No.

IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS RODRIGUEZ FERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Donna Lee Elm
Law Practice of Donna Elm
1465 West Wagon Wheel Road
Cottonwood, Arizona 86326
602-299-7022
donnaelm1014@gmail.com
Counsel of Record for Petitioner

QUESTION PRESENTED

Petitioner Carlos Rodriguez Fernandez was convicted of producing child pornography by surreptitiously filming his teenage stepdaughter twice going about her normal bathroom routine. The relevant statutes require that a minor be used to engage in "sexually explicit conduct" (i.e., "lascivious exhibition of the anus, genitals, or pubic area") for the purpose of producing a visual depiction thereof. Though the minor never acted in any sexually explicit way in the videos – instead displaying mere nudity – the district court added language to the pattern jury instruction from the Eleventh Circuit's *Holmes* case that innocent conduct may constitute a "lascivious exhibition" based on "the actions of the individual creating the depiction." In *Holmes*, the Eleventh Circuit joined three other circuits in applying an expansive "context" test, permitting juries to consider a breadth of evidence extrinsic to the otherwise innocent image. With no Supreme Court guidance, circuits are deeply split, developing a confusing and contradictory variety of tests and factors for these cases, from limiting the evidence to the "four corners" of the image, to a middle ground of "limited context," to a broad array of "context" evidence (sometimes First Amendment protected), as well as outliers focusing on select wording in the statute. The question thus is:

> **To comport with the First Amendment and Due Process in determining whether an image of a child acting innocently constitutes child pornography, must courts apply a "limited context" test, rather than expand their inquiry to unconstrained "context" or restrict their inquiry to the image itself?**

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties appear on the caption of the title page. There are no corporate entities having any interest in this case.

LIST OF ALL PROCEEDINGS

This case was tried by the Honorable Carlos E. Mendoza in the Orlando Division of the District Court of the Middle District of Florida. It was captioned as *United States of America v. Carlos A. Rodriguez Fernandez,* under case number 6:18-cr-135. Judgment was entered on September 5, 2019.

The case was directly appealed to the Eleventh Circuit Court of Appeals. It was captioned as *United States of America v. Carlos A. Rodriguez Fernandez,* under case number 19-13516. The opinion was rendered on December 4, 2020. Though not for publication, it was unofficially reported as *United States v. Rodriguez Fernandez,* 2020 WL 7090699 (11th Cir. 2020), and is attached as Appendix A.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Carlos Rodriguez Fernandez respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Rodriguez Fernandez*, No. 19-13516 (11th Cir. 2020).

JURISDICTION

The United States District Court for the Middle District of Florida had jurisdiction over this criminal case in accordance with 18 U.S.C. § 3231. Pursuant to 28 U.S.C. § 1291, the United States Court of Appeals for the Eleventh Circuit had jurisdiction to review the final order of the district court. The Eleventh Circuit's decision was issued on December 4, 2020. *See* Appendix A.

Petitioner invokes this Court's jurisdiction per 28 U.S.C. § 1254(1). SUP. CT. R. 14.1(e). This petition is timely filed within 150 days of the Eleventh Circuit's opinion. SUP. CT. R. 13.1 and this Court's special procedures during the Covid-19 pandemic.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech . . .

Section 2251 of Title 18 of the United States Code provides, in relevant part:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . shall be punished as provided under subsection (e) . . .

Section 2256 of Title 18 of the United States Code defines "sexually explicit conduct," providing, in relevant part:

> (2)(A) . . . "sexually explicit conduct" means actual or simulated . . .
>
> (v) lascivious exhibition of the anus, genitals, or pubic area of any person.

INTRODUCTION

Because merely nude images are safeguarded free speech, *Osborne v. Ohio*, 495 U.S. 103, 112 (1990), prosecuting child pornography based on depictions of nude children behaving innocently draws precipitously close to First Amendment protections. A thin line separates "lascivious exhibition of the anus, genitals, or pubic area" from bathtub photos in the family album, and this Court has never set forth how to distinguish between the two. "Lascivious exhibition" is clearly key, but lower courts have constructed a wide variety of tests and factors to determine the scope of that phrase. Some circuits' tests flatly contradict each other, while others have led to aberrant results. This case provides the Court with a fitting opportunity to shore up the line between protected speech and criminal pornography in these close cases.

Due to the lack of a definitive test for these cases, the broad reach of conduct that has been swept into prosecutions of lascivious exhibitions is disquieting. It has ranged from: clothed children briefly exposing underwear at play on a jungle gym, *United States v. Johnson*, 639 F.3d 433 (8th Cir. 2011); to surreptitiously videotaping girls in underwear to satisfy a panties fetish, *United States v. Helton*, 302 Fed. App'x 842 (10th Cir. 2008) (unpublished); to scantily clad girls performing sexually suggestive dancing, *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994); to sleeping fully dressed children, *United States v. Romero*, 558 Fed. App'x 501 (5th Cir. 2014) (unpublished); to sleeping undressed children, *United States v. Villard*, 885 F.2d 117 (3rd Cir. 1989); to toddlers in bathtub photos, *United States v. Brown*, 579 F.3d 672 (6th Cir. 2009), *cert. denied*, 558 U.S. 1133 (2010); to surreptitious recordings in a tanning salon, *United States v. Steen*, 634 F.3d 822 (5th Cir. 2011); to nude children that focus on genitalia, *United States v. McCall*, 833 F.3d 560 (5th Cir. 2016); to what would be pornographic exhibitions except pelvic areas were

pixelated, *United States v. Grimes*, 244 F.3d 375 (5th Cir. 2001); to a girl displaying her genitals with a man's genitals in the background, *United States v. Stewart*, 729 F.3d 517 (6th Cir. 2013); to an adult having sexual intercourse with a child, *United States v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012).

This breadth of examples, and significantly differing outcomes, arise due to circuits employing a variety of inconsistent tests for "lascivious exhibitions." Some jurisdictions look exclusively to the "four corners" of the image. E.g., *Villard*, 885 F.2d at 125. A number add unqualified extrinsic "context" to that analysis. E.g., *United States v. Miller*, 829 F.3d 519 (7th Cir. 2016). The Sixth Circuit adopted a middle ground: "image plus limited context." *Brown*, 579 F.3d at 683 (reducing risk of "over-criminalizing" behavior by limiting context to "circumstances directly related to the taking of the image"). Outliers diverge from this continuum, for instance disregarding the sexually explicit image and examining the purpose for taking the picture, *United States v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. 2015) (finding no evidence he intended *to create pornography* when he photographed himself penetrating a child), or disregarding a clearly salacious purpose when the image was not nude, *Romero*, (despite providing captions to pictures of sleeping children that described sexual acts he wanted to do to them, it was not pornography because the children were not nude). Given this level of confusion and inconsistency, it behooves this Court to ensure more constitutionally principled prosecutions of these "lascivious exhibition" child pornography cases by deciding what test applies.

STATEMENT OF THE CASE

A. Factual Background

Raised in communist Cuba, Carlos Rodriguez Fernandez suffered religious persecution and

faced arrest for refusing military duty. When Castro allowed disaffected Cubans to leave, Mr. Rodriguez Fernandez rode a raft to this country during the "1994 Cuban Raft Crisis." Naturalized as an American citizen, he secured regular work as a truck driver and had no criminal record. In 2012 he met, and in 2013 married, Natalie Garcia. She had an older son and an eight-year-old daughter at that time.

In March of 2018, agents monitoring the internet located a computer receiving child pornography from a peer-to-peer network. They traced the IP address to the computer in Mr. Rodriguez Fernandez's house. Upon securing a search warrant in April, they seized the computer and its peripheral hardware. They found a USB cable going from the computer to a hole in the wall one foot above the floor. On the other side of the wall was an electrical outlet facing the toilet in the bathroom used by the victim.[1] A camera was hidden inside the outlet. Mr. Rodriguez Fernandez admitted receiving child pornography and erotica, and when confronted about the camera, admitted installing it to check for illicit drug use by the youngsters.

Agents found child pornography and erotica (both commercially produced in Russia) on the computer. They also found two videos showing the victim using the bathroom in her normal routine as well as a deleted screenshot from one video, filmed ostensibly by the hidden camera on April 10 and 11, 2018. From its location, the camera could only take in the lower part of her body; when the victim spread her legs while using the toilet, it briefly caught her pubic area. The deleted screenshot was made of that instance; it showed no signs of manipulation, cropping, or

[1] There had been an actual electrical outlet at that location, which was at the normal height for floor outlets. The outlet's placement was thus not devised by Mr. Rodriguez Fernandez. No other outlets can be seen in the exhibits picturing the bathroom. Docs. 114-5, 114-6 & 114-29. Moreover, the toilet paper dispenser was directly above the outlet, and could obscure the camera's view when filled with paper.

augmentation of the image, and the videos had no manipulation. Furthermore, there was no evidence that Mr. Rodriguez Fernandez had shared or transferred any of the pornographic images or his homemade videos, or had sexually abused the victim or others.

On April 13, 2018, state authorities arrested Mr. Rodriguez Fernandez, charging him with six counts of possession of child pornography.

B. District Court Proceedings

On June 13, 2018, a federal grand jury indicted him on two counts of production and one count of possession of child pornography. The state case was dismissed in transferring prosecution to the U.S. Attorney. Except for the dates of offense (April 10, 2018 in Count One and April 11, 2018 in Count Two), the first two counts use identical charging language:

> On or about [date], in the Middle District of Florida and elsewhere, the defendant, Carlos A, Rodriguez Fernandez, did use and attempt to use a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct using materials that had been mailed, shipped and transported in and affecting interstate and foreign commerce by any means, including a computer. In violation of 18 U.S.C. § 2251(a) and (e).

Count Three was the possession charge (pursuant to 18 U.S.C. § 2252A(a)(5)(B)) which is not contested here.

The defense moved in limine to preclude introduction of commercially produced child erotica found on the computer.[2] Doc. 75. Although the government had originally provided notice of its intent to admit the erotica pursuant to FED. R. EVID. 404(b), during oral argument it switched

[2] The government acknowledged that child erotica was protected speech, so was legally possessed. Doc 168 at 4-5. *See also United States v. Edwards*, 813 F.3d 953, 958 (10th Cir. 2015) (distinguishing illegal pornography from legal erotica); *Stewart*, 729 F.3d at 520 (child erotica "may not quite necessarily be child pornography, but are still inappropriate pictures"); *United States v. Andersen*, 2010 WL 3938363 at fn. 11 (Army Ct. Crim. App. 201) (unpublished) ("We cannot dispense with the significant First Amendment and Due Process concerns that might arise" if child erotica were prosecuted as child pornography.").

to the theory that the erotica was "inextricably intertwined" with charged offenses. The district court accepted that as its basis to deny the defense motion, and with this distinct advantage, the government was able to introduce legally possessed erotica as evidence of the charges, including the unrelated production counts. It was additionally spared any limiting instructions both at the time the evidence was admitted and in the jury instructions.

The case went to trial on June 13-14, 2019. The two videos of the stepdaughter and the deleted screenshot were admitted as government's exhibits 8I, 8L, & 8N. Jurors were informed about the hidden camera, what steps were needed to install it, his software to use, view, and save it, and how the images were given innocent file names when saved. The government admitted numerous examples of commercial child pornography and erotica found on the computer. Because the District Court had ruled that the erotica was "inextricably intertwined" with the commercial child pornography in Count Three, there was no Rule 404(b) instruction nor one specifically limiting its use to the possession count. The jury was never advised that the erotica was not the charged child pornography or that it was in fact legally possessed. Additionally, the government introduced extensive testimony about how Mr. Rodriguez Fernandez searched for (Tor browser), downloaded, viewed, hid, and deleted commercial pornography. The defense vigorously challenged the prosecution case, then rested without undertaking a case.

The government sought, over defense objection, an addition to the Eleventh Circuit pattern jury instruction defining the elements of § 2251(a).[3] The pattern instruction defined "sexually explicit conduct" using the precise language of 18 U.S.C. § 2256(2)(A), ending with "lascivious exhibition of the genital or pubic area of any person." It then defined "lascivious exhibition" as:

[3] ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (Criminal), Offense Instruction No. O82 (2016).

> . . . indecent exposure of the genitals or pubic area, usually to incite lust. Not every exposure is a lascivious exhibition. To decide whether a visual depiction is a lascivious exhibition, you must consider the context and setting in which the genitals or pubic area is being displayed. Factors you may consider include [listing the *Dost* factors[4]].

The government requested to add to that instruction certain verbiage that it selected from *United States v. Holmes*, 814 F.3d 1246, 1251-52 (11th Cir.), *cert. denied*, 137 S. Ct. 294 (2016).

Holmes was the Eleventh Circuit's opinion that decided the test to apply in assessing whether images of otherwise innocent nude children could constitute illegal child pornography. Holmes had surreptitiously videotaped his stepdaughter engaged in her bathroom routine for five months. Police found numerous small holes drilled in the bathroom wall that could allow for filming, and holes drilled behind a doll on the windowsill with holes cut in the doll's dress to facilitate videotaping through the doll. In total, he created twenty-three videos. The camera hidden under the lip of the vanity captured pictures of the girl fully nude with her pelvic area at times "plainly visible." Holmes created twenty-six screen shots from the videos that provided close-up views of her pelvic area. Holmes argued that his videos and screen shots displayed mere nudity (protected speech), so his actions were at worst voyeuristic. The court disagreed, announcing it was joining other circuits that "concluded that depictions of otherwise innocent conduct may in fact constitute a 'lascivious exhibition of the genitals or pubic area' of a minor based on actions of the individual creating the depiction." *Id.* at 1251-52. However, when it came to the precise and express "holding" of the case, the Eleventh Circuit was more circumscribed:

> Today we join the Eighth, Ninth, and Tenth Circuits and hold that a lascivious exhibition may be created by an individual who surreptitiously videos or photographs a minor and later captures or edits a depiction, even when the original

[4] *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom, United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

depiction is one of an innocent child acting innocently.

Id. at 1252.

In asking to supplement the pattern jury instruction with *Holmes*, the prosecutor did *not* use its express holding, but rather represented to the district court that the "correct statement of the law" of *Holmes* was the broader general description of other circuits' holdings: "Depictions of otherwise innocent conduct may constitute a lascivious exhibition of the genitals or pubic area of a minor based on the actions of the individual creating the depiction." The defense requested the pattern instruction as written, objecting to the government's addition. Agreeing that the government's selected verbiage was a correct statement of the *Holmes* law, the district court overruled the objection and inserted the government's broader descriptive language into the jury instruction. *See* Jury Instruction #11, attached as Appendix B. This provided another advantage to the government, as it would allow argument that all manner of "actions" by Mr. Rodriguez Fernandez (i.e., wide open "context") to be considered when deciding whether his videos were "sexually explicit."

The prosecutor devoted most of her closing argument regarding the production counts to the lengths Mr. Rodriguez Fernandez went to so as to set up the hidden camera, with only the briefest mention of the content of the videos. Doc. 172 at 177-79. She concluded by quoting her addition to the pattern instruction, "based on the actions of the individual creating the depiction." She then added,

> Well, his actions are clear. . . . his actions and what he did to was to create lascivious exhibitions of her genitals by the way he hid that camera, the place he hid it, the manner he hid it, all of the steps that he undertook in order to hide it. If there was any doubt at all about what his motive was, that is resolved by where he placed the camera, the height that he placed it at . . .

After mentioning that the aim of the lens was on the victim's vaginal area, and her face could not be seen, the prosecutor returned to belabor her theme of his "actions creating" the videos, describing the different viewing software he had used and how he had viewed the videos. Doc. 172 at 183. The jury convicted Mr. Rodriguez Fernandez as charged.

The statutory mandatory minimum for the production counts was 180 months, and their statutory maximum sentence was 360 months. Probation calculated the U.S.S.G. range to be 840 months. The judge sentenced Mr. Rodriguez Fernandez to a total term of 480 months, consisting of 360 months each (the statutory maximum sentence) for the pair of production counts (running concurrently) and 120 months for the unrelated possession count (running consecutively).[5]

C. Court of Appeals Proceedings

On appeal, Mr. Rodriguez Fernandez challenged the *Holmes* addition to the definition of lascivious exhibition in the pattern jury instruction. He noted that *Holmes* was never based on an incorrect instruction of law, and the government failed to offer any case law using *Holmes* in its jury instructions; moreover, the language the government used exceeded *Holmes'* express holding, enabling the instruction to sweep in more conduct than *Holmes* allowed. He argued, "[b]y supplementing Instruction O82 with an overbroad modification of the *Holmes* holding that omitted the specific type of conduct that *Holmes* criminalized, the District Court opened the door to the jury convicting Mr. Rodriguez Fernandez on non-criminal conduct." That was a significant risk given so much evidence discussing a variety of conduct related to creating and receiving pornography and erotica beyond "capturing and editing a depiction." He also appealed other issues,

[5] Defense counsel did not object to the objective unreasonableness of the sentence.

not relevant to the questions presented here.[6]

The Eleventh Circuit affirmed as to all issues. Focusing on whether injecting *Holmes* into the pattern instruction was justified at all, the court summarily concluded that the supplemental *Holmes* instruction was an "accurate statement of the law." Because the pattern instruction did not countenance surreptitious recordings, adding *Holmes* was not an abuse of discretion. The court never otherwise addressed the overbreadth error arising from the language that the government had selected in place of the *Holmes* holding.

REASONS FOR GRANTING THE WRIT

A. This Court Should Accept this Case Because the Question Presented Has Important Free Speech and Due Process Implications.

This Court assumed in *Ferber* (when interpreting an almost identical statutory phrase) that courts would not subsequently "widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition of the genitals.'" *New York v. Ferber*, 458 U.S. 747, 773 (1982). In the past decade, reported cases have increasingly dealt with otherwise innocent conduct by children being sexualized by pornographers. While some courts have cautiously approached the potential intrusion on free speech involved, others have expanded the conduct that qualifies for this offense. Certainly the "[unlimited] context" jurisdictions give the government great latitude in admitting evidence that could be protected speech in the name of "context." In Mr. Rodriguez Fernandez's case, the government admitted considerable "context"

[6] Those issues included: (1) excluding a videotaped confrontation with the victim about finding child pornography on her tablet; (2) admitting child erotica as "inextricably intertwined" with the charges; (3)(a) adding verbiage to the child pornography production jury instruction's "use" of a minor to produce images, specifying that also includes unknowingly being photographed; (3)(c) responding to a jury question whether the case agent's presence at counsel table might be unethical or a conflict of interest by telling them directly it was not (thus judicially vouching for his credibility, which is solely the province of the jury); (4) *Batson* challenges based on excluding a subset of gender, *i.e.*, single men with no children; and (5) cumulative error.

evidence well beyond posing subjects, directing the camera focus, and manipulating images – and that included erotica which is certainly protected speech. This Court is called upon to protect First Amendment rights per *Ferber* and rein in excesses resulting from unrestricted "context" tests.

Although the *Holmes* decision never mentioned First Amendment ramifications of its holding, the court of appeals was in fact defining the limits of a category of speech. Yet this Court's first major pornography decision following *Ferber* voiced its concern that the First Amendment be diligently preserved in pornography cases. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984) (this Court "expressly anticipated that an 'independent examination' of the allegedly unprotected material may be necessary 'to assure ourselves that the judgment … does not constitute a forbidden intrusion on the field of free expression.'"). Other courts of appeals have followed suit, expressing grave concern about any First Amendment encroachment that their pornography holdings could create. For example, the First Circuit noted that, "In determining that the photograph contains a lascivious exhibition of the genitals, the district court helped define the limits of the largely unprotected category of child pornography. This was a quintessential First Amendment ruling. Thus, we must review the district court's determination de novo to ensure that the First Amendment has not been improperly infringed." *United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999). The Eighth Circuit stated that, "The meaning of 'lascivious exhibition of the genitals' is an issue of law . . . raising First Amendment concerns"). *United States v. Rayl*, 270 F.3d 709, 714-15 (8th Cir. 2001). But the Eleventh Circuit issued *Holmes* without any nod to the First Amendment.

There are also Due Process implications arising from leaving prosecution of these types of child pornography cases without a clear and consistent test. "A fundamental principle in our legal

system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Federal Communications Comm'n v. Fox Televisions Stations, Inc.*, 567 U.S. 239, 253 (2012); *and see Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). The Court cited this principle in *Williams,* a child pornography case. *United States v. Williams*, 553 U.S. 285, 304 (2008) (due process is violated when the statute "fails to provide fair notice of what is prohibited, or is *so standardless* that it authorizes or encourages seriously discriminatory enforcement") (emphasis supplied). Though various tests have emerged, they are often at odds and have generated such inconsistencies as reversing production convictions: (a) where the image was a man penetrating a child, because the government failed to show the purpose of taking it was to produce pornography, *Palomino-Coronado*; compared to (b) where images of a fully clothed girl at play had appended captions describing sexual acts the defendant wanted to perform, because although the purpose was plain, the photos were not pornographic, *Romero*. *See Farrell v. Burke*, 449 F.3d 470, 485 (2nd Cir. 2006) (Due Process can be violated when a statute allows for differences in its application) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

Moreover, as seen in the case at bar, the "context" test has permitted the government to use all manner of innocent activity (including First Amendment protected erotica) as "context." Lower courts' interpretation of "sexually explicit conduct" and "lascivious exhibition of the genitals or pubic area" have become unmoored from the statutory language and from constitutional limits. To put individuals on fair notice of what constitutes prohibited "lascivious exhibitions" of children, the Court should grant this Petition to decide the question presented.

Finally, the question is important as well because it involves principles of lenity, federalism, and constitutional avoidance arising from the sentence doubling the fifteen-year

mandatory-minimum penalty to its statutory maximum for what is otherwise local conduct, based on an overbroad interpretation of the ambiguous statutory phrase, "lascivious exhibition of the pubic area," as applied to images depicting mere nudity when there otherwise is no distribution of the images or sexual abuse.

B. This Court Should Settle the Split and Confusion Among the Circuits concerning what Lascivious Exhibition Test to Apply to Otherwise Innocent Images of Children.

To avoid arbitrary or discriminatory enforcement, laws need explicit standards for those who apply them. *Farrell*, 449 F.3d at 485 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Failure to make clear how a law will be applied could trigger a Due Process violation. This is particularly troubling when the law's scope may tread into protected speech. *Id.* (citing *Smith v. Goguen*, 415 U.S. 566, 573 (1974)).

The Supreme Court has yet to announce a definition of "lascivious exhibition."[7] Consequently, how to determine whether images of nude children acting innocently will cross the line into "lascivious exhibition" has produced divergent lines of caselaw. The most relied upon formulation is not a test at all, but a set of *factors* produced by a district court. *See United States v. Dost*, 676 F. Supp. 828, 832 (S.D. Cal. 1986).[8] Though a number of jurisdictions rely to some

[7] The Eleventh Circuit defined "lascivious exhibition" previously as images that potentially "'excit[es] sexual desires' or is 'salacious.'" *United States v. Grzybowicz*, 747 F.3d 1296, 1306 (11th Cir. 2014) (citing *United States v. Williams*, 444 F.3d 1286, 1299 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285 (2008). Other courts have relied on dictionary definitions. E.g., *Knox*, 32 F.3d at 744 (Black's Law Dictionary); *United States v. Courtade*. 929 F.3d 186, 191-92 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 907 (2020) (Webster's Third New International Dictionary); *but cf., United States v. Rivera*, 546 F.3d 245, 249 (2nd Cir. 2008) ("The dictionary definition is of little help" in defining the elusive concept of lasciviousness).

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

degree on *Dost* factors in analyzing nude depictions of children, and some include the factors in jury instructions, the factors have been subject to widespread criticism. They "produced a profoundly incoherent body of case law." A. Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 953 (2001). There are "many reasons to be cautious of the *Dost* factors, several of which other courts have previously identified." *Steen*, 634 F.3d at 828-29 (Higginbotham, J. concurring); *United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006) ("the Dost factors have fostered myriad disputes that have led courts far afield from the statutory language"). Some courts reject *Dost* factors or treat them just as a set of helpful ideas, not the test per se. E.g., *Miller*, 829 F.3d at 531 n.1 (discouraging routine use of the factors); *United States v. Larkin*, 629 F.3d 177, 182 (3rd Cir. 2010) (the factors "are not dispositive and serve only as a guide").

The sixth *Dost* factor, "whether the image is intended or designed to elicit a sexual response in the viewer," has led to the widest variety of standards. Courts differ whether the inquiry is limited simply to the image or to other extrinsic evidence. *Rivera*, 546 F.3d at 251-52 (citing *Frabizio*, 459 F.3d at 89-90). Courts are also divided on whether that factor should be interpreted as a defendant's "subjective reaction" to the depiction or whether it represents an objective test where the "intended effect" on the viewer is key. *See Rivera*, 546 F.3d at 252 (quoting *Amirault*, 173 F.3d at 34).

At one end of the tests' continuum are decisions that limit the evidence for determining whether an image constitutes an illegal lascivious exhibition to the "four corners" of the image alone. One of the early court of appeals opinions to decide whether images of nude children behaving innocently could satisfy the "lascivious exhibition" statutory proscription was the Third Circuit's *Villard* case. Villard had photographs of a sleeping nude boy who had a semi-erect penis.

The court applied *Dost* factors, but in discussing the sixth one, it rejected both subjective intent ("private fantasies" are protected) and objective intent (nudity does not become pornography when placed in the hands of a pedophile) inquiries. Instead, the court decided it must therefore "look at the photograph rather than the viewer." *Villard*, 885 F.2d at 122 & 125; *and see Doe v. Chamberlin*, 299 F.3d 192 (3rd Cir. 2002) (looking only to the pictures to decide whether they represented "sexually explicit conduct" per 18 U.S.C. § 2256).

The First Circuit adopted *Villard*, rejecting a subjective test, wryly noting that "If [the defendant's] subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography." *Amirault*, 173 F.3d at 34 (citing *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987) ("Private fantasies are not within the statute's ambit.")). It also held "serious doubts that focusing upon the intent of the deviant photographer is any more objective than focusing upon a pedophile viewer's reaction." *Id.* Noting that both subjective and objective tests could "turn innocuous images into pornography," the First Circuit instead appropriated the "four corners" test looking only to "objective criteria of the photograph's design." *Amirault*, 173 F.3d at 35 (citing *Villard*, 885 F.2d at 125). *Amirault* also rejected the Ninth Circuit's "context" test from *Wiegand*. *Id.* at 34. Later in *Frabizio*, the First Circuit found that sole reliance on *Dost* factors was improper, but it nonetheless continued to consider only the image itself in deciding the issue. *See Frabizio*, 459 F.3d at 86.[9]

The Fifth Circuit followed suit. In *Romero*, there were photos of children sleeping nude as

[9] In *Frabizio*, the court stated that it had not decided the "four corners" test in *Amirault*, a declaration that was subject to a vigorous dissent arguing *Amirault* was precedent. 459 F.3d at 89 & 94. Nevertheless, the court's analysis in *Frabizio* rested solely on the image. Furthermore, the First Circuit recently affirmed a guilty plea of producing child pornography, naturally relying on his admissions at the change of plea, but it also looked only to the images to confirm that they were lascivious. *See United States v. Goodman*, 971 F.3d 16 (1st Cir. 2020).

well as playing on a playground where their pelvic area (covered by clothing) was sometimes apparent. Romero added captions to these otherwise innocent photos, describing sexual acts he would like to do to the children. *See Romero*. Despite written intent to stimulate a sexual response from these images, the majority applied *Dost* and looked only to the photos (not captions), and because they did not constitute sexually explicit images, they reversed. This case graphically shows the limitations of the "four corners" test. In a strongly worded dissent, Judge Higginson continued to look only to the photographs, but incorporated the focus and timing of taking the pictures (such that the pubic area was most exposed) to find subjective sexual intent – applying a test more akin to the Sixth Circuit's "image plus limited context" test. The majority's logic was supported by its earlier case, *Steen*, where despite voyeuristic purpose in filming in a tanning salon, the court limited its consideration to the images to decide intent. *See Steen*, 634 F.3d at 827. Inverting that fact pattern but remaining faithful to the images alone test, the court declined to consider that pubic areas of otherwise sexually explicit depictions of minors had later been pixelated by the defendant, reasoning that the photos had been "lascivious exhibitions," and what he added to them afterward did not change that. *See Grimes*, 244 F.3d at 380-81. Note how this case directly contradicts the *Holmes* holding that addresses context in terms of what the defendant did to images after they were taken.

The Fourth Circuit declined to apply *Dost* factors, instead affirming based on characteristics of the video itself. *United States v. Courtade*, 929 F.3d 186, 192 (4th Cir. 2019) ("the video's objective characteristics – the images and audio contained within its four corners, irrespective of Courtade's private subjective intentions" reveal the purpose). In apparent dicta, the court noted that its holding was corroborated by extrinsic evidence that Courtade had tricked the

girl to take the shower. *Id.* at 193.

At the other end of the continuum is the test that considers "context" in addition to (and at times in place of) the images. The seminal case for that test is the Ninth Circuit's *Wiegand*. Wiegand posed nude girls to focus the display of their genitalia. The Court paid far more attention to how he set up the photographs than their content. *See Wiegand*. A more recent Ninth Circuit case expresses that test more clearly: images of boys in the natural function of urinating were not sexually explicit per se; but "instead of looking at the four corners of the photographs," the court took into account extrinsic evidence of the defendant's stories of urination between adults and children to decide that that those pictures were for a sexual purpose. *United States v. Flocker*, 504 Fed. App'x 637 (9th Cir. 2013) (unpublished). This outcome directly contradicts the Fifth Circuit's *Romero* case that overlooked captions, considering only the photos.

The Eighth Circuit also applies a "context" test. In *Horn*, the defendant argued that the tapes were not "lascivious exhibitions" because they depicted nude children behaving normally. The court found *Dost* "neither definitive nor exhaustive," and sought intent by how the video depictions were frozen on images of young girls when their pubic area was exposed. That manipulation rendered them "lascivious." *United States v. Horn*, 187 F.3d 781, 789-90 (8th Cir. 1999). That holding resonates with the Eleventh Circuit's *Holmes'* holding: an individual who surreptitiously records a nude minor engaged in innocent behavior, then later captures or edits a depiction, creates a lascivious exhibition. *Holmes*, 814 F.3d at 1252. In another Eighth Circuit case, the defendant secretly videotaped unclothed girls weighing themselves. That was surely innocent nudity, but the defendant focused and positioned the camera so as to capture images from their shoulders to their knees and zoomed in on pelvic height. The Court relied on that and his

confession to find he had intended to produce sexually explicit images. *Johnson*, 639 F.3d at 440-41. The Tenth Circuit reached a similar result in *Wolf* who photographed a girl seemingly innocently sleeping with legs spread, exposing her pubic area. The court thought she had been posed, and certainly his positioning of the camera would get a clear shot of her genitals. That extrinsic evidence created a lascivious exhibition. *United States v. Wolf*, 890 F.2d 241 (10th Cir. 1989).

The Seventh Circuit also embraced the "context" test to decide intent. In *Miller*, the defendant surreptitiously filmed girls undressing and showering, but not zooming in on their public area. The court held that "fact finders are not constrained to the four corners of these videos to find they were lascivious." Instead, intent was proven by the steps the defendant took to surreptitiously film the girls as well as Miller's homemade pornographic videos with adult women (shielded by the First Amendment). Adopting a subjective intent standard, the court reasoned that his only purpose was to get images that would sexually excite him. The court held that although the primary focus of evaluating the legality of these images was the images themselves, the intent and motive of the photographer can be relevant in considering whether they are sexually explicit. *Miller*, 829 F.3d at 525. This case shows the danger of allowing in a wide breadth of "bad act" evidence – which can be protected speech – to prove lasciviousness. In another case, the Seventh Circuit found that the defendant's prior acts of child molestation were admissible to show that he "was not simply a legitimate photographer who happened to have taken non-sexual photographs of nude children." *United States v. Burt*, 495 F.3d 733, 740 (7th Cir. 2007), *cert. denied*, 552 U.S. 1063 (2007). The Eleventh Circuit also adopted a "context" test in *Holmes*.

The middle ground test was reached by the Sixth Circuit in *Brown*. Brown videotaped his

toddler step-granddaughters in the tub, on the toilet, and on the floor. He also had downloaded a large cache of images of nude young girls. He conceded the lascivious nature of one posed image he had taken, but not the others. Some of the other pictures were arguably centered on the genitalia, and some were shot shoulder-down. Nonetheless, analyzing the imagers under the four corners test, the court concluded that it was not clear that the images were lascivious.[10] *Brown*, 579 F.3d at 681 ("[a]side from the fact that the girls are nude, the videos do not seem to satisfy any of the *Dost* factors"). The court recognized that the circuit split between "four corners" versus "context" tests was understandable, "given that there are important considerations weighing in favor of both perspectives." *Id.* at 683. It explained:

> On one hand, there are strong arguments for considering context. Ignoring the contextual evidence construes the statute too narrowly as it inevitably fails to capture behavior that is "intended" to exploit children. This result is cause for particular concern in a context where young children are at risk. Moreover, strict adherence to a four corners test could harm criminal defendants in some circumstances by limiting consideration of contextual evidence that would show that images are art or innocent family photographs.
>
> On the other hand, if we frame the inquiry too broadly and place too much emphasis on the subjective intent of the photographer or viewer . . . , a seemingly innocuous photograph might be considered lascivious based solely upon the subjective reaction of the person who is taking or viewing it. This could invoke the constitutional concerns associated with criminalizing protected expressive activity. [Citing *Osborne* and *Williams* (nudity alone is protected expression, and pornography offenses should carefully avoid intrusions into "protected expressive activity"); other citations omitted].
>
> . . .
>
> In sum, while the context in which an image was taken likely helps a factfinder understand whether an image was intended to elicit a sexual response in

[10] The district court had also concluded that bathtub photos showing their mother feeding the girls whip cream was indisputably lascivious, but the appellate court, more cautious of free speech and innocent activity, disagreed. *Brown*, 579 F.3d at 681.

> the viewer, there is a countervailing and significant risk that a context-specific test could reach too broadly and "over-criminalize" behavior.

Id. at 683. Ultimately, the court rejected subjective intent: "downloaded images of other children might shed light on Defendant's subjective intent in taking photographs of his step-granddaughters. However, . . . when a court considers context in too broad a fashion, it can find an otherwise innocuous photograph lascivious, and runs the risk of convicting a defendant for conduct unrelated to the charges at hand." *Id.* at 685-86. The court also acknowledged that too much prejudicial "context" (citing past behavior, other alleged deviances, and criminal conduct not directly related to the charges) posed Due Process concerns since it could be used to convict defendants for acts extrinsic to those prosecuted. *Id.* Striking a middle ground, it applied a "limited context" test that would examine the image and permit consideration of contextual evidence limited to "the circumstances directly related to the taking of the images."[11] *Id.* at 683. The court expressly rejected consideration of any evidence not directly related to the taking of the images (naming "other bad acts," possession of other pornography, and a defendant's general "unseemliness") so as to avoid undue prejudice and constitutional concerns. *Id.* at 684.

In the subsequent Sixth Circuit case of *Stewart*, the court used the "limited context" test to find that Stewart's "otherwise innocuous" photos of nude children were rendered lascivious by focusing on the genitals and editing the depictions (cropping and brightening the images). *Stewart*, 729 F.3d at 527-28.

Mr. Rodriguez Fernandez contends that the most reasoned test for evaluating whether

[11] The court also offered several factors that could be used for this limited inquiry: "(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 684.

depictions of nude children acting innocently constitute lascivious exhibitions, and the one most faithful to constitutional mandates, is the Sixth Circuit's "limited context" test.

C. The Instant Case Offers a Factually Fitting Vehicle to Explore What Test of "Lascivious Exhibition" Applies to Otherwise Innocent Depictions of Children.

Mr. Rodriguez Fernandez's case offers a particularly suitable example to demonstrate how the three different circuit tests reach inconsistent conclusions. First, if analyzed under a strict "four corners" of the image test, the depictions of the victim carrying out her normal bathroom routine are not "sexually explicit." The videos hardly capture any image of her pubic area, let alone one that is clearly a "lascivious exhibition." Admittedly, the deleted screen shot showed her pelvic area, but it was in the context of using the bathroom; as such, she was "exhibiting" using the toilet, not her genitals. Thus, consistent with *Steen* and *Amirault*, the instant case would not satisfy the "four corners" test, and Mr. Rodriguez Fernandez would not be guilty of the production counts.

Second, if analyzed under the unrestricted "context" test (used in this case), the government had free rein to introduce all sorts of "actions of the individual creating the depiction," to the point where the weight of that evidence alone became compelling, especially when there was no opportunity for a limiting instruction. Hence, the government could go to great lengths describing how he searched for, viewed, downloaded, stored, saved, hid, and later viewed commercial child pornography – and could argue that was evidence that his videos constituted lascivious exhibitions. Moreover, the government also described in minute detail all the steps, equipment, tools, and technology hardware and software that he went through to produce the two videos, and again all he did to download, store, and view them, as evidence that they constituted lascivious exhibitions. Fortunately, he had no prior bad sexual acts, though those would have been "fair game" under the unlimited "context" test. However, he did download child erotica, which is protected speech under

the First Amendment. The government was allowed to (and argued) that his erotica was evidence to use in the production counts. Given all that evidence (actions of the individual producing the images) that the jury was told it could include when deciding the production charges, it is little wonder that he was convicted. Thus, consistent with *Holmes* and *Wiegand*, the instant case would easily satisfy an unrestricted "context" test – especially when that test was worded so broadly as the producer's unqualified "actions" – and Mr. Rodriguez Fernandez would be guilty of the production counts.

Third, if analyzed under the "limited context" test of *Brown*, the government could introduce "circumstances directly related to the taking of the images." This differs from Jury Instruction #11, which included any actions of the producing individual, not restricted to those related to the production itself. Without belaboring the point, the government would be authorized to describe how Mr. Rodriguez Fernandez replaced the outlet wires with a camera and made two videos as well as a single deleted screen shot. The possession of child pornography charge would not be considered "inextricably intertwined," and he would be entitled to a limiting instruction. Moreover, the "limited context" test would not allow the government to use protected speech (the erotica) as evidence of the production counts (and likely the possession count as well). An important consequence of using the "limited context" test is that the defendant would be better able to mount a defense, such as by showing that the screen shot could have been unintentionally created. With those restrictions on what would be admissible, the appropriate test in the jury instruction, a limiting instruction, and curtailed closing arguments, the jury would likely find him not guilty of production under the reasonable doubt standard (though he would be convicted of possession of the Russian child pornography).

The instant case also provides an occasion to explore specifically what type of "limited context" should be allowed, either by formulating it in the test or by exemplifying it with factors. The Sixth Circuit's test included only circumstances directly related to the taking of the images, suggesting how the image was composed, if the subject was posed, whether the camera zoomed in, and lighting, props, or setting used – all could be considered under that test. Although the wide open descriptive verbiage of *Holmes* was used in the instant case, *Holmes'* express holding imposed some restrictions on "context," namely what the producer "later captures or edits." *Brown* treats before the production set-up whereas *Holmes* treats after the production editing. Since *Holmes* has two slightly different tests, and because it varies from the Sixth Circuit test, this case allows the Court several options to decide how far a "limited context" test should go.

Furthermore, when the "limited context" test is applied, it is conceivable that Mr. Rodriguez Fernandez would not have been charged with production at all. The facts of *Holmes* are so much more egregious and show far greater intentionality than those here.[12] When the evidence and argument is more restricted by the "limited context" test, the government may well exercise its charging discretion to pursue multiple possession or receiving counts instead of production charges.

Finally, the outcome was not harmless for Mr. Rodriguez Fernandez. Although the Eleventh Circuit concluded that the trial judge had not abused his discretion in supplementing the pattern jury instruction with *Holmes* (without differentiating the express holding from the general

[12] Holmes filmed for five months, producing twenty-three videos, getting multiple images where the girl's pubic area was "plainly visible." Mr. Rodriguez Fernandez filmed for two days, producing two videos with only a single fleeting exposure of the pelvic area. Holmes made multiple holes for filming from various directions, including through a doll and under the tip of the vanity. Mr. Rodriguez Fernandez used an existing electrical outlet, but it was directly under the toilet paper roll. Holmes created twenty-six screen shots and zoomed them in on the genitalia, and he kept them all. Mr. Rodriguez Fernandez made one screen shot that was not cropped, zoomed, or edited in any way, which showed the pelvic area but was not terribly revealing, and he deleted it.

descriptors of other circuits' tests), an error of law in an instruction is an abuse of discretion per se. *United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002); *United States v. Bruguier*, 735 F.3d 754, 761 (8th Cir. 2013) (omitting a mens rea element allowed conviction for innocent conduct). Jury instructions defining the crime must not sweep in conduct beyond reach of the statute or law. *See Skilling v. United States*, 561 U.S. 358 (2010) (the danger of overbreadth in a jury instruction lies in a jury convicting the defendant based on innocent conduct). Because "actions of the individual creating" the images extended significantly beyond the actual holding of *Holmes* (later captures or edits images), Mr. Rodriguez Fernandez was reversibly prejudiced by that instruction.

Thus, the facts of Mr. Rodriguez Fernandez's case provide an excellent vehicle for this Court to explore existing tests and formulate its own constitutionally sensitive test, and possibly useful factors that illuminate what evidence can be considered, when otherwise innocent depictions of children are rendered criminally sexually explicit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Donna Lee Elm

/s/ *Donna Lee Elm*

Donna Lee Elm
Law Practice of Donna Elm
1465 West Wagon Wheel Road
Cottonwood, Arizona 86326
602-299-7022
donnaelm1014@gmail.com
Counsel of Record for Petitioner

INDEX TO APPENDICES

APPENDIX A:

***United States v. Carlos Rodriguez Fernandez*,**
2020 WL 7090699 (11th Cir. 2020) (unpublished).

833 Fed.Appx. 803
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
Carlos A. RODRIGUEZ
FERNANDEZ, Defendant-Appellant.

No. 19-13516
|
Non-Argument Calendar
|
(December 4, 2020)

Synopsis

Background: Defendant was convicted in the United States District Court for the Middle District of Florida, No. 6:18-cr-00135-CEM-GJK-1, Carlos Eduardo Mendoza, J., of production of child pornography and possession of child pornography. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] district court did not abuse its discretion in excluding video purportedly showing defendant confronting stepdaughter about pornographic images found on her tablet computer;

[2] images of child erotica were inextricably intertwined with evidence of charged production of child pornography and possession of child pornography;

[3] government's use of four peremptory challenges to strike childless male venire members was not discriminatory under *Batson*;

[4] depictions of otherwise innocent conduct could constitute "lascivious exhibition of the genitals or pubic area" of minor based on actions of individual creating that depiction;

[5] person was "used," with meaning of statute prohibiting production of child pornography, if person was knowingly or unknowingly photographed or videotaped; and

[6] district court did not abuse its discretion in response to jury question about legality and ethicality of having case agent sit at prosecution table during defendant's trial.

Affirmed.

West Headnotes (6)

[1] Criminal Law Photographs and videos

Defendant did not produce any evidence to authenticate video purportedly showing defendant confronting stepdaughter about pornographic images found on her tablet computer, which was to serve as defense that someone else in home downloaded charged child pornography, and therefore district court did not abuse its discretion in excluding it; evidence was lacking as to when video originally had been recorded and what device was used to make recording, and defendant did not offer any evidence or witness testimony about accuracy of recorded events or about whether video had been altered. 18 U.S.C.A. §§ 2251(a), 2251(e), 2252A(a)(5)(B), 2252A(b)(2); Fed. R. Evid. 901(a).

[2] Criminal Law Obscenity and lewdness

Images of child erotica were inextricably intertwined with evidence of charged production of child pornography and possession of child pornography, and therefore district court did not abuse its discretion in not excluding them as "other act" evidence, since child erotica images illustrated defendant's method of searching for, downloading, and storing child pornography files and, thus, helped complete story of offense, and images also were sufficiently linked in

time and circumstances with charged child pornography files. 18 U.S.C.A. §§ 2251(a), 2251(e), 2252A(a)(5)(B), 2252A(b)(2); Fed. R. Evid. 404(b).

[3] **Constitutional Law** Peremptory challenges

Jury Peremptory challenges

Government's use of four peremptory challenges to strike childless male venire members was not discriminatory under *Batson*, in defendant's trial on charges of production of child pornography and possession of child pornography, since childlessness was not protected class, government accepted four male venire members before using its first peremptory challenge, and 10 of 12 jurors and 2 alternates impaneled on jury were men, including two without children. U.S. Const. Amend. 5; 18 U.S.C.A. §§ 2251(a), 2251(e), 2252A(a)(5)(B), 2252A(b)(2).

[4] **Infants** Exhibition or use of child in indecent material or performance

Depictions of otherwise innocent conduct could constitute "lascivious exhibition of the genitals or pubic area" of a minor, for purposes of definition of sexually explicit conduct in child pornography criminal statute, based on actions of individual creating that depiction. 18 U.S.C.A. § 2251(a).

[5] **Infants** Exhibition or use of child in indecent material or performance

Person was "used," with meaning of statute prohibiting production of child pornography, if person was knowingly or unknowingly photographed or videotaped. 18 U.S.C.A. § 2251(a).

[6] **Criminal Law** Requisites and sufficiency

District court did not abuse its discretion in response to jury question about legality and ethicality of having case agent sit at prosecution table during defendant's trial on charges of production of child pornography and possession of child pornography; district court said jury's questions reflected "a basic misunderstanding" that "need[ed] to be corrected" and stated "How can an agent sitting on the Government's side also be a witness?" Because the rules specifically allow for that. "He gets to hear the other witnesses. Is this even legal or ethical?" It is legal and ethical. "Does it create a conflict of interest?" No, it does not as a matter of law. 18 U.S.C.A. §§ 2251(a), 2251(e), 2252A(a)(5)(B), 2252A(b)(2).

Attorneys and Law Firms

***805** Sean Siekkinen, Assistant U.S. Attorney, U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee

Donna Lee Elm, Law Practice of Donna Elm, Cottonwood, AZ, for Defendant-Appellant

Carlos A. Rodriguez Fernandez, Pro Se

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:18-cr-00135-CEM-GJK-1

Before WILSON, ROSENBAUM, and EDMONDSON, Circuit Judges.

Opinion

PER CURIAM:

****1** Defendant Carlos Rodriguez Fernandez appeals his convictions for production of child pornography, in violation of 18 U.S.C. § 2251(a), (e), and for possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). No reversible error has been shown; we affirm.

In 2018, an undercover investigation of a peer-to-peer file-sharing network identified a computer that was sharing child pornography files. The computer's Internet Protocol (IP) address was traced to Defendant's home, which he shared with his wife and his 14-year-old stepdaughter ("D.G."). Upon executing a search warrant on the home, officers located a desktop computer in Defendant's home office. Officers

also discovered a USB cable that ran from the back of the computer through the wall and into the adjacent room: a bathroom used by D.G. The USB cable was connected to a webcam hidden behind an electrical outlet plate and located directly across from the toilet.

During a post-Miranda[1] interview, Defendant told officers that he was the primary user of the desktop computer, that he used a peer-to-peer file-sharing program to obtain child pornography, that he had been downloading child pornography for years, and that he knew that what he ***806** was doing was illegal. Defendant told officers specifically that he had downloaded files that originated from a Russian website known for commercially-produced child pornography. Defendant also told officers that he had installed the webcam in D.G.'s bathroom.

A certified computer forensic examiner analyzed the computer's hard drives and found two videos showing D.G.'s naked genitals while she used the toilet. The videos were recorded using the hidden webcam and had been viewed multiple times. One of the hard drives also contained images and videos of child pornography obtained from peer-to-peer file-sharing networks.

Defendant was charged with two counts of production of child pornography and one count of possession of child pornography. Following a two-day trial, the jury found Defendant guilty of the charged offenses. The district court sentenced Defendant to a total of 480 months' imprisonment.[2]

I.

We first address Defendant's challenges to the district court's evidentiary rulings. We review the district court's evidentiary rulings under an abuse-of-discretion standard. See United States v. Dodds, 347 F.3d 893, 897 (11th Cir. 2003).

A. Defense Video

[1] Defendant says the district court abused its discretion in excluding a video purportedly showing Defendant confronting D.G. about pornographic images found on D.G.'s tablet computer.[3] Defendant says the excluded video supports his defense that someone else in the home downloaded the charged child pornography.

****2** Defendant sought to introduce the video two days before trial was scheduled to begin. Defendant's lawyer said he first learned of the video when Defendant's wife gave him a cell phone containing the video file.

The government moved to exclude the video on several grounds, including lack of proper authentication. After a hearing, the district court granted the government's motion, concluding that "significant issues" existed with authentication.

The district court has "broad discretion in determining whether to allow a recording to be played before the jury." United States v. Capers, 708 F.3d 1286, 1305 (11th Cir. 2013). The party seeking to introduce a recording bears the burden of producing "sufficient evidence to show that the recording is an accurate reproduction of the conversation recorded." Id.; see Fed. R. Evid. 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.").

Here, Defendant produced no evidence to authenticate the video. Nothing evidenced when the video was originally recorded or what device was used to make the recording.[4] Defendant offered no evidence ***807** or witness testimony about the accuracy of the recorded events or about whether the video had been altered. Given the total absence of evidence authenticating the video, the district court abused no discretion in granting the government's motion in limine. Nor did the district court's evidentiary ruling deny Defendant the opportunity to present his third-party-guilt defense: Defendant could have testified about the events depicted in the video and about the accuracy of the recording but did not do so.

B. Child Erotica Images

[2] Defendant next contends that the district court abused its discretion in permitting the government to introduce six images of child erotica found on Defendant's computer. The district court concluded that the images were admissible as "inextricably intertwined" with the evidence of child pornography found on the computer.

Under the Federal Rules of Evidence, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid.

404(b). Rule 404(b) is inapplicable to exclude evidence that is "inextricably intertwined" with evidence of the charged offense. United States v. Ford, 784 F.3d 1386, 1393 (11th Cir. 2015).

"[E]vidence is inextricably intertwined with the evidence regarding the charged offense if it forms an 'integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted.' " United States v. Edouard, 485 F.3d 1324, 1344 (11th Cir. 2007). Such evidence may "pertain[ ] to the chain of events explaining the context, motive, and set-up of the crime," and "is properly admitted if linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." Id. (alteration omitted).

**3 During his initial interview with police, Defendant told officers that he downloaded child pornography, including images that originated from a Russian website called "LS" or "LS Models." A forensic analysis of Defendant's computer uncovered Google searches for "LS Island full torrent." At trial, an investigator testified that the LS Models website consists of series of photographs of underage girls in various positions and states of undress. Each series begins with the girl wearing some clothing (child erotica) and evolves to the child being completely nude with exposed genitals (child pornography).

Each of the six images of child erotica introduced at trial were stamped with the "LS Models" logo. The same logo was also found on one of the images of child pornography introduced at trial. Both the charged child pornography files and the child erotica files had been downloaded in "LS" torrent files and were saved in the same hidden location on Defendant's computer.

The child erotica images illustrated Defendant's method of searching for, downloading, and storing child pornography files and, thus, helped complete the story of the offense. The images were also sufficiently linked in time and circumstances with the charged child pornography files. The district court abused no discretion in *808 admitting the images of child erotica as "inextricably intertwined."

II.

[3] Defendant next contends that the district court erred in denying his Batson[5] challenges to the government's use of four peremptory challenges to strike childless male venire members.

We review the district court's resolution of a Batson challenge under a clearly erroneous standard. See United States v. Ochoa-Vasquez, 428 F.3d 1015, 1039 (11th Cir. 2005). "We give great deference to a district court's finding of whether a prima facie case of impermissible discrimination has been established." Id.

The Equal Protection Clause prohibits the striking of potential jurors based on gender. See J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 146, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Under the three-step Batson analysis, (1) the party objecting to the strike "must make a prima facie showing that a peremptory challenge has been exercised on the basis of [a protected ground];" (2) the striking party then has the burden to articulate a class-neutral basis for striking the juror in question; and (3) the "court must determine whether the defendant has shown purposeful discrimination." Foster v. Chatman, ––– U.S. ––––, 136 S. Ct. 1737, 1747, 195 L.Ed.2d 1 (2016). In deciding whether an objecting party has established a prima facie case of discrimination, the court must consider "all relevant circumstances." Ochoa-Vasquez, 428 F.3d at 1044.

As an initial matter, Defendant has established no pattern of strikes against men. The record demonstrates that the government accepted four male venire members before using its first peremptory challenge. See id. at 1046 (finding no pattern of discrimination in part because the government had accepted Hispanic jurors before using its first strike against a Hispanic juror). Defendant contends instead that the government discriminated against a subset of gender: men without children. But Defendant has identified (and we have found) no binding precedent establishing childlessness as a protected class. Moreover, of the 12 jurors and 2 alternates impaneled on the jury, 10 were men (including 2 without children) and 4 were women.

On this record, the district court committed no clear error in finding that Defendant failed to make out a prima facie showing of discrimination.

III.

[4] **[5]** Defendant next contends that the district court erred in instructing the jury on the elements of child exploitation and in responding to a question from the jury during deliberations.

A. Jury Instructions

****4** "We review the legal correctness of a jury instruction de novo, but defer on questions of phrasing absent an abuse of discretion." United States v. Prather, 205 F.3d 1265, 1270 (11th Cir. 2000) (citations omitted). Generally speaking, "district courts have broad discretion in formulating jury instructions" if the instructions as a whole reflect accurately the law and the facts. Id. (quotations omitted). "[W]e will not reverse a conviction on the basis of a jury charge unless the issues of law were presented inaccurately, or the charge improperly guided the jury in such a substantial way as to violate due process." Id. (quotations omitted).

***809** Section 2251(a) prohibits the use of "any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. § 2251(a). Our pattern jury instruction for this offense explains, in pertinent part, that one of the required elements is the "use" of a minor to engage in "sexually explicit conduct." See 11th Cir. Pattern Jury Instr. (Crim.) O82 (2020). "Sexually explicit conduct" includes the "actual or simulated ... lascivious exhibition of the genitals or pubic area of any person." Id. "Lascivious exhibition" means "indecent exposure of the genitals or pubic area, usually to incite lust" but "not every exposure is a lascivious exhibition." Id.

The government sought to supplement the pattern jury instruction based on our decision in United States v. Holmes, 814 F.3d 1246 (11th Cir. 2016). The defendant in Holmes -- like the Defendant in this case -- was charged with using hidden cameras to make video recordings of his teenage stepdaughter nude while using the bathroom. In Holmes, we concluded that, for purposes of section 2251(a), "depictions of otherwise innocent conduct by a minor can constitute 'a lascivious exhibition of the genitals or pubic area' based on the actions of the individual creating the depiction." 814 F.3d at 1247.

The district court supplemented the pattern jury instructions with these two statements:

> A person is "used" if the person is knowingly or unknowingly photographed or videotaped.
>
> Depictions of otherwise innocent conduct may constitute a lascivious exhibition of the genitals or pubic area of a minor based on the actions of the individual creating the depiction.

The district court's jury instructions stated accurately the law of this Circuit. Because the circumstances involved in this case -- the surreptitious recording of otherwise innocent bathroom routines -- are not addressed directly by the pattern instructions, the district court abused no discretion in determining that the supplemental language would assist the jury.

B. Response to Jury Question

[6] Defendant also contends that the district court erred in answering a question from the jury. During its deliberations, the jury sent a note asking the court questions about the legality and ethicality of having the case agent sit at the prosecution table during the trial. The district court said the jury's questions reflected "a basic misunderstanding" that "need[ed] to be corrected." The district court answered the questions this way:

> "How can an agent sitting on the Government's side also be a witness?" Because the rules specifically allow for that.
>
> "He gets to hear the other witnesses. Is this even legal or ethical?" It is legal and ethical.
>
> "Does it create a conflict of interest?" No, it does not as a matter of law.

Defendant contends the district court's response bolstered impermissibly the agent's credibility.

We review a district court's response to a jury question under an abuse-of-discretion standard. See United States v. Joyner, 882 F.3d 1369, 1375 (11th Cir. 2018). The district court has "considerable discretion" in answering a jury question so long as the answer does not misstate the law or confuse the jury. Id.

****5** The Federal Rules of Evidence permit "an officer or employee of a party [who has been] designated as the party's representative" to be present during trial. See Fed. R. Evid. 615(b). The Advisory Committee Notes also provide expressly that, under Rule 615(b), the government is permitted ***810** "to have an investigative agent at counsel table throughout the trial" even if "the agent is or may be a witness." Id.

Because the district court's response to the jury question was both an accurate statement of the law and necessary to correct a misunderstanding of the jury, we see no abuse of discretion.

IV.

Defendant next contends that the cumulative sum of the district court's errors created a fundamentally unfair trial in violation of his right to due process. We reject this argument.

"The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." Capers, 708 F.3d at 1299. Because Defendant has failed to demonstrate that the district court committed an error -- plain, harmless, or otherwise -- his argument under the cumulative error doctrine fails.

AFFIRMED.

All Citations

833 Fed.Appx. 803, 2020 WL 7090699, 114 Fed. R. Evid. Serv. 159

Footnotes

1 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2 Defendant raises no challenge to his sentence on appeal.

3 The complained-of video is not in the record on appeal. The district court described the video as showing someone from behind (allegedly Defendant) holding a tablet computer and D.G. sitting across the room talking on the phone. As Defendant scrolls through the tablet, images are visible on the screen including images of adult pornography, "some items that one could argue is child pornography," and naked images of D.G. The conversation recorded on the video is in Spanish; Defendant provided no translation.

4 That the cell phone provided by Defendant's wife was not the device used to record the video is undisputed. The available metadata from the cell phone showed that the pre-recorded video was saved onto the cell phone sometime in May 2018: after Defendant's arrest and while Defendant was out on bond.

5 Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

APPENDIX B:
Jury Instruction #11

INSTRUCTION 11

SEXUAL EXPLOITATION OF CHILDREN PRODUCING CHILD PORNOGRAPHY 18 U.S.C. § 2251(A)

It is a Federal crime for any person to use a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct if the visual depiction was produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

1) an actual minor, that is, a real person who was less than 18 years old, was depicted;
2) the Defendant used the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct; and
3) the visual depiction was produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer.

In some cases, it is a crime to attempt to commit an offense—even if the attempt fails. In this case Defendant is charged in Counts One and Two with both committing and attempting to commit the crime of using a minor to engage in

sexually explicit conduct for the purpose of producing a visual depiction of the conduct.

The Defendant can be found guilty of attempting to commit that offense only if both of the following facts are proven beyond a reasonable doubt:

First: That the Defendant knowingly intended to use a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct; and

Second: The Defendant's intent was strongly corroborated by his taking a substantial step toward committing the crime.

A "substantial step" is an important action leading up to committing of an offense—not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in committing the offense.

While the Government must prove that a purpose of the sexually explicit conduct was to produce a visual depiction, it need not be Defendant's only or dominant purpose.

The term "interstate or foreign commerce" means the movement of a person or property from one state to another state or from one state to another country. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States. It is not necessary for the Government to prove that the Defendant knew that the materials used to produce the visual depiction had moved in interstate or foreign commerce.

The term "minor" means any person who is less than 18 years old.

The term "producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

A person is "used" if the person is knowingly or unknowingly photographed or videotaped.

The term "visual depiction" includes undeveloped film and videotape, and data stored on a computer disk or by any other electronic means that can be converted into a visual image.

The term "sexually explicit conduct" means actual or simulated:

- sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- masturbation;
- sadistic or masochistic abuse; or
- lascivious exhibition of the genitals or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the genitals or pubic area, usually to incite lust. Not every exposure is a lascivious exhibition. Depictions of otherwise innocent conduct may constitute a lascivious exhibition of the genitals or pubic area of a minor based on the actions of the individual creating the depiction.

To decide whether a visual depiction is a lascivious exhibition, you must consider the context and setting in which the genitalia or pubic area is being displayed. Factors you may consider include:

- the overall content of the material;
- whether the focal point of the visual depiction is on the minor's genitalia or pubic area;
- whether the setting of the depiction appears to be sexually inviting or suggestive—for example, in a location or in a pose associated with sexual activity;
- whether the minor appears to be displayed in an unnatural pose or in inappropriate attire;
- whether the minor is partially clothed or nude;
- whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity; and
- whether the depiction appears to have been designed to elicit a sexual response in the viewer.