.

[71] Lee now asserts that the defense was more salient to Counts 3 and 4, and "was far less appropriate to [Count 5] in which the cropped images were tied to stories that had been created and modified under the use account of Christopher G. Lee." (Doc. 217 at 32). This, however, is not accurate. Trial counsel took pains to point out that numerous individuals had access not only to Lee's computers, but also to Lee's account, and put forth the idea that someone else may have written the stories to which the cropped photographs were attached. (Doc. 207 at 445-46; Doc. 208 at 518-20).

[72] *Strickland*, 466 U.S. at 689.

The evidence before the jury established at least three of the *Dost* factors. Lee concedes in this motion—as he must—that the cropped photographs focused on the pubic area of the minors, satisfying the first *Dost* factor.[73] Moreover, as the Third Circuit noted on direct appeal, several of the photographs suggested a willingness to engage in sexual activity, "such as an image that appeared to depict one boy touching another boy's genitals, and another where a boy appeared to be touching himself."[74] This satisfies the fifth *Dost* factor. Finally, given the context of these pictures—the pictures were cropped to focus on the pubic region and many were included in stories describing graphic sexual relations with and among children—there is evidence that Lee intended for the images to elicit a sexual response in himself, thereby satisfying the sixth *Dost* factor.[75] Consequently, even if counsel's performance were deficient, there is no substantial likelihood that trial counsel's decision to concede that the images were lascivious "changed the outcome of . . . trial."[76]

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[73] Doc. 217 at 24.

[74] *Lee*, 701 F. App'x at 182 n.6.

[75] *See United States v. Stewart*, 729 F.3d 517, 527 (6th Cir. 2013) ("The jury could have reasonably inferred that the act of image editing, combined with the peculiar composition of the resultant images, demonstrated that the images were designed or intended to elicit a sexual response in the viewer"); *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) (noting that by closely focusing on a child's genitalia, the "pictures featured the child photographed as a sexual object" thus supporting the conclusion that the photographer took the photographs "to suit his peculiar lust").

[76] *Branch*, 758 F.3d at 238.

ii. *Failure to Move to Dismiss Count 5*

Lee next asserts that, for two reasons, trial counsel was ineffective for failing to move to dismiss Count 5.[77] First, Lee argues that the Court likely would have dismissed Count 5 because, as a matter of law, pornographic images may never be created by cropping non-pornographic images.[78] Second, Lee believes that, in the alternative, 18 U.S.C. § 2251(a) is unconstitutionally vague as applied, because the statute does not provide fair warning that cropping non-pornographic images in such a way that a minor is not identifiable may constitute child pornography.[79]

As to Lee's first assertion, several courts have concluded that pornography may be created by altering non-pornographic images. For example, in *United States v. Stewart*, the defendant took non-pornographic photographs of children playing at the beach and cropped them to focus "solely on the female genitalia of the naked, or nearly naked, child in the original image" and in other photographs brightened the images to draw attention to the children's genitalia.[80] The United States Court of Appeals for the Sixth Circuit examined the photographs and determined that there was sufficient evidence of lasciviousness, including that "the focal point of the images was the childrens' genitalia, the children were partially clothed or nude, and

[77] Doc. 217 at 24-31.

[78] *Id.* at 24-28.

[79] *Id.* at 28-31.

[80] 729 F.3d 517, 522 (6th Cir. 2013).

these images were cropped and brightened from larger photographs that largely were innocuous."[81] Importantly, the Sixth Circuit held:

> Although [the defendant] contends that the act of image manipulation cannot—as a matter of law—render an image lascivious when the larger image from which it was cropped was undisputably not lascivious, his position ignores the case law which holds that a jury may consider evidence of composition, framing, and focus to support a finding of lasciviousness.[82]

And in *United States v. Horn*, the United States Court of Appeals for the Eighth Circuit examined a conviction that included—in part—videos of children at the beach in swimming suits and playing nude on a jungle gym.[83] Although the videos in their totality were largely innocuous, the defendant captured still images from the videos. As the Eighth Circuit summarized, "[s]hots of young girls are freeze-framed at moments when their pubic areas are most exposed, as, for instance, when they are doing cartwheels; and these areas are at the center of the image and form the focus of the depiction."[84] The Eighth Circuit rejected an argument similar to that presented in *Stewart*:

> [The defendant] argues that an otherwise innocent video tape of nude children cannot be made into a lascivious exhibition of the genitals by freeze-framing. We disagree. 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. The "lascivious exhibition" is not the work of the child, whose innocence is not in question, but of the

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81 *Id.* at 527.

82 *Id.* at 528.

83 187 F.3d 781, 789 (8th Cir. 1999).

84 *Id.* at 790.

> producer or editor of the video. In this case, the producer or editor generated a product that meets the statutory definition of sexually explicit conduct.[85]

Similarly, in *United States v. Holmes*, the defendant "secretly recorded [a minor] while in her bathroom performing normal, everyday activities."[86] From those videos, the defendant "created twenty-six screen captures . . . [and] two of those screen captures depict[ed] close-up views of [the minor's] pubic area."[87] The United States Court of Appeals for the Eleventh Circuit concluded that the images were lascivious, holding that "a lascivious exhibition may be created by an individual who surreptitiously videos or photographs a minor and later captures or edits a depiction, even when the original depiction is one of an innocent child acting innocently."[88]

The Court agrees with these courts that nothing prevents a non-pornographic image from becoming pornographic through editing, and Lee points to no relevant case law to the contrary. Although Lee relies on *United States v. Steen*[89] in support of his argument, that decision is inapposite. There, the United States Court of Appeals for the Fifth Circuit examined a fifteen-second video, during which a minor's "pubic region is only visible for about 1.5 seconds."[90] After examining the

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85 *Id.*

86 814 F.3d 1246, 1251 (11th Cir. 2016).

87 *Id.* at 1250.

88 *Id.* at 1252.

89 634 F.3d 822 (5th Cir. 2011).

90 *Id.* at 827.

Dost factors, the Fifth Circuit determined that there was no evidence of lasciviousness.[91] However, the video was not edited in any way, and no still shots were taken that focused on the minor's genitalia. That the video *could* have been edited is irrelevant; it was not, and *Steen* is therefore of little assistance to Lee. Lee further notes that in *United States v. Cunningham*, the Sixth Circuit did not dispute that cropped images of a clothed-child's genitalia was "not illegal."[92] However, the Sixth Circuit was not called upon to address the legality of the photographs and therefore did not need to address that question—particularly when an examination of whether such images constitute child pornography is necessarily fact-intensive.[93]

At bottom, Lee's argument ignores a basic reality about the images that he cropped. While Lee argues that photographs must be viewed in their pre-cropped totality, this argument overlooks the fact that, as discussed previously, the cropping of a photograph results in a new image which must be viewed in its own.[94] In sum, the law—and common sense—firmly establishes that an individual may create new, pornographic images by cropping or editing non-pornographic images in such a

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91 *Id.* at 827-28.

92 669 F.3d 723 (6th Cir. 2012).

93 *See, e.g.*, *Vargas v. City of Philadelphia*, 783 F.3d 962 at 975 n.14 (3d Cir. 2015) (noting that "appellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief" or such issue generally will not be considered on appeal).

94 *See 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" (emphasis added).

manner that the altered images become lascivious by, *inter alia*, shifting the focus of the photograph to the child's genitalia.

The Court similarly concludes that Lee "used" the minors for § 2251(a) purposes at the moment that he edited the photographs—thereby creating new photographs—[95]not the moment that he took the photographs.[96] When Lee edited the photographs to focus on the children's genitalia, he at that moment used the children within the meaning of § 2251(a). Consequently, there is no reasonable probability that the Court would have granted a motion to dismiss Count 5 based on this argument, and Lee cannot establish either deficient performance or prejudice.

The Court then must turn to Lee's final argument related to counsel's failure to move to dismiss Count 5: that 18 U.S.C. § 2251(a) is unconstitutionally vague as applied to Lee.[97] Lee relies on a series of morphing cases to argue that § 2251(a) is unconstitutionally vague if a child is not identifiable in a cropped image.[98] To be certain, numerous circuit courts have held that the "morphing statute," 18 U.S.C.

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95 *Cf. Holmes*, 814 F.3d at 1251 (noting that "what constitutes lascivious exhibition is not concrete, and for this reason it is necessary to determine the potentially lascivious nature with respect to the actual depictions themselves" (internal quotation marks omitted)); *Ortiz-Graulau v. United States*, 756 F.3d 12, 19 (1st Cir. 2014) ("'Use' reaches a defendant's active involvement in producing the depiction even if the interpersonal dynamics between the defendant and the depicted minor are unknown").

96 For that reason, the cases cited by Lee in support of his conclusion that images must be viewed at the time of their creation (Doc. 217 at 27-28) are not relevant to the Court's analysis.

97 Doc. 217 at 28-31.

98 *Id.* at 29-31.

§ 2252A, is constitutional as applied to a defendant only if a child is identifiable in the altered or morphed image.[99]

However, the morphing statute is fundamentally different from statutes that address child pornography using real children. In addressing morphed images, Congress criminalized only images that use an "identifiable minor," that is, a minor "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."[100] This language was necessary because, on their own, digitally-manipulated photographs do not necessarily involve children and "could be applied to situations where no actual child could be harmed by the production or distribution of the image."[101] However, where the morphed image depicts an identifiable minor, it "implicates the interests of a real child" and is thus punishable by law.[102]

In contrast, the statute that Lee was convicted of violating prohibits the use of "any minor" without limitation to whether the minor is identifiable.[103] Unlike the morphing statute, 18 U.S.C. § 2251(a) always involves the use of real children. This renders the statute fundamentally different from the morphing statute, as "[t]he

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99 *Shoemaker*, 730 F.3d at 786; *Boland*, 698 F.3d at 883-84; *Hotaling*, 634 F.3d at 738-30; *Bach*, 400 F.3d at 632.

100 18 U.S.C. § 2256(9)(A)(ii); *see* 18 U.S.C. § 2252A(a)(7).

101 *Bach*, 400 F.3d at 631 (citing *Free Speech Coal.*, 535 U.S. 234).

102 *Id.* at 632.

103 18 U.S.C. § 2251(a).

underlying inquiry [in any child pornography case] is whether an image of child pornography implicates the interests of an actual minor."[104]

Unlike morphing statutes then, a conviction under § 2251(a) does not require an identifiable minor, it only requires an actual minor.[105] Here, actual children were used in the cropped photographs, and actual children were victimized by Lee's creation of child pornography. Congress has recognized that all child pornography "feeds the [child pornography] market . . . supports demand in the national market and is essential to its existence."[106] Moreover, "all child pornography offenses are extremely serious because they both perpetuate harm to victims and normalize and validate the sexual exploitation of children."[107] Congress intended to end all child pornography utilizing real children, not simply child pornography with identifiable victims, as such harms are present regardless of whether the minor is identifiable.[108]

This view of 18 U.S.C. § 2251 is necessary to implement Congress' ban of child pornography. Were child pornography that used real children deemed non-criminal simply because the victim is not identifiable in the photograph, offenders

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[104] *Hotaling*, 634 F.3d at 729 (citing *United States v. Williams*, 553 U.S. 285, 289 (2008); *Free Speech Coal.*, 535 U.S. at 258).

[105] Indeed, at least two circuit courts have concluded that the minor need not be identified. *See United States v. Theis*, 853 F.3d 1178, 1181 (10th Cir. 2017); *Ortiz-Graulau*, 756 F.3d at 19.

[106] *United States v. Holston*, 343 F.3d 83, 90 (2d Cir. 2003).

[107] *United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017) (brackets and internal quotation marks omitted).

[108] See *Ortiz-Graulau*, 756 F.3d at 19 ("In enacting 18 U.S.C. § 2251, Congress intended a broad ban on the production of child pornography and aimed to prohibit the varied means by which an individual might actively create it." (internal quotation marks omitted)).

would be virtually immune from prosecution. For example, offenders could produce child pornography and avoid all criminal liability by simply blurring or cutting out a child's face or other identifying characteristics, or by focusing an image closely on the child's genitalia. Surely, this is not what Congress intended when it criminalized the production of child pornography, and Lee's assertions cannot be squared with that intent or the plain language of § 2251(a). Because there is no reasonable probability that the Court would have dismissed Count 5 on an as-applied constitutional challenge, Lee cannot establish deficient performance[109] or prejudice resulting from trial counsel's failure to move to dismiss Count 5.

C. Failure to Explain Images and Stories

Lastly, Lee argues that trial counsel was ineffective for failing to place the cropped images and sexually explicit stories in context for the jury which, according to Lee, would have demonstrated to the jury that the images were not child pornography.[110] Lee contends that trial counsel should have called an expert witness in art history to discuss the history of "homoerotic photography" and explain to the

[109] Even if a challenge to the constitutionality of 18 U.S.C. § 2251(a) had merit, no case law supports Lee's position on this matter. "The Sixth Amendment does not require counsel for a criminal defendant to be clairvoyant" and predict unexpected developments in the law. *United States v. Harms*, 371 F.3d 1208, 1212 (10th Cir. 2004). It would ask too much of defense counsel to predict such drastic changes in the law as those requested by Lee in his § 2255 motion, and the Court cannot conclude that trial counsel was constitutionally deficient for failing to so do. *See Murray v. Carrier*, 477 U.S. 478, 486, (1986) ("the constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim").

[110] Doc. 217 at 31-34.

jury "that cropped images not terribly different from the ones underlying [Count 5] are currently hanging in museums."[111] Additionally, Lee asserts that, had trial counsel notified the jury that a legitimate market exists for erotic stories involving children, the jury may not have concluded that such stories written by Lee were indicative of an intent to create child pornography.[112]

As to the first point, Lee presents an expert report attesting that artwork in the recent past has sometimes featured child nudity, and occasionally featured graphic adult nudity.[113] Although trial counsel could have presented such testimony to the jury and argued that the cropped images were merely artistic photographs, he opted not to pursue such a defense based upon a legitimate trial strategy. As trial counsel explained, "I did not consult, or consider consulting with, an art history expert with regard to the cropped images . . . [because] I believed arguing that child pornography is art falls on deaf ears."[114]

Instead of pursuing a strategy that he believed would "fall[] on deaf ears," trial counsel sought to build a case about the "lack of security on the Boal Mansion Museum's computer systems" and convince the jury that there was insufficient evidence that Lee—rather than one of the dozens of other individuals who has access

[111] *Id.* at 31-33.

[112] *Id.* at 33-34.

[113] *See* Doc. 217-3.

[114] Doc. 217-1 at 3.

to Lee's computer and login information—created the child pornography. Trial counsel elicited a great deal of testimony at trial establishing that numerous people had access to the computers,[115] and—although the defense ultimately failed—trial counsel could have convinced the jury that the Government failed to sustain its burden of proof. This was a reasonable tactical decision.

The Court also rejects Lee's argument that counsel's decision not to call an expert witness was not reasonable because trial counsel did not adequately research the issue prior to deciding not to call an expert witness. As the Supreme Court has emphasized, "[c]ounsel [i]s entitled to formulate a strategy that [i]s reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."[116] This is not a case where trial counsel failed to pursue an obviously meritorious defense in favor of a weaker or frivolous defense. Rather, as counsel noted in his affidavit, arguing before a jury that child pornography is art rarely succeeds as a defense,[117] and no amount of consultation with an expert likely would have changed that conclusion. Counsel thus made a reasonable decision to "avoid activities that appear distractive from more important duties"[118] and instead pursue

[115] Doc. 206 at 107-13, 138-39, 233-39; Doc. 207 at 286-89, 291-95, 435-36, 442-46; Doc. 208 at 507-24.

[116] *Harrington*, 562 U.S. at 107.

[117] Doc. 217-1 at 3.

[118] *Harrington*, 562 U.S. at 107.

what he viewed as a more realistic defense.[119] The Court finds no fault in that decision.

Lee also argues that trial counsel should have explained that legitimate markets exist for the erotic child-related stories in which many of the cropped images were found.[120] However, Lee has presented no *prima facie* evidence demonstrating that there is a legitimate market for erotic stories involving sex with and among children. Rather, Lee relies entirely on trial counsel's affidavit stating that, during jury deliberations, counsel "was advised that a market exists outside child pornography for text stories like the ones admitted into evidence in this case, and that I should have had someone testify about that market in order to place the stories in context."[121] However, this demonstrates—at most—that there *might* have been a legitimate market for such stories, as there is no evidence that the source of such information was reliable; indeed, the source of this information could have been Lee himself. Lee's speculative assertions on this point are insufficient to sustain a claim of ineffective assistance of counsel.

Additionally, as set forth above, trial counsel pursued a reasonable strategy of attempting to demonstrate that a number of other individuals may have created the

[119] As noted previously, although Lee argues that this defense was inappropriate in defending against Count 5 because the images were found in Lee's personal account on the computer, trial counsel put forth evidence demonstrating that numerous individuals had access to Lee's computer and personal account. (Doc. 207 at 445-46; Doc. 208 at 518-20).

[120] Doc. 217 at 33-34.

[121] Doc. 217-1 at 3-4.

child pornography and written the stories that were found on Lee's computer.[122] Attempting to introduce evidence of a "legitimate market" for stories such as those written by Lee would risk confusing the jury about whether Lee was denying having written the stories or was instead arguing that he wrote the stories, but for legitimate purposes—especially when there is no evidence that Lee wrote the stories for any purpose other than to satisfy his own sexual predilections. At worst, such a defense could potentially have led the jury to believe that Lee was conceding that he did write the stories and, thus, did crop the accompanying images, thereby undermining his entire defense. As a consequence, the Court finds that Lee has failed to establish ineffective assistance of counsel on this claim.

Finally, Lee contends that the errors, even if not individually sufficiently prejudicial, are collectively sufficiently harmful to amount to ineffective assistance of counsel.[123] For the reasons previously discussed, the Court finds that trial counsel's performance did not fall below a reasonable standard and, thus, the cumulative error analysis is inapplicable.[124] Even if there were error, none of the

[122] *See* Doc. 208 at 517-20.

[123] Doc. 217 at 34-35.

[124] *See Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007) ("a cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless" (internal quotation marks omitted)).

errors, considered singly or cumulatively, are sufficient to conclude that Lee suffered any demonstrable prejudice.

D. Certificate of Appealability

Because this Court will denied Lee's § 2255 motion, this decision will not be appealable unless this Court or a circuit justice issues a certificate of appealability.[125] A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right."[126] To satisfy this standard Lee must demonstrate that reasonable jurists would find that the Court's assessment of the constitutional claims is debatable or wrong.[127] This Court finds that Lee has not met this burden, and the Court therefore declines to issue a certificate of appealability.

III. CONCLUSION

For the foregoing reasons, the Court concludes that Lee did not receive ineffective assistance of counsel, and his 28 U.S.C. § 2255 motion will be denied. The Court will also deny a certificate of appealability.

An appropriate Order follows.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
United States District Judge

[125] 28 U.S.C. § 2253(c)(1)(B).

[126] *Id.* § 2253(c)(2).

[127] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003).

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ORDER OF THE THIRD CIRCUIT COURT OF APPEALS DATED SEPTEMBER 30, 2020 [App. 34-35]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1465

UNITED STATES OF AMERICA

v.

CHRISTOPHER G. LEE,
Appellant

(M.D. Pa. No. 4:14-cr-00254-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, and McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/ Stephanos Bibas
Circuit Judge

Dated: September 30, 2020
JK/cc: All Counsel of Record