No. _____

In The
Supreme Court of the United States

GERALD LEE GROOMES,
Petitioner,
vs.

ARKANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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I.

Question Presented

Does a state's unreasonable application of a criminal statute prohibiting the possession of images depicting a "lewd exhibition" of child nudity in a manner that infringes on a substantial amount of protected expression violate the First Amendment?

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Petition for Writ of Certiorari

Gerald Lee Groomes, an inmate currently incarcerated at the North Central Unit of the Arkansas Department of Correction in Calico Rock, Arkansas, by and through his attorney, respectfully petitions this Court for a writ of certiorari to review the judgment of the Arkansas Court of Appeals.

V.

Opinions Below

The decision by the Arkansas Court of Appeals denying Mr. Groomes' direct appeal is reported as *Groomes v. State*, 586 S.W.3d 196 (Ark. App. 2019). The Arkansas Supreme Court denied Mr. Groomes' petition for review on January 23, 2020. That order is attached at Appendix A-1.

VI.

Jurisdiction

Mr. Groomes' petition for review to the Arkansas Supreme Court was denied on January 23, 2020. Mr. Groomes invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the Arkansas Supreme Court's judgment.

VII.

Constitutional Provisions Involved

United States Constitution, Amendment I:

> *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.

VIII.

Statement of the Case

The question presented by this case is whether a state's unreasonable application of a criminal statute prohibiting the possession of images depicting a "lewd exhibition" of child nudity in a manner that infringes on a substantial amount of protected expression violates the First Amendment.

In *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court recognized that "depictions of nudity, without more, constitute protected expression." *Id.* at 112; *New York v. Ferber*, 458 U.S. 747, 765 n. 18 (1982). The *Osborne* Court indicated that state supreme courts should be given leeway to interpret their criminal statutes in a manner that does not infringe on protected expression. *Osborne*, 495 U.S. at 120. Based on this rationale, the Court in *Osborne* held that a statute which was interpreted in a manner which criminalized only "lewd" depictions of nude minors was not unconstitutionally vague or overbroad, but nonetheless reversed and remanded the case to ensure that the element of lewdness had been proven. *Id.* at 122, 126.

The *Osborne* Court noted that, when determining the application of a statute which criminalizes the possession of lewd images featuring child nudity is constitutional, "[t]he crucial question is whether the depiction is lewd[.]" *Id.* at 114 n. 11. The *Osborne* Court implied that the application of such a statute to pornographic "photographs of adolescent boys in sexually explicit situations", the subject matter at issue in that case, was a reasonable application of the lewdness requirement. *Id.* at 116.

Since *Osborne* was decided, numerous states, including Arkansas, have enacted statutes which criminalize the "lewd" depiction of child nudity. See Ark. Code Ann. § 5-27-602(a)(2); Ark. Code Ann. § 5-27-601(15).[1] However, Arkansas has interpreted its statute in a manner that substantially infringes on constitutionally protected expression by effectively eviscerating the statutory "lewdness" requirement and transforming it into a vague "indecency" test.

The Arkansas Supreme Court has interpreted the term "lewd" in the statute to mean "obscene or indecent; tending to moral impurity or wantonness." *Cummings v. State*, 110 S.W.3d 272, 278 (Ark. 2003); Black's Law Dictionary 919 (7th ed. 1999). This definition is difficult to parse and even more difficult to apply in a principled manner. The terms "obscene" and "wantonness" are in line with the Ohio Supreme Court's interpretation of "lewd" in *Osborne*.[2] On the other hand, the term "indecent" implies a lesser standard for lewdness which is vague and subjective in application.[3] Under such a standard, "some might think that any nudity, especially that involving a minor, is by definition 'lewd.' " *Osborne*, 495 U.S. at 133 (Brennan, J., dissenting.)

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[1] Specifically, the Arkansas statute prohibits the viewing or possession of images of children "engaging in sexually explicit conduct." Ark. Code Ann. § 5-27-602(a)(2). "Sexually explicit conduct" is defined, in part, as the "lewd exhibition of the genitals or pubic area of any person or breast of a female." Ark. Code Ann. § 5-27-601(15). In this manner, the Arkansas law ostensibly prohibits the viewing or possession of images which depict a "lewd exhibition" of child nudity.

[2] *Osborne*, 495 U.S. at 113 n. 10 (quoting the Ohio Supreme Court's limiting interpretation that, "the only conduct prohibited by the statute is conduct which is *not* morally innocent, *i.e.*, the possession or viewing of the described material for prurient purposes. So construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity . . .") (emphasis added); *Miller v. California*, 413 U.S. 15, 24 (1973) (defining "obscene" to mean matter which "appeals to the prurient interest").

[3] *See Donnenberg v. State*, 232 A.2d 264, 268 (Md. App. 1967) (holding that interpreting the term "lewd" to mean something less than obscenity "would be too vague to constitute a permissible standard in a criminal statute."); *See Osborne*, 495 U.S. at 134 n. 7 (Brennan, J., dissenting.)

In applying its interpretation, the Arkansas Supreme Court has made it clear that images which are not "lewd" may nonetheless fall within the scope of criminal statutes which prohibit "sexually explicit" images. Instead, "indecency" is all that must be shown for material to be deemed "lewd." *George v. State*, 189 S.W.3d 28, 35 (Ark. 2004) (quoting with approval the court of appeals' statement that "even if the scenes depicted on the videotapes were not 'lewd,' the scenes were at the very least indecent and, therefore, 'lewd' as contemplated by [the criminal statute].") The Arkansas Supreme Court's application of its criminal statutes in this manner infringes on a substantial amount of constitutionally protected expression.

Petitioner Groomes is an unfortunate victim of the state's unreasonably broad interpretation of its criminal statute prohibiting the viewing or possessing of lewd images. In this case, Mr. Groomes was accused of knowingly possessing twenty images in violation of Section 5-27-602(a)(2). He was charged with a separate count for each image. The public defender who represented Mr. Groomes at trial made a motion for directed verdict with respect to five images that were allegedly found in the recycle bin of his home computer.[4] The five images showed nude children in ordinary non-sexual settings. One image showed two subjects standing with a volleyball; three subjects socializing in an outdoor setting; two subjects standing outdoors; a subject holding a jump rope; and a subject sitting on a boat. There is nothing remotely prurient, either implicitly or explicitly, about the images. The demeanor, facial expressions, and body language of the subjects in each image suggests nothing inappropriate. All of the subjects appear to be comfortable in their surroundings and enjoying each other's company in a non-sexual

[4] Groomes was also charged with possessing fifteen additional images, each charged as a separate offense, which were not challenged on First Amendment grounds.

manner. Nothing about the five images suggests that they were derived from the sexual exploitation of the subjects shown therein.

Petitioner's trial counsel moved for dismissal of the counts on the ground that the images did not depict any "lewd exhibition" of nudity and therefore were not sexually explicit. *Groomes v. State*, 586 S.W.3d 196, 199-200 (Ark. App. 2019). The trial court denied the motion. *Id.* The case was submitted to the jury and a conviction was returned on all counts. *Id.* at 197. The trial court imposed the minimum sentence of three years in prison on all twenty counts, to be run consecutive to each other for a combined total of sixty years in prison.

On appeal, Mr. Groomes argued that the five challenged images were not "lewd" as a matter of law, and therefore constituted constitutionally-protected depictions of nudity. Groomes relied on a case from the Massachusetts Supreme Court which held that seven virtually indistinguishable images were not "lewd" as a matter of law. *Commonwealth v. Rex*, 11 N.E.3d 1060, 1070 (Mass. 2014) ("As a matter of law, no grand jury could conclude that the seven photocopies constituted a 'lewd exhibition' . . ."). Groomes also cited cases from several other jurisdictions which had reached similar conclusions.[5] One federal court of appeals had remarked with respect to indistinguishable images that "[e]ven a most conservative, straight-laced, and puritanical viewer of the photographs could not responsibly claim that the photographs are 'lewd'[.]") *U.S. v. Schedule No. 287 Alessandra's Smile*, 230 F.3d 649, 657 (3rd Cir. 2000).

[5] *Doe v. Chamberlain*, 299 F.3d 192, 196 (3d. Cir. 2002) (images of nude girls showering on a beach do not qualify as "lewd exhibitions"); *See also Lockwood v. State*, 588 So.2d 57, 58 (Fla. App. 1991); *United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999) (an image of a nude female standing in a hole in the sand is not a "lewd exhibition"); *Craft v. State*, 558 S.E.2d 18, 26 (Ga. App. 2001) (images of nude children taken before or after swimming are not "lewd exhibitions"); *U.S. v. Schedule No. 287 Alessandra's Smile*, 230 F.3d 649, 655-57 (3rd Cir. 2000) (images of nude children engaged in ordinary activities such as exercising as playing sports do not constitute "lewd exhibitions").

Nonetheless, the Arkansas Court of Appeals affirmed the lower court's denial of the motion for directed verdict with respect to all five images. *Groomes v. State*, 586 S.W.3d 196, 202 (Ark. App. 2019). The court essentially reasoned that Arkansas courts apply the term "lewd" more broadly than other jurisdictions do. *Id*. Under controlling Arkansas case law, the term "lewd" is not limited to lewd images. It also includes "indecent" images of children which are not lewd. *See Id.*, citing *George*, 189 S.W.3d at 35 ("even if the scenes depicted on the videotapes were not 'lewd,' the scenes were at the very least indecent and, therefore, 'lewd' as contemplated by [the criminal statute].") Under this rationale, the court of appeals essentially held, in not so many words, that Arkansas case law had eviscerated the statutory "lewdness" requirement and transformed it into a vague "indecency" test. Such a test does not pass constitutional muster. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 263 (2002) (O'Connor, J., concurring in part) (rejecting government's argument that it could proscribe material "that is merely indecent without violating the First Amendment.")

Puzzlingly, the court of appeals offered little guidance on how to apply Arkansas' novel "indecency" test. The court's opinion suggests that "a determination of lewdness is ultimately based on whether the combined effect of the visual depiction, including the age of the minor, setting, attire, pose and emphasis on the genitals, is designed to elicit a sexual response in a pedophile viewer." *Groomes*, 586 S.W.3d at 202. However, the appellate court did not explain how that analysis supports the conclusion that the five images at issue were "lewd", contrary to the conclusion of nearly every court that has examined similar images. *See Id.* Instead, the court cursorily stated that, "[h]aving viewed the challenged images ourselves and having applied our standard of review to the

record as a whole, we hold that sufficient evidence supports the jury's verdict that the five images depicted sexually explicit conduct." *Id.*

It is apparent that the court of appeals, following the lead of the state supreme court, merely paid lip service to the lewdness requirement in the Arkansas criminal statute that is intended to distinguish constitutionally-protected depictions of nudity from images that are not protected. Under its vague lewdness analysis, it is conceivable that any image of a nude child could be deemed "sexually explicit."

It is equally apparent that the court of appeals relied on its misperception that the five challenged images were "found with other photographs that clearly showed sexually explicit conduct" and thus arguably could have been "possessed for lewd purposes." *Id.* However, there is no logic behind that rationale. Groomes was separately convicted and punished for possessing each challenged image. Even disregarding the court's flawed premise, a constitutionally-protected depiction of nudity does not lose its protection simply because the defendant possesses other material which is not protected. The court of appeals erred to the extent that it relied on his alleged possession of unrelated images to determine that the five challenged images were "lewd."

As a result of the court of appeals' decision to affirm his convictions on the five challenged images, Petitioner is now serving five consecutive three-year sentences, for a total of fifteen years in prison, with respect to the five challenged convictions.

IX.

Reasons For Granting The Writ

The Court should take this opportunity to clarify the constitutional distinction between images of nudity, which it has held are protected by the First Amendment, and lewd images which may be proscribed the government. To date, this Court has not offered

any analytical framework to guide states in their application of the lewdness requirement. States like Arkansas cannot be permitted to flout the constitutional boundaries by ostensibly limiting their criminal statutes to "lewd" images, but then interpreting that term in a manner that would encompass any nude image of a child. The consequence is a substantial infringement on constitutional freedom of expression. Indeed, the approach taken by Arkansas is even more harmful than a state which expressly proscribes possession of all nude images of children. By ostensibly limiting its statute to "lewd" images of children, but then applying that term in an overly broad manner that could reach any image of a nude child, Arkansas deprives its citizens of fair warning that their conduct may be criminal.

In this case, Petitioner had no reason to suspect that possession of the five challenged images would constitute an offense under Ark. Code Ann. § 5-27-602(a)(2). To the best of the undersigned's knowledge, all other jurisdictions that have examined similar images have unanimously concluded that they do not constitute a "lewd exhibition" of nudity. These jurisdictions include the Massachusetts Supreme Court, the U.S. Court of Appeals for the First Circuit, the U.S. Court of Appeals for the Third Circuit, the Florida Court of Appeals and the Georgia Court of Appeals.[6] Accordingly, there is currently a conflict between these jurisdictions and the Arkansas Supreme Court and Court of Appeals on the question of what constitutes a "lewd" image that is not protected by the First Amendment. The constitutional analysis concerning the images of nudity that may be proscribed should be uniform across the country. The Court should take this

[6] *Commonwealth v. Rex*, 11 N.E.3d 1060, 1070 (Mass. 2014); *Doe v. Chamberlain*, 299 F.3d 192, 196 (3d. Cir. 2002); *See also Lockwood v. State*, 588 So.2d 57, 58 (Fla. App. 1991); *United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999); *Craft v. State*, 558 S.E.2d 18, 26 (Ga. App. 2001); *U.S. v. Schedule No. 287 Alessandra's Smile*, 230 F.3d 649, 655-57 (3rd Cir. 2000).

opportunity to clarify its constitutional jurisprudence in this area of the law and resolve the conflict between these jurisdictions.

X.

Conclusion

For the foregoing reasons, Mr. Groomes respectfully requests that this Court issue a writ of certiorari to review the judgment of the Arkansas Court of Appeals.

DATED this 22nd day of April, 2020.

Respectfully submitted,

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