

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ADAM ALAN HENRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in 18 U.S.C. § 2256(2)(A)(v) the definition of “sexually explicit conduct” defined as the lascivious exhibition of the genitals or pubic area of any person is vague, ambiguous, overbroad and a violation of due process.

LIST OF PARTIES

The parties to the proceedings were Petitioner, Adam Alan Henry and the Respondent, United States of America in Case No. 18-10358, United States Court of Appeal for the Ninth Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Adam Alan Henry respectfully petitions this court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in case number 18-10358 reflecting a conviction of 18 U.S.C. § 2251(a) and (e).

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed petitioner Adam Alan Henry's conviction and sentence from the Eastern District of California in *United States v. Adam Alan Henry*, case number 1:13-cr-00409-DAD-BAM on January 13, 2020 in case number 18-10358. (Appendix A) The court unanimously denied Mr. Henry's petition for rehearing in an order filed February 4, 2020. (Appendix C)

JURISDICTION

The Ninth Circuit Court of Appeals affirmed Henry's Judgment of Conviction and Sentence on January 13, 2020. Henry timely filed a Petition for Rehearing, which was denied February 4, 2020. The Writ of Mandate was filed on February 12, 2020.

This Court has jurisdiction over the timely petition pursuant to 28 U.S.C. § 1254(1), Rules 13.1 and 13.3, and this Court's COVID-19 Order issued March 19, 2020, extending the filing deadline 150 days from the lower court judgment,... or order denying a timely petition for rehearing.

BAIL STATUS

The Petitioner has been incarcerated since his arrest on November 13, 2013, and is currently being held in the Federal Correctional Institution in Lompoc, California. His expected release date is November 26, 2030.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 18 United States Code, section 2251(a) and (e):

Sexual exploitation of children

(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.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of

title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

Title 18 United States Code, section 2256 defines Sexual Exploitation and other Abuse of Children as follows:

For the purposes of this chapter [*18 USCS §§ 2251 et seq.*], 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 genitals or pubic area of any person;

(B) For purposes of subsection 8(B) of this section, "sexually explicit conduct" means--

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

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

STATEMENT OF THE FACTS

In September 2013 and in November 2013, the home and office of Petitioner, Adam Alan Henry was searched.

Found on the computers in his home were videos and screenshots from the videos. Thirteen screenshots were taken from the videos and submitted as evidence. (Appendix D)

Evidence established that the Petitioner and his wife had set up a camera in a hanging plant in their guest bathroom to record people using the bathroom. Two screenshots were taken of the backside view of the minor and one screenshot was a frontal view of the minor. (Appendix D – pgs. D-36 – D-38)

A video camera was set up in the master bedroom by the Petitioner's wife to record the minor trying on various items of clothing. (Appendix D – pgs. D-26 – D-35)

The Petitioner alone was indicted on November 21, 2013, by the Federal Grand Jury for a violation of 18 U.S.C. § 2251 (a) and (e), Conspiracy to Sexually Exploit a Minor and for Receipt and Distribution of a Visual Depiction of a Minor Engaged in Sexually Explicit Conduct in violation of 18 U.S.C. § 2252(a)(2) for other videos found on the computers.

REASONS FOR GRANTING THE WRIT

The Petitioner, Adam Alan Henry was found guilty of 18 U.S.C. § 2251(a) and (e), Conspiracy to Sexually Exploit a Minor. The 13 screenshots are the basis of the Petitioner's conviction which the jury found to be "sexually explicit conduct" that displayed the lascivious exhibition of the genitals or pubic areas of a minor.

An analysis of the 13 screenshots do not depict the lascivious exhibition of the genitals or pubic area. The 10 screenshots from the bedroom merely display the minor changing clothes and trying on different types of clothing.

The three screenshots from the bathroom display two shots of the minor's backside and one shot of her front side.

The screenshots are not sexually suggestive, nor do they suggest sexual coyness or a willingness to engage in sexual activity. The minor is not depicted in an unnatural pose, or wearing inappropriate attire.

In [*United States v. Courtade*, 929 F.3d 186 \(4th Cir. 2019\)](#) in a prosecution under 18 U.S.C. § 2251(a)(4)(B), Possession of Child Pornography, the court had to interpret the meaning of "sexually explicit conduct" as defined by 18 U.S.C. § 2256(2)(A)(v). *Id.* at 191.

The court indicated that the statute by its terms "requires more than mere nudity, because the phrase 'exhibition of the genitals or pubic area' is qualified by the word 'lascivious.'" [*United States v. Villard*, 885 F.2d 117, 121 \(3d Cir. 1989\)](#) (citations omitted). See also [*United States v. Amirault*, 173 F.3d 28, 33 \(1st Cir. 1999\)](#).

The court did not have any precedent interpreting the term “lascivious exhibition” as used in section 2256(2)(A)(v) however, in analyzing various dictionary definitions, indicated that “lascivious exhibition” means “a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer.” (Citations omitted.) [*Id.* at 192.](#)

Many courts, in applying “lascivious exhibition” have looked to [*United States v. Dost*, 636 F.Supp. 828, 832 \(S.D. Cal. 1986\)](#) which encouraged the trier of fact to look to the following factors, among others that may be relevant in the particular case:

- 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.

The *Courtade* court pointed out that

The *Dost* factors have been subject to criticism over the years. See, e.g., [*United States v. Frabizio*, 459 F.3d 80, 85](#)

([1st Cir. 2006](#)) (observing that the factors 'have fostered myriad disputes that have led courts far afield from the statutory language.') Particularly divisive has been the sixth factor, which potentially implicates subjective intent and asks whether the depiction is intended or designed to elicit a sexual response from the viewer. See [United States v. Brown, 579 F.3d 672, 682-83 \(6th Cir. 2009\)](#) (explaining that "[s]ome courts have accepted arguments that lasciviousness should be determined from the image alone" and "[o]ther courts have explicitly avoided the question").

[Id. at 192.](#)

In *Courtade*, the court did not analyze the *Dost* factors since the objective characteristics of the video alone displayed the minor's breasts and genitals at the direction of the defendant by deceit and manipulation. *Id.* at 193.

In [United States v. Barry, 2014 U.S. Dist. LEXIS 79157](#) (S.D. Texas Criminal No. H-12-691), *aff'd*, [634 Fed. Appx. 407 \(5th Cir. 2015\)](#), cert. denied [136 S.Ct. 1700 \(2016\)](#) the defendant was charged, as in this case, with a violation of 18 U.S.C. § 2251(a) and (e), Conspiracy to Sexually Exploit a Minor.

The defendant and his partner adopted two young children and took pictures of themselves with the young children naked. Many of the pictures were in the bathroom and in the bedroom with both the adult males and children's genitals exposed. The defense was that they were nudists and that the pictures were not made for sexual pleasure. *Id.* at 39.

The court explained that

Section 2256 does not define "lascivious exhibition." See [United States v. Villard, 885 F.2d 117, 121 \(3d Cir. 1989\)](#) ("Whatever the exact parameters of 'lascivious exhibition,' we find it less readily discernable than the

other, more concrete types of sexually explicit conduct listed in [section 2256\(2\).](#)"); [United States v. Hill, 322 F. Supp. 2d 1081, 1084 \(C.D. Cal. 2004\)](#) ("Lasciviousness is an elusive concept, and courts have struggled to develop a test for identifying it." (footnote omitted)); *but see* [United States v. Frabizio, 459 F.3d 80, 85 \(1st Cir. 2006\)](#) ("The statutory standard needs no adornment.").

[Id. at 51.](#)

The *Barry* court set out the differences among the circuits in applying the six factor test in [Dost, supra](#). One area of dispute was how many of the factors must be present for a depiction to qualify as "lascivious." *Id.* (comparing differences between the Tenth Circuit and the Third Circuit). *Barry* at 53.

Courts have also noted that the sixth *Dost* factor—whether the visual depiction is intended or designed to elicit a sexual response in the viewer—is particularly relevant in production cases. See [United States v. Rivera, 546 F.3d 245, 252 \(2nd Cir. 2008\)](#). *Barry* at 54.

The First Circuit stated that the sixth factor is "the most confusing and contentious of the *Dost* factors." [United States v. Amirault, 173 F.3d 28, 34 \(1st Cir. 1999\)](#). It explained that this confusion is caused because the sixth factor does not provide guidance to answer the following questions:

Is this a subjective or objective standard, and should we be evaluating the response of an average viewer or the specific defendant in this case? Moreover, is the intent to elicit a sexual response analyzed from the perspective of the photograph's composition, or from extrinsic evidence (such as where the photograph was obtained, who the photographer was, etc.)?

The Barry court stressed that

The circuits are split on whether a court should limit its review to the images itself, the "four-corners test," or whether the court should consider the context in which the image or related images were produced. The Third Circuit and possibly the First Circuit, the first courts to address the issue, limit the analysis to the four corners of the image. See [Villard, 885 F.2d at 122](#).

[Barry at 54](#).

By contrast, the Second, Sixth, and Tenth Circuits also consider the context in which the images were produced. (Citations omitted.) A test was adopted that considers whether a visual depiction is intended or designed to elicit a sexual response in the viewer (quoting [Dost, 636 F. Supp. at 832](#)) (noting that "lasciviousness" is not a characteristic of the child photographed but of the exhibition that the photographer sets up for an audience that consists of himself or likeminded individuals. (See [United States v. Wolf, 890 F.2d 241, 247 \(10th Cir. 1989\)](#).)

The court further stated that by considering the context in which the image was taken, courts can

"resolve close judgment calls about whether an image inadvertently focuses on a child's genitalia, or whether [the image] is intended to elicit a sexual response in the viewer." [Brown, 579 F.3d at 684](#). As the Second Circuit stated, in some situations, it is the "context that reinforces the lascivious impression." See [Rivera, 546 F.3d at 250](#).

The courts recognize "countervailing" policy considerations for each approach. See [Brown, 579 F.3d at 683](#). By placing too much emphasis on the subjective intent of the person producing the image, "a seemingly

innocuous photograph might be considered lascivious based solely upon the subjective reaction of the person who is taking or viewing it." *Id.* As the First Circuit noted, if the image taker's "subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography." [Amirault, 173 F.3d at 34](#); see also [Rivera, 546 F.3d at 252](#) (noting the concerns *Amirault* raised). But ignoring the context in which the image was produced "inevitably fails to capture behavior that is 'intended' to exploit children." [Brown, 579 F.3d at 683](#). In light of these competing concerns, the Sixth Circuit in *Brown* adopted a narrower version of the "context test" called the "limited context test." *Id.* This test "permits consideration of the context in which the images were taken, but limits the consideration of contextual evidence to the circumstances directly related to the taking of the images." *Id.* The factors to consider are "(1) where, when, and under what circumstances the photographs were taken, (2) the presence of other images of the same victim(s) taken at or around the same time, and (3) any statements a defendant made about the images." [Id. at 683-84](#) (footnote omitted).

Id. at 56.

In [United States v. Steen, 634 F.3d 822 \(5th Cir. 2011\)](#) a case with the facts almost identical to the present case, the court determined the defendant's conduct did not constitute a violation of 18 U.S.C. § 2251(a) and that the case **SHOULD NOT** have gone to the jury. The facts are as follows:

While visiting a tanning salon, Steen would stand on a chair, looked over the wall into the next tanning room, and video recorded the activity in the room adjacent to him. Steen videotaped a minor for 15 seconds as she adjusted the machine settings and entered the tanning bed. Most of the video displayed her back and hair, though her pubic region was visible on the right edge of the frame for approximately 1.5 seconds before she closed the tanning bed. *Id.* at 822.

Steen was indicted for a violation of 18 U.S.C. § 2251(a). The court focused on the definition of “sexually explicit conduct” i.e. as to whether the video depicted “lascivious exhibition of the genitals or pubic area of any person.”

The defense moved for an instructed verdict asserting that the evidence was insufficient to move beyond a reasonable doubt that the conduct filmed was sexually explicit or lascivious. The District Court denied the motion and the jury found the defendant guilty on the production of child pornography. [*Id.* at 825.](#)

In assessing conduct under § 2251(a) the court asked:

1. Did the production involve the use of a minor engaging in sexually explicit conduct, and
2. Was the visual depiction a depiction of such conduct?

The court stated “Steen clearly used [the minor] for the purpose of producing a nude video, but the statute requires more – the film must depict sexually explicit conduct.” *Id.* at 826.

The *Steen* court ultimately concluded that the conduct did not constitute a violation of 18 U.S.C. § 2251(a) and stated as follows:

We have previously adopted the ordinary meaning of the phrase “lascivious exhibition,” which we defined as “a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer.” Here, the government's evidence cannot meet this standard.

[*Id.* at 828.](#)

The focal point of the visual depiction in both the *Steen* case and this case **is not** on the genitalia, nor of the pubic area.

With almost identical facts in these two cases, two different conclusions!

In [*United States v. Spoor*, 904 F.3d 141 \(2nd Cir. 2018\)](#) in a prosecution under 18 U.S.C. § 2251(a), the court stressed that “[w]hether a video is, objectively, a “lascivious exhibition” depends on the content of the video itself and not on the sexual predilection of its creator.” *Id.* at 151.

The *Spoor* court stressed that “...the conduct to be prohibited must be adequately defined” and “suitably limited and described.” [*Brown*, 579 F.3d at 683](#). *Id.* at 151.

CONCLUSION

One must know what conduct is prohibited and it must be adequately defined. Title 18, U.S.C. section 2256(2)(A)(v) which defines “sexually explicit conduct” as the lascivious exhibition of the genitals or pubic area of any person is not an adequate description of prohibited conduct. The various circuits have construed the interpretation of this definition in different ways for essentially the same conduct, which in this case resulted in a sentence of 240 months.

Whether the visual depictions are looked at in a subjective or objective manner can result in different conclusions. As stated in [*United States v. Amirault*, 173 F.3d 28, 33 \(1st Cir. 1999\)](#), it is a mistake to look at the actual effect of the photograph on the viewer, rather than on the intended effect. (Citations omitted.)

If Amirault's subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography. (Citations omitted.) ("Private fantasies are not within the statute's ambit.")

It is respectfully requested that the Petitioner's Writ of Certiorari be granted and this court determine that the definition in 18 U.S.C. § 2256(2)(A)(v) is vague, ambiguous, overbroad and a violation of due process.

Dated: July 3, 2020

Respectfully submitted,

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